

# The Substance of *Montgomery* Retroactivity: The Definition of States' Supremacy Clause Obligation to Enforce Newly Recognized Federal Rights in Their Post-Conviction Proceedings and Why it Matters

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## ABSTRACT

*In Montgomery v. Louisiana, 136 S.Ct. 718 (2016), the Supreme Court made a decision of far-reaching importance to the criminal justice system: The Supremacy Clause requires states adjudicating post-conviction attacks to give full retroactive effect to “substantive” new rules of federal constitutional law.*

*The significance of this holding has so far been under-appreciated because of the assumption that “substantive” has the same narrow meaning in the context of the state’s obligations under the Supremacy Clause as it does under Teague v. Lane, 489 U.S. 288 (1989), which sets forth prudential limitations on the claims that the federal courts will entertain when adjudicating federal habeas corpus attacks on state criminal convictions.*

*But, this article argues, the two contexts are not the same and the assumption is unwarranted. To be sure, rules that are “substantive” under Teague are also substantive under Montgomery. But because Montgomery is based on the Supremacy Clause, the class of “substantive” federal rules for Montgomery purposes should be far*

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*broader than it is for Teague purposes.*

*“Substantive” rules under Montgomery, I propose, include all those whose policy underpinnings extend beyond enhancing the factual accuracy of particular decisions. Examples of such rules are ones whose aims include discountenancing government misconduct (e.g., barring evidence derived from coerced confessions or unreasonable searches) and achieving full community participation in the judicial process (e.g., adding new groups to the ones that may not constitutionally be excluded from jury service, and expanding the categories of juror bias that a defendant must be permitted to litigate).*

*Adopting the proposed definition will have structural benefits to the system of criminal justice adjudication. The Montgomery decision will necessarily have the effect of increasing the number of state post-conviction decisions. The broader the definition of “substantive” the more pronounced the effect. The more pronounced the effect the better off the criminal justice system will be, for two reasons. First, state post-conviction decisions will to some extent be able to fill the gap in the common law creation of new rules by lower federal courts that has resulted from the restrictive ruling in Teague. Second, the greater the salience of post-conviction decisions, the greater the pressure on the states to improve the quality of their post-conviction systems.*

*Thus, in the interests of making modest but real improvements in the quality of our criminal law, lawyers, legislators, academics, judges, and all individuals concerned about justice should seek adoption of the proposal of this article.*

## I. INTRODUCTION

### A. Overview

In *Montgomery v. Louisiana*<sup>1</sup> the Court held, following its adoption of a new constitutional rule of criminal law,<sup>2</sup> that the states’ flexibility to craft doctrines limiting the retroactivity of new rules in state post-conviction proceedings is subject to a constraint derived from the Supremacy Clause.<sup>3</sup> The states must give

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<sup>1</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

<sup>2</sup> The rule in question had been announced in *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (holding unconstitutional the imposition of mandatory life without parole sentences on juveniles). See *infra* Part II (providing fuller description of case); see also *infra* text accompanying notes 107–09 (noting continuing division over reach of *Miller*).

<sup>3</sup> U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”) (discussed *infra* Part III.C).

full retroactive effect to new rules of federal constitutional law which are “substantive.”<sup>4</sup>

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<sup>4</sup> *Montgomery*, 136 S. Ct. at 731–32. The logic of *Montgomery* does not apply to, and this article does not discuss, state court opinions in criminal cases construing their own constitutional guarantees more broadly than the corresponding federal right, *see, e.g.*, *Gardner v. App. Division of Sup. Ct.*, 436 P.3d 946, 1008 (Cal. 2019) (holding indigent misdemeanor defendant entitled by California Constitution to appointed counsel on appeal of suppression order); *State v. Santiago*, 122 A. 3d 1, 140 (Conn. 2015) (holding death penalty violates ban on cruel and unusual punishments of state constitution); *State v. Lilly*, 930 N.W.2d 293, 307–08 (Iowa 2019) (holding Iowa Constitution forbids routine jury management practices whose effect is underrepresentation of minority groups); *People v. Bridgeforth*, 69 N.E. 611, 614 (N.Y. 2016) (holding prosecutor’s use of peremptory strikes on basis of skin color as opposed to race forbidden by New York Constitution); *Commonwealth v. Alexander*, 243 A.3d 177, 181 (Pa. 2020) (holding state constitution provides greater protection than Fourth Amendment against automobile searches); *State v. Gregory*, 427 P.3d 621, 627, 631–32 (Wash. 2018) (holding that the “death penalty, as administered in our state,” violates cruel punishment clause of state constitution); *see also* *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (citing five state supreme court decisions holding prohibitions on same-sex intimacy unconstitutional under state constitutions after *Bowers v. Hardwick*, 478 U.S. 186 (1986) refused to do so under Constitution); William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201 (2020) (discussing legal theories for death penalty abolition available under state constitutional analogues to Eighth Amendment); LaKeith Faulkner & Christopher R. Green, *State-Constitutional Departures From the Supreme Court: The Fourth Amendment*, 89 MISS. L.J. 197 (2020) (collecting state law cases providing greater protections than Fourth Amendment); David Rassoul Rangaviz, *Compelled Decryption and State Constitutional Protection Against Self-Incrimination*, 57 AM. CRIM. L. REV. 157 (2020) (canvassing state constitutions that might be interpreted to provide greater protection against compelled decryption than available under Fifth Amendment); Laura Denvir Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 VAL. U. L. REV. 421, 431–37 (2004) (collecting decisions holding under state law that freestanding actual innocence claims are cognizable in post-conviction proceedings although Court has not definitively determined whether such claims state a federal constitutional violation); *see generally* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Bruce Ledewitz, *How State Courts Can Help America Recover the Rule of Law: The Pennsylvania Experience*, 82 ALB. L. REV. 1325 (2019).

For a proposal to utilize California law to extend the *Bridgeforth* holding to that state, *see* Emily Rose Margolis, Note, *Color as a Batson Class in California*, 106 CAL. L. REV. 2067 (2018). For a more general consideration of the context and implications of the case, *see* Vinay Harpalani, *Civil Rights Law in Living Color*, 79 MD. L. REV. 881 (2019).

During 2019, the Supreme Courts of Kansas and Pennsylvania were asked to decide whether the death penalty violates their state constitutions. *See* John Hanna, *Kansas Abortion Ruling Prompts New Attack on Death Penalty*, AP NEWS (June 26, 2019), <https://apnews.com/article/dd55026d282043cabc84afa7e41ef644>; An-Li Herring, *PA Supreme Court to Consider Putting End to Death Penalty*, WESA-FM (Dec. 4, 2018), <https://www.wesa.fm/post/pa-supreme-court-consider-putting-end-death-penalty>. The Pennsylvania Supreme Court ruled that it would not determine the issue in the context of a statewide petition for extraordinary relief but would rule on claims properly presented by individuals’ post-conviction petitions. *See* *Cox v. Commonwealth*, 218 A.3d 384 (Pa. 2019). In the Kansas Supreme Court case, *Carr v. State*, No. 90108 (docket available at <https://pittsreporting.kscourts.org/Appellate/CaseDetails?caseNumber=90198>), briefing on the issue was completed in November of 2019 but no decision had been issued as of this writing.

Of course the expansion of state constitutional rights beyond contemporaneously-recognized federal ones may occur in civil cases as well as criminal ones, *see, e.g.*, *Obergefell v. Hodges*, 135 S.

Properly understood, this arcane-sounding decision opens an important path towards reform of the entire structure of criminal adjudication. Following that path requires appreciating the critical importance of *Montgomery*'s roots in the Supremacy Clause. As the remainder of this article argues, those roots mean that many more new rules of federal law are "substantive" for purposes of state post-conviction review than for purposes of federal habeas corpus. In the context of state post-conviction proceedings, I propose, "substantive" rules of federal law should be defined as all those whose policy underpinnings extend beyond enhancing the factual accuracy of particular decisions. Examples include rules whose aims embrace the repudiation of government misconduct (e.g., barring evidence derived from coerced confessions or unreasonable searches) and the achievement of full community participation in the judicial process (e.g., adding new groups to the ones that may not constitutionally be excluded from jury service and expanding the categories of juror bias that a defendant must be permitted to litigate).

The consequence of adopting this broader definition of "substantive" will be to increase the number of state post-conviction proceedings. That, in turn, will improve the criminal justice system in two ways. First, state post-conviction decisions will to some extent compensate for the Supreme Court's restrictions on the authority of the lower federal courts to adjudicate habeas corpus claims. Second, the greater the salience of post-conviction decisions, the greater the pressure on the states to improve the quality of their post-conviction systems. Thus, establishing the appropriate definition of "substantive" under *Montgomery* is not just a narrow doctrinal project. Adoption of the proposal of this article would make a modest but real improvement to the quality of our criminal law.

### B. Outline

After explaining the background of *Montgomery* in Part II, Part III argues that the definition of "substantive" needs to be crafted to harmonize with the

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Ct. 2584, 2611 (2015) (listing state supreme court decisions favoring same-sex marriage); ILYA SOMIN, THE GRASPING HAND: *KELO* V. *CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 181–87 (2015) (discussing state courts' acceptance of limitation on Takings rejected under Constitution in *Kelo v. City of New London*, 545 U.S. 469 (2005)); Sanford Levinson, *Courts as Participants in "Dialogue": A View from American States*, 59 U. KAN. L. REV. 791, 810–29 (2011) (discussing state-level successes of litigants seeking to equalize school funding in wake of Constitutional defeat in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)); Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963, 1971–77 (2008) (same); Samuel Wang et al., *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203 (2019) (proposing that partisan gerrymandering be attacked through litigation based on state constitutions); Derek Warden, *Disability Rights and the Louisiana Constitution*, <https://ssrn.com/abstract=3730757> (arguing that the Louisiana Constitution forbids certain forms of disability discrimination) but those cases are also outside the scope of this article.

surrounding legal context, keeping firmly in mind the problem at hand.<sup>5</sup> The Court in *Montgomery* simply imported the definition that originated in *Teague v. Lane*.<sup>6</sup> (Part III.A) But the still-evolving meaning of “substantive” for purposes of *Teague*, which arose in the context of federal habeas corpus review, should respond to the policy concerns arising when state prisoners mount federal collateral attacks on their convictions. (Part III.B) For purposes of *Montgomery*, the term should be defined so as to further the states’ long-established obligations under the Supremacy Clause to give full effect to federal rights.<sup>7</sup> (Part III.C)

Part IV points out that the Supreme Court of the United States is not the only court with the power to recognize new federal rights to which *Montgomery* applies. The practical importance of this is that states will be required to give retroactive effect on state post-conviction to such rights in their own systems even before the rights are recognized by the Supreme Court.

As the canonical *Martin v. Hunter’s Lessee*<sup>8</sup> affirmed, our system has recognized since the time of ratification that state courts are not just empowered but obligated to shape the contours of federal law.<sup>9</sup> Their freedom in this regard is

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<sup>5</sup> See *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (“The line between ‘substance’ and ‘procedure’ shifts as the legal context changes.”); *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 109–111 (1945) (stating that distinction between substance must be “applied with an eye alert to essentials” of the particular problem at hand, regardless of terms’ use in other contexts, because a “policy so important . . . must be kept free from entanglements with analytical or terminological niceties.”).

<sup>6</sup> *Teague v. Lane*, 489 U.S. 288, 307 (1989).

<sup>7</sup> See *Haywood v. Drown*, 556 U.S. 729, 734–42 (2009); *Felder v. Casey*, 487 U.S. 131, 138–43 (1988). See also Carlos M. Vázquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 VA. L. REV. 905, 911–12 (2017). These federal rights may originate in federal statutes and treaties as well as the Constitution and my argument applies to those situations as well. See *infra* notes 76, 138.

<sup>8</sup> *Martin v. Hunter’s Lessee*, 14 U.S. 304, 323–34 (1816).

<sup>9</sup> See *id.* at 340–42; Charlton C. Copeland, *Federal Law in State Court: Judicial Federalism Through a Relational Lens*, 19 WM. & MARY BILL RTS. J. 511, 576–78 (2011); Judith S. Kaye, *State Courts in Our Federal System: The Contribution of the New York Court of Appeals*, 46 SYRACUSE L. REV. 217, 228 (1995) (“[A]s established by Justice Marshall more than two centuries ago . . . our federal system has relegated the task of interpreting the federal constitution not only to the federal courts but also to the courts of fifty states.”); Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1329 (2017) (observing that under Supremacy Clause, “State courts are . . . obligated and entrusted to interpret [federal] constitutional principles”). For a comprehensive overview of the past, present, and potential future of this power, see Jason Mazzone, *When the Supreme Court is Not Supreme*, 104 NW. U. L. REV. 979, 980 (2010) (observing that “[s]tate courts have always exercised a good deal of authority to determine, independently and definitively, the meaning of the Constitution”).

This article is limited to the enunciation of federal rights in criminal cases, although a great deal of the relevant jurisprudence flowed originally from civil controversies, see *id.* at 984–93, and has continued to do so, see *infra* note 81; see generally Diego A. Zambrano, *Federal Aggrandizement*

subject to judicial check only by the Supreme Court of the United States.<sup>10</sup> Within the geographical limits to which they apply, their decisions are for Supremacy Clause purposes just as much statements of federal law as decisions of the United States Supreme Court. Federalism is multipolar, not vertical. (Part IV.A)

Part IV then offers some past, present, and predictable future examples in modern criminal law of state courts recognizing broader federal constitutional protections for defendants than contemporary Supreme Court doctrine. (Part IV.B)

Part V elaborates the definition of “substantive” that should be used in the *Montgomery* context and applies it to a number of illustrative situations.

Under *Montgomery*, the term includes its meaning under *Teague* but is not limited to that meaning (Part V.A). “Substantive” federal rules for *Montgomery* purposes are those implementing national policies whose principal goals are not confined to enhancing the factual accuracy of particular decisions. The many examples of such rules include ones whose purposes include discouraging government misconduct and achieving full community participation in the judicial process. (Part V.B)

Part VI describes how the increased volume of state post-conviction proceedings that *Montgomery* will engender might bring about beneficial architectural changes to the current system of criminal adjudication.

Regardless of how broadly *Montgomery* is read—but particularly if courts adopt an appropriate understanding of “substantive”—the case should lead to the partial restoration of the lower courts’ role in shaping federal constitutional law in the criminal area. As numerous judicial and academic commentators have pointed out, that role was effectively destroyed with respect to the federal courts by the combination of *Teague* and the statutory restrictions imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>11</sup> If state courts begin to be

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*and the Decay of State Courts*, 86 U. CHI. L. REV. 2101 (2019) (overviewing current allocation of civil cases between state and federal courts).

<sup>10</sup> See Martin, 14 U.S. at 351–52. See also Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 88 YALE L.J. 1035, 1049 (1977). For a description of the background that focuses specifically on modern problems of relevance to this article, see James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 701–04 (1998).

<sup>11</sup> See, e.g., 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.1, text accompanying note 27 (7<sup>th</sup> ed. 2016); CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 295 (2016) (describing AEDPA as “decimating [the federal judiciary’s] ability to hear and redress claims of federal constitutional violations” in criminal cases, rendering the remedy worthless); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1820 (1991) (criticizing *Teague* “for sharply restricting habeas courts from either developing or enforcing the constitutional law of criminal procedure”); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1223–44 (2015). Cf. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 199–200 (2018) (noting

heard from more often, the quantity of inter-court dialogue will increase, which should improve the overall quality of legal thinking. (Part VI.A)

Moreover, there are already pressures bearing on the states from a variety of angles to improve their post-conviction processes.<sup>12</sup> The more *Montgomery* increases the number of such proceedings, the stronger those pressures will become, which should enhance the quality of all state post-conviction adjudications. (Part VI.B)

Part VII is a brief conclusion that encourages all stakeholders in the criminal justice system to take advantage of the reform opportunities that *Montgomery* provides.

## II. MONTGOMERY IN THE SUPREME COURT

In 2012 the Court ruled in *Miller v. Alabama*<sup>13</sup> that the Eighth Amendment forbade sentencing a juvenile to life without parole for homicide under a system

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unfairness of this situation to state criminal defendants and encouraging state courts to develop federal law even at the price of occasional reversals).

AEDPA was in many respects simply a codification of a number of rules limiting federal habeas corpus review that the Court had already adopted in cases decided during the two decades before the statute was enacted. *See* *State v. Preciose*, 609 A. 2d 1280, 1294 (N.J. 1992) (“[T]he Supreme Court’s retrenchment of federal habeas review . . . forces state prisoners to rely increasingly on state post-conviction proceedings as their last resort for vindicating their state and federal constitutional rights.”); Christopher Flood, *Closing the Circle: Case v. Nebraska and the Future of Habeas Reform*, 27 N.Y.U. REV. L. & SOC. CHANGE 633, 639 (2002) (“Since the early 1970s, Congress and the federal courts have instituted a number of dramatic changes to the structure of postconviction review. As a result of these changes, state postconviction proceedings have increasingly become both the first and the last opportunity for state petitioners to claim the protection of the courts from violations of their rights.”) (footnotes omitted); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 1–4 (1997) (explaining that AEDPA would need to be interpreted in light of the fact that “the judicial train [had arrived] at the station before the legislative one”).

In one of its earliest such cases, the Court had cut off federal habeas corpus challenges to states’ erroneous rejections of Fourth Amendment claims. *See* *Stone v. Powell*, 428 U.S. 465, 481–82 (1976); Steven Semeraro, *Enforcing Fourth Amendment Rights Through Federal Habeas Corpus*, 58 RUTGERS L. REV. 983, 985–86 (2006) (proposing that *Stone* be overruled in light of AEDPA); Theodore J. Kristek, Jr., Note, *Redefining the Relationship Between Stone and AEDPA*, 106 VA. L. REV. 523 (2020) (arguing that AEDPA should be read to have superseded *Stone*); *see generally*, Mark R. Brown, *Bruce’s “Other” Supreme Court Case*, 48 STETSON L. REV. 307 (2019) (discussing precursor to *Stone*). The particular relevance of *Stone* for present purposes is that it was in effect during the period of the conflicting state court Fourth Amendment rulings discussed *infra* text accompanying notes 115–17. Thus, a federal habeas court which concluded (accurately, as it turned out) that the pro-defendant states were construing the Constitution correctly was disabled from giving effect to its views.

<sup>12</sup> *See infra* Part VI.B.

<sup>13</sup> *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

making the sentence mandatory.<sup>14</sup> For the sentence to be constitutional, the sentencer had to make a particularized determination that the defendant was one of those rare juveniles whose crime reflected “irreparable corruption” rather than “transient immaturity.”<sup>15</sup>

In the wake of this ruling, Henry Montgomery, a Louisiana prisoner who had been sentenced as a juvenile to life without parole for murder under a mandatory system in which no such determination was made, brought state post-conviction proceedings seeking the benefit of *Miller*.<sup>16</sup> He was unsuccessful; the Louisiana courts held that under state law *Miller* was not retroactive to cases on collateral review.<sup>17</sup> Because states are free, within the limits of federal law, to craft their own retroactivity doctrines applicable to post-conviction review,<sup>18</sup> one would have expected the Louisiana Attorney General in opposing Montgomery’s certiorari petition to take the position that the ruling below rested on an independent and adequate state ground that foreclosed Supreme Court review.<sup>19</sup> That official might have urged that although the state’s framework for retroactivity analysis was based on the one the Court had adopted for federal habeas corpus cases in *Teague*,<sup>20</sup> it was still state law.<sup>21</sup> The Attorney General did not make this argument, however,<sup>22</sup>

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<sup>14</sup> The Court had decided two years earlier that the states could not sentence a juvenile offender to life without parole for a non-homicide offense without providing “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” See *Graham v. Florida*, 560 U.S. 48, 75 (2010). The states were forbidden from making a permanent judgment at the time of sentencing that all such defendants are “irredeemable, and thus deserving of incarceration for the duration of their lives.” *Id.* In addition, as discussed in more detail *infra* Part IV.B.1, the Court had previously decided in *Roper v. Simmons*, 543 U.S. 276, 578 (2005), that capital punishment could not be inflicted on defendants younger than eighteen.

<sup>15</sup> *Miller*, 567 U.S. at 478–79 (internal citations omitted). The precise reach of the decision is a matter of dispute. See *infra* text accompanying notes 107–09.

<sup>16</sup> See *Montgomery v. Louisiana*, 136 S. Ct. 718, 726 (2016). Montgomery remains imprisoned. See Grace Toohey, *After 55 Years in Prison, Baton Rouge Man Key to Supreme Court Ruling Again Denied Freedom*, THE ADVOCATE, (Apr. 11, 2019), [https://www.theadvocate.com/baton\\_rouge/news/courts/article\\_00ea4dd4-5c10-11e9-81e9-8b553bae84c3.html](https://www.theadvocate.com/baton_rouge/news/courts/article_00ea4dd4-5c10-11e9-81e9-8b553bae84c3.html) (reporting April 2019 parole denial; next hearing likely in two years).

<sup>17</sup> See *Montgomery*, 136 S. Ct. at 727.

<sup>18</sup> See *Danforth v. Minnesota*, 552 U.S. 264 (2008). Unlike Louisiana, some states had decided under their own law to apply *Miller* retroactively, see, e.g., *Falcon v. State*, 162 So. 3d 954 (Fla. 2015); *People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014); *State v. Ragland*, 836 N.W.2d 107, 114–17 (Iowa 2013).

<sup>19</sup> See STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE ch. 3.22 (11th ed. 2019) (overviewing Court’s “Lack of Jurisdiction to Review Judgments Based on Independent and Adequate State Grounds”).

<sup>20</sup> *Teague v. Lane*, 489 U.S. 288 (1989).

<sup>21</sup> Cf. *Colwell v. State*, 59 P.3d 463, 471 (Nev. 2002) (“We adopt the general framework of *Teague*, but reserve our prerogative to define and determine within this framework whether a rule is

and the Court therefore appointed an amicus to do so.<sup>23</sup>

The Court's *Montgomery* opinion, written by Justice Kennedy for a six-member majority, decided that, although *Teague v. Lane* had indeed been based on retroactivity considerations specific to federal statutory habeas actions challenging state criminal convictions,<sup>24</sup> its ruling that new "substantive" rules of constitutional law applied retroactively on collateral review was also a requirement of the Supremacy Clause.<sup>25</sup>

The Court explained that convictions contrary to substantive rules are constitutionally void regardless of when the rule was announced and that under the Supremacy Clause states may not "mandate that a prisoner continue to suffer punishment barred by the Constitution."<sup>26</sup> Hence, Louisiana could not apply its own retroactivity rules to keep Mr. Montgomery out of court: "Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge."<sup>27</sup>

The Court accordingly turned to the question of "whether *Miller*'s prohibition on mandatory life without parole for juvenile offenders indeed did announce a new substantive rule."<sup>28</sup> Applying *Teague*'s paradigm, the Court wrote that a procedural rule was one regulating "only the manner of determining the defendant's culpability."<sup>29</sup> In contrast, a substantive rule (1) "forbids criminal punishment of

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new and whether it falls within the two exceptions to nonretroactivity (as long as we give new federal constitutional rules at least as much retroactive effect as *Teague* does).").

<sup>22</sup> See Brief in Opposition at 6, *Montgomery* (No. 14-280) (Dec. 3, 2014) ("Because Louisiana has adopted *Teague* the Louisiana Supreme Court's determination as to whether *Miller* is retroactive pursuant to *Teague* renders its decision 'interwoven with the federal law.' *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). Here, the Louisiana Supreme Court 'decided the case the way it did because it believed that federal law [would require] it to do so.' *Id.* at 1041.").

<sup>23</sup> See *Montgomery*, 136 S. Ct. at 727–28.

<sup>24</sup> See 28 U.S.C. § 2254 (2017).

<sup>25</sup> See *Montgomery*, 136 S. Ct. at 729. Stated slightly more technically, what *Montgomery* held was that although the basic *Teague* rule of non-retroactivity for "new" rules was a prudential one, its exceptions were constitutionally required. The *Teague* rule and its exceptions are described *infra* Part III.B.

<sup>26</sup> *Montgomery*, 136 S. Ct. at 731.

<sup>27</sup> *Id.* at 731–32.

<sup>28</sup> *Id.* at 732.

<sup>29</sup> *Id.* (internal citations omitted). For example, permitting an advisory sentencing jury in a Florida capital case to consider an invalid aggravating circumstance is unconstitutional, see *Espinosa v. Florida*, 505 U.S. 1079 (1992), but the rule is procedural rather than substantive and therefore a defendant whose direct appeal ended prior to *Espinosa* cannot successfully assert a claim based on it

certain primary conduct” or (2) prohibits “a certain category of punishment for a class of defendants because of their status or offense.”<sup>30</sup>

The Court explained that *Miller* had declared “life without parole an unconstitutional penalty for ‘a class of defendants because of their status’—that is, juvenile offenders whose crimes reflect the transient immaturity of youth . . . . As a result, *Miller* announced a substantive rule of constitutional law.”<sup>31</sup> Therefore, “prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption.”<sup>32</sup>

The principal dissent, written by Justice Scalia and joined by Justices Thomas and Alito, attacked both the majority’s Supremacy Clause holding and its categorization of the *Miller* rule as substantive.

The rule of *Teague*, Justice Scalia said, was a prudential response to the problems of finality arising in the context of federal habeas corpus, and its transformation into a Supremacy Clause mandate was unwarranted.<sup>33</sup> “The Supremacy Clause does not impose upon state courts a constitutional obligation it

to invalidate his conviction through a federal habeas corpus action. *See Lambrix v. Singletary*, 520 U.S. 518, 539 (1997). For other examples, see *Montgomery*, 136 S. Ct. at 735–36.

<sup>30</sup> *Montgomery*, 136 S. Ct. at 732. A few months after *Montgomery*, Justice Kennedy, writing for the Court over only a single dissent, added to his earlier definition the thought that “this Court has determined whether a new rule is substantive or procedural by considering the function of the rule,” *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). *See infra* Part III.B(1) (suggesting that the meaning of “substantive” under *Teague* remains cloudy).

There is an extended discussion of what rules are “substantive” for *Teague* purposes in HERTZ & LIEBMAN, *supra* note 11, §25.7. Examples in the first numbered category in the text include constitutional rules protecting from punishment certain sorts of speech, *see, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), or intimate conduct, *see, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Examples in the second category include imposing capital punishment on defendants who are mentally retarded, *see Atkins v. Virginia*, 536 U.S. 304 (2002); *see also infra* note 50 (noting subsequent change of nomenclature to “intellectually disabled”), or for the offense of rape, *see Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Coker v. Georgia*, 433 U.S. 584 (1977).

<sup>31</sup> *Montgomery*, 136 S. Ct. at 724 (internal citations omitted). The Court noted that this conclusion was unaffected by the fact that a state could meet the demands of *Miller* by adopting a procedure to determine that the juvenile was one of the few on whom a sentence of life without parole could appropriately be imposed. *Id.* at 734–35. Such a hearing would “not replace but rather give[] effect to *Miller’s* substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity”. *Id.* at 735. For example, the Court said, the constitutional prohibition on executing intellectually disabled defendants is undoubtedly substantive notwithstanding that its implementation requires procedures to determine whether any particular defendant falls within that class. “Those procedural requirements do not . . . transform substantive rules into procedural ones.” *Id.*

<sup>32</sup> *Id.* at 736.

<sup>33</sup> *Id.* at 738–39. *See also id.* at 742–43 (describing majority as having “created jurisdiction by . . . converting an equitable rule governing federal habeas relief to a constitutional command governing state courts”).

fails to impose on federal courts.”<sup>34</sup>

In any event, Justice Scalia continued, the rule of *Miller* was procedural rather than substantive. That opinion had stated, “Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.”<sup>35</sup> Thus, “it is as plain as day that the majority is not applying *Miller*, but rewriting it.”<sup>36</sup>

The reason for this “distortion of *Miller*,” Justice Scalia suggested, was to enable the Court to proscribe the sentencing of juveniles to life imprisonment without parole while not acknowledging that it was doing so—an acknowledgement which “would have been something of an embarrassment” because the Court in outlawing the death penalty for juveniles in *Roper*<sup>37</sup> had said that life without parole was a severe enough punishment.<sup>38</sup>

Justice Thomas also contributed a separate dissent, whose thrust was that because the Constitution does not require either the state or federal courts to entertain post-conviction attacks at all, the extent to which they do so is “a matter about which the Constitution has nothing to say.”<sup>39</sup>

### III. SUBSTANCE IN CONTEXT

#### A. Overview

*Montgomery* imported its division between “substantive” and “procedural” rules from *Teague*. But *Teague* arose in a very different context than *Montgomery*. The problem presented by *Teague* was how to craft judicial rules for federal habeas corpus review of state criminal convictions to accommodate the disruptive effects of federal courts’ recognition of new constitutional rights, an issue misleadingly but universally denominated one of “retroactivity.”<sup>40</sup> The problem

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<sup>34</sup> *Id.* at 741. *But see infra* Part III.C (suggesting numerous flaws underpinning this assertion).

<sup>35</sup> *Miller v. Alabama*, 567 U.S. 460, 483 (2012).

<sup>36</sup> *Montgomery*, 136 S. Ct. at 743. As indicated *infra* text accompanying notes 107–09, the Court is likely to re-address the *Miller* rule in the next year or so. Nothing in my argument depends on what it decides.

<sup>37</sup> *Roper v. Simmons*, 543 U.S. 276 (2005) (discussed *infra* Part IV.B).

<sup>38</sup> *Montgomery*, 136 S. Ct. at 744. *See infra* note 137 (discussing this passage).

<sup>39</sup> *Montgomery*, 136 S. Ct. at 750. *See infra* text accompanying notes 164–66 & note 164 (discussing this statement).

<sup>40</sup> *See Danforth*, 552 U.S. 271 & 271 n.5 (2008) (declining to alter terminology but explaining that “retroactivity” misleadingly suggests that issue is when right came into existence whereas in fact the question in such cases is “redressability,” i.e., “whether a violation of the right that occurred prior

presented by *Montgomery* was how to define the obligations of the state courts under the Supremacy Clause when called upon to adjudicate such rights, regardless of when they were first recognized. Those two questions are not the same.<sup>41</sup>

### B. *The Teague Context*

There has been a great deal written on the origins, formulation, interpretation, and consequences of the *Teague* rule and I do not intend to repeat those analyses here.<sup>42</sup>

Tersely put, during the 1950s and 1960s the Court recognized a number of new constitutional rights in the criminal law area. In critiquing these developments, observers such as Justice Harlan noted that the settled expectations of the states would be upended and the costs to the court system increased if all state prisoners whose proceedings had not conformed to the newly-announced rules could afterwards mount successful collateral attacks on their convictions by federal habeas corpus.<sup>43</sup>

Eventually, the Court responded to these concerns by creating the doctrine announced in *Teague*.<sup>44</sup> A federal court considering a federal habeas corpus attack

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to the announcement of the new rule will entitle a criminal defendant to the relief sought”). Specifically, the Court described *Teague* as grounded in “equitable and prudential considerations,” *id.* at 278. Chief Justice Roberts, joined by Justice Kennedy, dissented, taking the position that the majority was wrong in its “view that retroactivity is a remedial question,” *id.* at 304. Their position was that in determining the question of retroactivity the Court was determining the content of the federal law applicable to the case at hand, *id.* at 307, “something on which the Constitution gives this Court the final say,” *id.* at 303. This view may well explain why Justice Kennedy could write, and Chief Justice Roberts join, the *Montgomery* majority in rejecting Justice Scalia’s complaint, quoted *supra* note 33, that the Court had “convert[ed] an equitable rule governing federal habeas relief to a constitutional command governing state courts;” they did not accept his characterization of *Teague*’s prohibition on the application of “new” rules by federal habeas courts as grounded in equitable considerations. These issues are further discussed *infra* note 44.

<sup>41</sup> See Liebman & Ryan, *supra* note 10, at 859–64 (using *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995) to illustrate the point). The multiple legal, conceptual, and practical problems generated by applying the *Teague* definition of “substantive” to the *Montgomery* context are ably overviewed in Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 NOTRE DAME L. REV. 443, 487–96 (2017).

<sup>42</sup> For a comprehensive discussion see HERTZ & LIEBMAN, *supra* note 11, ch. 25. A recent treatment that situates the case within the Court’s overall civil and criminal retroactivity jurisprudence appears in Charles W. “Rocky” Rhodes, *Loving Retroactivity*, 45 FLA. ST. U. L. REV. 383, 392–419 (2018).

<sup>43</sup> Rhodes *supra* note 42, at 392–95; Vázquez & Vladeck, *supra* note 7, at 916–17.

<sup>44</sup> “*Teague* is plainly grounded in [the Court’s authority under 28 U.S.C. § 2243 (2017) to adjust] the scope of federal habeas relief in accordance with equitable and prudential considerations,” *Danforth*, 552 U.S. at 278.

The court adopted *Teague*’s limitations on the application of new law to serve “the interests of the States, not the federal courts.” HERTZ & LIEBMAN, *supra* note 11, § 25.6, text accompanying

on a state criminal conviction must as a threshold matter decide whether a ruling for the prisoner would require the statement of a new rule.<sup>45</sup> If so, the habeas court must dismiss the case unless the proposed new rule would be (1) substantive<sup>46</sup> or a (2) watershed rule of criminal procedure.<sup>47</sup> An early example of the application of the methodology took place in *Penry v. Lynaugh*,<sup>48</sup> where a Texas Death Row prisoner asserted that the Constitution precluded his execution because he was mentally retarded. The Court held that it could reach the constitutional question, even though the rule he sought was “new,” because it was substantive.<sup>49</sup> On the merits, the Court concluded that the new rule Penry sought did not exist,<sup>50</sup> but that he was entitled to prevail on his claim that the proceedings below had violated the Court’s “old” rule requiring a sentencer to give consideration to his mental retardation as a mitigating factor.<sup>51</sup> In partial dissent, Justice Scalia, speaking for

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note 25 (original emphasis). Hence, contrary to the ruling in *Knight v. Fla. Dep’t. of Corr.*, 936 F.3d 1322, 1331–34 (11th Cir. 2019), if a state, as it is fully entitled to do, *id.* at 1332 (citing *Danforth*), adopts a rule allowing a prisoner to assert more claims than *Teague* would, the federal court should “respect the State’s implicit conclusion that a conviction’s and sentence’s constitutionality is more important to the State than the conviction’s and sentence’s finality.” HERTZ & LIEBMAN, *supra* text accompanying note 25. Indeed, that outcome “may be required,” *id.*, lest a prudential rule be turned into a limitation on federal subject matter jurisdiction. Of the current Justices, only Chief Justice Roberts, in his *Danforth* dissent discussed *supra* note 40, has rejected the view of the *Danforth* majority quoted in the first paragraph of this note that *Teague*’s limitation on the application of new rules in federal habeas corpus is indeed a prudential one.

<sup>45</sup> The requirement that this issue be considered first, which is criticized at length in *Id.*, §25.4 (discussing “Nonretroactivity as a ‘threshold’ question”), “is far from a merely technical matter” because its practical effect is to forbid lower federal judges “to interpret the United States Constitution in habeas corpus cases and relegate[] those judges to the virtually ministerial task of putting into operation decisions that the Supreme Court renders on direct review,” *id.* at 1408. Thus the only criminal law contexts in which the lower federal courts may regularly engage in the common law development of new constitutional rules are the trial and direct appeal phases of federal criminal prosecutions.

<sup>46</sup> See *Montgomery*, 136 S. Ct. at 732 (setting forth definition of substantive for *Teague* purposes); *supra* text accompanying note 30 (quoting definition); *infra* text accompanying notes 61–62 (discussing definition).

<sup>47</sup> See *Teague*, 488 U.S. at 311–15 (1989).

<sup>48</sup> *Penry v. Lynaugh*, 492 U.S. 302 (1989).

<sup>49</sup> *Id.* at 329–30.

<sup>50</sup> This aspect of *Penry* was explicitly overruled by *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding mentally retarded persons exempt from execution under Eighth Amendment). Some years later the Court changed its terminology from “mentally retarded” to “intellectually disabled,” see *Hall v. Florida*, 572 U.S. 704 (2014), but I have not done so retrospectively in this article.

<sup>51</sup> *Penry*, 492 U.S. at 328. The Court explained, *id.* at 315–19, that *Jurek v. Texas*, 428 U.S. 262 (1976) had upheld the Texas death penalty statute based upon the Court’s understanding that it would be read so as to “permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing sentence,” and that in cases decided well before the filing of

four Justices, heatedly disputed that this latter rule was “old.”<sup>52</sup>

And so it goes. From the time it was announced, *Teague* has been both controversial in concept and incomprehensible in application.<sup>53</sup> Within months of the decision, the New York City Bar Association called for it to be legislatively overruled with respect to capital cases because of its “arbitrary and perverse consequences . . . where life is at stake.”<sup>54</sup> Leading scholars soon criticized the effects of the ruling on criminal justice adjudication generally, pointing out that it created an inappropriate incentive structure for the states, threatened norms of fundamental fairness, and deprived the justice system of the beneficial work of the lower federal courts.<sup>55</sup> Today, like astronomers trying to elaborate the Ptolemaic system of astronomy, judges viewing *Teague* quarrel over whether their dueling perceptions result from sound “metaphysics” or instead “ignore[] reality . . . here on Earth, [where] the laws of physics still apply” and the Supreme Court cannot “alter the space time continuum.”<sup>56</sup>

As desirable as it may be to abolish or modify *Teague*, that is not the argument of this section. The point here is far more modest. Even if no changes are made to the *Teague* doctrine in cases where it applies, i.e., on federal habeas corpus, to import it without reflection into contexts other than federal habeas corpus would be extremely poor policy. The *Montgomery* situation, which does not involve federal habeas corpus but rather the demands of the Supremacy Clause in

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Penry’s habeas corpus petition the Court had applied the rule to invalidate portions of the Oklahoma and Ohio death penalty statutes. *See* *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).

<sup>52</sup> *Penry*, 492 U.S. at 352. At the other end of the spectrum, the four Justices who had dissented in *Teague*, a non-capital case, attacked its unconsidered extension to capital cases, *see id.* at 341 (Brennan & Marshall, JJ., dissenting), and two of those also specifically targeted the framework under which retroactivity is a threshold consideration. *See id.* at 350 (Stevens & Blackmun, JJ., dissenting) (“[I]t is neither logical nor prudent to consider a rule’s retroactive application before the rule itself is articulated.”).

<sup>53</sup> *See* HERTZ & LIEBMAN, *supra* note 11, § 25.1, text accompanying notes 10–25 (overviewing continuing differences among Justices and confusion in lower federal courts “over the import and application of fundamental components of the doctrine,” and observing that other jurisprudential developments suggest “that the Court may or ought to be prepared to reconsider the premises underlying the *Teague* doctrine as a whole”).

<sup>54</sup> *See* Association of the Bar of the City of New York, Committee on Civil Rights, *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. ASSOC. BAR 848, 849, 852–53 (1989). By way of disclosure, I was the principal author of this report, *see id.* at 860.

<sup>55</sup> *See* Fallon & Meltzer, *supra* note 11, at 1816–20.

<sup>56</sup> *Compare* *Lester v. United States*, 921 F.3d 1306, 1317 (11th Cir. 2019) (statement of William Pryor, J. respecting denial of rehearing en banc) *with id.* at 1331 (statement of Rosenbaum, J. joined by Martin and Jill Pryor, JJ. respecting denial of rehearing en banc). Their difficulties are entirely understandable. *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 314 n.36 (2000) (describing *Teague* as case that “recategorizes Time itself”).

state post-conviction proceedings, is one of those contexts.

As we move on to consider that context in the next section, two points about *Teague*, one intellectual and one practical, should be borne in mind.

1. A great deal of thinking has been devoted to the still-murky questions of whether a rule is “new,”<sup>57</sup> and when during the course of an individual prisoner’s litigation it became so.<sup>58</sup> Much less has been devoted to *Teague*’s exceptions.<sup>59</sup> In particular, there is no reason to think that we have fully mapped the cloudy astronomical region of the so-called first *Teague* exception, viz. that even if a rule of constitutional law is “new,” a federal habeas corpus court may apply it if the rule is “substantive.”<sup>60</sup> Indeed, the Court has hinted that the term “substantive” covers more territory than has yet been explored. “Although *Teague* describes new substantive rules as an exception to the bar on retroactive application of procedural rules, this Court has recognized that substantive rules ‘are more accurately characterized as . . . not subject to the bar.’”<sup>61</sup> This otherwise unexplained statement may reflect a recognition that in the context of federal review of detentions the concept currently sought to be captured by labelling some claims “substantive” is not a new one that sprang into being in the second half of the twentieth century. There is a long history, dating back to the Judiciary Act of 1789, of making federal review available to federal and state prisoners

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<sup>57</sup> See HERTZ & LIEBMAN, *supra* note 11, §25.5.

<sup>58</sup> Because *Teague* only applies to new rules, if a rule was announced before the prisoner’s conviction became final the doctrine will not be a barrier on federal habeas corpus. See *id.*, § 25.6, text accompanying note 1 (explaining that “The point at which ‘finality’ sets in is . . . critical for nonretroactivity purposes”); see also *McKinney v. Arizona*, No.18-1109 (2019), Petition for a Writ of Certiorari at 19–20, *cert. granted* 2019 WL 936074 (June 10, 2019) (arguing in successful petition for review that under *Teague* “finality is not always final”). This insight is the basis for the proposal made in Ruthanne M. Deutsch, *Federalizing Retroactivity Rules: The Unrealized Promise of Danforth v. Minnesota and the Unmet Obligation of State Courts to Vindicate Federal Constitutional Rights*, 44 FLA. ST. U. L. REV. 53, 77–81 (2016) that the state courts are in certain circumstances required to hear in post-conviction proceedings constitutional claims that did not exist at the time of direct appeal but would be barred from federal habeas corpus review as stating a “new” rule.

<sup>59</sup> See Vázquez & Vladeck, *supra* note 7, at 920 (noting relative lack of commentary regarding provenance of *Teague* exceptions).

<sup>60</sup> See *supra* text accompanying note 45. The next paragraph of text parses the “so called.” In its current formulation, the second *Teague* exception, for “watershed” new rules of criminal procedure, see *supra* text accompanying note 47, is very narrow, see HERTZ & LIEBMAN, *supra* note 11, §25.7, text accompanying notes 26–27, and I will not discuss it further.

<sup>61</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004)).

asserting claims that their imprisonments violated either the Constitution or other fundamental rights of national importance.<sup>62</sup> To the extent that *Teague* jurisprudence has become disconnected from this history, that is a flaw in *Teague*'s doctrinal framework. Students of *Teague* should be working to repair the flaw. More to the present point, it should not be carried forward when legal thinkers are called upon to build doctrinal frameworks in other environments.

2. As previously noted,<sup>63</sup> one deleterious practical effect of current *Teague* doctrine has been that, in the criminal area only, the process of formulating new constitutional rules has been substantially deprived of the benefits of percolation through the lower federal courts that commonly enriches and improves the quality of judicial decision-making.<sup>64</sup> Ameliorating that situation would benefit the justice system.<sup>65</sup>

### C. *The Montgomery Context*

The Supremacy Clause background relevant to this article is uncontroversial.<sup>66</sup> Under the Constitution, no lower federal courts need be created.<sup>67</sup> And even if they are, they might be granted only limited subject matter

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<sup>62</sup> See 1 HERTZ & LIEBMAN, *supra* note 11, § 2.4[d][x], text accompanying notes 287–89; *id.*, §2.4 [e]; see also *Danforth v. Minnesota*, 552 U.S. 264, 271–72 (2008); ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 61–62 (2003). There is also a long history of criticism of judicial attempts to articulate the boundaries of this territory. See, e.g., Note, *The Writ of Habeas Corpus in the Federal Courts*, 35 COLUM. L. REV. 404, 406, 412 (1935) (describing contemporary doctrine respecting availability of writ to prisoners as displaying “the confusion and inconsistency necessarily incident to the attempt to conceptualize the inconceptual” and arguing that its “hopeless entanglement” be replaced with a rational jurisprudence focused on “the relative values, as applied to the specific defect, of finality of judicial determination and flexibility in reexamination of errors in the interests of human liberty.”).

<sup>63</sup> See *supra* note 45.

<sup>64</sup> The effect of *Teague* in combination with that of AEDPA, see *supra* text accompanying note 11, has been that “state postconviction is the best opportunity for . . . lower courts, and ultimately the Supreme Court . . . to decide open questions in federal constitutional criminal procedure.” Giovanna Shay, *The New State Postconviction*, 46 AKRON L. REV. 473, 475 (2013).

<sup>65</sup> See *infra* Part VI.A.

<sup>66</sup> The propositions in the next three sentences of text are all to be found in *Palmore v. United States*, 411 U.S. 389, 400–02 (1973).

<sup>67</sup> See U.S. CONST. art. III, § 1 (creating Supreme Court and authorizing creation of “such inferior Courts as the Congress may from time to time ordain and establish”); RICHARD H. FALLON ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, Ch. 1, § C.2 (7th ed. 2015) (describing background of the “Madisonian Compromise” leading to this provision). An

jurisdiction.<sup>68</sup> Hence, if national law is to be truly national, state courts need to implement it. As the Court has held since the Marshall era,<sup>69</sup> that is why the text of the Clause states explicitly: “This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>70</sup>

The state courts must accordingly be open to federal claims absent a “valid excuse.”<sup>71</sup> Of course, it is not a valid excuse that a state disagrees with the policy

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extensively documented discussion of the proceedings at the Constitutional Convention respecting both Article III and the Supremacy Clause that eventuated in the “Madisonian Compromise” appears in Liebman & Ryan, *supra* note 10, at 705–73.

<sup>68</sup> In fact, as described in FALLON ET AL., *supra* note 67, ch. VIII, § 1, except for a very brief period between the enactment of the Act of Feb. 13, 1801, 2 Stat. 89 and its repeal by the Act of March 8, 1802, 2 Stat. 13, the federal courts did not have general federal question jurisdiction until 1875. See GERALD LEONARD & SAUL CORNELL, *THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION AND THE FALL OF THE FOUNDERS’ CONSTITUTION, 1780S—1830S* at 87–92, 103–04 (2019); Tyler S. Moore, *Trimming the Least Dangerous Branch: The Anti-Federalists and the Implementation of Article III*, 56 TULSA L. REV. 1 (2020). That year saw enactment of the Act of March 3, 1875, § 1, 18 Stat. 470 (imposing amount in controversy requirement of \$500), the lineal predecessor of 28 U.S.C. § 1331 (2017). Not long afterwards, the Court stated forcefully that the passage of the statute did not in any way alter the Supremacy Clause obligations of state courts adjudicating habeas cases to enforce federal rights. See *Robb v. Connolly*, 111 U.S. 624, 635–39 (1884).

<sup>69</sup> See Liebman & Ryan, *supra* note 10, at 799–804 (discussing *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816) and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821)).

<sup>70</sup> U.S. CONST. art. VI, cl. 2. See Saikrishna Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 903 (2003).

Justice Scalia’s statement, “The Supremacy Clause does not impose upon state courts a constitutional obligation it fails to impose on federal courts,” is one that he himself describes as “a maxim,” *Montgomery v. Louisiana*, 136 S. Ct. 718, 741 (2016) (Scalia, J., dissenting), and is unsupported by any authority. More significantly, it is at odds with both the original intent of the provision and its drafting history. These have been recently been canvassed in a detailed scholarly study which describes the obligations that the Supremacy Clause does impose on the federal courts. See William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, <https://ssrn.com/abstract=3383183>, at 81–82 (draft dated June 15, 2020 of article to be published in *Michigan Law Review*). For a discussion of other legal provisions bearing on the obligation of the federal courts to hear habeas claims, see *infra* notes 184–91 and accompanying text. The federal government is of course bound by the prohibition against the imposition or enforcement of substantively invalid convictions or sentences, see Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 486–87 & 487 n.328 (2018), but that long-recognized rule is more comfortably rooted in principles of substantive due process than supremacy.

<sup>71</sup> See *Haywood v. Drown*, 556 U.S. 729, 735 (2009); *Testa v. Katt*, 330 U.S. 386, 392 (1947). Subsequent to my writing of this article, an argument has been made by Ann Woolhandler and Michael G. Collins, *State Jurisdictional Independence and Federal Supremacy*, 72 FLA. L. REV. 73 (2020) that the cases in this line were historically wrong and should not be followed in implementing *Montgomery*. The many flaws in this argument are ably sketched out in Carlos M. Vázquez & Stephen I. Vladeck, *Testa, Crain, and the Constitutional Right to Collateral Relief*, 72

of the federal law.<sup>72</sup> Hence, states have often defended refusing to hear a federal claim by asserting that their reason for doing so was not policy-based but rather “procedural.”<sup>73</sup> The Supreme Court has never accepted that argument.<sup>74</sup> The definition of a “valid excuse” does not depend on whether the state rule is “substantive” or “procedural,” but rather on whether its enforcement will frequently and predictably interfere with vindication of the federal right.<sup>75</sup> Thus, for instance, a state rule requiring the prompt filing of a detailed notice of claim as a predicate to damages actions against government officers cannot be applied to actions based on a federal statute because the rule would systematically deprive plaintiffs of the full benefit of such actions, as well as leading to inconsistent results depending on the state in which the federal action was brought.<sup>76</sup>

Hypothetically, then, if post-conviction actions in Louisiana must be filed on 8.5 x 11 inch paper but Henry Montgomery had filed his *Miller* claim on 11 x 14 inch paper, there would probably have been no Supremacy Clause violation in rejecting the claim. The Louisiana rule would be a “valid excuse,” not because the paper size rule is “procedural” rather than “substantive” but because its application would not frequently and predictably defeat enforcement of the federal right.<sup>77</sup> A

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FLA. L. REV. F. 10 (2021), Part I. *See also infra* note 78 (citing additional Supremacy Clause support for conclusions of this article).

<sup>72</sup> Haywood, 556 U.S. at 736. It makes no difference that the state’s view on the matter is so strong that it also keeps from its courts corresponding state-law claims. *See id.* at 739–42 (dispelling “misperception” that state excuse is valid so long as state and federal claims are treated equally; “equality of treatment is . . . the beginning, not the end, of the Supremacy Clause analysis”).

<sup>73</sup> *See, e.g.,* Garrett v. Moore-McCormack Co., 317 U.S. 239, 248 (1942).

<sup>74</sup> *See, e.g., id.* at 245–46 (rejecting defense and holding that question for determination was whether the state court proceeded in such a way that “rights of the parties under controlling federal law would be protected”). *See also* Allen Erbsen, *A Unified Approach to Erie Analysis for Federal Statutes, Rules, and Common Law*, 10 U.C. IRVINE L. REV. at 25–28, 93 (forthcoming 2020) (available at <https://ssrn.com/abstract=3607678>) (noting that distinction between substance and procedure plays no role in Supremacy Clause analysis).

<sup>75</sup> *See* Felder v. Casey, 487 U.S. 131, 141 (1988).

<sup>76</sup> *See id.* at 140–53. The text of the Supremacy Clause applies not just to federal rights arising under the Constitution but also to ones flowing from treaties and federal statutes, and many important Court precedents, including *Haywood*, *Testa*, *Garrett* and *Felder*, have glossed the Clause in the latter situation, *e.g.,* Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507–08 (1962); *Clafin v. Houseman*, 93 U.S. 130, 136–37 (1876). The source of the federal right does not make any difference to the Supremacy Clause analysis. *See generally* Carlos Manuel Vázquez, *Treaties as the Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 601–02 (2008). Thus, although most *Montgomery* cases are likely to arise in situations where the newly recognized right arises under the Constitution, nothing in my analysis *infra* Part V.B depends on that circumstance. *See infra* note 138.

<sup>77</sup> The “probably” in the last sentence covers some unusual hypothetical fact pattern under which this statement would be untrue, as, for example, if there existed a prison rule forbidding

blanket rule of state law denying retroactivity to *Miller* claims, on the other hand, would have that effect and be invalid under the Supremacy Clause.<sup>78</sup> The same would be true of state default or exhaustion rules requiring the assertion of claims not yet in existence.

In the actual *Montgomery* case, the Supreme Court was not using “substantive” to define the nature of the state’s barrier to relief, but rather to define the class of new rules of constitutional law that the state post-conviction court was required to hear irrespective of its retroactivity doctrines. Nevertheless, because the strong impetus of Supremacy Clause law since the founding has been to require federal constitutional claims brought in state court to be heard while the strong impetus of retroactivity law in the *Teague* era has been to prevent federal constitutional claims brought in federal court from being heard, the appropriate definition of “substantive” rules for *Montgomery* purposes requires an analysis that focuses on the policies underlying the Supremacy Clause.

Such an analysis appears in Part V below. But to conduct it soundly we must first remind ourselves that the Supreme Court of the United States is not the only judicial body with the power to recognize new federal rights that a state court must enforce. The reminder is needed for two reasons. First, as an intellectual matter, a definition of “substantive” rules in the *Montgomery* context that is true to the structural postulates of the Supremacy Clause needs to take into account that state supreme courts have the same authority.<sup>79</sup> Second, as a practical matter, once a state supreme court recognizes a new federal “substantive” right, the state post-conviction courts will be required to enforce it regardless of whether the Supreme Court has yet recognized the right.

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possession of 8.5 x 11-inch paper. *Cf.* *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (invalidating state prison rule forbidding prisoner from assisting others to prepare habeas petitions; “Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.”)

<sup>78</sup> See Vázquez & Vladeck, *supra* note 7, at 935–39 (providing additional doctrinal support for this conclusion); Vázquez & Vladeck, *supra* note 71, Part II (providing strong further support for this aspect of their argument in response to Woolhandler & Collins, *supra* note 71). See also *Bowles v. Florida*, U.S. LEXIS 4565, at \*1–2 (Aug. 22, 2019) (statement of Justice Sotomayor respecting denial of certiorari) (noting that state procedural rule requiring claims of ineligibility for execution based on the intellectual disability ruling in *Hall v. Florida*, 572 U.S. 701 (2014) to be filed ten years before the case was decided “creates grave tension with this Court’s guidance in *Montgomery v. Louisiana*”).

<sup>79</sup> *Cf.* Vázquez & Vladeck, *supra* note 7, at 954 (“[W]e think that the right recognized in *Montgomery* is a right to obtain collateral relief in state courts for claims based on new substantive rules that have been definitively recognized for the first time by the Supreme Court after the petitioner’s conviction became final. The holding [rests on an understanding] of the effect of *Supreme Court* decisions recognizing new substantive rules.”) (original emphasis). I think this statement is correct as a description of the situation that the *Montgomery* Court had particularly in mind, see *infra* note 87. But, for the reasons described in the remainder of this article, I do not think that the case is limited to those circumstances.

## IV. STATE RECOGNITION OF NEW FEDERAL CONSTITUTIONAL RIGHTS

A. *Overview*

The autonomy of state courts to interpret federal constitutional guarantees independently of Supreme Court jurisprudence was so intrinsic to the original structure of the Constitution that the federal jurisdictional statutes in place until the end of 1914 did not give a litigant asserting that a state supreme court had rendered a decision over-protecting federal constitutional rights recourse to the Supreme Court; only a party asserting the wrongful denial of a federal claim (meaning in criminal cases the defendant) could seek Supreme Court review.<sup>80</sup> The modern statutory framework is different, though, and in parsing it the Supreme Court has been assiduous in asserting its exclusive role as the last word on the scope of federal constitutional rights.<sup>81</sup>

There are, nevertheless, many reasons why a state decision expanding defendants' federal constitutional rights<sup>82</sup> may go unreviewed by the Supreme Court and thus become binding in the rendering jurisdiction. For instance, the government may not seek review;<sup>83</sup> the decision may not be final for purposes of

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<sup>80</sup> See Mazzone, *supra* note 9, at 990.

<sup>81</sup> See Peter N. Salib & David K. Suska, *The Federal-State Standing Gap: How to Enforce Federal Law in Federal Court Without Article III Standing*, 26 WM. & MARY BILL RTS. J. 1155, 1203–09 (2018) (explaining jurisprudence, much which has developed in civil disputes and rests on “shaky” legal foundations, as driven by Court’s wish to “reserve[] to itself the power to conclusively interpret federal law,” *id.* at 1203).

<sup>82</sup> The cases of interest for this Part are ones in which the state courts self-consciously break new doctrinal ground, *e.g.*, *Eunjoo Seo v. State*, 148 N.E.3d 952 (Ind., 2020) (holding that Fifth Amendment forbids requiring defendant to reveal password of lawfully-seized electronic device); *Commonwealth v. Davis*, 220 A. 3d 534 (Pa. 2019) (same), not ones in which they simply apply old doctrines to fact patterns that have not yet come to the Court. See, *e.g.*, *Jardines v. State*, 73 So. 3d 34 (Fla. 2011), *aff’d* *Florida v. Jardines*, 569 U.S. 1 (2013) (finding dog sniff search on homeowner’s property unconstitutional); *In re Ellison*, 385 P.3d 15 (Kan. 2016) (holding, in accord with other state courts, that federal constitutional right to speedy trial applies to civil commitment proceedings against sex offender). Of course, how any particular case is to be categorized may well be a disputed question whose resolution depends on the ultimate opinion of the Court.

<sup>83</sup> For example, in 2018 the local authorities in the District of Columbia and New York State determined not to appeal decisions of their highest courts that misdemeanor defendants not otherwise entitled to jury trials under existing Supreme Court Sixth Amendment doctrine gained that right if they could be deported as a result of their convictions. See *Bado v. United States*, 186 A.3d 1243 (D.C. 2018) (en banc); *People v. Suazo*, 118 N.E.3d 168 (N.Y. 2018); Dan M. Clark, *DA Will Not Seek SCOTUS Review of Immigrant’s Jury Trial Right*, N.Y. L.J., Dec. 5, 2018, at 1. In an earlier example, no review was sought by the government when, in *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948), the Supreme Court of California held in a civil case that the state’s statute prohibiting interracial marriage violated the Equal Protection Clause. See *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967) (citing case).

the Court's certiorari jurisdiction;<sup>84</sup> the federal constitutional ruling may not be dispositive of the outcome;<sup>85</sup> or the Justices may decide for prudential reasons to allow the envelope-pushing ruling to stand.<sup>86</sup> Moreover, some Justices have suggested that discretionary review should be granted particularly sparingly when sought by state governments in criminal cases.<sup>87</sup>

A rule of federal constitutional law recognized idiosyncratically by a state may of course form the basis of a state post-conviction claim in that state. Moreover, because the rule is in that state as fully an authoritative construction of the Constitution as is a decision of the United States Supreme Court,<sup>88</sup> the courts of that state are required under the Supremacy Clause<sup>89</sup> to give their new rules the retroactive effect mandated by *Montgomery*.<sup>90</sup> This doctrinal conclusion is both

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<sup>84</sup> See 28 U.S.C. § 1257 (a) (2017) (granting certiorari jurisdiction over “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had”). For example, as further discussed *infra* note 97, in *Barber v. Gladden*, 298 P.2d 986 (Ore. 1956), the Oregon Supreme Court decided as a matter of first impression that the Equal Protection Clause required that an indigent unsuccessful petitioner for state habeas corpus be permitted to appeal without posting an appeals bond. That, however, was an interlocutory ruling and whether the Supreme Court could (much less would) have reviewed it at the State’s behest is murky at best. See SHAPIRO et al., *supra* note 19, ch. 3.7 (describing case law under § 1257 (a)). Eventually the prisoner lost his appeal on the merits and the Supreme Court then denied his certiorari petition. See *Barber v. Gladden*, 309 P.2d 192 (Ore. 1957), *cert. denied*, 359 U.S. 948 (1959). Similarly, *Eunjoo Seo* is an unlikely candidate for Supreme Court review because it is arguably moot under federal, although not state, standards. See 148 N.E.3d at 963 (Massa, J., dissenting).

<sup>85</sup> See, e.g., *State v. Hodge*, 726 A.2d 531, 550–54 (Conn. 1999) (deciding in wake of *Batson v. Kentucky*, 476 U.S. 79 (1986) (forbidding jury challenges on basis of race) that Equal Protection Clause forbids jury challenges on basis of religion but determining that challenge under review had not been made on that basis). For a comprehensive overview of *Batson* jurisprudence, see Elisabeth Semel, *Batson and the Discriminatory Use of Peremptory Challenges in the 21st Century*, in 1 NJP LITIGATION CONSULTING, JURYWORK: SYSTEMATIC TECHNIQUES 245 (2d ed. 2018–19). For a discussion of the current status of jury challenges based on religion, see *id.*, at 270–73.

<sup>86</sup> See SHAPIRO ET AL., *supra* note 19, ch. 4.25 (describing common considerations influencing whether to grant review of state court decisions).

<sup>87</sup> See, e.g., *Kansas v. Carr*, 577 U.S. 108, 127–32 (2016) (Sotomayor, J. dissenting and collecting authorities). Justice Scalia responded for the Court: “What a state court cannot do is experiment with our Federal Constitution and expect to elude this Court’s review so long as victory goes to the criminal defendant.” *Id.* at 641. As this example shows, the Justices are at some level aware of the state courts’ authority to formulate new federal constitutional law doctrines, but that awareness may be fairly described as sporadic. Their default mode, as in *Montgomery*, is to assume that any new rule of federal constitutional law, at least any important and long-lasting one, will emanate from themselves.

<sup>88</sup> See *supra* text accompanying notes 8–10.

<sup>89</sup> The text of the Supremacy Clause, which has been quoted, *supra* note 3, is specifically directed to state court judges. See generally, *supra* Part III.C.

<sup>90</sup> See *infra* Part V.B (describing *Montgomery* mandate). A further discussion of the subject matter of this paragraph of text appears in Part II of my reply article, Eric M. Freedman, *Montgomery*

sensible and unremarkable because for Supremacy Clause purposes the critical point is the origin of the rule in the Constitution, not the identity of the court pronouncing it.

Confining itself to the last half century or so, and with no pretense of exhaustive coverage, the next section of this Part provides a few examples of criminal cases in which state supreme courts have construed the federal constitution in a way more protective of individual rights than the Supreme Court of the United States had done at the time.

Of course, if a court follows this path without also determining that the same result would follow under state law, then its ruling is vulnerable to reversal by the Supreme Court of the United States, a highly significant risk that would not otherwise exist.<sup>91</sup> Furthermore, because *Montgomery* is bottomed on the Supremacy Clause, a state supreme court basing its ruling on non-federal law is not subject to the retroactivity obligations that the case imposes.

On the other hand, there may be a number of affirmative reasons for a state supreme court to utilize its authority to expand the contours of federal constitutional rights.<sup>92</sup> Quite apart from the possibility that the legal arguments are

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and “Substantive” Rights Enforceable Retroactively in State Post-Conviction Proceedings: A Brief Reply to Professor Vázquez, 18.2 OHIO STATE J. OF CRIM. L. 263, 265–66 (2021).

<sup>91</sup> See *Kansas v. Carr*, 577 U.S. 108, 118 (2016) (discussed *supra* note 87). The course of freedom of expression jurisprudence in New York in the 1980s illustrates some of the competing considerations. In *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) the Court reversed a ruling in favor of an adult bookstore that the New York Court of Appeals had rested on First Amendment grounds. On remand, the Court of Appeals reinstated its holding on the basis of the state constitution. See *People ex. rel. Arcara v. Cloud Books, Inc.*, 503 N.E.2d 492 (N.Y. 1986). Civil liberties nationally plainly would have been better served if the Court of Appeals had taken that route, at least in the alternative, the first time rather than relying exclusively on the First Amendment.

The Court’s decision in *New York v. Ferber*, 458 U.S. 747 (1982), which I have criticized at some length elsewhere, see Eric M. Freedman, *A Lot More Comes into Focus When You Remove the Lens Cap: Why Proliferating New Technologies Make it Particularly Urgent for the Supreme Court to Abandon its Inside-Out Approach to Freedom of Speech, and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883, 925–29 (1996), was also a reversal of a New York Court of Appeals decision upholding a First Amendment challenge. In that instance, the Court of Appeals on remand held that the defendant’s claim lacked merit under the state constitution. See *State v. Ferber*, 441 N.E.2d 1100 (N.Y. 1982). In light of this view, the Court of Appeals could not have avoided deciding the First Amendment issue in its original opinion. This differentiates the case from *Arcara*, where the Court of Appeals thought that the challenge had merit under both bodies of law and therefore had freedom to choose between them without changing the outcome.

<sup>92</sup> For an overview of a number of these by a retired Chief Justice of the Connecticut Supreme Court, see Chase T. Rogers, *Putting Meat on Constitutional Bones: The Authority of State Courts to Craft Constitutional Prophylactic Rules Under the Federal Constitution*, 98 B.U.L. REV. 541, 572–73 (2018) (including possibility that effect of awaiting Supreme Court pronouncement which may never come would be that “important rights may be underenforced, and large areas of constitutional law may never be developed, to the loss of both state courts and, ultimately, the Supreme Court”) (footnotes omitted).

in fact stronger under federal than state constitutional law,<sup>93</sup> there may be constraints on the ability of the state supreme court to rest its decision on state constitutional law that do not apply to its interpretation of the Constitution.<sup>94</sup> For example, various provisions of the state constitutions of California, Florida and Louisiana provide that they shall not be interpreted more expansively than their federal counterparts.<sup>95</sup>

Moreover, state supreme courts, which are subject to electoral accountability,<sup>96</sup> may sometimes find it attractive to rely on the federal constitution. Following that course might permit them to shift the blame for potentially unpopular results to the federal government<sup>97</sup> and to take advantage of

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<sup>93</sup> See Mazzone, *supra* note 9, at 1062–1063; Rogers, *supra* note 92, at 573 & 573 n.164. See generally Allan W. Vestal, *Removing State Constitution Badges of Inferiority*, 22 LEWIS & CLARK L. REV. 4 (2019) (describing various lingering “archaic, ineffective, and unnecessary provisions in our state constitutions” that violate Constitution).

<sup>94</sup> Any hypothetical attempt to impose constraints through the state’s political process on interpreting the Constitution would encounter obvious Supremacy Clause obstacles, see Mazzone, *supra* note 9, at 1056, as well as potential state and federal constitutional law problems relating to the independence of the judiciary.

<sup>95</sup> See CAL. CONST. art. I § 7 (providing that nothing in state constitution imposes duties on the government “which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation;” provision upheld against Equal Protection Clause challenge in *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527 (1982)); *id.* at art. I § 24 (“In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this State in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.”); FLA. CONST. art. I § 12 (providing that protections against unreasonable searches, seizures, and interceptions of private communications and corresponding exclusionary rules, “shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court”); *id.* at art I § 17 (providing that state prohibition on cruel and unusual punishments “shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution”); LA. CONST. art. I § 4(G) (providing that with certain exceptions compensation for takings “shall not exceed the compensation required by the Fifth Amendment of the Constitution of the United States of America”); Mazzone, *supra* note 9, at 1055–56.

<sup>96</sup> See Levinson, *supra* note 4, at 802–04 (summarizing state judicial selection and retention mechanisms).

<sup>97</sup> See *Kansas v. Carr*, 577 U.S. 108, 118 (2016). For example, in its ruling, discussed *supra* note 84, that the Constitution required that an indigent be permitted to take an appeal of an adverse

the general cultural respect for the commands of the Constitution.<sup>98</sup> Because so many more cases are denied review by the Supreme Court than are granted it,<sup>99</sup> the statistical odds are that a state court which wishes to achieve those goals will succeed.<sup>100</sup>

To be sure, if a number of state courts have agreed with the expansion of a federal constitutional right and the Supreme Court later disagrees, those state courts may have to reconsider their views. But that is already the case and has not resulted in any notable practical problems.<sup>101</sup>

## B. *Illustrative Modern Cases*

### 1. State Innovations Resulting in Expeditious Supreme Court Response

The cases of least interest for present purposes are ones in which the Supreme Court promptly confirms or rejects the state court's view. In those cases, there will not be an extended period during which the state courts have an unusual interpretation of the federal constitution in place and need to confront the retroactivity issue on state post-conviction.

An example is *Simmons v. Roper*.<sup>102</sup> Two Supreme Court cases decided in 1989 had established that juveniles aged 16 and above were eligible for execution.<sup>103</sup> But in 2003, Simmons persuaded the Missouri Supreme Court that

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ruling in a state habeas corpus action without posting bond, the Oregon Supreme Court stated several times in the course of a short opinion that its decision was "forced, not by our own reasoning but by the necessary implications of the decision of the United States Supreme Court" in *Griffin v. Illinois*, 351 U.S. 12 (1956). See *Barber v. Gladden*, 298 P.2d 986, 989–90 (Ore. 1956).

<sup>98</sup> See *Mazzone*, *supra* note 9, at 1063. See also *Rogers*, *supra* note 92, at 572 (observing that "the parties and the general public may have more confidence in a rule that is subject to correction by the Supreme Court.").

<sup>99</sup> See SHAPIRO et al., *supra* note 19, ch. 1.20(b); *Rogers*, *supra* note 92, at 572 & 572 n. 167 (commenting that small percentage of cases reviewed by Court means that state supreme court rulings on federal constitutional rights "may not come before the Court for years . . . if ever"); see also *supra* text accompanying note 83 (noting that government may choose not to seek Supreme Court review of decision expanding defendants' federal constitutional rights).

<sup>100</sup> Thus, for example, the decision in *Barber* was never reviewed by the United States Supreme Court. See *supra* note 84.

<sup>101</sup> For example, prior to *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558, 576 (2003), a number of state supreme courts had ruled that their consensual sodomy statutes violated the Constitution. See *People v. Onofre*, 415 N.E.2d 936, 938–41, 943 (N.Y. 1980).

<sup>102</sup> *Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003).

<sup>103</sup> See *Stanford v. Kentucky*, 492 U.S. 361, 362 (1989) (ruling executions of 16-year-olds permissible under Eighth Amendment); *Thompson v. Oklahoma*, 487 U.S. 815, 816 (1989) (ruling executions of 15-year-olds impermissible under Eighth Amendment).

the landscape had been altered by an intervening Supreme Court death penalty case<sup>104</sup> and that the Eighth Amendment line should now be drawn at the age of 18.<sup>105</sup> The Supreme Court granted the state's certiorari petition and in a 2005 decision affirmed the ruling of the Missouri Supreme Court.<sup>106</sup> Thus Missouri was no longer uniquely generous in its interpretation of the Eighth Amendment, as it would have been if the Court had denied certiorari.

More recently, faced with confusion as to the meaning of *Miller v. Alabama*'s ban on mandatory sentences of life without parole for juveniles<sup>107</sup> in the wake of *Montgomery*,<sup>108</sup> the Supreme Court has signaled its intention to resolve that issue in the October 2020 Term.<sup>109</sup>

## 2. State Innovations Resulting in Delayed Supreme Court Response

In some cases, there has been a substantial delay before state court rulings expanding the federal constitutional rights of criminal defendants beyond the limits of contemporary Supreme Court jurisprudence have received the Court's endorsement.

For example in a 1968 case the California Supreme Court granted state habeas corpus relief vacating the convictions of a topless dancer and a nightclub manager for lewd exposure and dissolute conduct based on an erotic dance performance at the club.<sup>110</sup> "Although the United States Supreme Court ha[d] not ruled on whether the performance of a dance is potentially a form of expression protected against

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<sup>104</sup> *Atkins v. Virginia*, 536 U.S. 304, 318–19 (2002) (holding mentally retarded persons exempt from execution under Eighth Amendment).

<sup>105</sup> *See Simmons*, 112 S.W. 3d at 399–400.

<sup>106</sup> *See Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>107</sup> *See Miller v. Alabama*, 567 U.S. 460 (2012) (holding such sentences violate Eighth Amendment).

<sup>108</sup> *See Alice Reichman Hoesterey, Confusion in Montgomery's Wake: State Responses, the Mandates of Montgomery, and Why a Complete Categorical Ban on Life Without Parole for Juveniles is the Only Constitutional Option*, 45 *FORDHAM URB. L.J.* 149 (2017).

<sup>109</sup> On March 9, 2020, the Supreme Court granted the Petition for a Writ of Certiorari in *Jones v. Mississippi*, No. 18-1259, which was predicated on conflicting interpretations by the lower courts of *Montgomery*'s restatement of the *Miller* rule. *See id.* at 9–14. For an overview of problems that have divided the lower courts, see Zachary Crawford-Pechukas, Note, *Sentence for the Damned: Using Atkins to Understand the "Irreparable Corruption" Standard for Juvenile Life Without Parole*, 75 *WASH. & LEE L. REV.* 2147, 2184–91 (2018). For a discussion of still-emerging problems in the area and possible solutions, see Mary Marshall, Note, *Miller v. Alabama and the Problem of Prediction*, 119 *COLUM. L. REV.* 1633 (2019).

<sup>110</sup> *In re Giannini*, 466 P.2d 535 (Cal. 1968) (Tobriner, J.), *cert. denied sub nom. California v. Giannini*, 395 U.S. 910 (1969).

state intrusion by the guarantees of the First and Fourteenth Amendments to the federal Constitution,” the California court determined that it was.<sup>111</sup> Thirteen years later, in *Schad v. Borough of Mount Ephraim*,<sup>112</sup> the United States Supreme Court, upholding a challenge brought by an establishment which allowed customers to view nude dancers in glass booths, endorsed this view: “as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation.”<sup>113</sup>

In another instance, in *United States v. Matlock*<sup>114</sup> the Court determined in 1974 that where two people had joint control over a physical space one of them could give consent to a police search in the absence of the other, who could not later seek to contest the search when its fruits were offered in evidence against her at a criminal trial. This left undecided the issue of whose views controlled if the second person were present and objected to the search. Between 1977 and 1992 three isolated state supreme courts determined, against the great weight of state and federal authority,<sup>115</sup> that under the Fourth Amendment there was no effective consent in that situation.<sup>116</sup> In 2004 the Georgia Supreme Court agreed.<sup>117</sup> The United States Supreme Court granted the state’s certiorari petition and in 2006 affirmed the ruling in favor of the criminal defendant.<sup>118</sup>

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<sup>111</sup> *Id.* at 538. Hence, the court concluded, the convictions before it could not stand because the constitutional requirements for the suppression of obscenity had not been met. *Id.* at 538–41.

<sup>112</sup> *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

<sup>113</sup> *Id.* at 66. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the Court eventually reaffirmed this conclusion, *see id.* at 565 (“[N]ude dancing . . . is expressive conduct within the outer perimeters of the First Amendment”), while adopting a far more government-friendly test on the merits than *Giannini* had. *See also* *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000) (concluding that Pennsylvania Supreme Court had erred in distinguishing *Barnes* and upholding a First Amendment challenge by a nude dancing establishment to a ban on public nudity). For a thoughtful but unsuccessful attempt to persuade the Supreme Court to reform the relevant First Amendment doctrine, *see* Jeffrey S. Raskin, Comment, *Dancing on the Outer Perimeters: The Supreme Court’s Precarious Protection of Expressive Conduct*, 33 SANTA CLARA L. REV. 395, 432–36 (1993).

<sup>114</sup> *United States v. Matlock*, 415 U.S. 164 (1974).

<sup>115</sup> *See* Petition for Writ of Certiorari, at 7–8, *Georgia v. Randolph*, 547 U.S. 103 (2006) (No. 04-1067), 2005 WL 309364 (collecting authority). *See also* *Randolph*, 547 U.S. at 109 n.1 (acknowledging status of issue in lower courts).

<sup>116</sup> *See* *Silva v. State*, 344 So. 2d 559 (Fla. 1977); *In re D.A.G.*, 484 N.W.2d 787 (Minn. 1992); *State v. Leach*, 782 P.2d 1035 (Wash. 1989).

<sup>117</sup> *See* *State v. Randolph*, 604 S.E.2d 835 (Ga. 2004).

<sup>118</sup> *See Randolph*, *supra* note 115.

### 3. State Innovations Currently Without Supreme Court Response

As this is written, the Justices have yet to be heard from regarding several areas in which state supreme courts have recognized broader federal constitutional rights for criminal defendants than provided in existing Supreme Court caselaw.

In 2016 the Court held in *Hurst v. Florida*,<sup>119</sup> that Florida's death penalty system was invalid under the Sixth Amendment because the jury was not required to make factual findings of the aggravating factors supporting the death sentence. On remand, the Florida Supreme Court held in *Hurst v. State* that the Sixth and Eighth Amendments imposed several additional requirements, including a jury determination that the balance of aggravating and mitigating factors warranted a death sentence and that the jury decision be unanimous.<sup>120</sup> Florida filed a petition for certiorari asserting that these requirements extended defendants' rights under those Amendments beyond the limits of the Court's existing jurisprudence.<sup>121</sup> The petition was denied,<sup>122</sup> leaving *Hurst v. State* as the binding law in Florida on the federal constitutional issues.

Continuing efforts to implement *Batson v. Kentucky*,<sup>123</sup> the leading case on the permissibility of peremptory jury challenges under the Equal Protection Clause have generated a number of issues currently splitting state supreme courts<sup>124</sup> as well as some rulings pushing the boundaries of existing law. But the Supreme Court has not intervened. Thus, for example, there was no Court response when in

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<sup>119</sup> *Hurst v. Florida*, 136 S. Ct. 616 (2016). For a discussion of the case and some of its implications, see Maria T. Kolar, "Finding" a Way to Complete the Ring of Capital Jury Sentencing, 95 DENV. L. REV. 671, 712–24 (2018).

<sup>120</sup> *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). There is a further discussion of this case *infra* text accompanying notes 159–63. More recently, the Florida Supreme Court has modified its views on the constitutional issues so as to significantly constrict the requirements for jury decision-making. See *State v. Poole*, 297 So. 3d 487 (Fla. 2020). It has, however, left unchanged the retroactivity framework described *infra* text accompanying note 163. See *Brown v. State*, No. SC19-704, 2020 WL 5048548 at \*24 & n.16 (Fla. Aug. 27, 2020).

<sup>121</sup> See Petition for Writ of Certiorari, at 18–33, *Florida v. Hurst*, No. 16-998, 2017 WL 656209 (filed Feb. 13, 2017).

<sup>122</sup> See *Florida v. Hurst*, 137 S. Ct. 2161 (2017).

<sup>123</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986). For a full discussion of the origins and evolution of *Batson*, see *Flowers v. Mississippi*, 139 S. Ct. 2228, 2240–45 (2019). The three steps of a *Batson* challenge are reiterated in *id.* at 2241, 2243.

<sup>124</sup> See, e.g., *People v. Williams*, 299 P.3d 1185, 1242–54 (Cal. 2013) (Liu, J., dissenting) (overviewing conflicting caselaw regarding standard of appellate review applicable to a trial court's determination regarding the third step of the *Batson* inquiry), *cert. denied*, *Williams v. California*, 571 U.S. 1197 (2014). For additional examples, see Semel, *supra* note 85, at 317–18 & 318 n.5 (determining whether prosecutorial explanation for strike is race-based), 359–60 (assessing strike made for mix of valid and invalid reasons).

2017 the Washington Supreme Court adopted a unique “bright line rule” under which “the peremptory strike of a juror who is the only member of a cognizable racial group on a jury constitutes a prima facie showing of racial motivation,”<sup>125</sup> sufficient to satisfy the first of the three requirements imposed by *Batson* for a successful Equal Protection Clause challenge.<sup>126</sup>

#### 4. State Innovations on the Horizon

Identifying examples of state innovations that may emerge over the next several years is not difficult.

In *Peña-Rodriguez v. Colorado*,<sup>127</sup> the Supreme Court held that a state court evidentiary rule protecting secrecy of jury deliberations violated the Sixth Amendment to the extent that it prevented a criminal defendant from putting forward post-conviction evidence that the jury’s consideration of his case had been infected by racism. In *Rhines v. Young*, a capital defendant brought a federal habeas corpus petition asserting that the same rule should apply to anti-gay bias.<sup>128</sup> Although his effort foundered on procedural shoals and the Supreme Court denied review,<sup>129</sup> it is entirely plausible that a state supreme court might soon accept the claim.<sup>130</sup>

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<sup>125</sup> *City of Seattle v. Erickson*, 398 P.3d 1124, 1132 (Wash. 2017) (en banc). See Semel, *supra* note 85, at 280–81, 295–96 (discussing case).

<sup>126</sup> The Washington Supreme Court subsequently adopted WASH SUP. CT. GEN. RULE 37 (e)—(i), which lay out a series of evidentiary rules “to eliminate the unfair exclusion of potential jurors based on race or ethnicity,” *id.* at 37(a). See Semel, *supra* note 85, at 281 (describing rules as “replac[ing] the *Batson* inquiry with a more rigorous approach.”). If Washington courts in the future read the rules as incorporating *Erickson* and rely on the former not the latter in applying the “bright line rule,” described in text, there is little likelihood of United States Supreme Court review. See *supra* text accompanying note 85.

<sup>127</sup> *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

<sup>128</sup> See Adam Liptak, *For Justices’ Consideration: Did Jurors’ Biases Affect a Gay Man’s Sentence?*, N.Y. TIMES, Apr. 2, 2019, at A20.

<sup>129</sup> *Rhines v. Young*, No. 18-8029, 2019 WL 826425 (U.S. Apr. 15, 2019).

<sup>130</sup> See Jason Koffler, Note, *Laboratories of Equal Justice: What State Experience Portends for Expansion of the Peña-Rodriguez Exception Beyond Race*, 118 COLUM. L. REV. 1801, 1805, 1845–47 (2018) (predicting that “Courts are likely to . . . apply the *Peña-Rodriguez* exception to biases beyond race” and supporting such expansion); *id.* at 1804 n.14 (collecting commentary to same effect). See also Richard Lorren Jolly, *The New Impartial Jury Mandate*, 117 MICH. L. REV. 713, 719 (2019) (“[W]hile the Court is adamant that the *Peña-Rodriguez* holding is limited to racial bias, it is unlikely the Court can identify a limiting principle to exclude biases against other classes.”) (footnotes omitted); Sydney Melillo, Note, *“Vegas Rule: Jury Deliberation Edition”: Should the Sixth Amendment Exception for Alleged Racial Bias in Deliberations Extend to Gender?*, 11 DREXEL. L. REV. 705, 708–09 (2019) (arguing “that the *Peña-Rodriguez* exception . . . should be extended to gender-motivated animus of jurors.”).

Similarly, the lower age limit of 18 that the Supreme Court set for executions in *Roper v. Simmons*,<sup>131</sup> is now under sustained assault as advocates urge that the 8<sup>th</sup> Amendment line should be set at 21.<sup>132</sup> Some state supreme court may well find the attack meritorious before too long.

## V. DEFINING “SUBSTANTIVE” UNDER *MONTGOMERY*

### A. Introduction

We now return to the issue of defining “substantive” for *Montgomery* purposes. Any rule that is substantive under *Teague*<sup>133</sup> is substantive under *Montgomery*. That is exactly what *Montgomery* held<sup>134</sup> and its legal conclusion was correct. But the proper frames of reference for *Montgomery* problems and *Teague* problems are different.<sup>135</sup> The conclusion that new substantive rules under *Teague* are also new substantive rules under *Montgomery* is most soundly reached by applying the definition of “substantive” set forth at the start of the next section as the appropriate one for use in cases presenting *Montgomery* issues.<sup>136</sup> That definition necessarily embraces at a minimum rules that are substantive under the *Teague* paradigm but is independent of, and in no way restricted to, rules within that template.<sup>137</sup>

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<sup>131</sup> *Roper v. Simmons*, 543 U.S. 551 (2005) (discussed *supra* text accompanying notes 102–06).

<sup>132</sup> See John H. Blume, et. al., *Death by Numbers: Why Evolving Standards Compel Extending Roper’s Categorical Ban Against Executing Juveniles from 18 to 21*, 98 TEXAS L. REV. (forthcoming 2019) (available at <https://ssrn.com/abstract=3341438>).

<sup>133</sup> As explained *supra* Part III.B, I disclaim any purpose to define what those rules might be. Some of the rules that I classify in the next section as “substantive” under *Montgomery* may well be so under *Teague*. That, however, is a *Teague* discussion, not a *Montgomery* one, and this article does not engage in it.

<sup>134</sup> See *Montgomery v. Louisiana*, 136 S. Ct. 718, 731–32 (2016).

<sup>135</sup> See *supra* Part III. For that reason, my discussion in the next section of various doctrines that do or do not apply retroactively under a sound understanding of *Montgomery* carries no implication regarding their status under *Teague*. This article is about *Montgomery* retroactivity, not *Teague* retroactivity. See *supra* note 133.

<sup>136</sup> My purpose is to define “substantive” not “new,” see *supra* text accompanying notes 57–58. I assume for the sake of discussion that my various examples in the next section involve “new” rules, although in many instances they may actually be just the application of old rules to new fact patterns.

<sup>137</sup> Suppose, for instance, Justice Scalia was correct when he said in his *Montgomery* dissent, see *supra* text accompanying notes 35–38, (1) that the Court’s new rule was procedural under *Teague* and (2) that its purpose was not primarily having “state and federal collateral-review tribunals . . . engage in [the] silliness [of], probing the evidence of ‘incorrigibility’ that existed decades ago,” but rather “eliminating life without parole for juvenile offenders.” *Montgomery*, 136 S.

As we have seen thus far, *Montgomery* arose when a new federal constitutional right had been recognized<sup>138</sup> and a state post-conviction petitioner then sought to vindicate it.<sup>139</sup> The Court used the term “substantive” to capture the sort of right that the Supremacy Clause requires a state to enforce retroactively when it adjudicates collateral attacks on its convictions.<sup>140</sup> The Supremacy Clause context of *Montgomery* should be key to defining the term.<sup>141</sup> The principle guiding the formulation of Supremacy Clause doctrine has always been vindicating federal public policy goals by insuring that states do not act in ways that frequently and predictably defeat a federal right.<sup>142</sup> Let us follow that lodestar.

### B. *The Definition*

I propose: a new “substantive” rule of federal law that a state is required to enforce retroactively in state post-conviction proceedings is one whose policy underpinnings extend beyond enhancing the factual accuracy of particular decisions. The remainder of this section applies that proposed definition to a variety of illustrative fact patterns.

A straightforward example of a substantive rule of federal constitutional law is the one against the admission into evidence of coerced confessions. Although the rule may certainly tend to enhance factual accuracy, it is also significantly grounded in other considerations.<sup>143</sup> Hence, the rule is “substantive” under

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Ct. at 744 (Scalia, J., dissenting). In that event, the rule announced by the majority would be (1) procedural under *Teague*, but (2) substantive under the appropriate definition articulated at the beginning of the next section of text, *infra* Part V.B.

<sup>138</sup> Although the case arose under those circumstances, the analysis of this section is equally applicable to rights flowing from federal statutes and treaties. *See supra* note 76. For example, the last twenty years or so have seen significant litigation, some of it in the state post-conviction context, in which litigants have asserted claims under the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, *e.g.*, *State v. Gutierrez*, No. 74236, 2020 WL 7183533 (Nev. Dec. 4, 2020); *Torres v. Oklahoma*, 120 P.3d 1184 (Okla. Crim. App. 2005). *See* Sandra Babcock, *The Limits of International Law: Efforts to Enforce Rulings of the International Court of Justice in U.S. Death Penalty Cases*, 62 SYRACUSE. 183, 189–93, 197 (2012).

<sup>139</sup> *See supra* Part II.

<sup>140</sup> *See supra* text accompanying notes 25–27.

<sup>141</sup> *See supra* Part III.C.

<sup>142</sup> *See supra* Part III.C.

<sup>143</sup> *See* *Rogers v. Richmond*, 365 U.S. 534, 540–42 (1961) (“To be sure, confessions cruelly extorted may be . . . untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration.”); *see generally* Dean A. Strang, *Inaccuracy and the Involuntary Confession: Understanding Rogers v. Richmond Rightly*, 110 J. CRIM L. & CRIMINOLOGY 69 (2020).

*Montgomery*. The day after the rule was announced<sup>144</sup> the Supremacy Clause required a state postconviction court to entertain a claimed violation of it notwithstanding any retroactivity barrier under state law.

Similar considerations apply to the decision in *Randolph*<sup>145</sup> against the Fourth Amendment validity of one-party search consents. The constitutional rule that was announced there was not premised on considerations of accurate fact-finding (and may in fact have run counter to them) but rather reflected the outcome of a balancing between the government's investigative interests and "an objecting individual's claim to security against the government's intrusion into his dwelling place."<sup>146</sup> Because the rule was therefore substantive for *Montgomery* purposes, the states which had previously reached the same federal constitutional conclusion as the Court<sup>147</sup> were required to apply it retroactively in state post-conviction from the moment they did, and all states were so required following the Court's decision.

Confrontation Clause cases, on the other hand, should ordinarily not be classified as substantive under *Montgomery*. Consider *Williams v. Illinois*,<sup>148</sup> which rejected a challenge under that Clause to testimony regarding an out-of-court laboratory test. If the Supreme Court overruled the case tomorrow, that decision would announce a new rule of federal constitutional law but not one that the Supremacy Clause would require a state court to enforce in a subsequent state post-conviction proceeding. The reason is that the fundamental public policy behind the new rule would be the enhancement of factual accuracy in the individual case.<sup>149</sup>

Rules adding new groups to the set whose exclusion from jury service violates either the fair cross-section requirement of the Sixth Amendment<sup>150</sup> or the Equal

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<sup>144</sup> Of course, that day was long before *Rogers*. See *Brown v. Mississippi*, 297 U.S. 278, 285–86 (1936) (citing *Moore v. Dempsey*, 261 U.S. 86, 91 (1923)); see also FREEDMAN, *supra* note 62, at 70–71, 74–76, 79–80 (describing facts of *Moore*); Wesley M. Oliver, *Prohibition's Fourth Amendment Confessions Rule*, 17 OH. ST. J. CRIM. L. 445 (2020) (discussing legacy of *Brown*); see generally Strang, *supra* note 143, at 77–81 (describing legal environment in period between *Brown* and *Rogers*).

<sup>145</sup> See *Georgia v. Randolph*, 547 U.S. 103 (2006) (discussed *supra* text accompanying notes 117–18).

<sup>146</sup> *Id.* at 115.

<sup>147</sup> See *supra* note 116.

<sup>148</sup> *Williams v. Illinois*, 567 U.S. 50 (2012). See Michael S. Pardo, *Confrontation After Scalia and Kennedy*, 70 ALA. L. REV. 757, 769–72 (2019) (describing case).

<sup>149</sup> See *Williams*, 567 U.S. at 119 (Kagan, J. dissenting) (explaining that "the Confrontation Clause prescribes a particular method for determining" whether evidence introduced at trial to support a conviction is reliable).

<sup>150</sup> See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) (noting that "the selection of a petit jury from a representative cross section of the community" is an essential component of the Sixth Amendment right to a jury trial and invalidating conviction returned by jury where statutory selection

Protection Clause<sup>151</sup> should be considered substantive for *Montgomery* purposes. Although increasing the diversity of jurors surely increases the accuracy of their factfinding, the public policy behind such new rules goes well beyond that.<sup>152</sup> Two

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system permitted women to serve only if they had previously filed a written declaration of desire to do so). *See also* *Thiel v. S. Pac. Co.*, 328 U.S. 217 (1946) (exercising supervisory power over federal courts and reversing verdict in civil case for violation of fair cross-section requirement where daily wage-earners not called for service). *See generally* Nina Chernoff, *Black to the Future: The State Action Doctrine and the White Jury*, 58 WASHBURN L.J. 103 (2019) (criticizing current fair cross-section doctrine as insufficiently strict against government).

<sup>151</sup> Most of the recent activity in this area has been in the field of peremptory challenges after *Batson v. Kentucky*, 476 U.S. 79 (1986) overruled the crippling standards that had been imposed by *Swain v. Alabama*, 380 U.S. 202 (1965). Because *Batson* represented “an explicit and substantial break with prior precedent,” the Court, applying its pre-*Teague* retroactivity doctrines respecting federal habeas review, held in *Allen v. Hardy*, 478 U.S. 255, 258–59 (1986) that only defendants whose cases had not yet become final on direct review would be able to invoke the new rule. For the reasons already noted, *see, e.g., supra* text accompanying note 135, that decision and ones like it have no bearing on the argument presented in this paragraph of text.

<sup>152</sup> *See Allen*, 478 U.S. at 259 (“By serving a criminal defendant's interest in neutral jury selection procedures, the rule in *Batson* may have some bearing on the truth-finding function of a criminal trial. But the decision serves other values as well. Our holding ensures that States do not discriminate against citizens who are summoned to sit in judgment against a member of their own race and strengthens public confidence in the administration of justice. The rule in *Batson*, therefore, was designed “to serve multiple ends,” only the first of which may have some impact on truth finding. *See Brown v. Louisiana*, 447 U.S. 323, 329 (1980).”); *see also Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019) (“By taking steps to eradicate racial discrimination from the jury selection process, *Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system.”); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628, 631 (1991) (“Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality . . . [and] cause[s] injury to the excused juror.”). For a discussion of the importance of this rationale in the context of the Court’s extension of *Batson* to the exclusion of women in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), *see* Joanna L. Grossman, Note, *Women’s Jury Service: Right of Citizenship or Privilege of Difference*, 46 STAN. L. REV. 1115 (1994). For a summary of the Court’s expansions of *Batson* in the years after the case was decided, *see Flowers*, 139 S. Ct. at 2243; Semel, *supra* note 85, at 252. *See generally* Mark E. Wojcik, *Extending Batson to Peremptory Challenges of Jurors Based on Sexual Orientation and Gender Identity*, 40 N. ILL. U. L. REV. 1, 3 (2019) (arguing that *Batson* should be extended to “prohibit excluding potential jurors based on their actual or perceived sexual orientation or gender identity”). A recently-adopted California statute has enacted this and a number of other reforms as matters of state law. *See* 2020 Cal. Legis. Serv. Ch. 318 (A.B. 3070) (West) (prohibiting exclusions based, *inter alia*, on “age, mental disability, physical disability, medical condition,[or] genetic information,” and providing enforcement procedures). Discussing the fair cross-section requirement of the Sixth Amendment, the Court noted in *Taylor* that the exclusion of women from the jury “may not in a given case make an iota of difference.” 419 U.S. at 532. But, it ruled, the policy purpose of guarding “against the exercise of arbitrary power” by prosecutors and “the professional or perhaps over conditioned or biased response of a judge” is not served “if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.” *Id.* at 530. Similarly, the Court in *Thiel* wrote that the exclusion did “violence to the

simple, if slightly time-shifted, examples illustrate the Supremacy Clause consequences of this conclusion. The day after the Court decided *Strauder v. West Virginia*,<sup>153</sup> the courts of that state became required to adjudicate the post-conviction claims of state prisoners challenging their convictions on the ground that non-Whites had been statutorily excluded from their juries.<sup>154</sup> The day after some state supreme court decides that the federal constitution prohibits religion-based peremptory challenges of jurors, the courts of that state will be required to adjudicate the claims of any state prisoners challenging their convictions on the ground that the prosecutor struck venire members on the basis of religion.<sup>155</sup>

Along the same lines, the actual new rule of *Peña-Rodriguez v. Colorado*,<sup>156</sup> that the Sixth Amendment grants a convicted defendant the right to inquire into racial bias during juror deliberations, and a hypothetical new rule of a state supreme court extending the principle to anti-gay bias<sup>157</sup> are both “substantive” under a proper reading of *Montgomery*. In ruling for Mr. Peña-Rodriguez, the Court’s concern was not just the risk that an innocent man might have been convicted but “ensur[ing] that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.”<sup>158</sup> Thus after the announcement of either rule *Montgomery* requires that state post-conviction courts entertain claims of its violation regardless of their own retroactivity doctrines.

The same reasoning applies to the decision of the Florida Supreme Court in *Hurst v. State*.<sup>159</sup> The court held that in a capital case the Sixth and Eighth Amendments require that a jury determine beyond a reasonable doubt and

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democratic nature of the jury system,” 328 U.S. at 223, and the challenger need not show any prejudicial effect on the outcome of his case. *Id.* at 225. For an overview of the many advantages of a broadly inclusive jury in addition to more accurate factfinding, see Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 821–38 (2020).

<sup>153</sup> *Strauder v. West Virginia*, 100 U.S. 303 (1879) (invalidating as racially discriminatory a statute limiting jury service to white males and reversing prisoner’s conviction). Almost a century later *Taylor* repudiated the suggestion of *Strauder* and some subsequent cases that the gender discrimination in the statute was permissible. See *Taylor*, 419 U.S. at 536 n.19.

<sup>154</sup> Although *Strauder* assumed that the claim was only available to minority-race prisoners, the Court eventually concluded otherwise. See *Peters v. Kiff*, 407 U.S. 493 (1972); see also *Powers v. Ohio*, 499 U.S. 400 (1991) (reaching same conclusion with respect to *Batson* claims).

<sup>155</sup> For further discussion of this hypothetical, see *infra* Part VI.A.

<sup>156</sup> *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

<sup>157</sup> See *supra* text accompanying notes 128–30.

<sup>158</sup> *Peña-Rodriguez*, 137 S. Ct. at 868.

<sup>159</sup> *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied, sub nom.* Florida v. Hurst, 137 S. Ct. 2161 (2017) (discussed *supra* text accompanying notes 119–22).

unanimously that the balance of aggravating and mitigating factors warrant a death sentence. The opinion explained that these rules not only increased reliability with respect to each finding, but also served on a systemwide basis to limit the number of death verdicts returned, thereby serving “to help narrow the class of murderers subject to capital punishment.”<sup>160</sup> Moreover, the unanimity requirement would align Florida with the evolving standard of decency among the states and ensure that its juries were performing their critical role of ensuring that capital sentences reflected the moral consensus of the community.<sup>161</sup> These policy bases demonstrate that the rules of federal constitutional law announced in *Hurst v. State* are “substantive” within the meaning of *Montgomery*.

As in the cases discussed so far, the necessary legal consequence of that conclusion is that, notwithstanding any state law retroactivity doctrines, the courts of Florida must entertain in state post-conviction proceedings claims by prisoners that they were sentenced in violation of the rules announced in *Hurst v. State*. “Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.”<sup>162</sup> To date, however, Florida has indeed refused. Instead of entertaining state post-conviction claims by all prisoners whose death sentences were returned in violation of *Hurst*, it has formulated a retroactivity rule closing the courthouse doors to all Death Row inmates whose direct appeals became final before a specific date in 2002 when a relevant Supreme Court precedent was decided.<sup>163</sup>

Pace Justice Thomas, state retroactivity law is not “a matter about which the Constitution has nothing to say.”<sup>164</sup> What the Constitution says in its Supremacy

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<sup>160</sup> *Hurst v. State*, 202 So. 3d. at 60.

<sup>161</sup> *Id.* at 61–62.

<sup>162</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718, 731–32 (2016).

<sup>163</sup> *See Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016). The relevant precedent is *Ring v. Arizona*, 536 U.S. 584 (2002). For a discussion of these developments, see Hannah L. Gorman & Margot Ravenscroft, *Hurricane Florida: The Hot and Cold Fronts of America’s Most Active Death Row*, 51 COLUM. HUM. RTS. L. REV. 937, 963–64, 975–76 (2020).

In contrast, once the Delaware Supreme Court, reading the requirements of *Hurst v. Florida*, 136 S. Ct. 616 (2016), much as the Florida Supreme Court did, invalidated the state’s death penalty statute in *Rauf v. State*, 145 A.3d 430 (Del. 2016), the state courts replaced all existing death sentences with ones of life imprisonment. *See* Esteban Parra, *Delaware’s Last Two Death Row Inmates Resentenced to Life in Prison*, DELAWARE ONLINE (Mar. 13, 2018, 5:00 PM), <https://www.delawareonline.com/story/news/local/2018/03/13/delawares-last-death-row-inmates-resentenced-life-prison-tuesday/407863002/>.

<sup>164</sup> *Montgomery*, 136 S. Ct. at 750 (Thomas, J., dissenting). This statement could hardly be taken literally even if Justice Thomas were correct in his underlying premise that state post-conviction review processes need not exist at all. There are any number of situations in which a state is not required to offer a benefit but is subject to constitutional constraints if it does. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021–25 (2017); *Rosenberger v.*

Clause is that the state may not enforce in its courts any rule of state law that will frequently and predictably interfere with vindication of a federal right.<sup>165</sup> That was the law long before *Montgomery* and still is.<sup>166</sup> The new question created by *Montgomery* is what federal rights are “substantive” for purposes of its holding.

Returning to that issue, a cluster of representational and autonomy rights of criminal defendants should be considered “substantive” under an appropriate reading of *Montgomery*. For instance, *McCoy v. Louisiana*<sup>167</sup> held that the petitioner’s Sixth Amendment rights had been violated when, over his vociferous objections, his trial counsel conceded to the jury that McCoy was factually, although not legally, guilty of the charges. The rationale for the decision was not limited to considerations of factual accuracy but significantly grounded in furthering “that respect for the individual which is the lifeblood of the law.”<sup>168</sup>

The Court wrote:

Violation of a defendant’s Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called “structural”; when present, such an error is not subject to harmless-error review. *See, e.g., McKaskle*

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Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 828–30 (1995); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 539–41 (1985); *Batson v. Kentucky*, 476 U.S. 79, 91 (1986); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975); *Graham v. Richardson*, 403 U.S. 365, 374 (1971). The Court has made this point quite explicitly about appellate stages of the criminal process. *See Evitts v. Lucey*, 469 U.S. 387, 393, 400–05 (1985). Presumably Justice Thomas would think that the Constitution had something to say about a state retroactivity rule that permitted White prisoners in state post-conviction proceedings but not Black ones to claim the benefits of some favorable legal development.

In this case, Florida’s retroactivity rule suffers from several constitutional defects beyond its inconsistency with the Supremacy Clause encapsulated in the next sentence of text. As more fully described in the unsuccessful Petition for Certiorari, *Kelley v. Florida*, 139 S. Ct. 112 (2018) (No.17-1603) (<https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-1603.html>), Florida’s partial retroactivity rule, whose practical effect is to deny new sentencing trials to a class of defendants who would be least likely to be sentenced to death today, cannot be squared with the requirements of either the Equal Protection Clause, *see, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (applying “strict scrutiny” to state criminal law distinctions bearing on fundamental rights and invalidating sterilization statute because “the law lays an unequal hand on those who have committed intrinsically the same quality of offense”) or the Eighth Amendment, *see, e.g., Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (“[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.”).

<sup>165</sup> *See Felder v. Casey*, 487 U.S. 131, 141 (1988).

<sup>166</sup> *See supra* Part III.C.

<sup>167</sup> *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

<sup>168</sup> *Id.* at 1507 (internal citations omitted). *See State v. Horn*, 251 So. 3d 1069, 1075 (La. 2018) (“*McCoy* is broadly written and focuses on a defendant’s autonomy to choose the objective of his defense.”).

[v. Wiggins,] 465 U.S. 168, 177 [1984] . . . (harmless-error analysis is inapplicable to deprivations of the self-representation right, because “[t]he right is either respected or denied; its deprivation cannot be harmless”); *United States v. Gonzalez-Lopez*, 548 U. S. 140, 150 . . . (2006) (choice of counsel is structural); *Waller v. Georgia*, 467 U. S. 39, 49-50 (1984) (public trial is structural) . . . . An error may be ranked structural, we have explained, “if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest,” such as “the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.”<sup>169</sup>

This suggests the likelihood that as a general matter new federal constitutional rules of criminal law that are “structural” for harmless error purposes are “substantive” for *Montgomery* purposes because the inapplicability of harmless error analysis implies that such rules do not have as their principal concern the likelihood that the contested proceeding reached the correct factual result.<sup>170</sup>

#### VI. THE POTENTIAL OF *MONTGOMERY* ENFORCEMENT IN STATE POST-CONVICTION PROCEEDINGS FOR IMPROVING THE STRUCTURE OF CRIMINAL ADJUDICATION

A necessary consequence of *Montgomery* is that the number of state post-conviction decisions will increase in light of the states’ new Supremacy Clause obligation to hear claims based on new substantive rules of federal constitutional law,<sup>171</sup> both ones originating in the Supreme Court of the United States and ones originating in their own court systems.<sup>172</sup> The broader the definition of “substantive” the more pronounced the effect will be. Enhancing the salience of state post-conviction proceedings in the overall structure of criminal adjudication would be desirable for two reasons.

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<sup>169</sup> *McCoy*, 138 S. Ct. at 1511 (internal citations omitted).

<sup>170</sup> See generally *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (holding that where jury is erroneously instructed on reasonable doubt reversal is automatic without consideration of whether the trial evidence was actually sufficient for conviction under proper instructions); Elizabeth Earle Beske, *Backdoor Balancing and the Consequences of Legal Change*, 94 WASH. L. REV. 645, 687–88 (2019) (listing additional examples).

<sup>171</sup> See *supra* text accompanying note 4.

<sup>172</sup> See *supra* text accompanying notes 55–57.

### A. Enriching Systemwide Dialogue

As noted above,<sup>173</sup> the sidelining of the lower federal courts as expositors of constitutional law in the criminal area has impoverished the usual dialogue among courts that, in accord with our common law tradition, ordinarily enriches constitutional thinking before the Court pronounces a definitive legal rule.<sup>174</sup> To the extent that the voices of state courts are heard more often, the damage will be mitigated.<sup>175</sup>

This is a structural benefit that is independent of whatever particular decisions are reached, including decisions that a certain rule is not “substantive” within the meaning of *Montgomery* or that, if it is, the prisoner is not entitled to prevail. For example, suppose there is a holding by the Supreme Court of the United States or a state supreme court that the federal constitution prohibits jury strikes on the basis of religion. That would be a substantive rule under the framework set forth in Part V.B above.<sup>176</sup> Not surprisingly, I think a court should accept that framework and reach the same conclusion. But legal discourse would be advanced if a court were to write a reasoned explanation in support of some other paradigm or some other conclusion.<sup>177</sup> If, on whatever rationale, the new rule was classified as substantive, then, under *Montgomery*, a state post-conviction court could not invoke state

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<sup>173</sup> See *supra* text accompanying notes 63–65.

<sup>174</sup> See SHAPIRO et al., *supra* note 19, ch. 4.4(b) (discussing benefits of “percolation” of issues through lower courts); Oliver Wendell Holmes, Jr., *Codes and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870) (“It is the merit of the common law that it decides the case first and determines the principle afterwards . . . It is only after a series of determinations on the same subject-matter that it becomes necessary to ‘reconcile the cases,’ as it is called, that is, by a true induction to state the principle which has until then been obscurely felt.”); Harry W. Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443, 445, 462 (1975) (observing that common-law methodology has pervaded American constitutional law from its origins through modern times). During our early national period, the establishment of the legitimacy of judicial review was intertwined with the establishment of the legitimacy of judicial exposition of the law by common law methods. See ERIC M. FREEDMAN, *MAKING HABEAS WORK: A LEGAL HISTORY* 98–101 (2018); see generally Graham Mayeda, *Uncommonly Common: The Nature of Common Law Judgment*, 19 CAN. J.L. & JURIS. 107, 123–24, 131 (2006) (arguing that legitimacy of common law flows from its methodology).

<sup>175</sup> As a theoretical matter this benefit might at some point be outweighed by the costs to the judicial system of having to deal with a burdensome influx of new claims but as a practical matter there is little likelihood of reaching that point. Issues under *Montgomery* arise only after a court has recognized a new substantive constitutional right in the field of criminal law, a fairly rare occurrence.

<sup>176</sup> See *supra* text accompanying note 155.

<sup>177</sup> I agree with Vázquez & Vladeck, *supra* note 7, at 958–59, that *Montgomery* entitles a state prisoner to file a state post-conviction petition asserting that a newly-recognized federal constitutional right is retroactive without any requirement of awaiting a Court decision to that effect. As the discussion *supra* Parts III–V should make clear, the definition of “substantive” is a question of federal constitutional law that a state court is both empowered and required to decide in the first instance.

retroactivity doctrines to foreclose a prisoner's claim that her incarceration followed a trial at which the rule was violated. But the prisoner might still lose on the merits. For example, the post-conviction court might decide that the basis of the challenged strikes of Muslim venire members had not been religion but record-based doubts as to their ability to be impartial in a case where the defendant was accused of dumping a truckload of pork bellies into a mosque.<sup>178</sup> That ruling would both give the prisoner her day in court and contribute to the growth of the law.<sup>179</sup>

### B. *Enhancing State Post-Conviction Processes*

To the extent *Montgomery* results in more and more visible, state post-conviction proceedings, it will augment the states' motivation—already increasing in recent years—to make those proceedings meaningful.

As effective federal habeas corpus review has withered, state post-conviction courts have come under growing pressure to improve the quality of their adjudicatory processes through such mechanisms as the provision of competent counsel and robust discovery rights.<sup>180</sup>

The practical source of this pressure is that the constriction of federal habeas corpus review has increasingly left the state courts as the only realistic opportunity for the merits of post-conviction claims to be heard and injustices corrected.<sup>181</sup>

The doctrinal manifestations of this pressure appear at two levels: first, the structural level and, second, individual case level.<sup>182</sup>

- (1) The structural level. State post-conviction systems must provide due process. Their failure to do so is subject to attack through a federal

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<sup>178</sup> This hypothetical is similar to the actual ruling in *State v. Hodge*, 726 A.2d 531, 549–54 (Conn. 1999) (cited *supra* note 85).

<sup>179</sup> See Rogers, *supra* note 92, at 572–573 (commenting that Court will benefit from previous analyses by state supreme courts when it considers federal constitutional issues).

<sup>180</sup> See Kovarsky, *supra* note 41, at 444–45, 448–50.

<sup>181</sup> See *id.* at 456–60; see also Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 935 (2003) [hereinafter *ABA Guidelines*] (Commentary to Guideline 1.1) (“Because state collateral proceedings may present the last opportunity to present new evidence to challenge the conviction, it is imperative that counsel conduct a searching inquiry to assess whether any mistake may have been made.”). As a matter of disclosure, I serve as Reporter to the *ABA Guidelines*. *Id.* at 915.

<sup>182</sup> See Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After Martinez and Pinholster*, 41 HOFSTRA L. REV. 591, 600 (2013); Shay, *supra* note 64, at 481.

civil rights lawsuit.<sup>183</sup>

- (2) The individual case level. When state prisoners seek federal habeas corpus review of their convictions, the states (A) face the threat that the outcomes of inadequate state post-conviction processes will not survive, and (B) benefit from a promise that if those proceedings have been fair the federal habeas courts will largely defer to their outcomes.

A. Where a state post-conviction system exists, a state prisoner must utilize it as a pre-condition to the grant of federal habeas relief—unless it is unavailable or “ineffective to protect the rights of the applicant.”<sup>184</sup> An example of such a system is one that fails to provide a fair hearing when relevant facts are in dispute.<sup>185</sup>

Similarly, a federal habeas corpus court is required to presume the truth of the facts found by the state courts<sup>186</sup>—unless the petitioner

<sup>183</sup> See *Skinner v. Switzer*, 562 U.S. 521, 529, 532–34 (2011); *Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 70, 73–75 (2009); Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85 (2012).

<sup>184</sup> 28 U.S.C. § 2254(b)(1) (2020). See HERTZ & LIEBMAN, *supra* note 11, § 23.4[a][ii] at 1325 n.22 (discussing provision); Eve Brensike Primus, *Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine*, 116 MICH. L. REV. 75 (2017) (providing detailed roadmap of historical origins and potential litigation future of attacks on state post-conviction processes as structurally inadequate to vindicate federal rights). See also Eve Brensike Primus, *Equitable Gateways: Toward Expanded Federal Habeas Corpus Review of State-Court Criminal Convictions*, 61 ARIZ. L. REV. 291, 307 (2019). See generally *Ex parte Hawk*, 321 U.S. 114, 118 (1944) (“[W]here resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate a federal court should entertain his petition for habeas corpus, else he would be remediless.”) (citations omitted).

<sup>185</sup> See *Smith v. Wyrick*, 693 F.2d 808, 810 (8th Cir. 1982), *cert. denied*, 460 U.S. 1024 (1983). See also Eric M. Freedman, *Fewer Risks, More Benefits: What Governments Gain by Acknowledging the Right to Competent Counsel on State Post-Conviction Review in Capital Cases*, 4 OHIO ST. J. CRIM. L. 183, 189 (2006) (observing that a state post-conviction system that “cannot be effectually employed without the assistance of a competent attorney” should meet § 2254(b)(1)’s description); Eve Brensike Primus, *Effective Trial Counsel After Martinez v. Ryan: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604 (2013) (making similar suggestion in wake of *Martinez v. Ryan*, 566 U.S. 1 (2012)). For an overview of the duties of counsel representing a state post-conviction petitioner, see *ABA Guidelines*, *supra* note 181, at 932–35. These efforts to improve the quality of state post-conviction representation are taking place against the backdrop of a federal habeas corpus jurisprudence that very frequently refuses to reach the merits of constitutional claims because of missteps by whatever counsel petitioners may have had during state post-conviction. More often than not, “[w]hether an inmate obtains merits review is hugely sensitive to differences in postconviction representation and barely sensitive at all to the quality of the underlying claim.” Lee Kovarsky, *The Habeas Optimist*, 81 U. CHI. L. REV. DIALOGUE 101, 121 (2014).

<sup>186</sup> See 28 U.S.C.A. § 2254(e)(1) (2020).

has not been given a full and fair opportunity to develop the claim there.<sup>187</sup> This exception, long embodied in the statutory<sup>188</sup> and judge-made<sup>189</sup> rules governing federal habeas corpus review, flows from the very definition of “habeas corpus”<sup>190</sup> and ultimately rests

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<sup>187</sup> See 1 HERTZ & LIEBMAN, *supra* note 11, ch. 7 (discussing this exception). See generally William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 441–42 (1961) (suggesting that to the extent states increased the robustness of their post-conviction review processes, “intervention by any federal court . . . would become unnecessary.”).

<sup>188</sup> See *Townsend v. Sain*, 372 U.S. 293, 312 (1963) (holding state determinations of fact not binding in federal habeas corpus proceeding if not based on “full and fair” factfinding procedures). See also *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992) (noting that the state “must afford the petitioner a full and fair hearing on his federal claim” or else federal rehearing of the facts is required).

The Court discussed this longstanding rule in *Jefferson v. Upton*, 560 U.S. 284, 292–94 (2010), and ordered a remand for consideration of its applicability. The eventual result was that the Court of Appeals, reviewing a District Court hearing into the procedures employed by the state postconviction court, “agree[d] with the district court that the factual record compels the conclusion that Jefferson did not receive a full and fair hearing in his state habeas proceeding[,]” and held “that the state court’s factual findings were not entitled to a presumption of correctness.” See *Jefferson v. GDCP Warden*, 941 F.3d 452, 476 (11th Cir. 2019). Hence, on federal habeas corpus petitioner needed only prove his case by a preponderance of the evidence, *see id.* at 473.

For a complete discussion of the current statutory situation, see Justin F. Marceau, *Don’t Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications*, 62 HASTINGS L.J. 1, 57–64 (2011).

<sup>189</sup> See *Moore v. Dempsey*, 261 U.S. 86, 92 (1923) (holding that state post-conviction processes were not “sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself”). This ruling seems to have reflected an acceptance of petitioner’s argument that the facts had been determined at the state level on a motion for a new trial heard by the very judge whose conduct was in question and whose decision could only be reviewed for legal error. See FREEDMAN, *supra* note 62, at 80–81 (quoting Moore’s brief); *see also id.* at 87–88, 91, 199 n.7, 200 n. 10 (discussing predecessor cases of *Frank v. Magnum*, 237 U.S. 309 (1915) and *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807)).

<sup>190</sup> See *Boumediene v. Bush*, 553 U.S. 723, 773–92 (2008) (holding that power to conduct inquiry into law and facts after assessing adequacy of prior proceedings is, along with power to order release, the core of habeas); FREEDMAN, *supra* note 174, at 9–10, 20, 24–26 (discussing importance of factfinding in habeas proceedings through the centuries); Eric M. Freedman, *Habeas Corpus in Three Dimensions—Dimension Three: Habeas Corpus as an Instrument of Checks and Balances*, 8 NE. U. L.J. 251, 303 n.264 (2016) (endorsing views of scholars who have noted that duty of factfinding means that “in adjudicating habeas cases courts must employ procedural mechanisms, e.g., discovery, that are sufficient for this purpose, regardless of whether those procedures existed at common law, are made available by statute, or conform to the wishes of the jailers.”). See generally James H. Brewer, *Suspension Clause Interpretation and the Development of Postconviction Remedies in Washington and Oregon*, 54 WILLAMETTE L. REV. 495, 527 (2018) (considering applicability of *Boumediene* to interpretation of state constitutional prohibitions on suspension of writ).

upon the Constitution.<sup>191</sup>

B. On the other hand, AEDPA contains various limitations on the federal courts' authority to grant the writ to state prisoners, including the provision of 28 U.S.C. § 2254(d)(1) that "with respect to any claim that was adjudicated on the merits in State court proceedings"<sup>192</sup> the writ shall not be granted unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."<sup>193</sup> Construing this provision as a threshold barrier to fact-finding by the District Court, *Cullen v. Pinholster* held that in determining whether petitioner has met AEDPA's legal standard the federal habeas court must confine itself at the outset to a consideration of the record that the state courts had before them.<sup>194</sup> Thus if the states conform to the requirements discussed in Paragraph 2 (A) and "create robust processes for post-conviction review, the federal courts will under *Pinholster* treat their individual outcomes with greater respect than before."<sup>195</sup> The prospect of an uptick in the number of state post-conviction proceedings as a result of *Montgomery* is yet another reason why states should respond positively to the converging pressures to improve the quality of those proceedings, an outcome that would benefit the whole criminal justice system.

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<sup>191</sup> See *Panetti v. Quarterman*, 551 U.S. 930, 948–54 (2007) (refusing to defer to state courts' factual finding that petitioner was mentally competent because their fact-finding process was inadequate); *Pennsylvania ex rel Herman v. Claudy*, 350 U.S. 116, 118–19, 123 (1956) (reversing state Supreme Court for summarily denying habeas petition on merits simply based on respondent's denial and without providing evidentiary hearing); Liebman & Ryan, *supra* note 10, at 835–36 (discussing Article III); Marceau, *supra* note 188, at 7 (discussing due process); Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. 953, 992–99 (2012) (discussing Suspension Clause, U.S. Const. art. I, § 9, cl. 2).

<sup>192</sup> 28 U.S.C.A. § 2254(d)(1) (1996). If this pre-condition does not apply, neither does the remainder of the section. See *Cullen v. Pinholster*, 563 U.S. 170, 180–83, 187 (2011); *Porter v. McCollum*, 558 U.S. 30, 39 (2009); *Cone v. Bell*, 556 U.S. 449, 472 (2009); *Rompilla v. Beard*, 545 U.S. 374, 380 (2005); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Rodney v. Filson*, 916 F.3d 1254, 1261–62 (9th Cir. 2019).

<sup>193</sup> 28 U.S.C. § 2254(d)(1) (2017).

<sup>194</sup> See *Pinholster*, 563 U.S. at 183.

<sup>195</sup> Freedman, *supra* note 182, at 600. See generally Lee Kovarsky, *Preclusion and Criminal Judgment*, 92 NOTRE DAME L. REV. 637, 671 (2016) (observing that in cases where *Pinholster* applies its effect is "to form an almost insurmountable § 2254(d) hurdle.").

## VII. CONCLUSION

Formulating an appropriate definition of “substantive” for *Montgomery* purposes is not just a narrow doctrinal project. The case arose in the context of a noxious current problem in criminal law adjudication, namely the set of issues that has arisen as the Justices have struggled over the forty years since *Teague* to create sound rules for administering post-conviction attacks on state convictions. If read appropriately, *Montgomery* represents an opportunity to advance towards a solution by employing some old but recently-unmined resources—legal resources from a vein of Supremacy Clause law that might enable the reframing of thinking about the retroactivity of new rules of federal law, and practical resources from reinvigorated decision making by state post-conviction courts.

In the interests of making modest but real improvements in the quality of our criminal law, lawyers, legislators, academics, judges, and all individuals concerned about justice should take full advantage of every opportunity to secure adoption of the proposal of this article: “Substantive” new rules of federal law under *Montgomery* include all those whose policy underpinnings extend beyond enhancing the factual accuracy of particular decisions.