No. 06-8273

IN THE

Supreme Court of the United States

STEPHEN DANFORTH,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF *AMICUS CURIAE* OF THE STATES OF ALASKA, COLORADO, DELAWARE, FLORIDA, HAWAII, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW MEXICO, OREGON, SOUTH DAKOTA, AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

Teague v. Lane, 489 U.S. 288, 310-14 (1989), held that a new rule of criminal procedure based on the Federal Constitution does not apply retroactively when a prisoner collaterally attacks his conviction or sentence unless it constitutes a "watershed" rule, *i.e.*, a rule without which the accuracy of the fact-finding process is "seriously diminished" and which constitutes a "bedrock" procedural requirement.

Alaska and its sister *amici* states provide procedures to collaterally attack convictions and sentences. When a prisoner's collateral attack is based on a new rule of federal constitutional law that issued after the prisoner's conviction became final, *amici* have an interest in applying a predictable, uniform federal standard rather than being subjected to the fluctuating retroactivity standards of 50 individual states. *Amici* also have an interest in application of the *Teague* standard because it protects convictions that have become final. Finally, because a *Teague* non-retroactivity defense may be waived by a state, *Teague* also gives states litigation flexibility by allowing them to address the merits of a claim when appropriate.

SUMMARY OF ARGUMENT

The history of *Teague* (including both the specific case law on which it is based and its place within the Court's retroactivity jurisprudence) and *Teague*'s language show that it set a general retroactivity standard for cases on collateral review, not merely a rule applicable only to federal habeas cases involving state prisoners. *Teague* relied on opinions of Justice Harlan which stressed the need to have different retroactivity standards for direct and collateral review and which used examples that defined "collateral review" in expansive terms, to include federal prisoner petitions under 28 U.S.C. § 2255 and state-court collateral review. *Teague* similarly relied on a distinction between direct and collateral review and used additional examples that included state-court

collateral review within the meaning of "collateral review." *Teague* also relied on concerns that are of equal applicability in both state-court and federal collateral review, such as finality and equal treatment of similarly situated litigants.

The *Teague* Court was justified in believing that it had authority to formulate a retroactivity standard governing collateral review in both state and federal court. As to the latter, *Teague* is doubtless based in part on the Court's equitable powers regarding federal habeas actions. However, *Teague* is supported by more than just the Court's equitable powers. Rather, the Court also had authority to make *Teague* binding in state court because it meets the criteria for being a federal common-law rule. Under Danforth's view, a state post-conviction relief court could apply a new constitutional rule announced by this Court retroactively even though it would not be retroactive under *Teague*. If the state court construed the new rule erroneously and the prisoner sought federal review, the conflicts created show why *Teague* must be treated as a binding federal common-law rule.

Three primary criteria must be met to warrant the adoption of a federal common-law rule—there must be unique federal interests at stake, a basis of authority or warrant for creating the rule, and a conflict between state and federal law. *Teague* meets all three criteria.

First, there are unique federal interests at stake that inhere in the power of this Court and lower federal courts to review state collateral review proceedings, either via direct or habeas review. These federal interests include (1) the federal courts' resources, (2) remaining as the final forum for interpreting the Federal Constitution, and (3) preserving the integrity of federal review by ensuring that similarly situated litigants are treated equally. There is also a federal interest in the temporal scope of new federal constitutional rules.

Second, there is a warrant for the adoption of retroactivity standards for federal constitutional rules and sources of

authority that this law is anchored to. The power to set retroactivity standards is an inherent aspect of sovereignty retained by the federal government as part of the legislative and judicial powers granted by Articles I and III of the Federal Constitution. This Court's power of direct review and federal courts' habeas jurisdiction give federal courts a strong interest in setting rules integral to the exercise of such review. Federal courts also have the authority to interpret and enforce federal constitutional rights. Necessity also provides a basis for enforcing federal retroactivity standards when federal constitutional rules are at issue in state court, in order to prevent this Court's retroactivity decisions from being rendered ineffectual by state courts.

Third, there would be substantial conflicts between state and federal law if states could apply their own retroactivity standards and ignore *Teague*. If a state court in a collateral review action erroneously interpreted one of this Court's precedents and the case was then brought before this Court on appeal or a district court in a habeas action, the reviewing federal courts would face the dilemma of either jettisoning *Teague* to correct the federal constitutional error or adhering to *Teague* and leaving the error uncorrected.

Requiring state courts to apply a federal retroactivity standard when evaluating the retroactivity of a rule based on the Federal Constitution is fully consonant with principles of federalism. States remain free to set their own retroactivity standards for rules based on state law. If a state supreme court finds a new federal constitutional rule compelling it can adopt the rule as a matter of state law and then apply state retroactivity standards to it. State legislatures and courts likewise retain control over retroactivity standards for state statutes and state appellate decisions based on state law.

Finally, the Minnesota Supreme Court's position in *Danforth*—that *Teague* is binding in state-court collateral review—is one shared by a number of states. And while some states believe they are not bound by *Teague*, the majority of

states nonetheless follow *Teague*. Accordingly, affirming *Danforth* will work no disruption to the fabric of the law. By contrast, the rationales underlying the arguments of Danforth and supporting *amici* would fatally undermine several of this Court's significant precedents.

ARGUMENT

I. THE HISTORY, NATURE, AND LANGUAGE OF *TEAGUE* SHOW THAT IT ANNOUNCED A GENERAL RETROACTIVITY STANDARD FOR COLLATERAL REVIEW, NOT SIMPLY A HABEAS RULE

This Court's holding in *Teague*, that new rules of criminal procedure based on the Federal Constitution do not apply retroactively, with exception for "watershed" rules, was one of the most significant precedents in the Court's retroactivity jurisprudence.[1] The Court's retroactivity case law developed over a 30-year period and the jurisprudential considerations that impacted individual justices' views apply in multiple settings and are not cabined within the individual categories of civil, criminal, or habeas cases. This case law, *Teague*'s placement within it, and *Teague*'s language show that *Teague* should not be viewed simply as a rule for habeas cases but rather as a general retroactivity standard.

In *Great Northern Railway Co. v. Sunburst Oil*, 287 U.S. 358, 364 (1932), the Court recognized that the Federal Constitution does not compel states to adopt any particular retroactivity standard for cases arising under state law. Aside from that pronouncement, the Court's retroactivity juris-

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[1] Danforth frames the question presented as whether *Teague* applies to United States Supreme Court decisions. Pet.Br. at i. However, this Court and state appellate courts have also correctly applied *Teague* to evaluating retroactivity of new federal constitutional rules announced by lower federal and state appellate courts. *See, e.g., Gilmore v. Taylor*, 508 U.S. 333, 335-46 (1993); *Carter v. Johnson*, 599 S.E.2d 170, 171-73 (Ga. 2004); *State v. Egelhoff*, 900 P.2d 260, 267 (Mont. 1990).

prudence remained relatively static until *Linkletter v. Walker*, 381 U.S. 618 (1965). *Linkletter* was a federal habeas case involving the retroactivity of *Mapp v. Ohio*, 367 U.S. 643 (1961). Abandoning the longstanding English and American view that judicial decisions apply retroactively, the Court instead adopted a three-factor test for evaluating the retroactivity of new federal constitutional rules in criminal and habeas cases. *Linkletter*, 381 U.S. at 622-29. That test looked at the purposes of the new rule, the extent to which law enforcement and courts reasonably relied on the old rule, and the effect on the administration of justice caused by retroactive application of the new rule. *Id.* at 629. Under the *Linkletter* test courts had a number of options regarding retroactivity, ranging from making a rule completely retroactive, completely prospective, or gradations in between (such as not applying the new rule to the parties before the court but applying it to all cases occurring after a fixed date). The Court applied *Linkletter* to both criminal and habeas cases for over 20 years.[2] The Court also adopted a standard similar to *Linkletter* for evaluating retroactivity in civil cases, in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 105-07 (1971).

The *Linkletter* test came under increasing attack from courts and academic commentators over the years. In 1987 the Court finally scrapped *Linkletter* for criminal cases and returned to the pre-*Linkletter* standard, in *Griffith v. Kentucky*, 479 U.S. 314 (1987). The Court held that "a new rule [constitutional] rule for the conduct of criminal prosecutions

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[2] Significantly, the Court applied *Linkletter* to cases arising on state collateral review a number of times. *See Kitchens v. Smith*, 401 U.S. 847, 848 (1971); *McConnell v. Rhay*, 393 U.S. 2, 3 (1968); *Arsenault v. Massachusetts*, 393 U.S. 5, 6 (1968); *DeStefano v. Woods*, 392 U.S. 631, 632-35 (1968); *Witherspoon v. Illinois*, 391 U.S. 510, 513, 523 n.22 (1968); *Johnson v. New Jersey*, 384 U.S. 719, 726-35 (1966). As seen in the text below, *Teague*'s language shows that the Court meant to continue applying the Court's retroactivity jurisprudence to state collateral review.

is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final[.]" *Id.* at 328.

Linkletter's civil counterpart, *Chevron Oil*, also came under attack over the years, particularly in *American Trucking Ass'n v. Smith*, 496 U.S. 167 (1990), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). Those opinions were divided, however, and no position garnered a majority until the Court decided *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993), where it adopted the same standard as *Griffith* in the civil context.

Teague, which was decided between *Griffith* and *Harper*, represents the adoption of Justice Harlan's views on retroactivity in the specific context of collateral review. Justice Harlan articulated the position that there should be different standards for when a prisoner seeks retroactive application of a new rule of criminal law on collateral (as opposed to direct) review of his conviction in *Desist v. United States*, 394 U.S. 244, 260-69 (1968) (Harlan, J., dissenting), and in *Mackey v. United States*, 401 U.S. 667, 681-95 (1971) (Harlan, J., concurring in part and dissenting in part). In 1988, in *Yates v. Aiken*, 484 U.S. 211, 215-17 (1988), the Court noted that Justice Harlan's views had been gaining increasing favor, but found it unnecessary to create a new retroactivity standard for collateral review. By 1989, Justice O'Connor, who had previously taken the opposite position in dissent in *Griffith v. Kentucky*, 479 U.S. at 329-33, also embraced the Harlan view, and a four-justice plurality was able to formulate a new retroactivity standard for collateral review in *Teague*. That standard was adopted by a majority of the court within the year. *See Penry v. Lynaugh*, 492 U.S. 302, 313-14 (1989).

Teague involved federal habeas review, but *Teague*'s reliance on prior criminal retroactivity case law and the Court's later discussion of *Teague* in civil retroactivity case law suggest that its reasoning extends beyond the confines of habeas. *Teague* itself contains multiple indicia that it set a

general retroactivity standard for all forms of collateral review of criminal matters, not just a habeas rule.

First, *Teague* was based primarily on Justice Harlan's concurrence in *Mackey*. *Teague*, 489 U.S. at 306-13. Justice Harlan had urged courts to focus on the general procedural context in which retroactivity claims are raised, stating that they should look to the "nature, function, and scope of the adjudicatory process in which such cases arise." *Mackey*, 401 U.S. at 682 (Harlan, J., concurring in part and dissenting in part). He stated, "The relevant frame of reference, in other words, is not the purpose of the new rule whose benefit the petitioner seeks, but instead the purposes for which the writ of habeas corpus is made available." *Id.* This latter sentence is often seized upon to claim that Justice Harlan was speaking only of federal habeas corpus for state prisoners, *see, e.g.*, *Smart v. State*, 146 P.3d 15, 21 (Alaska App. 2006), but the opinion shows this not to be the case. *Mackey* combined several cases, one involving a *federal* prisoner, Elkanich, attacking his conviction under 28 U.S.C. § 2255.[3] *Mackey*, 401 U.S. at 649. Justice Harlan stated, "As I do not propose to make any distinction, for retroactivity purposes, between state and federal prisoners seeking collateral relief, I shall refer throughout this opinion to both procedures as the writ of habeas corpus, and cases before us involving such judgments as cases here on collateral review." *Id.* at 681 n.1 (Harlan, J., concurring in part and dissenting in part). His opinion also showed that he viewed "collateral review" as encompassing not only *federal* but also *state* collateral review. He noted that he believed that the new rule in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which came to the Court on certiorari from a state-court collateral review case, was properly given retroactive application in that case. *Mackey*, 401 U.S. at 694

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[3] Federal courts apply *Teague* to review of federal convictions in § 2255 actions. *See United States v. Price*, 400 F.3d 844, 845-49 (10th Cir. 2005); *United States v. Martinez*, 139 F.3d 412, 416 (4th Cir. 1998).

(Harlan, J., concurring in part and dissenting in part). Justice Harlan's entire discussion in *Mackey* shows that his conception of "collateral review" was not focused solely on federal habeas cases involving state prisoners but rather was more general and encompassed all forms of collateral review in criminal matters.

Second, *Teague* distinguished generally between "direct review" and "collateral review" or "collateral attack," rather than between direct review and federal habeas review. *Teague*, 489 U.S. at 303, 305-07, 309-11, 316. *Teague* referred to *Yates v. Aiken*, 484 U.S. 211 (1988), a state-court collateral review case, as "collateral review," as it also did *Pennsylvania v. Finley*, 481 U.S. 551 (1987), which involved a state post-conviction relief action. *Teague*, 489 U.S. at 307. Justice Stevens' concurrence likewise framed the matter in terms of the direct-collateral distinction. *Id.* at 318-19, 321 (Stevens, J., concurring).

Third, though *Teague* partially relied on federal-state comity considerations, the Court also referred to other concerns that show that *Teague* was broader than the habeas context. *Teague* referred repeatedly to the need for finality of criminal convictions. *Teague*, 489 U.S. at 308-10. Finality is a concern regardless of whether a conviction is attacked in state or federal court, and is independent from comity concerns. This Court observed in *Beard v. Banks*, 542 U.S. 406, 413 (2004), "*Teague* . . . protects not only the reasonable judgments of state courts but also the States' interest in finality quite apart from their courts." *Teague* also referred to the need for equal treatment of litigants, 489 U.S. at 302-05, 315-16, another concern that applies with equal force to collateral attacks in both state and federal court.

Thus, as seen in the foregoing discussion, the history of *Teague* and the opinion itself both make clear that it set forth a general retroactivity standard for collateral review cases, not simply a standard for habeas cases. Danforth and various *amici* claim that this is not so, however, arguing that *Teague*

is really more limited, and that the standard it announced is properly viewed as a choice-of-law rule or part of the law of remedies. Pet.Br. at 20-21, 32; National Association of Criminal Defense Lawyers ("NACDL") Brief at 22-29. The argument appears at first to be supported by the views of some justices. Justice Stevens' dissent in *American Trucking* discussed retroactivity as an aspect of choice-of-law and of remedies. *American Trucking,* 496 U.S. at 209-24 (Stevens, J., dissenting). The plurality opinion in *James B. Beam Distilling Co.* was in accord. *Beam*, 501 U.S. at 534-35 (Stevens, J., joined by Souter, J.). But this view was rejected by the plurality opinion in *American Trucking*, 496 U.S. at 189 and 194. More importantly, Justices Stevens and Souter joined the majority in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752-59 (1995), which recognized that retroactivity is not a remedial principle (though remedial principles may in certain circumstances bear upon the relief achieved, for reasons explained by Justice Breyer).

Similarly, as to the view that *Teague* is only a habeas rule, premised on considerations of federal-state comity, Justice Kennedy stated, "it would be a misreading of *Teague* to interpret it as resting on the necessity to defer to state-court determinations. *Teague* did not establish a deferential standard of review of state-court decisions of federal law. It established instead a principle of retroactivity." *Wright v. West*, 505 U.S. 277, 307 (1992) (Kennedy, J., concurring).

II. THIS COURT'S AUTHORITY TO ANNOUNCE FEDERAL COMMON-LAW RULES PERMITTED MAKING *TEAGUE* BINDING IN STATE-COURT COLLATERAL REVIEW

A. Introduction

As seen in the previous section, this Court described *Teague* in terms that encompass collateral review of a criminal conviction in both federal and state court. As to the former, the Court's authority to do so doubtless stems in part

from its equitable powers regarding federal habeas for state prisoners, as conferred by 28 U.S.C. § 2243. *See, e.g.*, *Withrow v. Williams*, 507 U.S. 680, 714-18 (1993) (Scalia, J., concurring in part and dissenting in part, joined by Thomas, J.) (discussing case law). But the Court's authority to do so also derived from additional sources that permitted it to extend the rule to state-court proceedings. Specifically, *Teague* is properly viewed as a rule of federal common law.

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 71-80 (1938), overruled precedent that permitted federal courts in diversity actions to develop a general federal common law, but the Court did not eliminate the ability of federal courts to create federal common law. The same day *Erie* was decided, the Court upheld its authority to create federal common law in *Hinderlider v. La Plata & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), finding that it provided a basis for adjudicating an interstate water-rights dispute. Post-*Erie* the Court has continued to sanction the development of federal common law in a more limited and focused manner. Retroactivity standards for federal rules applied in state-court collateral review is an area where this is appropriate.

B. Criteria for Federal Common-Law Rules

It is difficult to devise a single formula that encompasses all the criteria for when it is appropriate to fashion a federal common-law rule. "[T]he governing principles [are] amorphous" and "there is no platonic essence of federal common law with concomitantly obvious conceptual categories that are easy to apply." C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, § 4514, at 452 (2d ed. 1996) ("Wright & Miller"). "To some extent, each exercise of federal common lawmaking is sui generis in that it is the product of the unique interplay of specific statutory or constitutional language, case-sensitive policy concerns, and other case-specific factors." *Id.* at 462. Still, two categorical observations can be made.

First, this Court has authority to formulate federal common-law rules that are binding in state courts through the Supremacy Clause. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-27 (1964).

Second, retroactivity standards may be adopted as federal common-law rules, as seen by decisions where the Court has described certain federal retroactivity standards as binding on the states under the Supremacy Clause. *See American Trucking,* 496 U.S. at 177-78; *Harper*, 509 U.S. at 100 ("The Supremacy Clause . . . does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law"). The Supremacy Clause by its terms makes the Federal Constitution, federal statutes, and treaties the supreme law of the land. As seen in *Sabbatino,* this Court has added a fourth category of authority that can be binding on the states, federal common law. The power of federal retroactivity analysis to bind the states does not stem from any of the first three sources of federal law. The Federal Constitution does not require state courts to apply a particular retroactivity standard to judicial decisions. No federal statute speaks to the issue of whether state courts are required to apply any particular retroactivity standard to such rulings, nor does any treaty. Thus *American Trucking* and *Harper* can only mean, when they say that certain federal retroactivity standards are binding in state court, that those standards are federal common law.

Beyond those categorical observations, three major principles guide the inquiry here. All of them must ultimately be viewed through the lens of federalism.

First, federal common law is only appropriate where there are unique federal interests at stake. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). The federal interest may come from the need to enforce specific provisions of the Federal Constitution. *See Bush v. Lucas*, 462 U.S. 367, 374 & n.12 (1983).

Second, "federal courts must possess some federal-common-law-making authority before undertaking to craft it." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 741 (2004) (Scalia, J., concurring, joined by Rehnquist, C.J., and Thomas, J.). This principle looks to the Court's warrant or justification for adopting a federal common-law rule. It may stem from (1) the fact that the Court is adjudicating the meaning of a constitutional provision, (2) in some limited situations, a constitutional or statutory grant of jurisdiction over cases in a particular area, or (3) tradition or necessity.[4]

Third, there needs to be genuine conflict between federal and state law to warrant adopting federal common law. *Atherton v. Fed. Deposit Ins. Corp.*, 519 U.S. 213, 218 (1997). The need for such conflict is most pronounced in statutory preemption cases; courts will not develop federal common law to fill in gaps in a federal statutory scheme unless there is a clear conflict between state and federal law. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988). Outside the statutory preemption context the conflict need not be as dramatic, and "the fact that the area in question *is* one of unique federal concern changes what would otherwise be a conflict that cannot produce preemption into one that can." *Id.* at 507-08.

C. Application of the Criteria for Federal Common Law to the Context of Retroactivity on Collateral Review

The *Teague* standard meets all of the criteria set out above for being a federal common-law rule.

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[4] *See Sosa*, 542 U.S. at 742 (grant of admiralty jurisdiction in Federal Constitution); *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507-08 (2001) (necessity authorizes federal common law as to preclusive effect of federal court judgments); *Wright & Miller*, § 4514, at 470 ("a significant array of cases involv[e] the employment of federal common law [where] there is a strong national or federal concern originating from the Constitution, from tradition, or from practical necessity").

First, unique federal interests are at stake when a state prisoner collaterally attacks his conviction, seeking retroactive application of a new federal constitutional rule. Because a state court's interpretation of the Federal Constitution in a collateral attack is subject to review by this Court on appeal and by lower federal courts in a habeas petition, retroactive application of new federal rules affects the federal courts' exercise of their review functions. Under Danforth's view, state courts should be able to retroactively apply a ruling that would not be retroactive under *Teague*. If that were so, federal courts would be forced to choose between reviewing the case or applying *Teague*, thus compromising federal court oversight of federal constitutional law. The federal courts' interests in remaining as the ultimate forum for interpretation of the Federal Constitution and in controlling their own judicial resources are thus implicated, as is their interest in the temporal scope of new constitutional rules.[5]

Another significant federal interest, deriving again from this Court's constitutionally granted review powers, is ensuring equal treatment of similarly situated litigants in order to preserve the integrity of judicial review.[6] Under Dan-

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[5] As to the federal courts' interest in remaining as the ultimate expositor of the Federal Constitution, *see, e.g., Miller v. Johnson*, 515 U.S. 900, 922-23 (1995) (citing cases); *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940) (Supreme Court must ensure that "state courts will not be the final arbiters of important issues under the federal constitution"). As to the relationship between finality, habeas, and judicial resources, *see McCleskey v. Zant*, 499 U.S. 467, 490-92 (1991).

[6] In holding that new rules apply to all cases pending in the trial court or on direct review, this Court noted that the need for treating similarly situated litigants alike rested on "basic norms of constitutional adjudication" and "the nature of judicial review." *Griffith*, 479 U.S. at 322. *See also Teague*, 489 U.S. at 317 (White, J., concurring) (*Griffith* "appear[s] to have constitutional underpinnings"); *James B. Beam Distilling Co.*, 501 U.S. at 540 (describing *Griffith* as an "equality principle"); *id.* at 547 (Blackmun, J., concurring, joined by Marshall and Scalia, JJ.) (stating that *Griffith*'s rule "derives from the integrity of judicial review" required by

forth's view, if one of this Court's constitutional rulings were not retroactive under *Teague*, the state courts would nonetheless be free to make it retroactive under state-law standards. But this would create disparities between similarly situated litigants. Prisoners in states which granted retroactivity could use the new ruling to attack their convictions, but prisoners in other states and prisoners convicted in federal court could not rely on the new ruling. This disparity would be further compounded by the fact that such practice would result in a rule of federal constitutional law not being subject to uniform national interpretation.

Second, there is a warrant for the adoption of retroactivity standards and sources of authority that retroactivity law is anchored to. At a fundamental level, the power to set retroactivity standards is an inherent aspect of sovereignty that has been incorporated into our constitutional framework. Two inherent sovereign powers are the powers to adjudicate and to legislate. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) (adjudication); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (legislation). A concomitant power is the ability to set the temporal scope of new judicial or statutory commands, that is, whether they apply prospectively or retroactively. That this power is an inherent aspect of sovereignty can be seen by looking at retroactivity practice in the Anglo-American tradition when the Constitution was adopted.

As to legislation, statutes passed by Parliament were normally only prospective in effect. *See Landgraf v. USI Film Products*, 511 U.S. 244, 265 & n.17 (1994). But this general principle did not prevent Parliament from expressly providing that a statute was retroactive. *See* E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 778 (1936). The Framers likewise recognized that Congress could also do so,

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the Constitution's grant of authority to review cases and controversies); *Harper*, 509 U.S. at 95.

subject only to the limitations imposed by the prohibitions on *ex post facto* laws, bills of attainder, and impairment of contracts. *See* U.S. Const. art. I, sec. 9, cl.3 and sec. 10, cl.1.

As to judicial decisions, the Blackstonian view that judges discovered rather than made the law was prevalent, and accordingly judicial decisions were almost always retroactive in English practice. But this was not invariably the case. In 1675, only a little over a century prior to the adoption of the Federal Constitution, English chancery practice with its reliance on equitable considerations had approved prospective application of a judicial decision in order to protect a party that had relied on prior law. *See Lord Nottingham's Chancery Cases*, 73 Selden Society 182 (1954) (cited in Justice Roger Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 Hastings L. J. 533, 567 (1977)). And nineteenth-century American courts, though steeped in the Blackstonian view, nevertheless issued some prospective rulings based on the same reliance concerns as Lord Nottingham. *See, e.g., Gelpcke v. City of Dubuque*, 68 U.S. 175 (1863); *Bingham v. Miller*, 17 Ohio 445 (1848). These early English and American cases show that while the Framers may have thought of prospective judicial rulings as inconsistent with both the English tradition from which they came and the judicial power they created in Article III, they nonetheless would also have, at least in the public international law sense, conceived of the power to set retroactivity standards for judicial decisions as an inherent aspect of sovereignty. As the Court later said regarding the ability of state courts to set retroactivity standards for state law:

> A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. . . . The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature.

Great Northern Railway Co., 287 U.S. at 364-65.

Accordingly, the power to set retroactivity standards for both statutes and judicial decisions is properly viewed as an inherent aspect of sovereignty. This power was retained by the United States when the Constitution was adopted, and is an aspect of both the legislative and judicial powers set out in Articles I and III. However, this power to set retroactivity standards was not divided evenly among the legislative and judicial branches. Stated differently, though as a general matter Congress addresses the retroactivity of statutes and the judicial branch addresses the retroactivity of judicial decisions, this is not invariably so. Each branch may play an appropriate role in formulating retroactivity standards for the other. For example, in *Tyler v. Cain*, 533 U.S. 656, 663 n.5 (2001), in discussing the retroactivity standards in 28 U.S.C. § 2244(b)(2)(A) for second or successive federal habeas petitions, this Court stated, "[e]ven if we disagreed with the legislative decision to establish stringent procedural requirements for retroactive application of new rules, we do not have license to question the decision on policy grounds." Conversely, in *Landgraf v. USI Film Products*, the Court recognized its authority to set out a general standard for evaluating the retroactivity of statutes that do not expressly address retroactivity. *Landgraf*, 511 U.S. at 263-80.

This inherent power to set retroactivity standards for rules based on federal law is not simply a power to set retroactivity standards *in federal court*. The federal system devised by the Framers contemplated from the outset that the laws of both the United States and individual states would be applied in the courts of the other sovereign; federal courts apply state law in diversity actions, and state courts apply federal law in numerous areas. It is true enough as a general matter that each sovereign is free to apply its own rules of procedure when applying the other sovereign's substantive law and that the federal government does not attempt to control procedure in state court (except where explicitly required by the Federal Constitution, such as by the Due Process Clause). But in di-

versity actions, where the *Erie* doctrine allows federal courts to apply federal procedure while construing state substantive law, federal courts nonetheless respect state retroactivity standards by treating them as part of state substantive law and therefore binding in federal court.[7] Given the federal courts' treatment of the retroactivity standards of the states, it is apparent that in this reverse-*Erie* situation, federal retroactivity standards should likewise be viewed as substantive and controlling when federal law is at issue in state court.

This inherent authority of the federal government to set retroactivity standards for new federal constitutionally based criminal rules in cases on collateral review is further shaped by several explicit sources of authority. This Court has authority to review a state court's decision construing the Federal Constitution in a state-court collateral review proceeding. *See* U.S. Const. art. III, sec. 2. The federal courts can review state-court criminal judgments via a writ of habeas corpus. *See* U.S. Const. art. I, sec. 9, cl. 2; 28 U.S.C. § 2254. Because federal courts have review over such cases, they have an undeniably strong interest in setting rules integral to the exercise of that review. The federal courts also have the power to interpret and enforce both federal constitutional rights in general and related matters such as their temporal scope and remedies for their violation. *See Chapman v. California*, 386 U.S. 18, 21 (1967). A final source of authority is necessity. There are no federal constitutional provisions or statutes regarding retroactivity of judicial decisions. The Court's retroactivity decisions could be rendered ineffectual if they could be ignored by states applying a different retroactivity standard under state law.

Finally, the third requirement for creating federal common law, that concurrent applicability of federal and state laws

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[7] *See, e.g., United States v. Estate of Donnelly*, 397 U.S. 286, 296 n.* (1970) (Harlan, J., concurring); *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 318-19 (5th Cir. 1999).

gives rise to irreconcilable conflicts, is satisfied here. The core conflict created by Danforth's position lies with the untenable dilemma in which it places federal courts, requiring them to choose between various aspects of their sovereignty, *i.e.*, their inherent power to set retroactivity standards versus their powers of judicial review and error-correction. This can be seen in the following scenario. Assume that a prisoner convicted in state court whose conviction is final seeks post-conviction relief in state court based on a new federal constitutional rule announced by this Court. Assume also that the state court, applying the new rule retroactively under state law (though it would not be retroactive under *Teague*), construes the rule against the prisoner. Assume further that the state court errs in its interpretation of the new federal rule. If the prisoner then seeks review in federal court, either via appeal to this Court or via a habeas petition in federal district court, the federal court would face two choices: it could either jettison the *Teague* retroactivity standard in order to review and correct the erroneous state-court ruling, or it could leave the erroneous state-court ruling unreviewed, allowing the state court to act as a *de facto* court of last resort for a federal constitutional claim. Either option is seriously flawed.

The first option—using state retroactivity law to force federal courts to abandon federal retroactivity doctrine as a precondition for being able to review state-court decisions—amounts to an attempt to attach state-law conditions to the exercise of the federal judicial power, which this Court has repeatedly prohibited.[8]

The second option—requiring this Court to allow state courts to act as an unreviewed forum of last resort for the resolution of federal constitutional claims—is equally flawed.

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[8] *See Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 105-06 (1945) (state law cannot define federal remedies in diversity case); *Pennsylvania v. Williams*, 294 U.S. 176, 182 (1935) (federal jurisdiction not subject to control by state law); *Herron v. Southern Pac. Co.*, 283 U.S. 91, 94 (1931) (state law cannot control procedure in diversity case).

Federalism demands that there be one ultimate arbiter of federal constitutional law with power to correct erroneous interpretations by lower courts and to compel adherence to its precedents. The Constitution assigns that role to the Supreme Court. Similarly, the power of lower federal courts to review state-court criminal judgments in habeas cases underscores the importance of federal judicial review in general. This interest would likewise be compromised under this option.

Danforth's proposal also violates a basic principle of constitutional adjudication—that states cannot act to accomplish indirectly what they would be forbidden from accomplishing directly. *See, e.g., Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-78 (1990). No state could directly require federal courts to abandon federal retroactivity standards and follow state retroactivity standards when reviewing claims originating from state court. Neither can states attempt to do so indirectly, by forcing the federal courts into the untenable dilemma described above.

Teague thus meets the criteria for being a federal common-law rule and is binding in state court through the Supremacy Clause. Moreover, the Court has recognized that when it has prescribed a binding federal retroactivity standard, that standard is binding in a unitary sense, *i.e.*, it is the only retroactivity analysis applicable (in state or federal court) to federal constitutional rules. That is why the Court in *American Trucking* stressed the goal of "ensur[ing] the *uniform application* of decisions construing constitutional requirements[.]" *American Trucking*, 496 U.S. at 178 (emphasis added). That is why the Court in *Harper* stated that "[t]he Supremacy Clause . . . does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law." *Harper*, 509 U.S. at 100.

Two additional considerations point to why *Teague* must be viewed as binding in state court. The first is that the retroactivity standards established for judicial decisions construing the Federal Constitution should parallel and be

given equal dignity with the retroactivity standards applicable to federal statutes. If a federal statute expressly contains a retroactivity provision, the Supremacy Clause makes that provision binding in state court. Similarly, state courts have recognized that when federal statutes do not contain an express retroactivity provision, that they are to apply federal retroactivity and statutory construction principles in evaluating retroactivity.[9] The retroactivity standards set by this Court for judicial decisions are entitled to equal dignity with both Congressional pronouncements as to the retroactivity of particular statutes and with the general retroactivity standard that the Court has set for federal statutes in *Landgraf v. USI Film Products*.

The second consideration is the need for simplicity and consistency. Jurists and litigants should be able to rely on being able to apply a uniform federal retroactivity standard when construing federal law. As one state jurist has noted, the retroactivity of a Supreme Court decision should not "depend on the jurisdiction in which the defendant was prosecuted." *Windom v. State*, 886 So.2d 915, 944 (Fla. 2004) (Cantero, J., concurring).

III. APPLYING FEDERAL RETROACTIVITY STANDARDS TO FEDERAL CONSTITUTIONAL RULES IN STATE-COURT PROCEEDINGS IS CONSISTENT WITH PRINCIPLES OF FEDERALISM

Danforth claims that requiring state courts to apply a federal retroactivity standard to federal constitutional rules would turn "established concepts of federalism upside down" and deprive states of their abilities to act as laboratories to

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[9] *See, e.g., Newman Signs, Inc. v. Hjelle*, 317 N.W.2d 810, 815-16 (N.D. 1982); *Levine v. Fed. Deposit Ins. Corp.*, 651 So.2d 134, 136-37 (Fla. App. 1995). *See also Hagan v. Gemstate Mfg.*, 982 P.2d 1108, 1114 (Or. 1999) ("When this court construes a federal statute or regulation, we follow the methodology prescribed by federal courts.").

experiment with different approaches to collateral review. Pet.Br. at 6, 24-31. He is in error. Applying *Teague* in state court is fully consistent with principles of federalism.

Justice Black explained the balance accommodated by federalism in *Younger v. Harris*, 401 U.S. 37 (1971):

> [Federalism] does not mean blind deference to "States Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of *both* State and National Governments[.]

Id. at 44 (emphasis added). The common-sense proposition that, in a federal system, federal retroactivity standards control the retroactivity of a rule based on the Federal Constitution, while states are free to set their own retroactivity standards for rules based on state law, fully respects the interest of both the states and the federal government and gives states appropriate flexibility to administer justice and to experiment regarding collateral review proceedings.

If a state supreme court finds a new federal constitutional rule compelling, it can adopt the rule as a matter of state constitutional law, via court rule, or through exercise of supervisory powers; the state legislature may also adopt the rule by statute. State legislatures and courts likewise retain control over retroactivity of state statutes and state appellate decisions based on state law. Requiring state courts to apply *Teague* to federal constitutional rules in collateral review proceedings when it is properly invoked, while permitting a state executive branch to waive a *Teague* defense and allowing states total control over retroactivity standards for state-law based rules, is fully consistent with federalism.

IV. DANFORTH AND SUPPORTING *AMICI*'S REMAINING ARGUMENTS REGARDING CONSTRUING *TEAGUE* AS BINDING IN STATE-COURT COLLATERAL REVIEW ARE WITHOUT MERIT

Danforth and his supporting *amici* (and Kansas, which has filed an *amicus* brief supporting neither side) offer up several remaining arguments why *Teague* should not be viewed as binding in state court. They are in error.

First, Danforth isolates language in *Teague* referring to federal habeas corpus for state prisoners, relying on it to conclude that *Teague* meant only to establish a habeas rule. Pet.Br. at 7-8. As shown elsewhere in this brief, *Teague*'s primary distinction was between direct and collateral review, and its reference to federal habeas was only illustrative of the latter, not exclusive. Danforth also cites later decisions of this Court that have referred to *Teague* as applying in federal habeas actions. Pet.Br. at 10. These decisions do not purport to exclude state collateral review from the scope of *Teague*, and the fact that the Court has referred to federal habeas so often is unsurprising in that it is the primary vehicle by which such retroactivity issues come to it. The Court's most recent opinion applying *Teague*, *Whorton v. Bockting*, ___ U.S. ___, 127 S.Ct. 1173 (2007), consistently referred to *Teague* as applying to "collateral review," not habeas, and explained the difference between *Griffith* and *Teague* as a difference between direct and collateral review. 127 S.Ct. at 1180.

Second, Danforth points to the fact that this Court has not, in several cases, taken the state courts to task for failure to raise *Teague*, referring to *Collins v. Youngblood,* 497 U.S. 37, 41 (1990), *Godinez v. Moran*, 509 U.S. 389, 397 n.8 (1993), *Schriro v. Farley*, 510 U.S. 222, 228-29 (1994), and *Horn v. Banks*, 536 U.S. 266, 271-72 (2002). Pet.Br. at 16-17. Danforth concludes that this shows a lack of federal interest in requiring state courts to follow *Teague*.

Danforth fails to account for the fact that this Court's treatment of these cases was capable of simpler explanations. First, *Teague* had not even been decided at the time of the state-court collateral proceedings in *Collins, Godinez,* and *Schriro.*[10] One would not expect this Court to take state courts to task for failing to apply a decision that did not yet exist. Second, courts are not obligated to *sua sponte* raise *Teague* when it is not raised by the government. Third, courts do not ordinarily address claims not raised by the parties. Fourth, a state can waive a *Teague* defense. These reasons provide sufficient explanation for why the Court did not take the state courts to task for failure to raise *Teague.*

Third, and related to the previous point, Danforth and *amici* find significance in the fact that states can waive *Teague.* Pet.Br. at 16-17; NACDL Br. at 13. They are of the view that a waiveable rule is not important enough to be binding on the states and that *Teague*'s waiveability undercuts the claim that construing *Teague* as binding is necessary to achieve equal treatment of similarly situated litigants. Their conclusions rest on flawed analysis.

The importance of a constitutional rule, and its status as binding in state-court proceedings under the Supremacy Clause, is not undercut by the fact that the rule is waiveable. Many important constitutional rights that are binding in state court are nonetheless waiveable by one of the parties, the Sixth Amendment right to jury trial being only one of many possible examples. And significantly, though most rights inure to the benefit of individuals, the Court has also rec-

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[10] *Teague* was decided February 22, 1989. *Teague*, 489 U.S. at 288. State court proceedings in *Collins* concluded prior to *Teague*, *see Collins*, 497 U.S. at 39-40, as they also did in *Schriro. See Schriro v. State*, 533 N.E.2d 1201 (Ind. 1989) (decided February 8, 1989). In *Godinez*, the state-court proceedings concluded three weeks after *Teague*, *see Moran v. Warden*, 810 P.2d 335 (Nev. 1989) (decided March 15, 1989), but given decision timelines it is apparent that there was no real opportunity to raise a *Teague* defense in state court in *Godinez.*

ognized that there are constitutional rights that belong to government entities that are binding in state court proceedings but that can be waived. *See Alden v. Maine*, 527 U.S. 706, 711-57 (1999) (recognizing that states enjoy fundamental sovereign immunity from suit in both state and federal court, but that it may be waived by a state).

Danforth's reliance on *Teague*'s waiveability to support the conclusion that it cannot be binding in state court proves too much. Danforth and *amici* in essence believe that this Court can do only one of two things, but not both—it can have a uniform rule, binding in state court, or it can have a waiveable rule, not binding in state court, but if the Court believes that a rule should be waiveable to accommodate other interests,[11] it can make the rule waiveable but such a rule can never be binding in state court. This is not true of rules deriving directly from the Constitution, such as the right to jury trial, and neither federalism nor the principles underlying federal common law dictate this result when the rule is a federal common-law rule. Significantly, *Teague*'s waiveability furthers two important interests in our federal system, uniform interpretation of federal law and federal court oversight of federal constitutional law.

Fourth, Danforth relies on a number of cases that he claims stand for the proposition that federal law is merely a floor, and that states are free to go beyond it so long as they provide at least the same level of retroactivity that federal law requires. Pet.Br. at 30-32, 34-35. Danforth cites *Johnson v. New Jersey*, 384 U.S. at 733; *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *Beard v. Banks*, 542 U.S. 406, 412 (2004); *Johnson v. United States*, 544 U.S. 295, 306 & n.6 (2005); and *Washington v. Recuenco*, 126 S.Ct. 2546, 2551 n.1 (2006). Pet.Br. at 30-32, 34-35. The cases do not support his argument.

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[11] For example, a state could conclude that a prisoner's claim under the new rule was meritless and that it was beneficial and easier to obtain a decision construing the new rule than it was to litigate *Teague*.

Johnson v. New Jersey and *Lego v. Twomey* merely stand for the unremarkable proposition that states may provide additional protections *as a matter of state law*, not that they may do so under federal law.

As to *Beard*, Danforth places heavy reliance on a sentence stating that "[s]uch a judgment is 'final' despite the possibility that a state court might, in its discretion, decline to enforce an available procedural bar and choose to apply a new rule of law." Pet.Br. at 32, 35-36 (citing *Beard*, 542 U.S. at 412). This sentence did not purport to be a normative statement of the law, but rather was only a descriptive statement of what courts have occasionally done.

Johnson v. United States notes that states are free to enact statutes of limitations for state post-conviction relief actions, 544 U.S. at 306 & n.6, a fact which neither hinders nor advances Danforth's argument.

Finally, *Recuenco* did not hold that Washington was free to apply its own state-law harmless-error standard to Recuenco's case on remand. Given that Recuenco's case was on direct review, such a holding would have directly contravened *Chapman v. California*, 386 U.S. 18, 24 (1967), which requires states to apply federal harmless-error analysis on direct review when evaluating federal constitutional claims. Rather, Recuenco, who was subject to an enhanced sentence based on his use of a firearm, argued that Washington law did not authorize juries to make findings of fact as to firearms enhancements and that harmless-error analysis should not apply where no jury could make a finding. 126 S.Ct. at 2550. This Court disagreed, stating that the core issue was whether *Blakely* error was subject to structural or harmless-error analysis under federal law, that it was unclear that Recuenco's interpretation of Washington law was correct, but that because it held that *Blakely* error was subject to harmless-error analysis, the Washington Supreme Court could evaluate the federal harmless-error issue again in light of Recuenco's state-law argument. *Id.* at 2550-51 & n.1.

The fifth main objection to construing *Teague* as binding in state court is set out in Kansas's *amicus* brief. Kansas argues that states are not constitutionally obliged to provide collateral review procedures, that states have significant leeway to structure collateral review systems when they do create them, and that the federal government's interest in retroactivity standards for federal constitutional rights in state court ends when a conviction has become final on direct review. Kan.Br. at 3-18. Kansas is in error.

First, this is the same position advanced by South Carolina and rejected in *Yates v. Aiken*, 484 U.S. at 217-18. To be sure, the Court did not directly confront the claim's merits in *Yates*, but the claim did not receive a warm reception in *Yates* and should be rejected here as well.

Second, Kansas cites *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987), and two cases relying on *Finley*, *Murray v. Giarratano*, 492 U.S. 1, 10 (1989), and *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 402-03 (2001), for the proposition that states are not constitutionally obliged to provide post-conviction relief mechanisms. Kan.Br. at 6. The language in *Finley* that Kansas relies on is arguably *dicta* – the issue in *Finley* was not whether states have to provide a post-conviction relief process, but rather whether there is a right to counsel in such actions, and the prior decision *Finley* cited for this proposition, *United States v. MacCollom*, 426 U.S. 317, 323 (1976), was only a plurality opinion. But even if *Finley* is not *dicta*, that does not support Kansas's position.

Kansas's argument rests on the premise that if a state-created right or procedure is not required by the Constitution, then it is outside the reach of the Constitution and the federal courts. But as Kansas recognizes, states are not required to provide an appellate process, and yet this Court has recognized that the Constitution permits it to review aspects of state appellate process for compliance with basic constitutional requirements. *See Smith v. Robbins*, 528 U.S. 259, 270-84 (2000); *Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985).

Similarly, the fact that states may not be required to provide collateral review mechanisms does not place them completely beyond the purview of the Constitution or federal courts. The Court has applied the Equal Protection Clause of the Fourteenth Amendment to invalidate a state collateral review law. *See, e.g., Long v. Dist. Ct. of Iowa*, 385 U.S. 192, 194-95 (1966). And though the Fourteenth Amendment's Due Process Clause gives states wide latitude to structure their collateral review mechanisms, such proceedings are not beyond the reach of the Due Process Clause either.[12]

As noted above, the Constitution itself does not compel the adoption of a particular retroactivity standard for federal constitutional rules. However, because the Court has adopted the *Teague* standard, principles of federal common law support its application to state-court collateral review. But in any event, recognizing that retroactivity for federal constitutional rules is a rare area where a federal standard is required does not conflict with the cases holding that states have wide latitude to structure their collateral review processes. Kansas's position should be rejected.

V. AFFIRMING *DANFORTH* WORKS NO DISRUPTION TO EXISTING PRECEDENT; DANFORTH'S POSITION IF ADOPTED WOULD UNDERCUT SEVERAL SIGNIFICANT PRECEDENTS

Amicus American Civil Liberties Union characterizes the Minnesota Supreme Court's decision as "startling" and reaching an "astonishing" conclusion, ACLU Brief at 2, in essence implying that an additional reason counseling against

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[12] This latitude to structure state collateral-review mechanisms may conceivably extend to types of cognizable claims, burden of proof, harmless-error standards for review, methods of legal assistance for claimants, statutes of limitation, and claim-joinder and claim-processing rules. None of these pose as direct a conflict as allowing states to apply their own retroactivity standards to federal constitutional rules.

affirmance is that doing so would result in a significant disruption to state-court jurisprudence. *Amici* is in error in that the Minnesota Supreme Court's decision is in accord with substantial authority from other states, and affirming will cause no upheaval in state law. By contrast, the rationales underlying the arguments of Danforth and *amici* would fatally undermine several of this Court's precedents.

To begin, a number of state appellate courts have explicitly taken the position that *Teague* is binding when evaluating the retroactivity of federal constitutional rules in state-court collateral review proceedings.[13] It is apparent from the manner in which additional states apply *Teague* that they too view *Teague* as binding.[14] Additional states have noted the issue without deciding but lean towards the view that *Teague* is binding, or have otherwise manifested this view in discussing retroactivity law.[15] And though a small number of

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[13] *See Porter v. State*, 102 P.3d 1099, 1102 (Idaho 2004); *State v. Egelhoff*, 900 P.2d 260, 267 (Mont. 1995); *State v. Purnell*, 735 A.2d 513, 517, 520-24 (N.J. 1999); *Page v. Palmateer*, 84 P.3d 133, 136-38 (Or. 2004); *Talley v. State*, 640 S.E.2d 878, 880-81 (S.C. 2007); *Taylor v. State*, 10 S.W.3d 673, 679 (Tex. Crim. App. 2000). *See also Houlihan v. State*, 706 N.W.2d 731, 734 (Mich. 2005) (Markman, J., dissenting on other grounds, joined by Corrigan and Young, JJ.)

[14] *See People v. Cage*, 155 P.3d 205, 210 & n.4 (Cal. 2007) (recognizing *Griffith-Teague* direct-collateral distinction); *In re Moore*, 34 Cal.Rptr.3d 605, 609-12 (Ct. App. 2005) (applying *Teague*); *State v. Reeves*, 453 N.W.2d 359, 382-84 (Neb. 1990); *People v. Eastman*, 648 N.E.2d 459, 463-65 (N.Y. 1995); *Thomas v. State*, 888 P.2d 522, 527 (Okla. Crim. App. 1994); *People v. Hughes*, 865 A.2d 761, 780-81 (Pa. 2004); *State v. Gomez*, 163 S.W.3d 632, 644 n.9, 651 n.16 (Tenn. 2005); *Van Tran v. State*, 66 S.W.3d 790, 810-11 (Tenn. 2001); *Mueller v. Murray*, 478 S.E.2d 542, 546-49 (Va. 1996).

[15] *See Edwards v. People*, 129 P.3d 977, 981-82 (Colo. 2006); *Duperry v. Solnit*, 803 A.2d 287, 317-19 (Conn. 2002); *State v. Gomes*, 113 P.3d 184, 188-90 (Haw. 2005); *Drach v. Bruce*, 136 P.3d 390, 400-04 (Kan. 2006); *Bowling v. Commonwealth*, 163 S.W.3d 361, 370-71 (Ky. 2005); *State v. Adams*, 912 A.2d 16, 34-38 (Md. Spec. App. 2006); *State v.*

states are of the view that *Teague* is not binding,[16] the majority of states (including most of those that view *Teague* as not binding) have nonetheless voluntarily adopted or follow *Teague*.[17] The net result is that affirming *Danforth* will work no significant disruption to the fabric of the law.

By contrast, accepting Danforth and *amici*'s arguments would undermine a number of this Court's precedents. *Griffith* and *Harper* would fail to the degree that they direct *state* courts to apply new federal constitutional rules to all cases pending on direct review in criminal and civil cases. Kansas asserts that the Court has "divined" a constitutional basis for these rules. Kan.Br. at 10. That is true insofar as those cases apply to this Court's direct review of state cases (the basis stems from preserving the integrity of this Court's Article III review powers). But there is no specific constitu-

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Tallard, 816 A.2d 977, 979-80 (N.H. 2003); *Agee v. Russell*, 751 N.E.2d 1043, 1046-47 (Ohio 2001); *Azeez v. Mangum*, 465 S.E.2d 163, 170-72 (W.Va. 1995). Colorado and New Hampshire adopted *Teague*.

[16] *See Smart v. State*, 146 P.3d 15, 17-27 (Alaska App. 2006) (Alaska Supreme Court review granted February 13, 2007); *Johnson v. State*, 904 So.2d 400, 407-09 (Fla. 2005); *State v. Mohler*, 694 N.E.2d 1129, 1132 (Ind. 1998); *State v. Whitley*, 606 So.2d 1292, 1296-97 (La. 1992); *State v. Whitfield*, 107 S.W.3d 253, 265-68 (Mo. 2003); *Colwell v. State*, 59 P.3d 463, 469-72 (Nev. 2002); *State v. Forbes*, 119 P.3d 144, 146-47 (N.M. 2005); *State v. Zuniga*, 444 S.E.2d 443, 445-46 (N.C. 1994); *Cowell v. Leapley*, 458 N.W.2d 514, 517-18 (S.D. 1990); *State v. Evans*, 114 P.3d 627, 633 (Wash. 2005). Indiana, Louisiana, Nevada, North Carolina, and Washington voluntarily adopted *Teague*.

[17] *See State v. Slemmer*, 823 P.2d 41, 48-49 (Ariz. 1991); *Flamer v. State*, 585 A.2d 736, 748-49 (Del. 1990); *Harris v. State*, 543 S.E.2d 716, 717-18 (Ga. 2001); *People v. Flowers*, 561 N.E.2d 674, 681-82 (Ill. 1990); *Brewer v. State*, 444 N.W.2d 77, 81 (Iowa 1989); *Carmichael v. State*, ___ A.2d ___, 2007 WL 2003414, at *6 (Maine, July 12, 2007); *Commonwealth v. Bray*, 553 N.E.2d 538, 540-42 (Mass. 1990); *Manning v. State*, 929 So.2d 885, 896-900 (Miss. 2006); *Pailin v. Vose*, 603 A.2d 738, 741-42 (R.I. 1992); *State v. Lagundoye*, 674 N.W.2d 526, 531-32 & n.11 (Wis. 2004).

tional provision that authorizes such a directive to *state* courts, as to which *Griffith* and *Harper* can only be understood as federal common-law rules based on the Court's inherent sovereign authority to set retroactivity standards. Judges and commentators have likewise suggested that this Court's authority to require state courts to apply the *Chapman* harmless-error standard on direct review might be viewed as based on federal common law. *See Brecht v. Abrahamson*, 507 U.S. 619, 645 (1993) (White, J., dissenting, joined by Blackmun and Souter, JJ.); D. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. Chi. L. Rev. 1, 5 (1994). The damage to the accepted framework of criminal procedure that would result from adopting Danforth's position provides an additional reason to affirm.

CONCLUSION

This Court should affirm the Minnesota Supreme Court's holding that the *Teague* standard governs the retroactivity analysis for federal constitutional rules at issue in state-court collateral review proceedings.

Respectfully Submitted,

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