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New Law, Old Cases, Fair Outcomes: Why the Illinois Supreme Court Must Overrule People v Flowers, 43 Loy. U. Chi. L.J. 727 (2012)

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In 1989, the U.S. Supreme Court in *Teague v. Lane* held that a state prisoner seeking post-conviction relief in federal court could not base his claim on a "new rule" established in a Supreme Court case decided after his conviction became final.[1] In 1990, the Illinois Supreme Court in *People v. Flowers* explicitly adopted the *Teague* approach and similarly held that an Illinois prisoner seeking post-conviction relief in *state court* could not base his claim on a "new rule" established in a state supreme court case decided after his conviction became final.[2] Thus, for state post-conviction review, the Illinois Supreme Court adopted the same "nonretroactivity" rule the U.S. Supreme Court created for post-conviction review.

Using the same definition of "new rule" in both state and federal proceedings appears symmetrical. But is it? As BBC reporter Alan Mackay once noted, "Like the ski resort full of girls hunting for husbands and husbands hunting for girls, the situation is not as symmetrical as it might seem."[3]

This Article contends that the Illinois Supreme Court's adoption of the *Teague* rule was based on a woeful misunderstanding of the most basic principles of federalism. The U.S. Supreme Court's explicit goal in *Teague* had nothing to do with reaching the result that would deliver the most justice to Mr. Teague. Rather, the Supreme Court viewed the case in terms of establishing the proper respect federal courts must give

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1. Teague v. Lane, 489 U.S. 288, 299 (1989). A state conviction becomes "final" after the time for filing a petition for a writ of certiorari from the state judgment affirming the conviction has expired or, if the petition was filed, after the U.S. Supreme Court denies certiorari. Gonzalez v. Thaler, 132 S. Ct. 641, 653–54 (2012); *see also infra* note 70 (describing how *Teague* established two very limited exceptions where a new rule can be applied after a conviction is final).

2. 561 N.E.2d 674, 681–82 (Ill. 1990).

3. JOHN D. BARROW, NEW THEORIES OF EVERYTHING 138 (2d ed. 2007).

to the final judgments of state courts.[4] The U.S. Supreme Court held that, in reviewing a habeas corpus petition from a state prisoner, principles of federalism—here, comity and deference towards state court judgments—trumped Mr. Teague's individual concerns.[5] *Teague* involved the proper balance *between* the federal court system and the state court system, not issues *within a state court system itself.*

Drawing on the work of political scientist Hugh Heclo,[6] this Article contends that a distinction must be made between opinions that are written with an "institutional" goal (i.e., providing justice for an individual party) and opinions written with an "organizational" goal (i.e., guaranteeing proper relations between state courts and federal courts). As this Article demonstrates, the Illinois Supreme Court in *Flowers* mistakenly applied *Teague* as if it were an "institutional" decision, when it was actually an "organizational" decision. Because *Teague* only deals with problems *between* federal and state court systems, it has no relevance to *Flowers*, a case concerned exclusively with a problem contained in a single state court system. It is time to re-examine and reject the rule in *Flowers*.

Part I of this Article discusses the legal and historical background of retroactivity in post-conviction review.[7] Part II provides three reasons why the *Flowers* court inappropriately adopted the *Teague* rule: first, *Teague* involved relations between the state and federal courts and has no relevance to proceedings within a state system; second, on a related point using Hugh Heclo's terminology, *Teague* was an "organizational" case concerned with federal/state relations and had no relevance to the Illinois court system's "institutional" concern of providing justice to individual criminal defendants; and third, the interest in "finality" is not a strong enough reason for Illinois to deny favorable retroactive rulings to prisoners seeking relief in post-conviction proceedings.[8] Part III considers a corollary to the *Flowers/Teague* rule: if a new rule cannot

4. Danforth v. Minnesota, 552 U.S. 264, 280 (2008) ("[*Teague*] was intended to limit the authority of federal courts to overturn state convictions.").

5. *See id.* ("[T]he *Teague* rule of nonretroactivity was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings.").

6. *See infra* notes 133–148 and accompanying text (discussing the differences between what Heclo calls "institutional thinking" and "organizational thinking" and how such theories apply to the Illinois Supreme Court's interpretation of *Teague* through its decision in *Flowers*).

7. *See infra* Part I (providing a legal and historical background regarding retroactivity in collateral proceedings beginning with principles of federalism and introducing the cases of *Teague* and *Flowers*).

8. *See infra* Part II (distinguishing the holding in *Teague* from the issue of retroactivity in collateral proceedings in Illinois).

be applied retroactively in post-conviction proceedings, then logically a new rule also cannot be *created* in a post-conviction case.[9] It then discusses a recent case in which the Illinois Supreme Court confronted the myriad of problems caused by this policy limiting the retroactivity of post-conviction rules.[10] Part IV concludes that, because *Flowers* improperly restricts Illinois courts from applying important new rules to Illinois criminal defendants, justice demands *Flowers* be overruled.

I. RETROACTIVITY IN COLLATERAL PROCEEDINGS: *TEAGUE V. LANE* AND *PEOPLE V. FLOWERS*

What should a court do when it is compelled to follow binding case law that it knows will result in an injustice? Three years ago in *People v. Davis*,[11] the First District Appellate Court of Illinois faced this precise issue. The court rendered an unjust decision, even after admitting that the result contained "an element of inequity."[12] Despite this judicial red flag, the Illinois Supreme Court denied leave to appeal without comment.[13]

The jury convicted Davis of murder and sentenced him to natural life.[14] But Davis was only fourteen years old at the time of the incident, and the court instructed the jury on a theory of accountability.[15] Moreover, in 2002 the Illinois Supreme Court in *People v. Miller*[16] held in the case of another juvenile murderer—like Davis, convicted through accountability—that natural life based on the facts of that case was unconstitutionally disproportionate.[17] Based on *Flowers*, however, the court barred Davis from relying on the *Miller* decision in a post-conviction petition[18] because *Miller* was decided after Davis's

9. *See infra* Part III (analyzing the ramifications of the *Flowers* rule and whether new rules can be created in post-conviction cases).

10. *See infra* Part IV (discussing a 2010 Illinois Supreme Court case that based its holding on the flawed analysis in *Flowers*).

11. 904 N.E.2d 149 (Ill. App. Ct. 2009), *appeal denied*, 919 N.E.2d 357 (Ill. 2009).

12. *Id.* at 159.

13. 919 N.E.2d 357, 357 (Ill. 2009) (table disposition).

14. *Davis*, 904 N.E.2d at 151.

15. *Id.* at 153.

16. 781 N.E.2d 300 (Ill. 2002).

17. *See id.* at 309–10 (explaining how, under the particular facts of the case, a sentence of natural life imposed on a juvenile defendant convicted of murder through accountability violated the Illinois Constitution).

18. *See* 725 ILL. COMP. STAT. 5/122-1 (2010) (explaining post-conviction trial court petitions).

conviction became final and therefore could have no retroactive effect on Davis's case.[19]

Compare the different ways Illinois courts treated these two juveniles. On direct review, the court carefully considered whether Miller's natural life sentence, required by statute at the time of the decision,[20] was unconstitutionally disproportionate. The Illinois Supreme Court affirmed both the sentencing judge's conclusion that natural life was disproportionate and his decision that fifty years was a proper sentence. On collateral review, though, the Illinois court declined to consider whether Davis's natural life sentence was unconstitutional because it refused to apply the *Miller* decision retroactively.

Perhaps *Flowers* could once have been written off as merely a bad decision. But when it is used to prevent Illinois courts from even considering whether a fourteen-year-old boy's actions merit a sentence of natural life, it has crossed the line from mere embarrassment to serious injustice. The Illinois Supreme Court must overrule *Flowers* and apply new rules retroactively in collateral proceedings.

A. The Roots of Flowers: Federalism, Habeas Corpus, and Teague v. Lane

To understand the flaws in *Flowers*, it is first necessary to generally examine the role of federalism in the review of state criminal convictions. Second, it is important to understand the evolution of the concept of habeas corpus throughout American history. Finally, these two factors must be jointly considered in understanding the U.S. Supreme Court decision in *Teague*.

As the U.S. Supreme Court recently noted, "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'"[21] Before the adoption of the U.S. Constitution in the eighteenth century, it was accepted wisdom that sovereignty—"the equivalent of rights when held by governments, rather than by private citizens"[22]—could only exist as

19. *Davis*, 904 N.E.2d at 158.

20. *See* 730 ILL. COMP. STAT. 5/5-8-1 (2010) (mandating a sentence of natural life in convictions for multiple murders).

21. Bond v. United States, 131 S. Ct. 2355, 2364 (2011) (quoting Alden v. Maine, 527 U.S. 706, 758 (1999)).

22. J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CAL. L. REV. 277, 280 (2010).

a unitary, indivisible concept.[23] The Founders, however, believed in a concept of "dual sovereignty." James Madison memorably described this system in *The Federalist, No. 51*: "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people."[24] In the words of Justice Anthony Kennedy, the Founders "split the atom" of sovereignty when they established the federal system.[25]

Thus, the enforcement of criminal law is a responsibility shared by both the federal and state governments. Yet, this responsibility is not shared equally—traditionally, state governments have been responsible for the vast majority of criminal prosecutions.[26] Currently, states account for roughly 96% of all felony prosecutions and over 99% of all misdemeanor prosecutions.[27] For most of American history, criminal procedure rules in a state prosecution were based solely on the rules established in that particular state.[28] The guaranteed rights for criminal defendants found in the federal Bill of Rights had absolutely no effect on state criminal cases.[29]

The first federal constitutional provision with significant relevance to state criminal prosecutions was the Due Process Clause of the Fourteenth Amendment.[30] Although the Due Process Clause became

23. Montesquieu certainly believed this. *See* Laurence Claus, *Montesquieu's Mistakes and the True Meaning of Separation*, 25 O.J.L.S. 419, 426 (2005) ("Montesquieu did not question the prevailing orthodoxy that ultimate sovereign power could not be divided without risking chaos."). *But see* ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 18–20 (2010) (contending that the Framers were aware of Continental theorists who believed in the notion of divisible sovereignty).

24. THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 2003).

25. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

26. *See* Timothy P. O'Neill, *"Stop Me Before I Get Reversed Again": The Failure of Illinois Appellate Courts to Protect Their Criminal Decisions From United States Supreme Court Review*, 36 LOY. U. CHI. L.J. 893, 894–96 (2005) (explaining how federal courts rarely interfere with state criminal proceedings).

27. KAMISAR, LAFAVE, ISRAEL, KING & KERR, MODERN CRIMINAL PROCEDURE 18 (12th ed. 2008).

28. *Id.* at 24–30 (describing how the Warren Court began to "selectively incorporate" the guarantees of the Bill of Rights against the states during the 1960s).

29. *See* Barron v. Mayor of Baltimore, 32 U.S. 243, 250–51 (1833) (holding that the Federal Bill of Rights only applies against the federal government).

30. U.S. CONST. amend. XIV § 1.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

effective against state action in 1868, the U.S. Supreme Court applied it only sparingly against state court criminal decisions for the next ninety years.[31] It was not until the Warren Court revolution of the 1960's that the U.S. Supreme Court became actively engaged in influencing state criminal law.[32] The Court did this by "selectively incorporating" most,[33] though not all,[34] of the guarantees of the federal Bill of Rights.[35]

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life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

31. *See, e.g.*, Rochin v. California, 342 U.S. 165, 166, 174 (1952) (determining that warrantless use of a stomach pump on arrestee merely to recover two morphine capsules resulted in a violation of the Due Process Clause of the Fourteenth Amendment); Powell v. Alabama, 287 U.S. 45, 57, 72–73 (1932) (noting that the state's failure to allow adequate time for African-American defendants in a capital case to secure counsel resulted in a violation of the Due Process Clause of the Fourteenth Amendment); Moore v. Dempsey, 261 U.S. 86, 87, 92 (1923) (holding that a trial held in a lynch-mob atmosphere violated the Due Process Clause of the Fourteenth Amendment).

32. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 440–41 (14th ed. 2001) (describing the Warren Court's role in incorporating the guarantees of the Bill of Rights against the actions of state governments).

33. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 795–96 (1969) (holding the protection against double jeopardy—guaranteed by the Fifth Amendment—is applicable to the states through the Due Process Clause of the Fourteenth Amendment); Duncan v. Louisiana, 391 U.S. 145, 149–50 (1968) (holding the right to a jury trial—guaranteed by the Sixth Amendment—is applicable to the states through the Due Process Clause of the Fourteenth Amendment); Washington v. Texas, 388 U.S. 14, 22–23 (1967) (holding the right to compulsory process—guaranteed by the Sixth Amendment—is applicable to the states through the Due Process Clause of the Fourteenth Amendment); Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) (holding the right to a speedy trial—guaranteed by the Sixth Amendment—is "as fundamental as any of the rights secured by the Sixth Amendment" and therefore is applicable to states through the Due Process Clause of the Fourteenth Amendment); Pointer v. Texas, 380 U.S. 400, 403 (1965) (holding the right to confront adverse witnesses—guaranteed by the Sixth Amendment—is a "fundamental right and is made obligatory on the States by the Fourteenth Amendment"); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding the privilege against compulsory self-incrimination—guaranteed by the Fifth Amendment—applies to the states through the Due Process Clause of the Fourteenth Amendment); Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (holding the right to assistance of counsel—guaranteed by the Sixth Amendment—similarly applicable to provide appointed counsel for indigent defendants in state criminal prosecutions); Robinson v. California, 370 U.S. 660, 667 (1962) (holding the right against cruel and unusual punishments—guaranteed by the Eighth Amendment—similarly applicable against the states through the Due Process Clause of the Fourteenth Amendment); Mapp v. Ohio, 367 U.S. 643, 649 (1961) (holding the right to privacy—guaranteed by the Fourth Amendment—applicable to states through the Due Process Clause of the Fourteenth Amendment).

34. *See, e.g.*, Hurtado v. California, 110 U.S. 516, 538 (1884) (holding that the Due Process Clause of the Fourteenth Amendment did not make the Indictment Clause of the Fifth Amendment enforceable on the states).

35. Selective incorporation is the process by which a particular guarantee listed in the Bill of Rights is made applicable to the states through the Fourteenth Amendment. BLACK'S LAW

However, not all state criminal defendants believed that state courts were enforcing their newly-incorporated federal rights.[36] Thus, once their state appeals were exhausted, many state prisoners turned to federal courts for relief. The U.S. Supreme Court's small discretionary docket, however, made direct review largely illusory.[37] State prisoners in the 1960's therefore began asking lower federal courts to grant petitions for writs of habeas corpus.[38]

The broad concept of habeas corpus goes back to Magna Carta in 1215.[39] Although established in the U.S. Constitution,[40] the federal guarantee had no applicability to state prisoners until Congress passed the Habeas Corpus Act of 1867.[41] Essentially, that Act provided federal relief for any person—including a state prisoner—who was "restrained of his or her liberty" in violation of federal law.[42]

The proper scope of this guarantee generated significant debate.[43] There were two major schools of thought: one expressed a narrow view of the power of federal habeas corpus, the other a much broader view.[44] The narrow view prevailed for almost a century.[45] This asserted that

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DICTIONARY 834 (9th ed. 2009). The Court's decision to selectively incorporate a provision turned on "whether the particular Bill of Rights guarantee [was] itself essential to 'fundamental fairness.'" SULLIVAN & GUNTHER, *supra* note 32, at 441; *see also supra* note 33 (providing examples of cases in which such rights were selectively incorporated and made applicable to the states through the Due Process Clause).

36. *See, e.g.*, Stone v Powell, 428 U.S. 465, 525 (Brennan, J., dissenting) ("State judges popularly elected may have difficulty resisting popular pressures not experienced by federal judges given lifetime tenure designed to immunize them from such influences.").

37. The Judiciary Act of 1925 made the U.S. Supreme Court's docket largely discretionary. Ch. 229, 43 Stat. 936 (1925); *see also* Jonathan Sternberg, *Deciding Not To Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. S. CT. HIST. 1 (2008) ("Given complete discretion over its docket, far more often than not the Court declines to exercise jurisdiction and . . . avoids the overwhelming majority of questions put before it."); Adam Liptak, *The Case of the Plummeting Supreme Court Docket*, N.Y. TIMES, Sept. 28, 2009, http://www.nytimes.com/2009/09/29/us/29bar.html (noting that each year the Supreme Court selects only 80 cases from more than 8,000 requests for review).

38. *See* 28 U.S.C. § 2254 (2006) (federal law regarding application for a writ of habeas corpus on behalf of a person in custody pursuant to state law).

39. *See generally* RALPH V. TURNER, MAGNA CARTA 52–78, 148, 155–57, 161–62 (2003) (explaining the history of the Magna Carta and its relation to the concept of habeas corpus).

40. *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

41. *See* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (expanding federal habeas corpus jurisdiction to include review of federal and state convictions).

42. *Id.*

43. *See* KAMISAR ET AL., *supra* note 27, at 1573 (explaining the various views on the proper scope of federal habeas review of state criminal convictions).

44. LAFAVE, ISRAEL & KING, CRIMINAL PROCEDURE 1315 (4th ed. 2004).

45. Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76

federal courts possessed very limited power to grant writs of habeas to state prisoners. It held that the scope of federal habeas power should be confined only to those rare cases where state prisoners had been convicted by courts lacking either personal or subject matter jurisdiction.[46]

But a broader view took hold of the Court for two decades starting with *Brown v. Allen*, decided in 1953.[47] Although the Vinson Court decided *Brown*, most of the cases promulgating this broader view were products of the subsequent Warren Court.[48] This view held that federal courts had an important role in reviewing collateral challenges by both federal and state prisoners, but it was particularly true regarding federal claims of state prisoners.[49] There was a strong belief that persons convicted of crimes in state courts were entitled to at least one opportunity to litigate their federal claims in a federal forum.[50] Thus, in many ways, the Warren Court made it easier for state prisoners to obtain federal habeas review of their convictions and sentences.[51]

A substantial change subsequently occurred within the Burger and Rehnquist Courts.[52] These courts shifted the focus away from the state

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HARV. L. REV. 441, 441–42 (1963).

46. *Id.* at 441.

47. Brown v. Allen, 344 U.S. 443, 480 (1953) (concluding habeas allowed where state convicts alleged that their convictions were invalid due to racial discrimination in the jury selection process).

48. *See, e.g.*, Kaufman v. United States, 394 U.S. 217, 217, 221–22 (1969) (finding that federal habeas relief should be available to a federal prisoner convicted based on "evidence obtained in an unconstitutional search and seizure"); Fay v. Noia, 372 U.S. 391, 398 (1963), *overruled by* Wainwright v. Sykes, 433 U.S. 72 (1977) (finding that federal habeas relief should be available to a defendant whose confession was coerced despite his "failure to have pursued a state remedy not available to him at the time he applies"); Sanders v. United States, 373 U.S. 1, 7–8 (1963) (finding that federal habeas relief should be available to a defendant charged with robbing a federally insured bank who appeared without counsel and alleged mental incapacity).

49. *See Fay*, 372 U.S. at 430–31 ("Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner.").

50. Larry W. Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609, 619 (1983).

51. *See, e.g.*, *Fay*, 372 U.S. at 398 (allowing a state prisoner to bring a federal claim in habeas petition unless he knowingly and deliberately waived the claim in state proceedings).

52. *See* Stephen F. Smith, *Activism As Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1070 (2002) (noting that early on, the Burger Court began to make significant rollbacks of precedent coming out of the Warren Court, including an expansion of the writ); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 726–27 (2002) (discussing the steps taken by the Rehnquist Court to restrict the ability of prisoners to bring successive habeas claims).

prisoner's interest in a federal forum; instead, they emphasized the duty of federal courts to defer to state court decisions except in exceptional circumstances.[53] In the area of habeas corpus, the watchwords of the Burger and Rehnquist courts were "comity" and "federalism."[54] The new goal was for federal courts to disturb state court criminal judgments as little as possible.

Perhaps the best example of this change can be found in the Rehnquist Court's decision in *Coleman v Thompson*,[55] a 1991 death penalty case from Virginia. At the time, there was a strong feeling in some quarters that defendant Roger Keith Coleman was actually innocent of the rape and murder convictions that put him on death row.[56] Yet note the striking way Justice Sandra Day O'Connor begins her majority opinion denying relief: "*This is a case about federalism.* It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus."[57] Consistent with this approach, the Burger and Rehnquist Courts issued a series of opinions restricting state prisoners' rights to habeas relief, which resulted in the Supreme Court disturbing far fewer state court criminal convictions than had the Warren Court.[58]

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53. J. Richard Broughton, *Habeas Corpus and the Safeguards of Federalism*, 2 GEO. J.L. & PUB. POL'Y 109, 139–40 (2004).

54. *See, e.g.*, Engle v. Isaac, 456 U.S. 152, 167–68 (1982) (extending "'cause' and 'prejudice'" requirement even to errors that affect the reliability of the state trial process); Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977) (establishing a more stringent requirement that federal claims had to be raised and exhausted in state court proceedings before they could be raised in federal habeas; waived claims could only be raised under stringent "cause and prejudice" standard); Stone v. Powell, 428 U.S. 465, 489–92 (1976) (denying habeas review to Fourth Amendment claims that had received a full and fair hearing in state courts).

55. Coleman v. Thompson, 501 U.S. 722 (1991).

56. *See generally* JOHN C. TUCKER, MAY GOD HAVE MERCY (1998) (detailing evidence suggesting that Coleman may have been innocent). DNA testing after Coleman's execution appears to support Coleman's guilt. *DNA Tests Confirm Executed Man's Guilt*, MSNBC.com (Jan. 12, 2006), http://www.msnbc.msn.com/id/10823771/ns/us_news-crime_and_courts/t/dna-tests-confirm-executed-mans-guilt/.

57. *Coleman*, 501 U.S. at 726 (emphasis added).

58. *See, e.g.*, Murray v. Carrier, 477 U.S. 478, 492 (1986) ("Attorney error short of ineffective assistance of counsel does not constitute a cause for a procedural default" in a case where the attorney of a state court defendant failed to raise an objection regarding the victim's statement on appeal); Engle v. Isaac, 456 U.S. 107, 135 (1982) (finding that petitioners were not entitled to federal habeas relief where they were unable to demonstrate cause for their failure to comply with Ohio procedural law requiring contemporaneous objections to jury instructions); U.S. v. Frady, 456 U.S. 152, 170 (1982) (finding that the defendant was not entitled to federal habeas relief where he could not demonstrate an "actual and substantial disadvantage" or prejudice regarding the alleged errors in jury instructions read at his state court trial); Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (finding that federal habeas relief is not available in a case where the defendant failed to raise an objection about his confession at trial in state court, and finding "no cause and

One of the landmark Rehnquist Court decisions limiting federal habeas review of state criminal cases was *Teague v. Lane*—the case the Illinois Supreme Court primarily relied upon in *Flowers*.[59] Teague, the state habeas petitioner, had completed direct review of his conviction[60] in that it was "final."[61] Soon thereafter, the Court decided *Batson v. Kentucky*,[62] a case that significantly changed the legal landscape of jury selection in finding that racial discrimination by the State while exercising its peremptory challenges at trial resulted in a violation of the Equal Protection Clause.[63] Relying on this new case, Teague filed a petition asking for a federal writ of habeas corpus.[64]

Justice O'Connor's plurality opinion in *Teague* reconfigured the role of habeas corpus in reviewing state convictions. [65] According to the opinion, the function of federal habeas review was not to reverse a final judgment of a state court merely because the Court would now decide the case differently based on recent changes in the law.[66] Instead, the focus should be shifted 180 degrees: the only issue should be whether the state court had improperly flouted the constitutional principles that existed *at the time the state court decided the case*.[67] Habeas corpus should not be used as a vehicle to either announce new constitutional rules or reverse a state court because of a recent constitutional rule unknown to the state court.[68] Rather, the sole function of habeas review

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prejudice" with Florida's procedural rule requiring a confession to be challenged "at trial or not at all"); Stone v. Powell, 428 U.S. 465, 494 (1976) ("[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.").

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

60. "Direct review" of a state criminal conviction ends when the U.S. Supreme Court either decides the case on the merits or denies *certiorari*. In cases where no petition for *certiorari* is filed, direct review ends when the time allowed for filing such a petition has expired. Gonzalez v. Thaler, 131 S. Ct. 641, 655 (2012).

61. *Teague*, 489 U.S. at 302–15.

62. Batson v. Kentucky, 476 U.S. 79 (1986).

63. *Id.* at 93.

64. *Teague*, 489 U.S. at 294.

65. Although *Teague* was a plurality opinion garnering only four votes, the majority of the Court quickly affirmed and used the rule. *See* Penry v. Lynaugh, 492 U.S. 302, 313 (1989) ("Because Penry is before us on collateral review, we must determine, as a threshold matter, whether granting him the relief he seeks would create a new rule. Under *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions." (citation and internal quotation marks omitted)).

66. *Teague*, 489 U.S. at 305–10.

67. *Id.* at 307–09.

68. *Id.* at 307–09.

should be to correct seriously flawed state court decisions. The only demand a federal court could make on a state court conviction is that the state court had merely followed the "law-at-the-time."[69]

The effect of *Teague* was dramatic. Using this new analysis, the Supreme Court proceeded to reject a long list of habeas challenges from state prisoners.[70] Moreover, the spirit of *Teague* was later reflected in the changes to habeas corpus that Congress passed in the 1996 Anti-Terrorism and Effective Death Penalty Act.[71]

To summarize, the nonretroactivity principle the U.S. Supreme Court announced in *Teague* is only germane to the work of federal courts in that it establishes the degree of deference that federal courts must give state court criminal judgments in our federal "compound republic." Since it is based on federalism and comity principles,[72] *Teague* has absolutely no relevance to how a state court system should govern itself from within. Unfortunately, the Illinois Supreme Court in *Flowers*

69. LAFAVE, ISRAEL & KING, *supra* note 44, at 1356. *Teague* recognized two exceptions where "new rules" would be given retroactive effect on federal habeas review. One is for a new rule that places "certain kinds of primary, private individual conduct beyond the power of criminal law-making authority." *Id.* at 307 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring)). The second is for a new rule that concerns "watershed rules" of criminal procedure; the Court in *Teague* conceded that it is "unlikely that many such components of basic due process have yet to emerge." *Id.* at 311, 313. The U.S. Supreme Court has yet to find a *Teague* exception. *See* Kermit Roosevelt III, *A Retroactivity Retrospective, With Thought for the Future: What the Supreme Court Learned from Paul Mishkin, and What it Might*, 95 CAL. L. REV. 1677, 1678–87 (2007) (examining the problems with *Teague*'s definition of a new rule as "any result not dictated by precedent" and the resulting confusion on principles of retroactivity in both collateral and direct review (quoting *Teague*, 489 U.S. at 301)).

70. *See, e.g.*, O'Dell v. Netherland, 521 U.S. 151, 153 (1997) (finding that the *Simmons* rule "which requires that a capital defendant be permitted to inform his sentencing jury that he is parole-ineligible if the prosecution argues that he presents a future danger" was a new rule and thus precluded the petitioner from raising the issue in his habeas petition); Stringer v. Black, 503 U.S. 222, 237 (1992) (finding that the cases decided after petitioner's conviction was final did not constitute "new rules" because the precedents regarding the specificity of aggravating factors in a Mississippi death penalty case were already present at the time of petitioner's case); Butler v. McKellar, 494 U.S. 407, 411 (1990) (holding that a violation of one's Fifth Amendment rights for "police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation" announced in *Roberson* constituted a "new rule" because it was announced after the petitioner's conviction became final); *Penry*, 492 U.S. at 328, 340 (affirming the denial of petitioner's habeas petition which claimed "that it would be cruel and unusual punishment . . . to execute a mentally retarded person" on the basis that such would constitute a "new rule").

71. LAFAVE, ISRAEL & KING, *supra* note 44, at 1315–16 (stating that the 1996 Act only allows relief based on claims adjudicated in state courts when the state decision involves an unreasonable interpretation or application of clearly established federal law).

72. *Teague*, 489 U.S. at 308 ("[W]e have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review.").

failed to understand this and improperly relied on *Teague* in its decision.

B. People v. Flowers*: the Illinois Supreme Court Erroneously Adopted* Teague *for State Post-Conviction Petitions*

One year after the U.S. Supreme Court decided *Teague*, the Illinois Supreme Court was faced with another defendant's attempt to retroactively take advantage of favorable case law that was decided after his conviction was final. But although the factual situation was similar to *Teague*, the Illinois court failed to understand that the legal context was entirely different. This failure explains why *Flowers* must be overruled.

While Marvin Flowers was charged with murder, the trial court granted his request to instruct the jury on voluntary manslaughter.[73] However, the instructions also told the jury that they could not find the defendant guilty of both murder and voluntary manslaughter, i.e., that these were mutually exclusive crimes.[74] Yet the jury instructions also told the jury the very opposite, i.e., that these were *not* mutually exclusive crimes.[75] The instructions were written so that only someone first convicted of murder could then be eligible to be convicted of voluntary manslaughter.[76] In other words, contrary to what the judge told the jury, only a murderer could be found guilty of voluntary manslaughter. The jury found Flowers guilty of murder.[77] Flowers argued that his conviction should be reversed because of these constitutionally flawed instructions, but the appellate court affirmed the trial court in a Rule 23 order.[78]

Sometime after his conviction had become final, Flowers filed a petition under the Illinois Post-Conviction Hearing Act,[79] which the trial court subsequently denied.[80] The appellate court, however, granted the petition by applying *People v. Reddick*, a recent Illinois Supreme Court case that examined the same instructions of which Flowers had

73. People v. Flowers, 561 N.E.2d 674, 676 (Ill. 1990).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 677.

78. *Id.*; People v. Flowers, 451 N.E.2d 1039 (Ill. App. 1982) (Table). Illinois Supreme Court Rule 23 allows the Appellate Courts to dispose of a case through an unpublished summary order when the disposition is controlled by well-established precedent. ILL. SUP. CT. R. 23 (2011).

79. 725 ILL. COMP. STAT. 5/122 (2010).

80. *Flowers*, 561 N.E.2d at 677.

complained.[81] In *Reddick*, the court found the instructions to be seriously flawed and on direct review reversed the murder conviction.[82] The appellate court that considered Flowers's post-conviction petition agreed that *Reddick* controlled and ordered a new trial for Flowers.[83] The State's petition for leave to appeal was granted.[84]

The primary issue before the Illinois Supreme Court in *Flowers* was whether an Illinois prisoner could seek relief in a state post-conviction proceeding by relying on a case that was decided only after his conviction had become final.[85] The court held that he could not because *Reddick* was decided after Flowers's conviction had become final.[86] As a result, Flowers was barred from relying on it retroactively, and his murder conviction was affirmed.[87]

The Illinois Supreme Court decided *Flowers* by relying on the then-recent U.S. Supreme Court decision in *Teague*.[88] The *Flowers* court pointed out that *Teague* prohibited a state prisoner requesting federal habeas corpus from retroactively relying on a new constitutional rule of criminal procedure established after his conviction became final. It then followed that an Illinois state prisoner filing a state post-conviction petition should likewise be barred from relying on such a rule established after his state conviction had become final.[89]

At first blush, the analogy seems plausible. In fact, the Illinois Supreme Court spent only a few paragraphs deciding the issue.[90] But a closer analysis shows that the analogy is fatally flawed. As this Article will show, *Teague* applies only to judicial issues *between* federal courts and state courts; it has no relevance to judicial issues *within* a particular state court system.

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81. People v. Flowers, 548 N.E.2d 766, 768–69 (Ill. App. Ct. 1989) (citing People v. Reddick, 526 N.E.2d 141, 147 (Ill. 1988)).

82. *Reddick*, 526 N.E.2d at 147.

83. *Flowers*, 561 N.E.2d at 677.

84. *Id.*

85. *Id.* at 680. The court also considered two other issues. First, petitioner argued that the trial court in the original trial had violated constitutional principles of double jeopardy when it instructed the jury, which had returned a verdict of both murder and voluntary manslaughter, that they could not find the petitioner guilty of both and required the jury to return to deliberations and pick one or the other. *Id.* at 677–79. Second, petitioner argued that the "inherently contradictory" instructions given to the jury violated his right to due process and right to a trial by jury. *Id.* at 679–80. The court rejected both arguments. *Id.* at 677–80.

86. *Id.* at 684.

87. *Id.* at 674.

88. *Id.* at 681.

89. *Id.*

90. *Id.* at 681–84.

II. THE *TEAGUE* ANALYSIS HAS NO APPLICABILITY TO THE ISSUE OF WHETHER ILLINOIS SHOULD ALLOW NEW RULES TO BE RETROACTIVELY APPLIED TO ILLINOIS POST-CONVICTION PETITIONS

There are several reasons why the *Flowers* court erred in its reliance on *Teague*. First, a recent decision of the U.S. Supreme Court explicitly held that *Teague* is only relevant on the issue of how much deference federal courts should extend to state court judgments.[91] As to the issue of how a state court system should approach the issue of retroactivity within its own system, the Court has further held that a state court is free to decide not to follow *Teague*. Second, using political scientist Hugh Heclo's distinction between "organizational thinking" and "institutional thinking," it is clear that the *Flowers* court did not understand that *Teague* was concerned only with "organizational" concerns of the relations between state and federal courts and thus had no relevance to the Illinois court system's "institutional" concern of reaching the fairest result. Third, the only conceivable reason supporting the *Flowers* "nonretroactivity" rule is the value of finality in criminal cases.[92] Close analysis shows that finality is not a strong enough reason to deny favorable retroactive rulings to defendants seeking relief on post-conviction review.

A. The U.S. Supreme Court Has Made It Clear that Teague *Has No Relevance to the Issue of How a State Court Should Deal with Retroactivity in Collateral Proceedings Within its Own Judicial System*

In 2008, the U.S. Supreme Court decided *Danforth v. Minnesota*, in which it faced the issue of whether the *Teague* rule binds state courts as well as federal courts regarding the retroactivity of federal law in criminal cases.[93] In holding that *Teague* has no effect on state courts, *Danforth* showed how deeply flawed the Illinois Supreme Court's analysis in *Flowers* is.[94]

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91. Danforth v. Minnesota, 552 U.S. 264, 278–79 (2008).

92. *Flowers*, 561 N.E.2d at 682 (discussing the analogy between the issues of finality in habeas proceedings and retroactivity of state law). The *Flowers* court stated:

> Certainly, Illinois has an interest in finality of its criminal trials, so long as the defendant was accorded a trial consistent with constitutional principles. In fact, our post-conviction statute provides a 10-year window during which the action may be brought. Although our statute is unclear, we do not believe that a constitutional principle established after the trial necessarily must be retroactively applied.

Id. Clearly, the issue of finality in criminal cases influenced the *Flowers* court's decision to apply *Teague*.

93. *Danforth*, 552 U.S. at 266.

94. *Id.* at 282 ("[*Teague*] does not in any way limit the authority of a state court, when

Danforth was charged under Minnesota law with first-degree sexual conduct with a minor, and later tried, convicted, and sentenced.[95] After his conviction became final,[96] the U.S. Supreme Court decided *Crawford v. Washington*, which tightened the rules concerning when out-of-court statements could be used under the Sixth Amendment's Confrontation Clause.[97] Believing that *Crawford* would mandate a new trial in his case, Danforth filed a post-conviction petition pursuant to Minnesota state law.[98]

On appeal, Danforth made two arguments before the Minnesota Supreme Court.[99] First, he argued that under *Teague*, the *Crawford* decision should be applied to him retroactively.[100] The court, however, held that it did not believe the U.S. Supreme Court would find *Crawford* to be retroactive under a *Teague* analysis.[101] Alternatively, Danforth argued that the Minnesota Supreme Court was "free to apply a broader retroactivity standard than that of *Teague*," and should apply the *Crawford* rule to his case even if federal law did not require it to do so.[102] In response, the Minnesota court held that it had no choice in the matter; it was legally bound to apply *Teague* whenever the retroactivity of a new federal rule was at issue.[103]

The U.S. Supreme Court granted certiorari to decide whether *Teague* actually prohibited a state court from granting retroactive effect to a

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reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*.").

95. *Id.* at 267.

96. For a definition of the concept of "finality," see Bator, *supra* note 45, at 443–44 (illustrating that a state court conviction involving federal questions is not final until after the federal issues have been decided by the trial court, are preserved for any further state appellate review, and then "[o]n affirmance . . . subject to direct review by the United States Supreme Court, usually on certiorari, sometimes on appeal. In case of affirmance by that Court or a denial of the writ, the judgment . . . becomes final and binding.").

97. *Crawford*, 541 U.S. 36, 68–69 (2004); *see also Danforth*, 552 U.S. at 267–69 (holding that where testimonial statements are at issue, "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation").

98. *Id.* at 267.

99. *Id.* at 277–78. The first reason is that the *Teague* opinion never "asserts or intimates" that states cannot expand upon the class of those who may benefit from a new rule and the second reason is that "*Teague* is based on statutory authority that extends only to federal courts applying a federal statute." *Id.* at 279.

100. *Id.* at 267.

101. Indeed, the Minnesota Supreme Court was proved correct when the U.S. Supreme Court subsequently held that *Crawford* was not retroactive under *Teague*. *See* Whorton v. Bockting, 549 U.S. 406, 421 (2007) (holding that *Crawford* was not included under either of the two *Teague* exceptions).

102. *Danforth*, 552 U.S. at 267–68.

103. *Id.* at 268.

new federal rule in a case that is final when *Teague* would forbid a federal court from doing so.[104] Holding for Danforth, the Court held that Minnesota was free to reject the *Teague* nonretroactivity principle within its own state court system.[105]

It is important to note that *Danforth* is different from *Flowers* in a crucial respect. Unlike Minnesota, the Illinois Supreme Court in *Flowers* did not believe it was legally bound to apply *Teague* to its state post-conviction law.[106] Nevertheless, in the course of explaining why a state was not bound to follow *Teague*, the U.S. Supreme Court's analysis showed why a state would be wise to not apply it.[107]

Danforth began by emphasizing that *Teague* was a very narrow decision and only relevant to relations *between* federal courts and state courts.[108] The Court gave three reasons for this conclusion. The first two emphasize that *Teague* said nothing about limitations on states; this is even clearer when it is recalled that *Teague* was simply interpreting a federal statute.[109]

It is the third reason that is particularly relevant to *Flowers*. Here, *Danforth* explained why *Teague* is not even remotely germane to the issue of how a state court should treat retroactivity within its own state system. The Supreme Court began by noting that *Teague* was meant to "apply only to federal courts considering habeas corpus petitions challenging state court criminal convictions."[110] *Teague* itself stressed that its holding was based on concerns of federalism and comity, and, as *Danforth* noted, these concerns "are unique to *federal* habeas review of state convictions."[111] *Danforth* observed:

> *If anything*, considerations of comity militate *in favor* of allowing state courts to grant [post-conviction] relief to a broader class of individuals than is required by *Teague*. And while finality is, of course, implicated in the context of state as well as federal habeas, finality of

104. Danforth v. State, 718 N.W.2d 451 (Minn. 2006), *cert. granted*, 75 U.S.L.W. 3621 (U.S. May 21, 2007) (No. 06-8273).

105. *Danforth*, 552 U.S. at 280–81.

106. *Flowers*, 561 N.E.2d at 681–82 (recognizing that the court was not compelled to adopt *Teague* in Illinois).

107. *Danforth*, 552 U.S. at 279–80.

108. *Id.* at 264, 277 ("[*Teague*] was tailored to the unique context of federal habeas and therefore had no bearing on whether States could provide broader relief in their own post-conviction proceedings.").

109. *Danforth*, 552 U.S. at 265; 28 U.S.C. § 2241 (2008).

110. *Danforth*, 552 U.S. at 279.

111. *Id.*

> state convictions is a state interest, not a federal one. It is a matter that States should be free to evaluate.[112]

States are "independent sovereigns with plenary authority to make and enforce their own laws."[113] Thus, *Teague* had no intention of limiting "a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions."[114]

The question remains: why was the Illinois Supreme Court in *Flowers* so willing to apply *Teague* to Illinois post-conviction procedure? Note that *Danforth* emphasizes that the main considerations behind *Teague* were federalism and comity.[115] The word "federalism" is nowhere to be found in the few paragraphs that analyze *Teague* in the *Flowers* opinion.[116] And, although *Flowers* acknowledges that "comity" issues underlie *Teague*, it offers no analysis of why this principle of federalism should impact whether Illinois should apply *Teague* to state post-conviction proceedings.[117]

Thus, *Flowers* adopted *Teague* without ever discussing how *Teague*'s underlying values of federalism and comity were possibly relevant to how Illinois courts should resolve Illinois cases. *Flowers* adopted the entire *Teague* decision, thinking it provided an easy solution to the issue of retroactivity in post-conviction relief. As Addolfo Davis can tell you, it did not.[118]

A clue as to why *Teague* has no bearing on state court systems is found in a sentence from Justice Stevens's opinion in *Danforth* cited above: "*If anything*, considerations of comity militate *in favor* of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*."[119] The reason is this: principles of federalism presume that both the state and federal court

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112. *Id.* at 279–80 (emphasis added).

113. *Id.* at 280.

114. *Id.* 280–81.

115. *Id.* at 279 (commenting that *Teague* was predicated on "federalism and comity considerations").

116. *See Flowers*, 561 N.E.2d at 681–82 (illustrating that the Court relied on *Teague*'s bare holding that "decisions establishing new constitutional rules of criminal procedure are not to be applied retroactively to cases pending on collateral review" subject to the two exceptions, without addressing the concepts of federalism, which formed the basis for the rule).

117. *Id.* at 681–82.

118. *See supra* notes 11–20 and accompanying text. Despite admitting to an inequitable result in sentencing a fourteen year-old to natural life on a theory of accountability, the Illinois Appellate Court followed *Flowers*, preventing reliance on a later decision holding that such punishment is unconstitutionally disproportionate.

119. *Danforth*, 552 U.S. at 279–80 (emphasis added).

systems are each doing their jobs properly. The Warren Court, however, was leery of the idea that state courts were capable of enforcing federal constitutional rights of criminal procedure within their own state court systems.[120] Therefore, the Warren Court granted federal courts broad rights to reverse state court criminal convictions through federal habeas corpus.[121] On the other hand, the Burger and Rehnquist Courts saw state courts as fully capable of doing justice within their own criminal law systems. They saw the liberal use of federal habeas corpus as an insult to the ability of state courts to administer criminal justice.[122] In the Warren Court era, federal courts essentially reviewed constitutional claims in federal habeas under a *de novo* standard of review, giving no deference to the correctness of the state court conviction.[123] However, the Burger and Rehnquist Courts completely changed this. Those Courts held that comity *demanded* that federal courts treat state court criminal judgments with the respect and deference due to decisions made by a partner branch in our federal system.[124] The assumption was that state courts had already "gotten it right" and therefore, federal courts should interfere only in egregious cases.[125] Thus, the deference to state courts found in *Teague* was

120. Stone v. Powell, 428 U.S. 465, 494–96 (1976).

121. *See generally* Yackle, *supra* note 50, at 616 (referring to the Warren Court and the extensive use of federal habeas corpus, the author states that "the Supreme Court had launched a campaign to restructure state criminal process on the federal model, as described in the Bill of Rights . . . [a]ccordingly, the Court recruited the federal habeas courts to ensure that the state courts complied with new, and unpopular, federal doctrines").

122. *See, e.g.*, Sandra Day O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 811–15 (1981) (arguing that the Court lacked respect for the ability of state court judges to apply federal constitutional law). This law review article was written by Justice O'Connor before her appointment to the U.S. Supreme Court.

123. *See* Wright v. West, 505 U.S. 277, 302–03 (1992) (O'Connor, J., concurring) (cataloging U.S. Supreme Court cases using *de novo* review to review habeas corpus petitions).

124. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 128 (1982) ("Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.").

125. For cases using waiver and forfeiture rules as reasons not to disturb state court criminal judgments, see, for example, Murray v. Carrier, 477 U.S. 478, 487–89 (1986) (holding that an allowance of claims of ineffective assistance of counsel in state court would increase federal habeas corpus costs and deny state courts their Sixth Amendment right to address such issues); Reed v. Ross, 468 U.S. 1, 13–16 (1984) ("[A]bsent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel . . . ."); Engle v. Isaac, 456 U.S. at 126–29 (finding that a prisoner waives a state court's hearing of a constitutional claim absent exceptional circumstances, thereby preventing corresponding habeas petitions); Wainwright v. Sykes, 433 U.S. 72, 87–91 (1977) (when a procedural default prevents a state court from hearing a constitutional claim, a prisoner cannot obtain federal habeas relief absent a showing of cause and actual prejudice); Francis v. Henderson, 425 U.S. 536, 542 (1976) ("There is no reason to . . .

predicated on the philosophy that federal review should presumptively assume that the state court had already reached a completely fair and just decision. This explains Justice O'Connor's previously mentioned opening sentence in *Coleman v. Thompson* that a habeas case was a "case about federalism," and not about re-deciding a controversial state death penalty case.[126]

It should now be clear why *Teague* has no relevance *within* a state court system. *Teague* functions as a barrier between federal and state courts, denying federal courts the power to interfere with state court convictions that have presumptively been thoroughly vetted within the state court system. Based on the comity inherent in our federal system, the Court's decision in *Teague* assumes that the state court has done its best to reach the correct result.

Yet when a *state* court system applies *Teague*, it uses a procedural device to deny a defendant relief when it has already granted that same relief to another state defendant. Thus, when the federal system applies *Teague*, it restrains the federal system from interfering with a state's efforts to reach the best possible result in a case, but when a state applies *Teague* to itself, it irrationally restrains *itself* from reaching the best result.

In other words, a state that adopts *Teague* is *purposely refusing* to reach the optimal result in a criminal case within its own justice system. Thus, a state's adoption of *Teague* destroys the whole reason why federal courts used *Teague* to defer to state court judgments in the first place. Former Justice James L. Dennis of the Louisiana Supreme Court understood this point perfectly.[127] He noted that a state court's adoption of *Teague* does not promote the goals of federalism; rather, "in self-defeating circularity, [the state court] blindly replicates the very federal habeas rule by which the High Court attempts to accord comity to our state laws and decisions."[128]

So why does Illinois engage in this "self-defeating circularity" that negates the whole federal purpose of *Teague*? Part of the reason is that the Illinois Supreme Court almost never sees a U.S. Supreme Court criminal decision it does not like. Whether the issue is double jeopardy, equal protection, or search and seizure, the Illinois Supreme Court, for

give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants." (quoting Kaufman v. United States., 394 U.S. 217, 228 (1969))).

126. Coleman v. Thompson, 501 U.S. 722, 726 (1991).

127. State *ex rel.* Taylor v. Whitley, 606 So. 2d 1292, 1303 (La. 1992) (Dennis, J., dissenting).

128. *Id.*

the most part, follows in "lockstep" fashion whatever the U.S. Supreme Court says in matters of criminal law.[129]

It is one thing for the Illinois Supreme Court to blindly follow the U.S. Supreme Court in substantive areas such as search and seizure[130] or double jeopardy.[131] But it is quite another to follow the U.S. Supreme Court in an area of law that does not apply to the work of state courts: federal habeas corpus review. The *Flowers* decision did not recognize that *Teague* was *qualitatively* different from the usual U.S. Supreme Court cases dealing with criminal law and procedure.

B. Teague *and the Difference between "Organizational" and "Institutional" Thinking*

The qualitative difference between *Teague* and the more typical U.S. Supreme Court criminal law decision can be seen through the lens of political scientist Hugh Heclo's recent book *On Thinking Institutionally.*[132] Here Heclo makes a distinction crucial to understanding why the Illinois Supreme Court should not have blindly adopted *Teague*. He distinguishes between two very different types of

129. *In re* Jonathon C.B., No. 017750, 2011 Ill. LEXIS 1102, at **66 (Ill. June 30, 2011) (Illinois will follow federal interpretation in the area of equal protection); People v. Caballes, 851 N.E.2d 26, 45–55 (Ill. 2006) (Illinois will follow federal interpretation in the area of search and seizure in a "limited lockstep" fashion); *In re* P.S., 676 N.E.2d 656, 662 (Ill. 1997) (Illinois will follow federal interpretation in the area of double jeopardy). The exceptions to "limited lockstep" are narrow and rare. *See* People v. Lampitok, 798 N.E.2d 91, 99 (Ill. 2003) (referring to the exceptions to the lockstep doctrine as "narrow" and irrelevant to that case). An exception will be found only if the court finds "in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our constitution are intended to be construed differently than are similar provisions in the Federal Constitution, after which they are patterned." People v. Tisler, 469 N.E.2d 147, 157 (Ill. 1984). The one major example is found in *People v. Krueger*, 675 N.E.2d 604 (Ill. 1996). The Illinois Supreme Court in *People v. Krull*, held that the "good faith exception" would not be applied to a warrantless search executed pursuant to a statute later held to be unconstitutional. People v. Krull, 481 N.E.2d 703, 708–09 (Ill. 1985). The U.S. Supreme Court granted certiorari and reversed, holding in a 5–4 decision that indeed the "good faith exception" did apply to such a search. People v. Krull, 480 U.S. 340, 360 (1987). Nine years later, the Illinois Supreme Court re-examined the issue and this time found that the state's history of an exclusionary rule for search and seizure violations—in a case predating *Mapp* by thirty-eight years—allowed the Court to find that the Illinois Constitution provided more protection than the U.S. Supreme Court provided in Krull. *Krueger*, 675 N.E.2d at 611–12 (citing People v. Brocamp, 138 N.E. 728, 731 (Ill. 1923)). Krueger is the "narrow exception" to the lockstep doctrine referred to in Lampitok. *Lampitok*, 798 N.E.2d at 99.

130. *Tisler*, 469 N.E. 2d at 157 (noting the similar construction of federal and Illinois state laws for search and seizure).

131. *In re* P.S., 676 N.E.2d at 662 (noting the Illinois Supreme Court held to follow double jeopardy under state law the same way it is construed under the federal constitution).

132. HUGH HECLO, ON THINKING INSTITUTIONALLY (2008).

thinking: "institutional thinking" and "organizational thinking."[133] In Heclo's words, "Institutions usually are associated with particular organizations that are at least formally charged with pursuing certain ends."[134] Effective *organization* is merely a means to an end, i.e., the achievement of *institutional* goals. Thus, human endeavors require both an interest in the "organization" and an interest in the "institution."[135] Heclo says that "institutional thinking" is concerned with being "committed to the *ends* for which organization occurs rather than to an organization as such."[136] On the other hand, "organizational thinking" is concerned with being committed to the structure that facilitates the achievement of goals.[137] This means there can be tragic conflict between institutional duty and organizational loyalty.[138]

Heclo uses the Federal Bureau of Investigation to illustrate such conflicts. J. Edgar Hoover was a master of "thinking organizationally" to protect the bureaucratic power of the FBI within government, and "in doing so [he] did long-term damage to the institutional qualities of the FBI as a law-enforcement agency."[139] On the other hand, Coleen Rowley, the agent who criticized the FBI for its pre-9/11 failures, is a model of "thinking institutionally."[140] Yet her superiors tarred her as someone who was disloyal to the FBI.[141] In other words, they faulted her for not "thinking organizationally."[142]

When we apply this analysis to the federal and state court system, we can say that the "institutional goal" is the achievement of justice. On the other hand, the "organizational goal" is a smooth-running, efficient court system. Sometimes these goals mesh and sometimes they come into conflict.

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133. *Id.* at 90–98.

134. *Id.* at 90.

135. *Id.*

136. *Id.* (emphasis added).

137. *Id.*

138. *Id.* at 91.

139. *Id.* at 90.

140. Rowley was an FBI agent in Minneapolis. Three weeks before the "9/11" attacks, she learned that a known Islamic extremist named Zacarias Moussaoui had paid cash for flying lessons. She arrested him, but the FBI denied her request for a warrant to search his laptop computer. After "9/11," she criticized her superiors for their lack of diligence in following up on this lead. *Colleen Rowley Biography*, NOW: POL. & ECON. (Mar. 4, 2005), http://www.pbs.org/now/thisweek/index_030405.html.

141. *Id.*

142. *See* HECLO, *supra* note 132, at 90 ("It was a career-ending choice to put thinking institutionally morally ahead of thinking organizationally.").

For example, from an "organizational" viewpoint, courts must have rules for how cases are presented. Filing deadlines, for example, must be enforced.[143] Proper objections must be made at trial in order to preserve an issue for appellate review.[144] Objections not properly made will usually result in forfeiture of the point on appeal.[145] However, a knowing waiver of an issue will prevent that claim from ever being considered on appeal.[146] None of these rules are necessarily concerned with the "institutional goal" of reaching the absolute fairest result in each individual case. Indeed, sometimes the enforcement of these procedural rules may result in apparent injustice to an individual criminal defendant.[147]

Similarly, *Teague* is concerned with "organizational goals," and not "institutional goals." Blindly applying *Teague* to Illinois law, in *Flowers* the Illinois Supreme Court demonstrated little awareness that *Teague* was solely concerned with the "organizational goal" of maintaining smooth relations between federal and state court systems and had absolutely nothing to do with the "institutional goal" of achieving the best result in each case.

What relevance do the federalism and comity concerns of *Teague* have to the inner-workings of a unitary state court system? In a word: none. Unfortunately, the *Flowers* decision appears to be predicated on the erroneous assumption that all U.S. Supreme Court cases are equally applicable in either state or federal settings. But as Addolfo Davis can attest, this is simply not true.

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143. *See, e.g.*, 725 ILL. COMP. STAT. 5/116-1(b) (2010) (stating that a motion for a new trial must be filed within 30 days following the entry of a finding or the return of a verdict); ILL. SUP. CT. R. 315(b) (providing the window of time during which a party may file a timely petition for leave to appeal an Illinois appellate court decision to the Illinois Supreme Court).

144. People v. Herron, 830 N.E.2d 467, 472 (Ill. 2005) ("Generally, a defendant forfeits review of any putative jury instruction error if the defendant does not object to the instruction or offer an alternative instruction at trial and does not raise the instruction issue in a posttrial motion.").

145. A court can still consider a forfeited claim if the claim falls within the "plain error" exception. *See id.* at 479 ("[T]he plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence.").

146. Hill v. Cowan, 781 N.E.2d 1065, 1069 (Ill. 2002) (distinguishing "waiver" from "forfeiture").

147. *See* Coleman v. Thompson, 501 U.S. 722, 740–44 (1991) (holding that counsel's mistake in not filing a timely notice of appeal in a death penalty case did not excuse the procedural default for habeas review).

C. Finality is Not a Strong Enough Reason to Refuse to Apply Retroactivity on Post-Conviction Review

People v. Flowers cited two reasons for refusing to allow retroactive application of favorable changes in the law to state prisoners on post-conviction review: comity and finality.[148] As previously demonstrated, comity has no relevance to issues within a state court system.[149] But is the state interest in finality of criminal convictions sufficient to support nonretroactivity? A close analysis shows why the use of favorable retroactive changes trumps the interests of finality in state post-conviction proceedings.

As Chief Justice John Roberts's dissent in *Danforth* notes, "finality" was a value mentioned in *Teague*.[150] Yet for a number of reasons finality concerns in state post-conviction proceedings are less significant than those in federal habeas review.

First, the *Flowers* court did not acknowledge how procedurally different federal habeas corpus is from Illinois post-conviction. In a federal habeas corpus proceeding, a state prisoner must show that he has "exhausted" his claim. This means the prisoner has given the state court system an adequate opportunity to rule on his claim by taking advantage of every conceivable forum provided for by the state in which he was convicted.[151] Moreover, if the claim was not properly raised under state court rules, the claim is considered "procedurally defaulted" and barred from being raised in a habeas corpus petition.[152]

Illinois post-conviction petition procedure is the exact opposite of this. Any issue previously decided on state direct review will be denied

148. People v. Flowers, 561 N.E.2d 674, 682–83 (Ill. 1990) ("The scope of a *habeas* proceeding is also defined by interests of comity and finality.").

149. *See supra* notes 53–55 and accompanying text (beginning with the Burger and Rehnquist Courts, the Supreme Court refrained from disturbing state court judgments by way of habeas relief as much as possible over concerns of federalism and comity).

150. Danforth v. Minnesota, 552 U.S. 264, 299–300 (2008) (Roberts, C.J., dissenting) ("*Teague* also relied on the interest in finality: 'Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.'").

151. *See* Rose v. Lundy, 455 U.S. 509, 518–20 (1982) ("[I]t would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation . . . .").

152. *See* Wainwright v. Sykes, 433 U.S. 72, 81–85 (1977) (detailing the Supreme Court's "tortuous efforts" to deal with the issue of "the reviewability of federal claims which the state court has declined to pass on because not presented in the manner prescribed by its *procedural* rules" (emphasis in original)).

post-conviction consideration on the grounds of res judicata.[153] Conversely, any issue that on direct appeal could have been raised but was not is considered procedurally defaulted.[154] Thus, the only issues cognizable under the Illinois Post-Conviction Act are those constitutional issues that *could not have been raised* on direct review because the issues relied on evidence lying outside the trial record. Two examples of issues raised in Illinois post-conviction proceedings are ineffective assistance of counsel[155] and government suppression of material exculpatory evidence.[156]

There are two important differences between Illinois post-conviction proceedings and federal habeas corpus that militate in favor of retroactivity in Illinois. First, Illinois post-conviction decisions are made much earlier in time than federal habeas corpus decisions. Illinois law generally provides that a post-conviction petition must be filed no more than six months after the conclusion of any proceedings he had—or could have had—in the U.S. Supreme Court.[157] There was no time limit for federal habeas petitions at the time *Teague* was decided.[158] This lack of a time limit meant that if a federal court granted a federal habeas petition, it was a very real possibility that state prosecutors might be prevented from re-trying the case. The time lapse—which could be many years[159]—may have resulted in disappearing prosecution witnesses, fading memories, and lost evidence. Decades ago, commentators such as Paul Bator and Henry Friendly strenuously argued that federal courts had no right to free guilty state prisoners

153. People v. Miller, 203 Ill. 2d 433, 437 (2002) ("[*R*]*es judicata* limit[s] the range of issues . . . to constitutional issues that have not been, and could not have been, previously adjudicated.")

154. People v. Ligon, 940 N.E.2d 1067, 1073 (Ill. 2010).

155. *Id.*

156. People v. Coleman, 701 N.E.2d 1063 (Ill. 1998).

157. There is an exception to the time limit if the petitioner can show that the late filing "was not due to his or her culpable negligence." 725 ILL. COMP. STAT. 5/122-1(c) (2010).

158. Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," after* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 61–62 (2009) ("[T]he Supreme Court's development of its retroactivity doctrine through *Teague* . . . occurred at a time when there was no statute of limitations for the bringing of a federal habeas corpus petition."). Note that the AEDPA amendments in 1996 instituted stricter time lapses. *Id.* at 62 n.425.

159. *See, e.g.*, Vasquez v. Hillery, 474 U.S. 254, 279 (1986) (Powell, J., dissenting) (disagreeing with the Court's holding that the question of "whether relief should be denied where the discrimination claim is pressed many years after conviction, and where the State can show that the delay prejudiced its ability to retry the defendant" is irrelevant).

through federal habeas corpus.[160] *Teague* agreed with these "finality" concerns.[161]

In light of this, Christopher N. Lasch has convincingly argued that the "finality" concern has much less relevance for proceedings *within* a state system than it has for habeas proceedings *between* a state system and the federal system.[162] By definition, the lag between the first trial and the judicial order of a new trial in a state post-conviction proceeding will be much shorter than the lag caused by a federal habeas proceeding.[163] Moreover, the "intra-system quality" of state post-conviction proceedings makes them a much more integral part of the original trial than does the "inter-system quality" of federal habeas review.[164]

The second difference is equally important. By definition, issues raised by state prisoners on federal habeas corpus had to have been raised in every possible state forum in order to preserve the issue for federal review.[165] It is one thing to deny retroactivity of a new rule to an issue on which the petitioner had already obtained several reviews in state court, but it is very different to deny retroactivity to a prisoner who is *compelled* by state procedure to raise an issue for the *first time* on post-conviction review. Ordinary retroactivity rules allow a defendant to take advantage of new rules throughout the course of his direct appeal.[166] To *compel* a prisoner to raise an issue *for the first time* in a

160. *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 509 (1963) (critiquing federal habeas review, the author states that "[t]here is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the applicable federal law than his neighbor in the state courthouse"); Judge Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 172 (1970) (arguing that collateral attacks of a state conviction through federal habeas relief undermines the finality of state court judgments and should be regulated by requiring a showing of "colorable innocence" when seeking a habeas petition).

161. Teague v. Lane, 489 U.S. 288, 308–10 (1989) ("Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.").

162. Lasch, *supra* note 158, at 43–46 (contending that there is no principled reason why state courts should not reject *Teague* and allow retroactivity in state postconviction proceedings).

163. *Id.* at 57 nn.393–98 and accompanying text ("[I]ntra-system postconviction proceedings occur earlier in time than federal habeas review.").

164. *Id.* ("[T]he postconviction judge and the prosecutor defending the postconviction action will be familiar with the state law applicable to the case, and quite likely the facts as well, as state postconviction proceedings are often brought before the same trial court that imposed judgment.").

165. 28 U.S.C. § 2254(b) (2006).

166. *See* Griffith v. Kentucky, 479 U.S. 314, 328 (1987) ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal,

post-conviction context and then to deny him the retroactivity he would have received on direct appeal is both arbitrary and unjust. In the words of Professor Lasch, "Just as finality is not a strong enough interest to overcome the need for retroactive application of new rules on direct review, so too to the extent state postconviction proceedings serve as a first round of litigation for certain types of claims, finality must fail as a justification for nonretroactivity."[167]

Thus, issues in Illinois post-conviction proceedings must be brought promptly and they must be issues that could not have been brought on direct review. The nonretroactivity rule of *Teague*, on the other hand, was predicated on a system where a federal court faced old claims that had been repeatedly decided. *Teague* has no applicability to cases exclusively within a state system. *Flowers* should be overruled.

III. YET ONE MORE REASON TO OVERRULE *FLOWERS*: THE ILLINOIS SUPREME COURT AGAIN MISUSES RETROACTIVITY IN *PEOPLE V. MORRIS*

Addolfo Davis's case should be enough to motivate the Illinois Supreme Court to allow retroactive application of favorable new rules in state post-conviction proceedings. As shown above, Illinois courts are refusing to review the natural life sentence of a 14-year-old boy found guilty of murder by accountability. They refuse review in spite of the fact that in 2002 another juvenile murderer was provided the relief Davis is seeking and the Illinois Supreme Court approved a 50-year sentence for this juvenile notwithstanding the mandatory life sentence proscribed by statute.[168] Their refusal is based on the Illinois Supreme Court's 1990 decision in *Flowers*, in which the court mindlessly applied *Teague v. Lane*, a U.S. Supreme Court case forbidding retroactivity in the context of federal habeas review.[169] As this Article has shown, *Teague* simply has no relevance to the Illinois post-conviction system.

But to make a bad situation worse, the Illinois Supreme Court recently decided *People v Morris*, yet another decision based on its

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pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.").

167. Lasch, *supra* note 158, at 61.

168. People v. Miller, 781 N.E.2d 300, 310 (Ill. 2002). On November 7, 2011, the U.S. Supreme Court agreed to decide whether sentencing a juvenile murderer to life imprisonment without possibility of parole violates the Eighth Amendment. Miller v. State, 63 So. 3d 676 (Ala. Crim. App. 2010), *cert. granted sub nom.*, Miller v. Alabama, 80 U.S.L.W. 3280 (U.S. Nov. 7, 2011) (No. 10-9646); Jackson v. Norris, 2011 Ark. 49 (2011), *cert. granted sub nom.*, Jackson v. Hobbs, 80 U.S.L.W. 3280 (U.S. Nov. 7, 2011) (No. 10-9647).

169. People v. Flowers, 561 N.E.2d, 674, 682–83 (Ill. 1990) (applying the *Teague* rule and noting that the "*Teague* test is helpful and concise").

flawed analysis in *Flowers*.[170] Instead of forbidding a prisoner from making a claim, however, the court perversely forbade *itself* from making a just decision. For if a prisoner cannot ask the court for the benefit of a new rule on post-conviction review, likewise a court should be barred from creating a new rule in such a proceeding.

To understand *Morris*, it is necessary to consider *People v. Whitfield*, a case decided by the Illinois Supreme Court in 2005.[171] At no point in any of the process was Whitfield, a defendant who entered a guilty plea in exchange for a specific sentence, told that he was also required by statute to serve a three-year term of mandatory supervised release ("MSR").[172] Whitfield sought post-conviction relief once he learned of the MSR, alleging that imposition of the undisclosed three-year term constituted a violation of due process.[173] The Illinois Supreme Court agreed; it found that since Whitfield had never been informed of the mandatory MSR, he did not receive the sentence for which he had bargained.[174] The court noted that the U.S. Supreme Court had previously held that where a defendant does not receive the benefit of his bargain in a plea agreement, the remedy is to remand the case to either allow the defendant to actually receive what he bargained for or to allow him to withdraw his plea.[175] Because Whitfield had already requested the benefit of the bargain he had made, the Illinois Supreme Court ordered that on remand the 25-year imprisonment plus a three-year term of MSR sentence be changed to "22 years' imprisonment plus [three] years of [MSR]."[176] In *Whitfield*, the Illinois Supreme Court rendered a fair and just decision.

But compare *Whitfield* to the Illinois Supreme Court's 2010 decision in *People v. Morris*.[177] In 1998 James Morris pled guilty to felony

170. People v. Morris, 925 N.E.2d 1069, 1079-83 (Ill. 2010) (applying the *Teague* test with reference to *Flowers* and determining that the new rule at issue "should only be applied prospectively to cases where the conviction was not finalized prior to . . . the date [the new rule] was announced").

171. People v. Whitfield, 840 N.E.2d 658 (Ill. 2005).

172. *Id.* at 660–61.

173. *Id.* at 661–62.

174. *Id.* at 666–73 ("In sum, we find that, in the case at bar, defendant has established a substantial violation of his constitutional rights.").

175. *Id.* at 673 (citing Santobello v. New York, 404 U.S. 257, 262-63 (1971)) ("The Supreme court, in *Santobello*, provided for two possible remedies when a defendant does not receive the benefit of the bargain: either the promise must be fulfilled or defendant must be given the opportunity to withdraw his plea." (quotations omitted)).

176. *Id.* at 673–74.

177. People v. Morris, 925 N.E.2d 1069 (Ill. 2010).

charges pursuant to a negotiated plea.[178] Similar to Mr. Whitfield's experience, at no time during Morris's sentencing hearing did the judge mention the possibility of an MSR.[179] Relying on *Whitfield*, Morris asked the Illinois Supreme Court for a similar remedy.[180] The court refused; first, it noted that Morris's sentencing took place before the Supreme Court decided *Whitfield*.[181] Citing *Flowers*, it then noted that new constitutional rules of criminal procedure are not applicable to post-conviction proceedings.[182] Finally, the court found that *Whitfield* had indeed promulgated a new rule, but under *Flowers*, Morris could not have it applied to his case.[183] Thus, the court denied Morris's petition.[184]

None of this is surprising so far, but a discerning reader may wonder how the Illinois Supreme Court could ever have decided the *Whitfield* case in 2005 by fashioning a "new rule." *Whitfield*, after all, was a post-conviction proceeding. If *Flowers/Teague* forbade a petitioner from taking advantage of new rules already promulgated, does it not follow that a petitioner cannot ask a court to fashion a new rule *just for his case*?

The answer must be yes; these results are inconsistent and cannot follow from one another. As a matter of law, the *Teague* rule absolutely forbids what the Illinois Supreme Court did in *Whitfield*. The U.S. Supreme Court has held that "[u]nder *Teague*, new rules will not be applied *or announced* in cases on collateral review."[185] There is no question that, in deciding *Whitfield* in 2005, the Illinois Supreme Court violated the *Flowers/Teague* rule by announcing a new rule in the

178. *Id.* at 1072 (discussing the facts surrounding Morris's guilty plea).

179. *Id.* at 1073 ("The trial court did not mention MSR during sentencing, and there was no mention of MSR in the sentencing order.").

180. *Id.* at 1075 ("Defendant[] assert[s] that [he is] entitled to postconviction relief and rel[ies] on this court's decision in *People v. Whitfield* to support [his] argument." (citation omitted)).

181. *Id.* at 1075 ("[T]here is no dispute that the conviction[] before us w[as] final prior to this court's decision in *Whitfield*.").

182. *See id.* at 1078 ("In *Teague*, the Supreme court held that new constitutional rules of criminal procedure are not applicable to cases on collateral review unless the rule falls within one of two exceptions: (1) the new rule places certain kinds of primary, private individual conduct beyond the power of the criminal-law-making authority to proscribe; or (2) the new rule is a water-shed rule of criminal procedure . . . ." (quotations omitted)).

183. *Id.* at 1078-81. The *Morris* court also found that Morris could not take advantage of either of the two *Teague/Flowers* exceptions. *Id.* at 1079–80.

184. *Id.* at 1080–81 ("[W]e hold that the new rule announced in *Whitfield* should only be applied prospectively to cases where the conviction was not finalized prior to . . . the date *Whitfield* was announced.").

185. Penry v. Lynaugh, 492 U.S. 302, 313 (1989) (emphasis added), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).

course of deciding a post-conviction petition. *Morris* said that in light of *Flowers/Teague*, "a better course in *Whitfield* would have been to forgo the announcement of a new rule."[186] The truly chilling aspect is that nowhere in *Morris* does the court say that the *Whitfield* decision was unjust; nowhere does it say that Mr. Whitfield was treated unfairly; nowhere does it say that it has any misgivings about the substance of the decision. Rather, for the sake of *Flowers* and its erroneous adoption of the *Teague* rule, the court is willing to state that it should not have granted Mr. Whitfield relief in his case. Bizarrely, the court concludes by providing that the rule they never should have announced in *Whitfield* will be given prospective effect to all whose convictions were not final on the date the *Whitfield* decision was issued. By giving this rule prospective effect, the court suggests that the decision it never should have made in *Whitfield* was nonetheless wise enough to apply to future convictions![187]

When the *Flowers* rule—a formalistic rule the court never should have adopted in the first place—results in Illinois's highest court announcing that it lacks the power to grant relief to a defendant whom the court admits deserves relief, there is but one conclusion: *People v. Flowers* was wrongly decided and must be overruled.

IV. CONCLUSION

The American federal system—our "compound republic"—is something to be treasured. The federal system envisions state courts and federal courts working in overlapping spheres. It requires judges at every level to be sensitive to the nuances of such a sophisticated system.

U.S. Supreme Court decisions are not fungible. Some are concerned with resolving issues of substantive law—these are "institutional" in nature. But others like *Teague v. Lane* are concerned with resolving issues of the federal system itself—these are "organizational" in nature. When a state court errs by believing an "organizational" case is really an "institutional" case, it produces bad decisions such as *People v. Flowers*.

It is time for the Illinois Supreme Court to realize that new rules should be allowed to be applied in post-conviction proceedings. Likewise, it is time for the Court to realize that new rules can actually

186. *Morris*, 925 N.E.2d at 1081.

187. *Id.* at 1081 ("[W]e hold that the new rule announced in *Whitfield* should only be applied prospectively to cases where the conviction was not finalized prior to December 20, 2005, the date *Whitfield* was announced.").

be made in post-conviction proceedings. It is time for the Court to admit its mistake and overrule *People v. Flowers.*