TAKING JUSTICE TO ITS LOGICAL EXTREME: A COMMENT ON *TEAGUE V. LANE*

SUSAN BANDES*

> The discomfort incidental to a difficult choice will be heightened insofar as the judge views himself as having had personal responsibility for a choice from among many alternatives before him. The discomfort will be reduced insofar as he can view himself as a mechanical instrument of the will of others.
>
> Robert Cover, *Justice Accused*

Teague v. Lane[1] is a decision which, on many levels, concerns the failure of judges to take responsibility for their decisions. Judges[2] treated Frank Teague—referred to throughout the Supreme Court's opinion only as "petitioner"[3]—shoddily and arbitrarily.[4] Without acknowledgment or explanation, the Supreme Court radically altered the landscape

* Professor of Law, DePaul University College of Law. B.A. 1973, State University of New York (Buffalo); J.D. 1976, University of Michigan. I wish to thank Erwin Chemerinsky, Barry Friedman, and Stephen Siegel for their helpful comments on earlier drafts, and Sakina Carbide, Diana Hsu, and Maria Ticsay for their research assistance.

This Article is dedicated to my former colleague, Patricia Unsinn, whose meticulous and zealous representation of Frank Teague should not have led to the shameful precedent *Teague v. Lane*.

1. 489 U.S. 288 (1989). By *Teague*, I mean to include its progeny as well. Some of those cases, particularly Saffle v. Parks, 494 U.S. 484 (1990), will be discussed specifically below.

2. Or Justices, see *infra* note 3.

3. Or more specifically, because the case involved allegations of racial discrimination, the Court sometimes used "petitioner, a black man." *Teague*, 489 U.S. at 292. If Frank Teague is merely a nameless and dehumanized "petitioner," it may be easier for the Justices to deny the consequences of their decision. Ironically, *Teague* was the case in which Chief Justice William Rehnquist made it clear how important it was to *him* to be correctly named:

> Ms. Unsinn: Well, Judge, it was certainly a conclusion—
> Question: Yes, I'm the Chief Justice, I'm not a judge.
> Ms. Unsinn: Pardon me, Justice Rehnquist.

Record at 7, *Teague* (No. 87-5259).

4. The "new law" rule was newly established in Teague's case without briefing or argument on the issue and was then applied to bar Teague from relief for a claim which otherwise would have clearly been successful under the Court's recent ruling in Batson v. Kentucky, 476 U.S. 79 (1986). For an excellent account of Teague's treatment by both the Supreme Court and the lower courts, see Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 808-11 (1992).

of habeas corpus jurisprudence and its underlying constitutional guarantees, making it far more difficult for prisoners, including those on death row, to obtain relief. The members of the Court achieved these goals through the "new law" rule, which purports to remove all the difficult choices, judgments, and unruly emotions from deciding habeas cases, portraying any harsh-seeming consequences, like the incarceration or execution of unconstitutionally convicted people, as merely the unfortunate, unavoidable byproduct of mechanically applied reason. To add insult to injury, the Court constricted access to habeas in the name of evenhanded justice and fairness.[5]

There is one positive thing to be said about *Teague*: It provides an excellent vehicle for discussing the role of the federal courts. *Teague* can be used as a prism to illuminate many facets of the courts' role. Using as a starting point the *Teague* Court's self-described objective of fine-tuning a small corner of retroactivity doctrine, I first examine how *Teague* and its progeny have instead fundamentally changed the nature of federal habeas jurisdiction. More generally, I use *Teague* to illustrate the interplay between jurisdictional doctrine and the development of constitutional norms, as well as the way in which superficially neutral jurisdictional rules can interfere with the realization of substantive rights. Finally, I show how jurisdictional assumptions collapse into jurisprudential assumptions. Though purportedly neutral, rational, and dispassionate, both sets of assumptions lead in only one direction: toward the constriction of rights.

I. EVALUATING *TEAGUE* ON ITS OWN TERMS: ITS EFFECT ON THE LOWER FEDERAL COURTS' HABEAS JURISDICTION

Teague's self-described goals are to remedy the perceived unfairness inherent in the former retroactivity test,[6] to do so without thwarting the goal of deterring unreasonable state court interpretations of federal constitutional law,[7] and to preserve finality of judgments without unduly burdening fairness and accuracy to the litigant.[8] Even if these goals are appropriate,[9] *Teague* fails on all three counts.

---

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

6. *Id.* at 300-05.

7. *Id.* at 305-06 (quoting Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)).

8. *Id.* at 312-16.

9. For numerous reasons *Teague*'s articulated goals are inappropriate, in both descriptive and prescriptive senses. The first goal is unworkable because, as I discuss below, any retroactivity rule

Beginning with the first self-described goal, *Teague* holds that the habeas court must determine at the outset whether granting habeas relief would entail announcing a new rule. If so, the court must refrain from announcing the rule. The *Teague* Court justifies this result as necessary to remedy the unfair results of former retroactivity rules, under which some habeas petitioners but not others received retroactive relief.[10] However, *Teague* leads to unfairness on a much grander scale. The decision merely succeeds in creating a new arbitrary category of remediless prisoners: those whose cases happen to be on collateral, rather than direct, review at the auspicious moment when the Court hands down a decision classified as "new law."[11] Thus the speed with which a case happens to progress dictates whether the prisoner obtains relief, and perhaps whether the prisoner lives or dies.[12] Moreover, the Court's goal of eliminating the unfair application of retroactivity rules is virtually unattainable. The only way to eliminate all disparity would be to make every rule completely retroactive.[13]

The Court uses the hyper-rational language of cost-benefit analysis to justify its decision, as if a mathematical formula can determine, in a value-free manner, whether the individual or the state should prevail. Inevitably, the Court's reasoning falls far short of attaining the objective precision these terms promise.[14]

---

other than full retroactive effect creates some disparity. The second goal is at best too narrow, at worst simply an inaccurate statement of the purpose of the habeas statutes. As Kit Kinports points out, there is no support in the statutes or common law for the "view that the writ's purpose is to deter state courts from ignoring constitutional commands." Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 178-79 (1991). Moreover, the Court's single-minded focus on deterrence ignores the important habeas function of providing an independent federal forum for the vindication of constitutional rights. The third goal suffers a similar infirmity. It imbues finality with an overriding importance which is contradicted by the statute itself. *See infra* text accompanying notes 24-34.

10. *Teague*, 489 U.S. at 300-05. Prior to *Teague* retroactive application on collateral review was determined under the three-part balancing test set forth in Linkletter v. Walker, 381 U.S. 618 (1965). *See also* Friedman, *supra* note 4, at 805-07 (discussing multi-faceted retroactivity balancing test).

11. *Teague*, 489 U.S. at 309.

12. Penry v. Lynaugh, 492 U.S. 302 (1989) (extending *Teague* to capital cases).

13. Friedman, *supra* note 4, at 807. Friedman cites Justice Harlan's comment: "Some discrimination must always exist in the legal treatment of criminal convicts within a system where the governing law is continuously subject to change." Mackey v. United States, 401 U.S. 667, 689 (1971) (Harlan, J., concurring in part and dissenting in part).

14. Cost-benefit analysis by its very nature tends to undervalue benefits that cannot be quantified. See for example the decisions cutting back on the exclusionary rule, such as United States v. Leon, 468 U.S. 897 (1984); United States v. Calandra, 414 U.S. 338 (1974) (easily identifying the costs of excluding evidence but having more difficulty weighing such unquantifiable benefits as affirming constitutional rights and safeguarding the integrity of the judicial process). *See Leon*, 468 U.S. at 949 (Brennan, J. dissenting); Yale Kamisar, Gates, *Probable Cause, Good Faith and Beyond*,

The benefits of habeas are not easily quantified. They accrue not only to the individual prisoner but to the judicial system and society at large. Habeas affirms the importance of the right at stake and provides "the opportunity to check constitutional violations and to further the evolution of our thinking in some area of the law."[15] By undervaluing these benefits and overvaluing finality interests,[16] the *Teague* Court predictably finds the benefits outweighed by the inconvenience and frustration suffered by state judges when their convictions are upset on collateral review.[17]

When the cost-benefit calculus is applied in death penalty cases, its pretext of objective weighing conceals truly horrifying judgments about relative worth. By what cost-benefit calculus do the members of the Court conclude that it is better for a petitioner to die—though the Court *now believes* that the petitioner was unconstitutionally convicted—than to "punish" the state for its good faith mistake?[18] How can this conclusion be squared with its mirror image: that it is better for a petitioner to die—though convicted unconstitutionally under *contemporaneous* law—than to give that petitioner the "windfall" of benefitting from a law later overruled?[19] The Court portrays the calculus as scientific, devoid of emotional content; thus the Court feels no need to justify its choices.

The next stated goal of *Teague* is to deter unreasonable state court determinations of federal constitutional law. The *Teague* cases, with rare

---

69 IOWA L. REV. 551, 608-15 (1984) (discussing use of cost-benefit analysis in exclusionary rule cases); *see also* Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 43 (1988) (use of cost-benefit analysis generally).

15. *Teague*, 489 U.S. at 338 (Brennan, J., dissenting).

16. *See infra* text accompanying notes 24-34.

17. *Teague*, 489 U.S. at 310.

18. *See* Butler v. McKellar, 494 U.S. 407, 414 (1990); Penry v. Lynaugh, 492 U.S. 302, 313-14 (1989) (Scalia, J., dissenting); *see also* Ann Althouse, *Saying What Rights Are—In and Out of Context*, 1991 WIS. L. REV. 929, 959 (criticizing the *Teague* Court for viewing habeas reversal as punishment for state judges).

The use of the "good faith" concept demands close scrutiny. *Teague* refers to United States v. Leon, 468 U.S. 897 (1984), which establishes the good faith exception to the exclusionary rule. However, Justice Brennan effectively counters that the *Leon* analogy is a poor one. Whatever one thinks of the use of the exclusionary rule to deter unconstitutional police conduct taken in "objective good faith," deterrence of state judicial opinions written in good faith is a shaky concept indeed. *Butler*, 494 U.S. at 425 n.6 (Brennan, J., dissenting).

19. Lockhart v. Fretwell, 133 S. Ct. 838 (1993). In *Fretwell*, the petitioner had been sentenced to death because under contemporaneous law the court had unconstitutionally considered an aggravating factor but his attorney had not objected. The case holding that the use of this factor was unconstitutional was later reversed. Thus, the Court was presented with the mirror image of *Teague*: a case in which following the *Teague* rule would have given the petitioner the benefit of the law as it existed at the time of his conviction, not as it existed on collateral review. This the Court refused to do, holding that it would not grant criminal defendants a windfall. Thus, the state may

exception, deprive petitioners of the retroactive benefit of "new rules." New rules are those not dictated by prior precedent. Even if they are controlled by or within the logical compass of prior decisions, the Court considers them new if their result was susceptible to debate among reasonable minds.[20] This goal of *Teague* rests on the starkly positivist belief that judges can mechanically determine the law *given to them*, cordoning it off from the law they create. *Teague* conceives the role assigned to the habeas courts as passive—a rote, mistake-proof endeavor, for the results of which the courts have no responsibility.

Evaluated on the narrow utilitarian ground it is meant to achieve, *Teague* fails. If anything, *Teague* serves as a "lewd wink"[21] rather than a deterrent to the state courts because it suggests that the Court will accept all but the most outrageous deviations from federal law.[22] The deterrent effect of habeas is further diluted because *Teague* denies relief to litigants whose cases would announce new law, creating a disincentive to litigate federal claims.[23]

The only one of *Teague*'s stated goals that is partially achieved is the preservation of finality. In this regard *Teague* is part of the larger fabric of habeas decisions concerning successive petitions, procedural default, and deference to state findings, all of which put a premium on avoiding excessive interference with state court judgments.[24] However, the habeas

---

now carry out a death sentence that is invalid when carried out, as well as one that was invalid when imposed.

Fretwell, Graham v. Collins, 113 S. Ct. 892 (1993), and Herrera v. Collins, 113 S. Ct. 853 (1993), were all decided on January 25, 1993, after the date on which this Symposium was conducted. Therefore, neither the presentations nor the comments originally addressed these cases. It seems necessary to address them now.

20. *Butler*, 494 U.S. at 414-15.

21. The phrase is borrowed from Ralph Rossum, *Congress, The Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385, 425 (1983).

22. Stringer v. Black, 112 S. Ct. 1130, 1140 (1992); *Butler*, 494 U.S. at 424-25 (Brennan, J., dissenting). In a closely related development, the members of the Court are becoming increasingly fragmented on the issue of how deferential the habeas courts must be to state courts' mixed findings of fact and law. *Compare* Wright v. West, 112 S. Ct. 2483, 2491 (1992) *with id.* at 2497 (O'Connor, J., concurring in the judgment) *and id.* at 2498 (Kennedy, J., concurring in the judgment). *See also* James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2010-40 (1992) (examining Justices' differing views on habeas review).

23. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1819 (1991); Kathleen Patchell, *The New Habeas*, 42 HASTINGS L.J. 941, 1009 (1991).

24. *See, e.g.*, Wright v. West, 112 S. Ct. 2483 (1992) (deference to state findings); Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992) (deference to state findings); Coleman v. Thompson, 111 S.

statute makes a deliberate choice to subordinate finality to other values.[25] *Teague* subverts congressional intent by achieving finality at the expense of all the other values Congress meant habeas to safeguard, including fairness and accuracy, even in capital cases.[26]

The Court stacks the deck in favor of finality in several ways. First, the Court makes instrumental use of the term, allowing the Court to justify giving the state, but not the petitioner, the benefit of new rules on the theory that only the state has a finality interest.[27] Next, the Court focuses on fairness and accuracy as the only counterbalancing values, willfully blinding itself to such basic tenets of habeas jurisdiction as the importance of the federal forum for constitutional claims, the concern for ensuring convictions free from constitutional error, and the desire to safeguard the integrity of the judicial process.[28]

Finally, the Court stacks the deck through its unconscionably narrow interpretation of fairness and accuracy. The Court revises and yokes together separate tests suggested by Justice Harlan and Judge Friendly to create a hybrid test far more restrictive than either would conceivably have endorsed.[29] The Court requires that *both* fairness and accuracy be implicated and that the new rule be a "watershed" rule of criminal

---

Ct. 2546 (1991) (procedural default); McCleskey v. Zant, 111 S. Ct. 1454, 1469-72 (1991) (successive petitions).

25. *See* 28 U.S.C. § 2254(d) (1988) (providing for federal court deference to state determinations of fact but not law). *See generally* Brown v. Allen, 344 U.S. 443 (1953) (providing a federal forum for reconsideration of constitutional questions, though state courts gave them full reconsideration).

26. *See* Sawyer v. Smith, 110 S. Ct. 2822, 2833 (1990) (Marshall, J., dissenting). The nadir of this approach is achieved in Lockhart v. Fretwell, 113 S. Ct. 838 (1993), in which the Court reasons that finality is the basis for denying petitioner the benefit of new rules on habeas, and that because the petitioner has no interest in finality, it is also justifiable to deny petitioner the benefit of contemporaneous rules and instead give the state the benefit of the new rule on habeas. But to say that the petitioner has no interest in finality is like saying a capital defendant has no interest in the death penalty. The petitioner's interest clearly is not congruent with the *state's* interest, but presumably the state's interest is not the only one that merits consideration.

27. *Fretwell*, 113 S. Ct. 838; *see supra* note 26.

28. *See e.g.*, Saffle v. Parks, 494 U.S. 484, 495 (1990); Butler v. McKellar, 494 U.S. 407, 413 (1990); Penry v. Lynaugh, 492 U.S. 302, 313 (1989); *Teague*, 489 U.S. at 314.

29. Patchell, *supra* note 23, at 991-94.

procedure on the order of *Gideon v. Wainwright*,[30] a category the Court pointedly suggests is unlikely to expand.[31]

The other stated purpose of finality in criminal cases is to allow prisoners to get on with the process of rehabilitation.[32] What is striking about the Court's approach is that it rests on assumptions about how to achieve the prisoner's rehabilitation, but makes no realistic attempt to consider the prisoner's perspective.[33] Even assuming the possibility that prison rehabilitates,[34] I am confident, after representing prisoners on appeal and collateral review for several years, that prisoners who believe they are unjustly incarcerated will not find repose in the finality of their sentences.

II. THE ARTICLE III IMPLICATIONS OF *TEAGUE*: THE EFFECT OF JURISDICTIONAL RULES ON EVOLVING CONSTITUTIONAL STANDARDS

Teague's approach to controlling federal judicial access has obvious and intentional consequences for the lower federal courts' ability to participate in the evolution of constitutional standards for state criminal cases. The rule announced in *Teague* prohibits lower federal courts from such participation.[35] In doing so the Court assumes, as it frequently does in the jurisdictional context, that it can restrict (or even remove) the lower courts' ability to articulate norms and yet leave untouched their ability to decide the cases before them. Judge Higginbotham subscribes

30. *Saffle*, 494 U.S. at 495 (citing *Gideon*, 372 U.S. 335 (1963)). The Court takes a similarly crabbed view of fairness in Herrera v. Collins, 113 S. Ct. 853 (1993), in which it holds that the capital petitioner's claim of actual innocence does not entitle petitioner to habeas relief unless petitioner can also allege that an independent constitutional violation occurred in the underlying criminal proceedings or that the process under which he was convicted offends some principle of justice so rooted in tradition and conscience as to be ranked as fundamental.

31. *Teague*, 489 U.S. at 313; *see also* Friedman, *supra* note 4, at 824 (opining that Court unlikely to expand criminal constitutional rights). The Court exacerbates the problem through its insistence on applying the fairness-and-accuracy test in the capital sentencing context as well as in review of the conviction, although the accuracy standard is notably unsuited to review of death sentences, which rest on "moral judgments about the defendant's culpability." *Saffle*, 494 U.S. at 508-14 (Brennan, J., dissenting); Patchell, *supra* note 23, at 974-77.

32. *See* Warren E. Burger, *Annual Report to the American Bar Association*, 67 A.B.A. J. 290, 293 (1981); Orrin G. Hatch, *The Importance of Habeas Corpus Reform*, 14 CRIM. JUST. J. 149, 161 (1992).

33. *See* Hatch, *supra* note 32, at 161; *see also* Minow & Spelman, *supra* note 15, at 51 (importance of judge taking perspective of all parties into account before reaching a decision).

34. *E.g.*, Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE WES. RES. L. REV. 748, 790 (1987).

35. *Teague*, 489 U.S. at 310; Butler v. McKellar, 494 U.S. 407, 415 (1990). Of course courts may participate in the rare instance where a new rule falls within one of the two *Teague* exceptions.

to a similar assumption in his remarks.[36] This assumption is seriously flawed and may even run afoul of Article III.

It is common knowledge that the *Teague* cases are a disaster for the federal habeas courts in their role as the articulators of legal norms. The courts are reduced to what Judge Posner once called "potted plants."[37] The federal habeas courts' sole job seems to be ensuring that state courts do not deviate from announced Supreme Court precedent. The assumption is that this restricted role is not so bad so long as the lower courts' case-deciding function is unaffected.[38] This assumption stems from the theme touched on earlier: Deciding cases is the courts' legitimate work; and it can be performed by mechanical application of precedent. Articulating norms is unpredictable, fraught with perilous discretion, and thus somehow unsavory.[39] It can be cordoned off without losing much of value.

The distinction between the courts' two functions—case deciding and norm articulating—runs throughout jurisdictional doctrine.[40] Yet it is misleading to describe two neatly severable categories. The two functions are intertwined. In order to decide cases, courts must articulate norms which guide future courts.[41] Conversely, when courts articulate norms, they must do so in actual cases so that they have sufficient concrete facts and adversarial arguments to inform their decisions.[42]

The difficulties inherent in distinguishing the two functions riddle the law of federal courts, as, for example, in the standing context. When the Court, in *Warth v. Seldin*,[43] *United States v. Richardson*,[44] and *Lujan v. Defenders of Wildlife*,[45] insufficiently values the lower federal courts' norm-articulation function, it thereby adopts a highly restrictive view of

36. Patrick E. Higginbotham, *Notes on* Teague, 66 S. CAL. L. REV. 2433, 2450-51 (1993).

37. Richard A. Posner, *What Am I, A Potted Plant?*, THE NEW REPUBLIC, Sept. 28, 1987, at 23. I also like Minow and Spelman's phrase "computers in robes." Minow & Spelman, *supra* note 14, at 74.

38. Higginbotham, *supra* note 36, at 2450-51.

39. It has other baggage as well. It is thought to be undemocratic, and, in the habeas context, contrary to the principles of federalism. *See* Wright v. West, 112 S. Ct. 2482, 2491 (1992); Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 301-04 (1990).

40. *See generally* Bandes, *supra* note 39.

41. *Id.* at 289-92.

42. *Id.*

43. 422 U.S. 490 (1975).

44. 418 U.S. 166 (1974).

45. 112 S. Ct. 2130 (1992).

their case-deciding function as well; it blinds itself to whole categories of plaintiffs with public law (norm-creating) interests.[46]

Likewise, the damage *Teague* does to the habeas courts' norm-articulation function inevitably compromises their case-deciding function as well. The lower federal courts may no longer provide justice even in the case before them if it means making "new law." The courts are in fact precluded from using the normal common law tools to decide cases before them or to set precedents for the future.

The impairment of lower federal courts' norm-articulation and case-deciding functions raises Article III problems.[47] *Teague* goes directly to *how* the federal courts may decide particular cases. The decision tells the lower court that it may decide the case, may deny the writ, and thereby uphold the conviction and the sentence, but may not reach certain constitutional conclusions. At the same time, *Teague* does not bar the court from reaching constitutional conclusions based on new law if the result is to *uphold* the conviction or sentence.[48] Put another way, *Teague* may force a court to place its imprimatur on a conviction it might otherwise hold unconstitutional, because it denies the court the ability to determine its constitutionality. *Teague* does not withhold jurisdiction from a case or a category of cases; it instead interferes with the court's interpretive

46. In these public interest cases, the Court refuses to accept that what it would call ideological interests, as opposed to material interests, can be the predicate for an injury-in-fact sufficient to satisfy Article III. This insulates broad categories of important cases from judicial review. For a much fuller discussion on this topic, see Bandes, *supra* note 39, at 276-79.

47. Despite the impressive body of scholarship on *Teague*, very little has been written on this point. My fellow commentator, Dan Meltzer, in his insightful article on retroactivity, briefly expresses doubt that *Teague* raises constitutional concerns. Fallon & Meltzer, *supra* note 23, at 1799-1804. Patchell suggests that *Teague* violates the Article III rule against advisory opinions, because it forces courts to decide whether a rule is new before they can reach a decision on the merits, thus forcing them to render an abstract ruling with no concrete application. Patchell, *supra* note 23, at 1005.

48. *See* Lockhart v. Fretwell, 113 S. Ct. 838 (1993).

function in the cases before it.[49] In *Marbury v. Madison*'s language *Teague* bars the court from its emphatic duty "to say what the law is."[50]

It is important to understand that this interference with the courts' function is a one-way rachet—it can lead only to the diminishment of rights.[51] This brings me to my final point: Ultimately, the jurisdictional analysis of *Teague* makes sense only in the larger context of its jurisprudential and political assumptions.

III. *TEAGUE*'S JURISPRUDENCE: MECHANICAL REASON AND THE DENIAL OF RESPONSIBILITY

Teague can be fully understood only as part of the current Court's relentless campaign against habeas corpus and the constitutional protections underlying it, particularly in capital cases.[52] *Teague* plays an important role in this campaign by ensuring that in most state criminal prosecutions, the Supreme Court will be the only federal court to determine the scope of those protections.[53] The Court thinly disguises its hostility and impatience toward habeas claims in the language of formalism and inexorable reason: The Court seeks to present its value choices as value-free.

---

49. Assuming that the *Teague* line of cases is judicial interpretation of the habeas statute, rather than illegitimate common law, the *Teague* limitation can be evaluated as a congressional limit on federal court jurisdiction. In this light, it arguably violates United States v. Klein, 80 U.S. (13 Wall.) 128 (1872). The precise holding in *Klein* is controversial, but it is common ground that the decision places limits on the ability of Congress to use its jurisdictional powers to regulate the decisions of the federal courts. *See* Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 WIS. L. REV. 1189, 1222. In this regard *Teague* arguably grants a conditional jurisdiction to the lower federal courts: It permits them to decide the case, but prohibits full use of the Constitution in the decision-making process. Furthermore, because *Teague* bars the courts from making new law only when it benefits the petitioner, but not when it benefits the government, *Fretwell*, 113 S. Ct. at 844, it may also violate the proviso that Congress may not prescribe a rule of decision in a manner that requires the courts to decide a controversy in the government's favor. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 404 (1980). Whether or not *Teague* violates the letter of *Klein*, it raises serious Article III problems akin to those in *Klein*. Even if one rejects my initial assumption and classifies *Teague* as judicially rather than congressionally inflicted, the problem remains that it offends the basic principle we attribute to Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), that courts cannot decide cases inconsistently with constitutional limitations. *See also* Yakus v. United States, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting) (affirming *Marbury* principle).

50. *Marbury*, 5 U.S. (1 Cranch) at 177.

51. This one-sidedness has been made explicit in *Fretwell, supra* note 19.

52. *See, e.g.*, Sawyer v. Whitley, 112 S. Ct. 2514, 2518 (1992). See generally the comments of my fellow commentator Larry Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331 (1993). *See also* Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225, 240 (1992) (powerfully describing the shocking judicial conduct that led to Harris' execution).

53. *See* Althouse, *supra* note 18, at 949.

Teague shares its approach with cases like *Michael H. v. Gerald D.*[54] and *Bowers v. Hardwick*,[55] which choose to describe rights as narrowly as possible. In *Michael H.* Justice Scalia opted for defining rights at the most specific level supported by historical tradition.[56] Although his articulated purpose is to free judges from making value judgments, his choice of level of abstraction is itself value-laden and serves to stunt the evolution of rights.[57] Likewise, *Teague* makes a value choice in its decision to treat each extension of case law as a narrow, isolated holding, rather than more broadly as a point on a continuum animated by underlying values. *Teague* is billed as a value-neutral means of correcting a retroactivity problem.[58] Instead *Teague* deliberately chooses certain interpretive principles to achieve specific goals, such as the constriction of habeas corpus and the underlying rights it seeks to vindicate.

To determine whether the ruling sought by a given petitioner qualifies as a new rule, the court must characterize the existing precedents and determine whether deviations from those precedents are significant. Although *Teague* presents this exercise as foolproof and mechanical,[59] the ability to characterize goes to the heart of the judicial role: "the capacity to know what differences make a difference."[60]

Justice Kennedy's decision in *Saffle v. Parks*[61] illustrates how the threshold *Teague* decision is permeated by judicial discretion and judicial values. Robyn Leroy Parks challenged his death sentence on the ground that the sentencing jury was wrongly instructed to avoid any influence of sympathy, a violation of the Eighth Amendment. The precedents on which he relied, *Lockett v. Ohio*[62] and *Eddings v. Oklahoma*,[63] held that the capital sentencing jury could not be precluded from considering any

54. 491 U.S. 110 (1989).

55. 478 U.S. 186 (1986).

56. *Michael H.*, 491 U.S. at 122-24. *But see* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 n.7 (1992) (interpreting right to just compensation at a much broader level of generality).

57. For a fuller discussion of the similarities between *Teague*, *Bowers*, and *Michael H.*, see 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 (1992). *See also* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990) (selection of level of generality inevitably involves value choices).

58. *Teague*, 489 U.S. at 316.

59. *See, e.g.*, Saffle v. Parks, 494 U.S. 484, 490 (1990) ("there is a simple and logical difference. . . .").

60. Minow & Spelman, *supra* note 14, at 54.

61. 494 U.S. at 484.

62. 438 U.S. 586 (1978).

63. 455 U.S. 104 (1982).

relevant mitigating evidence. The Court held that these cases did not speak directly to the issue in *Saffle*, which it characterized as not about "*what* mitigating evidence the jury must be permitted to consider in making its sentencing decision, but . . . *how* it must consider the mitigating evidence."[64] That is, the jury was not precluded from hearing the evidence, just "guided" in its consideration of it.[65]

The first way in which the majority ensured its desired outcome was to characterize the issue narrowly and selectively. Justice Kennedy claimed that Parks' argument was "that jurors be allowed to base the sentencing decision upon the sympathy they feel for the defendant after hearing his mitigating evidence."[66] As Justice Brennan countered in dissent, the actual argument was that "a jury may not be prohibited from considering and giving effect to all relevant mitigating evidence when deciding whether to impose the death penalty."[67] The majority also ensured its outcome through the differences it found significant and the similarities it did not find significant between precedent and the instant case. The majority focused on the nearly incomprehensible difference between the type of evidence the jury may consider and the way the jury may consider it[68] and ignored the crucial similarity that all three cases shared: the danger that the jury would not properly consider mitigating evidence.

Having thus decided that Parks was requesting a new rule, the Court considered whether it could nevertheless apply this new rule under the second *Teague* exception:[69] that failure to do so would interfere with the fairness and accuracy of the verdict (or, in this case, the sentence).[70] In this part of the opinion, the Court's hostility toward the underlying Eighth Amendment claim became explicit. Justice Kennedy saw no fairness or accuracy problem with the improper instruction. Indeed, he found the very idea of allowing jurors to give any weight to natural sympathy threatening to fairness and accuracy. Justice Kennedy thought

64. 494 U.S. at 490.

65. *Id.*

66. *Id.* at 489.

67. *Id.* at 499-500 (Brennan, J., dissenting).

68. This difference is incomprehensible partly because of the characterization problem. As Justice Brennan pointed out, the thrust of petitioner's argument *was* that the jury would think itself precluded from considering the evidence at all. *Id.*

69. The first *Teague* exception permits the retroactive application of a new rule if that rule places a class of private conduct beyond the power of the state to prohibit, *id.* at 494 (citing *Teague*, 489 U.S. at 311), or addresses a substantive categorical guarantee accorded by the Constitution, *id.* (citing Penry v. Lynaugh, 492 U.S. 302, 329-30).

70. *See supra* note 31.

giving any weight to natural sympathy allowed the sentence to turn on whether the defendant could strike an emotional chord in the jury.[71] Yet, despite his antipathy toward sympathy, the whole Eighth Amendment notion of mitigation is premised on the relevance of the sentencing jury's mercy and compassion to the decision of whether to impose the death penalty.[72] In short, Justice Kennedy's use of *Teague* to restrict habeas corpus was a direct result of his narrow view of Eighth Amendment principles.

The Court's attitudes toward mercy, sympathy, and compassion provide a revealing subtext for *Teague*. Mercy and compassion may discomfit some jurists because they are so emotional, so unquantifiable, so clearly value-laden. Far from adding to the court's information, these sentiments are thought to threaten fairness and accuracy.[73] *Teague* must appear to be at the opposite pole: the embodiment of pure rationality. The judge need do little more than take a head count of whether certain other courts agree with a precedent; this count will tell the judge how to decide the case. *Teague* is the neutral principle concept taken to its extreme: jurisdiction by rank and numbers.

But the goal of pure rationality is both misguided and unattainable. Neither judges nor juries are potted plants, for which we can be thankful. Choice and emotion guide their decisions; the only questions are *which* choices and *which* emotions.[74] In the criminal context, the Rehnquist Court reserves its compassion for crime victims,[75] its sympathy for the frustrated state court judge.[76] The emotions which drive the *Teague*

71. *Saffle*, 494 U.S. at 493.

72. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 304 (1976); Gregg v. Georgia, 428 U.S. 153, 182 (1976).

73. Listen to Justice Scalia's language in Penry v. Lynaugh, 492 U.S. 302, 359 (1988) (Scalia, J., concurring in part and dissenting in part), as he objects to the Court's holding that the jury must be instructed that it can consider mitigating evidence of the petitioner's mental retardation and abused background:

> The Court seeks to dignify this by calling it a process that calls for a "reasoned moral response" . . . but reason has nothing to do with it . . . It is an unguided, emotional "moral response" that the Court demands to be allowed—an outpouring of personal reaction to all the circumstances of a defendant's life and personality, an unfocused sympathy.

See also Justice Thomas' concurrence in Graham v. Collins, 113 S. Ct. 892, 903 (1993) (Thomas, J., concurring) (emphasizing need for national sentencing standards).

74. *See* Posner, *supra* note 37. *See generally* William J. Brennan Jr., *Reason, Passion and "The Progress of the Law"*, 10 CARDOZO L. REV. 3 (1988) (arguing that jurisprudence is not devoid of value choices); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987) (arguing that empathy and legality are not mutually exclusive); Minow & Spelman, *supra* note 15; Benjamin Zipursky, DeShaney *and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101 (1990) (arguing that compassion has a proper role in jurisprudence).

75. *See, e.g.*, Payne v. Tennessee, 111 S. Ct. 2397 (1991).

76. Althouse, *supra* note 18, at 958.

cases include the "visceral temptation to help prosecute the criminal"[77] and hostility and impatience toward the petitioner's claims.

Teague is a case study in the dangers of the logical extreme. The Court reached the logical extreme by forgetting about humanity and fallibility and by believing that logic exists in a vacuum. At the logical extreme reason is divorced from empathy and the sense of human dignity. Unfortunately, the logical extreme fails to produce logical results. For a case whose articulated purpose was to promote fairness and even-handed justice, *Teague* has served neither goal. And I hope, to paraphrase Raymond Carver,[78] that fairness and justice are what we talk about when we talk about the role of the federal courts.

77. Brennan, *supra* note 74, at 11.

78. RAYMOND CARVER, WHAT WE TALK ABOUT WHEN WE TALK ABOUT LOVE (1989).