Activism as Restraint: Lessons from Criminal Procedure

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Activism As Restraint: Lessons from Criminal Procedure

Stephen F. Smith*

I. Introduction

Much has been made in recent years about the puzzling chasm that separates constitutional law, on the one hand, and criminal procedure, on the other—what one leading commentator terms, accurately enough, a "dissociation of legal sensibility." All too often the Supreme Court has approached criminal procedure questions without regard to considerations that are widely recognized as relevant to constitutional interpretation, such as textual meaning, original intention, and historical practice. Rather than trouble itself with such considerations, the debate in criminal procedure tends to focus exclusively on results—specifically, on the perceived wisdom or fairness of all sorts of procedural innovations in the criminal justice system. This is very odd because, thanks to the Warren Court, American criminal procedure is constitutional law, and remains so even after thirty years of conservative revisionism.

By now it is common knowledge that almost the entire field of criminal procedure, formerly within the more or less exclusive province of the several States, has been constitutionalized. This was the famous—or, if you prefer, infamous—"Criminal Procedure Revolution." Now it is only slightly exaggerated to say that all of the rules that really count concerning the process of investigating and prosecuting crimes come from the pages of the

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3. See Dripps, supra note 1, at 1560 (arguing that the Court decides criminal procedure cases based on "fundamental fairness[]" qualified by interest-balancing" and that this approach "has generated an unprincipled and inconsistent body of law").
I readily add my voice to the growing chorus that "the Constitution needs to be put back into criminal procedure."5

One key benefit of bridging the artificial divide between constitutional law and criminal procedure would be to force courts and scholars to take seriously the normative implications of an expansive role for the federal judiciary in criminal procedure. After all, one of the dominant themes of the constitutional law literature over the last two generations has been coming to grips with the vexing "counter-majoritarian difficulty," Alexander Bickel's famous, if somewhat dated, phrase describing the tension that arises in a democracy when an unaccountable judiciary sets aside actions of the politically accountable branches of government.7 To be sure, the bulk of the scholarly debate has been aimed at minimizing or explaining away the counter-majoritarian difficulty and therefore justifying Supreme Court adventurism in pursuit of ends that often could not readily be achieved through the legislative process.8 Still, the relevant point here is that constitutional law theorists recognize on some level that broad exercises of judicial power require special justification in a representative democracy such as ours.

This recognition has been conspicuously absent in criminal procedure, where broad exercises of federal judicial power are largely taken for granted. In Professor Akhil Amar's memorable phrasing, both courts and many criminal procedure scholars have treated the Constitution not as a binding document with the force of law, but rather as a "ventriloquist's dummy that can be made to say anything the puppeteer likes."9 A poignant example can be found in the Sixth Amendment right to trial by jury.

5. This has bookstore implications for students: all first-year law students are required to purchase a copy of the Federal Rules of Civil Procedure, but, as far as I know, no teacher of Criminal Procedure mandates the purchase of the corresponding criminal rules. The real pedagogical use of the Federal Rules of Criminal Procedure, then, would seem to be to break the monotony of reading an endless stream of Supreme Court opinions and casebook notes.

6. Dripps, supra note 1, at 1561; see also, e.g., Amar, supra note 2, at 1132; William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 YALE L.J. 1, 3-4 & n.1 (1997). Putting the Constitution back into criminal procedure would require deconstitutionalizing certain areas of criminal procedure and expanding constitutional protection in others because prior constitutional decisions, both expanding and contracting constitutional rights, grounded on fairness concerns and interest-balancing, might not withstand rigorous constitutional analysis.

7. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962); see generally Suzanna Sherry, Too Clever by Half: The Problem with Novelty in Constitutional Law, 95 NW. U. L. REV. 921, 921 (2001) ("[T]he 'counter-majoritarian difficulty' remains—some forty years after its christening—a central theme in constitutional scholarship. Indeed, one might say that reconciling judicial review and democratic institutions is the goal of almost every major constitutional scholar writing today." (footnote omitted)).

8. See generally Mark Tushnet, Constitutional Interpretation, Character, and Experience, 72 B.U. L. REV. 747, 747 (1992) (noting that modern liberal constitutional theory had its genesis in "the need to defend the Warren Court's accomplishments against intellectual assaults first from the proponents of 'legal process' theory and then from political conservatives").

9. Amar, supra note 2, at 1130.
Like all the other rights conferred by the Sixth Amendment, the right to trial by jury applies "[i]n all criminal prosecutions." A textualist would readily infer that these rights should be available in every criminal prosecution—that, in other words, the phrase "all criminal prosecutions" means precisely what it says. This inference would be all the more compelling given that Article III unequivocally mandates the use of juries in all federal criminal trials. Undaunted by text, however, the Supreme Court has charted another course.

In *Duncan v. Louisiana*, the Warren Court sugar-coated the bitter pill of incorporation of the jury-trial provision against the states by concluding that states need not provide juries in prosecutions for "petty" crimes. The supposedly more textually oriented Rehnquist Court magnified this error by extending it to federal prosecutions, in which the universality of juries in criminal cases is even more clearly established by the text of Article III. In neither instance did the Court even try to reconcile its categorical exclusion of petty crimes from the scope of the right to trial by jury with the constitutional text. The Court's "ventriloquist's dummy" thus was made to speak in a manner contrary to the plain text of the Constitution. This approach—taking liberties with the Constitution in the name of what struck the Justices as good policy—has been characteristic of many criminal procedure rulings, particularly during the Warren Court's "Rights Revolution."

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10. See U.S. Const. amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.....").

11. See U.S. Const. art. III, § 2, cl. 3 ("The trial of all Crimes, except in Cases of Impeachment, shall be by Jury....."). Seen in this light, juries are not merely a matter of a defendant's "right"; they are also a structural check against arbitrary exercises of power by trial judges. See generally Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 83-88 (1998).


13. Id. at 159. "Petty crimes" are generally defined as crimes for which six months or less imprisonment is authorized. See Blanton v. City of North Las Vegas, 489 U.S. 538, 542-43 (1989).

14. See Lewis v. United States, 518 U.S. 322 (1996) (holding that no right to jury trial exists in federal prosecutions for petty crimes despite U.S. Const. art. III, § 2, cl. 3 (quoted supra note 11)). Lewis, in fact, went considerably beyond *Duncan* in limiting the right to trial by jury. *Lewis* held that prosecutors can avoid jury trials simply by "stacking" against the defendant multiple crimes that, if charged separately, would be considered petty offenses but in combination carry the possibility of consecutive jail sentences in excess of the six-month threshold for serious crimes. Id. at 330. Justice Anthony Kennedy, though concurring on other grounds, described the "no aggregation" rule endorsed in *Lewis* as "one of the most serious inroads on the right to jury trial in the Court's history." Id. at 331 (Kennedy, J., concurring).

15. For all the talk about "indeterminacy" in constitutional law, there is broad consensus among constitutional theorists that constitutional text is binding on judges. See generally Geoffrey R. Stone et al., *Constitutional Law* 691-92 (1986). Against this backdrop, *Duncan* and *Lewis* show just how far removed criminal procedure often is from conventional constitutional interpretation.

16. See, e.g., Amar, supra note 2, at 1125 ("On a lawyerly level, some of the Warren Court's most important criminal procedure pronouncements lacked firm grounding in constitutional text and structure."); Stuntz, *supra* note 6, at 11 (noting that the Warren Court produced "a great many constitutional rules, most of which are highly contestable").
In the case of the Warren Court, however, it was not to last for very long. Richard M. Nixon relentlessly attacked the Court’s criminal procedure decisions during his 1968 campaign for president and pledged to appoint Justices who would not “handcuff” the police.\(^{17}\) Nixon was swept into the White House, and he and his Republican successors named the next eleven Justices to the Supreme Court, including Warren E. Burger (to replace Warren) and William H. Rehnquist (to replace Burger) as Chief Justices in 1969 and 1986 respectively.\(^{18}\) Over the next three decades, the Burger and Rehnquist Courts fundamentally reworked constitutional criminal procedure through a gradual yet highly effective process of limiting and chipping away at, and occasionally overruling, Warren-era precedents.

The alarm went out from the academy: “Many commentators—usually admirers of the Warren Court’s handiwork—have lamented over the years about what they view as a wholesale repudiation of the Warren Court’s work; their comments are full of words like ‘retreat,’ ‘decline,’ and ‘counter-revolution.’”\(^{19}\) Critics of the “Counterrevolution” assailed the Court for “judicial activism,”\(^{20}\) a charge that once formed the rallying cry of Warren’s critics. More interestingly, even supporters of the Rehnquist Court began to accept the “activist” label—yes, the Court was activist, but it was doing the right thing.\(^{21}\) All of this makes criminal procedure an interesting context in which to address conservative judicial activism.

The remainder of this Article is organized as follows. In Part II, I use the example of habeas corpus to illustrate how key Warren Court decisions in

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18. There were, of course, some occasional miscues; Justices Harry A. Blackmun, John Paul Stevens, and David H. Souter became reliably liberal voices on the Court. Even so, the unprecedented string of appointments by Republican presidents successfully shifted the balance of power in favor of the conservative wing of the Court in criminal procedure.


criminal procedure fared during the Counterrevolution waged by the Burger and Rehnquist Courts.\textsuperscript{22} In Parts III and IV, I turn to a normative analysis of the conservative Court’s reworking of constitutional criminal procedure. After dealing in Part III with the superficially easy, but on reflection quite difficult, issue of defining judicial activism, I advance a limited defense of judicial activism in Part IV. My basic claim is that even if the Counterrevolution is viewed as activist—as I think much of it must be—it nevertheless was normatively defensible as a necessary condition, in a “second-best” world, of reaching an equilibrium closer to the judicial restraint model than would be possible if activism were only a one-way ratchet.

Though my thesis supplies a justification for the Burger and Rehnquist Court’s basic approach to legal change, it would be a mistake to conclude that my argument is simply that activism is an acceptable course for conservative Justices. To me, “reactivism”—activism in response to, and in amelioration of, earlier activism—would be equally justified as a response by liberal Justices to conservative activism. Even though reactivism can be used to move the law back in the direction it would have taken had the first episode of activism been characterized instead by restraint, reactivism is not necessarily a conservative construct.

Properly understood, “restraint” may be either liberal or conservative depending on the type of policies the political branches are pursuing at any given time. During the New Deal, for example, judicial restraint would have favored politically liberal ends (such as the growth of the modern welfare state) because that was the orientation of reform-minded national and state legislatures at the time. By contrast, where the political branches are pursuing conservative initiatives, as was generally the case during the last two decades (think of limiting welfare and habeas corpus and bringing back the federal death penalty as examples), judicial restraint would favor politically conservative ends. Consequently, even though Republican presidents from the time of Nixon forward have understandably used restraint as a kind of code-word for a conservative judicial philosophy, there is no inherent political bias in the concept of judicial restraint or of reactivism. The Counterrevolution in criminal procedure brings these points sharply into focus. The Supreme Court over the last few decades has unquestionably been conservative on criminal procedure matters. At the same time, it has been quite activist.

\textsuperscript{22} To avoid potential confusion, I should note that I follow the usual convention of using the unmodified term “habeas corpus” to refer to the writ of \textit{habeas corpus ad subjiciendum}—the vehicle by which the legality of detention is tested. At common law, there were other forms of habeas corpus that served other purposes not relevant here. \textit{See} RICHARD H. FALLON, JR. \textit{ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM} 1337 n.1 (4th ed. 1996) (describing the various forms of the writ of habeas corpus enumerated by Blackstone).
II. Habeas Corpus from Warren to Rehnquist

A detailed survey of the key elements of the Warren Court's criminal procedure decisions and how they held up during the Rehnquist Court is beyond the scope of this Article. What I propose to do instead is to use habeas corpus—the historic vehicle for obtaining federal-court review of constitutional challenges to state-court convictions—as a case study in how the Burger and Rehnquist Courts responded to Warren Court criminal procedure precedents they believed to be erroneous. It might seem odd to start with habeas corpus, which is at least superficially a statutory remedy, as a case study in constitutional criminal procedure, so I should defend my approach briefly before turning to habeas.

At the outset, it would be a mistake to dismiss habeas corpus jurisprudence as merely an implementation of legislative policy choices. Habeas relief, in point of fact, is not a statutory remedy at all, if by "statutory" one means that the statute itself, as opposed to court decisions, is the source of the applicable rules of decision. Historically, the Supreme Court, not Congress, has created the myriad rules and limitations governing the availability of habeas corpus. Until recently, the main hard-and-fast rule on the issue that originated with Congress was that habeas relief could not be granted on the basis of violations of state law. Other than this limitation, the only guidance Congress traditionally gave the courts was that they should exercise their habeas jurisdiction "as law and justice require."

23. For such a detailed survey dealing with the criminal-investigation side of constitutional criminal procedure, see Steiker, supra note 4, at 2466–532. Professor Steiker's basic insight is that the Burger and Rehnquist Courts fundamentally reworked criminal procedure without mass overrulings. In her words:

The proponents and debunkers of the "counter-revolution" hypothesis turn out to both be right: the Burger and Rehnquist Courts have accepted to a significant extent the Warren Court's definition of constitutional "rights" while waging counter-revolutionary war against the Warren Court's constitutional "remedies" of evidentiary exclusion and its federal review and reversal of convictions.

Id. at 2470.

24. At its inception in England, habeas corpus was one of the great common-law writs. By the mid-fourteenth century, it had developed into an important but limited vehicle for challenging detention by the Crown that was contrary to the "law of the land" and that was achieved without what would later become known as "due process of law." See generally WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 2327 (1980) (discussing the expansion of the writ of habeas corpus in the mid-fourteenth century). It has been settled from the early years of the Republic that the power to issue writs of habeas corpus, though referenced in the Constitution, see U.S. CONST. art. I, § 9, cl. 2, exists in the federal courts only where authorized by Congress. See Ex parte Bollman, 8 U.S. (3 Cranch) 75, 93–94 (1807) (treating as a preliminary question "whether by any statute, compatible with the Constitution of the United States, the power to award a writ of habeas corpus, ... has been given to this Court). Even so, in cases where habeas relief has been legislatively authorized, the substantive law of habeas corpus could be determined by reference to common-law principles. Id.

25. See 28 U.S.C. § 2254(a) (1994) (providing that the writ can issue "only on the ground that [the prisoner] ... is in custody in violation of the Constitution or laws or treaties of the United States").

26. Id. § 2243. The one critically important exception to this historical trend is the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), tit. I, Pub. L. No. 104-132, 110 Stat. 1214
As a result, it was the Court that, in the first instance, traditionally created rules governing when the writ of habeas corpus could issue, with Congress occasionally codifying certain court-developed rules by statute. An illustration is the familiar rule that a habeas petitioner must generally exhaust available state-court remedies before proceeding in federal court: the Court created the exhaustion requirement and Congress later codified it. The fact that habeas corpus rules traditionally have been judicially created is significant for present purposes because it undermines any suggestion that developments in habeas corpus are not representative of court-driven elements of constitutional criminal procedure. It would be odd indeed if habeas corpus—the remedy for constitutional violations—were to have evolved independently of the evolution of the underlying constitutional rights enforced through habeas given the necessary logical connection between rights and remedies in law. Habeas corpus, therefore, is properly viewed as a part—indeed, a critical part—of constitutional criminal procedure.

The importance of habeas corpus in constitutional criminal procedure is shown by the fact, made evident below, that both the Warren Court and the Burger and Rehnquist Courts addressed themselves early on to habeas corpus reform. For the Warren Court, all of the constitutional rights in the world would count for little unless state-court prisoners (and particularly the black ones, who were especially poorly treated in Southern courts) could get out of state court and seek redress in federal court—specifically, in the lower federal courts. Habeas corpus was also of central importance in the Counterrevolution. Slowing the growth in the rights of criminal defendants, or even cutting back the scope of such rights, could not effectively swing the pendulum back in the direction of law enforcement if death-row inmates

(codified in scattered sections of 28 U.S.C.), in which a bipartisan Congress, acting in the wake of the Oklahoma City bombing, went far beyond even the Rehnquist Court in restricting the scope of habeas corpus. Among other things, the AEDPA adopts a strict time limit for filing habeas proceedings, see 28 U.S.C. § 2244(d) (Supp. V 1999), a “reasonableness” standard requiring deference to state courts’ resolution of federal constitutional issues, see id. § 2254(d)(1) (Supp. V 1999), and restrictive standards governing relitigation in successive habeas cases, see id. § 2244(b) (Supp. V 1999).

27. See 28 U.S.C. § 2254(b)(1) (Supp. V 1999) (codifying exhaustion requirement of Ex parte Hawk, 321 U.S. 114, 116–17 (1944), as a prerequisite to issuance of the writ); see generally DUKER, supra note 24, at 203–04 (detailing the development of the habeas exhaustion doctrine).


29. For a similar view, see Joseph L. Hoffman & William J. Stuntz, Habeas After the Revolution, 1993 SUP. CT. REV. 65, 68.

30. State prisoners could seek certiorari in the Supreme Court of the United States on direct review of their convictions, but docket constraints rendered the Court institutionally incapable of effectively policing state criminal trials without assistance from the lower federal courts. The advantage of habeas corpus proceedings as a vehicle for policing state trials is that they are filed in U.S. District Court and are followed by appeals of right to the regional courts of appeals and the possibility of certiorari in the Supreme Court. As such, habeas corpus allows the lower federal courts to perform the review functions that docket constraints prevent the Supreme Court from performing on certiorari directly from the state-court systems.
could avoid execution with protracted habeas proceedings or if prisoners serving long sentences could file repeated habeas proceedings years after their convictions to take advantage of intervening changes in constitutional law. For both Courts, therefore, habeas corpus reform was integral to the successful implementation of their very different constitutional visions of criminal justice and of federal-state court relations in the administration of the criminal law.

There is another reason for viewing habeas as indicative of developments in other areas of constitutional criminal procedure. In a real sense, the various arguments over the merits of individual criminal procedure decisions were all reflected in, and swamped by, the larger debate over the scope and purposes of federal habeas corpus. In other words, the habeas debate—namely, whether federal habeas relief should serve a broad or more limited role in policing the administration of justice in state criminal courts—also factored into the debate that took place when it came, for example, to police interrogation in *Miranda v. Arizona* or the exclusionary rule in *Mapp v. Ohio*. In each instance, the basic issue for the Supreme Court was whether institutions of state government could be trusted to define and remedy federal constitutional violations and to ensure fair treatment of criminal defendants in general and especially racial minorities. If not—and, at every turn, the Warren Court found states untrustworthy—then expansive federal judicial oversight would be imposed so that federal courts could perform the constitutional review that states could not be trusted to perform. For these reasons, habeas corpus is a fitting candidate for a case study in the Revolution/Counterrevolution dialectic in constitutional criminal procedure.

Turning, then, to habeas corpus, the basic lesson is that there, as elsewhere in constitutional criminal procedure, the Burger and Rehnquist Courts did indeed work a counterrevolution in the doctrinal rules they inherited from the Warren Court. To be sure, the scope of habeas corpus remains broader than it was before the time of the Warren Court, just as criminal procedure as a whole remains almost entirely constitutionalized. In

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31. The habeas debate has consisted of clashes between what has been described as "Federalist" and "Nationalist" ideologies. See generally Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1151-63 (1988). In criminal procedure, the Federalists emphasize the fairness, competence, and integrity of state courts as enforcers of federal constitutional rights and therefore advocate giving deference and substantial measures of finality to state courts decisions. Nationalists, however, believe that the state courts are decidedly inferior to federal courts in the enforcement of federal constitutional norms and advocate aggressive review of state court criminal convictions. See Hoffman & Stuntz, *supra* note 29, at 70-71. As will become evident below, Nationalism drove the Warren Court's jurisprudence, and Federalism was the guiding principle for the Burger and Rehnquist Courts.


both respects, the triumph of the Warren Court has been an enduring one. Still, the victory is far less complete—and, some might say, far less meaningful—after three decades of Counterrevolution. In the case of habeas corpus, the doors to the federal courthouse, though still open, are only barely so: the vast majority of habeas petitions are essentially doomed to failure before they even reach the federal courthouse. As with habeas, constitutional criminal procedure as a whole looks very different today than it did forty years ago.

A. The Warren Court Revolution

The American writ of habeas corpus, made available for the first time in 1867 to prisoners challenging the constitutionality of state-court convictions, was originally quite limited in scope. The writ was available only to correct the small category of constitutional infirmities that were regarded as in some sense "jurisdictional" in nature. Unless the claimed error of federal law deprived the state court of jurisdiction, the judgment of conviction would preclude a collateral attack in a federal habeas proceeding.  

34. The Judiciary Act of 1789, ch. 20, §14, 1 Stat. 73, 81–82, first authorized the federal courts to issue writs of habeas corpus to correct unlawful deprivations of liberty, but that authorization was limited to federal prisoners. See Ex parte Bellman, 8 U.S. (4 Cranch) 75, 99 (1807) (construing §14 of the Judiciary Act of 1789 as authorizing habeas corpus for federal prisoners only). Two later pieces of legislation, enacted in response to two famous incidents in the mid-nineteenth century, authorized federal courts to order the release of prisoners held under state law where the prisoners were foreign nationals held for acts ordered by foreign governments or U.S. citizens held for actions authorized by federal law. See DUKER, supra note 24, at 187–89 (discussing laws passed in 1833 and 1842). These comparatively insignificant expansions of habeas corpus into the state-prisoner realm, which were motivated by a desire to protect federal supremacy in specific areas of unique federal concern (such as foreign relations) as opposed to generalized suspicion or distrust of state courts, were overshadowed in importance by the 1867 legislation. The 1867 law extended habeas corpus to "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." Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.


36. See, e.g., Ex parte Watkins, 28 U.S. (2 Pet.) 193, 203 (1830) ("An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."). True, the Court had applied the jurisdiction limitation somewhat elastically—a good example is Frank v. Magnum, 237 U.S. 309 (1915), in which the Court held that the fact that a trial was conducted in a lynching-mob atmosphere implicated the trial court's jurisdiction. Oddly enough, after overcoming the jurisdictional limitation, the Frank Court then proceeded to deny the habeas petition on the merits, based on the state appellate court's determination that the atmosphere in which the trial was conducted had no effect on the outcome. Id. at 334–38. Despite the elasticity of the Court's conception of "jurisdiction," however, the relevant point is that the Court had traditionally made "some effort, no matter how implausible, to 'kiss the jurisdictional book.'" Barry Friedman, A Tale of Two Habeas, 73 MINN. L. REV. 247, 263 (1988). The only apparent exception is Waley v. Johnston, 316 U.S. 101 (1942) (per curiam), in which the Court seems to have held that it was unnecessary to "kiss the jurisdictional book" if the habeas petitioner's claims could not have been raised in state court. Waley, however, did not
One of the first major undertakings by the Warren Court was to broaden access for state-court prisoners to challenge their convictions in federal court. That this project would be an integral part of the Court’s reform agenda made perfect sense. Episodes like the unconscionable, racist ordeal of the Scottsboro Boys in the Alabama courts made it painfully obvious that Southern courts could not be trusted to try black defendants accused of serious crimes against whites in anything resembling a fair and evenhanded manner. Consequently, the Warren Court sought to transform the “Great Writ” into an effective vehicle for policing the actions of state law enforcement, prosecutors, and judges.

Just two years after firing the opening shot in the Revolution in 1961, the Court took up the issue of habeas corpus. First, a little background is necessary. In Brown v. Allen, decided a few months before Warren became Chief Justice, the Court had taken the important step of lifting the “jurisdiction” limitation on habeas corpus, albeit, curiously, without erode the jurisdiction limitation where claims were raised or could have been raised in state court. See WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 28.3(c), at 1306 (3d ed. 2000).

37. The Scottsboro Boys were nine black youths charged in Alabama with raping two white women alleged to have been prostitutes. Even though the evidence against the defendants was weak—for example, the medical evidence suggested that neither woman had been raped and the women’s testimony conflicted in important ways—the all-white jury convicted the defendants and sentenced all but one of them to death (including one who was too young to be sentenced to death under Alabama law). It was fairly clear at the time, and is now widely accepted as true, that the defendants were almost certainly innocent. Indeed, at a retrial, one of the two alleged rape victims recanted and testified that they had fabricated the allegations of rape, and many newspapers (both in the North and the South) ran articles in the early 1930s contending that the Scottsboro Boys had, in all likelihood, been wrongly convicted. See Michael J. Klarman, The Racial Origins of Modern Criminal Procedure, 99 MICH. L. REV. 48, 64-67 (2000).

38. It is no coincidence that the Warren Court also breathed new life into another previously moribund, Reconstruction-era federal remedy for unconstitutional state action, 12 U.S.C. § 1983, which even today still constitutes the basic vehicle for challenging the constitutionality of state action in federal court. See Monroe v. Pape, 365 U.S. 167 (1963). The culprits, in the Court’s view, were not just local police and prosecutors, but also state judges, who, either due to lack of integrity or independence, could not be trusted faithfully to enforce federal rights, and so an array of broad federal remedies allowing federal judges to enforce those rights directly was the cure. Damages actions under § 1983 would be a vehicle for policing the police in addition to the exclusionary rule whereas habeas corpus would be the means of regulating misconduct by prosecutors and judges.

39. Many commentators identify Mapp v. Ohio, 367 U.S. 643 (1961), as the point at which the Revolution began. JEROLD H. ISRAEL ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION 285 (2000). Professor Israel and his coauthors, however, believe that it may be appropriate to trace the Revolution back to Griffin v. Illinois, 351 U.S. 12 (1956), where a badly splintered Court held that states must furnish trial transcripts for indigents appealing criminal convictions if such transcripts are a legal prerequisite to an appeal. Mapp seems the better choice between the two, both in terms of its temporal proximity to the rest of the Revolution and its intrinsic importance. Griffin, after all, was comparatively insignificant, measured against the obvious importance of Mapp, until it was extended to the right to appellate counsel in Douglas v. California, 372 U.S. 353 (1963), in sweeping terms that seemed to invalidate all wealth-based inequalities in the criminal justice system. Even so, Professor Israel and his coauthors are surely correct that Griffin was the first real indication of the Warren Court’s creativity in criminal procedure and willingness to tackle endemic problems in the criminal justice system, such as indigency and racism.

40. 344 U.S. 443 (1953).
acknowledging what it was doing.\textsuperscript{41} \textit{Brown} had opened the path to federal-court supervision of state criminal investigation and adjudication, but a serious practical obstacle prevented habeas from realizing its full potential as an effective tool for policing the states. It was to this obstacle that the Warren Court turned its attention.

For a variety of reasons in contested criminal cases, perhaps most often lawyer incompetence, viable federal claims are often not raised, and therefore are not adjudicated, in the state courts. This problem is of even greater importance in a system characterized by plea bargaining; by pleading guilty, as the vast majority of defendants do in the United States,\textsuperscript{42} a defendant almost invariably foregoes the opportunity to challenge his conviction on direct appeal.\textsuperscript{43} Would such "procedurally defaulted" claims—that is, federal claims not properly preserved in state court—be cognizable on habeas? Prior law said no; the Warren Court reversed course in 1963 in \textit{Fay v. Noia}.\textsuperscript{44}

In \textit{Fay}, the Court held that procedurally defaulted claims could be adjudicated in the first instance by a federal court sitting in habeas as long as the defendant himself, as opposed to his lawyer, had not consciously decided to "deliberately bypass[]" available state remedies.\textsuperscript{45} The deliberate-bypass standard left little room for procedural defaults because, under certain

\begin{footnotes}
\footnote{41. See generally Friedman, supra note 36, at 264–65 ("The fact that the \textit{Brown} Court did address Brown's claims on the merits, without any attempt to fit them into the jurisdictional framework, signalled a shift in the scope of the writ. \textit{Brown} has been cited frequently for the proposition that habeas lies to correct any constitutional error addressed in state-court proceedings. This represented a shift of tremendous significance, yet the \textit{Brown} Court not only failed to explain the shift but failed even to acknowledge it." (footnote omitted)). For a contrary argument that \textit{Brown} was not as legally significant as the conventional wisdom posits, see Eric M. Freedman, \textit{Brown v. Allen: The Habeas Corpus Revolution That Wasn't}, 51 ALA. L. REV. 1541 (2000).

42. Recent statistics show that more than 90\% of state-court felony convictions nationwide are the result of a guilty plea, as opposed to conviction following a trial. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1995, at 498 tbl.5.47 (1996). Though unknown for much of the history of the common law, the roots of systemic plea bargaining trace back well into the nineteenth century and certainly were deeply implanted in American practice by the time of the Warren Court. See generally John H. Langbein, \textit{Understanding the Short History of Plea Bargaining}, 13 LAW & SOC'Y REV. 261, 261–70 (1979) (discussing various factors that led to significant plea bargaining in nineteenth-century common-law jurisdictions). An important recent treatment of the origins of plea bargaining notes that, by the 1920s, scholars were already "lament[ing] our 'vanishing jury,'" a reference to the widespread use of plea bargaining as a substitute for criminal trials. George Fisher, \textit{Plea Bargaining's Triumph}, 109 YALE L.J. 857, 859 (2000).

43. It is theoretically possible but exceedingly rare for a defendant who has unconditionally pled guilty to file a direct appeal challenging the constitutionality of his conviction or sentence. This makes sense because a defense lawyer who advises entry of an unconditional guilty plea presumably does so in the belief that the sentence reduction or other concession offered in exchange for the guilty plea is advantageous for the defendant. It is only later, after the time for a direct appeal has expired, that a defendant usually has second thoughts about having pled guilty, by which time he will typically have forfeited his right to appellate review.


45. Id. at 439.}
\end{footnotes}
circumstances, even a conscious decision by a defendant not to raise a federal claim might not bar habeas review.\textsuperscript{46} Even where a deliberate bypass had occurred, moreover, a federal court had the discretion to reach the merits of the defaulted claim.\textsuperscript{47}

That same year, in \textit{Townsend v. Sain},\textsuperscript{48} the Warren Court returned to \textit{Brown v. Allen} and the issue of claims that were properly preserved in state court. \textit{Brown} had concluded that federal district courts were required to afford habeas petitioners evidentiary hearings to establish facts necessary to their constitutional claims only where there was a "vital flaw" in the state court's factfinding.\textsuperscript{49} In \textit{Townsend}, the Court rejected that standard as too restrictive, holding that district courts "must grant an evidentiary hearing" to resolve disputed issues of fact if the petitioner had not deliberately bypassed opportunities to develop the necessary factual record in the state courts.\textsuperscript{50}

With these decisions, the path to full, de novo relitigation in the lower federal courts and ultimately on certiorari in the Supreme Court was assured for state-court prisoners. It is difficult to underestimate the considerable doctrinal creativity on the part of the Warren Court that ushered in the modern era of habeas corpus. Prior to the Warren Court, habeas corpus was an extraordinary remedy that permitted federal court intervention only when a state court proceeding was so fundamentally flawed as to render the resulting conviction an "absolute nullity."\textsuperscript{51} The Warren Court was the first in history explicitly to reject that limited conception of habeas, advancing a broad remedial vision for habeas in which the federal courts would serve as the ultimate guardian of the rights of criminal defendants not just in the extraordinary case, but in \textit{every} case where the habeas jurisdiction was invoked. Along with the bold new mission for habeas corpus, came a new perception of the state courts: state courts were either unwilling to enforce, or institutionally incapable of enforcing, federal constitutional rights in a fair and impartial manner, particularly in cases involving minority defendants. These developments not only changed habeas corpus, but also revolutionized the administration of the criminal law in America.

Having thus transformed habeas corpus into a potent federal remedy for state-court prisoners, the Warren Court spent the balance of the Revolution federalizing the "substance," as it were, of criminal procedure. The result was a staggering array of new, judge-made constitutional mandates based on

\begin{itemize}
  \item \textsuperscript{46} In \textit{Fay}, the defendant elected not to appeal to a higher state court in order to avoid the risk that if his life sentence were overturned, he would face the possibility of a death sentence; the Court ruled that no deliberate bypass had occurred. \textit{Id.} at 439–40.
  \item \textsuperscript{47} \textit{Id.} at 438.
  \item \textsuperscript{48} 372 U.S. 293 (1963).
  \item \textsuperscript{49} \textit{Brown v. Allen}, 344 U.S. 443, 506 (1953).
  \item \textsuperscript{50} \textit{Id.} at 312–13 (emphasis added).
  \item \textsuperscript{51} \textit{Ex parte Watkins}, 28 U.S. (3 Pet.) 193, 203 (1830).
\end{itemize}
the Bill of Rights and made applicable to the states, governing permissible practices in all areas of criminal procedure, including search and seizure,\footnote{See, e.g., Katz v. United States, 389 U.S. 347 (1967) (expanding the Fourth Amendment to reach far beyond the confines of real-property law in order to protect broader "privacy" interests); Mapp v. Ohio, 367 U.S. 643 (1961) (extending the Fourth Amendment exclusionary rule to the states).} police interrogation,\footnote{3. See, e.g., United States v. Wade, 388 U.S. 218 (1967) (extending the Sixth Amendment right to counsel to post-indictment suspect line-ups); Miranda v. Arizona, 384 U.S. 436 (1966) (ruling that suspect confessions made while in police custody must be excluded from evidence unless preceded by the now-famous \textit{Miranda} warnings); Massiah v. United States, 377 U.S. 201 (1964) (holding that police cannot deliberately elicit incriminating statements from a defendant, in the absence of his attorney, once formal adversary proceedings have been initiated).} and criminal adjudication.\footnote{See, e.g., Duncan v. Louisiana, 391 U.S. 145 (1968) (ruling that defendants charged with felonies and other serious crimes have the right to trial by jury); Douglas v. California, 372 U.S. 353 (1963) (ruling that indigent convicts have the right to appointed counsel, at the state's expense, in first appeals of right); Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that indigent defendants have a right to state-funded defense counsel in all felony prosecutions).}

Prior decisions on these, and other, scores were overruled.\footnote{5. See, e.g., United States v. Wade, 388 U.S. 218 (1967) (extending the Sixth Amendment right to counsel to post-indictment suspect line-ups); Miranda v. Arizona, 384 U.S. 436 (1966) (ruling that suspect confessions made while in police custody must be excluded from evidence unless preceded by the now-famous \textit{Miranda} warnings); Massiah v. United States, 377 U.S. 201 (1964) (holding that police cannot deliberately elicit incriminating statements from a defendant, in the absence of his attorney, once formal adversary proceedings have been initiated).} In fact, so many decisions were overruled that, as one commentator wryly put it, "[t]he list of opinions destroyed by the Warren Court reads like a table of contents from an old constitutional law casebook."\footnote{56. Philip B. Kurland, \textit{Politics, the Constitution, and the Warren Court} 90-91 (1970).} From then on, state courts would have to do it Warren's way if they wanted their convictions to stand up in federal court. It is easy to see why the Warren Court's jurisprudence was regarded as nothing short of revolutionary.

\textbf{B. The Counterrevolution That Was (And Is)\footnote{57. My heading comes from the clever title of an interesting collection of essays published by my colleague, Vince Blasi. \textit{The Burger Court: The Counter-Revolution That Wasn't} (Vincent Blasi ed., 1983). By inverting his title, I do not mean to suggest disagreement with his basic premise—namely, that the Burger years exhibited only a "moderating influence" on the continued expansion of Warren-era doctrine and thus dashed hopes or fears of "reversals and undercuttings of activist Warren Court precedents." Vincent Blasi, \textit{The Rootless Activism of the Burger Court, in The Burger Court: The Counter-Revolution That Wasn't}, supra, at 199. In many ways, the Burger years were transitional ones, and, with the exception of habeas corpus law, it was not until the rise of the Rehnquist Court that the criminal-procedure world began to look very different. A broader roll-back in criminal procedure was difficult during the Burger years given the fact that Justice Stewart, who had dissented in cases like \textit{Miranda} and \textit{Escobedo} and therefore would have been a likely pick to vote to overturn such cases, had a secret policy of refusing to join Nixon-appointed Justices in overturning Warren Court precedents. See Evan H. Caminker, \textit{Sincere and Strategic Voting Norms on Multimember Courts}, 97 Mich. L. Rev. 2297, 2322 n.76 (1999).}}\footnote{Cf., e.g., Blasi, supra note 57, at 198.}

By 1969 the Warren Court had come to an end, and the Counterrevolution had begun. Some might say the Counterrevolution did not really begin until the mid-1980s, when "law-and-order" conservative Justices finally had a reliable majority on the Court.\footnote{58. Cf., e.g., Blasi, supra note 57, at 198.} To be sure, most of the dramatic roll-backs would have to await Ronald Reagan's appointments to
the Court, and, in the meantime, significant expansions of key Warren Court precedents occurred on Burger’s watch.\textsuperscript{59} On the whole, however, the Burger years were more than just the calm before the storm—many Warren Court precedents were curtailed or at least not significantly extended, and the Court’s application of Warren-era precedents began to take on a distinctly more prosecution-friendly flavor.\textsuperscript{60}

Even the Burger Court, with the conservatives’ more tenuous hold on power, was able to begin an affirmative roll-back when it came to habeas corpus. Interestingly enough, habeas corpus drew the Burger Court’s attention fairly early on, as it had during the Warren years. It is understandable that limiting habeas would have been a top priority during the Counterrevolution.

Both the rhetoric and substance of the expansion of habeas by the Warren Court had the effect of treating state judges as second-class citizens. Instead of being equal partners in the enforcement of federal constitutional norms and in the administration of justice, state judges were treated as part of the problem. They were viewed as either less competent than their federal counterparts or less committed to full and fair enforcement of federal law than federal judges, and their processes were accordingly given less respect than federal processes and their convictions less finality than federal convictions.\textsuperscript{61}

In addition, absent the sort of statutory limits on habeas corpus added by Congress in 1996,\textsuperscript{62} habeas corpus litigation had developed into a serious threat to the finality of state-court criminal convictions. It was not uncommon for state prisoners to make multiple trips through federal habeas, which was possible until the 1996 Act because a denial of habeas relief

\textsuperscript{59} See, e.g., Brewer v. Williams, 430 U.S. 387 (1977) (refusing to overrule \textit{Miranda} and expanding \textit{Massiah} beyond explicit interrogation to reach police statements, such as the legendary “Christian burial” speech, that facilitate incriminating answers from a suspect). As Professor Steiker explains, \textit{Brewer} was both “dramatic[] and emphatic[]” in its reaffirmation of \textit{Massiah}. Steiker, supra note 4, at 2475.

\textsuperscript{60} For example, the Burger Court ruled that evidence seized in violation of \textit{Miranda} can nonetheless be used to impeach testimony by the defendant at trial, see Harris v. New York, 401 U.S. 222 (1971), and that \textit{Miranda} does not apply in evaluating the voluntariness of a consent to search by someone not in custody, see Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Later, with only Justice Sandra Day O’Connor replacing Justice Potter Stewart (who was often on the conservative side of criminal procedure issues), the Burger Court held that the fruits of unreasonable searches and seizures are admissible notwithstanding \textit{Mapp} where the officers acted in good-faith reliance on a defective warrant, see United States v. Leon, 468 U.S. 897 (1984), and that statements obtained in violation of \textit{Massiah} (and, by extension, \textit{Miranda} and the Fourth Amendment) could be used at trial if the police would have inevitably discovered the incriminating evidence, see \textit{Nix v. Williams}, 467 U.S. 431 (1984). It was also the Burger Court that first recast the \textit{Miranda} warnings as “prophylactic” standards rather than real constitutional mandates. \textit{See} Michigan v. Tucker, 417 U.S. 433, 439 (1974). This aspect of \textit{Tucker} was ultimately disavowed in \textit{Dickerson v. United States}, 530 U.S. 428, 437-40 (2000), with the \textit{Dickerson} Court ruling that “\textit{Miranda} is a constitutional decision.”


\textsuperscript{62} \textit{See supra} note 25 (citing the AEDPA).
historically did not preclude later habeas actions. For each trip through habeas, states were forced to expend time and resources defending convictions years (and occasionally decades) after criminal trials had taken place. Therefore, once the balance of power shifted on the Court, it was only a matter of time before the Court would revisit the subject of habeas corpus.

The Burger Court's first target was the deliberate-bypass standard for procedural defaults under *Fay v. Noia*. In *Davis v. United States*, the Court formulated an alternative standard for determining whether failure to object to racial discrimination in the selection of a federal grand jury amounted to a procedural default. In place of the deliberate-bypass standard, the Court enunciated what would come to be known as the "cause-and-prejudice" standard: failure properly to preserve a claim at trial in a federal prosecution or on direct appeal would preclude postconviction review on the defaulted claim unless the prisoner could show "cause" for the default and that he suffered "actual prejudice" from the constitutional violation.

On its face, the holding in *Davis* is reconcilable with *Fay*, if only because *Davis* arose under the postconviction procedure for federal prisoners, not the separate habeas corpus procedure for state prisoners. The difference in reasoning, however, is stark. Whereas *Fay* pointed to forfeiture of state-court remedies as a sufficient punishment for (and deterrent to) procedural defaults, *Davis* pointed to the forfeiture of similar remedies in a federal prosecution as reason to bar postconviction remedies as well.

Especially to a conservative Court that prided itself for taking federalism seriously, the striking asymmetry created by the interaction of *Davis* and *Fay*, in which courts protected the integrity of federal (but not

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63. See generally LAFAVE ET AL., supra note 36, § 28.5(c), at 1330–31. For its part, the Warren Court had held that relitigation in a subsequent habeas proceeding was not barred unless "the ends of justice would not be served by reaching the merits of the subsequent application." Sanders v. United States, 373 U.S. 1, 15 (1963).

64. See, e.g., Vasquez v. Hillery, 474 U.S. 254 (1986) (reversing a twenty-three-year-old murder conviction due to the exclusion of blacks from the grand jury by the trial judge). As one would expect, the relitigation problem was particularly serious in capital cases. Bluntly put, for prisoners seeking to avoid execution, delay itself in many cases is a victory, albeit surely not the full victory they would want. Indeed, with the Court's move to the right on criminal procedure issues from the Nixon years forward, delay was increasingly the only victory many death-row inmates could realistically expect from the Supreme Court.


67. Id. at 242–44.

68. Id. at 244–45.


70. See *Fay*, 372 U.S. at 433.

71. See *Davis*, 411 U.S. at 242.
state) procedures, would not be tolerable.\textsuperscript{72} Sure enough, the Court later confronted this imbalance. In \textit{Wainwright v. Sykes},\textsuperscript{73} the Court extended \textit{Davis}'s cause-and-prejudice standard to virtually all procedural defaults in state court, thereby ensuring parity of treatment as between federal and state courts in the vast majority of cases.\textsuperscript{74}

Dismissing the "sweeping language" of \textit{Fay} as "dicta,"\textsuperscript{75} Justice Rehnquist's majority opinion in \textit{Sykes} ruled that state court raise-or-waive rules deserve "greater respect" than they received under the approach taken in \textit{Fay}, which the Court limited to its facts.\textsuperscript{76} In dissent, Justice Brennan condemned as "unfair" any procedural default rule that would "visit[] the mistakes of a trial attorney on the head of a habeas corpus applicant" and thus argued for retention of the deliberate-bypass standard.\textsuperscript{77} In \textit{Coleman v. Thompson},\textsuperscript{78} the Court drained the little vitality that remained in the deliberate-bypass standard after \textit{Sykes}, holding that, short of a "fundamental miscarriage of justice," "all cases" of procedural defaults are governed by the cause-and-prejudice standard.\textsuperscript{79}

\footnotesize{
\textsuperscript{72} Federalism is usually thought of as an imperative of the Rehnquist Court rather than the Burger Court, but it would be a mistake to dismiss the Burger Court as a Court that had little regard for federalism. Even beyond the restrictive habeas cases discussed in the text and the Court's 
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 87--88. The Court did not define "cause" and "prejudice" except to say that they are "narrower than the standard set forth in \textit{dicta in Fay}." \textit{Id.} at 88. The Court later held that attorney error will constitute "cause" sufficient to excuse a procedural default only where attributable to a conflict of interest or so egregious as to constitute an independent Sixth Amendment violation under \textit{Strickland v. Washington}, 466 U.S. 668 (1984). See \textit{Murray v. Carrier}, 477 U.S. 478, 488 (1986). Outside of these contexts, the Court found "no inequity in requiring \[a habeas petitioner\] to bear the risk of attorney error that results in a procedural default." \textit{Id.}
\textsuperscript{75} See \textit{Sykes}, 433 U.S. at 85.
\textsuperscript{76} See \textit{id.} at 87--88 ("It is the sweeping language of \textit{Fay v. Noia}, going far beyond the facts of the case eliciting it, which we today reject.").
\textsuperscript{77} \textit{Id.} at 116 (Brennan, J., dissenting).
\textsuperscript{79} \textit{Id.} at 750--51 (emphasis added). The addition of "fundamental miscarriage of justice" as another basis for excusing procedural defaults was designed primarily as a safety valve for any factually innocent defendants who were nonetheless convicted. \textit{See Murray}, 477 U.S. at 495--96. The
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The Court's next major effort was to tighten up the standards for securing relief on claims that were properly preserved in state court. In *Stone v. Powell*,\(^8\) the Court, emphasizing the "costs" and "benefits" of habeas review, held that Fourth Amendment exclusionary-rule claims would not be heard on habeas unless the state courts failed to afford a "full and fair opportunity" to litigate those claims.\(^8\) The particular approach taken in *Stone* did not catch on, and so Fourth Amendment claims are the only claims categorically excluded from the scope of habeas.\(^8\) Even so, however, the theoretical underpinning of *Stone*—the notion that cost-benefit analysis and restrictive formulations of the purposes of habeas review could justify limiting the scope and standard of habeas review—proved to be enormously influential in later cases.

In a real sense, all subsequent restrictions of habeas corpus, both by the Court and, in 1996, by Congress, rested squarely on *Stone's* reconceptualization of the costs and benefits of habeas corpus. Habeas corpus was no longer the unmitigated good that the Warren Court had taken it to be; instead, habeas proceedings had substantial costs, and the benefits were far less than previously supposed.\(^8\) This sharp about-face on the cause-and-prejudice standard was also the mechanism by which the Court narrowed the obligation of district courts under *Townsend v. Sain*, 372 U.S. 293 (1963), to conduct evidentiary hearings to resolve disputed questions of fact. In *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), the Court treated a petitioner's failure to develop facts necessary to his claims on habeas corpus as a default disentitling him to an evidentiary hearing absent a showing of actual innocence or "cause for his failure to develop the facts" and "prejudice resulting from that failure." *Id.* at 11. The contrary standard from *Townsend*, which the Court deemed a "substantial[] change" from prior law dependent upon the now-repudiated deliberate-bypass standard from *Fay*, was expressly overruled. *Id.* at 5 & n.2.\(^8\)


81. *Id.* at 481–82. The costs included "diverted [attention] from the ultimate question of guilt or innocence" and the loss of "reliable and often the most probative" evidence bearing on truth-finding in criminal trials. *Id.* at 489. The benefits—an additional deterrent to Fourth Amendment violations—were "minimal" to the Court, especially "in relation to the costs," because it found little reason to expect that "law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal." *Id.* at 493.

82. The Supreme Court has declined to extend *Stone* to bar any claims other than Fourth Amendment claims, even those, such as *Miranda* claims, that often (though, unlike Fourth Amendment claims, not invariably) exclude probative evidence of guilt. See, e.g., *Withrow v. Williams*, 307 U.S. 680 (1933) (refusing to apply *Stone* to *Miranda* exclusionary-rule claims); *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (rejecting the application of *Stone* to claims of ineffective assistance of counsel); *Rose v. Mitchell*, 443 U.S. 545 (1979) (refusing to read *Stone* as precluding habeas review of claims of unconstitutional discrimination in the selection of grand jurors). These post-*Stone* decisions have transformed *Stone* from a potentially important statement about the overriding importance of factual innocence in habeas doctrine into a narrow principle limited to Fourth Amendment exclusionary-rule claims.

83. Although the *Stone* balancing is more than a little formalistic, there was one major reason for striking a different habeas cost/benefit balance—namely, the country itself had changed considerably since the time the Warren Court struck the balance in favor of extensive federal judicial oversight. By the time of the Burger Court, for example, juries rather than lynching mobs determined guilt or innocence in criminal cases, and trials were not conducted based on appeals to racism (both because blacks and other minorities were no longer excluded from jury service and, in many parts of the country, racial attitudes had become a lot more progressive since the days of the
The normative value of broad habeas corpus review paved the way for the substantial encroachments on habeas corpus that would follow.

The *Stone* approach reached its apogee in the courts in *Teague v. Lane*, which is now understood to be the Court’s most drastic restriction of habeas corpus. In *Teague*, the Court took up, *sua sponte*, the extent to which new rules of federal law can be applied “retroactively” in habeas proceedings arising out of previously conducted trials. Like Justice Powell in *Stone*, Justice O'Connor's plurality opinion (which almost immediately garnered majority support) drew a sharp distinction between the purposes served by collateral review and those served by direct review.

In Justice O'Connor's view, the function of habeas corpus is not to remedy violations of federal law (a function she thought adequately served by direct review on appeal or certiorari), but instead the substantially more modest goal of "‘deter[ing]’ gross deviations by state courts from clear, preexisting constitutional standards." Once a conviction survives direct

86. See *Teague*, *489 U.S. at 306* (plurality opinion) (“As [Justice Harlan] had explained in *Desist* [*v. United States*, *394 U.S. 244* (1969)], ‘the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this deterrence function, . . . the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place.’”) (quoting *Desist*, *394 U.S.* at 262–63 (Harlan, J., dissenting)). In this sense, *Teague* can be seen as the equivalent of qualified immunity in § 1983 cases—in both cases, federal courts will withhold a remedy for a constitutional violation if the relevant state actor (the state court in habeas cases and law enforcement in § 1983 cases) did not violate clearly established federal law. Unlike qualified immunity under § 1983, where the Court first decides whether a constitutional violation occurred and only secondarily considers whether the remedy (money damages) should be denied, see *Saucier v. Katz*, *533 U.S. 194*, 201 (2001), *Teague* operates as a "threshold" bar to reaching the merits and, as such, precludes a habeas court from reaching the merits (and thus contributing to the continued development of constitutional law) unless one of the narrow *Teague* exceptions applies. *Teague*, *489 U.S.* at 310 (plurality opinion). Thus, *Teague* has stilled the development of constitutional criminal
review (and therefore becomes "final"), remedial considerations are eclipsed on collateral review by "interests of comity and finality." Consequently, "new rules" of federal law, broadly defined as rules not literally "dictated by precedent existing at the time the defendant's conviction became final," will not be announced or applied in habeas cases except in two extremely narrow situations.

The dire implications of *Teague* were soon noticed within the academy. As Professor Barry Friedman put it: "*Teague* shuts down the habeas courts. Where once these courts played an active, important role in defining the content of criminal procedure, they now can do little but patrol the perimeters of criminal constitutional law." This assessment is exaggerated in a number of senses, but nevertheless right on the mark in terms of the broad, ominous implications that *Teague* had for the Warren Court's remedial vision of habeas corpus.

The federal courts obviously remain open to habeas petitions—to that extent, they most certainly have not been "shut down." In addition, nothing in *Teague* (or elsewhere) prevents the federal courts from making new rules of constitutional law in federal criminal prosecutions, and in federal and state cases still pending at the trial level or on direct review, the Court has specifically mandated retroactive application of all new rules of constitutional law. Still, Professor Friedman's assessment of the deleterious impact of *Teague* remains valid in light of the bigger picture.

After all, state courts are where more than ninety percent of the criminal cases in this country are prosecuted. In that large universe of cases, habeas corpus is the only real opportunity the federal courts have to define new principles of constitutional law given the familiar docket constraints on the Supreme Court. *Teague*, however, takes that opportunity away by limiting

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87. *Teague*, 489 U.S. at 308 (plurality opinion). A conviction becomes "final" under *Teague* when it is immune to reversal on direct appeal in higher courts or on certiorari in the Supreme Court. Id. at 295.

88. Id. at 301 (plurality opinion) (emphasis added).

89. The two exceptions allow application of new rules which grant constitutional protection to primary conduct punished as a violation of criminal law or constitute "watershed rules of criminal procedure" promoting the accuracy of criminal trials. Id. at 311–14 (plurality opinion).

90. Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 823 (1992). Friedman's strongly worded view represents the virtually unanimous opinion of criminal procedure scholars. For a rare kind word from within the academy on *Teague*, see Hoffman & Stuntz, supra note 29, at 99–104, who argue that the purpose of habeas should be reconceived as deterring egregious misbehavior by state courts.


habeas to enforcement of absolutely clear-cut preexisting rules of constitutional law.93 Given the breadth of the Court’s definition of new rules, it is, as one critic has noted, “virtually impossible” to get past the Teague bar94—and that, of course, was precisely the point.95

Seen in this light, it is difficult to overestimate the effectiveness of the Counterrevolution in undoing the Warren Court innovations in the area of habeas corpus. Although habeas corpus remains available for relitigation of the constitutionality of state-court convictions, reversal on habeas has become a prospect that state courts simply need not be concerned with in the vast majority of cases.96 Strict procedural default rules, applicable not only to the small percentage of criminal cases that result in trials, but also to the enormous group of cases resolved by guilty pleas, constitute a formidable, and often insuperable, obstacle to habeas relief in many cases. Even where no procedural defaults have occurred, Teague essentially means that the habeas petitioner must lose if there is any conceivable justification for the state court’s ruling in light of prior precedent, however wrong the ruling might be in light of intervening cases or however illogical the result is in light of the reasoning of prior cases.

93. The usual response is that the federal courts can still use federal criminal prosecutions as the vehicle for announcing new rules of constitutional law. The argument, however, rests on an assumption that is not only undefended but far from obvious—namely, that federal and state cases are essentially fungible for lawmaking purposes. On closer analysis, federal and state court prosecutions differ in ways that would render federal criminal cases less than perfect—and, in certain cases, perhaps even poor—substitutes for state cases. To give but one example, the fact that state law enforcement agencies have a heavier caseload and less resources than their federal counterparts should mean, all things being equal, that local police will invest more energy into getting confessions and state court convictions will be more dependent on confessions than federal convictions (which will rest, to a greater degree, on independent investigation by government agents). This means that, from a lawmaking perspective, state cases would be far better vehicles for regulating confessions or the validity of police interrogation techniques. If this is correct, then it may be that, contrary to the usual assumption, state and federal criminal prosecutions are not fungible for lawmaking purposes.


95. For claims that might somehow clear the Teague hurdle, the Court added another obstacle: a forgiving “harmless error” standard allowing courts greater flexibility in habeas cases to uphold criminal convictions notwithstanding constitutional error. In Brecht v. Abrahamson, 507 U.S. 619 (1993), the Court rejected its longstanding assumption that on habeas review, as on direct review under Chapman v. California, 386 U.S. 18 (1967), constitutional error will not be deemed “harmless” absent proof beyond a reasonable doubt that the verdict was untainted by the error. Under Brecht, habeas relief must be denied upon the substantially lesser showing that the state court’s constitutional error had no “substantial and injurious effect or influence in determining the jury’s verdict.” Brecht, 507 U.S. at 637–38. This was too restrictive even for Justice O’Connor, the author of Teague and a key figure in the Counterrevolution—she favored application of the more stringent Chapman standard as a means of “restor[ing] confidence in the verdict’s reliability” following a demonstration of constitutional error. Id. at 652–53 (O’Connor, J., dissenting).

96. For example, habeas success rates plummeted from 3 to 4% during the 1970s to 1% by the early 1990s. See FALLON ET AL., supra note 22, at 1364 (footnotes omitted).
These important changes to habeas corpus came about only because the Burger and Rehnquist Courts were as willing as the Warren Court to rethink prior dogmas about habeas and the proper relationship between federal and state courts. The view was no longer that habeas was necessary in order for the federal courts to police states that were presumptively hostile to federal rights and racial minorities. The presumption was now reversed: state courts could now be trusted to decide criminal cases fairly and to enforce constitutional rights. As a result, extensive federal judicial oversight was not only unnecessary but also potentially harmful to the extent it allowed federal judges to overturn, based on "technicalities" or second-guessing, convictions entered against factually guilty defendants at the conclusion of a fair trial. With this reconceptualization of the costs and benefits of habeas, habeas law was reformed in ways that moved away from a remedial vision of habeas and back in the direction of the federal courts performing the role of back-stopping miscarriages of justice in the state courts—an important role, to be sure, and a broader one than the federal courts had when habeas was limited to "jurisdictional" defects. Still, the role was considerably more limited than habeas corpus had served under the Warren Court. Therefore, the criminal procedure jurisprudence of the Burger and Rehnquist Courts has proven to be every bit as "revolutionary" as its predecessor's.

III. "Activism" and the Counterrevolution

Against the backdrop of this case study of how the Burger and Rehnquist Courts responded to Warren-era precedents in criminal procedure, the question can now be asked: was it activist for these Courts to refashion the doctrines of criminal procedure created during the Warren years? This question cannot be addressed without first developing an understanding of what activism is. In the following sections, I derive a definition of activism, apply it to the "counterrevolutionary" Courts, and then move on to larger normative questions.

A. Understanding Activism

Very little attention has been paid to the meaning of the term activism. The term serves principally as the utmost judicial put-down, a polemical, if unenlightening, way of expressing strong opposition to a judicial decision or approach to judging. The problem is that in many cases the accusation of activism is simply leveled, and readers are left to guess what notion of

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97. Richard Posner refers to judicial activism as "a premier term of judicial opprobrium." RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 198 (1985). He ultimately, however, defines activism in terms that suggest that activism is not inherently improper. See infra note 102 and accompanying text.
activism the accuser has in mind. Another problem with contemporary usage of activism is that it is usually politically driven—it is a label affixed only to decisions with which one disagrees on the merits.

I start from the premise that whether or not a decision is activist should not depend on whether the judge is enforcing the “right” values. If broad exercises of judicial power are acceptable from the Warren Court and from judges sharing its liberal vision, how can they possibly be illegitimate when employed by later courts and judges for purposes different from those that motivated the Warren Court? The Constitution is not a one-way liberal ratchet any more than it is a one-way conservative or libertarian (or anything else) ratchet. Consequently, I believe that a unitary, neutral definition of activism—neutral in the sense that it is applicable both to liberal and conservative judges alike—is essential if activism is to be anything more than an epithet.

I think we ought to resist the temptation to jettison activism as an uninformative epithet and try to rehabilitate the concept of activism as an effective, nonideological way of criticizing court decisions. Without at least some common ground on the proper role of judges—as I think can be captured in a careful, ideologically balanced approach to defining activism—

98. See Bradley C. Canon, A Framework for the Analysis of Judicial Activism, in SUPREME COURT ACTIVISM AND RESTRAINT 385 (Stephen C. Halpern & Charles M. Lamb eds., 1982) (noting that “conceptions of activism are usually not explicitly noted or articulated”). Oddly enough (or, perhaps, tellingly), the most sustained attention given to defining and studying the phenomenon of activism has come from political scientists, not law professors. See, e.g., id. at 386-87; GLENDON SCHUBERT, JUDICIAL POLICY-MAKING: THE POLITICAL ROLE OF THE COURTS 153-57, 209-13 (rev. ed. 1974); CHRISTOPHER WOLFE, JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY? 30-31 (1997).

99. For example, fans of the Revolution often condemn the Rehnquist Court for activism based on its retrenchment on the “rights revolution” without regard to the fact that those rights were themselves the product of activism by the Warren Court. See, e.g., Lino A. Graglia, Judicial Activism of the Right: A Mistaken and Futile Hope, in LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 65, 85-86 (Ellen Frankel Paul & Howard Dickman eds., 1990) (noting that liberal scholars “defend judicial activism on the left by declaring left-wing judicial activists American heroes” while condemning activism on the right as a “judicial usurpation of lawmaking power”). Needless to say, many conservatives have not been as principled as Professor Graglia in condemning conservative activism. On this issue, as on so many others, there is plenty of hypocrisy to go around.

100. For a general critique of the “one-way-ratchet” approaches to constitutional law, described (in the terminology of voting-rights law) as “non-retrogression” on rights, see John C. Jeffries, Jr. & Daryl J. Levinson, The Non-Retrogression Principle in Constitutional Law, 86 CAL. L. REV. 1211 (1998). Naturally, all of us have political and moral values and commitments and would therefore find certain outcomes preferable to others, and debates about the wisdom and morality of legal rules are to be encouraged. The point here is simply that such disagreements have no place in the determination of whether a decision is “activist” or not, unless one is content merely to use activism as shorthand for “I disagree.”

101. Another kind of neutrality is important—namely, neutrality as to the correctness of the underlying decision. One of the problems with current usage of the term “activism” is that it typically signifies nothing more than disagreement on the merits. As I hope will become clear, my concept of activism aims to be more than mere shorthand for “I disagree” and thus to achieve this second kind of neutrality as well as ideological neutrality.
we run the risk that scholarly discourse will degenerate, as it already has to a large extent, into insoluble disputes over methods of constitutional interpretation or competing policy considerations or visions of the good society. In other words, as the last two generations of constitutional-law scholarship show, scholars are hopelessly divided on the proper methods of interpreting the Constitution, and as each election and judicial confirmation battle in the U.S. Senate reminds us, our society is deeply divided over the wisdom of issues like abortion and affirmative action. An ideologically neutral definition of activism may therefore be our last, best hope for reaching at least some degree of consensus concerning what judges may do and may not do in our democratic society.

Let me be clear at the outset about my aims and methodology. My goal is to attempt to derive a definition of activism that preserves the connotation of condemnation inherent in commonly shared understandings of activism. At the same time, I try to avoid the ideological bias that almost invariably hinders reasoned discourse about the concept of activism. To this end, I strive to incorporate only generally shared intuitions into my basic definition of activism. To the extent contemporary discussions of activism usually identify a single judicial philosophy or method of constitutional interpretation as "correct" and dismiss all others as "activist," my approach will seem broader. This, however, is only because I am aiming for a comprehensive, ideologically neutral definition of activism that is not synonymous with legal incorrectness.

Based on the different definitional approaches taken in the literature, there appear to be both substantive and procedural dimensions to activism. The substantive definition of activism encompasses a variety of grounds for concluding that a decision is, in some sense, illegitimate as opposed to simply incorrect or misguided. In its procedural version, activism focuses on the process through which the result was derived, as opposed to the permissibility of the result reached. I confess at the outset that many of the key concepts cannot be reduced to crystal-clear definitions, and, as with other legal concepts, there will be room for argument and disagreement as to their meaning and proper application; indeed, it is precisely the quest for simplicity and clarity in addressing the complicated phenomenon of judicial activism that has led to a number of normatively unsatisfying definitions of activism. The hope is less that the treatment of activism that follows will answer lots of the questions than it will identify and stimulate thinking about the right sorts of questions that bear on a proper understanding of judicial activism.

With these caveats, I shall proceed to flesh out these two dimensions of activism (which, incidentally, are equally applicable to questions of constitutional and statutory interpretation) and address competing understandings of activism below.
1. Substantive Activism.—Some have argued that activism results whenever courts interfere with initiatives of the political branches of government. Richard Posner has perhaps most clearly articulated this view, stating that judicial activism involves courts “acting contrary to the will of the other branches of government” and thereby “taking power from th[ose] other branches.”

It is true, of course, that judicial interference, usually manifested and most easily seen in the form of judicial invalidation of statutes, is strongly correlated with periods of heightened activism. Even so, equating “conflict” or “interference” with activism rests on an unwarranted assumption—namely, that the federal courts are supposed to be inactive rather than active but restrained.

There is a critical distinction between an “activist” court, on the one hand, and an “active” court, on the other. A court faithful to principles of judicial restraint could never be activist (at least not in a first-best world) but would nevertheless be quite active in demanding that other branches of government remain within their proper constitutional bounds. It could hardly be otherwise given Marbury v. Madison, which held that enforcing the Constitution is an essential part of the “judicial Power” vested in the federal courts by Article III.

102. POSNER, supra note 97, at 210; see also, e.g., Glendon Schubert, A Functional Interpretation, in THE SUPREME COURT IN AMERICAN POLITICS: JUDICIAL ACTIVISM VS. JUDICIAL RESTRAINT 17 (David F. Forte ed., 1972) (noting that a court “is activist whenever its policies are in conflict with those of other major decision-makers”).

103. During the Lochner era, for example, the Supreme Court invalidated close to two hundred economic regulatory statutes as contrary to the Due Process Clause. See STONE ET AL., supra note 15, at 739. The fact that the “Old Men” struck down so many statutes is usually taken as clear proof of activism, which explains why critics of the Rehnquist Court often stress the number of statutes it has invalidated. See, e.g., An Activist Court Mixes Its High-Profile Messages, WASH. POST, July 2, 2000, 2000 WL 19617335 (“According to Walter Dellinger, a former solicitor general in the Clinton administration . . . , the Rehnquist court has invalidated 24 acts of Congress in the past five years. ‘If that’s not a record, it’s close to it,’ he said.”). Critics also are quick to compare the current Court to the Lochner Court. See, e.g., Alden v. Maine, 527 U.S. 706, 814 (1999) (Souter, J., dissenting) (noting a “striking” similarity between the Rehnquist Court’s sovereign-immunity decisions and “the Lochner era’s industrial due process” and predicting that “the Court’s late foray into immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting”). Needless to say, the comparison is not intended to be flattering.

104. I limit the claim about judicial restraint precluding activism to the “first-best” world because, as I argue later in this Article, even a judge who firmly believes in judicial restraint might properly take action deemed activist in a “second-best” world as a means of countering activism (liberal or conservative) by his colleagues. In the second-best world, activism in response to activism—what I call reactivism—may actually help replicate results consistent with judicial restraint to the extent Justices are unwilling to overturn prior activist precedents in a particular context. See infra notes 198–222.

105. 5 U.S. (1 Cranch) 137 (1803).

106. Id. at 178 (“So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law . . . the constitution, and not such ordinary act, must govern the case to which they both apply.”). Naturally, one could legitimately argue that Marbury was wrong, and those who would prefer to
Once the implications of judicially enforceable constitutionalism are understood, it becomes clear that Posner's definition of activism is both overinclusive and underinclusive. It is overinclusive because courts are supposed to strike down unconstitutional action by other branches. Given *Marbury*, it would be odd to view invalidations of statutes as inherently activist. Posner's definition is underinclusive as well because interference with other branches is not a necessary condition of judicial activism. Again, *Marbury* suggests the reason.

Once constitutionalism, of the judicially enforceable variety, is accepted as a bedrock principle of American governance, the thought of judges being permitted either to act in contravention of the "fundamental and paramount law" that is the Constitution or to authorize other government actors to do so is unsurpassingly strange. Alexander Hamilton said it well: American-

allocate all or almost all decisionmaking authority to the political branches might well find an inactive judiciary to be considerably more congenial than active but restrained judiciary or the judiciary that we presently have. Rather than argue these broader points concerning institutional choice, I simply accept judicially enforced constitutionalism as envisioned in *Marbury* as a given and try to derive a concept of judicial activism that flows from the features of that brand of constitutionalism.

Perhaps in recognition of this point, Professor Graglia endorses the classic Thayerian position that it is proper for courts to act only when a constitutional transgression is clear—that, in other words, it is "activist" to invalidate actions of the political branches unless the Constitution "clearly prohibit[s]" such actions. See Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J.L. & PUB. POL'Y 293, 296 (1996); see generally James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 151 (1893). The source of that limitation on judicial power, however, is far from apparent. Surely, it is not the Constitution or any theory of interpretation. As Professor Lawson has said, when it comes to how clear a constitutional violation must be before a court can act, "there is nothing in the nature of interpretation, of originalism, or of the Constitution that can provide the answer." Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411, 422 (1996). Although, as a matter of opinion-writing rhetoric, Chief Justice John Marshall offered examples of clear constitutional violations (e.g., a one-witness treason statute in violation of the two-witness rule contained in U.S. CONST. art. III, § 3, cl. 1) in *Marbury* in the course of justifying judicial review, *see Marbury*, 5 U.S. (1 Cranch) at 179, there was no suggestion that judicial review is limited to correcting clear constitutional transgressions. Indeed, quite the opposite: the judicial duty to "say what the law is" means, as Marshall put it, that courts "must of necessity expound and interpret" the Constitution, actions that encompass far more than enforcement of clear constitutional mandates. *Id.* at 177 (emphasis added). Moreover, limiting judicial review to clear cases of unconstitutionality would essentially transform Article III courts from restrained but nonetheless "active" players in the constitutional order into inactive (and hence virtually irrelevant) ones. Any doubt on this score is dispelled by *Teague v. Lane*, 489 U.S. 288 (1989). By limiting habeas courts to enforcement of preexisting constitutional mandates that are clear both in their meaning and their application to the particular case, *Teague* has all but ended any meaningful role for habeas courts. *See supra* notes 84–95 and accompanying text. The same phenomenon would occur if a clear constitutional violation were the only proper basis for exercising judicial review—which is not to say that there are no "easy" constitutional cases (there are), but only that those cases are not the ones that are litigated. Graglia himself all but confesses the point elsewhere, noting that "examples of enacted law clearly in violation of the Constitution are extremely difficult to find." Graglia, *supra* note 99, at 67.

*But see* Graglia, *supra* note 107, at 296 (arguing that "it is not activism for judges to refuse to act by declining to disallow a policy choice and permitting the results of the political process to
style judicial review "supposes that the power of the people is superior to both [the judicial and legislative power], and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." As a result, unless one rejects the notion of intergenerational fidelity to the Constitution, there is no principled basis on which courts might prefer policy choices embodied in statutes over those embodied in the Constitution itself.

"Dead-hand" theorists do, of course, reject the notion that present generations ought to be "ruled from the grave," especially by (white) men who inhabited a vastly different world and whose ideologies were radically different from our own. If this argument is accepted, and federal judges...
are not to be bound by any constraint that smacks of dead-hand control, then, as a descriptive matter, there would seem to be no meaningful limits on the power of the judiciary. True, political controls over the courts would remain, such as naming new judges to fill judicial vacancies, impeachment and removal, and overruling activist rulings by constitutional amendments. These political checks, however, have failed to constrain even the most pronounced periods of counter-majoritarian activism in our history, including the *Lochner* era and the Warren Court Revolution.¹¹² Absent external constraints on the power of judges, a strong normative argument could be made that society would be better off without judicial review. Allowing judges to wield unlimited power over the lives, liberty, and property of citizens, not to mention the prerogatives of other branches of government, would offend traditional American conceptions of the rule of law, which are founded on the proposition that ours is a "government of laws, not of men."¹¹³ Again, the point was not lost on the founding presidential election when it appeared there could be two different slates of electors sent from Florida, America was prepared to have its next president selected under an obscure statute, the Electoral Count Act, 3 U.S.C. § 5, that was passed in the wake of the disputed Tilden-Hayes presidential election of 1876. A dead-hand theorist might object to that degree of dead-hand control—why should an 1876 statute govern who would become president more than a century later? On the other hand, however, there is undeniably value in having ex ante rules in place to deal with high-stakes battles like presidential election contests. See Elizabeth Garrett, *Institutional Lessons from the 2000 Presidential Election*, 29 Fla. St. L. Rev. 975, 976–86 (2001).

¹¹² See generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 46–48 (1980). That said, it may well be that, in both instances, political checks did work by preventing even more aggressive and sustained exercises in activism than those that actually occurred. Though certainly plausible, this does not detract from my central point but rather serves to underscore it: the fact that the *Lochner* and Warren Courts were able to be activist in such controversial and politically unpopular ways for so long, and in the face of opposition by presidents as politically powerful as Franklin D. Roosevelt and Dwight D. Eisenhower, leaves little room for confidence in the effectiveness of political controls as deterrents to judicial activism. See Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 Va. L. Rev. 747, 775 (1991) (arguing that political controls ensure only that "Supreme Court Justices will not behave like Martians"). Needless to say, the appointment power can bring periods of particularly pronounced activism to an end (as it did for the Warren era), but only after it has already taken place. By then, however, the damage may be irreversible—legislation may have been declared unconstitutional, for example, and the interest-group bargains that won enactment of the invalidated legislation may have dissipated—and the activist decisions are cloaked with the protective mantle of stare decisis. See ELY, supra, at 47.

¹¹³ According to a recent exposition on the rule of law, "[t]he essence of the Hume-Adams opposition of 'government of laws' to 'government of men'—the core conception of the rule of law—is that something other than the mere will of the individuals deputized to exercise government powers must have primacy." Ronald A. Cass, *The Rule of Law in America* 3 (2001). Although there are differing conceptions of the rule of law, the ideal described by Professor Cass is commonplace in contemporary discussions of the rule of law. See generally Richard H. Fallon, Jr., "The Rule of Law As a Concept in Constitutional Discourse," 97 Colum. L. Rev. 1, 7–8 (1997) (noting that "leading modern accounts" of the rule of law all subscribe to "the supremacy of legal authority" and therefore posit that "law should rule officials, including judges, as well as ordinary citizens" (emphasis added)). This is not to deny that judges often have considerable discretion—clearly, they do—and such discretion is not, in itself, inconsistent with the rule of law. For the rule of law to exist, however, there must be at least some legal constraint, even if imperfect, on the individual actor and that restraint must be "embodied in authority outside the control of (external to) the individual exercising legal power."
generation: "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved any thing, would prove that there ought to be no judges distinct from that body."¹⁴

There are also functional objections to judicial review unconstrained by constitutional text. There is little reason for faith in the institutional competence of courts, as compared to legislative bodies, to make the intensely value-laden judgments or policy calls required by "noninterpretive" judicial review. The federal judiciary is far from representative of society as a whole,¹¹⁵ nor is it free from the "public-choice" problems that make legislatures less than ideal guardians of the public interest.¹¹⁶ In short, if what the courts are doing is neither "law" nor constrained by law, then lawyers in robes—which, after all, is all judges are—should be just about the last people we want doing it.¹¹⁷

This combination of formal and functional objections may explain why there is broad agreement (even from nonoriginalist quarters) that constitutional text must be binding on judges. As Professor Tom Grey has declared: "We are all interpretivists; the real arguments are not over whether judges should stick to interpreting, but over what they should interpret and what interpretive attitudes they should adopt."¹¹⁸ The breadth of this


¹⁵. See generally Michael J. Klarman, What's So Great About Constitutionalism?, 93 NW. U. L. REV. 145, 189–90 (1998) ("Justices of the United States Supreme Court, indeed of any state or federal appellate court, are overwhelmingly upper-middle or upper-class and extremely well educated, usually at the nation's more elite universities. Moreover, unlike legislators who generally share a similar cultural background, federal judges enjoy a relative political insulation which significantly reduces any offsetting obligation to respond to the non-elite political preferences of their constituents.").


¹⁸. Thomas Grey, The Constitution as Scripture, 37 STAN. L. REV. 1, 1 (1984); see generally STONE ET AL., supra note 15, at 296 ("Almost all commentators believe that the text of the Constitution is binding."). "Interpretivists" believe that judges "should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution"; "noninterpretivists," on the other hand, contend that "courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document." ELY, supra note 112, at 1. As the Grey quotation suggests, even proponents of the broadest theories of constitutional adjudication bristle at the suggestion that they favor a noninterpretive role for the courts, and so the terms "interpretivism" and "noninterpretivism" have fallen into disuse lately. What is significant for present purposes, however, is not the terminology but rather what terminological dispute tells us
consensus among believers in judicial review weakens any objection that building textualism into my definition of activism strips it of the ideological neutrality I seek.\textsuperscript{119} Even if this point of view requires commitment to a "preconstitutional rule" positing the controlling nature of the Constitution, that rule seems so thoroughly uncontroversial, and is so widely accepted, as to be unproblematic for present purposes.\textsuperscript{120}

The interpretive-fidelity aspect of activism would be unduly impoverished if it required only that judges not violate clear text in, or clear inferences from, the Constitution. Although the scope of matters decided by the Supreme Court over the last few generations in the name of the Constitution might reasonably lead one to the opposite conclusion, in point of fact the Constitution itself speaks only to a narrow range of issues. Given that our populist Constitution delineates only the "great outlines" of our government and therefore lacks the "proximity of a legal code,"\textsuperscript{121} it would hardly be much of a constraint if all judges are bound to do, from the standpoint of interpretive fidelity, is to avoid contravention of clear constitutional mandates. It is also necessary that a decision actually find some affirmative support in the Constitution, whether in its language or structure. Only in that instance can a court plausibly claim that it is enforcing the Constitution instead of its own policy preferences or, in the language of the Founding generation, that it is exercising "judgment" instead of "will."\textsuperscript{122}

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\textsuperscript{119} By "textualism," I intend the usual meaning of that approach to constitutional interpretation, which involves discerning the meaning and implications of the words used in the Constitution and deriving meaning from constitutional structure. \textit{See generally} \textit{Amar, supra} note 2 at 28–33. This, of course, is not the only possible understanding of textualism. One considerably broader, value-laden approach would require judges to adopt a "moral" reading of the Constitution. \textit{See} \textit{RONALD DWORKIN, LAW'S EMPIRE} (1986).

\textsuperscript{120} Given this consensus that the Constitution is law, not to mention the fact that this notion lies at the very foundation of our system of judicially enforceable constitutionalism under \textit{Marbury v. Madison}, I find it unnecessary here to advance a political or moral justification for fidelity to text or the broader yet related ideal of the rule of law. Nevertheless, it is noteworthy that the rule of law enjoys "universal attraction" (except, one supposes, among tyrants) because it "pulls society in the direction of knowable, predictable, rule-based decision making, toward limitations on the power entrusted to government officials, toward alignment of power with legitimacy." \textit{Cass, supra} note 113, at 19.

\textsuperscript{121} \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat) 316, 407 (1819).

\textsuperscript{122} \textit{See THE FEDERALIST NO. 78}, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
Until now, this discussion of the interpretive-fidelity aspect of activism has rested on an implicit assumption that should be laid bare before moving on to other issues. A key principle motivating my attempt to define activism has been that the concept should be more than shorthand for a claim that a decision is legally incorrect. For this reason, I have defined the interpretive-fidelity component of activism solely in terms of a decision's permissibility in light of text and structure, which I regard as ideologically neutral because of the broad consensus that the Constitution itself (and, in statutory cases, the legislation that becomes law) is binding on judges.

Where the text is plain and unambiguous, of course, this approach dictates only one permissible (i.e., nonactivist) outcome—namely, that required by the language or structure. If, however, the text is indeterminate, a range of potential interpretive options will be available to a court, some of which will be disqualified by text or structure alone and others not. In that case, any choice the court makes among the range of permissible interpretations (that is to say, of interpretations not disqualified by text or structure) will not be activist in terms of fidelity to text, even though the correctness of its choice will certainly be debatable on the merits. In other words, all the interpretive-fidelity definition of activism does is delimit the bounds within which judges have discretion; as long as they do not transgress those bounds, their resulting decisions will not be activist from the standpoint of interpretive fidelity.

123. This concept of a range of permissible outcomes has antecedents throughout the law. Under Tyagne, a habeas court takes the state court's resolution of a constitutional issue and determines whether it was within the range of permissible outcomes under previously established federal caselaw. See Tyagne v. Lane, 489 U.S. 288, 305-10 (1989) (holding that permissible interpretations of previously existing caselaw will not be overturned on habeas). The same basic analytical inquiry is made on qualified-immunity issues in suits seeking money damages under § 1983—did the officer exceed the bounds of permissible state action delineated by prior caselaw? See Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (applying an objective reasonableness standard in determining whether a government official's conduct will be immune from § 1983 damages liability). Administrative law provides yet another example: "Chevron deference" requires courts to accept an administrative agency's interpretation of a statute committed to its administration as long as it represents a "permissible construction of the statute." Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984). In all these areas, the law recognizes that a constitutional text or a statutory text, while ruling out a number of interpretive options as impermissible, may nevertheless leave a range of other interpretive options open and that the text may give no indication as to which of the options within the range is the "right" one. For a helpful elaboration of this concept, see Caleb Nelson, Stare Decisis and Demonstrably Erroneous Precedents, 87 VA. L. REV. 1, 5-8 (2001).

124. It bears emphasis that the written text—and only the written text—determines the range of permissible interpretive outcomes. This is important to the neutrality of the interpretive-fidelity category of activism because it does not prefer any of the competing methods of resolving textual ambiguity. So, in the case of constitutional interpretation, originalists can look to the intent of the Framers in resolving ambiguity, and nonoriginalists can utilize natural law, representation-reinforcement, or other theories of interpretation. As long as the results reached do not contravene the text, the decision will not be considered activist on interpretive-fidelity grounds. This, of course, will leave considerable room for judicial discretion in confronting open-ended constitutional terms like "due process" or "unreasonable" searches and seizures. My concept of activism,
Another definition of activism looks to the willingness of a court "to use its authority to engage in judicial review in an assertive manner" by, for example, overruling or limiting prior precedents and announcing previously unknown innovations in doctrine. As with invalidation of statutes, the fact that a court overrules lots of cases and announces lots of new constitutional mandates is a red flag that activism may well be afoot. This insight, however, is difficult to translate into a concrete definition of activism. It is correct that if a court finds scores of new constitutional mandates that prior courts did not manage to see, or if a court overturns lots of prior rulings, it is likely (but nevertheless not inevitable) that what is driving the later Court is not the Constitution but rather the court's own policy preferences. Even so, there is unfortunately no way to determine how many overrulings, or how many new doctrinal pronouncements, are "too much."

Moreover, in terms of fidelity to precedent, it would be too blunt to posit, as the assertiveness model does, that overrulings are invariably activist. The Supreme Court has consistently held that "[s]tare decisis is not an inexorable command," particularly "in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" Given that overrulings are specifically permitted, in appropriate cases, by stare decisis doctrine, the fact that decisions are overruled cannot, on its own, constitute proof of activism.

Activism may be shown, so far as fidelity to precedent is concerned, by looking to the reasons advanced for the overruling. Stare decisis rules emphasize that decisions may not be overruled simply because they are considered to be wrong by a later court. Instead, in both constitutional and

however, is multi-faceted, so the relevant question is not how much the limitations in one particular type of activism would constrain judicial discretion, but rather the effect of the various elements of the definition of activism as a whole.

125. FREDERICK P. LEWIS, THE CONTEXT OF JUDICIAL ACTIVISM: THE ENDURANCE OF THE WARREN COURT LEGACY IN A CONSERVATIVE AGE 7 (1999). I refer to this as the "assertiveness model" of judicial activism.

126. Indeed, conservative attacks on the Warren Court pointed to the sheer number of overrulings that occurred during Warren's tenure as proof positive that activism was at work. For example, in Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993), Justice Scalia criticized the Warren era as a time "marked by a newfound disregard for stare decisis," one in which "this Court cast overboard numerous settled decisions, and indeed even whole areas of law, with an uncereemonious 'heave-ho.'" Id. at 108-09 (concurring opinion).

127. Payne v. Tennessee, 501 U.S. 808, 828 (1991); see, e.g., Agostini v. Felton, 521 U.S. 203, 235 (1997). In Patterson v. McLean Credit Union, 491 U.S. 164 (1989), the Court emphatically stated that "[o]ur precedents are not sacrosanct," noting that "we have overruled prior decisions where the necessity and propriety of doing so has been established." Id. at 172.

128. See, e.g., Nelson, supra note 123, at 2 (noting that the "conventional wisdom" is that "a purported demonstration of error is not enough to justify overruling a past decision"). The Rehnquist Court has been something of a paradox on stare decisis. On the one hand, the Court has bolstered the force of precedent by holding that prior precedents should be retained unless there is "special justification" for an overruling, which, as Professor Amar has shown, marked a considerable change from prior judicial practice. See generally Akhil Reed Amar, The Document and the Doctrine, 114 HARV. L. REV. 26, 81-82 (2000). On the other hand, the Rehnquist Court has stressed that, even
statutory cases, "special justification" is required before a court can properly jettison prior precedent.129

Given current stare decisis doctrine, a decision that overrules prior precedent without advancing special justification for doing so, or only upon an implausible demonstration of special justification, should be deemed activist. This is so because rules of stare decisis, though often (but only partially accurately) described as wise judicial "policy," cannot be casually ignored whenever a court deems fit; rather, they are themselves "authoritative legal rules," albeit rules that do not purport to be of constitutional dimension.130 It would therefore be improper for a court to disregard those rules, assuming that the concept of stare decisis is not itself unconstitutional.131

after the Warren era, overrulings have not been exceptional occurrences, noting in Payne v. Tennessee, 501 U.S. 808 (1991), that "the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions." Id. at 828.

129. Patterson, 491 U.S. at 172 (statutory case); see also Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (holding that, even in constitutional cases, "any departure from the doctrine of stare decisis demands special justification"). In deciding whether to overrule prior cases, the Court typically looks to various policy considerations, including (1) the workability of prior decisional law, (2) the extent of reliance on the prior decision, (3) whether the prior doctrine's theoretical foundations have been undermined by later cases, and (4) whether factual circumstances critical to the prior decision have changed. Planned Parenthood v. Casey, 505 U.S. 833, 854-55 (1992). For a good general discussion of these policy factors, see Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?, 109 YALE L.J. 1535, 1551-64 (2000). My colleague Caleb Nelson has argued in an interesting recent article that stare decisis rules should be modified so that "demonstrable error" is again recognized as an independent ground for overturning precedent. See Nelson, supra note 123, at 7; see also Amar, supra note 128, at 78-89 & n.28. Given my view that it is activist for judges to disregard clear constitutional or statutory text, I agree that stare decisis doctrine should be revised to recognize clear or demonstrable error as a valid basis for overruling a prior precedent assuming there are no extraordinarily strong reliance interests counseling adherence to prior law.

130. John Harrison, The Power of Congress over the Rules of Precedent, 50 DUKE L.J. 503, 508 (2000).--It is partially accurate to describe stare decisis rules as policy, as my colleague Professor Harrison has explained, because they are "influenced by and reflect policy considerations." Id. This, however, is true of any rule of law. For example, one element of due process is that a person cannot be criminally punished without being afforded a fair trial. The rule that a fair trial is the "price" for infliction of criminal punishment is undoubtedly influenced by policy considerations (primarily, the importance of avoiding conviction of innocent people), yet it would be strange to say that due process itself is a "policy." Rather, it, like stare decisis, is a rule of law that serves policy interests. Thus, "[w]hen judges say they are bound by precedent," the assertion should be taken to "mean that they are following actual rules and not ignoring the law because they believe that applying it would be undesirable." Id. at 508-09.

131. See infra notes 213-19 and accompanying text. There is a sense in which it may seem circular to say that court-made stare decisis rules should determine the propriety of overrulings, but that is only because the Framers did not, and Congress has not of yet seen fit to, speak to the issue of precedent. Despite their judicial origin, stare decisis rules are "authoritative legal rules" that judges cannot properly disregard. See Harrison, supra note 130, at 505. Similarly, a court's handling of precedent should be considered activist if the court is less than forthright in its treatment of precedent, such as by distinguishing cases on immaterial grounds or misconstruing statements in prior decisions to avoid having to disavow or adhere to the prior decisions. (For what may be all-time lows on these points, see Employment Division v. Smith, 494 U.S. 872 (1990), and Paul v. Davis, 424 U.S.
With this analysis, I can finally offer a substantive definition of activism. A decision is “substantively activist” if the result (1) lacks affirmative support in, or is outside the range of permissible outcomes delineated by, the constitutional or statutory text or structure, (2) is reached by overruling prior binding precedent without adequate justification in light of applicable stare decisis rules, or (3) is arrived at by distinguishing or otherwise limiting precedents on immaterial grounds. In each instance, the necessary implication is that the judges rendered a decision they were not entitled to make. Substantive activism often will, but need not, result in conflict between the judiciary and the political branches of government, measured in terms of invalidation of action undertaken by other branches (including statutes or criminal convictions), or overrulings.

The ideological neutrality of this definition is plain in that it does not privilege certain approaches to constitutional interpretation or political outcomes over others: only plain emanations from text and structure must be heeded, and even then only because of the broad consensus that judges cannot properly reach results that the Constitution plainly forbids. What may not be so obvious is that this definition of substantive activism is, in substantial measure, neutral as between correct and incorrect outcomes as well. Interpretations that are consistent with the written text bearing on any given point are not activist even though one might well believe one of those interpretations to be “right” and the others “wrong”; in this instance, there will be legally incorrect decisions that should not be considered to be activist. Similarly, given that precedent factors into the definition of substantive activism, there will be instances where a decision is correct as an original matter, but nevertheless should be deemed activist in light of prior judicial decisions on the subject. It is only where a decision is activist because it lies outside the range of textually permissible interpretations that an activist decision is necessarily wrong. Therefore, the definition of substantive activism outlined here is not necessarily equivalent to an allegation of error.

693 (1976).) This mode of decisionmaking is activist because it is a departure from the normal common-law model of adjudication, in which the applicable law “arises” from the facts considered to be material in the case. Where the material facts in a present case are the same as in a past case, then the common-law model, coupled with rules of stare decisis, require the same result in both cases, unless there is a legally valid reason (i.e., a reason other than mere disagreement on the merits, see Nelson, supra note 123, at 2) for overturning the prior case. Naturally, there will be room for disagreement about whether a fact was “material” in a prior case or not, but that problem is one that runs throughout the common law—which presumably is one reason (other than mere sadism) that law professors torture their students with hypotheticals and exam questions that challenge students to figure out the facts that are material to a judicial decision.

132. Of course, it is possible to argue that, in a system based on precedent, prior rulings are themselves law, so that a decision that correctly interprets a written text is nevertheless incorrect if prior rulings have adopted a different interpretation. The more traditional way of viewing precedent is that it is merely “evidence” of what the law is, albeit evidence that is rebuttably presumed correct and therefore to be accepted as conclusive absent a valid reason for not doing so. See generally Amar, supra note 128, at 87.
and, in many of its applications, simply will not speak to the correctness of
the decision or interpretation in question.

2. Procedural Activism.—The procedural aspects of activism can be
derived more briefly because there is less disagreement about how to
measure proper judicial conduct once substantive outcomes are taken out of
the picture. At its core, procedural activism preserves the separation of
powers between the federal courts and the political branches of government.
The basic insight here is that even though courts, like legislatures, in an
important sense make law, courts are required to do so in a distinctive way,
one that is markedly different from the way in which legislative bodies make
law. Unlike Congress, Article III courts are not self-starting institutions; they
may make law only if, and to the extent that, Congress has authorized them
to decide a particular dispute within the bounds delineated in Article III and
a litigant has properly invoked their jurisdiction.133 Once a dispute has been
properly brought before a federal court, the issue has to be “justiciable,” or
capable of judicial resolution on principled, nonpolitical grounds; to the
extent that the claim is not justiciable, the matter must be left for resolution,
if at all, by the political branches of government.134

Even if the ultimate issue in a case is justiciable and subsumed within a
valid grant of jurisdiction by Congress, there is the further requirement that
courts may make law only to the extent necessary to decide the case.
Resolving cases or controversies is the institutional responsibility of the
federal courts, and, as Marbury v. Madison established, judicial review is
permitted only as a necessary concomitant to their case-resolution
function.135 For this reason, the federal courts may not issue advisory
opinions136 or otherwise decide legal questions outside of the confines of a
case or controversy, such as where the plaintiff invoking the court’s

133. The lower federal courts, being creatures of statute, have only the jurisdiction affirmatively
given them by Congress within the bounds delineated in Article III. Sheldon v. Sill, 49 U.S. (8 How.)
441 (1850). With the Supreme Court, the analysis is different, but the end result is similar because a
congressional grant of jurisdiction in the initial action is required for the Court to exercise its appellate
jurisdiction. The Supreme Court owes its existence to the Constitution, not Congress, and, as such, the
Court alone is “vested” with jurisdiction by the Constitution. U.S. CONST. art. III, § 1; see Ex parte
McCardle, 74 U.S. (7 Wall.) 316 (1869). The Constitution gives the Court original jurisdiction in
certain cases and in all others appellate jurisdiction “with such Exceptions... as the Congress shall
make.” U.S. CONST. art. III, § 2, cl. 2. “It is generally accepted that Congress has ‘excepted’ from
Supreme Court jurisdiction all cases that do not fall within an affirmative statutory grant.” Peter W.
134. “A controversy is nonjusticiable—i.e., involves a political question—where there is a
textually demonstrable constitutional commitment of the issue to a coordinate political department, or a
lack of judicially discoverable and manageable standards for resolving it.” Nixon v. United States, 506
135. 5 U.S. (1 Cranch) 137, 178 (1803).
jurisdiction lacks standing to do so or the plaintiff's claim has become moot. In Bickel's phrasing, these assorted justiciability limitations on the federal courts guard against activism by requiring the courts to practice the "passive virtues." 

Ever since Bickel advanced the concept, the passive virtues have come under sustained scholarly criticism because, in the view of critics, they would impede Supreme Court intervention in controversial areas where the Court should be heard. This view became so widespread within the academy that it was difficult, until very recently, to find constitutional law theorists who regard the passive virtues as anything other than a quaint, and long-since outmoded, conception of the judicial function. As Professor Stephen Carter has noted—with, one hopes, at least some degree of overstatement—"[f]ew scholars, and virtually no judges, seem to believe any longer in the passive virtues."

Interestingly, the passive virtues may be undergoing a rebirth of sorts in the literature in the torrent of academic criticism of Bush v. Gore, in which the Supreme Court halted Florida's chaotic manual recount of presidential ballots and, with it, Vice President Gore's 2000 bid for the White House. To


139. See BICKEL, supra note 7, at 111–98.

140. For example, Michael Dorf has recently argued that the passive virtues are objectionable to the extent they would interfere with the Supreme Court's ability to "use its bully pulpit to articulate a broad moral vision." Michael C. Dorf, The Limits of Socratic Deliberation, 112 HARV. L. REV. 4, 13 (1998). In less political terms, Neal Katyal has argued, both normatively and descriptively, for a broad conception of the judicial role in which courts give nonbinding advice to other branches of government. See Neal Kumar Katyal, Judges As Advisers, 50 STAN. L. REV. 1709 (1998). The leading proponent of the view that the passive virtues would unduly restrict the role of the Supreme Court is Gerald Gunther. See Gerald Gunther, The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review, 64 COLUM. L. REV. 1 (1964).

141. Stephen L. Carter, Religious Freedom As If Religion Matters: A Tribute to Justice Brennan, 87 CAL. L. REV. 1059, 1073 n.28 (1999). A notable exception is Cass Sunstein, who breathed new academic life into the passive virtues with his Harvard Foreword entitled Leaving Things Undecided, 110 HARV. L. REV. 6 (1996) [hereinafter, Sunstein, Leaving Things Undecided]. See also CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). Professor Sunstein's concept of minimalism looks favorably upon Bickel's passive virtues but nonetheless envisions a considerably narrower role for courts in the resolution of controversial public-policy issues. Sunstein prefers that such issues be resolved democratically through the political branches rather than by the courts, whereas Bickel's passive virtues were largely ways for the Supreme Court to avoid weighing in on such issues until the appropriate time for authoritative judicial resolution. See Sunstein, Leaving Things Undecided, supra, at 8 n.8. For a critical review of the "New Minimalism"—which, as Sunstein confesses, is really a rediscovery of "a range of old ideas." Sunstein, Leaving Things Undecided, supra, at 7; see Christopher J. Peters, Assessing the New Judicial Minimalism, 100 COLUM. L. REV. 1454 (2000).

the Court's many critics, the Court did more than simply give the wrong
answer to the legal questions presented in *Bush v. Gore*; it actually took a
case it had no business deciding in the first place and therefore, in Bickel's
terms, failed to practice the passive virtues by letting the proceedings
continue uninterrupted in the Florida courts, the Florida Legislature, and, if
necessary, Congress. Thus, as bad as the Florida election ordeal was for
late-night television, it at least had the beneficial effect of forcing scholars
stunned by the outcome to advocate judicial restraint with a fervor not seen
since the Progressives' condemnation of *Lochner* generations ago.

Notwithstanding the ebb-and-flow of the popularity of Bickel's passive
virtues in the academy, it would be surprising if the concept of procedural
activism did not incorporate the traditional limitations on adjudication that
Bickel described as the passive virtues. Even Gunther, the leading critic of
the passive virtues, did not take issue with the concept of justiciability limits
on the power of the federal courts or with the minimalist notion that courts
should resist the "maximalist" urge, in Sunstein's terms, to decide "too
much." To the contrary, Gunther recognized that adjudication must be
withheld when "the jurisdictional requirements of Article III are not met" and
accepted as "sound and of principled content" minimalist doctrines pursuant
to which the Court decides a case on the merits through "avoidance only of
some or all of the constitutional questions argued."  

The understandable focus of Gunther's ire was "Bickel's manipulative
use of jurisdictional doctrines" to avoid the merits of a case, not the passive
virtues themselves. To say that traditional justiciability doctrines should


145. Gunther, *supra* note 140, at 16–17; see also id. (endorsing the minimalist rules of
constitutional adjudication distilled in Justice Brandeis's famous concurrence in *Ashwander v. TVA*, 297 U.S. 288, 346 (1936)); id. at 20 ("[A]voidance of broad substantive constitutional decisions without avoiding all decisions on the merits is common Court practice. Much of Bickel's discussion regarding the choice and desirability of narrower grounds of decision is wise and useful."). I should add that Bickel's passive virtues, like the Brandeisian minimalist rules, are fully consistent with the fact that the modern institutional role of the Supreme Court extends far beyond simply deciding who
wins and who loses in particular cases. When issues of constitutional law are squarely presented in a
proper case, both sets of principles permit authoritative resolution by the Supreme Court in
comprehensive, well-reasoned opinions that, in the course of deciding the cases at hand, lay down
principles that will serve as precedent for future cases. See Bickel, *supra* note 7, at 235–43. In this
sense, both differ from those aspects of Sunstein's distinctive brand of minimalism that requires the
Court to decide cases through opinions that are "as incompletely theorized as possible," Sunstein,
*Leaving Things Undecided*, supra note 141, at 99, avoid "deductive" reasoning, id. at 14, and form
broad rules or "issues of basic principle," id. at 20. Sunstein's goal, as he readily admits, is to "force
democracy" by keeping courts out of controversial matters as far as possible and leaving such matters
for resolution by the political branches. Id. at 7.

146. Gunther, *supra* note 140, at 16 (emphasis added); see also id. at 10 (rejecting Bickel's "neo-
Brandeisian fallacy: . . . to assert an amorphous authority to withhold adjudication altogether [is] a
power far broader than any suggested by the examples given by Brandeis, a discretion far wider
not be manipulated to avoid unwanted but nonetheless mandatory exercises of jurisdiction does not entail rejection of the passive virtues as improper in themselves. Consequently, departures from the traditional adjudicative model enshrined in the Constitution’s justiciability limits on federal-court jurisdiction are properly regarded as procedurally activist even if the underlying judgment is sound on the merits.\(^4\)

This form of judicial overreaching can take several forms. For example, a court might decide “too much” by resolving issues that need not be decided in order to reach a reasoned disposition of the case.\(^5\) Similarly, a court might exceed its authority by granting a remedy that is overbroad in relation to the constitutional violation found or by remedying a violation in an unnecessarily intrusive manner.\(^6\) If the relief ordered is not narrowly tailored to the violation, then, in a real sense, the court has crossed the line separating constitutional enforcement from the policy-wonk world of divining the “best” way to structure institutions of state or local government.\(^7\)

In light of these considerations, a definition of procedural activism is possible. A decision is “procedurally activist” if it reaches the merits when
the passive virtues would counsel against doing so or resolves more issues than are necessary, strictly speaking, to reach a reasoned disposition of the case. In these instances, the underlying result may or not be correct, and may or may not be substantively activist, yet the decision has been reached through improper means and therefore should be considered procedurally activist, wholly apart from matters of substance.

B. Was the Counterrevolution Activist?

I can now consider whether the Counterrevolution by the Burger and Rehnquist Courts was, in some sense, activist. Applying the ideologically neutral definition of activism developed in the last section, it is unquestionable that the Counterrevolution was frequently activist. A few examples from the habeas corpus context should illustrate the point that those Courts did indeed resort to activism in undoing the earlier activism of the Warren Court.\textsuperscript{151}

\textit{Teague v. Lane}\textsuperscript{152} is a classic example of procedural activism. In that case, the Court held that, except in two narrow circumstances, “new” rules of federal law could not be applied on habeas corpus. The difficulty was that the far-reaching issue decided by the Court was not addressed by the parties to the case. Indeed, it was discussed only in a single amicus brief, and was not the subject of any discussion at oral argument.\textsuperscript{153} The first time the parties learned that radical changes were in store for habeas retroactivity doctrine was when they received the Court’s opinion on the merits in \textit{Teague}. By then, of course, it was too late for the parties to have any input into the

\textsuperscript{151} Cases like \textit{Miranda v. Arizona}, 384 U.S. 436 (1966), \textit{Mapp v. Ohio}, 367 U.S. 643 (1961), and \textit{Escobedo v. Illinois}, 378 U.S. 478 (1964), were, in my view, either in derogation of, or lacking support in, the constitutional text and thus were substantively activist. \textit{Miranda} was also a procedurally activist decision because the Court, in a case where Miranda’s lawyers rested only on the Sixth Amendment right to counsel, created an elaborate new regulatory regime for custodial interrogation, grounded on the Fifth Amendment’s Self-Incrimination Clause, based on the Court’s own untutored survey of police interrogation manuals. \textit{Miranda}, 384 U.S. at 461. \textit{Miranda} also discussed issues that were not before the Court, such as the standard for determining whether Miranda rights had been validly waived; the waiver issue was not ripe because, before \textit{Miranda}, state and local police did not advise suspects of what would later become known as their \textit{Miranda} rights. \textit{Id.} at 475. Substantive activism was also afoot in the overruling of established precedents based solely on disagreement with the merits, as in \textit{Katz v. United States}, 389 U.S. 347 (1967), and \textit{Gideon v. Wainwright}, 372 U.S. 335 (1963). \textit{See Katz}, 389 U.S. 347 (overruling, inter alia, \textit{Olmstead v. United States}, 277 U.S. 438 (1928)); \textit{Gideon}, 372 U.S. 335 (overruling \textit{Betts v. Brady}, 316 U.S. 455 (1942)).

\textsuperscript{152} 489 U.S. 288 (1989).

\textsuperscript{153} Justice Brennan’s dissent noted: “Astonishingly, the plurality adopts this novel precondition to habeas review without benefit of oral argument on the question and with no more guidance from the litigants than a three-page discussion in an \textit{amicus} brief.” \textit{Id.} at 330 (Brennan, J., dissenting). It is hornbook law that federal courts not only can but must, where the parties fail to do so, raise questions of subject-matter jurisdiction sua sponte. \textit{See, e.g., Steel Co. v. Citizens for a Better Environment}, 523 U.S. 83, 94–95 (1998). Nonretroactivity, however, “is not... jurisdictional” but rather a merits defense that is forfeited if not raised in opposition to a habeas claim. Schiro v. Farley, 510 U.S. 222, 228–29 (1994).
matter (other than by filing the usual petition for rehearing, which the Court invariably denies without comment).154

To be sure, easy issues can be disposed of by a court *sua sponte*, but the issue of whether habeas review should be withdrawn for new rules was by no means easy. As such, the prudent course under the circumstances would have been to ask for briefing on the point or to highlight the retroactivity issue and leave it for a later day, both steps the Court has taken in other contexts when it anticipated the possibility of a broader or significantly different disposition than that urged by the parties.155 Clearly, the plurality in *Teague* was determined to put an end to what it perceived to be longstanding abuses in habeas corpus and to provide state-court convictions the finality they were lacking. Whether or not this was desirable can be debated on the merits, but the claim here is only that it was activist to reach out and take such a far-reaching step without full adversarial treatment.156

Of the counterrevolutionary habeas cases discussed in Part II, only two—*Wainwright v. Sykes*157 and *Stone v. Powell*158—were substantively

154. Cf. Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL'Y 283, 288 (1996) ("The party's opportunity to make its case, to present its arguments, to persuade the Court—its opportunity, in other words, to be a genuine participant in the decisionmaking process—is rendered chimerical because the outcome has already been decided, on the basis of criteria it neither knew would govern nor could help to shape. What a charade the judicial process then becomes!").

155. For instance, the Court highlighted, but did not reach, the issue of whether *Miranda* had been legislatively abrogated when it first took notice of 18 U.S.C. § 3501, the statute Congress passed in 1968 to displace *Miranda* as the standard governing the admissibility of confessions in federal prosecutions. See *Davis v. United States*, 512 U.S. 452, 457 n. * (1994). In addition, presumably as a predicate for an overruling in *Patterson v. McLean Credit Union*, the Court, over a four-Justice dissent, set the case for reargument and directed the parties to brief the question whether *Runyon v. McCrary*, 427 U.S. 160 (1976), should be overruled. *Patterson v. McLean Credit Union*, 485 U.S. 617 (1988) (per curiam). The outcry from civil-rights groups that *Runyon*, a landmark civil-rights case applying a Reconstruction-era antidiscrimination statute to private actions, might be overruled was so fierce that the Court ultimately backed down; and it seems fair to suppose that the reason the Court backed down was its unwillingness to brave the political firestorm as opposed, say, to the strength of the stare decisis arguments of *Runyon*’s defenders. Whatever the reason, however, after having clearly signaled its willingness to overrule *Runyon* absent any invitation from the parties to do so, the Court trotted out stare decisis as the justification for retaining *Runyon* even though the Court noted its belief that the case was wrongly decided. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

156. Another procedurally activist aspect of *Teague* was that the plurality purported, in a habeas case involving a *state* conviction, to make its new approach to retroactivity applicable to *federal* convictions as well. See *Teague*, 489 U.S. at 301 (plurality opinion) (holding that a case establishes a "new" rule if it "breaks new ground or imposes a new obligation on the States or the Federal Government") (emphasis added). The applicability of the "new rule" retroactivity standard to federal prosecutions not only was not before the Court in *Teague* but was also less than obvious. Several key concepts in *Teague* (comity between federal and state courts and deterring state judges from flouting federal rights) do not apply in the context of federal prosecutions, and their inapplicability to the federal context might have warranted a different approach in that context to retroactivity. That the Court did not even entertain this possibility shows that the federalism and comity rationales in *Teague* were mere window-dressing—finality (or, more bluntly put, the view that criminal defendants must lose) was really the operative concept.

activist. Sykes rejected the Warren Court's deliberate-bypass standard for state-court procedural defaults except for the particular kind of default that occurred in Fay v. Noia.\textsuperscript{159} The main reason given by Sykes for doing so—that state procedural rules deserved "greater respect" than the Warren Court had given them—\textsuperscript{160} is merely a claim that Fay was wrongly decided. Even if that were so, however, mere demonstration of error is an insufficient reason for overturning precedent under current stare decisis doctrine.\textsuperscript{161}

Perhaps it was recognition of this point that led the Court to characterize Fay's treatment of the procedural default issue as "dicta,"\textsuperscript{162} but that characterization is wrong. Given the warden's claim that the Court could not reach the merits of Fay's claim because it had been defaulted in state court, the Fay Court was squarely presented with the procedural-default question. The Court held that, although state-court procedural defaults could bar review by a habeas court, review would be precluded only when a deliberate bypass occurred, and (not surprisingly) the Court then proceeded to define what it meant by deliberate bypass. This is not the making of dicta, any more than Coleman's across-the-board adoption of the far less forgiving cause-and-prejudice standard for all kinds of procedural defaults was dicta. In both cases, the definitions (each of which was highly contestable) were necessary to the outcome. Rehnquist's effort to avoid Fay thus was disingenuous.

Stone was also a substantively activist decision. The reason is not, as some have argued,\textsuperscript{163} that the habeas statute dictated a different result. As previously shown, the habeas statute simply authorized issuance of the writ on federal-law grounds as principles of "law and justice" require, leaving it to the Court to determine when the writ should issue.\textsuperscript{164} The real reason that Stone was activist is that it was inconsistent with Mapp v. Ohio,\textsuperscript{165} the case that applied the exclusionary rule against the states. Stone held that the exclusionary rule was intended simply to deter Fourth Amendment violations by the police, and then proceeded to preclude habeas review of exclusionary-rule claims because it saw "no reason to believe" that the threat of habeas

\begin{footnotes}

\footnotetext[158]{428 U.S. 465 (1976).}
\footnotetext[159]{372 U.S. 391 (1963).}
\footnotetext[160]{Sykes, 433 U.S. at 88.}
\footnotetext[161]{See supra note 128. In contrast, the Rehnquist Court decision dealing the ultimate death blow to the deliberate-bypass standard, Coleman v. Thompson, 501 U.S. 722 (1991), was not activist because, after Sykes, the Warren Court's standard could be seen as a "remnant of abandoned doctrine," which (somewhat oddly) is recognized as special justification for overruling a case. See Paulsen, supra note 129, at 1557 (describing this ground for overruling as reflecting the Court's view that "[i]t is okay to overrule precedent if you do it in two (or more) steps"). The "remnant" exception to stare decisis thus is a sort of "adverse-possession" rule allowing trespasses against precedent eventually to mature into good title.}
\footnotetext[162]{Sykes, 433 U.S. at 87.}
\footnotetext[163]{See, e.g., Stone, 428 U.S. at 515–22 (Brennan, J., dissenting).}
\footnotetext[164]{See supra notes 24–26 and accompanying text.}
\footnotetext[165]{367 U.S. 643 (1961).}
\end{footnotes}
review would deter unconstitutional searches.\textsuperscript{166} \textit{Mapp}, however, had identified the "imperative of judicial integrity"—that is, the need to prevent courts from using illegally seized evidence and thereby profiting from unconstitutional conduct—as an independent reason for the exclusionary rule.\textsuperscript{167} \textit{Stone}, therefore, was not faithful to \textit{Mapp}.

Here, I have given just three examples of activist decisions by the Burger and Rehnquist Courts drawn from the narrow but important area of habeas corpus. Broadening the focus to all of criminal adjudication or criminal procedure as a whole would undoubtedly reveal many more. What these examples show is that in order to establish what it considered a proper balance between the policies of habeas corpus and the interest of the states in finality and the integrity of their judicial processes, the Burger and Rehnquist Courts chose, on more than an infrequent basis, to resort to activism—not just in habeas law, but throughout criminal adjudication.\textsuperscript{168}

IV. Activism As Restraint?

To the extent the Burger and Rehnquist Courts did indeed resort to activism in revising the Warren Court's code of constitutional criminal

\textsuperscript{166} \textit{Stone}, 428 U.S. at 493; see also id. at 492 ("Evidence obtained by police officers in violation of the Fourth Amendment is excluded at trial in the hope that the frequency of future violations will decrease.").

\textsuperscript{167} \textit{Mapp}, 367 U.S. at 659; see also id. at 657 (describing the "philosophy" of the Fourth Amendment was to "assure... that no man is convicted on unconstitutional evidence"). To be sure, the Warren Court itself had emphasized deterrence concerns in \textit{Linkletter v. Walker}, 381 U.S. 618 (1965), where the Court held that \textit{Mapp} would not be applied to previously conducted trials. The \textit{Linkletter} Court's recognition that it would be unfair to apply \textit{Mapp} to cases resolved under the prior law, however, did not limit \textit{Mapp}'s broader conception of the purposes of the exclusionary rule—purposes that were not implicated in \textit{Linkletter} because, absent retroactive application of \textit{Mapp}, the use of the illegally seized evidence was perfectly constitutional. Indeed, even after \textit{Linkletter}, the Court held that exclusionary rule claims were subject to postconviction review in federal prosecutions and assumed, in dicta later repudiated in \textit{Stone}, that the same rule governed in habeas cases. See \textit{Kaufman v. United States}, 394 U.S. 217 (1969).

\textsuperscript{168} In criminal investigation, the Counterrevolution was more indirect, but no less effective in reshaping Warren-era doctrine. In criminal investigation, as Professor Carol Steiker has explained, \textit{Mapp} and other controversial Warren-era rules of behavior for police doctrines ("conduct rules") could be, and were repeatedly, negated by adoption of countervailing "decision rules" telling courts how to respond to antecedent violations of conduct rules. See generally Steiker, supra note 4. This obviated any real need for the Burger and Rehnquist Courts to overrule the Warren Court's conduct rules; for example, the many subsequent exceptions created to the Fourth Amendment exclusionary rule, limitations on standing to raise Fourth Amendment claims, and the prohibition of habeas review of such claims have taken much of the bite out of \textit{Katz} and \textit{Mapp}. \textit{Id.} at 2504. The same dynamic took place in \textit{Miranda} doctrine. See infra notes 203–08. Given that criminal adjudication, unlike criminal investigation, generally speaks only to one audience (courts) instead of two (courts and police), there has been less room for using decision rules to change Warren-era rules of criminal adjudication. As such, it is not surprising that the Burger and Rehnquist Courts committed more direct assaults on precedent in criminal adjudication than in criminal investigation. For examples of such assaults, see, for example, \textit{Teague v. Lane}, 489 U.S. 288 (1989), which overruled \textit{Linkletter v. Walker}, 381 U.S. 618 (1965), and \textit{Wainwright v. Sykes}, 433 U.S. 72 (1977), which overruled \textit{Fay v. Noia}, 372 U.S. 391 (1963).
procedure, the larger normative question arises concerning the propriety of the Counterrevolution. Some proponents of judicial restraint might object that activism, once identified, is by definition unjustified. This is a principled position, but not, as I hope to demonstrate, one that will actually promote judicial restraint. If one is really interested in promoting judicial restraint, then it may be necessary at times for a court, confronted with prior instances of activism, to respond in kind so that the pendulum might be moved back in the direction of restraint, e.g., of adherence to written texts.

Two caveats are in order before proceeding to the argument. First, I make no claim that activism is defensible across the board. My own view is that restraint is the proper approach for federal judges to take; this is why I limit my defense to reactivism, which by definition can occur only after, and to the extent that, a majority on the Court has already committed a significant departure from principles of judicial restraint. Proponents of restraint presuppose that activism is never justified; to the extent that view is adopted by restraint-minded judges, activist judges, conservative or liberal—who, by definition, reject judicial restraint as an operative principle—will be left with a free hand to impose their moral and political values on society through constitutional adjudication. If that happens, then judicial restraint will operate, in practical terms, as the handmaiden of judicial activism, and the Constitution will finally have been transformed into a one-way ratchet.

Second, although the story of the Counterrevolution (and hence much of the focus of this Article) has largely centered on conservative judicial activism, it would be unfair to dismiss this effort as a justification for conservative judicial activism as such. As I hope is clear by now, reactivism is an ideologically neutral concept. Liberal Justices can use reactivism to counter earlier instances of conservative activism, just as the Rehnquist Court has used reactivism to roll back the Warren Court Revolution in criminal procedure. My aim, therefore, is neither to praise conservative activism as such nor to bury judicial restraint, but instead to suggest the need to rethink, to some extent, conventional understandings of judicial restraint. What is needed, I believe, is a more nuanced view of judicial restraint, one that is tailored to the realities of constitutional adjudication in modern society. I am under no illusion that refining judicial restraint along these lines will end judicial activism—indeed, it will actually require activism in certain instances—but it should produce an equilibrium closer to the restraint model than our current system of adjudication.

169. See, e.g., Graglia, supra note 99, at 85.
170. Again, it bears emphasis that reactivism does not necessarily push toward less judicial activity or fewer rights. Where prior courts have underenforced the Constitution—and arguments have been made along these lines in a variety of contexts, such as to the Privileges and Immunities Clause and the Contracts Clause, for example—then, to the extent those prior decisions were activist in one of the senses I have described, reactivism would result in more aggressive judicial review and more enforceable rights.
A. The Problem

A hypothetical may help set the stage for consideration of reactivism. Imagine that the Supreme Court is asked to decide in Case One, as a matter of first impression, whether criminal defendants have a constitutional right to a particular kind of safeguard at trial. After due consideration, the votes are tallied, and the Court rules six to three for the defendant, concluding that the right does, in fact, exist. The three dissenters believe the Court’s conclusion to be an impermissible one in light of the constitutional text and file a vehement dissent.

Sometime later, Case Two comes up, asking the Court to resolve a Circuit split concerning what defendants need to show in order to make out a successful claim for reversal based on the right recognized in Case One. The six Justices in the majority in Case One split among two different tests in Case Two. Three Justices vote to affirm the petitioner’s conviction based on the strict test applied by the court of appeals, which the petitioner does not satisfy and which would be very difficult for any defendant to satisfy. Another group of three Justices endorses a lax test that the petitioner satisfies and that other defendants could readily satisfy and therefore vote to reverse. Because a majority is required to control the disposition of the case, neither the strict nor lax groups can, on their own, decide the case, the disposition of which will therefore be determined by how the dissenters vote. Let us further assume that the dissenters, though still convinced that Case One was an activist decision, believe that the strict test is undesirable on its own terms, perhaps because it is less workable than the lax test. How should they vote?

Under conventional norms of judicial behavior, the dissenters would have two options. First, they could reaffirm their prior view that Case One was wrongly decided and vote to affirm the conviction, urging that the prior precedent in Case One should be overruled. This is so because horizontal stare decisis (the binding force of precedent in later cases on the same court that rendered it) binds the Court “as a whole,” not its individual members, who therefore remain free to file repeated dissents on the same issue despite the adverse precedent. In the hypothetical, this approach would result in a six-to-three vote affirming the conviction without an opinion for the Court, with a three-Justice plurality adopting the strict test and the three Case One dissenters concurring in the judgment on the grounds that Case One should be overruled.

171. Suzanna Sherry, Justice O'Connor's Dilemma: The Baseline Question, 39 WM. & MARY L. REV. 865, 870 (1998) (“The stare decisis question asks whether the Court as a whole should overrule its prior decision . . . . The dissenting Justice can either concede the point or reargue the issue [in subsequent cases]. Justices thus may occasionally continue to reject a particular holding of the Supreme Court from which they dissented, dissenting again and again in every case raising the same question or issue.”). The most striking example of this phenomenon, as Professor Sherry recognizes, is the series of repeated dissents by Justices Brennan and Marshall arguing, in the face of years of rulings to the contrary, that capital punishment could never be constitutionally imposed. See id.
Second, if the dissenters are unwilling to advocate overruling Case One, or if they do but fall short (and they will because, by hypothesis, they lack the necessary five votes to overrule Case One), the dissenters could, in essence, “let bygones be bygones.” This would mean that they would begrudgingly accept Case One as a given and thus proceed to answer the question posed in Case Two. In that event, the dissenters should, under conventional norms, adopt the lax test in Case Two because that is the choice they would make if they were sitting in judgment alone without regard to the decisional outcome their choice would produce in conjunction with the votes of other Justices.1

Neither of these alternatives, it should be noted, would be terribly attractive to the dissenting Justices. Most obviously, absent intervening personnel changes on the Court, it would largely be pointless for the dissenting Justices to vote in Case Two to overrule Case One. Except in the rare switch by members of the Case One majority, the dissenters will not have the five votes in Case Two necessary for an overruling. Under those circumstances, voting to overrule might have value as a moral statement (as in the repeated dissents by Justices Brennan and Marshall in capital cases), but it will not carry the day for their cause. Indeed, doctrinal incoherence might well result if Justices continued voting their preferred outcomes after those outcomes were rejected—first-best voting by the Justices might prevent the Court from assembling a majority or even a clear plurality opinion as to the reasoning for the disposition, thereby defeating the law-clarifying purpose of published appellate opinions.

The second alternative for the dissenting Justices in Case Two—following erroneous precedents to their logical end—would likewise have little allure. The dissenting Justices would be magnifying the effect of what they believe to be an erroneous interpretation of the Constitution if they were required to give the precedent the same robust effect they would give to a correct decision. As a result, even where they are unwilling to overrule a precedent they believe to be wrong, Justices will typically respect them only so far as they go and will not extend them beyond that scope.172 There may

172. As Professor Caminker has explained, it would be “unfamiliar” on the conventional view to examine legal rules for correctness as “rule packages” rather than on an individual basis. Caminker, supra note 57, at 2346. In other words, each rule (here, either the strict or lax test in Case Two) would be examined separately and on its own terms to determine whether it is correct or not, without regard to either the content of other rules that bear on the same general subject (here, the constitutional rule adopted in Case One), or the voting behavior of the dissenters’ colleagues in Case Two. These principles give rise to what Professor Caminker terms the “sacrosanct disposition constraint on strategic behavior: a Justice may vote strategically for a suboptimal [i.e., less than highest preferred] rule only if her insincere vote leads to the same disposition as her sincere vote would have done.” Id. at 2335.

be circumstances in which Justices will be willing to extend precedents they deem misguided, and this happened in several important areas of doctrine during the Counterrevolution. This response, however, will be unusual; generally speaking, the choice will be between overruling the precedent or adhering to it so far as it goes.

Now, imagine that Case Three comes before the hypothetical Court. This time, there have been personnel changes on the Court, and two members of the Case One majority have been replaced by Justices who agree with the Case One dissenters that Case One was wrongly decided. With this hypothetical turn of events, the Case One dissenters now have an option—overruling Case One—that they lacked in Case Two. Should the Case Three majority overturn Case One (and, implicitly, Case Two)? The staunchest proponents of first-best voting would say that Case One should be overruled because Justices should always vote their first-best preferences.

involving the question whether Griffin v. California, 380 U.S. 609 (1965), which prohibited prosecutorial comment on, or adverse inferences from, the defendant’s silence at trial, applies at sentencing. Rejecting the majority’s decision to extend Griffin, Justice Scalia argued forcefully in dissent that Griffin was the product of “a breathtaking act of sorcery” by the Court and a “wrong turn” in terms of text and tradition. Mitchell, 526 U.S. at 336 (Scalia, J., dissenting). Even so, instead of advocating overruling Griffin, Justice Scalia would not have applied it to sentencing. See id. arguing that the fact of error in Griffin “is not cause enough to overrule it, but is cause enough to resist its extension”). For additional criminal-procedure examples, see Scott v. Illinois, 440 U.S. 371-74 (1979), which held that the right to state-appointed trial counsel under Arégersinger v. Hamlin, 407 U.S. 25 (1972), where jail time may be imposed, does not extend to cases where imprisonment will not be imposed, no matter how necessary defense counsel may be for an effective defense or avoiding erroneous convictions. See also Ross v. Moffitt, 417 U.S. 600, 608-15 (1974) (holding that the right to state-appointed counsel on direct appeal under Douglas v. California, 372 U.S. 353 (1963), does not extend to discretionary-review proceedings).

174. The Burger and Rehnquist Courts did, on several notable occasions, extend controversial Warren-era precedents, such as Miranda and Massiah. See generally Steiker, supra note 4, at 2474-78, 2480-84. This seems to reflect the Court’s commendable desire to have at least a minimally logical and workable system for implementing Warren Court precedents that would not be overruled. If, for example, Miranda were to be retained as the standard for custodial interrogation, then it would make little sense to permit the police to ignore a suspect’s unambiguous invocation of his Miranda rights and continue interrogating the suspect in the absence of counsel until the suspect finally relents and confesses. See Minnick v. Mississippi, 498 U.S. 146 (1990); Edwards v. Arizona, 451 U.S. 477 (1981). According to a recent biography, Justice White systematically voted, in all cases except abortion, to reaffirm—and even extend—rulings he believed to have been wrongly decided, Miranda included, based on a strong belief in precedent. See Dennis J. Hutchinson, The Man Who Was Once Whizzer White: A Portrait of Justice Byron R. White 369, 389-90 (1998). Dean Jeffries suggests, in contradiction to Hutchinson, that White may actually have been closer to his colleagues’ “free and easy attitude toward unwelcome prior decisions” than might otherwise appear and may, in fact, have voted to extend unfortunate precedents as a way of bringing home to his colleagues the full costs of their mistakes. See Jeffries, supra note 173, at 501.

175. The parallels to the Counterrevolution should now be apparent: the Burger Court was typically in the Case Two situation, lacking the votes necessary for wholesale repudiation of the Warren Court’s criminal procedure decisions, whereas the Rehnquist Court was usually in the Case Three situation in that, by the late 1980s, it had five Justices who disagreed with just about everything the Warren Court did in constitutional criminal procedure.

176. Professor Lawson argues that Justices must decide each case based on their first-best interpretation of the Constitution and that it is unconstitutional for them to vote based on prior Court
For most of the rest of us, however—including Justices on the Supreme Court—the answer is an unequivocal "it depends."

As previously mentioned, in both constitutional and statutory cases, current stare decisis rules require "special justification" before the Court can revisit prior precedent.\textsuperscript{177} In doctrinal terms, this would, in turn, devolve into policy-laden inquiries such as the "workability" of the doctrine of the prior case or the extent to which overturning the precedent would upset "reasonable reliance interests," inquiries that cannot be made in the abstract.\textsuperscript{178} If truth be told, however, these factors are broad enough that, if the Court really wanted to, it could come up with a reason in Case Three for overturning Case One.\textsuperscript{179} The more pertinent question, therefore, is whether the Justices would be willing to overrule Case One.

This question is substantially more difficult than proponents of first-best voting admit. Clearly, overrulings do happen every Term, roughly on the order of one-and-a-half overrulings, on average, per year over the last two decades, and so the Justices are willing to revisit prior precedent in certain contexts.\textsuperscript{180} Unless we are to assume that a majority of the Supreme Court only disagrees with two cases a year on average, which seems highly implausible, the rate of overrulings suggests a general reluctance to overturn precedent. That Justices would be instinctively reluctant to overrule prior decisions should not come as a surprise because there are significant costs to overruling precedent.

Perhaps the most important of these costs is the potential for upsetting reliance interests on the part of society as a whole. For example, even as he strongly argued that the Court had so broadly construed the Commerce Power as to hand Congress a "blank check," Justice Thomas, who has proven himself to be among the least reluctant on the current Court to overturn precedent, got cold feet in \textit{United States v. Lopez}.\textsuperscript{181} He lamented that it was likely too late in the day to return to the original understanding of the Commerce Clause (which, to him, would have required rejection of the

\begin{footnotesize}
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\item See supra note 141 and accompanying text.
\item See generally Paulsen, supra note 129, at 1551 (listing factors).
\item Indeed, according to at least one empirical study, modern Supreme Court justices virtually never subjugate their preferences to the norms of stare decisis. See Jeffrey A. Segal & Harold J. Spaeth, \textit{The Influence of Stare Decisis on the Votes of United States Supreme Court Justices}, 40 AM. J. POL. SCI. 971, 971 (1996) (reporting their conclusion that "[o]verwhelmingly, Supreme Court justices are not influenced by landmark precedents with which they disagree"). Based on this and other empirical data, Fred Schauer has noted that "there is scant evidence that precedent operates as a genuine constraint in Supreme Court cases of substantial moral or political consequence." Frederick Schauer, \textit{Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior}, 68 U. CIN. L. REV. 615, 626 (2000).
\item See supra note 140.
\item 514 U.S. 549 (1995).
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\end{footnotesize}
notion that Congress can regulate purely intrastate activity based on the aggregate effect of such activity on interstate commerce), noting in a footnote that "consideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clean." Thomas accordingly called only for the Court to "temper" its Commerce Clause jurisprudence, and that is essentially what the majority did. Related to the reliance point is that there are potential costs to the Justice calling for the overruling; costs to which the Justices are, to varying degrees, quite sensitive. Perhaps the foremost of these costs is discomfort or reputational harm caused by sharp scholarly or public criticism. Such criticism would undoubtedly have occurred if Lopez had ordered, or any Justice specifically called for, a return to what President Franklin Roosevelt once derisively referred to as a "horse-and-buggy definition of interstate commerce." Lopez is a powerful reminder that there are limits to how far even the most aggressive Justices will go to correct errors they perceive to be flagrant trespasses on the Constitution, even in areas they consider to be important. Another is Dickerson v. United States in which Chief Justice Rehnquist—whose main priority on the Court seems to have been undoing the Warren Court's decisions in criminal procedure—wrote for seven Justices not only declining to overrule Miranda, but also firmly establishing it as a "constitutional

182. Id. at 601 n.8; see also id. at 574 (Kennedy, J., concurring) ("Stare decisis operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature. That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy... "). Interestingly, Justice Scalia, an advocate of originalism, did not join Justice Thomas's concurring opinion in Lopez, choosing instead to sign onto the majority opinion without comment.

183. Id. at 584 (Thomas, J., concurring). In light of these cautionary notes sounded in the concurring opinions, the Lopez majority did not fundamentally rework existing Commerce Clause doctrine—indeed, not a single case was overruled—but instead took a more limited approach. The Court held that "noncommercial" intrastate activities may not be aggregated to demonstrate the requisite "substantial effect" on interstate commerce. Id. at 567. In so holding, however, the Court went out of its way to endorse aggregation for commercial activities, id. at 559, as well as sweeping congressional authority to regulate two other "broad categories" of activities. See id. at 558 (reaffirming prior Commerce Clause holdings establishing congressional authority to "regulate the use of the channels of interstate commerce" and to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"). Using its reaffirmed ability to regulate pursuant to these latter approaches, Congress immediately reenacted the Gun-Free School Zones Act, 18 U.S.C. § 922(q), invalidated in Lopez, adding a requirement that the gun must have crossed interstate lines at some point—as, naturally, virtually every (if not every) gun has. See id. § 922(q)(2)(A) (1996) (adding requirement that the firearm must "have[ve] moved in... interstate or foreign commerce").

184. Franklin D. Roosevelt, The Two Hundred and Ninth Press Conference, May 31, 1935, in 4 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 200, 221 (Samuel I. Rosenman ed., 1938). Even the more limited step the Court took in Lopez drew sharp criticism, as if the Court had committed some grave sin in suggesting that there are limits to the Commerce Clause. See, e.g., Peter M. Shane, Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism, 45 VILL. L. REV. 201, 209 (2000).
decision." Although Justice Scalia saw no reason for "hesitation" at the prospect of reconsidering *Miranda*, the Court evidently did despite the fact that the views of Rehnquist and certain other members of the majority on the correctness of *Miranda* were undoubtedly closer to Scalia's than Warren's. It is little wonder, then, that even in the realm of constitutional law, stare decisis doctrine puts more of a premium on keeping past issues "'settled'" than insisting that they be "'settled right'"—less, to be sure, than in statutory contexts, but a premium nonetheless—and the reason is that the Justices prefer not to overrule prior precedents.

Some opponents of stare decisis have argued that the cure for this problem is for Congress to abrogate stare decisis and require the Justices to decide each case in accordance with their "best present understanding of the meaning of the Constitution." This, however, would be no cure at all, for at least two reasons. First, there is no real support for the empirical assumption that stare decisis acts as a constraint on Supreme Court Justices, at least in controversial cases. There is no reason to think that abolishing stare decisis rules would change the Justices' behavior if in fact stare decisis

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185. 530 U.S. 428, 438 (2001); see also id. at 432 ("We hold that Miranda, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule Miranda ourselves.").
186. Id. at 461 (Scalia, J., dissenting).
187. Reluctance to strike down an icon like *Miranda* was not the only reason for Justices who disagreed with the decision to vote to reaffirm it in *Dickerson*. The conventional wisdom is that the costs of *Miranda*, though very real and substantial when the decision took law enforcement nationwide totally by surprise in 1966, are now low (maybe even "vanishingly" so) because law enforcement has fully adjusted to the *Miranda* framework and still achieves confessions in large numbers of cases. See generally Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. Rev. 500, 547 (1996) (arguing that "Miranda's empirically detectable net damage to law enforcement is zero"). If this empirical assessment is accurate, then the images of Justice White, the most vituperative of the *Miranda* dissenters, repeatedly voting to extend *Miranda* in later years, see supra note 174, and of Chief Justice Rehnquist writing the opinion reaffirming *Miranda* in *Dickerson* may not be as counterintuitive as they seem at first, and subsequent, blushes. Needless to say, to constitutional purists who insist on legally correct outcomes, the costs of *Miranda*—whether real or imagined, or whether sunk or not—would be beside the point; all that would matter is that the "right" interpretation of the Constitution be adopted.
188. See Agostini v. Felton, 521 U.S. 203, 235 (1997) (noting that stare decisis reflects the view "that in most matters it is more important that the applicable rule of law be settled than that it be settled right") (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). Why, then, was the Warren Court so willing to overturn precedent in criminal procedure? The answer would seem to be that the Warren Court majority was uniquely suited by background to take an active role in national affairs and to believe itself to be competent to do so. From Chief Justice Warren—a former governor and presidential contender—on down, the Warren Court majority was largely composed of individuals who came to the Court with substantial national political experience, not significant prior judicial service, a trend reversed in subsequent Court appointments. For an interesting examination of judicial background as it influenced the attitudes of the Warren, Burger, and Rehnquist Courts, see Mark Tushnet, *The Warren Court as History: An Interpretation*, in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 28–31 (Mark Tushnet ed., 1993).
189. Paulsen, supra note 129, at 1538.
190. See supra note 179.
rules do not meaningfully constrain judicial behavior in important cases in the first place.

Second, and relatedly, opponents of stare decisis overlook the critical fact that stare decisis exists because the Justices are reluctant to overrule precedent, not the other way around. If a majority of the Justices did not like stare decisis or found it too constrictive, they would have exercised their unquestioned power to reject stare decisis rules altogether or to broaden them to leave greater flexibility for overrulings; after all, stare decisis is a judicially created doctrine. The Justices have not only failed to take either step; they have taken the opposite step under the Rehnquist Court, changing stare decisis rules in ways that make overrulings more (not less) difficult.191 It is impossible to know for certain why this shift has occurred, but a plausible explanation is strong reluctance on the Court's part to overturn scores of prior precedents, perhaps even a preference for second-best solutions as instruments for legal change.192

To the extent the Justices are instinctively reluctant to overturn precedent, this reluctance would likely prompt the Court to avoid undesired reconsideration of previously resolved issues even if stare decisis were abrogated. Even without the convenient excuse of stare decisis, the Justices' cost-benefit calculus would still be the same in deciding whether to reject prior judicial errors. The need to constantly rethink all legal questions anew in a world without stare decisis would increase the workload of the Justices, not to mention their own personal exposure to criticism, as Posner has explained in his recent treatment of judicial motivation.193 The Justices

191. See generally Amar, supra note 128, at 81-83 (documenting the shift by the Rehnquist Court toward more stringent stare decisis rules than reflected in traditional Court practice). This shift corresponds with the finding of at least one empirical study that, to the extent modern Justices have rested on stare decisis as a reason for not reconsidering landmark precedents, it almost always "moved a justice from a conservative to a liberal position." Segal & Spaeth, supra note 179, at 984.

192. My treatment of judicial reluctance to reconsider prior precedents is descriptive, not normative. In my view, the Justices are often too reluctant to correct their prior mistakes. Where a majority of the Supreme Court is convinced that it erred in a prior case, the Court ought to be more willing than it typically is to overrule precedent, at least absent strong reliance interests or other substantial factors counseling adherence to prior rulings. The desire to avoid criticism for their rulings, though understandable given human nature, is not to be commended. Indeed, the Court's greatest success story, Brown v. Board of Education, 347 U.S. 483 (1954), would not have come to pass had the members of the Court been unwilling to withstand the sharpest of criticism in order to vindicate enduring constitutional principles.

193. Posner explains:

If judges considered every case afresh they would, if conscientious, have to work harder; deciding a case conscientiously without reading the previous decisions would be like writing a serious, thoughtful article without doing any research to discover what had already been written on the subject. The judges would also lose the protection
would directly bear these reputational and other costs while the benefits would accrue largely to society as a whole. Thus, even if stare decisis were abrogated, Justices would have strong incentives to behave as if it remained in effect—which they could do, for example, by hiding behind their discretionary docket and denying certiorari in controversial areas that might involve undesired overrulings.¹⁹⁴

B. Reactivism As a Second-Best Solution

Before illustrating the potential uses of reactivism as a solution to the dilemmas noted above, it is first necessary to define precisely what reactivism is. Reactivism occurs whenever a Court responds to the activism of an earlier decision in ways that are themselves activist. Reactivist responses can take a variety of forms. It can occur in the form of outright overrulings in circumstances where the “special justification” demanded by stare decisis rules as a precondition to overruling is lacking. Reactivism can also take the alternative form of redressing an erroneous prior decisional rule by adopting competing decisional rules that counteract the earlier one. This would include limiting or distinguishing prior precedent in ways that undermine the precedent, as well as adopting compensating rules, such as decision rules in criminal procedure, that do not undermine the precedential value of the earlier decision but nevertheless, in practical terms, reduce the real-world impact of the decision.

So defined, it is possible to consider how reactivism would create a more palatable third option for the dissenting Justices in both the Case Two situation, in which they lack the votes to overturn Case One, and the Case

¹⁹⁴. Even if the Court’s jurisdiction were made mandatory, the Justices could use justiciability doctrines, such as standing and ripeness, strategically to avoid undesired adjudication, as Bickel urged. See, e.g., BICKEL, supra note 7, at 142–43. There is also the possibility that the Justices would simply adopt prior interpretations they deem erroneous but nonetheless do not wish to overrule as their own in order to avoid undesired overrulings. Though inconsistent with norms of judicial candor, such a course of action would be an effective strategy because most constitutional errors probably do not involve politically divisive issues but rather are errors that the Court would not feel any burning desire to correct. The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871), where the Supreme Court upheld the constitutionality of paper money, is a useful illustration: despite substantial arguments, grounded both in text and original intention, that paper money is unconstitutional, it is unthinkable that, if stare decisis were abolished, the Supreme Court would throw the nation’s economy and banking system into chaos by overturning the Legal Tender Cases. Cf. ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 155 (1990) (“Whatever might have been the proper ruling shortly after the Civil War, if a judge today were to decide that paper money is unconstitutional, we would think he ought to be accompanied not by a law clerk but by a guardian.”). Absent stare decisis, the more likely result in that sort of case would be that the Court would adopt the prior erroneous decision as its own, producing what might be viewed as essentially a de facto system of precedent.

from criticism and attack that comes from being able to blame an unpopular decision on someone else (that is, on earlier judges). And there might be more litigated cases because of the greater uncertainty of legal rights and duties in a system not stabilized by stare decisis.

POSNER, supra note 97, at 125.
Three situation, in which they have the votes but are unwilling to overrule the decision. In Case Three (and all subsequent cases relating to Case One), the Justices could adopt legal rules that limit the right recognized in Case One. So, for example, the Justices could hold that the right applies in certain situations but not others, or adopt rules making recovery for violations of the right more difficult or limiting the extent of recovery permitted for such violations. Any of these steps would allow the Justices to "limit the damage" done by Case One without having to disavow it.

Reactivism offers a palatable solution in the Case Two situation as well. The Case One dissenters would no longer face an unattractive binary choice of casting pointless votes to overturn Case One or extending Case One to its logical conclusion. Instead, they could cast their votes for the strict test, even though they believe the test to be inferior to the lax test viewed in isolation, to compensate for the Court's activism in Case One and establish a favorable precedent in Case Two. Adopting the strict test would, in conjunction with Case One, more closely replicate the state of affairs that would have obtained had restraint prevailed in the earlier case. In short, despite the fact that "sincere voting" by the dissenters in Case Two would produce reversal of the conviction based on the lax test, reactivism would justify them in voting "insincerely" to produce a precedent in Case Two compensating for the activist precedent established in Case One.

The key insight of reactivism is that Justices should not view court cases like law school exams, in which the court, like the student, has one chance to come up with the "right" answer. Rather, many legal issues and doctrines are interrelated and thus best thought about in relation to one another. Evan Caminker has called this the "phenomenon of doctrinal complements," and he rightly cites the New Federalism decisions as an example of complementary thinking about doctrine. More than a few of those decisions seem quite dubious on their own grounds, but may make some sense if, instead of providing the best answer to the discrete question of constitutional...
interpretation before it in any given case, the Court is viewed as trying to
counteract the "blank check" that modern Commerce Clause jurisprudence
has given to Congress. 198

Indeed, it makes little sense to think about federalism apart from the
scope of the Commerce power because national power and federalism are
flip sides of the same coin. Federalism, in other words, kicks in precisely
where national power leaves off. 199 As a result, where prior decisions have
put too much weight on one side of the balance, Justices can move back in
the direction of the "proper" balance by putting a thumb on the other side of
the scale. In the case of the New Federalism, the Rehnquist Court has tried
to counteract what it perceives to be overbroad congressional power vis-à-vis
the states by putting greater weight on the federalism side of the balance
without aggressively constricting Congress’s lawmaking power under the
Commerce Clause—a step that, as Lopez shows, even the most ardent
believers in limited federal powers (and the weakest adherents to stare
decisis) on the Court are unwilling to take so late in the day. Of course, the
phenomenon would work just as readily in the opposite direction as well in
that a future liberal majority could undo the New Federalism by expanding
national legislative power.

The clearest case for doctrinal complements would seem to be structural
issues, such as federalism and separation of powers, where the very essence
of the constitutional doctrine is to strike a balance between competing forces
(federal and state governments and the branches of the federal government,
respectively). Is there a broader role for doctrinal complements? The
answer, in my view, is yes.

Beyond structural issues, the complementary-doctrine analysis would
also seem to be generalizable to all right/remedy issues. Such issues are
"inextricably" bound up with one another.200 A court therefore cannot
meaningfully consider what the remedy for a Fourth Amendment violation
should be, for example, without having a clear sense of what the scope and
essence of the right to be free from "unreasonable" searches and seizures is
or ought to be. Likewise, a court cannot intelligently decide whether a
particular remedy (say, exclusion of illegally seized evidence or an injunction
against future unconstitutional acts) should be allowed without considering
the sufficiency of alternative remedies (such as money damages) for the
constitutional violation.201

198. See id. at 167.

199. See U.S. CONST. amend. X ("The powers not delegated to the United States by the
Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the
people."). I therefore agree with Professor Lawson’s broader claim that “[t]he Constitution was a
carefully integrated document, which contains no severability clause.” Gary Lawson, The Rise and

200. See supra note 150.

201. See John C. Jeffries, Jr., Disaggregating Constitutional Torts, 110 YALE L.J. 259, 282
(1999). Indeed, there is the potential for great mischief, in the form of underenforcement or
Recognition of these points—in other words, of the relatedness of strands of doctrine that might otherwise be regarded as discrete—runs throughout the Counterrevolution. This is the genius behind the use by the Burger and Rehnquist Courts of conduct rules and decision rules in the Steiker terminology: those Courts understood that they could take the “handcuffs” off the police without overruling the Warren Court’s conduct rules. All that was necessary was adoption of the right countervailing decision rules, which would move real-world litigation outcomes back in the direction that their own preferred conduct rules would have dictated.\(^{202}\)

The evolution of \textit{Miranda} provides a nice illustration of how this doctrinal-complement approach has played out, time and again, in criminal procedure. Notwithstanding their refusal to overturn \textit{Miranda}, neither the Burger Court nor the Rehnquist Court would have adopted the \textit{Miranda} rule in the first instance. That much is certain. The Courts’ unwillingness to overrule \textit{Miranda} did not, however, stop them from compensating for the decision in other ways. For starters, the Court has created exceptions to \textit{Miranda}, where failure to give the warnings would not require suppression of confessions,\(^{203}\) and has adopted a strict definition of “custody” that generally exempts encounters with police short of actual arrest from the strictures of \textit{Miranda}.\(^{204}\) The Court has allowed police interrogators to

\begin{footnotesize}
202. See supra note 168.


204. See generally Quarles, 467 U.S. at 655 (explaining that “the ultimate inquiry is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest”).
\end{footnotesize}
disregard "ambiguous" requests for counsel by suspects, and has been quick to find that suspects "reinitiated" contact with the police and thus vitiated earlier invocations of their Miranda rights.

The Court also adjusted related doctrines in ways that limited the impact of Miranda on what the Court considered to be fairly obtained confessions. For example, the Court adopted liberal standards for waivers of Miranda rights, making it easier for courts to infer such waivers from the making of a confession following administration of the Miranda warnings. In addition, absent physical coercion or threats by the police, courts appear to treat full compliance with the Miranda warnings as an air-tight guarantee of the voluntariness of a confession, leaving open the possibility that some truly involuntary confessions may escape judicial attention. The Court compensated for Miranda on the remedial side of the calculus, too, holding that suppression does not extend to use of statements for impeachment purposes at trial testimony or to use, during the prosecution's case-in-chief, of confessions bearing an insufficiently direct causal relationship with Miranda violations.

Given all the Court has done in the decades since Miranda, in Rehnquist's wonderful, almost self-congratulatory euphemism, to "reduce[]

205. See Davis v. United States, 512 U.S. 452, 461–62 (1994) ("If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation [under Miranda doctrine] to stop questioning him.").

206. In Oregon v. Bradshaw, 462 U.S. 1039 (1983), the suspect clearly said he wanted an attorney upon being advised of his Miranda rights, and asked the officer taking him from the police station to jail, "What's going to happen to me now?" Then-Justice Rehnquist's plurality opinion ruled that statement constituted a reinitiation of contact that allowed the police to interrogate him outside the presence of the suspect's attorney: "There can be no doubt in this case that in asking, 'Well, what is going to happen to me now?', respondent 'initiated' further conversation . . . [and] evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship." See id. at 1045–46 (plurality opinion).

207. Compare, e.g., North Carolina v. Butler, 441 U.S. 369, 373 (1979) (holding that "[a]n express written or oral statement of waiver" is "not inevitably . . . necessary" and that "waiver can be clearly inferred from the actions and words of the person interrogated") with Miranda v. Arizona, 384 U.S. 436, 475 (1966) ("[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.").

208. See Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984) (stating that "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare"); see generally Louis Michael Seidman, Brown and Miranda, 80 CAL. L. REV. 673, 745–46 (1992). Professor Stuntz argues that Miranda's stifling of judicial and legislative efforts to delineate "the line between good and bad police interrogation" is a reason for overruling Miranda. William J. Stuntz, Miranda's Mistake, 99 MICH. L. REV. 975, 999 (2001). So viewed, it may well be that reaffirming Miranda was actually the most "conservative" outcome in Dickerson.


210. See, e.g., Oregon v. Elstad, 470 U.S. 298 (1985) (refusing to suppress a second confession as the fruit of an earlier Miranda violation where the second confession was preceded by the Miranda warnings even though, as a factual matter, the defendant's second confession would not have been obtained absent the earlier incriminating statements obtained in violation of Miranda).
the impact of the *Miranda* rule on legitimate law enforcement," it comes as no surprise that the Rehnquist Court ultimately saw no need to overrule *Miranda*. This is not to say that *Miranda* had been gutted; where it applied, *Miranda* still had teeth, and so the police had (and still have) incentives to comply with *Miranda* doctrine in interrogating suspects. Even so, the adverse impact of *Miranda* had been blunted in fairly substantial ways long before *Dickerson* came to the Court.

The end result after decades of case-by-case refinement (and frequently revisionism) was a considerable change in *Miranda* doctrine, but not a complete evisceration of *Miranda*. Neither Warren nor Rehnquist got to have his first-best preference. What they did get was a second-best approach in which the suspect must be given basic information as to his rights and has the power, by making (and sticking to) an unequivocal request for counsel, to stop all questioning. Of course, the police have ample latitude to use persuasion or clever, noncoercive means to cause suspects not to exercise that power and, ultimately, to make incriminating statements that can be used against them at trial. After *Dickerson*, it would appear that *Miranda* law is finally at an equilibrium that almost all of the Justices—including supporters and critics of *Miranda*—can accept, as shown by the fact that seven of the nine Justices signed onto without comment an opinion reaffirming both *Miranda* and all of the limitations and exceptions adopted over the ensuing three decades. This is the advantage of reactivism—it provides an efficacious means by which a Court that fundamentally disagrees with earlier precedents, but is unwilling or unable to overrule them explicitly, can move the law (and, with it, actual case outcomes) back in what it believes to be the right direction. The legal system and the public thereby gain, to varying degrees, the benefits of the overruling. At the same time, reactivism allows risk-averse Justices and the Court as an institution to avoid the unpleasant consequences of overruling that have historically made Justices so reluctant

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211. *Dickerson*, 530 U.S. at 443.

212. In fact, so many limitations had been engrafted upon *Miranda* by the Burger Court (let alone the Rehnquist Court) that Albert Alschuler surmised back in 1987 that "a police training manual authored by Justice Holmes' 'bad man of the law'" might advise police officers, in many instances, that they should "not give [the suspect] the *Miranda* warnings." Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 Harv. L. Rev. 1436, 1442 (1987) (emphasis added).

213. Empirical studies have shown that it is "rare" for suspects to invoke their *Miranda* rights once questioning has begun. See Stuntz, * supra* note 206, at 988 (citing survey data). This data suggest that the police are quite skilled at conducting interrogations in ways that get the information they want without resorting to the kind of strong-arm tactics that would cause suspects who were initially willing to talk to invoke their *Miranda* rights during questioning.

214. Yale Kamisar is quite right that what *Dickerson* reaffirmed "is not the *Miranda* doctrine as it burst onto the scene in 1966, but *Miranda* with all its exceptions attached." Yale C. Kamisar, *Foreword: From Miranda to §3501 to Dickerson to...*, 99 Mich. L. Rev. 879, 894 (2001). Chief Justice Warren would be glad, I suppose, to hear that *Miranda* is now for the ages, but he would not recognize very much of what we now know as *Miranda* doctrine.
to overrule even the most indefensible decisions.\textsuperscript{215} Thus, the law gets "fixed" in a way that avoids sharp doctrinal shifts.

The effectiveness of this form of decisionmaking cannot be denied, I think, in light of the Counterrevolution. A larger question remains: Is reactivism principled? I believe it is, subject to one important caveat—namely, that the Justices must always respect constitutional text and structure when they attempt to counteract earlier erroneous precedents. As indicated by the wide consensus that the Constitution is law, action by judges in derogation of constitutional text is indefensible in principle. As long as the Court stays within the range of permissible outcomes delineated by the text, however, I believe the Court can and should select the outcome that produces the best overall result in conjunction with outcomes reached in prior, doctrinally related cases. This is the constitutional theory of the second-best.\textsuperscript{216}

Professor Lawson has argued that second-best solutions are principled (and, indeed, "probably right") only if "there is a[] proper role for horizontal precedent in constitutional theory."\textsuperscript{217} In his view, stare decisis is unconstitutional, and so he sees no place for second-best theory.\textsuperscript{218} Other prominent scholars have weighed in on the underlying question of the constitutional status of stare decisis—most recently Professor Fallon,
strongly defends the constitutionality of stare decisis. The constitutionality of stare decisis is thus rapidly becoming a cottage industry in the literature.

For now, I will leave this interesting debate to the heavyweights. Even though the justification for second-best theory grows out of a system of precedent, as Professor Lawson suggests, my claim is that we would likely have a system of precedent even if stare decisis were declared unconstitutional or abrogated by Congress. Opponents of stare decisis uncritically assume that judges are reluctant to overrule precedent because of the existence of stare decisis, but that view is wrong. Judicial reluctance to overturn precedent is a cause, not an effect, of stare decisis. As such, abrogating stare decisis would not necessarily change judicial behavior because it would not change the underlying fact that the Justices strongly prefer to adhere to prior decisions, even if they believe them to have been profoundly misguided. Like it or not, in a world where Justices are reluctant to overrule precedent, reactivism may be the only viable way of correcting many erroneous interpretations of the Constitution.

The aggressive, behind-the-scenes assault on erroneous precedents that I have referred to in this Article as reactivism is especially necessary in criminal procedure and other areas where a single activist decision, like Miranda, will generate a whole body of doctrine and scores of implementing cases, both in the Supreme Court and in lower appellate courts, within a short amount of time. The sheer number of the doctrinal emanations that such a decision will spin off will greatly magnify the usual judicial reluctance to reverse course. This "multiplier effect" is especially difficult to counter with straightforward overrulings, but can be effectively dealt with—as the remarkably successful course of the Counterrevolution shows—through reactivism and second-best theory. It is in this sense that activism, of the "reactivist" kind, actually is restraint, not just in constitutional criminal procedure but throughout constitutional law and beyond.


220. As Justice Scalia noted in his Dickerson dissent, "in the 34 years since Miranda was decided, this Court has been called upon to decide nearly 60 cases involving a host of Miranda issues." 530 U.S. at 463 (Scalia, J., dissenting). That point was certainly not lost upon the majority: overruling Miranda would have meant undermining literally dozens of other Supreme Court cases and the elaborate doctrines they spawned governing the manner in which police can conduct lawful interrogations under Miranda. Even apart from stare decisis, it would be asking an awful lot of the Court to expect it to overrule so many cases in a single stroke.
V. Conclusion

At the heart of the Rehnquist Court’s criminal procedure decisions, lies a fundamental paradox: a Court that was the product of a sustained effort by Republican presidents to reverse high-profile Warren Court decisions that “handcuffed” the police—decisions like *Miranda* and *Mapp*—failed to do so and, overall, overruled surprisingly few criminal procedure decisions from the Warren years. Indeed, one of the most significant developments from the final years of the Rehnquist Court was Chief Justice Rehnquist’s majority opinion in *Dickerson* reaffirming *Miranda*, which now, thanks to Rehnquist, will probably never be overturned.

Two conclusions might be drawn from this evidence. First, one might conclude that, from the perspective of those who wanted it to wage “counterrevolution” in criminal procedure, the Rehnquist Court was a conspicuous failure like the Burger Court before it. Second, one might infer that the Rehnquist Court has been a model of judicial restraint, dutifully putting aside its views on the merits and standing by controversial Warren Court precedents. Both of these conclusions, however, would be seriously mistaken.

Even without mass overrulings, the Rehnquist Court has been remarkably successful in fundamentally reshaping Warren Court criminal procedure doctrines. Following the lead of the Burger Court, the Rehnquist Court changed the law through strategic use of second-best solutions to minimize the impact of Warren Court doctrines on law enforcement practices that the Rehnquist Court deemed legitimate. *Miranda* was transformed from a doctrine that “would almost-but-not-quite abolish police interrogation”221 into a doctrine that now poses little obstacle to police success in the interrogation room. Similarly, whereas habeas corpus had previously presented a serious threat to the finality of convictions and the ability of states to enforce the death penalty, the Rehnquist Court made successful habeas petitions a rarity and executions all too common.

Regardless of what one ultimately thinks about the Rehnquist Court’s vision of criminal procedure, the story of the Counterrevolution carries broader lessons for adjudication. Given the natural judicial reluctance to overturn prior precedents, second-best solutions, such as those employed by the Rehnquist Court, are both essential and principled. Those who truly believe in judicial restraint—and, again, note that restraint might further liberal or conservative ends222—should recognize that second-best solutions such as reactivism may often be the only way of producing results that replicate those that would have been achieved had earlier Courts practiced restraint. Having an alternative means of “fixing” the law when the Justices

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221. Stuntz, supra note 206, at 979.
222. See supra Part I.
are unwilling to resort to the first-best solution of overruling makes it more likely that the law will in fact be “fixed.”

Moreover, there is value in second-best solutions even apart from judicial reluctance to overrule precedent because of the manner in which second-best solutions operate in comparison to overrulings. Overrulings are all-or-nothing solutions—the preferences of the side with at least five votes are written into law, and the dissenters’ contrary preferences go completely unfulfilled. It is inevitable, however, that the balance of power on the Court will swing back and forth over time, as it did with the rise and fall of the Warren Court. Even though overrulings are proper and should probably occur more frequently than they presently do, a regime in which every Court majority were obligated or felt free to overrule every prior decision it deemed erroneous would inject great instability into the law and risk all-out ideological warfare on the Supreme Court.

By contrast, second-best solutions such as reactivism tend, over time, toward equilibria. Unlike overrulings, second-best solutions allow both sides, in a sense, to win to some degree. This state of affairs, in which both sides get their second-best preferences (or something close to it), gives each side a stake in maintaining the status quo and, to that extent, will tend to promote doctrinal stability. Of course, some degree of instability will occur when Court personnel changes, but the attendant shifts in doctrine are more likely to occur in a fairly narrow intermediate range rather than from one polar extreme to another, the type of swings that overrulings produce.

The evolution of Miranda and habeas corpus is instructive on the tendency of second-best solutions to produce doctrinal equilibria. In Dickerson, Miranda supporters and opponents signed onto a majority opinion that reaffirmed Miranda and all the limitations engrafted upon it. In this compromise state of affairs, Miranda provides some protection for suspects (they will be told their rights and, if invoked, questioning must cease) but not, from the perspective of the police, too much protection. We see a compromise state of affairs, too, in habeas corpus: habeas is not nearly as potent a remedy as the Warren Court wanted, but it is also true that habeas remains considerably broader than it was before the 1950s (when only “jurisdictional” defects could be remedied). In each context, second-best solutions produced legal change in situations where overrulings would have been at best impracticable and in ways that should prove to be more stable over time than simply overturning Miranda and Warren-era habeas rulings would have.

The Burger and Rehnquist Courts got the message in criminal procedure decades ago, and things are rosy again for law enforcement and the law-and-order-minded public as a result. The only question is when will the academy catch on?