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Retroactive Application of "New Rules" and the Antiterrorism and Effective Death Penalty Act

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Introduction

For three decades, the retroactive application of United States Supreme Court criminal procedure decisions has confused the Court's habeas corpus jurisprudence.[1] During the October 1999 term, the Justices neglected an important opportunity to clarify this area of law, which is crucial to the vindication of fundamental constitutional rights.

The Court's decision in *Williams v. Taylor*[2] might have resolved the ambiguous relationship between the Court's pre-1996 habeas corpus retroactivity decisions—the most significant of which was *Teague v. Lane*[3]—and the habeas corpus reform provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[4] Unfortunately, the *Williams* decision has only engendered further confusion. Indeed, the plethora of opinions in *Williams* demonstrated that the fundamental disagreement among the Justices reflected in the Court's pre-AEDPA retroactivity decisions had survived, and perhaps been exacerbated by, the 1996 statute.

The best solution to this conundrum lies in the largely forgotten origins of the retroactivity framework adopted by the Court more than a dozen years ago in *Teague*. Two decades before *Teague*, the second Justice John Marshall Harlan proposed an approach to retroactivity questions in a pair of dissenting opinions. Justice Harlan argued that a decision that announced a "new rule"

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1 *See* Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CAL. L. REV. 485, 518 (1995); Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947, 975 (2000).

2 Williams v. Taylor, 529 U.S. 362 (2000).

3 Teague v. Lane, 489 U.S. 288 (1989). *See generally* Patrick E. Higginbotham, *Notes on* Teague, 66 S. CAL. L. REV. 2433 (1993); Eliot F. Krieger, Recent Development, Teague v. Lane: *The Court Declines in Fairness*, 25 HARV. C.R.-C.L. L. REV. 164 (1990).

4 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101-08, 110 Stat. 1214 (1996). For analysis of AEDPA, see Andrea A. Kochan, Note, *The Antiterrorism and Effective Death Penalty Act of 1996: Habeas Corpus Reform?*, 52 WASH. U. J. URB. & CONTEMP. L. 399 (1997). *See also* James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411 (2001) (discussing AEDPA's practical impact on death-penalty litigation); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997) (exploring the political pressures that led to AEDPA's passage).

of criminal procedure should not apply in federal habeas corpus proceedings reviewing criminal convictions that had become "final" before the new rule's announcement.[5] The *Teague* Court expressly adopted Justice Harlan's suggestion, which represented a theoretically sound and administrable response to the problem of when new rules should apply retroactively on habeas corpus. But the Court's post-*Teague* opinions that addressed the subsidiary question whether particular Supreme Court rulings constituted new rules for the purposes of this retroactivity analysis greatly complicated the issue.[6] In numerous decisions during the 1990s, a fragile majority of the Court employed such an expansive definition of the term "new rule" that the Justices effectively converted Justice Harlan's retroactivity system into a deferential standard of review for state court decisions, even as to questions of federal law. The approach in these cases contravened explicit warnings in Justice Harlan's dissents. Moreover, the decisions demonstrated that even those Justices who endorsed this standard vociferously disagreed over its precise meaning. The 1996 overlay of AEDPA's ambiguous habeas corpus reform provisions aggravated the confusion created by the case law in the early 1990s.

This Article seeks to clarify habeas corpus jurisprudence by advancing the counterintuitive claim that AEDPA, properly understood, requires the Court to revise its retroactivity case law in a way that will favor many habeas petitioners. In particular, AEDPA compels the Court to revisit its definition of "new rule" in the context of its habeas corpus retroactivity regime. Only by aligning the Court's new-rule standard with Justice Harlan's original proposal can the Court honor AEDPA's dual commands: (1) that Supreme Court decisions that change the law not apply retroactively in habeas corpus proceedings; and (2) that federal courts decide pure questions of law de novo when reviewing state court decisions in the habeas context.

Williams was the Court's first pronouncement on the relationship between AEDPA and the Court's retroactivity cases. *Williams* reveals that all nine Justices read AEDPA to continue the *Teague* rule in some form, but the *Williams* decision left for another day precisely how much of the Court's pre-AEDPA retroactivity jurisprudence the statute codified. *Williams*, therefore, did not foreclose, but rather may subtly foreshadow, the doctrinal reforms that this Article proposes.

The impact of AEDPA on the scope of *Teague*'s retroactivity bar is critical to the constitutional administration of criminal justice in the states. As many commentators have previously recognized, the broad definition of "new rule" prescribed in numerous pre-AEDPA decisions threatens to undermine federal habeas corpus as a meaningful remedy.[7] Moreover, review of state convictions by federal habeas courts is vital to the discovery and cor-

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5 Justice Harlan's dissenting opinions are discussed *infra* section IV.

6 *See* Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 550 (1999); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 414-15 (1996).

7 *See, e.g.*, Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 348-49 (1997); Linda Meyer, *"Nothing We Say Matters":* Teague *and New Rules*, 61 U. CHI.

rection of serious constitutional errors. Indeed, one extensive empirical study of habeas petitions filed between 1976 and 1991 by death row prisoners revealed that federal courts found reversible constitutional error in forty-two percent of the cases.[8] Thus, determining AEDPA's impact on *Teague* directly implicates the existence of an effective venue for vindicating federal constitutional rights impinged by state court criminal proceedings.

The first section of this Article briefly reviews the Court's *Teague* jurisprudence. Section II assesses the conflicting opinions in *Williams*. It identifies the few issues decided, and the many left open, regarding the relationship between *Teague* and the habeas-reform provisions of AEDPA. The third section focuses on the AEDPA provision that governs the standard of review for federal habeas-court assessment of state convictions, concluding that this provision requires federal courts to review pure questions of law de novo. Section IV unearths the forgotten origins of the Court's habeas corpus retroactivity doctrine in Justice Harlan's dissents of the 1960s. The fifth section ascertains that, as Justice Harlan prophetically observed more than thirty years ago, the preservation of the federal courts' ability to decide questions of federal law independently requires that the category of new rules be sharply circumscribed. Accordingly, I conclude by urging the Court to revisit and narrow substantially its definition of new rules to honor AEDPA's command that federal courts review pure questions of law de novo. The final section of this Article also articulates, and illustrates the application of, a standard for determining when a Supreme Court decision announces a new rule that better effectuates both AEDPA and Justice Harlan's position on retroactivity.

I. Federal Habeas Corpus Before AEDPA

As one distinguished commentator recently observed, the law governing federal habeas courts' review of state court criminal convictions "is quite complex and tends to change with every alteration in the membership of the

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L. REV. 423, 442-43 (1994); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 639 (1993); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2390 (1992).

8 *See* Brief Amici Curiae of Benjamin R. Civiletti et al., at 44-45, Wright v. West, 505 U.S. 277 (1992). A more recent, exhaustive study of the death penalty in America found similarly high error rates in capital cases. *See* James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995, at* http://justice.policy.net/jreport/index.html (last modified June 12, 2000); *see also* James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1846-61 (2000) (summarizing study's central findings); Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-first Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 WIS. L. REV. 1, 6-9 (noting that numerous innocent defendants have been sentenced to death); Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 17-27 (2002) (discussing the negative impact of changes in federal habeas standards on review of death-penalty cases in Texas); Ronald J. Tabak, *Habeas Corpus as a Crucial Protector of Constitutional Rights: A Tribute Which May Also Be a Eulogy*, 26 SETON HALL L. REV. 1477 (1996) (discussing the importance of the writ of habeas corpus in death-penalty proceedings); Kenneth Williams, *The Deregulation of the Death Penalty*, 40 SANTA CLARA L. REV. 677, 681-83 (2000) (same). Professor Liebman has also explored the root causes of such high error rates in capital cases and offered a comprehensive plan for reform. *See* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030 (2000).

[U.S. Supreme] Court."[9] A brief overview of this esoteric area of the law is essential to understanding AEDPA's impact on the Court's *Teague* jurisprudence.[10]

A. Federal Habeas Corpus Prior to Teague v. Lane

For hundreds of years prior to the American founding, English common law courts employed the writ of habeas corpus ad subjiciendum, often denominated the "Great Writ," to test the legality of an individual's imprisonment.[11] Courts in the American colonies and then in the fledgling states had employed the writ before the adoption of the U.S. Constitution.[12] That document clearly recognized this practice by providing that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[13] Although the First

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9 DAVID P. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL 214 (4th ed. 1999); *see also* Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1756 (2000) (describing current federal habeas law as "an intellectual disaster area"); William J. Shiels, Note, *Nonretroactivity on Habeas Corpus: Whittling at the Great Writ*, 24 SUFFOLK U. L. REV. 743, 743 (1990) (noting the Supreme Court's habeas corpus retroactivity decisions have left "behind a confused trail of case law").

10 For a good discussion of the various theoretical and practical issues that underlie the habeas debate, see generally David McCord, *Visions of Habeas*, 1994 BYU L. REV. 735. See also Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985).

11 *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 53, at 350 (5th ed. 1994); Michael O'Neill, *On Reforming the Federal Writ of Habeas Corpus*, 26 SETON HALL L. REV. 1493, 1497-98 (1996) (discussing historical development of the writ of habeas corpus). *See generally* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980) [hereinafter DUKER, CONSTITUTIONAL HISTORY]; ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY (2001); William F. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983 (1978) [hereinafter Duker, *English Origins*]. The writ of habeas corpus ad subjiciendum was but one of several forms of the writ of habeas corpus available at common law. For a discussion of other forms of the writ, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1337 n.1 (4th ed. 1996) [hereinafter HART AND WECHSLER].

12 *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 15.2, at 843-44 (3d ed. 1999) [hereinafter CHEMERINSKY, FEDERAL JURISDICTION]; DUKER, CONSTITUTIONAL HISTORY, *supra* note 11, at 127; Max Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 OHIO STATE L.J. 337, 337-41 (1983).

13 U.S. CONST. art. I, § 9, cl. 2. For opposing views on the meaning of the Suspension Clause, compare DUKER, CONSTITUTIONAL HISTORY, *supra* note 11, at 126-56 (arguing that the Framers intended the Clause to limit Congress's ability to interfere with the availability of the writ in state courts, but did not seek to limit Congress's power to disallow the writ in federal court) with Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451 (1996) (arguing for a broader interpretation of the Clause that would limit Congress's power to narrow federal habeas corpus) and Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 868 (1994) (arguing that "the Suspension Clause and the Fourteenth Amendment together are best read to mandate federal habeas review of the convictions of state prisoners"). *See also* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 COLUM. HUM. RTS. L. REV. 555 (2002). This Article, which focuses on the significance of AEDPA for the Court's *Teague* jurisprudence, takes no position in the debate concerning the proper scope of the Suspension Clause. Nor does this Article join the debate about the constitutionality of various AEDPA provisions. *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1553-73 (2000) (summarizing constitutional issues raised by AEDPA). *See generally* Symposium, *Congress and*

Federal Congress authorized the federal courts to grant the writ of habeas corpus to *federal* prisoners,[14] Congress did not empower federal courts to entertain a petition for the writ by persons whom *state* authorities incarcerated until 1867.[15] In that year, Congress vested the federal courts with power to grant the writ "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[16]

Notwithstanding Congress's use of such broad language, the U.S. Supreme Court initially held that the 1867 statute permitted federal courts to grant the writ[17] only to those state prisoners convicted in a trial court that lacked "jurisdiction."[18] Over the ensuing half century, however, the Court gradually expanded the category of jurisdictional defects, holding that the writ should be granted in numerous situations. These included when the state statute defining the offense for which the prisoner was incarcerated violated the federal constitution,[19] when the State, "supplying no corrective process . . . deprive[d] the accused of his life or liberty without due process of law,"[20] and when the court that tried the petitioner succumbed to the influence of a mob hostile to the accused.[21] In 1942, the Court abandoned the fiction that the writ was limited to convictions void for want of jurisdiction and stated that the writ would be available in all cases "where the conviction has been in disregard of the constitutional rights of the accused, and where

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the Courts: Jurisdiction and Remedies, 86 GEO. L.J. 2445 (1998) (exploring various constitutional issues raised by AEDPA).

14 *See* Judiciary Act of 1789, § 14, 1 Stat. 81-82; *see also* WRIGHT, *supra* note 11, at 351.

15 *See* Wayne A. Logan, *Federal Habeas in the Information Age*, 85 MINN. L. REV. 147, 150 (2000); WRIGHT, *supra* note 11, at 351. *But see* Eric M. Freedman, *Milestones in Habeas Corpus: Part I, Just Because John Marshall Said It Doesn't Make It So:* Ex Parte Bollman *and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 537 (2000) (arguing that "sensibly read, Section 14 [of the Judiciary Act of 1789] is a grant of power to the federal courts to issue writs of habeas corpus for state prisoners," and that, "in any event, no statutory authorization was required, since the federal courts could utilize their common law and state law powers to issue such writs").

16 Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. This Article focuses exclusively on the sections of AEDPA addressed to petitions for the writ filed by *state* prisoners in *federal* court and thus ventures no claims about petitions filed by federal prisoners, ordinarily processed pursuant to amended 28 U.S.C. § 2255.

17 Though federal courts use the writ to test the legality of incarceration, a prisoner's successful petition need not always result in the prisoner's immediate release from custody. In fact, in most instances "grant of the writ is expressly made conditional in order that the state may retry the prisoner in a fashion meeting constitutional demands." WRIGHT, *supra* note 11, at 352.

18 *See* Ex Parte Siebold, 100 U.S. 371, 375 (1879); *see also* Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 262-63 (1988) (noting that "for some sixty years after [the] enactment [of] the Act of 1867 . . . federal courts generally would not review claims of state prisoners challenging their incarceration unless they claimed that the trial courts lacked jurisdiction or had committed an error so fundamental that the habeas court found that the trial court had 'lost' its jurisdiction.").

19 *See Siebold*, 100 U.S. at 376-77.

20 Frank v. Mangum, 237 U.S. 309, 335 (1915); *see also* O'Neill, *supra* note 11, at 1517-18 (discussing the background to the *Frank* case).

21 *See* Moore v. Dempsey, 261 U.S. 86, 91 (1923). For a discussion of racial issues underlying *Moore*, see Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 50 (2000).

the writ is the only effective means of preserving his rights."[22] During this same period, the U.S. Supreme Court had developed the doctrine, later codified by the 1948 amendments to the 1867 Act, that a federal court should decline to grant the writ, unless a state prisoner had exhausted available remedies under state law.[23] This exhaustion requirement, when joined with the steady expansion of the writ's scope, raised the difficult question of what, if any, weight a federal court should accord a state court's prior rejection of a petitioner's federal constitutional claim.[24]

The U.S. Supreme Court resolved this question in its 1953 landmark decision, *Brown v. Allen*.[25] In that case, a North Carolina prisoner filed in federal district court a petition for the writ on the basis of a federal constitutional claim that the North Carolina courts had previously considered and rejected. Denying the petition, the federal district court relied "upon the procedural history and the record in the State Courts, for the reason that [a] habeas corpus proceeding is not available to the petitioner for the purpose of raising the identical question passed upon in those Courts."[26] The district judge explained that in such a case "[t]he judgment of the state court is ordinarily res adjudicata, not only of those issues which were raised and determined, but also of those which might have been raised."[27] The court rejected the petitioner's argument that the Reconstruction-era statute empowering the federal courts to grant the writ to state prisoners mandated an exception to the general rule that "adjudications made by the state courts in connection with applications made to them will be binding on the federal courts" in subsequent proceedings.[28]

Justice Frankfurter, however, in an opinion endorsed by a majority of the Court,[29] adopted the petitioner's argument. Indeed, Justice Frankfurter

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22 Waley v. Johnston, 316 U.S. 101, 105 (1942); *see also* WRIGHT, *supra* note 11, at 354.

23 *See* HART AND WECHSLER, *supra* note 11, at 1443-44.

24 Another issue raised by the exhaustion requirement, and addressed by numerous Supreme Court decisions and, more recently, AEDPA, was when a state court's dismissal of a prisoner's claim for failure to comply with state procedures should bar a federal habeas court's consideration of the claim's merits. That issue is beyond the scope of this Article. For a good overview of the problem, see CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 12, § 15.5.2. A related question is when will a prisoner who files successive petitions for the writ be denied relief for this reason alone, that is without inquiry into the merits of the prisoner's claim. For a discussion of this issue, which has also been addressed by the Court and by AEDPA, see CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 12, § 15.4.3. *See generally* Randal S. Jeffrey, *Successive Habeas Corpus Petitions and Section 2255 Motions After the Antiterrorism and Effective Death Penalty Act of 1996: Emerging Procedural and Substantive Issues*, 84 MARQ. L. REV. 43 (2000); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699 (2002).

25 Brown v. Allen, 344 U.S. 443 (1953). *See* CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 12, § 15.5.3, at 896-97 (discussing *Brown*). For a recent re-examination of the significance of *Brown*, see Eric M. Freedman, *Milestones in Habeas Corpus: Part III,* Brown v. Allen*: The Habeas Corpus Revolution That Wasn't*, 51 ALA. L. REV. 1541 (2000).

26 Speller v. Crawford, 99 F. Supp. 92, 95 (E.D.N.C. 1951).

27 *Id.* at 95-96 (internal quotation marks and citations omitted).

28 *Id.* at 96 (internal quotation marks and citations omitted).

29 Though Justice Reed delivered the "opinion of the Court" resolving the three consolidated appeals before the Court in *Brown v. Allen*, Justices Black, Douglas, Burton, and Clark endorsed Justice Frankfurter's discussion of "the bearing of the proceedings in the State courts

concluded that the 1867 statute required federal district courts to decide de novo both pure questions of federal constitutional law and mixed questions of law and fact when properly presented by a petition for habeas corpus, even if the trial and appellate courts of the incarcerating state had previously rejected petitioner's claims. Justice Frankfurter emphasized his solicitude for the state courts charged, in the first instance in the vast majority of cases, with the awesome responsibility of administering criminal justice.[30] He, nonetheless, concluded that Congress's decision to extend the federal courts' habeas jurisdiction to petitions brought by state prisoners compelled a ruling that "the prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim" by a federal habeas court.[31]

Thus, Justice Frankfurter concluded that a state court's rejection of a petitioner's claim did not preclude relitigation of the issue in a federal court exercising habeas corpus jurisdiction. He then offered the lower courts guidance for treating future cases. He distinguished between, on the one hand, questions of "historical fact," and on the other hand, pure questions of law and mixed questions of law and fact. As to state court determinations of historical or "basic" facts—"in the sense of a recital of external events and the credibility of their narrators"—federal habeas courts should ordinarily defer, "[u]nless a vital flaw be found in the process of ascertaining such facts in the State court."[32] As to pure questions of law, however, federal habeas courts owed no deference to prior state court decisions, as "[i]t [was] precisely these questions that the federal judge [was] commanded to decide."[33] This observation equally applied to "so-called mixed questions" of law and fact, for under the 1867 statute "the District Judge must exercise his own judgment on this blend of facts and their legal values."[34] Justice Frankfurter embraced this independent, which is to say de novo, consideration by federal habeas courts of pure questions of federal constitutional law as well as mixed

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upon the disposition of the application for a writ of habeas corpus in the Federal District Courts." *Brown*, 344 U.S. at 497 (Frankfurter, J., concurring in part and dissenting in part); *see also id.* at 513 (opinion of Justices Black and Douglas); *id.* at 487-88 (opinion of Justices Burton and Clark). Justice Frankfurter's opinion in *Brown* has been recognized as authoritative by both the Court—*see, e.g.*, *Wright v. West*, 505 U.S. 277, 288 (1992) (plurality opinion); *id.* at 300 (O'Connor, J., concurring)—and commentators, *see, e.g.*, HART AND WECHSLER, *supra* note 11, at 1351.

30 *See Brown*, 344 U.S. at 497-98. The Court stated:

> Experience may be summoned to support the belief that most claims in these attempts to obtain review of State convictions are without merit. Presumably they are adequately dealt with in the State courts. Again, no one can feel more strongly than I do that a casual, unrestricted opening of the doors of the federal courts to these claims not only would cast an undue burden upon those courts, but would also disregard our duty to support and not weaken the sturdy enforcement of their criminal laws by the States.

Id.

31 *Id.* at 500 (noting that under a contrary holding "the State court would have the final say which the Congress, by the Act of 1867, provided it should not have.").

32 *Id.* at 506.

33 *Id.*

34 *Id.* at 507.

questions of federal constitutional law and historical fact 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."[35] He invoked the supremacy of federal law to thwart the claim that it was anomalous for a single federal district judge to reverse the holding of a "higher" court, *i.e.* a state supreme court.[36]

Though controversial,[37] the Court's decision in *Brown* proved essential to the Warren Court's 1960s reformation of the criminal justice system within the states. The Court lacked the capacity to review and reverse every state court conviction that contravened its increasingly generous interpretations of the Bill of Rights' guarantees. Accordingly, the federal district courts, exercising habeas corpus jurisdiction, assumed responsibility for guaranteeing faithful adherence to the Supreme Court's rulings.[38] The Court's roughly

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35 *Id.* at 508. Seizing upon Justice Frankfurter's observation in *Brown v. Allen*, 344 U.S. at 508, that "there is no need for the federal judge, if he could, to shut his eyes to the State [courts'] consideration" of an issue raised by a habeas petition, Justice Thomas recently offered a revisionist interpretation of the case. He concluded that *Brown* held open the possibility of narrow, deferential review by federal habeas courts confronted with federal claims previously rejected by state courts. Writing for the three Justice plurality (Chief Justice Rehnquist, Justice Scalia, and himself) in *Wright v. West*, 505 U.S. 277 (1992), Justice Thomas argued that Justice Frankfurter's *Brown* opinion reflected an assumption that the writ would be available to a state prisoner only when the state courts' determination of a pure question of law or a mixed question of law and fact could be said to be unreasonable. *West*, 505 U.S. at 288 & n.5. In those instances where the state courts' decisions upholding a conviction and sentence were premised on an incorrect, though not unreasonable, interpretation of federal constitutional law, the course anticipated by *Brown*, according to Justice Thomas, was to deny the writ. *Id.* at 288. As Justice O'Connor's opinion concurring in the judgment, in which Justices Blackmun and Stevens joined, explained, Justice Thomas's position was inconsistent with not only the Justices' opinions in *Brown* but also countless intervening Supreme Court decisions. *Id.* at 300-03 (O'Connor, J., concurring). Thus, Justice Thomas failed to win a majority for his narrow interpretation of *Brown*. *See* CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 12, § 15.5.3, at 897.

36 *Brown*, 344 U.S. at 510. In Justice Frankfurter's eloquent words:

> Insofar as this jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law. It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law. The fact that Congress has authorized district courts to be the organ of the higher law rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower court to overrule a higher court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted.

Id.

37 For a discussion of the controversy sparked by *Brown*, in both Congress and the legal academy, see *infra* section III.B.

38 As one commentator has explained:

> [T]he growth in the size of the country and the amount of litigation meant that review by the United States Supreme Court was not sufficient to remedy all allegedly unconstitutional convictions. If there was to be federal court review of state court procedures, it would have to be undertaken in the district courts through habeas corpus.

CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 12, § 15.2, at 847; *see also* HART & WECHSLER, *supra* note 11, at 1361 ("The broad scope of habeas relitigation authorized in *Brown* and reaffirmed in *Fay v. Noia*, 372 U.S. 391 (1963), is often seen as an important or even necessary

contemporaneous expansion of both habeas corpus jurisdiction and its Bill of Rights interpretations raised another vexing question: when should its prodefendant revisions in the constitutional law of criminal procedure apply retroactively to prisoners convicted when less vigorous standards prevailed? The Court's decision in *Teague* ultimately addressed this question of retroactivity, after many years and a few false starts.

B. Teague *and the "New Rule" Decisions*

The evolution of the Court's *Teague* jurisprudence has been comprehensively chronicled elsewhere, and this Article will not attempt to duplicate those efforts.[39] A brief overview of this doctrine's development, however, enhances appreciation of the Court's recent decision in *Williams v. Taylor* and the important questions about the continuing vitality of the Court's retroactivity jurisprudence that *Williams* left unresolved.

Over thirty years ago in the midst of the Warren Court's criminal procedure revolution, Justice Harlan urged the Justices to abandon their flexible approach to the problem of determining which groundbreaking decisions the Court would apply retroactively.[40] In two dissenting opinions, Justice Harlan

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aspect of the Warren Court's effort to ensure that its criminal procedure decisions were followed by state courts."); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1041 (1977) ("[A]n expanded federal writ of habeas corpus" provided a "remedial counterpart to the constitutionalization of criminal procedure."); Friedman, *supra* note 18, at 253-54 ("[T]he Court expanded the scope of the writ of habeas corpus in *Brown* because the Court recognized that it no longer could shoulder the burden on direct review of scrutinizing constitutional claims arising in state criminal proceedings.").

39 *See, e.g.*, Susan Bandes, *Taking Justice to its Logical Extreme: A Comment on* Teague v. Lane, 66 S. CAL. L. REV. 2453, 2462-66 (1993); John Blume & William Pratt, *Understanding* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 325, 343-56 (1990-1991); David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23, 31-41 (1991); Markus Dirk Dubber, *Prudence and Substance: How the Supreme Court's New Habeas Retroactivity Doctrine Mirrors and Affects Substantive Constitutional Law*, 30 AM. CRIM. L. REV. 1, 3-9 (1992); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1738-49 (1991); Timothy Finley, *Habeas Corpus Retroactivity of Post-Conviction Rulings: Finality at the Expense of Justice*, 84 J. CRIM. L. & CRIMINOLOGY 975, 982-88 (1994); Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 802-14 (1992) [hereinafter Friedman, *Habeas and Hubris*]; Barry Friedman, *Pas De Deux: The Supreme Court and the Habeas Courts*, 66 S. CAL. L. REV. 2467, 2496-2501 (1993); Friedman, *supra* note 1, at 518-28; Higginbotham, *supra* note 3, at 2445-47; Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 ALA. L. REV. 421, 427-32 (1993); Meyer, *supra* note 7, at 427-55; Yackle, *supra* note 7, at 2381-94; Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 255-81 (1998); Roger D. Branigin III, Note, *Sixth Amendment—The Evolution of the Supreme Court's Retroactivity Doctrine: A Futile Search for Theoretical Clarity*, 80 J. CRIM. L. & CRIMINOLOGY 1128 (1990); Sharad Sushil Khandelwal, Note, *The Path to Habeas Corpus Narrows: Interpreting 28 U.S.C. § 2254(d)(1)*, 96 MICH. L. REV. 434, 439-40 (1997); Note, *Retroactive Application of New Rules*, 104 HARV. L. REV. 308, 309-14 (1990).

40 For a discussion of some of the jurisprudential issues presented by adjudicative retroactivity, see generally Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 (1997); Kermit Roosevelt III, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075 (1999); *see also* Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE L. REV.

admonished the Court to adopt a bright-line rule that "new rules" would apply retroactively only to criminal convictions still pending on direct review. Thus, a new rule would not apply to convictions that had become final before the rule was announced and hence were subject only to collateral review on an application for a writ of habeas corpus.[41] On this issue, Justice Harlan remained in the minority throughout his tenure on the Court. But in 1987 the Court held that henceforth *all* of its decisions, including those announcing new rules of criminal procedure, would apply retroactively to direct appeals from convictions pending at the time the new rule was announced.[42] Two years later in *Teague*, six Justices, expressly relying on Justice Harlan's dissents, adopted the other half of his proposal and held that new rules would not be applied on collateral review of convictions that had become final before the Court had announced the new rule.[43]

The *Teague* plurality recognized that it would be difficult to ascertain when a Supreme Court decision had announced a new rule for these purposes.[44] The plurality declined to establish an authoritative standard, but did articulate general guidelines. The plurality observed that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government."[45] The Court continued: "[t]o 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."[46]

Seizing upon the latter statement, a five Justice majority in *Butler v. McKellar*[47] concluded that "[t]he 'new rule' principle . . . validates *reasonable, good-faith* interpretations of existing precedents made by state courts even

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1515, 1558-60 (1998) (exploring the tension between the Court's recent criminal and civil retroactivity decisions).

41 Justice Harlan's dissenting opinions, and their implications for a cogent understanding of the relationship between AEDPA and the Court's retroactivity case law, are discussed in greater detail *infra* in the text accompanying notes 191-233. *See also* Yin, *supra* note 39, at 212-18.

42 *See* Griffith v. Kentucky, 479 U.S. 314 (1987); *see also* Meyer, *supra* note 7, at 433-34.

43 *See Teague*, 489 U.S. at 310 (plurality opinion); *see id.* at 319-20 (Stevens, J., concurring in part and concurring in the judgment, for himself and Justice Blackmun); *see also* Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (With an Emphasis on the* Teague *Rule Against New Rules in Habeas Corpus Cases)*, 88 NW. U. L. REV. 1046, 1052-74 (1994) (presenting "a postmodern deconstruction of the *Teague* rule against new rules in habeas cases"). Like Justice Harlan, the *Teague* plurality recognized two narrow exceptions to the rule against retroactive application of new rules. *See Teague*, 489 U.S. at 311-14. As this Article focuses on the proper definition of a "new rule" for the purposes of *Teague*, it undertakes no analysis of the desirability or scope of these two exceptions.

44 *See Teague*, 489 U.S. at 301 (plurality opinion) ("It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes.").

45 *Id.* (citing as examples the Court's decisions in *Rock v. Arkansas*, 483 U.S. 44 (1987), which held that a rule excluding all hypnotically refreshed testimony, as applied to a criminal trial, violated the due process clause of the Fourteenth Amendment, the compulsory process clause of the Sixth Amendment, and the Fifth Amendment's privilege against self-incrimination, and *Ford v. Wainwright*, 477 U.S. 399 (1986), which held that execution of an insane prisoner violated the Eighth Amendment).

46 *Teague*, 489 U.S. at 301. The rule announced in Justice O'Connor's plurality opinion in *Teague* won the support of a majority of the Court in *Penry v. Lynaugh*, 492 U.S. 302 (1989).

47 Butler v. McKellar, 494 U.S. 407, 414 (1990).

though they are shown to be contrary to later decisions."[48] *Butler* held that the Court's prior decision in *Arizona v. Roberson*[49] had announced a new rule for the purposes of *Teague*'s retroactivity bar, although the Court's opinion in *Roberson* had declared that the result in that case was "controlled" by prior precedent.[50] The *Butler* Court noted that the issue decided in *Roberson* had divided the lower courts prior to the Supreme Court's decision in *Roberson*. Because "the outcome in *Roberson* was susceptible to debate among reasonable minds," *Butler* held that *Roberson* had announced a "new rule" for the purposes of *Teague*'s procedural bar on retroactive application of new rules on habeas corpus.[51] This language in *Butler* in turn became the new test for determining whether a Supreme Court criminal procedure decision had announced a new rule: henceforth, every Supreme Court criminal procedure decision constituted a new rule so long as the result obtained therein "was susceptible to debate among reasonable minds."[52]

The Justices' conflicting opinions in *Wright v. West*[53] illustrate the significance of this expansion of the new-rule category. In that case, the Court confronted the reality that the *Butler* definition of new rule effectively required *federal* habeas courts to defer to *state* courts on issues of *federal* law. The Court had asked the parties to brief "the question whether a federal habeas court should afford deference to state-court determinations applying law to the specific facts of a case," so-called mixed questions of law and fact.[54] Writing for a three Justice plurality, Justice Thomas argued that the

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48 *Id.* (emphasis added). The Court cited as the sole support for the quoted proposition its prior decision in *United States v. Leon*, 468 U.S. 897, 918-19 (1984), which announced the good-faith exception to the exclusionary rule. The Court reasoned that a good-faith exception in the context of habeas corpus would no more undermine the incentives of state judges to honor federal law than did the analogous exception undermine the incentives of law enforcement to adhere to the requirements of the Fourth Amendment. *See Butler*, 494 U.S. at 414.

49 Arizona v. Roberson, 486 U.S. 675 (1988).

50 *See Butler*, 494 U.S. at 414-15 ("[T]he fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' under *Teague*."). The *Roberson* Court's declaration that its holding was "controlled" by prior precedent was no rhetorical exaggeration. *Roberson* merely confirmed that the prophylactic rule of Edwards v. Arizona, 451 U.S. 477, 484-85 (1981), which held that an accused who has "expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him," applied to police-initiated interrogation about a separate offense. *See Roberson*, 486 U.S. at 681. As the *Roberson* Court explained:

> [I]f a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities' behest, and not the suspect's own instigation, is itself the product of the inherently compelling pressures [of custody] and not the purely voluntary choice of the suspect.

Id. (internal quotation marks omitted). Certainly, it could not be said that *Roberson* broke new ground or imposed new obligations on the States. *See Butler*, 494 U.S. at 420-22 (Brennan, J., dissenting).

51 *See Butler*, 494 U.S. at 415; *see also* Meyer, *supra* note 7, at 440-44.

52 *Butler*, 494 U.S. at 415; *see also* Wright v. West, 505 U.S. 277 (1992); Stringer v. Black, 503 U.S. 222 (1992); Sawyer v. Smith, 497 U.S. 227 (1990); Saffle v. Parks, 494 U.S. 484 (1990).

53 Wright v. West, 505 U.S. 277 (1992). *See also* Woolhandler, *supra* note 7, at 576 (discussing *West*).

54 *West*, 505 U.S. at 284.

Court's decisions in *Butler* and its progeny had already adopted a deferential standard of review for pure questions of law. Citing *Butler*'s "susceptible to debate among reasonable minds" test for determining whether a decision had announced a new rule, Justice Thomas concluded:

> [I]f a state court has reasonably rejected the legal claim asserted by a habeas petitioner under existing law, then the claim seeks the benefit of a "new" rule under *Butler*, and is therefore not cognizable on habeas under *Teague*. In other words, a federal habeas court "must defer to the state court's decision rejecting the claim unless that decision is patently unreasonable."[55]

Justice O'Connor, who had authored the opinion for the plurality in *Teague* and had joined Chief Justice Rehnquist's opinion for the Court in *Butler*, wrote separately in *West* to address Justice Thomas's claims about the implications of these two prior decisions. Writing for herself and Justices Blackmun and Stevens, Justice O'Connor emphatically rejected the assertion of the *West* plurality that *Teague* and *Butler* required federal habeas courts to defer to state court decisions of pure questions of federal law.[56] Yet, Justice O'Connor struggled to reconcile this conclusion with *Butler*'s reasonableness test for determining whether a state prisoner was seeking a new rule barred by *Teague*.[57] Indeed, some passages of her opinion seemed to urge a different "new rule" standard than that enunciated in *Butler*, though other passages suggested her adherence to *Butler*'s reasonableness test.[58] Justice

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55 *Id.* at 291 (quoting *Butler*, 494 U.S. at 422 (Brennan, J., dissenting)); *see also id.* at 291 n.8 (Thomas, J., for plurality) ("[E]ach of our last four relevant precedents has indicated that *Teague* insulates on habeas review the state courts' reasonable, good-faith interpretations of existing precedents"; "[t]hus, *Teague* bars habeas relief whenever the state courts have interpreted old precedents *reasonably*, not only when they have done so properly.") (citations omitted). Ultimately, Justice Thomas declined to rule on the standard of review a habeas court should apply when reviewing a mixed question of law and fact—the issue on which the Court had sought additional briefing. *See id.* at 295 ("We need not decide such far-reaching issues in this case.").

56 *Id.* at 303-04 (O'Connor, J., concurring). Justice O'Connor wrote:

> *Teague* did not establish a 'deferential' standard of review of state court determinations of federal law. It did not establish a standard of review at all. Instead, *Teague* simply requires that a state conviction on federal habeas be judged according to the law in existence when the conviction became final. In *Teague*, we refused to give state prisoners the retroactive benefit of new rules of law, but we did *not* create any deferential standard of review with regard to old rules.

Id. (citations omitted).

57 *See id.* at 304. Justice O'Connor explained:

> Even though we have characterized the new rule inquiry as whether 'reasonable jurists' could disagree as to whether a result is dictated by precedent, the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new.

Id.

58 *Compare id.* ("To determine what counts as a new rule, *Teague* requires courts to ask whether the rule a habeas petitioner seeks *can be meaningfully distinguished* from that established by binding precedent at the time his state court conviction became final.") (emphasis added), *with id.* ("If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is *not reasonable*.")

O'Connor also manifested her ambivalence when conceding that "in practice, it may seem only 'a matter of phrasing' whether one calls the *Teague* inquiry a standard of review or not."[59] In short, Justice O'Connor denounced Justice Thomas's conclusion that the *Teague* rule, as implemented in *Butler*, effectively imposed a deferential standard of review on habeas courts' consideration of pure questions of federal law. She failed, however, to reconcile her prior endorsement of *Butler*'s new-rule test with her insistence that de novo review be preserved.[60]

Justice Kennedy's separate opinion reflects this same failure even more strikingly. Like Justice O'Connor, he denied that *Teague* and the cases implementing it effectively adopted a deferential standard of review for pure questions of law.[61] Justice Kennedy conceded, however, that "the fact that our standard for distinguishing old rules from new ones turns on the reasonableness of a state court's interpretation of then-existing precedents suggests that federal courts do in one sense defer to state-court determinations."[62] From that concession, Justice Kennedy never recovered. Indeed, it is difficult to see how habeas courts could "in one sense" defer to state court decisions on pure questions of federal law and yet in some other sense review those same decisions de novo.[63]

Notwithstanding the conflicting views articulated in *West*, the Court has adhered to *Butler*'s all-encompassing definition of the term "new rule." Most recently, in *O'Dell v. Netherland*,[64] a five Justice majority upheld a death sentence attacked by a habeas petitioner on the ground that the state court decision imposing it, though wrong, was not "unreasonable."[65] All agreed that O'Dell had been sentenced to death in violation of the Due Process Clause of the Fourteenth Amendment.[66] At the sentencing phase of O'Dell's murder trial, the prosecutor, emphasizing that O'Dell had been convicted of, and paroled on, serious offenses prior to the instant murder, forcefully argued that execution was the only way to keep O'Dell off the streets and society safe.[67] Indeed, the sole basis for O'Dell's death sentence was the jury's finding that

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(emphasis added). Though Justice O'Connor never renounced her allegiance to *Butler*, Justice Thomas suggested that she was in fact proposing a definition of "new rule" at odds with *Butler*. *See id.* at 291 n.8 (Thomas, J., for the plurality).

59 *Id.* at 304 (O'Connor, J., concurring).

60 *Id.* at 305 ("We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.").

61 *See id.* at 307 (Kennedy, J., concurring in the judgment) ("*Teague* did not establish a deferential standard of review of state-court decisions of federal law. It established instead a principle of retroactivity.").

62 *Id.*

63 *See id.* at 307-09. Justice Souter's separate opinion also seemed to adhere to *Butler*'s definition of new rule. *See id.* at 316 (Souter, J., concurring in the judgment) (applying the "no reasonable jurist" standard to conclude that the relief sought by West was barred by *Teague*).

64 O'Dell v. Netherland, 521 U.S. 151 (1997). *See* CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 12, § 15.5.1, at 879 (discussing *O'Dell*); Yackle, *supra* note 9, at 1748 (same).

65 *O'Dell*, 521 U.S. at 159-60.

66 *Id.* at 168 (Stevens, J., dissenting).

67 *Id.* at 154; *see also id.* at 168 n.1 (Stevens, J., dissenting) (quoting the prosecution's closing statement in the sentencing phase of O'Dell's trial).

O'Dell presented a "continuous, serious threat to society."[68] Nevertheless, the trial court denied O'Dell's request that the jury be informed that, in his case, the only possible alternative to a death sentence was a sentence of life imprisonment without the possibility of parole.[69]

In 1988, the U.S. Supreme Court denied O'Dell's petition for direct review of the Virginia Supreme Court decision affirming his death sentence.[70] In 1994, however, the U.S. Supreme Court, in *Simmons v. South Carolina*,[71] held that a state could not, consistent with the Constitution, premise a death sentence on the convict's future dangerousness and simultaneously prevent defense counsel from advising the sentencing jury that, under state law, the only alternative to a death sentence was life imprisonment without parole.[72] Three years later,[73] after granting review of the Fourth Circuit's denial of O'Dell's petition for the writ, a bare majority of the U.S. Supreme Court affirmed that denial, and left his death sentence undisturbed, on the ground that the Court's holding in *Simmons* constituted a new rule unavailable on habeas.[74]

Writing for the majority, Justice Thomas reaffirmed *Butler*'s rule of deference to state court determinations of federal constitutional law.[75] Even though the Court had decided *Simmons* by a 7-2 vote, and even though Justice Blackmun's plurality opinion persuasively asserted that the Court's rulings in two prior cases (which antedated O'Dell's death sentence) "compel[led]" reversal in *Simmons*,[76] Justice Thomas's opinion for the Court in *O'Dell* nevertheless concluded that *Simmons* constituted a new rule. Justice Thomas defended this determination on the ground that, prior to *Simmons*, the issue decided there was "'susceptible to debate among reasonable minds.'"[77] Justice Thomas relied on the existence of conflicting lower court authority prior to *Simmons*, and especially the fact of the two Justice dissent in *Simmons*, which he had joined.[78] Justices O'Connor and Kennedy joined

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68 *Id.* at 154, 168 n.1 (Stevens, J., dissenting).

69 *Id.* at 154; *see also id.* at 168-69 (Stevens, J., dissenting).

70 *See* O'Dell v. Virginia, 488 U.S. 871 (1988).

71 Simmons v. South Carolina, 512 U.S. 154 (1994).

72 *Id.* at 162. For a thorough discussion of *Simmons* and the issue of its applicability to subsequent federal habeas corpus proceedings, see generally Benjamin P. Cooper, Comment, *Truth in Sentencing: The Prospective and Retroactive Application of* Simmons v. South Carolina, 63 U. CHI. L. REV. 1573 (1996).

73 Though decided after the enactment of AEDPA, neither the majority nor dissenting opinions in *O'Dell* so much as mentioned the 1996 Act's habeas corpus-reform provisions.

74 *See O'Dell*, 521 U.S. at 153.

75 *See, e.g., id.* at 156 ("[T]he *Teague* doctrine 'validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.'") (quoting Butler v. McKellar, 494 U.S. 407, 414 (1990)).

76 *Simmons,* 512 U.S. at 164-65.

77 *O'Dell*, 521 U.S. at 160 (quoting *Butler*, 494 U.S. at 415).

78 *Id.* at 159-60. Justice Thomas also distinguished, by reading very narrowly, the two pre-*Simmons* rulings on which the plurality and concurring opinions in *Simmons* had relied. *Id.* at 160-62. Furthermore, Justice Thomas stressed other pre-*Simmons* decisions in which the Court, or individual Justices thereof, had, in *dicta*, suggested limits on the *prosecution's* ability, over defense counsel's objection, to inform a capital sentencing jury of the existence of postsentencing clemency proceedings. *Id.* at 164-65. In light of these cases, Justice Thomas opined that "[a] reasonable jurist in 1988 . . . may well have concluded that the most surely constitutional course,

Justice Thomas's *O'Dell* opinion without comment.[79] Thus, despite the concerns voiced in their separate opinions in *Wright v. West*, by 1997 they had acquiesced in a definition of "new rule" that required federal habeas courts to defer to any "reasonable" interpretation of federal law.[80] A solid majority of the Court had, thus, tacitly overruled *Brown*'s 1953 authoritative interpretation of the federal habeas corpus statute, without any direction from Congress to do so or even any explanation as to why *Brown*'s de novo standard of review should be jettisoned.[81]

II. The Significance of Williams v. Taylor

In April of 2000, the U.S. Supreme Court for the first time addressed the relationship between AEDPA's habeas corpus reform provisions and the Court's pre-existing *Teague* jurisprudence.[82] A badly splintered Court resolved some issues, but left undecided many others. The *Williams* decision is critical to understanding the impact of AEDPA on the Court's retroactivity case law, yet the ruling is extraordinarily convoluted, partly because the Court issued so many conflicting opinions. Accordingly, the decision is explored in some detail below.

In the U.S. Supreme Court, the sole issue pressed by petitioner Williams was the alleged ineffectiveness of his trial counsel at sentencing.[83] In 1986, Williams was convicted of robbing and murdering his neighbor.[84] At the sentencing phase of Williams's trial, his counsel relied almost exclusively on the fact that Williams had turned himself in to the authorities after the case had been closed.[85] Williams's attorney even intimated in his closing argument that he could identify no other persuasive reason for clemency.[86] In fact, Williams had suffered a "nightmarish" childhood of abuse and neglect, had a

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when confronted with a request to inform a jury about a defendant's parole eligibility, was silence." *Id.* at 165-66. By articulating a most grudging interpretation of the precedents on which *Simmons* was based, and by ignoring the obvious distinction between an instruction given at defense counsel's insistence and another given over defense counsel's objection, Justice Thomas set a standard of deference to state court interpretations of federal law that required a federal habeas court to deny the writ in all cases but those involving the most flagrant disregard of the prisoner's constitutional rights.

79 *Id.* at 153.

80 Even the *O'Dell* dissent accepted this deferential standard, engaging the majority only as to its application of the standard to O'Dell's claim, and arguing in the alternative that, even if *Simmons* constituted a new rule, its holding fit within one of the narrow exceptions to *Teague*'s retroactivity bar. *See O'Dell*, 521 U.S. at 168-78 (Stevens, J., dissenting).

81 In accordance with the Court's denial of his petition for the writ of habeas corpus, O'Dell died in the electric chair on July 24, 1997. Spencer S. Hsu, *Virginia Executes O'Dell Despite Worldwide Pleas: Condemned Man Marries Shortly Before Dying*, WASH. POST, July 24, 1997, at D1.

82 Williams v. Taylor, 529 U.S. 362, 379-80 (2000). *See generally* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 32.3 (4th ed. 2001) (detailed exegesis of *Williams*).

83 *Williams*, 529 U.S. at 367.

84 *Id.* at 368.

85 *Id.*

86 The Court observed that "[t]he weight of defense counsel's closing . . . was devoted to explaining that it was difficult to find a reason why the jury should spare Williams' life." *Williams*, 529 U.S. at 369.

sixth-grade education, and was "borderline mentally retarded."[87] Moreover, a subsequent investigation revealed that trial counsel had neglected to employ numerous friendly witnesses—including prison authorities, the State's expert witnesses on future dangerousness, and a certified public accountant who had visited with Williams as part of a prison ministry program.[88] All of these witnesses would have provided testimony weighing against a death sentence. Lacking the benefit of that evidence, the jury "found a probability of future dangerousness" and unanimously returned a sentence of death, which the trial court imposed and which the Supreme Court of Virginia upheld on direct appeal.[89]

Williams then sought relief via state collateral review.[90] After hearing the potentially mitigating evidence that defense counsel had not presented to the sentencing jury, the same judge who had presided over Williams's trial concluded that Williams had not received constitutionally adequate counsel.[91] Citing the U.S. Supreme Court's decision in *Strickland v. Washington*,[92] the trial judge also found a reasonable probability that the result of the sentencing phase would have been different had counsel performed adequately.[93] Accordingly, the judge recommended that Williams receive a new sentencing hearing.[94]

The Supreme Court of Virginia disagreed, however. That court rejected the trial judge's legal analysis on the ground that he had focused unduly on "mere outcome determination."[95] The Virginia Supreme Court read the intervening U.S. Supreme Court decision in *Lockhart v. Fretwell*[96] to modify the *Strickland* standard for assessing claims of constitutionally deficient counsel. The Virginia Supreme Court read *Lockhart* to require that the petitioner show that the ineffectiveness of counsel probably affected the outcome *and*, in addition, to convince the reviewing court that the ultimate result was "fundamentally unfair or unreliable."[97] The Virginia Supreme Court also discounted the force of the neglected mitigating evidence and, thus, concluded that counsel's alleged errors had not prejudiced Williams.[98]

Williams then sought relief under the federal habeas corpus statute. The district court, persuaded by the Virginia trial judge's analysis, granted the writ, but the U.S. Court of Appeals for the Fourth Circuit ("Fourth Circuit") reversed.[99] Relying on its prior decision in *Green v. French*,[100] which had

87 *Id.* at 395-96.

88 *Id.* at 395.

89 *Id.* at 370.

90 *Id.*

91 *Id.*

92 Strickland v. Washington, 466 U.S. 668 (1984).

93 *Williams*, 529 U.S. at 371.

94 *Id.*

95 Williams v. Warden of the Mecklenberg Corr. Ctr., 487 S.E.2d 194, 200 (Va. 1997).

96 Lockhart v. Fretwell, 506 U.S. 364 (1993).

97 *Williams*, 487 S.E.2d at 200 (citations omitted).

98 The Virginia Supreme Court assumed without deciding that trial counsel for Williams had performed incompetently within the meaning of the *Strickland/Lockhart* analysis. *Id.* at 198.

99 Williams v. Taylor, 163 F.3d 860, 874 (4th Cir. 1998).

100 Green v. French, 143 F.3d 865 (4th Cir. 1998).

construed the habeas corpus reform provisions of AEDPA to foreclose relief in all but an extremely narrow category of cases, the Fourth Circuit held that 28 U.S.C. § 2254(d)(1), as amended by AEDPA, precluded issuance of the writ.[101] The Supreme Court of the United States then granted certiorari.[102]

Williams afforded the Court its first opportunity to construe amended § 2254(d)(1), a project that had divided the federal circuit courts.[103] The Justices also differed in their interpretation of that section. Though Justice Stevens announced the judgment of the Court that the writ should issue setting aside Williams's sentence of death—a conclusion supported by six Justices—his construction of § 2254(d)(1) won only three other adherents, Justices Souter, Ginsburg, and Breyer.[104] Thus, Justice O'Connor delivered the opinion of the Court as to the statute's proper interpretation.[105] This section of her opinion was joined by Justice Kennedy and the three dissenters from the Court's decision to grant Williams relief—Chief Justice Rehnquist and Justices Scalia and Thomas.[106] Section 2254(d)(1) provides in pertinent part that the writ "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[107] The disagreement among the Justices centered on what precise meaning should be attributed to the three phrases "contrary to," "unreasonable application of," and "clearly established Federal law, as determined by the Supreme Court of the United States."

A. *"Clearly Established Federal Law as Determined by the Supreme Court of the United States"*

With respect to the last phrase of § 2254(d)(1), all nine Justices agreed that the language carried forward *in some form* the holding of *Teague v. Lane* that a decision announcing a "new rule" ought not apply retroactively on habeas to displace state court judgments that had become final before the rule was announced.[108] But both the majority and concurring opinions de-

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101 *See Williams*, 163 F.3d at 865.

102 *See* Williams v. Taylor, 526 U.S. 1050 (1999).

103 *See infra* note 125-33.

104 Williams v. Taylor, 529 U.S. 362, 367 (2000). *See* William E. Hellerstein, *"Shakin' and Bakin'": The Supreme Court's Remarkable Criminal Law Rulings of the 1999 Term*, 17 TOURO L. REV. 163, 193 (2000) (noting that "[t]he alignment of the Justices [in *Williams*] requires a scorecard.").

105 *Williams*, 529 U.S. at 399.

106 *Id.*

107 28 U.S.C. § 2254(d)(1) (2000).

108 *See Williams*, 529 U.S. at 380 ("It is perfectly clear that AEDPA codifies *Teague to the extent that Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final.") (opinion of Stevens, J., for himself and Justices Souter, Ginsburg, and Breyer) (emphasis added); *see also id.* at 412 (O'Connor, J., for herself, the Chief Justice, and Justices Scalia, Kennedy, and Thomas). Similarly, the Court was unanimous as to the significance of AEDPA's requirement that "Federal law" be "determined by the Supreme Court of the United States." Prior to AEDPA, lower federal courts looked to their own rulings, as well as those of the nation's highest court, when attempting to ascertain the state of the law as of the time the petitioner's conviction became

clined to rule that AEDPA codified the Court's case law concerning the definition of the term "new rule."[109] Justice O'Connor, writing for herself and four other members of the Court, concluded that "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1)."[110] The phrasing of this passage is significant. By using the term "old rule"—a term rarely employed in the Court's prior cases[111]—Justice O'Connor avoided deciding the question whether the Court's cases defining the term "new rule" survived AEDPA. Her opinion held only that the statutory phrase "clearly established federal law" was at least as broad as the decidedly narrow category of "old rules" under the Court's prior retroactivity cases.[112] Her opinion did not, therefore, foreclose the possibility that AEDPA might have enlarged the category of cases cognizable in habeas proceedings.[113] Indeed, Justice O'Connor acknowledged that "the 'clearly established Federal law' phrase bears only a slight connection to our *Teague* jurisprudence" but did not explain how the statutory standard differed from that articulated in the Court's cases.[114]

Justice Stevens's concurring opinion more explicitly reserved the issue of the relationship between the amended § 2254(d)(1) and the Court's retroactivity case law. His opinion, like that of Justice O'Connor, recognized that AEDPA codified some form of the Court's *Teague* jurisprudence:

> The antiretroactivity rule recognized in *Teague*, which prohibits reliance on "new rules," is the functional equivalent of a statutory pro-

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final. In *Williams*, all nine Justices agreed that AEDPA modified the Court's retroactivity jurisprudence by limiting habeas courts solely to U.S. Supreme Court precedent. As Justice Stevens put it, "[i]f this Court has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar." *Id.* at 381 (opinion of Stevens, J., for himself and Justices Souter, Ginsburg, and Breyer); *accord id.* at 412 (opinion of O'Connor, J., for herself, Chief Justice Rehnquist, and Justices Kennedy, Scalia, and Thomas) ("[Section] 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence."). *See generally* HERTZ & LIEBMAN, *supra* note 82, § 32.3 at 1429-32 (discussing relationship between § 2254(d)(1) and the *Teague* doctrine).

109 Nor did any Justice equate § 2254(d)(1)'s reference to "clearly established Federal law" with the meaning given that phrase in the Court's qualified immunity jurisprudence. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800 (1982), and its progeny. Justice Stevens's opinion expressly rejected the State's claim that § 2254(d)(1) should be so construed. *See Williams*, 529 U.S. at 380 n.12. The opinions of Justice O'Connor and the Chief Justice simply ignored this claim.

110 *Williams*, 529 U.S. at 412 (opinion of O'Connor, J., for herself, Chief Justice Rehnquist, and Justices Kennedy, Scalia, and Thomas). Justice O'Connor added "one caveat," that AEDPA limited habeas review to the law established by the Supreme Court's cases. *See supra* note 108.

111 Indeed, Justice O'Connor thought it necessary to defend her choice of the phrase "old rule" by citing one of the rare instances in which the Court had previously mentioned the category, as though to prove that she had not invented the usage. *See Williams*, 529 U.S. at 412.

112 *See id.* at 412.

113 Nor does the Supreme Court's more recent decision in *Horn v. Banks*, 122 S. Ct. 2147 (2002), foreclose the possibility that AEDPA requires the Court to revisit the meaning of "new rule" for the purposes of *Teague*'s retroactivity bar. To be sure, *Banks* reaffirms that the *Teague* antiretroactivity rule survives AEDPA. But the Court's brief *per curiam* opinion does not address the proper definition of "new rule" for *Teague* purposes.

114 *Williams*, 529 U.S. at 412.

> vision commanding exclusive reliance on "clearly established law." Because there is no reason to believe that Congress intended to require federal courts to ask both whether a rule sought on habeas is "new" under *Teague*—which remains the law—and also whether it is "clearly established" under AEDPA, it seems safe to assume that Congress had congruent concepts in mind.[115]

Taken alone, this passage might have suggested perfect congruence between AEDPA and the Court's retroactivity case law. But like Justice O'Connor, Justice Stevens stopped short of that conclusion: "It is perfectly clear that AEDPA codifies *Teague to the extent that Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final."[116] Justice Stevens hinted at the significance of the underscored qualifying language later in his opinion. He argued that an understanding of the *Teague* rule that required deference to state court determinations of federal law was supported by neither a proper understanding of *Teague* itself nor the amendments to § 2254(d)(1).[117]

Thus, both the majority and concurring opinions, which represented in this respect the views of all nine Justices, read AEDPA to codify some, but not necessarily all, of the Court's retroactivity jurisprudence. Those opinions' conflicting exegeses of § 2254(d)(1)'s other phrases further illuminates the Court's indecision concerning the relationship between AEDPA and *Teague*.

B. "Contrary to, or an Unreasonable Application of"

The ambiguity of Justice O'Connor's *Teague* discussion was mirrored by her interpretation of the statutory phrases "contrary to" and "unreasonable application of" federal law. With respect to the former phrase, Justice O'Connor's opinion for the majority hinted that it precluded de novo review of even pure questions of federal law. Justice O'Connor reasoned that:

> The word "contrary" is commonly understood to mean "diametrically different," "opposite in character or nature," or "mutually opposed." The text of § 2254(d)(1) therefore suggests that the state court's decision must be substantially different from the relevant precedent of this Court.[118]

Moreover, Justice O'Connor endorsed the Fourth Circuit's construction of § 2254(d)(1)'s "contrary to" language in *Green v. French*.[119] In a portion of the Fourth Circuit's opinion that Justice O'Connor did not quote, that court

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115 *Id.* at 379-80 (Stevens, J., concurring).

116 *Id.* at 380 (emphasis added). This Article does not address a rather technical issue flagged by pre-*Williams* commentary but which the *Williams* Court left unresolved—namely, whether amended § 2254(d)(1) changed the point in time for ascertaining the federal law against which a state court decision is to be measured. For a discussion of this issue, see Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103, 120-22 (1998).

117 *See Williams*, 529 U.S. 380-84.

118 *Id.* at 405 (O'Connor, J., for the majority) (citations omitted).

119 Green v. French, 143 F.3d 865, 869-70 (4th Cir. 1998). *See Williams*, 529 U.S. at 405

expressly held that, at least in some circumstances, § 2254(d)(1) required habeas courts to defer to state court decisions on pure questions of federal law.[120]

Unlike the Fourth Circuit, however, Justice O'Connor never stated that federal courts owed deference to state courts on pure questions of law. Indeed, as Justice Stevens observed in his concurring opinion, Justice O'Connor's definition of the phrase "contrary to"—that it be read to mean "diametrically different" from or "opposite in character or nature"—was consistent with the preservation of de novo review by federal habeas courts. Noting that "[t]he simplest and first definition of 'contrary to' as a phrase is in conflict with," Justice Stevens reasoned that "the phrase [is] surely capacious enough to include a finding that the state-court 'decision' is simply 'erroneous' or wrong."[121] Justice Stevens then concluded that Justice O'Connor's reading of the phrase was not materially different: "We hasten to add that even 'diametrically different' from, or 'opposite' to, an established federal law would seem to include 'decisions' that are wrong in light of that law."[122] Justice O'Connor also expressly reserved judgment on the Fourth Circuit's assertion that "state-court decisions that unreasonably extend a legal principle from our precedent to a new context where it should not apply (or unreasonably refuse to extend a legal principle to a new context where it should apply) should be analyzed under § 2254(d)(1)'s 'unreasonable application' clause."[123]

In light of these various conflicting implications, Justice O'Connor's opinion for the Court is hopelessly ambiguous as to whether the "contrary to" prong of amended § 2254(d)(1) directed federal courts to review pure questions of federal law de novo or to defer in some manner to state court decisions of these issues.[124] This ambiguity was correspondingly reproduced

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(O'Connor, J., for the majority) ("The Fourth Circuit's interpretation of the 'contrary to' clause accurately reflects th[e] textual meaning.").

120 *See Green*, 143 F.3d at 870. The Fourth Circuit held:

> If a state court decision is in square conflict with a precedent (supreme court) which is controlling as to law and fact, then the writ of habeas corpus should issue; if no such controlling decision exists, the writ should issue *only* if the state court's resolution of *a question of pure law* rests upon an *objectively unreasonable derivation of legal principles from the relevant supreme court precedents* . . . .

Id. (emphasis added).

121 *Williams*, 529 U.S. at 388-89 (Stevens, J., concurring).

122 *Id.* at 389. Moreover, Justice O'Connor declined to answer Justice Stevens's assertion that "there is nothing in the phrase 'contrary to'—as Justice O'Connor appears to agree—that implies anything less than independent review by the federal courts." *Id.*

123 *Id.* at 408 (O'Connor, J., for the majority) (citing *Green*, 143 F.3d at 869-70). Justice O'Connor expressed concern that at least some such cases might be better characterized as having arrived "at a conclusion opposite to that reached by this Court on a question of law." *Id.* Having identified the danger that the Fourth Circuit's interpretation of § 2254(d)(1) might improperly restrict a habeas court's ability to uphold federal law, Justice O'Connor left the question for another day. *See id.* at 408-09 ("Today's case does not require us to decide how such 'extension of legal principle' cases should be treated under § 2254(d)(1).").

124 To date, the Supreme Court's post-*Williams* decisions applying § 2254(d)(1) have declined to resolve this ambiguity. *See, e.g.*, Bell v. Cone, 122 S. Ct. 1843, 1852 (2002) (holding that, because "the state court *correctly* identified the principles announced in *Strickland* as those governing the analysis of respondent's claim[,] . . . the state court's adjudication was [not] con-

in Justice O'Connor's interpretation of § 2254(d)(1)'s "unreasonable application of" phrase. Here, her opinion failed to resolve a conflict among the circuits as to whether the deferential review mandated by that phrase was limited to mixed questions of law and fact or extended to pure questions of law as well.[125]

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trary to our clearly established law") (emphasis added); Ramdass v. Angelone, 530 U.S. 156, 178 (2000) (rejecting petitioner's constitutional claim on the merits and, on that basis, concluding that the state court's rejection of the same claim did not support relief under § 2254(d)(1)); *see also* HERTZ & LIEBMAN, *supra* note 82, § 32.3 at 1454, stating that in *Ramdass*:

> [T]he Court began by identifying the applicable Supreme Court precedent, then analyzed the merits of the claim and concluded that no constitutional error had occurred, and finally addressed the section 2254(d)(1) issue, readily finding that the state court's similar outcome on the merits was neither 'contrary to' nor an 'unreasonable application' of the relevant Supreme Court precedent.

HERTZ & LIEBMAN, *supra* note 82, § 32.3 at 1454. *But see* Todd E. Pettys, *Federal Habeas Relief And the New Tolerance for "Reasonably Erroneous" Applications of Federal Law*, 63 OHIO ST. L.J. 731, 753 (2002) (asserting that *Ramdass* illustrates the danger in assuming that § 2254(d)'s "unreasonable application" clause does not apply to at least some "pure" questions of law). Not surprisingly, the lower federal courts have divided over the meaning of the *Williams* decision on this point. *Compare* Van Tran v. Lindsey, 212 F.3d 1143, 1149-50, 1154 (9th Cir. 2000) (concluding that, in *Williams*, "the Court made clear that the statute embodies no distinction between pure questions of law and mixed questions of law and fact" and apparently adopting a "clear error" standard of review for both categories of questions), *with* Denny v. Gudmanson, 252 F.3d 896, 900 (7th Cir. 2001) (after discussing *Williams*, concluding that "[w]hen the case falls under § 2254(d)(1)'s 'contrary to' clause, we review the state court decision de novo to determine the legal question of what is clearly established law as determined by the Supreme Court and whether the state court decision is 'contrary to' that precedent."); *cf.* Hunter v. Moore, 2002 WL 2013266, at *2 (11th Cir. Sept. 4, 2002) ("[a] federal habeas court may issue the writ under the 'contrary to' clause if the state court . . . applies the *wrong* rule to the facts of a case") (emphasis added).

125 *Compare* Neelley v. Nagle, 138 F.3d 917, 924 (11th Cir. 1998) (holding that § 2254(d)(1)'s "unreasonable application of" clause is limited to mixed questions of law and fact, and thus does not extend reasonableness review to state court decisions of pure questions of federal law), *and* Lindh v. Murphy, 96 F.3d 856, 870 (7th Cir. 1996) (same), *rev'd on other grounds*, 521 U.S. 320 (1997), *with Green*, 143 F.3d at 870 (holding that the reasonableness review mandated by the second prong of § 2254(d)(1) governs review of some "pure" questions of federal law). Some passages of Justice O'Connor's *Williams* opinion hinted at agreement with the interpretation of § 2254(d)(1) adopted in *Neelley* and *Lindh*—that § 2254(d)(1)'s "unreasonable application of" clause applied only to state court decisions of mixed questions of law and fact. *See, e.g., Williams*, 529 U.S. at 407-08 (noting that the Court had equated the phrase "application of law" with mixed questions of law and fact in its pre-AEDPA decision, *Wright v. West* (discussed at text accompanying *supra* notes 523-63)); *id.* at 413 ("Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."). Elsewhere, however, Justice O'Connor's opinion suggested that the deference mandated by § 2254(d)(1) might, in some circumstances, extend to review of state court decisions of pure questions of federal law—the position asserted in the Fourth Circuit's *Green* decision. *See, e.g., id.* at 411 (stating that § 2254(d)(1) answers the question "whether, in reviewing a state-court decision on a state prisoner's claims under federal law, a federal habeas court should ask whether the state-court decision was correct or simply whether it was reasonable."); *id.* at 407 ("The Fourth Circuit's interpretation of the 'unreasonable application' clause of § 2254(d)(1) [in *Green*] is generally correct."); *id.* at 409-10 (criticizing the Fourth Circuit's invocation of the "no reasonable jurist" standard but failing to similarly disclaim that court's conclusion that the "unreasonable application of" prong extends to some pure questions of law).

In summary, Justice O'Connor read § 2254(d)(1) to grant the writ to petitioner Williams, given the Virginia Supreme Court's blatant misinterpretation of *Strickland* and *Lockhart*,[126] but otherwise provided little guidance as to the import of AEDPA's amendments to this provision.[127] Because of the close relationship between the standard of review under AEDPA and the scope of the term "new rule" for *Teague* purposes,[128] Justice O'Connor's (and, thus, the majority's) indecision about the former underscores the Justices' uncertainty as to the manner in which *Teague*'s retroactivity bar should be applied in future cases.

Nor does the concurring opinion by Justice Stevens articulate a cogent construction of § 2254(d)(1). Justice Stevens properly interpreted this provision to preserve de novo review of pure questions of law.[129] But Justice Stevens also concluded that § 2254(d)(1) codified de novo review of mixed

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126 *See Williams*, 529 U.S. 413-16 (O'Connor, J., for herself and Justice Kennedy) (explaining why the Virginia Supreme Court's decision to reinstate Williams's death sentence was both contrary to, and an unreasonable application of, the U.S. Supreme Court's decisions in *Strickland* and *Lockhart*).

127 The Court's decision in *Williams* is of too recent vintage to have provoked much academic commentary. To the extent that the legal literature reflects any discussion of the case, however, the views expressed are predictably discordant. *Compare* Jordan Steiker, *Habeas Exceptionalism*, 78 TEX. L. REV. 1703, 1705 (2000) ("In *Williams v. Taylor* . . . the Court read [§ 2254(d)(1)] to require habeas courts to leave undisturbed reasonable but wrong state court decisions."), *with* Yackle, *supra* note 9, at 1749 (differing with Professor Steiker and contending that § 2254(d)(1), as construed in *Williams*, does not "require federal courts to 'defer' to previous state court judgments."). *See also* Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate After* Williams v. Taylor, 2001 WIS. L. REV. 1493, 1508-10 (noting that *Williams* did not apply a reasonableness standard to its review of the Virginia Supreme Court's interpretation of *Lockhart* and *Strickland*, but nevertheless concluding that "[a]fter *Williams* . . . § 2254(d)(1)'s deferential standard of review is, as a practical matter, here to stay."); Samy Khalil, Note, *Doing the Impossible: Appellate Reweighing of Harm and Mitigation in Capital Cases After* Williams v. Taylor, *With A Special Focus on Texas*, 80 TEX. L. REV. 193 (2001) (exploring difficulties presented by appellate assessment of the impact at sentencing of defense counsel's failure to present mitigating evidence).

128 The relationship between these two apparently distinct doctrinal issues is explored *infra* at notes 183-208 and accompanying text.

129 *See Williams*, 529 U.S. at 377 (rejecting the Fourth Circuit's interpretation of § 2254(d)(1) because it "would wrongly require the federal courts, including this Court, to defer to state judges' interpretations of federal law"); *id.* at 389. Justice Stevens stated:

> If . . . a federal court is convinced that a prisoner's custody—or, as in this case, his sentence of death—violates the Constitution, that independent judgment should prevail. Otherwise the federal 'law as determined by the Supreme Court of the United States' might be applied by the federal courts one way in Virginia and another way in California.

Id. Indeed, Justice Stevens offered forceful constitutional and policy arguments, in addition to statutory ones, as to why § 2254(d)(1) should be interpreted to preserve de novo review of questions of federal law. *See, e.g.*, *id.* at 378-79 (observing that "[a]t the core of [the 'judicial power' of Article III of the Constitution] is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law."). *Cf.* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 873-76 (1998) (arguing that an interpretation of § 2254(d)(1) that would require federal courts to defer to state court determinations of mixed questions of law and fact would "raise . . . *at least* a serious doubt about the provision's constitutionality").

questions of law and fact.[130] The latter assertion left Justice Stevens in the awkward position of being unable to accord any independent significance to the "unreasonable application" clause of § 2254(d)(1),[131] contrary to the well-established rule of construction that meaning should be accorded to every clause and word of a statute.[132]

In short, *Williams* answers a few questions but leaves open many others. *Williams* stands for the proposition that AEDPA codified the antiretroactivity principle of *Teague*. *Williams* also shows that the Justices' disagreement over what constitutes a new rule for *Teague* purposes continues. This Article next suggests that the Court's apparent difficulty in discerning the standard of review prescribed by amended § 2254(d)(1) constitutes the key to understanding and dispelling the Court's persistent confusion about *Teague*'s proper implementation.

III. The Standard of Review Under § 2254(d)(1)

Williams left open a number of questions concerning the meaning of amended § 2254(d)(1). These include whether that section directs federal habeas courts to review de novo state court determinations of pure questions of federal law. Though § 2254(d)(1) is amenable to various interpretations,[133] the best reading of that section requires habeas courts to review pure questions of law de novo. Prior to *Williams*, that interpretation had been

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130 *Williams*, 529 U.S. at 387 (stating that "it is surely not a requirement that federal courts actually defer to a state-court application of the federal law that is, in the independent judgment of the federal court, in error").

131 *See id.* at 384 ("We are not persuaded that the phrases ['contrary to' and 'unreasonable application of'] define two mutually exclusive categories of questions."); *id.* at 407 (O'Connor, J., for the majority) (observing that Justice Stevens's interpretation of § 2254(d)(1) "saps the 'unreasonable application' clause of any meaning," because "[i]f a federal habeas court can, under the 'contrary to' clause, issue the writ whenever it concludes that the state court's application of clearly established federal law was incorrect, the 'unreasonable application' clause becomes a nullity.") (emphasis omitted).

132 *See id.* at 404 (O'Connor, J., for the majority) (observing that "[i]t is . . . a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute.") (internal quotation marks and citations omitted); *see also* Bennett v. Spear, 520 U.S. 154, 173 (1997) ("It is the 'cardinal principle of statutory construction' . . . [that] [i]t is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section.") (citations omitted); WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 644 (2d ed. 1995).

133 Some judges have concluded that the amendment does not change the preexisting de novo standard of review for both pure questions of law and mixed questions of law and fact. *See, e.g.*, Drinkard v. Johnson, 97 F.3d 751, 778-79 (5th Cir. 1996) (Garza, J., dissenting). Others have held that the amendment limits de novo review to pure questions of law and requires deference for mixed questions of law and fact. *See id.* at 766-69; Lindh v. Murphy, 96 F.3d 856, 868-74 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. 320 (1997). Finally, some courts have held that federal habeas courts should defer to state court determinations of both pure questions of law and mixed questions of law and fact. *See, e.g.*, Perez v. Marshall, 946 F. Supp. 1521, 1532-33 (S.D. Cal. 1996); Duncan v. Calderon, 946 F. Supp. 805, 813 (C.D. Cal. 1996). *See generally* Khandelwal, *supra* note 39, at 446-52 (discussing lower federal court decisions interpreting § 2254(d)(1)); Liebman & Ryan, *supra* note 129, at 864-73 (same).

persuasively advanced by a number of commentators[134] and adopted by a majority of the federal circuit courts.[135] This section briefly summarizes the argument for that construction of the statute.

A. The Textual Argument for De Novo Review of Pure Questions of Law

Amended § 2254(d) in full provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[136]

When reviewing trial court decisions, it has long been customary for federal habeas courts (indeed, for all appellate courts) to classify the issues raised by the party attacking the judgment into three categories: (1) pure questions of law; (2) mixed questions of law and fact; and (3) pure questions of fact. Distinct standards of review traditionally govern resolution of issues in each category.[137] The text and structure of § 2254(d) honor this tradition by distinguishing among these three categories of questions.

Section 2254(d)(2) governs federal habeas court review of state court "determination[s] of the facts," allowing the writ only when it can be said that such determinations are "*unreasonable* . . . in light of the evidence presented in the State court proceeding."[138] Section 2254(d)(1) addresses both pure questions of law and mixed questions of law and fact. As to the latter, which concern the application of legal principles to the facts of a particular case, § 2254(d)(1) allows the writ only when the state court decision

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134 *See, e.g.*, Khandelwal, *supra* note 39, at 452-53; Lee, *supra* note 116, at 111; *see also* Yackle, *supra* note 6, at 384 & 422-42 (arguing that § 2254(d) preserved de novo review of both pure questions of law and mixed questions of law and fact). *Cf.* Kent S. Scheidegger, *Response: Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 951-52 (1998) (asserting that "[t]he most reasonable interpretation of [§ 2254(d)(1)] is that 'contrary to' applies to the choice of the federal rule and 'unreasonable application of' applies to the application of [the federal] rule to the particular facts"; concluding that only the second phrase abrogates *Brown v. Allen*'s rule of de novo review, and then only as to so-called mixed questions of law and fact). *But see* Chen, *supra* note 6, at 572-73 (concluding that § 2254(d)(1) is best understood to require federal habeas courts to defer to reasonable state court determinations of both mixed questions of law and fact *and* pure questions of law).

135 *See Williams*, 529 U.S. at 384 (Stevens, J., concurring) (discussing circuit court decisions).

136 28 U.S.C. § 2254(d) (2000).

137 *See* Chen, *supra* note 6, at 556-57; Khandelwal, *supra* note 39, at 435-36, 452-56; Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868, 1869-70 (1997).

138 28 U.S.C. § 2254(d)(2) (emphasis added).

"involved an *unreasonable* application of" relevant federal law.[139] As to pure questions of law, the writ may be granted whenever the state court's decision "was contrary to" governing federal law.[140]

When is a state court decision of a pure question of law "contrary to" federal law? The text and overall structure of § 2254(d) compel the conclusion that a state court decision of a legal issue is contrary to federal law whenever that decision would be deemed to be an "incorrect" or "wrong" interpretation of governing federal law. In short, § 2254(d)(1)'s "contrary to" clause directs federal habeas courts to review state court determinations of pure questions of law de novo. This conclusion follows from the most natural reading of the words "contrary to," which mean "to conflict with."[141]

The structure of § 2254(d) also confirms this reading. When that section requires deference to state court determinations of factual questions or mixed questions of law and fact, the section limits relief to only those state court conclusions found to be "unreasonable."[142] Congress's failure to use this term when addressing pure questions of law refutes any argument that § 2254(d)(1) directs federal habeas courts to defer to state court determinations of pure questions of law.[143] An interpretation of § 2254(d)(1) that required federal habeas courts to defer to state court determinations of both mixed questions of law and fact *and* pure questions of federal law would disregard Congress's decision to treat the two categories of questions with separate clauses. If the "contrary to" clause were read to require deference to all reasonable state court interpretations of federal law, then the "unreasonable application" clause becomes superfluous. As Justice O'Connor observed in *Williams*, "[i]t is . . . a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute."[144] This principle defeats the claim that amended § 2254(d)(1) demands deference to state court decisions of pure questions of federal law.

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139 28 U.S.C. § 2254(d)(1) (emphasis added); *see also Williams*, 529 U.S. at 408 (O'Connor, J., for the Court) (noting that the Court had previously "used the almost identical phrase 'application of law' to describe" mixed questions of law and fact). *See generally* Pettys, *supra* note 124, at 733 (exploring "how best to make sense of the new 'unreasonably erroneous' standard of review" for mixed questions of law and fact).

140 28 U.S.C. § 2254(d)(1). *See also supra* note 134, listing commentators adopting this interpretation of AEDPA.

141 *See Williams*, 529 U.S. at 388 (Stevens, J., concurring in the result); *see also* Liebman & Ryan, *supra* note 129, at 866 (observing that the "contrary to law" clause of § 2254(d)(1) requires plenary or de novo review).

142 *See* 28 U.S.C. § 2254(d)(1). This Article does not address whether a less deferential standard should apply "to a summary state court opinion that fails to articulate its analysis of the federal constitutional claim(s)," an issue that has divided the lower federal courts. HERTZ & LIEBMAN, *supra* note 82, § 32.2 at 1425 (citing cases); *see also* Scott Dodson, *Habeas Review of Perfunctory State Court Decisions on the Merits*, 29 AM. J. CRIM. L. 223 (2002); Brittany Glidden, *When the State is Silent: An Analysis of AEDPA's Adjudication Requirement*, 27 N.Y.U. REV. L. & SOC. CHANGE 177 (2002); Steinman, *supra* note 127, at 1510-30.

143 *See* Khandelwal, *supra* note 39, at 448-52; Lee, *supra* note 116, at 137.

144 *Williams*, 529 U.S. at 404 (internal quotation marks and citations omitted); *see also* Bennett v. Spear, 520 U.S. 154, 173 (1997) ("It is the 'cardinal principle of statutory construction' . . . [that] [i]t is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section."); ESKRIDGE & FRICKEY, *supra* note 132, at 644; *cf.* Scheidegger, *supra* note 134, at 951-52.

Moreover, another canon of statutory interpretation, which provides that statutes should be construed so as to avoid serious constitutional questions,[145] likewise counsels in favor of an interpretation of AEDPA that preserves de novo review of pure questions of federal law. Prior to *Williams*, commentators had argued that AEDPA was unconstitutional to the extent that it required federal courts to defer to state court rulings on questions of federal law.[146] In fact, some went so far as to contend that Article III precluded federal courts from deferring to state court rulings even as to mixed questions of law and fact.[147] Of course, Justice O'Connor's majority opinion in *Williams*—which construed amended § 2254(d)(1) to require deference to reasonable but wrong state court determinations of mixed amended questions of law and fact[148]—implicitly rejected the position that the Constitution requires de novo review of these issues.[149] But as to pure questions of law, constitutional doubts persist about an interpretation of § 2254(d)(1) that would require federal courts to defer to state court decisions. Indeed, a reading of AEDPA that displaced de novo review of even pure questions of law would present the Article III problem in its starkest form.[150] Accordingly,

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145 *See, e.g.*, Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948 (1997) (discussing the canon of avoidance); Young, *supra* note 13, at 1553-73 (considering application of the avoidance canon to various AEDPA provisions).

146 *See* Liebman & Ryan, *supra* note 129, at 873; Kimberly Woolley, Note, *Constitutional Interpretations of the Antiterrorism Act's Habeas Corpus Provisions*, 66 GEO. WASH. L. REV. 414, 437 (1998).

147 *See* Liebman & Ryan, *supra* note 129, at 873-74.

148 As noted above, Justice O'Connor's opinion for the majority in *Williams* declined to decide whether the deference required by the "unreasonable application of" clause of amended § 2254(d)(1) extended to pure questions of law. That opinion, however, construed § 2254(d)(1) to require deference to mixed questions of law and fact. *See Williams*, 529 U.S. at 410 ("an *unreasonable* application of federal law is different from an *incorrect* application of federal law); *id.* at 411 ("Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."); *id.* at 408 (noting that the Court, prior to AEDPA, had "used the almost identical phrase 'application of law' to describe a state court's application of law to fact"); *see also supra* text accompanying notes 118-125.

149 Insofar as mixed questions of law and fact were concerned, the majority tacitly rejected the Liebman-Ryan Article III argument, which was presented to the Court in amicus briefs. *See, e.g.*, Brief Amici Curiae of Marvin E. Frankel et al., Williams v. Taylor, 529 U.S. 362 (2000). These same passages from the majority opinion in *Williams*, *see supra* note 148, likewise reflect the Court's rejection of Professor Yackle's argument that AEDPA's legislative history demonstrated Congress's intent to preserve de novo review of mixed questions of law and fact. *See* Brief Amici Curiae of the American Civil Liberties Union, Williams v. Taylor, 529 U.S. 362 (2000); *see also* Yackle, *supra* note 6, at 384, 436-43; Yackle, *supra* note 9, at 1751-52, 1752 n.123 (acknowledging that the *Williams* Court rejected his view that AEDPA carried forward de novo review of mixed questions of law and fact).

150 Consider Judge Easterbrook's argument, written for the en banc Seventh Circuit, in defense of the court's conclusion that amended § 2254(d)(1) preserved de novo review of pure questions of law but required deference to reasonable state court decisions of mixed questions of law and fact. *Lindh v. Murphy*, 96 F.3d 856, 870, 872 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997). In response to assertions of the avoidance canon, Judge Easterbrook insisted that the court's reading of § 2254(d)(1) did not offend the indisputable principle that "Congress lacks power . . . to require federal judges to 'defer' to the interpretations [of federal law] reached by state courts" because a mixed question of law and fact does not reflect a

the canon of avoidance provides additional support for construing amended § 2254(d)(1) to preserve de novo review of pure questions of federal law.

B. The Relevant Legislative History

AEDPA's legislative history confirms this reading of § 2254(d)(1). That history reveals a congressional compromise requiring deferential review of mixed questions of law and fact[151] but preserving de novo review of pure questions of law. Indeed, Congress repeatedly rejected proposals to extend a deferential standard of review to pure questions of law.

In *Brown v. Allen*,[152] the Supreme Court construed the federal habeas corpus statute to grant federal courts independent authority to rule on the federal law claims of state prisoners.[153] This ruling received much criticism.[154] Members of Congress responded by proposing legislation that would have overruled the decision and insulated state court convictions from federal habeas court review.[155] In the forty-three years between *Brown v. Allen* and AEDPA, Congress rejected numerous proposals that would have required federal habeas courts to defer to reasonable state court decisions of questions of federal law.[156]

"dispute [about] the meaning of the Constitution, but [rather a controversy about] its application to a particular set of facts." *Id.* at 870, 872. *But see* Liebman & Ryan, *supra* note 129, at 877 (answering Easterbrook's claim by asserting that the history of Article III compelled the conclusion that federal courts could not be made to defer to state court decisions even as to mixed questions of law and fact). Of course, Judge Easterbrook's acknowledgment that Congress lacks authority "to require federal judges to 'defer' to" state court decisions on questions of federal law means that, at least as to pure questions of federal law, AEDPA must if at all possible be construed to preserve de novo review. *See Lindh*, 96 F.3d at 868-70 (construing § 2254(d)(1) to preserve de novo review of pure questions of federal law).

151 Prior to 1996, the Supreme Court had raised, but not resolved, the question of what standard should govern federal habeas court review of state court determinations of mixed questions of law and fact. *See* Wright v. West, 505 U.S. 277 (1992), discussed in the text accompanying *supra* notes 53-63.

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

153 *Id. See supra* text accompanying notes 25-38.

154 *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 28 U. CHI. L. REV. 142 (1970).

155 The Judicial Conference of Senior Circuit Judges, chaired by Judge John J. Parker, proposed that federal courts should consider collateral attacks on state judgments only on a ground which presents a substantial Federal constitutional question: (1) which was not theretofore raised and determined; (2) which there was no fair and adequate opportunity theretofore to raise and have determined; and (3) which cannot thereafter be raised and determined in a proceeding in the state court, by an order or judgment subject to review by the Supreme Court of the United States on writ of certiorari. Report of the Committee on Habeas Corpus, 33 F.R.D. 363, 367 (1964); *see Hearings on H.R. 5649 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 84th Cong. (1955). Professor Larry Yackle notes that this proposal borrowed from the proposal of Professor Paul Bator, wherein federal habeas should be governed by the "process model" typically associated with the law of preclusion. *See* Bator, *supra* note 154. According to this model, Federal courts should be precluded from granting relief on the basis of claims when those claims were rejected by state courts after a "full and fair" process. The Parker Committee bill was introduced repeatedly over the span of several years but never gained wide acceptance. *See* Yackle, *supra* note 6, at 423-25.

156 For example, the Nixon Administration proposed habeas reform based on the Bator

These prior, unsuccessful, efforts at "reform" eventually led those in Congress who favored restricting federal habeas corpus to recognize that only more moderate legislation could pass. Senator Hatch, a long-time advocate of conservative reform, and Senator Specter, who had steadfastly resisted efforts to impose a deferential standard of review on habeas courts, agreed to sponsor together a compromise bill.[157] Both sponsors intended that this bill, which was enacted into law as AEDPA in April 1996, require deference to reasonable state court determinations of mixed questions of law and fact but preserve de novo review of pure questions of law.[158] Numerous statements by both the bill's supporters and opponents in Congress reflected this same understanding of the provision that has since been codified as amended § 2254(d)(1).[159] This history shows that habeas corpus reform be-

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model, formerly incorporated into the Parker Committee proposals. In a letter from then-Assistant Attorney General William Rehnquist, the Justice Department recommended that while the federal courts should not relinquish their formal authority to entertain petitions from state prisoners, they should nonetheless give "conclusive weight" to all prior state judgments against petitioners who had been accorded "an adequate opportunity to have full and fair consideration" of their claims in state court. Letter from William H. Rehnquist, Assistant Attorney General, to J. Edward Lumbard, Circuit Judge (Aug. 20, 1971). A bill containing this language was introduced later in the Senate, but was opposed by the Judicial Conference and never reached the floor. S. 567, 93d Cong. (1973). The next conservative presidential administration again resurrected the effort. During President Reagan's first term, a Task Force on Violent Crime recommended habeas reform. *Report of the Attorney General's Task Force on Violent Crime: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong. (1981). Bills similar to the Parker Committee proposals were introduced in both houses of Congress. *See* S. 653, 97th Cong. (1981); H.R. 5679, 97th Cong. (1981).

When it became apparent that such a drastic curtailment of *Brown v. Allen* would never win congressional majorities, the Reagan Administration shifted its effort to securing at least partial deference to state court judgments. The administration's subsequent proposal incorporated the "full and fair" language previously advocated by Professor Bator and Judge Parker. In accompanying commentary, however, the Justice Department explained that federal courts would only defer to state judgments that were "reasonable":

> [A] state adjudication would be full and fair . . . if (i) the claim at issue was actually considered and decided on the merits in state proceedings; (ii) the factual determination of the state court, the disposition resulting from its application of the law to the facts, and its view of the applicable rule of federal law were *reasonable*; (iii) the adjudication was consistent with the procedural requirements of federal law; and (iv) there is no new evidence of substantial importance which could not reasonably have been produced at the time of the state adjudication and no subsequent change of law of substantial importance has occurred.

The Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the Comm. on the Judiciary, 97th Cong., 98 (1982) (emphasis added). Bills containing such language passed the Senate in 1984 and 1991, but were never enacted. *See* S. 1763, 98th Cong. (1984); 137 CONG. REC. S8660-61 (1991). *See generally* Yackle, *supra* note 6, at 426-32.

157 S. 623, 104th Cong. (1994); *see also* Yackle, *supra* note 6, at 436.

158 Senator Hatch explained that the bill "essentially gives the Federal court the authority to review de novo whether the state court decided the claim in contravention of Federal law." 141 CONG. REC. S7848 (daily ed. June 7, 1995) (statement of Sen. Hatch). Senator Specter explained that the federal courts would not defer to the state courts regarding "determinations of Federal law," but he understood the bill to require "deference" to a state court decision "applying law to the facts." 142 CONG. REC. S3471 (daily ed. Apr. 17, 1996) (statement of Sen. Specter).

159 Senator Levin voted for the bill on the express understanding that it preserved independent review by federal courts on all questions of federal constitutional law. He explained that he "interpret[ed] the new standard [now codified as 28 U.S.C. § 2254(d)(1)] to give the Federal

came politically feasible only when Congress's more conservative members abandoned efforts to require deference to state court determinations of pure questions of federal law.

In short, the text and legislative history of amended § 2254(d)(1) both support the conclusion that it codifies de novo review of pure questions of federal law. The task ahead is to explore the significance of this conclusion for the Court's *Teague* jurisprudence. This Article finds below that, to honor the statute's command that de novo review be preserved, the Court must revisit and substantially narrow its definition of what constitutes a new rule for the purposes of *Teague*. This inquiry requires that we first recover Justice Harlan's understanding of how his proposed antiretroactivity regime was to operate.

IV. The Retroactivity Bar's Origins in the Opinions of Justice Harlan

In *Teague v. Lane*,[160] six Justices[161] purported to adopt the retroactivity position that Justice Harlan had advanced in dissent twenty years earlier.[162] Justice Harlan's dissenting opinions in *Desist v. United States*[163] and *Mackey v. United States*[164] argued for a procedural bar on retroactively applying "new rules" to upset otherwise final convictions on habeas review. Justice Harlan intended the category of new rules to be extremely narrow. His proposed retroactivity bar, therefore, would govern only those rare Supreme Court holdings that truly *changed* the law, not decisions that merely clarified or extended pre-existing constitutional principles or extended the same to new factual settings. Justice Harlan expressly (and quite prophetically) admonished that applying his suggested procedural bar to other than the narrowest category of new rules would illegitimately convert his proposed "choice-of-

courts the final say as to what the U.S. Constitution says." 142 CONG. REC. S3465 (daily ed. April 17, 1996) (statement of Sen. Levin). Further, regarding the "provision [of § 2254(d)(1) that] permits a Federal court to grant a petition for habeas corpus if the State court decision was contrary to Federal law," Senator Levin stated that he "interpret[ed] this language to mean that a Federal court may grant habeas corpus . . . any time that a State court incorrectly interprets Federal law and that error is material to the case." *Id.* Senator William Cohen objected to the bill's standard for mixed questions of law and of fact, stating, "I believe the writ's core function of affording independent Federal review to mixed questions of law and fact should be retained and that the deference provision in S. 735 should be withdrawn." 141 CONG. REC. S7839 (daily ed. June 7, 1995) (statement of Sen. Cohen). Senator Cohen did not take issue with the standard for pure questions of law, which suggests that he read the bill to continue de novo review insofar as such questions were concerned. Similarly, Senator Biden deemed a "problem" the bill's standard for the federal review of "the State court's application of Federal law to the facts" because it was "an extraordinary deferential standard," 141 CONG. REC. S7842 (daily ed. June 7, 1995) (statement of Sen. Biden). Senator Biden did not, however, object to the bill's standard of review for pure questions, suggesting that he too understood the bill to preserve de novo review of pure questions of law.

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

161 Namely, the members of the plurality as well as Justices Stevens and Blackmun.

162 The Court's decision in *Teague*, 489 U.S. at 288, is discussed *supra* in the text accompanying notes 39-46.

163 Desist v. United States, 394 U.S. 244, 256 (1969).

164 Mackey v. United States, 401 U.S. 667, 679 (1971).

law" regime into a deferential standard of review. He also asserted that such a transformation would undermine the federal habeas court's obligation to assess independently the correctness of a state court's interpretation of federal law. Because Justice Harlan's dissents are best understood in their jurisprudential context, this Article briefly reviews the Warren Court's initial efforts to articulate a retroactivity jurisprudence that would govern its criminal procedure innovations.[165]

A. *The Court's First Efforts Regarding Retroactivity:* Linkletter *and* Stovall

During the late 1950s and early 1960s, the Warren Court began a dramatic and comprehensive revolution in criminal procedure.[166] In cases such as *Griffith v. Illinois*,[167] *Mapp v. Ohio*,[168] *Gideon v. Wainwright*,[169] *Jackson v. Denno*,[170] and *Gilbert v. California*,[171] the Court read the Fourteenth Amendment's Due Process Clause to impose various restrictions on state criminal investigation and prosecution that previously had not been enforced or had been applied only to the federal government. The Court in these and other decisions, many of which expressly overruled prior holdings, imposed on the states unanticipated procedural rules of pervasive application. The retroactive application of these decisions called into question thousands of convictions from prior decades. As one commentator contemporaneously observed, "the judicially created revolution in criminal procedure . . . has thrown off numerous difficult problems of retroactivity."[172]

For several years, the Court ignored the pleas of both government litigants and dissenting Justices that the Court's more radical reversals need not necessarily be given full retroactive effect. The Court, however, ultimately adopted this position in *Linkletter v. Walker*.[173] In that case, the Court confronted the issue of whether *Mapp v. Ohio*, which extended the Fourth Amendment's exclusionary rule to the states, should apply retroactively to

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165 *See also* Meyer, *supra* note 7, at 427-33 (discussing the "origins of non-retroactivity").

166 For a recent, provocative assertion that the Warren Court improperly pursued confused notions of equality via its groundbreaking criminal procedure jurisprudence, see Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From* Brown *to* Miranda, Furman *and Beyond*, 54 VAND. L. REV. 359, 418-32 (2001).

167 Griffith v. Illinois, 351 U.S. 12 (1956).

168 Mapp v. Ohio, 367 U.S. 643 (1961).

169 Gideon v. Wainwright, 372 U.S. 335 (1963).

170 Jackson v. Denno, 378 U.S. 368 (1964).

171 Gilbert v. California, 384 U.S. 985 (1966).

172 *See* Herman Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 719 (1966); *see also* Fallon & Meltzer, *supra* note 39, at 1738-39 ("The Warren Court confronted the question of retroactivity in criminal cases while embarked on a fundamental restructuring of constitutional doctrines regulating criminal procedure."). For Justice Harlan's perspective on some core aspects of the Court's criminal procedure revolution, see his opinions in *Jackson*, 378 U.S. at 439-40 (1964) (Harlan, J., dissenting); La Vallee v. Durocher, 377 U.S. 998, 998 (1964) (Harlan, J., dissenting from denial of certiorari); Pickelsimer v. Wainwright, 375 U.S. 2, 3 (1963) (Harlan, J., dissenting); Patterson v. Medbury, 368 U.S. 839, 839-40 (1961) (separate memorandum). *See also* Eskridge v. Washington Prison Bd., 357 U.S. 214, 216 (1958) (Harlan and Whittaker, JJ., dissenting).

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

upset convictions that had become final before *Mapp*.[174] The Court had applied its ruling to Ms. Mapp herself, and had in the intervening period applied the rule announced in *Mapp* to other cases pending on direct review when *Mapp* was decided.[175] In *Linkletter*, however, the Court held that *Mapp* would not apply retroactively to overturn convictions that had become final before the Justices decided *Mapp*.[176]

Justice Clark's opinion for the Court, which Justice Harlan joined, stated that, in determining whether *Mapp* should apply retroactively to cases already final, "we must look to the purpose of the *Mapp* rule; the reliance placed on the [prior] doctrine; and the effect on the administration of justice of a retrospective application of *Mapp*."[177] The Court reasoned that the "prime purpose" of incorporating the exclusionary rule was to deter lawless police action.[178] The Court then concluded that "this purpose would [not] be advanced by making the rule retrospective."[179]

Two years later, the Court clarified *Linkletter*'s articulation in *Stovall v. Denno*.[180] In *Stovall*, the Court held that the opinions announced the same day in *Gilbert*[181] and *United States v. Wade*,[182] which established a right to counsel at lineups, would not apply retroactively to any other convictions arising out of prior lineups.[183] Justice Brennan's opinion for the Court, which Justice Harlan again joined, first reaffirmed the *Linkletter* standard for determining whether a new rule of criminal procedure applies retroactively.[184] Applying that standard to the Court's decisions in *Wade* and *Gilbert*, the Court emphasized the utter novelty of those rulings:

> The law enforcement officials of the Federal Government and of all 50 States have heretofore proceeded on the premise that the Constitution did not require the presence of counsel at pretrial confrontations for identification. Today's rulings [in *Wade* and *Gilbert*] were

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174 *Id.* at 619-20.

175 *Id.* at 622.

176 *Id.* at 640.

177 *Id.* at 636. The Court's opinion began by rejecting the formalistic Blackstonian position that courts, when operating legitimately, never announced "new" legal rules but rather merely discovered the rules that had always been there. *Id.* at 622-25. That barrier removed, the Court declared that:

> Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh 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.

Id. at 629.

178 *Id.* at 636.

179 *Id.* at 637. Moreover, because states had long relied on the Court's prior ruling that the Fourteenth Amendment did not require exclusion from trial of illegally obtained evidence, and many state court convictions had been premised on such evidence in the intervening years, the Court decided that "[t]o make the rule of *Mapp* retrospective would tax the administration of justice to the utmost." *Id.* at 637.

180 Stovall v. Denno, 388 U.S. 293, 296-97 (1967).

181 Gilbert v. California, 388 U.S. 263 (1967).

182 United States v. Wade, 388 U.S. 218 (1967).

183 *Stovall*, 388 U.S. at 296.

184 *Id.* at 296-97.

> not foreshadowed in our cases; no court announced such a requirement until *Wade* was decided by the Court of Appeals for the Fifth Circuit . . . . Law enforcement authorities fairly relied on this virtually unanimous weight of authority, now no longer valid, in conducting pretrial confrontations in the absence of counsel.[185]

Accordingly, the Court concluded that "retroactive application of *Wade* and *Gilbert* 'would seriously disrupt the administration of our criminal laws.'"[186]

Perhaps most significantly, the Court stated expressly what it had implied in *Linkletter*: that in applying the *Linkletter* factors "no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review."[187] The Court conceded the inequity between its treatment of convicts Wade and Gilbert, who received a new trial free of the tainted identification, and countless others identically situated, who were granted no relief.[188] The Court tolerated this inequity stating:

> [It is] an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound 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 Wade and Gilbert the benefit of today's decisions.[189]

In the Court's estimation, "the fact that parties involved [were] chance beneficiaries [constituted] an insignificant cost for adherence to sound principles of decision-making."[190]

Stovall at once clarified and solidified the standard for assessing the retroactivity of the Court's criminal procedure innovations. A majority of the Court found two subsequent cases, *Desist v. United States*[191] and *Mackey v. United States*,[192] to be relatively noncontroversial ones for applying the three-prong *Linkletter-Stovall* balancing test. In these two matters, however, Justice Harlan attacked the *Linkletter-Stovall* retroactivity analysis that he had previously joined.

B. Justice Harlan's Proposed Retroactivity Regime

Justice Harlan articulated his position on the retroactivity of the Warren Court's criminal procedure jurisprudence in two landmark dissents.[193] Justice Harlan argued that cases on direct review should be treated differently for retroactivity purposes than cases coming to the Court on collateral review. That said, he conceded the powerful force of the contrary argument

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185 *Id.* at 299 (citations omitted).
186 *Id.* at 300.
187 *Id.* at 299.
188 *Id.* at 301.
189 *Id.* (footnotes omitted).
190 *Id.*
191 Desist v. United States, 394 U.S. 244 (1969).
192 Mackey v. United States, 401 U.S. 667 (1971).
193 *See* Fallon & Meltzer, *supra* note 39, at 1743.

that the two categories of cases should be treated alike to further interests in equality and thoroughgoing application of the most enlightened legal rules. Informed by these considerations, he warned that the distinction between direct and collateral review should matter only when a Supreme Court case fundamentally changed the governing law after a conviction became final.

1. Drawing the Line Between Direct and Collateral Review

That cases on direct and collateral review should receive different treatment was the linchpin of Justice Harlan's retroactivity position.[194] For cases on direct review, the most current precedent should apply, even if a defendant would benefit from a change in the law announced after the defendant's trial. For cases on collateral review, however, Justice Harlan believed that the purpose of the Court's jurisdiction to review otherwise final convictions, even in light of the Court's recent (and in Justice Harlan's view questionable) expansion of that jurisdiction, counseled against retroactive application of changes in the governing law.

a. Direct Review

Though *Linkletter* denied relief to a habeas petitioner, the rationale of Justice Clark's opinion for the Court did not distinguish between direct and collateral review.[195] Justice Harlan joined the majority in *Linkletter*; however, he later recanted, calling for a reappraisal of the Court's retroactivity regime.

In the *Desist* and *Mackey* dissents, Justice Harlan argued that the judiciary's role, properly understood, mandated retroactive application of new constitutional rules to all cases pending on direct review at the time the new rules were announced. Justice Harlan implicitly rejected the position, advocated by Justice Douglas,[196] that the Court retained the power to merely announce a rule that would control future cases without applying it in the case at bar. Justice Harlan found similarly unacceptable the *Stovall v. Denno*[197] rule, which allowed the Court to apply a new constitutional rule prospectively, so long as an exception was made for "the particular litigant whose case was chosen as the vehicle for establishing that rule."[198]

Rather, Harlan thought that "all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down."[199] Justice Harlan believed this requirement to be implicit in the justification for judicial review: "criminal defendants cannot come before this Court simply to request largesse. This Court is entitled to decide constitutional issues only when the facts of a particular case *require* their resolution for a just adjudica-

194 *See* Meyer, *supra* note 7, at 432-33.

195 *See supra* text accompanying notes 173-179.

196 *Desist*, 394 U.S. at 256 (Douglas, J., dissenting).

197 Stovall v. Denno, 388 U.S. 293 (1967); *see also supra* text accompanying notes 180-190 (discussing *Stovall*).

198 *Desist*, 394 U.S. at 258 (Harlan, J., dissenting).

199 *Id.*; *see also* Mackey v. United States, 401 U.S. 667, 681 (1971) (Harlan, J., dissenting).

tion on the merits."[200] Because this "classical" model of constitutional adjudication recognized not only the Court's power but also its duty to pass on constitutional questions when necessary to the proper resolution of a case or controversy, the Court lacked power to deny relief in an appropriate case: "We do not release a criminal defendant from jail because we like to do so, . . . but only because the government has offended constitutional principle in the conduct of his case."[201]

Moreover, the Court's duty to act impartially and on the basis of reason required that similarly situated litigants be treated alike. In Justice Harlan's words, once the Court grants relief for a particular constitutional violation:

> [W]hen 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.[202]

Justice Harlan accused the Court of exceeding its authority when it resolved similar cases pending on direct review according to different rules of law. According to Justice Harlan:

> [Anything less than evenhanded and consistent application of a new rule of constitutional law] belie[d] the truism that it is the task of this Court, like that of any other, to do justice to each litigant on the merits of his own case. It is only if our decisions can be justified in terms of this fundamental premise that they may properly be considered the legitimate products of a court of law, rather than the commands of a super-legislature.[203]

b. Collateral Review

In contrast, Justice Harlan concluded that the Court was *not* duty bound to apply the most current understanding of the Constitution when addressing collateral challenges to otherwise final convictions. Rather, he concluded that it would be inappropriate to apply many, if not most, "new" constitutional rules to petitions for the federal writ of habeas corpus. Justice Harlan reached these conclusions by referring to what he considered the two "principal functions" of the writ of habeas corpus, as it had been expanded, for better or worse, in the third quarter of the twentieth century.[204] In addition

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200 *Desist*, 394 U.S. at 258 (Harlan, J., dissenting).

201 *Id.*

202 *Id.* at 258-59.

203 *Id.* at 259 (Harlan, J., dissenting); *see also Mackey*, 401 U.S. at 679 (Harlan, J., dissenting) ("[T]he 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 legislation.").

204 *Desist*, 394 U.S. at 259 (Harlan, J., dissenting). Here Professor Mishkin's influence on Harlan is apparent, as Mishkin argued that "[t]he best approach" to resolving the problems posed by retroactive application of new rules on habeas "is an examination of the functions of federal habeas corpus." Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 79 (1965).

to ensuring "that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted," the "threat" of relief on habeas provided "a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."[205] This second, deterrence function focused on the state court's adherence to those constitutional norms "established" at the time the habeas petitioner's claims were heard and rejected at trial or on direct appeal. Justice Harlan thus concluded that a federal habeas court need not retroactively apply new rules announced after the petitioner's conviction had become final to fulfill this role. Indeed, should the habeas court apply prodefendant innovations retroactively, the work of the original trial and appellate courts would be undone, even though they had, by hypothesis, acted in conformity with the law extant at the time:

> Although 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. If anyone is responsible for changing these rules, it is this Court.[206]

Justice Harlan conceded that the argument for thoroughgoing retroactive application of new constitutional rules on habeas had much merit:

> Assuring every state and federal prisoner a forum in which he can continually litigate the current constitutional validity of the basis for his conviction 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" and "just" than those they discarded.[207]

Nonetheless, Justice Harlan believed these interests to be "largely overridden by the interests in finality."[208] Justice Harlan ultimately left retroactivity on habeas a near mirror image of that on direct review: a presumption against retroactivity prevailed on the former with an irrebuttable presumption for retroactivity governing the latter. This summary oversimplifies, however, because Justice Harlan's rule against retroactivity on habeas applied only to the most radical legal reversals.

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

206 *Id.* at 264 (Harlan, J., dissenting).

207 *Mackey*, 401 U.S. at 689 (Harlan, J., dissenting).

208 *Id.* at 692 (Harlan, J., dissenting); *see also id.* at 690. Justice Harlan explained:

> Both the individual criminal defendant and society have an interest in insuring that there will at some point be 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.

Id. (citations omitted).

2. Justice Harlan's Narrow Definition of a "New Rule"

For the purposes of Justice Harlan's retroactivity framework, a Supreme Court decision constituted a "new rule" inapplicable on collateral review of prior convictions if, and only if, the decision was a significant, unanticipated change in the governing law. In his *Desist* dissent, Justice Harlan argued that the deterrence function of habeas corpus required only that the reviewing court apply "the constitutional standards that prevailed at the time the original proceedings took place."[209] But Justice Harlan recognized that most Supreme Court decisions would apply retroactively on habeas because they merely declared what in fact had always been the governing law.

In fact, Justice Harlan emphasized in the *Desist* dissent that the habeas court's analysis must not be limited to a constrained reading of the Supreme Court precedent available at the time the petitioner's conviction became final. Because "many, though not all" subsequent Supreme Court decisions would reflect piecemeal explication and gradual evolution of constitutional norms, rather than reversals of pre-existing law, these decisions should inform a habeas court's analysis of the law governing at the time the petitioner's conviction became final. In Justice Harlan's words:

> The theory that the habeas petitioner is entitled to the law prevailing at the time of his conviction is, however, one which is more complex than the Court has seemingly recognized. First, it is necessary to determine 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.[210]

As the *Desist* dissent makes clear, Justice Harlan believed that the rules announced in most Supreme Court decisions handed down after a petitioner's conviction had become final should, nonetheless, be applied on collateral review of the conviction.

Having clarified that his bar on retroactive application applied only to those rare Supreme Court decisions that truly announced new rules, Justice Harlan stated how these decisions might be distinguished from more routine cases. This observation reiterated his view that the category of new rules was narrow. Because new rules are those that *change* the law, Justice Harlan suggested that a Supreme Court decision should be applied retroactively, unless it was clear that the Supreme Court would have decided the issue differently at the time the petitioner's conviction became final:

> 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

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209 *Desist*, 394 U.S. at 263.

210 *Id.*; *see also* Fallon & Meltzer, *supra* note 39, at 1748 ("The conception of legal newness implicit in *Teague* and its progeny is difficult to reconcile with the conception of the judicial role embraced by Justice Harlan."); Friedman, *Habeas and Hubris*, *supra* note 39, at 811-12 (noting that Justice Harlan's proposed definition of "new rule" was significantly narrower than the definition adopted in *Teague* and subsequent cases).

> change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation. In such a context it appears very difficult to argue against the application of the 'new' rule in all habeas cases *since one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final.*[211]

The vigor with which Justice Harlan would have applied his test for determining whether a Supreme Court decision had announced a new rule is illustrated by his evaluation of the rule announced in *Katz* v. *United States*,[212] the retroactivity of which was at issue in *Desist*. In *Katz*, an electronic surveillance case, the Supreme Court expressly overruled two of its prior decisions and held that a defendant need not establish a trespass or some "actual penetration of a particular enclosure" as a prerequisite to claiming that electronically enhanced eavesdropping constituted a search for Fourth Amendment purposes.[213] The *Desist* plurality concluded that *Katz* was "a clear break with the past" and ruled that it should not apply retroactively on either direct or collateral review.[214]

Nonetheless, and even though *Katz* overruled prior cases, Justice Harlan was uncertain that the rule announced in *Katz* should be unavailable on collateral review. As he stated: "Even in this situation, however, the doctrine of *stare decisis* cannot always be a complete answer to the retroactivity problem if a habeas petitioner is really entitled to the constitutional law which prevailed at the time of his conviction."[215] Justice Harlan noted that prior to *Katz* the Court, in *Silverman* v. *United States*,[216] had questioned the principles underlying *Goldman* v. *United States*,[217] the more recent of the two cases *Katz* had overruled.[218] Moreover, the Court's opinion in *Silverman* concluded with language that foretold *Goldman's* future: "[w]e find no occasion to reexamine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch."[219]

Given the rationale and mood of *Silverman*, Justice Harlan argued that:

> [No] lawyer worthy of the name could, after reading *Silverman*, rely with confidence on the continuing vitality of the *Goldman* rule. Nor is it by any means clear to me that it would have been improper for a lower court to have declined to follow *Goldman* in the light of *Silverman*.[220]

For these reasons, even though *Katz* had overruled two prior Supreme Court decisions, Justice Harlan concluded that, "it . . . could be persuasively argued that the *Katz* rule should be applied to all cases which had not become final

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211 *Desist*, 394 U.S. at 263-64 (emphasis added).
212 Katz v. United States, 389 U.S. 347 (1967).
213 *Desist*, 394 U.S. at 246.
214 *Id.* at 248.
215 *Id.* at 264.
216 Silverman v. United States, 365 U.S. 505 (1961).
217 Goldman v. United States, 316 U.S. 129 (1942).
218 *See Desist*, 394 U.S. at 264.
219 *Silverman*, 365 U.S. at 512.
220 *Desist*, 394 U.S. at 265 (Harlan, J., dissenting).

at the time *Silverman* was decided."[221] A decision could constitute a new rule for Justice Harlan only if it worked a change in the law greater than merely overruling cases the validity of which the Court had previously questioned.

In sum, Justice Harlan premised the dissents that the *Teague* majority expressly invoked on a narrow understanding of the category of "new rules." In his view, they were limited to only those decisions in which the Court changed pre-existing law in the sense that it decided an issue differently than it would have when the habeas petitioner's conviction became final. As shown below, the extremely narrow nature of Justice Harlan's definition of a "new rule" followed from the fact that his proposed regime addressed a choice-of-law problem. Justice Harlan stated that he had no intention of imposing a deferential standard of review for legal issues.

3. Distinction Between a Choice-of-Law Rule and a Standard of Review

As an examination of the more recent "new rule" cases demonstrates,[222] the Supreme Court has essentially required federal habeas courts to apply a highly deferential standard of review. Justice Harlan flatly rejected such a deferential standard of review. Instead, he advocated a choice-of-law rule.[223] Indeed, Justice Harlan repeatedly and expressly emphasized that the question of retroactivity on habeas review posed a choice-of-law problem and, ironically, warned against a misapplication of his proposal that would effectively transform his choice-of-law rule into a deferential standard of review. In short, he clearly stated that his proposal would not relieve the habeas court of its established obligation to review de novo the legality of the challenged conviction, although that regime would in some circumstances limit the Supreme Court precedents against which a habeas court would measure the constitutionality of the prisoner's incarceration.

Justice Harlan's dissents in *Desist* and *Mackey* demonstrate that he proposed a choice-of-law rule. In fact, he explicitly and emphatically so labeled his proposal. In Harlan's *Desist* dissent, the opinion in which he introduced his proposed retroactivity regime, the Justice proclaimed that his proposal addressed a "'choice-of-law' problem on habeas."[224]

Moreover, throughout both dissents Justice Harlan described his proposed bar on retroactive application of "new rules" on habeas in terms that reflected a choice between the law as it existed when a conviction became final and the law governing at the time the Court was to rule upon the habeas petition. Justice Harlan maintained that, with two narrow exceptions, "the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place."[225] In other words, the habeas

221 *Id.* Although Justice Harlan's dissent in *Mackey* did not discuss at length which rules should be treated as new ones for the purposes of his retroactivity analysis, it did expressly reaffirm the *Desist* dissent's discussion of this issue. Mackey v. United States, 401 U.S. 667, 695 (1971).

222 *See supra* section I.B.

223 *See* Khandelwal, *supra* note 39, at 442-44.

224 *Desist*, 394 U.S. at 268.

225 *Id.* at 263.

court should not determine the constitutionality of a prisoner's incarceration "under the law existing at the time a petition is filed or adjudicated, as distinguished from the law that was applicable at the time the conviction became final."[226] The quoted language reveals Justice Harlan's understanding that, in the context of a postconviction change in the constitutional law of criminal procedure (a situation made more common by the Warren Court's rapid pace of innovation), the habeas court would be forced to *choose* between the law as it stood at the time the conviction became final and the current legal norms. Justice Harlan concluded that ordinarily the purpose of habeas review—to ensure faithful state court adherence to the requirements the Supreme Court imposed upon them—would best be served by measuring state court decisions against the law as it existed prior to a postconviction change.[227]

That Justice Harlan's retroactivity proposal constituted a choice-of-law rule rather than a deferential standard of review is further illustrated by his discussion of how a habeas court should determine whether a postconviction Supreme Court decision had announced a change in the law. As noted above, Justice Harlan would have limited his bar on retroactivity to only those Supreme Court rulings about which it could be said "that [the Supreme Court] would have ruled differently at the time the [habeas] petitioner's con-

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226 *Mackey*, 401 U.S. at 686; *see also id.* at 688-89. Justice Harlan reasoned:

> For me, with a few exceptions, the relevant competing policies properly balance out to the conclusion that given the current broad scope of constitutional issues cognizable on habeas, it is sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of all these cases on the basis of intervening changes in constitutional interpretation.

Id. See also id. at 687 ("[A]pplying current constitutional standards to convictions finalized while different views were ascendant appears unnecessary to achieve" the purpose of habeas review.); *Desist*, 394 U.S. at 268 ("[A] habeas petitioner is to have his case judged by the constitutional standards dominant at the time of his conviction.").

227 *See, e.g.*, *Desist*, 394 U.S. at 262-63 (Harlan, J., dissenting). Justice Harlan stated:

> [T]he 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. In order to perform this deterrence function, the habeas court need not, as prior cases make clear, apply all "new" constitutional rules retroactively. In these cases, the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place.

See also id. at 264 ("Although 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."); *Mackey*, 401 U.S. at 687 (Harlan, J., concurring in part and dissenting in part) (citing Kaufman v. United States, 394 U.S. 217, 266 (1969)). Justice Harlan explained:

> The primary justification given by the Court for extending the scope of habeas to all alleged constitutional errors is that it provides a quasi-appellate review function, forcing trial and appellate courts in both the federal and state system to toe the constitutional mark. However, the opinion in *Kaufman* itself concedes that there is no need to apply new constitutional rules on habeas to serve the interests promoted by that decision.

Id.

viction became final."[228] Of course, this standard assumes that the habeas court's role is to determine whether the decision under review *was correct* when measured against the law as it existed when the conviction became final—that is, whether the Supreme Court would have affirmed the decision had it been examined by the Court on direct review. It follows that the habeas court's review was not to be *deferential.* The habeas court was not to deny the writ so long as the state court's legal conclusion was reasonable, although perhaps incorrect, at the time it was rendered. Rather, the habeas court was to assess the *correctness* of the state court's decision of any legal issues. Justice Harlan's proposed qualification on habeas review was only that the conviction should be measured against the law as it then existed and not against subsequent prodefendant innovations.

Justice Harlan's application of his new-rule definition also shows that his proposal was a choice-of-law system and not a deferential standard of review. When confronting the Fourth Amendment rule of *Katz* the retroactivity of which was at issue in *Desist*, Justice Harlan observed that "[e]ven . . . the doctrine of *stare decisis* cannot always be a complete answer to the retroactivity problem if a habeas petitioner is really entitled to the constitutional law which prevailed at the time of his conviction."[229] With respect to the Supreme Court's *Goldman* and *Olmstead* decisions, which *Katz* had overruled, Justice Harlan stated that it was not "by any means clear to [him] that it would have been *improper* for a lower court to have declined to follow *Goldman* in the light of *Silverman*['s]" dictum casting doubt on the future vitality of *Goldman.*[230] From this narrow proposition, Justice Harlan concluded that "it thus could be persuasively argued that the *Katz* rule should be applied to all cases which had not become final at the time *Silverman* was decided."[231] Of course, Justice Harlan also recognized that it would have been perfectly reasonable for a lower court to continue to follow *Olmstead* and *Goldman* after the dictum in *Silverman.*[232] Thus, Justice Harlan's discussion of the retroactivity *vel non* of the rule announced in *Katz* clearly shows that Justice Harlan believed a habeas court should issue the writ when a conviction resulted from a reasonable, but objectively incorrect, interpretation of existing law.

Finally, Justice Harlan concluded his *Desist* dissent by warning that his proposed regime must not be improperly converted into a deferential standard of review on habeas. He feared that, given the genuine intellectual challenge of identifying true Supreme Court innovations, the federal courts would be tempted to avoid the inquiry by concluding that most Supreme Court decisions constituted new rules. In his words:

> 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.

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228 *Desist*, 394 U.S. at 264 (Harlan, J., dissenting).

229 *Id.*

230 *Id.* at 265.

231 *Id.*

232 *See id.* at 264.

> 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.*[233]

As Justice Harlan's two retroactivity dissents demonstrate, he recognized that treating many Supreme Court decisions as "new rules" to be denied retrospective application on habeas review would have the intolerable consequence of undermining the habeas court's obligation to conduct de novo review of legal issues. In such cases as *Butler*, *Wright*, and *O'Dell*,[234] the Court ignored Justice Harlan's admonition, conflated the distinction between a choice-of-law rule and a deferential standard of review, and fulfilled his unfortunate prophecy.

V. Reforming Teague

Section I of this Article showed that the Court's pre-AEDPA *Teague* jurisprudence defined "new rule" so broadly that it effectively required deference by federal habeas courts to state court determinations of pure questions of federal law. As section IV demonstrated, this transformation of *Teague*'s retroactivity rule defied the express admonition of Justice Harlan, whose retroactivity regime the *Teague* decision purported to adopt. In addition, a requirement that federal habeas courts defer to state court decisions on pure questions of federal law contravenes the express command of § 2254(d)(1), as amended by AEDPA, which preserves de novo review of these questions. The final section of this Article brings together these insights and argues that the Court must adopt a more narrowly circumscribed definition of new rule to honor the congressional compromise manifested in AEDPA.

This section concludes by proposing a definition of new rule that draws on Justice Harlan's thinking to vindicate the recent congressional judgment, expressed in AEDPA, regarding the role that federal habeas courts should play in our federal system of criminal justice. This proposed definition is then explicated and challenged by analyzing its consequences for a few illustrative cases.

A. The Need to Narrow the Court's Pre-AEDPA Definition of "New Rule"

Williams established that AEDPA codifies *Teague*'s bar on retroactive application of new rules.[235] But *Williams* left unresolved precisely how much of the Court's *Teague* jurisprudence—*i.e.*, the decisions defining the term "new rule" —AEDPA continued. The Justices wisely left that issue open, as

233 *Id.* at 268 (Harlan, J., dissenting) (emphasis added).

234 These decisions are discussed *supra* in the text accompanying notes 47-80.

235 *See supra* section II.

it implicates complex and fundamental questions about the import of AEDPA's habeas corpus reform provisions.

When a future case requires resolution of this issue, the Court should rule that AEDPA requires it to narrow substantially the definition of "new rule" articulated in cases such as *Butler* and *O'Dell*. In those decisions, slim majorities endorsed the proposition that every Supreme Court decision resolving an issue that "was susceptible to debate among reasonable minds" constituted a "new rule."[236] The *Teague* rule was rooted in, and expressly justified by, Justice Harlan's proposed approach to problems of retroactivity. The *Butler-O'Dell* definition of new rule, however, expanded that term's scope far beyond the limits that Justice Harlan contemplated.[237] More important, as Justice Harlan had predicted, the Court's adoption of an overbroad definition of new rule transformed what was originally intended, and justified, as a choice-of-law regime into an altogether unexamined and unsupported deferential standard of review that encompassed even pure questions of federal law.[238] As Justice Harlan had foreseen, this expansive definition was attractive to a Court that understandably hoped to avoid the admittedly difficult work of deciding which of its decisions *really* effected fundamental changes in the law. Moreover, as Justice Harlan had predicted this overbroad definition undermined the well-established "principle that a habeas petitioner is to have his case judged by the constitutional standards dominant at the time of his conviction."[239] Thus, before Congress revised the habeas statute, and without analysis of the relevant, weighty questions concerning the proper relationship between the state and federal courts under that statute, *Butler* and *O'Dell* effectively overruled the Court's seminal decision in *Brown v. Allen*.[240] *Brown* had authoritatively established the power and duty of federal habeas courts to decide independently whether state prisoners were being incarcerated consistent with federal law.

The debate among the Justices in *Wright v. West*[241] removes any doubt about the extent of the change implicitly worked in *Butler* and *O'Dell*. In *Wright*, Justice Thomas painstakingly explained to his colleagues the reverse revolution that *Butler* had effected.[242] To be sure, Justices O'Connor and Kennedy, who had joined the majority opinion in *Butler*, recoiled from Justice Thomas's conclusion that *Butler* had established a deferential standard of habeas review. But neither Justice's concurring opinion persuasively refuted Justice Thomas's reasoning. Moreover, after the *Wright* plurality forcefully asserted the import of *Butler*'s new-rule test, Justices Kennedy and O'Connor again joined in an even more extreme application of that same reasonableness test in *O'Dell*.[243] Whatever reservations Justices O'Connor and Ken-

236 Butler v. McKellar, 494 U.S. 407, 415 (1990); *see also* O'Dell v. Netherland, 521 U.S. 151, 160 (1997) (quoting *Butler*, 494 U.S. at 415).

237 *See supra* section IV.

238 *See supra* section I.

239 Desist v. United States, 394 U.S. 244, 268 (1969) (Harlan, J., dissenting).

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

241 Wright v. West, 505 U.S. 277 (1992).

242 For a more thorough discussion of all the opinions in this case, see *supra* section I.

243 *See supra* section I.

nedy had about the standard-of-review consequences of *Butler*'s new-rule test, they preferred the *sub silentio* evisceration of *Brown v. Allen*'s requirement of independent federal court review of state court criminal convictions to a re-delineation of the "new rule" category that honored *Brown*.

Standing alone, the tacit reversal of this core component of *Brown*'s federal habeas regime would be problematic, given Congress's longstanding acquiescence in *Brown*.[244] This development becomes intolerable when viewed in the light of Congress's affirmative decision, as reflected in AEDPA, to preserve de novo review of pure questions of federal law by federal habeas courts.[245]

Thus, this Article's ultimate prescription—that the Court revisit and substantially narrow the definition of "new rule" for the purpose of *Teague*'s retroactivity bar—is partly premised on the inconsistency between the *Butler-O'Dell* reasonableness test and the Court's own general habeas corpus jurisprudence. More important, however, Congress spoke specifically to the standard of review on habeas in 1996, reaffirming de novo review.[246] Unless and until Congress again amends the federal habeas provisions of Title 28, the Court must honor Congress's decision to preserve de novo review of pure questions of law, even though that legislative judgment requires the Court to revamp its "new rule" jurisprudence.

This Article's prescription is not premised on a *policy* argument that the definition of "new rule" must be narrowed because restoration of federal habeas court de novo review will better serve the interests of justice. *Brown v. Allen* has received erudite and persistent criticism since its announcement more than forty years ago.[247] Answering policy objections concerning the ideal role of the writ in a federal system of criminal justice is beyond this *doctrinal* article's scope. For present purposes, it suffices to note that powerful policy arguments can also be made for maintaining de novo review on habeas.[248] In any event, it is hornbook law that the habeas corpus jurisdiction of the federal district courts—like virtually all other heads of jurisdiction in those courts—is generally subject to Congress's plenary power.[249] Absent unconstitutional legislative overreaching, which is absent here, the federal courts may not decline to exercise the jurisdiction Congress has granted

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244 *See* Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 785 (1987) (noting that "[a]n argument can be made that Congress' failure to amend the habeas statute after *Brown v. Allen* . . . demonstrated implicit congressional acquiescence to th[is] decision.") (citations omitted).

245 *See supra* section III.

246 *See* 28 U.S.C. § 2254(d)(1) (2000).

247 *See, e.g.*, Bator, *supra* note 154; Friendly, *supra* note 154.

248 *See, e.g.*, Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805 (2000); *see also* Joseph L. Hoffman, *Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence*, 78 TEX. L. REV. 1771 (2000) (arguing that the Eighth Amendment requires that federal habeas courts review the merits of every death sentence).

249 *See* Felker v. Turpin, 518 U.S. 651, 664 (1996) (observing "that judgments about the proper scope of the writ are normally for Congress to make.") (internal quotation marks and citations omitted); *see also* Chemerinsky, *supra* note 244, at 765.

them.[250] AEDPA has reaffirmed the grant of jurisdiction to the federal district courts to hear petitions for the writ filed by state prisoners and has commanded the federal courts to review pure questions of federal law de novo. Therefore, the Court must revise its jurisprudence to obey that mandate, regardless of the policy preferences of individual sitting Justices.

Given the existing habeas corpus provisions of the U.S. Code, there is only one open question: what test for distinguishing old rules from new should replace the plainly overbroad reasonableness test enunciated in *Butler* and *O'Dell*? This question, and the related inquiry concerning how this Article's proposed test would operate in practice, are examined below.

B. Toward a New Definition of "New Rule"

1. Justice Harlan's Definition of "New Rule"

An obvious starting point for revising the definition of "new rule" to comport with AEDPA is the definition that Justice Harlan proposed more than thirty-five years ago. Justice Harlan framed his definition of new rule with the conscious purpose of preserving de novo review by federal habeas courts.[251] Indeed, he phrased his "new rule" standard so as to resolve any doubts in favor of retroactive application of the most current law and, thus, avoid any impingement upon the independence of federal habeas court review of state court convictions.[252] In Justice Harlan's words, his proposed bar on retroactive application of new rules on habeas would have applied only to those Supreme Court rulings about which it could be said "that [the Supreme] Court would have ruled differently at the time the [habeas] petitioner's conviction became final."[253] Justice Harlan even concluded that some decisions expressly overruling one of the Court's prior opinions were not new rules for retroactivity purposes.[254] Were the current Supreme Court's sole obligation to conform *Teague* to its conceptual origins, the clear course would be replacing the *Butler-O'Dell* definition of new rule with Justice Harlan's proposed test. Had AEDPA not intervened, this Article would conclude with that recommendation.

But AEDPA complicates the issue. My analysis above shows that § 2254(d)(1), as amended by AEDPA, preserves federal habeas corpus de novo review of pure questions of federal law.[255] Moreover, in *Williams*, all nine Justices agreed that the *Teague* rule was implicitly preserved by § 2254(d)(1)'s command that a federal court grant the writ only when the state court decision "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States."[256] The Court's new

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250 *See* Chemerinsky, *supra* note 244, at 765-67, 783-86.

251 *See supra* section IV.

252 *See supra* section IV.

253 Desist v. United States, 394 U.S. 244, 264 (1969) (Harlan, J., dissenting). *See generally supra* section IV.

254 *Desist*, 394 U.S. at 264.

255 *See supra* section III.

256 28 U.S.C. § 2254(d)(1) (2000). See *supra* text accompanying notes 108-114, for a discussion of this aspect of the *Williams* decision.

and improved definition of new rule must be grounded in this phrase of the existing habeas statute.

2. *"Clearly Established Federal Law, as Determined by the Supreme Court of the United States"*

In two significant ways, the quoted language parallels Justice Harlan's proposed definition of "new rule." First, Congress's use of the past tense—"established"—indicates that, as Harlan urged, the relevant question is what federal law required at the time the petitioner's conviction became final, not what federal law requires at the time the habeas petition was filed in, or considered by, the federal court. Courts must ignore intervening *changes* in the law beneficial to the petitioner. Second, amended § 2254(d)(1), like Harlan's proposed test, focuses inquiry on the U.S. Supreme Court's decisions before the time when the petitioner's conviction became final.

The major difference between amended § 2254(d)(1) and Justice Harlan's proposed test is that the former's use of the adverb "clearly" shifts the *burden* of persuasion, and hence the risk of equipoise, from the state to the petitioner.[257] Justice Harlan would have placed the burden of persuading the habeas court that one of the U.S. Supreme Court's prior decisions should not be applied retroactively because it had announced a new rule squarely on the state. That Justice Harlan would have accorded the habeas petitioner the benefit of the doubt is evidenced by his articulation of his proposed "new rule" test. This enunciation required near certainty that the U.S. Supreme Court would have affirmed the habeas petitioner's conviction, had it considered the case on direct review. This conclusion similarly follows from Justice Harlan's application of his proposed test in his *Desist* dissent, in which he concluded that even some decisions expressly overruling prior case law were to be treated as "old rules" for the purposes of his retroactivity regime.[258]

Yet § 2254(d)(1)'s requirement that the state court decision must be contrary to "clearly established" federal law reverses Justice Harlan's allocation of the burden of persuasion and, thus, the risk of any intractable ambiguity, about whether a Supreme Court ruling constitutes a "new rule." If a federal habeas court is hopelessly uncertain about whether a Supreme Court ruling is better characterized as a *change* in the law or as a mere elaboration of previously settled principles, the inconsistent state court conviction cannot be said to be contrary to "clearly established Federal law, as determined by the Supreme Court of the United States."[259] In such a case, therefore, amended § 2254(d)(1) requires that the writ be denied.

This change to Justice Harlan's proposed regime will prove decisive in a few cases. This set of cases, however, must be carefully circumscribed, lest § 2254(d)(1)'s command that federal habeas courts review pure questions of law de novo be nullified. Intractable ambiguity or hopeless uncertainty as to whether a Supreme Court decision actually changed the course of the law should be exceptional and must not be equated with any reasonable argu-

257 *See* 28 U.S.C. § 2254(d)(1).

258 *See supra* section IV.

259 28 U.S.C. § 2254(d)(1).

ment to this effect. De novo review requires that the writ issue whenever the federal habeas court concludes that the state court was wrong, not only when the state court is deemed to be unreasonable. Section 2254(d)(1)'s requirement that the law be "clearly established" must be harmonized with the provision's command that the writ be granted whenever a state court conviction is found to be "contrary to" federal law as it existed when the petitioner's conviction became final.[260] Accordingly, when a federal habeas court concludes that a petitioner's state court conviction rests on an erroneous decision of a material issue of federal law, the writ must issue, unless the habeas court gravely doubts whether the state court ruling was wrong at the time it was decided.

Hence, Justice Harlan's proposed inquiry—would the Supreme Court have affirmed the petitioner's conviction had it resolved the case on direct review[261]—should replace the reasonableness test of *Butler-O'Dell*, with one change. The sole modification is the reversal of Justice Harlan's allocation of the burden of persuasion. Section 2254(d)(1)'s requirement that the federal law be "clearly established" imposes on the petitioner the obligation to persuade the habeas court that any U.S. Supreme Court rulings issued after his conviction became final were merely elaborations of previously announced principles. Only when the habeas court seriously suspects that any such postfinality decisions fundamentally altered the law in the petitioner's favor, should the writ be denied in reliance on *Teague*. The precise import of this Article's proposed change in the definition of "new rule" for the purposes of *Teague* is explored below through a discussion of how courts would resolve various illustrative cases under the revised definition.

3. *Application of the Proposed New Definition of "New Rule"*

The paradigmatic example of a "new rule," according to the revised definition proposed, is a U.S. Supreme Court decision overruling a prior precedent or precedents. If, at the time the habeas petitioner's conviction became final, the state court decision comported with extant Supreme Court authority, the state court decision cannot be deemed to have been "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States."[262] Indeed, the Supreme Court's subsequent decision overruling prior case law implicitly acknowledges as much; the Court expressly overrules prior precedents to clarify that they no longer state controlling principles. Under the proper interpretation of amended § 2254(d)(1), the writ must be denied, even if the Supreme Court had foreshadowed the demise of the precedent on which the state court relied, so long as the precedent technically remained good law until expressly overruled by a subsequent decision. Section 2254(d)(1)'s requirement that the state court decision be "contrary to . . . *clearly* established Federal law" relieves state courts of any obligation to anticipate the Supreme Court's express abandonment of con-

260 28 U.S.C. § 2254(d)(1).

261 *See* Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting). *See generally supra* section IV.B.2.

262 28 U.S.C. § 2254(d)(1).

trolling authority.[263] For example, the Court's decision in *Mapp v. Ohio*,[264] which overruled *Wolf v. Colorado*[265] and for the first time extended the Fourth Amendment's exclusionary rule to the States, would constitute a new rule inapplicable to habeas petitions challenging state court convictions that had become final before *Mapp* was decided.[266]

Even though all Supreme Court decisions expressly overruling prior precedents should be deemed new rules, a decision need not necessarily overrule a prior precedent to constitute a "new rule." Both the purpose underlying Justice Harlan's retroactivity proposal and the language of amended § 2254(d)(1) support a new-rule category of slightly broader scope. As noted above, a state court decision is not "contrary to . . . clearly established Federal law" merely because the state court failed to anticipate a subsequent Supreme Court decision overruling a prior precedent.[267] So too the writ should not be granted merely because a state court did not foresee a subsequent Supreme Court decision that materially *changes* the law in a manner beneficial to the petitioner. Thus, as the *Teague* plurality recognized, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States."[268] The Court's decision in *Miranda v. Arizona*[269] is illustrative. That case, though overruling no prior precedents, for the first time announced a prophylactic rule, subject to a few narrow exceptions, foreclosing the admission of a confession into evidence, unless law enforcement officials had previously informed the accused of her constitutional rights.[270] The Court later ruled, quite appropriately, that the holding announced in *Miranda* would receive only prospective application.[271]

The most difficult Supreme Court rulings to classify will be those that are well grounded in the broad rationale of prior decisions but significantly extend the scope of judicially recognized constitutional rights of criminal defendants. Not every ruling that can be characterized as an extension of prior holdings should be deemed a new rule inapplicable on habeas, as the common law method of judicial decision making necessitates that the precise meaning of broad principles be elaborated over time.[272] Yet in a small cate-

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263 28 U.S.C. § 2254(d)(1) (emphasis added). This example of a new rule—a Supreme Court decision expressly overruling a prior precedent—illustrates the key difference between Justice Harlan's proposed definition of a new rule and that required by amended § 2254(d)(1). For a discussion of Justice Harlan's proposed definition, which excluded some Supreme Court decisions overruling prior precedents, see *supra* section IV.

264 Mapp v. Ohio, 367 U.S. 643 (1961).

265 Wolf v. Colorado, 338 U.S. 25 (1949).

266 For a discussion of the Court's consideration of the retroactive application of the *Mapp* decision, see *supra* section IV.

267 28 U.S.C. § 2254(d)(1).

268 Teague v. Lane, 489 U.S. 288, 301 (1989).

269 Miranda v. Arizona, 384 U.S. 436 (1966).

270 *See id.* at 448-49.

271 *See* Johnson v. State of New Jersey, 384 U.S. 719, 734 (1966).

272 As Justice Harlan put it: "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." Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting). Justice Harlan concluded that decisions work-

gory of cases, the extension of prior law will be so radical as to justify labeling the Supreme Court decision announcing the change a new rule for the purposes of *Teague*'s retroactivity bar. Indeed, the ruling sought by petitioner Teague would have been just such a dramatic extension of prior law. Teague asserted that the reasoning underlying the Court's decision in *Taylor v. Louisiana*,[273] which held that "the Sixth Amendment required that the jury venire [for a criminal case] be drawn from a fair cross section of the community,"[274] necessitated the extension of the fair cross section requirement to the actual petit jury seated to hear a defendant's trial.[275] Despite his insistence that the ruling he sought was grounded in the Court's prior holdings, Teague's petition asked the Court to announce a new rule of criminal procedure, given dicta in *Taylor*, intervening Supreme Court decisions and the departure from widespread existing practice that adoption of his argument would have entailed.

Cases like *Teague*, however, in which the extension of a previously articulated principle constitutes a new rule, should be rare. Decisions explicating the precise scope of prior holdings do not ordinarily announce new rules. Accordingly, a federal habeas court should typically decide whether a petitioner's conviction is "contrary to" the *reasoning* of Supreme Court decisions issued before the petitioner's conviction became final. An intervening decision from the Supreme Court that vindicates the petitioner's argument should ordinarily be noticed to support, not procedurally bar, his assertion. This narrowed understanding of the category of "new rule" both incorporates the insights of Justice Harlan's dissents and implements the language of amended § 2254(d)(1). When a habeas petitioner identifies a Supreme Court ruling issued before his conviction became final and argues that the principle underlying that decision also undermines his conviction, the petitioner asserts that the state court decision affirming his conviction "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States."[276] If the federal habeas court, assessing independently the merits of petitioner's legal argument, agrees, amended § 2254(d)(1) directs the federal court to issue the writ.[277] AEDPA's preservation of de novo review requires no less.

Thus, a court applying this proposed definition of "new rule" would have granted the writ, and overturned the petitioners' death sentences, in *Butler* and *O'Dell*. In both cases, the state court decisions affirming petitioners' convictions and sentences were "contrary to" a fair reading of Supreme Court decisions rendered before the petitioners' convictions became final.[278] Petitioners' requests for relief were, ironically, denied *because* the U.S. Su-

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ing such gradual evolution in the law must be applied retroactively on habeas, lest the Court compromise the principle that federal habeas courts decide issues of federal law de novo. *See id.* at 268.

273 Taylor v. Louisiana, 419 U.S. 522 (1975).

274 Teague v. Lane, 489 U.S. 288, 292 (1989).

275 *See id.*

276 28 U.S.C. § 2254(d)(1) (2000).

277 *Id.*

278 *See supra* section II.

preme Court had *adopted* petitioners' interpretations of pre-existing case law in decisions intervening between the date their convictions became final and the Court's consideration of their habeas petitions. Because the Court had, after petitioners' convictions became final, agreed with the arguments petitioners had presented (to no avail) in the state courts, the Court held their petitions for the writ to be procedurally barred. The Court's intervening confirmation of petitioners' interpretation of the prior cases on which petitioners had relied in state court transformed their arguments, to their ultimate chagrin, about the meaning of old law into impermissible reliance upon new rules.

The correct definition of new rule would avoid such absurd contortions. The federal habeas court would ask the simple question: was the petitioner *correct* in asserting to a state court that a Supreme Court precedent required reversal or re-sentencing as of the time that the petitioner's conviction became final? The Supreme Court's intervening embrace of a petitioner's understanding of a prior case would ordinarily constitute strong evidence that the petitioner's argument was correct at the time it was presented to the state court. The only proper exception to this general rule is that the writ should be denied if the intervening Supreme Court decision fundamentally changed the law, giving life to a petitioner's argument that was moribund when presented to the state court. Because the claims presented by Butler and O'Dell followed logically from prior Supreme Court cases, however, their petitions should have been granted.

Conclusion

In the mid-1960s, Justice Harlan proposed a fundamental change in the way that the Supreme Court then approached issues involving the retroactive effect of its prodefendant innovations in criminal procedure. During the late 1980s, in *Griffith v. Kentucky* and *Teague v. Lane*, the Court finally adopted Justice Harlan's retroactivity model. His vindication proved to be short-lived, however. Subsequent decisions concerning the scope of the category of new rules ignored Justice Harlan's warning against improperly converting his proposed choice-of-law regime into a deferential standard of review.

In 1996, after years of congressional stalemate, two competing factions reached a compromise that finally permitted passage of habeas corpus reform legislation. Essential to that compromise was the agreement of centrists to a requirement that federal habeas courts defer to state court determinations of mixed questions of law and fact in exchange for more conservative members' acceptance of a statute that preserved de novo review of pure questions of law. Congress's long-awaited amendment of the federal habeas corpus statute and reaffirmation of de novo review of pure questions of federal law requires that the Supreme Court re-examine its "new rule" jurisprudence. AEDPA's preservation of de novo review of pure questions of law compels the Court to narrow substantially the definition of new rule enunciated in cases such as *Butler* and *O'Dell*.

Articulating a clear definition of the term *new rule* that both respects the need to avoid true retroactivity and preserves de novo review of questions of

federal law is not an easy task. Fortunately, the Court has the benefit of Justice Harlan's thoughtful exploration of this problem, which both the Court and commentators have largely ignored. The Court should capitalize on the definition of the phrase "new rule" that Justice Harlan proposed in his *Desist* dissent, modifying that standard to accommodate amended § 2254(d)(1)'s requirement that federal law must be "clearly established" before it can support issuance of the writ to a state prisoner. Only if the Court so revises its new-rule jurisprudence will the Justices honor the 1996 congressional compromise manifested in AEDPA and clarify a fundamental aspect of habeas corpus, a writ critical to the protection of core constitutional rights.