C. State Postconviction Proceedings

Retroactive Application of New Rules. — The Supreme Court has struggled with the retroactive application of new rules of constitutional criminal procedure since at least 1965.[1] However, despite several changes of course and many opinions concerning retroactivity both on direct review and on federal habeas corpus review, the Court paid little attention to the retroactivity of federal constitutional rules in *state* postconviction proceedings. Last Term, in *Danforth v. Minnesota*,[2] the Supreme Court held that state habeas courts were free to give retroactive effect to new rules of constitutional criminal procedure even where federal courts would not. *Danforth* was remarkable in that it attracted seven votes for a broadly reasoned opinion about the nature of retroactivity, an area that has suffered from substantial disagreement in the past. *Danforth*'s treatment of retroactivity as a remedial issue and willingness to allow disuniformity among and within states may affect retroactivity doctrine outside the habeas context by weakening the constitutional justification for requiring full retroactivity on direct review.

In 1996, a Minnesota jury convicted Stephen Danforth of criminal sexual conduct with a minor.[3] The trial judge had declared the six-year-old victim incompetent to testify at the trial but had admitted into evidence a videotaped interview with the victim.[4] On appeal, the Minnesota Court of Appeals rejected Danforth's argument that the admission of the videotape violated his Confrontation Clause right to cross-examine witnesses against him, and held that "the videotape was sufficiently reliable to be admitted into evidence."[5] Danforth's conviction became final in 1999.[6]

In 2004, the Supreme Court radically changed its Confrontation Clause doctrine in *Crawford v. Washington*.[7] *Crawford* rejected the Court's previous approach, which had barred statements by unavailable witnesses that lacked "adequate 'indicia of reliability,'"[8] and replaced it with a rule barring statements that are "testimonial" in nature.[9] After the Court's decision, Danforth moved for state postcon-

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1 *See* Linkletter v. Walker, 381 U.S. 618, 639–40 (1965) (holding that the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), did not apply to convictions that became final before *Mapp* was decided).

2 128 S. Ct. 1029 (2008).

3 State v. Danforth, 573 N.W.2d 369, 372 (Minn. Ct. App. 1997).

4 *Id.*

5 *Id.* at 375.

6 Danforth v. State, 700 N.W.2d 530, 530–31 (Minn. Ct. App. 2005).

7 541 U.S. 36 (2004).

8 Ohio v. Roberts, 448 U.S. 56, 66 (1980) (quoting Mancusi v. Stubbs, 408 U.S. 204, 23 (1972)).

9 *Crawford*, 541 U.S. at 68–69.

viction relief on the ground that the admission of the videotape violated *Crawford*. The district court denied relief.[10]

The Minnesota Court of Appeals affirmed. The court first held that "[r]etroactivity with regard to cases on collateral review is governed by *Teague v. Lane*."[11] In *Teague*, a plurality of the Supreme Court had held that "new constitutional rules of criminal procedure" would not apply to cases that had become final before the new rules were announced unless they fell into an exception to the general rule.[12] Because *Crawford* fell into neither of the two recognized exceptions — rules that place "certain . . . conduct beyond the power of the criminal law-making authority to proscribe"[13] and "watershed rules of criminal procedure"[14] — the Court of Appeals held that *Crawford* did not apply retroactively to Danforth and denied relief.[15]

The Minnesota Supreme Court granted review and affirmed. The court first affirmed its prior precedent that it "*must* follow the *Teague* framework" when determining the retroactive effect of a new rule of constitutional law on collateral review.[16] The court explained that in *American Trucking Ass'ns v. Smith*,[17] the United States Supreme Court had held that retroactivity was a question of federal law binding on state courts.[18] Furthermore, although the Supreme Court had not explicitly addressed retroactivity on state collateral review, it also had not distinguished state postconviction proceedings from federal habeas, thus suggesting that the same rule applied to both.[19] Applying *Teague*, the court held that *Crawford* fell into neither of the two exceptions and that Danforth was not entitled to relief.[20]

The Supreme Court reversed, holding that *Teague* "does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is

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[10] *Danforth*, 700 N.W.2d at 531.

[11] *Id.* (citing Teague v. Lane, 489 U.S. 288 (1989)).

[12] *Teague*, 489 U.S. at 310 (plurality opinion). *Teague*'s retroactivity holding was later affirmed by a majority of the Supreme Court in *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989).

[13] *Teague*, 489 U.S. at 311 (plurality opinion) (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)).

[14] *Id.*

[15] *Danforth*, 700 N.W.2d at 532.

[16] Danforth v. State, 718 N.W.2d 451, 456 (Minn. 2006).

[17] 496 U.S. 167 (1990).

[18] *Danforth*, 718 N.W.2d at 456 (noting the Supreme Court's statement in *American Trucking* that it had "consistently required that state courts adhere to [the Court's] retroactivity decisions" (alteration in original) (quoting *Am. Trucking*, 496 U.S. at 177–78 (plurality opinion)) (internal quotation marks omitted)). The court also noted that in *Michigan v. Payne*, 412 U.S. 47 (1973), the U.S. Supreme Court had reversed the Michigan Supreme Court when the latter erroneously applied a new rule retroactively. *Danforth*, 718 N.W.2d at 456.

[19] *Danforth*, 718 N.W.2d at 456 (citing Schriro v. Summerlin, 542 U.S. 348, 351 (2004)).

[20] *Id.* at 461.

deemed 'nonretroactive' under *Teague*."[21] Writing for the Court, Justice Stevens[22] began by stating that "the source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule."[23] Thus, retroactivity decisions determine "not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought."[24] Retroactivity concerns remedies, and "the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law."[25]

Justice Stevens then explained that *Teague*'s rule "was tailored to the unique context of federal habeas" and thus did not limit the relief states could provide in postconviction proceedings.[26] *Teague* was grounded in the Court's statutory authority to interpret the federal habeas statute because it was situated in a line of cases "adjusting the scope of federal habeas relief in accordance with equitable and prudential considerations."[27] Moreover, *Teague*'s reasoning was based on considerations of federalism and comity, concerns "unique to *federal* habeas review of state convictions."[28] Indeed, comity weighed in favor of allowing states to provide broader relief, and "finality of state convictions is a *state* interest, not a federal one."[29] Although *Teague* was also concerned with uniformity in applying federal law, the "fundamental interest in federalism that allows individual States to" control their own criminal law and procedure within constitutional bounds "is not otherwise limited by any general, undefined federal interest in uniformity."[30] Thus, *Teague* "sp[oke] only to the context of federal habeas" and did not limit the power of state courts to provide remedies.[31]

The plurality opinion in *American Trucking* — which treated retroactivity as a question of federal law binding on state courts[32] — did not alter this conclusion. Although Justice Scalia had provided the fifth vote for the judgment in that case, he had sided with the dissent

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[21] *Danforth*, 128 S. Ct. at 1042.

[22] Justice Stevens was joined by Justices Scalia, Souter, Thomas, Ginsburg, Breyer, and Alito.

[23] *Danforth*, 128 S. Ct. at 1035.

[24] *Id.*; *see also id.* at 1035 n.5 ("It may, therefore, make more sense to speak in terms of the 'redressability' of violations of new rules, rather than the 'retroactivity' of such rules.").

[25] *Id.* at 1045.

[26] *Id.* at 1039.

[27] *Id.* at 1039–40.

[28] *Id.* at 1040–41.

[29] *Id.* at 1041.

[30] *Id.*

[31] *Id.* at 1041–42.

[32] Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 177–78 (1990) (plurality opinion).

on the retroactivity question. Thus, the dissent's reasoning on retroactivity, which treated the issue as one of remedies, should control.[33]

Finally, the Court held that no federal rule bars states from developing state law on retroactivity to govern state postconviction proceedings.[34] Justice Stevens reasoned first that if such a rule of federal law existed, it would bind all branches of state government, a result incompatible with the Court's previous holding that states can waive a *Teague* defense during the course of habeas litigation.[35] Second, the Court had no supervisory authority over state courts, and it would be inappropriate to establish such a rule as federal common law.[36] The "uncertainty about the source of authority" for such a rule thus "outweigh[ed] any . . . policy arguments" for imposing it.[37]

Chief Justice Roberts dissented.[38] He began by observing that "about the only point on which our retroactivity jurisprudence has been consistent is that the retroactivity of new federal rules is a question of federal law binding on States."[39] Cases before *Teague* had made clear that retroactivity was a federal issue.[40] *Teague*, in addressing collateral review, was "simply the other side of the coin" from *Griffith v. Kentucky*,[41] which addressed retroactivity on direct review in criminal cases.[42] *Griffith*'s holding explicitly covered both state and federal proceedings; *Teague* should likewise be binding on both state and federal courts.[43] Furthermore, the rationales behind *Teague* also applied to state postconviction proceedings. Finality was a federal as well as a state interest, and the "interest in reducing the inequity of

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[33] *See Danforth*, 128 S. Ct. at 1044–45; *see also Am. Trucking*, 496 U.S. at 219–20 (Stevens, J., dissenting). The *Danforth* Court also distinguished *Michigan v. Payne* by noting that in that case the state court had not purported to apply state retroactivity principles, but rather had applied the rule "pending clarification" by the Supreme Court. *Danforth*, 128 S. Ct. at 1043 (quoting Michigan v. Payne, 412 U.S. 47, 49 (1973) (internal quotation marks omitted)).

[34] *Danforth*, 128 S. Ct. at 1046.

[35] *Id.* (citing Collins v. Youngblood, 497 U.S. 37, 41 (1990)).

[36] *Id.*

[37] *Id.* at 1046–47.

[38] Justice Kennedy joined Chief Justice Roberts's opinion.

[39] *Danforth*, 128 S. Ct. at 1048 (Roberts, C.J., dissenting).

[40] *Id.* at 1049. *Michigan v. Payne*, for example, "either offers no support for the majority's position, because the state court simply applied federal retroactivity rules, or flatly rejects the majority's position, because the state court failed to apply federal retroactivity rules, and was told by this Court that it must." *Id.* at 1050–51.

[41] 479 U.S. 314 (1987).

[42] *Danforth*, 128 S. Ct. at 1052 (Roberts, C.J., dissenting).

[43] *Id.* Chief Justice Roberts reasoned that *Teague*'s citation to a state habeas case, *Yates v. Aiken*, 484 U.S. 211 (1988), indicated that "*Teague* contemplated no difference between retroactivity of new federal rules in state and federal collateral proceedings." *Danforth*, 128 S. Ct. at 1052 (Roberts, C.J., dissenting).

haphazard retroactivity standards and disuniformity in the application of federal law is quite plainly a predominantly federal interest."[44]

Chief Justice Roberts also criticized the majority's "misunderstanding of the nature of retroactivity generally."[45] The Court's civil retroactivity cases, he argued, had treated retroactivity not as a remedial issue but rather as a choice-of-law question: "what law — new or old — will apply."[46] Moreover, the Court's jurisprudence made clear that the choice between new law and old law was a federal question antecedent to the state-law question of remedies.[47]

The dissent rejected as inapposite the majority's distinction between "creating the law" and "declaring what the law already is."[48] After *Teague* rejected full retroactivity on collateral review, courts could no longer simply apply newly announced rules to all cases and thus necessarily had to decide whether to apply the new rule or the previous one. Because retroactivity concerned choice of law and not remedies, "[t]here is no reason to believe, either legally or intuitively, that States should have any authority over this question when it comes to which *federal* constitutional rules of criminal procedure to apply."[49]

Danforth's reasoning was striking for its breadth. Seven Justices agreed on a single conceptual model of retroactivity, achieving a level of consensus on the doctrine's foundations that had previously eluded the Court. Moreover, rather than limiting its reasoning by focusing on the unique nature of habeas review, the *Danforth* Court purported to establish the nature of retroactivity decisions generally. This broad reasoning sits in tension with the rest of the Court's retroactivity jurisprudence. By treating retroactivity as a remedial question, *Danforth* weakens the constitutional mandate to provide full retroactivity on *direct* review. Indeed, by allowing state courts to engage in case-by-case determinations of retroactivity, *Danforth* suggests that there is nothing constitutionally problematic per se with tailoring retroactivity rules to specific rules or cases, at least for state courts. By weakening these constitutional underpinnings, *Danforth* provides an opening for arguments in favor of more flexible approaches to retroactivity.

As the dueling analyses of the case law in *Danforth* demonstrated, the Court's prior retroactivity jurisprudence was an inconsistent patchwork with no clearly articulated source or justification. Until the 1960s, U.S. courts followed a general rule of full retroactivity in all

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[44] *Id.* at 1053.

[45] *Id.*

[46] *Id.* at 1055.

[47] *See id.* at 1055–56.

[48] *Id.* at 1056 (emphasis omitted) (quoting *id.* at 1044 (majority opinion)) (internal quotation marks omitted).

[49] *Id.* at 1056–57.

cases, whether civil or criminal, on direct or collateral review.[50] The Warren Court, unwilling to allow its revolution in criminal procedure to throw open prison gates across the country, departed from this rule in *Linkletter v. Walker*[51] by creating a balancing test to determine whether a new rule would apply retroactively in criminal cases.[52] A similar departure soon followed in the civil context.[53] In the face of academic opposition and vigorous dissents by Justice Harlan, however, the Court eventually reversed course.[54] In *Griffith*, the Court reestablished the rule of full retroactivity on direct review in criminal cases. The Court reasoned that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."[55] However, despite *Griffith*'s suggestion that full retroactivity on direct review was required by norms of constitutional stature, the Court declined to simply apply *Griffith*'s holding in later civil retroactivity cases.[56] Although the Court has suggested that a rule of full retroactivity also applies in the civil context, no rationale for such a rule has commanded a majority of the Court.[57] The basis for the Court's retroactivity jurisprudence in the direct review context hence remained unclear.

The Court's habeas retroactivity cases, by contrast, enjoyed greater consistency due to their narrow focus on the habeas context. In his dissents that laid the foundation for *Griffith* and *Teague*, Justice Harlan argued that decisions concerning retroactivity on federal habeas "can be responsibly made only by focusing, in the first instance, on the nature, function, and scope of the adjudicatory process in which such cases arise."[58] In *Teague*, Justice O'Connor relied heavily on Justice Harlan's reasoning, concluding that the unique considerations of finality and comity on habeas review justified a general rule of non-

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[50] *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1059 (1997).

[51] 381 U.S. 618 (1965).

[52] *See id.* at 629.

[53] *See* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) (creating a balancing test for determining retroactivity in civil cases).

[54] *See* Griffith v. Kentucky, 479 U.S. 314, 321–23 (1987) (citing Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part); Desist v. United States, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting)); Paul J. Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 59 (1965); *see also Danforth*, 128 S. Ct. at 1037.

[55] *Griffith*, 479 U.S. at 322.

[56] Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 197 (1990) ("[T]here are important distinctions between the retroactive application of civil and criminal decisions that make the *Griffith* rationale far less compelling in the civil sphere.").

[57] Fisch, *supra* note 50, at 1062.

[58] *Mackey*, 401 U.S. at 682 (Harlan, J., concurring in the judgments in part and dissenting in part).

retroactivity.[59] In a later civil case, the Court explained that the *Teague* rule was justified by the unique character of habeas proceedings: "[n]ew legal principles, even when applied retroactively, do not apply to cases already closed," and "the *Teague* doctrine embodies certain special concerns — related t[o] collateral review of state criminal convictions — that affect which cases are closed, for which retroactivity-related purposes, and under what circumstances."[60]

Danforth represents a major step in the Court's retroactivity jurisprudence, then, because seven Justices were willing to accept an explicit rationale for retroactivity that was not confined to habeas proceedings or even necessarily to criminal cases. Both opinions used expansive language to engage in a general debate over the nature of retroactivity. Justice Stevens explained that "our jurisprudence concerning the 'retroactivity' of 'new rules' of constitutional law is primarily concerned . . . with the availability or nonavailability of remedies."[61] Chief Justice Roberts replied that "when we ask whether and to what extent a rule will be retroactively applied, we are asking what law — new or old — will apply."[62] Both propositions could easily extend to retroactivity decisions in all contexts.

Nor does *Danforth*'s reasoning suggest that its conclusions are limited to the habeas context. Although the *Danforth* majority discussed at length the purposes of federal habeas and their importance to *Teague*, it employed these rationales only to explain why the holding in *Teague* was inapplicable to state habeas. Instead of citing these purposes as an affirmative reason for creating a different retroactivity rule for state collateral review,[63] the Court relied on its conclusions about

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[59] Teague v. Lane, 489 U.S. 288, 308–09 (1989) (plurality opinion); *cf.* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1816 (1991) (arguing that retroactivity rules should be different on habeas because of the unique nature of habeas relief).

[60] Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 758 (1995).

[61] *Danforth*, 128 S. Ct. at 1047.

[62] *Id.* at 1055 (Roberts, C.J., dissenting).

[63] *See id.* at 1041–42 (majority opinion). The Court could have confined its reasoning to the habeas context precisely by focusing on these policy considerations and how they differ between the federal and state habeas contexts. Professors Richard Fallon and Daniel Meltzer have identified the potential purposes of federal habeas as (1) providing a federal forum for federal rights; (2) protecting innocence; and (3) providing a remedy for situations in which the state failed to ensure a fair adjudicatory process. Fallon & Meltzer, *supra* note 59, at 1813–15. State habeas does not share the first goal at all, and it only partly shares the third because states can control their own adjudicatory processes — for example, through the supervisory powers of state supreme courts — in ways that federal courts cannot. Because *Teague* was so heavily rooted in the "nature, function, and scope of the adjudicatory process in which such cases arise," *Teague*, 489 U.S. at 306 (plurality opinion) (quoting *Mackey*, 401 U.S. at 682 (Harlan, J., concurring in the judgments in part and dissenting in part)), a different retroactivity rule could easily be justified for state postconviction proceedings even if, as the dissent in *Danforth* argued, some aspects of the *Teague* reasoning also apply to state review. In other words, the Court could have extended Justice Harlan's principle

the remedial nature of retroactivity — conclusions it reached without reference to the nature of habeas review. Moreover, although Justice Stevens reserved the question of whether "the distinction between civil and criminal cases" was "relevant,"[64] he discussed the Court's civil retroactivity cases at length and cited his own opinion in *American Trucking*, a civil retroactivity case in which he expressed similar ideas about the nature of retroactivity.[65]

Because *Danforth*'s reasoning likely applies at least to direct review in criminal cases and perhaps also to civil cases, *Danforth* may shape future retroactivity jurisprudence well outside the habeas context. By making retroactivity remedial and by allowing state courts to consider a host of pragmatic concerns in retroactivity decisions, *Danforth* cast doubt on the Court's previous discussions of full retroactivity on direct review as a basic constitutional norm.

Treating retroactivity as a remedial issue may facilitate a retreat from the absolute approach of *Griffith* because remedies are inherently a pragmatic matter, dealing with "the hard stuff of recalcitrant reality."[66] Approaches to remedies may be classified as either rights-maximizing or interest-balancing.[67] The *Danforth* Court's approach to retroactivity represents the latter, for although it reached what could be considered the rights-maximizing outcome, it also recognized that a defendant's interest in the vindication of his or her constitutional rights can be trumped by other considerations, including comity and

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one step further: just as "special concerns," *Reynoldsville Casket*, 514 U.S. at 758, could justify a departure from full retroactivity on federal habeas, differences between federal and state habeas could also justify different retroactivity rules.

A number of scholars have cited the distinct nature of state habeas as a rationale for allowing state courts to give greater retroactive effect to new rules of constitutional criminal procedure. *See, e.g.*, Fallon & Meltzer, *supra* note 59, at 1770 n.212; Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 ALA. L. REV. 421, 443–45 (1993). One author has argued that *Danforth* enhances federalism values by allowing state courts to tailor retroactivity rules to local needs and values. *See* Ilya Somin, *A Floor, Not a Ceiling: Federalism and Remedies for Violations of Constitutional Rights in* Danforth v. Minnesota, 102 NW. U. L. REV. COLLOQUY 365, 369 (2008). Allowing state courts to develop retroactivity rules above the federal minimum could also have other benefits, including providing an additional check against constitutional violations. *Cf.* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 627 (1981) (discussing potential of state courts to serve as partners of federal courts in constitutional litigation); Richard H. Fallon, Jr., *The Core of an Uneasy Case* for *Judicial Review*, 121 HARV. L. REV. 1693 (2008) (arguing that judicial review as an institution provides an additional protection against constitutional violations).

64 *Danforth*, 128 S. Ct. at 1046 n.23.

65 *Id.* at 1047 (citing Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 205 (1990) (Stevens, J., dissenting)).

66 Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983).

67 *Id.* at 591. A rights-maximizing approach considers only how to maximize the protection of the individual right in question, whereas an interest-balancing approach takes into account other interests.

the finality of convictions.[68] Indeed, the majority explicitly placed *Teague* in a line of cases responding to "equitable and prudential considerations."[69] Implicitly, then, *Danforth* held that retroactivity, framed as a remedial question, depends on a balancing of interests.

Applying an interest-balancing approach to retroactivity on *direct* review would represent a distinct retreat from *Griffith*, which rejected interest balancing when it held that the *Linkletter* balancing test[70] "violates basic norms of constitutional adjudication."[71] A remedial, interest-balancing approach is incompatible with *Griffith* because any balancing approach must acknowledge at least a theoretical possibility that some set of interests is strong enough to prevent retroactive application of a new rule, even on direct review. Professors Fallon and Meltzer, who argued long before *Danforth* that retroactivity should be considered a question of constitutional remedies, conclude that under a remedial model *Griffith* should be weakened: "*Griffith*'s rule is too unbending. . . . [R]emedial doctrine should be able to accommodate a variety of practical pressures, including those bearing on a Court, like the Warren Court, that wishes to expand recognized constitutional rights."[72]

Treating retroactivity as a remedial issue has the further consequence of making non-retroactivity compatible with Justices Stevens and Scalia's views about the nature of constitutional adjudication. Both Justices have advocated a Blackstonian model of constitutional adjudication in which the proper role of courts is "*declaring* what the law already is" rather than "*creating* the law."[73] The Blackstonian view is normally associated with full retroactivity because it treats the law as a constant; a "new" rule declares both what the law is today and what it was yesterday.[74] Treating retroactivity decisions as remedial in nature, however, breaks the link between the Blackstonian model and full retroactivity. Even if new rules always cover both future and past conduct, as the model demands, a court could make a

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[68] *Danforth*, 128 S. Ct. at 1041.

[69] *Id.* at 1040.

[70] The *Linkletter* test required courts to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Linkletter v. Walker, 381 U.S. 618, 629 (1965). The Court later reformulated the test in *Stovall v. Denno*, 388 U.S. 293 (1967), to consider the new rule's purpose, "the extent of . . . reliance by law enforcement authorities," and "the effect on the administration of justice" of applying the rule retroactively. *Id.* at 297.

[71] Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

[72] Fallon & Meltzer, *supra* note 59, at 1807.

[73] Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment); *see also id.* ("I share Justice Stevens' perception that prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be.").

[74] Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1082–83 (1999).

formally retroactive rule non-retroactive in practice by denying remedies for past violations. Under a remedial conception, then, non-retroactivity — in the sense of declining to provide remedies for past constitutional violations — is arguably consistent with the Blackstonian model. The Court's conception of retroactivity as a question of remedies thus weakens the foundations for *Griffith*'s absolute rule of full retroactivity.

Danforth may also weaken the Court's existing retroactivity jurisprudence because it allows for disuniformity in retroactivity rules within states. The majority addressed head-on any counterarguments about the interstate disuniformity created by departures from *Teague* by minimizing the importance of "any general, undefined federal interest in uniformity."[75] However, the majority did not discuss the problem of *intrastate* disuniformity — that is, the unequal application of federal constitutional rules to habeas petitioners within the same state. So far, most state courts that have departed from *Teague* on state post-conviction review have resurrected the interest balancing of *Linkletter*, which allows state courts to give retroactive effect to some new rules in some cases but not others.[76] *Danforth* thus gives states license to adopt the very interest-balancing approach that the Court itself rejected on both direct review and federal habeas. State courts could thus recreate in the habeas context the same inequity and disuniformity criticized in *Griffith*.

Danforth's express grant of permission to state courts to adopt disuniform rules suggests one of two possible conclusions. The first is that disuniformity in retroactivity rules does not violate the constitutional norms cited in *Griffith*. If so, one of the rationales behind full retroactivity on direct review is no longer valid and greater flexibility may be possible in retroactivity doctrine generally. The second is that these norms bind only federal courts and not state courts, perhaps because they are rooted in Article III of the Constitution. If so, state courts may not be bound by *Griffith* and could potentially decline to apply new rules retroactively on direct review. Either interpretation weakens the constitutional underpinnings of *Griffith*'s requirement of full retroactivity on direct review.

In *Danforth*, the Court has provided a broad, coherent rationale on which to build its retroactivity doctrine. However, the Court's opinion also creates tension with much of the retroactivity doctrine to which it cites. Unless the Court finds ways to limit its reasoning in future cases, *Danforth* may provide an opening for more flexible approaches

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[75] *Danforth*, 128 S. Ct. at 1041.

[76] *See* Hutton, *supra* note 63, at 462–64.

to retroactivity doctrine. *Griffith*'s "basic norms of constitutional adjudication" may no longer be as basic as they once were.

D. Status of International Law

Self-Execution of Treaties. — The debate over whether treaties should be presumed to be self-executing, meaning automatically enforceable in domestic courts, pits internationalists, who seek to enhance the force of international law, against nationalists, who oppose perceived threats to United States sovereignty.[1] With no conclusive Supreme Court decision on the issue, each side has invoked evidence of historical practices to support its preferred presumption.[2] Last Term, in *Medellín v. Texas*,[3] the Supreme Court provided its most direct answer to date, holding that the International Court of Justice's (ICJ) decision in *Avena and Other Mexican Nationals*[4] was not enforceable in U.S. courts. The Court's reasoning implicitly rejected a presumption in favor of self-execution, but was unclear as to whether the opposite presumption was at work. By elevating an inappropriately narrow textual analysis of treaty language and declining to adopt a clear presumption, the Court failed both in its own purported goal of increasing predictability and in the dissent's competing goal of maximizing accuracy. The Court should instead have implemented a categorical approach to self-execution, fulfilling both of those purposes as well as enhancing the accountability of the political branches in their exercise of foreign affairs powers.

José Ernesto Medellín, a Mexican national, was arrested in 1993 for participating in the gang rape and murder of two Houston teenagers.[5] After waiving his *Miranda* rights in writing, Medellín gave a written confession.[6] The local law enforcement officers, however, failed to inform Medellín of his right under Article 36 of the Vienna Convention on Consular Relations[7] to report his detention to the Mexican consu-

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[1] *See* Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 466 (2003) (noting the two extreme positions).

[2] *Compare* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 697–704 (1995) (interpreting the history of the Supremacy Clause and early Supreme Court decisions to argue for a presumption in favor of self-execution), *with* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2092 (1999) (arguing that the debates over the ratification of the Constitution reflect a Framing-era understanding that treaties required implementing legislation "before they could have any domestic effect").

[3] 128 S. Ct. 1346 (2008).

[4] (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

[5] *Medellín*, 128 S. Ct. at 1354.

[6] *Id.*

[7] Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].