# The Scope of the Constitutional Right to Collateral Relief in State Court—A Reply

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## I. INTRODUCTION

In *The Constitutional Right to Collateral Post-Conviction Review*,[1] Professor Stephen Vladeck and I argued that the Supreme Court in *Montgomery v. Louisiana*[2] recognized a constitutional right to collateral relief in state court for state prisoners incarcerated in contravention of a new substantive rule of federal law. In his new article, *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*,[3] Professor Eric M. Freedman agrees that *Montgomery* recognized a constitutional right to collateral relief in state courts and argues that this right is broader in two respects than Professor Vladeck and I argued. This response focuses on an aspect of Professor Freedman's thesis that departs from the position laid out in the article by Professor Vladeck and me and another aspect of his thesis that we did not expressly address. First, while Professor Vladeck and I argued that the right to post-conviction review accrues when the U.S. Supreme Court recognizes a new substantive rule,[4] Professor Freedman argues that the right also accrues when the highest court of a state recognizes a new substantive right under the U.S. Constitution.[5] Second, Professor Freedman argues that the category of a substantive right for *Montgomery* purposes is broader than the category of a substantive right for purposes of *Teague v. Lane*.[6]

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1 Carlos M. Vázquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 VA. L. REV. 905 (2017).

2 Montgomery v. Louisiana, 136 S. Ct. 718, 732 (2016).

3 Eric M. Freedman, *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*, 18 OH. ST. J. CR. L. 207, 207–08 (2021).

4 *See* Vázquez & Vladeck, *supra* note 1, at 952.

5 Freedman, *supra* note 3, at 227.

6 Teague v. Lane., 489 U.S. 288, 289–91 (1989) (plurality opinion); *see* Freedman, *supra* note 3, at 207–08.

## II. WHEN DOES THE RIGHT ACCRUE?

The Supreme Court's holding in *Teague* that new substantive rules are applicable retroactively came in the context of a federal habeas corpus petition. The Court held that federal habeas relief was generally not available if the petitioner was basing her claim on what would, if accepted by the court, constitute a new rule of law.[7] Because the petitioner seeking recognition of a new rule would not be entitled to the benefit of the rule if the court recognized it, the Court held that the federal habeas court should not entertain the claim, as any holding recognizing the claim would be dictum.[8] The Court recognized two exceptions to this non-retroactivity rule, however. First, the Court recognized that new rules would be retroactively applicable, and hence enforceable in federal habeas cases, if the rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[9] The Court later expanded this category to include "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[10] This first category of retroactively-applicable new rules is generally understood to consist of rules that are "substantive" in nature. The second category of retroactively applicable new rules consists of "watershed" procedural rules, which the Court defined as "those new procedures without which the likelihood of an accurate conviction is seriously diminished."[11] The Court doubted that many rules falling into this category had yet to emerge,[12] and the Court has yet to find one. *Montgomery* involved a new "substantive" rule, and Professor Freedman's article focuses on new rules falling in this category.

Under *Teague*, the federal habeas petitioner is entitled to relief based on a new substantive rule even if that rule has not yet been recognized by any other court. In other words, the federal habeas petitioner can ask the habeas court to recognize a new substantive rule for the first time in her case. Congress in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[13] subsequently limited the power of the federal courts to grant habeas relief to state prisoners.

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[7] *Teague*, 489 U.S. at 305–308.

[8] *Id.* at 316.

[9] *Id.* at 307 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)).

[10] Penry v. Lynaugh, 492 U.S. 302, 330 (1989).

[11] *Teague*, 489 U.S. at 313.

[12] *Id.*

[13] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–32, 110 Stat. 1214.

Most relevantly, AEDPA provides that a state prisoner whose claim was adjudicated on the merits in state court may not obtain collateral relief in the federal courts unless the state court's "adjudication of the claim . . . 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."[14] This provision calls into question whether federal habeas courts can grant habeas relief on the basis of new rules at all. The Court has indicated that the question remains open.[15] But this limitation on the federal courts' habeas power applies only if the prisoner's claim was "adjudicated on the merits" in state court.[16] If the state prisoner's claim was not adjudicated on the merits in state court, the *Teague* regime remains operative, and the prisoner may ask the federal habeas court to recognize the new substantive rule for the first time in the context of the habeas petition.[17]

In *Montgomery*, the Court held that state courts are required to entertain claims based on new substantive rules, at least if the state courts are open to collateral claims challenging convictions or sentences as unlawful.[18] The petitioner in *Montgomery* relied on a new rule that had been recognized in a prior decision of the U.S. Supreme Court. In *Miller v. Alabama*, the Court had held that "mandatory life-without-parole sentences for juveniles violate[s] the Eighth Amendment."[19] In *Montgomery*, the Court was asked to address whether *Miller* should apply retroactively. The Court answered that question in the affirmative,[20] and Professor Vladeck and I argued that the Court, in the process, found that state courts were constitutionally obligated to entertain claims for collateral relief on the basis of new substantive rules of federal constitutional law.[21]

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[14] 28 U.S.C. § 2254(d)(1) (2012).

[15] *See* Greene v. Fisher, 565 U.S. 34, 39 n.* (2011).

[16] 28 U.S.C. § 2254(d)(1) (2012).

[17] If the prisoner raised her claim at trial, the state court will presumably have adjudicated it. If the prisoner did not raise her claim at trial or on direct appeals, the claim may be found to have been procedurally defaulted. But the Court has recognized that procedural defaults may be excused if the prisoner makes a convincing case that she is actually innocent. *See* Murray v. Carrier, 477 U.S. 478, 496 (1986). It is arguable that a prisoner who was convicted of a crime for conduct later found to be constitutionally protected is actually innocent of any offense and is thus entitled to waiver of procedural default. *See generally* Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417 (2018).

[18] Montgomery v. Louisiana, 136 S. Ct. 718, 732 (2016).

[19] Miller v. Alabama, 567 U.S. 460, 470 (2012).

[20] *Montgomery*, 136 S. Ct. at 732.

[21] Vázquez & Vladeck, *supra* note 1, at 937–38.

Professor Vladeck and I considered and rejected the possibility that *Montgomery* gives state prisoners the right to seek collateral relief on the basis of new rules that had not yet been recognized by another court (as in *Teague*). We noted that, in any such case, the state prisoner will have had the opportunity to raise her substantive claim at her trial and on direct appeals. If she raised the claim, the state courts will have already considered the claim; if she did not raise it, the claim will have been procedurally defaulted.[22] We thought it implausible that the U.S. Constitution gives state prisoners the right to raise the same claim multiple times.[23] Thus, we concluded that the state prisoner's right to collateral relief in the state courts was a right to raise a new substantive claim that had been authoritatively recognized *by another court*. Based on this line of reasoning, we concluded that the right to collateral relief recognized in *Montgomery* accrues when the U.S. Supreme Court recognizes a new substantive rule of federal constitutional law.[24]

Professor Freedman agrees that the right to collateral relief in state court accrues when *another court* has recognized the new substantive rule of federal law. But Professor Freedman argues that the right accrues not only when the U.S. Supreme Court recognizes the right, but also when the right is recognized by the state's highest court.[25] (The right accrues in the latter case only for prisoners convicted in the state whose highest court recognized the right.) Professor Freedman makes a plausible case for this view, but his claim invites some observations.

Professor Freedman's argument that the right to collateral relief should accrue when the state's highest court recognizes a new substantive rule is based in part on the notion that state courts are as obligated to enforce federal law as is the U.S. Supreme Court.[26] But this argument proves too much, as all federal and state courts are equally required to give effect to federal constitutional law. Under this theory, a right to state collateral review would accrue whenever a state trial or intermediate appellate court recognizes the new constitutional rule. It would also suggest that recognition of a new substantive rule by a federal trial or intermediate appellate court would trigger the right to state collateral review.

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[22] *See* Vázquez & Vladeck, *supra* note 1, at 915.

[23] We distinguished *Teague* on the ground that it involved the right of a state prisoner to present her claim to a *federal* court for the first time. A state prisoner might justifiably be given a (statutory) right to present her claim to a federal district court at least once. *See* Vázquez & Vladeck, supra note 1, at 939–40.

[24] *See id.* at 954.

[25] Freedman, *supra* note 3, at 227.

[26] *See id.* at 211 ("As the canonical *Martin v. Hunter's Lessee* 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.").

If Professor Freedman's position is that the right to collateral review in state court is limited to cases in which the new substantive rule was recognized by *the highest* state court (in addition to the U.S. Supreme Court), Professor Freedman needs a limiting principle. His article suggests that the limiting principle is the authoritative nature of the decisions of the state's highest courts within the state. Professor Freedman writes that, "because [a rule of federal constitutional law] is in that state as fully an authoritative construction of the Constitution as is a decision of the United States Supreme Court, the courts of that state are required under the Supremacy Clause to give their new rules the retroactive effect mandated by *Montgomery*."[27]

If the constitutional right to collateral relief turns on the extent to which the decisions by the rendering court are authoritative, then the constitutional right turns on a matter of state law. States can in theory have different rules of stare decisis. Indeed, the legal system of Louisiana (the state involved in *Montgomery*) is based on the civil law, which traditionally has given less weight to precedent than common law systems have.[28] This is not necessarily fatal to Professor Freedman' argument, as some constitutional provisions do offer protection to state-created rights.[29] But it does complicate the analysis.

Perhaps more importantly, if the decision's authoritativeness within a geographic subsection of the nation is the limiting principle, Professor Freedman's argument would appear to require the conclusion that a decision by an intermediate state appellate court triggers the right to collateral review for state prisoners within the geographic district over which the appellate court exercises jurisdiction, at least if the court's decision is subject only to discretionary review and the state's highest court denies review.[30] (It would also seem to require the conclusion that federal prisoners within a given circuit have a right to collateral relief based on the recognition of a new substantive rule by a federal appellate court.) Professor Freedman does not argue that the right to collateral review is triggered by the

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[27] *Id.* at 227.

[28] *See* Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in A Common Law Nation*, 65 LA. L. REV. 775, 787 (2005) (noting that "in legal systems based on the civil law tradition, cases are not formally recognized as a source of law, and the doctrine of stare decisis is not recognized."). Mary Garvey Algero shows that Louisiana "value[s] precedent in such a way that it is extremely influential, but not always binding on the courts." *Id.* at 775.

[29] For example, the Contracts Clause protects against the impairment of contracts, yet contracts are usually binding as a matter of state law. *E.g.*, Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938).

[30] In most states, intermediate appellate courts exercise jurisdiction over appeals within a geographic district. *See* NICOLE L. WATERS ET AL., BUREAU OF JUST. STATS., CRIM. APPEALS IN ST. CTS., NCJ 248874, at 2–3 (2015), https://www.bjs.gov/content/pub/pdf/casc.pdf. And in most states, the jurisdiction of the highest state court is discretionary. *Id.* at 3.

decisions of an intermediate appellate court, but he does not explain why the decisions of the highest state court trigger the right to collateral review within the state, but the decisions of an intermediate appellate court do not trigger the right within their geographic districts.

Professor Freedman might respond to this objection by broadening his argument to encompass decisions by intermediate appellate courts, but this would create some significant practical difficulties. As Professor Vladeck and I discussed in our article, states are free to apply reasonable procedural restrictions on state prisoners' right to state collateral review. For example, they can subject a *Montgomery* claim to the statute of limitations they generally apply to state collateral claims. But, we argued, the statute of limitations must begin to run anew when the right to collateral relief accrues.[31] Let's say a state imposes a statute of limitations of one year. Under our view that the right accrues when the U.S. Supreme Court recognizes the new substantive rule, the statute of limitations would begin to run anew at the time of the Supreme Court's decision. If Professor Freedman is right that the federal constitutional right to state collateral review accrues when a state's highest court recognizes a new substantive rule under the federal Constitution, the statute of limitations would begin to run at that point (or perhaps when the U.S. Supreme Court denies certiorari, or when the time for seeking such review expires). If the U.S. Supreme Court denies review, prisoners in the state would be entitled to collateral review for one year as of that point, but prisoners in other states would not be. If the U.S. Supreme Court later grants review of the issue in another case (presumably in a case from another state denying relief) and recognizes the new rule, prisoners in other states would have a right to review of their convictions (for whatever length of time permitted by those states' statutes of limitations) as of that date. This regime would be reasonably administrable. But if intermediate state court decisions triggered the right to collateral relief, then prisoners from different districts would be entitled to different levels of relief. And decisions from different appellate courts would trigger the statute of limitations for such prisoners at different times. Moreover, since prisoners seek collateral relief against the warden of the prison in which they are detained, the divergent rights to collateral relief would depend on the decisions of appellate courts in the districts in which they are detained rather than where they were tried. These are just the complications that would arise from state statutes of limitations. Other procedural rules could raise practical difficulties of their own.

Professor Freedman might cite these practical difficulties in support of a prudential argument for limiting the right to collateral relief to cases in which the prisoner is being held in contravention of a new substantive rule announced by the state's highest court. But the systemic effects of Freedman's proposed rule, even as so limited, are likely to be counterproductive. First, as noted, the decision of the state's highest court would trigger a right to collateral relief only if the U.S.

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[31] *See* Vázquez &Vladeck, *supra* note 1, at 956–57.

Supreme Court denies certiorari. If the U.S. Supreme Court grants certiorari, then either it will reverse (thus removing the basis for the right to collateral relief) or it will affirm (thus itself becoming the basis of the right to collateral relief). Professor Freedman's argument that the decisions of the highest state court should be recognized as an alternative trigger for the right to collateral relief would have practical significance only for the period between the time the highest state court renders an unreviewed decision recognizing a new substantive rule and the time the U.S. Supreme Court grants certiorari on this issue in a later case. If the Court in the later case rules that the right recognized by the state's highest court does not exist, then the prisoners in that state will no longer be entitled to collateral relief on the basis of that rule. In the interim, however, some number of state prisoners will have been released on the basis of this now-rejected rule.

The prospect that state prisoners will be "erroneously" released on the basis of a new rule recognized by a state's highest court is not, by itself, a reason to reject Professor Freedman's argument.[32] After all, the same problem would exist if the U.S. Supreme Court decides that a substantive rule exists and later reverses itself. But the likelihood that the U.S. Supreme Court would later reverse its own decision recognizing a new substantive rule is much smaller than the likelihood that it would reverse such a decision by a state's highest court, particularly if another state's highest court has come out the other way (as would presumably be the case if the Court has granted certiorari). More importantly, the possibility that state prisoners will be "erroneously" released on the basis of a decision of the highest court of a state in the interim is very likely to be a decisive reason for the U.S. Supreme Court to grant certiorari in the earlier case recognizing the new substantive rule. Professor Freedman has given several examples of decisions by the highest court of a state recognizing new substantive rules that the U.S. Supreme Court has allowed to percolate before ultimately granting certiorari on the issue.[33] He cites as an advantage of his proposed regime that it would permit state courts to be part of the conversation concerning the recognition of new substantive rules. State courts' participation in that conversation would, according to Professor Freedman, "enrich[] and improve[] the quality of judicial decision-making," and "benefit the justice system." [34] But the state decisions that the Supreme Court let stand for a period of time were rendered when such state decisions were not thought to trigger a right to collateral relief as a matter of federal law. If state

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[32] The release would be erroneous only in retrospect. At the time the decision was rendered, it was, by hypothesis, plausible enough that the Supreme Court denied certiorari.

[33] Note, however, that these decisions involved "substantive" rules in the broader sense proposed by Professor Freedman, as distinguished from the traditional sense. He cites, for example, several state supreme court cases holding that where two people control a physical space, one could not give consent to a search of the space over the protest of the other. *See* Freedman, *supra* note 3, at 232. The right found in those cases would not be "substantive" under the traditional definition.

[34] *See id*. at 222.

decisions recognizing new substantive rules of substantive law are recognized to give rise to a federal right to collateral relief in the state courts, as Professor Freedman argues, the likelihood that the U.S. Supreme Court would leave the decision unreviewed would decrease substantially.[35] If so, then Professor Freedman's proposal might wind up being self-defeating.

## III. PROFESSOR FREEDMAN'S BROADER INTERPRETATION OF A "SUBSTANTIVE" RIGHT

Professor Freedman also advances a far-reaching argument regarding the scope of the category of "substantive" claims to which the right to collateral relief recognized in *Montgomery* extends. "Substantive' rules under *Montgomery*," Freedman argues, "include all those whose policy underpinnings extend beyond enhancing the factual accuracy of particular decisions."[36]Thus, this category would cover a broader range of new constitutional rules than would qualify as substantive for *Teague* purposes. A rule would be substantive not just when it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'"[37] or when it "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense,"[38] but also, for example, when it imposes a constitutional requirement in part in order to serve broader societal goals. As an example, he cites the rule of *Batson v. Kentucky*,[39] which was designed in part to serve the societal goal of strengthening "public confidence in the administration of justice."[40] Also substantive under Professor Freedman's standard would be claims under the Fourth Amendment exclusionary rule because such rules serve to deter police misconduct.[41] On the other hand,

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[35] It is true that decisions by a state's highest court recognizing a new substantive federal right could also be the basis of collateral review if the state recognizes them as a basis for collateral review as a matter of state law, as they may do under *Danforth v. Minnesota*, 552 U.S. 264, 275 (2008). Additionally, such a decision will be applied by the lower courts of the state at trial and on direct review, thus resulting in possibly "erroneous" dismissals of indictments. Avoiding this possibility would also presumably incline the U.S. Supreme Court not to leave the decision unreviewed. If so, acceptance of Professor Freedman's argument might not result in fewer grants of certiorari than the current regime. But it is possible that the Court would perceive a greater responsibility to avoid the possibility of "erroneous" grants of relief (a) of persons already convicted (b) on the basis of a federally-required right to collateral relief.

[36] Freedman, *supra* note 3, at 208.

[37] Teague v. Lane, 489 U.S. 288, 307 (1989) (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)).

[38] Penry v. Lynaugh, 492 U.S. 302, 330 (1989).

[39] Baston v. Kentucky, 476 U.S. 79 (1986).

[40] Freedman, *supra* note 3, at 238 n.151 (quoting Allen v. Hardy, 478 U.S. 255, 259 (1986)).

[41] Freedman, *supra* note 3, at 236–37.

claims under the Confrontation Clause would not be substantive because "the fundamental public policy behind [a new Confrontation Clause rule] would be the enhancement of factual accuracy in the individual case."[42]

In the *Teague* context, the Court's recognition that continuing to detain prisoners after the conduct for which they were convicted has been definitively found to be constitutionally protected appears to be based on the injustice of detaining the innocent.[43] The Court's recognition that someone cannot continue to be subjected to a sentence after the Court has definitively held that she is ineligible for that sentence would appear to be based on similar concerns about the injustice of detaining someone who we might say is legally innocent because "no valid criminal statute . . . supplied the basis for [her] sentence."[44] The Court in *Teague* drew a distinction between this form of unconstitutionality and constitutional flaws in the process that led to the conviction. The latter flaws do not necessarily mean that the prisoner's continued detention is unlawful. For the latter category of flaws, the court in *Teague* recognized that continued detention would be unlawful if the conviction contravened *some* constitutional rules. Even for this category, however, the court focused on the likelihood that the constitutional flaw would result in the continued detention of the innocent.[45] (As noted, the Court predicted that there would be few new procedural rules falling into this category.) Professor Freedman's category of substantive rules encompasses rules having little bearing on innocence. Indeed, his category encompasses new constitutional rules that the Court has found not to be enforceable on federal habeas even under *old* rules—precisely because the rules have little bearing on the prisoner's innocence.[46]

Professor Freedman is correct to note that the categories of substantive and procedural are not platonic ideals. The meaning of these terms can depend on the reasons for which we are drawing the distinction.[47] Professor Freedman argues that a different approach to defining "substantive" for *Montgomery* purposes is

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[42] *Id.* at 133. However, even the Confrontation Clause might be said to promote policies in addition to truth finding. For example, the Confrontation Clause also gives a defendant the psychic satisfaction of confronting her accusers. Indeed, enhancing factual accuracy itself advances the broader goal of strengthening public confidence in the administration of justice.

[43] *See generally* Litman, *supra* note 17.

[44] *See generally* Litman, *supra* note 17, at 419.

[45] Teague v. Lane, 489 U.S. 288, 313 (1989) (noting that only some procedures are "central to an accurate determination of innocence or guilt."); *id.* (defining as "watershed rules" those "new procedures without which the likelihood of an accurate conviction is seriously diminished.").

[46] *E.g.*, Stone v. Powell, 428 U.S. 465, 489–90 (1976) ("The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding.").

[47] Freedman, *supra* note 3, at 219–20.

warranted because the *Montgomery* holding was based on the Supremacy Clause, whereas *Teague* was based on the federal habeas statutes.[48] "The principle guiding the formulation of Supremacy Clause doctrine," Professor Freedman argues, "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."[49]

But here again, Professor Freedman's argument proves too much, as it would seem to support retroactive application of even purely procedural rights. The Supremacy Clause requires the states to comply with federal laws that are procedural in nature as well as those that are substantive. For example, as Professor Freedman recognizes, the Court in *Felder v. Casey* relied on the Supremacy Clause in holding that states may not apply their notice-of-claim statutes to claims under 28 U.S.C. §1983 because of the important federal interest in the vindication of §1983 rights. "[U]nder the Supremacy Clause," the Court held, the state notice-of-claim statute "must yield to the federal interest."[50] If the Supremacy Clause is the basis for determining what sorts of claims trigger the constitutional right to collateral relief in state court, it is unclear why claims under the Confrontation Clause would not qualify.

Moreover, although the Supreme Court in *Montgomery* relied on the Supremacy Clause in holding that the obligation to afford collateral relief for new substantive rules of law was binding on the states, it did not rely on the Supremacy Clause in defining the underlying right that collateral relief enforces.[51] Collateral relief is the remedy that gives effect to a right not to be subjected to continued detention. If there is a right not to be subjected to continued detention, the Supremacy Clause requires that the right be enforceable in the courts. The Court in *Montgomery* accordingly relied on the Supremacy Clause in concluding that the prisoner had a right to collateral relief in state court. But the remedial right to collateral relief presupposes a right not to be subjected to continued detention having its sources elsewhere.

In discussing the basis of the right of prisoners not to be detained in contravention of new substantive rules, the Court made clear that the right is grounded in the Constitution rather than the federal habeas statute.[52] But it did not specify which provision of the Constitution grounds this right. In our article,

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[48] *Id.* at 208.

[49] *Id.* at 236.

[50] Felder v. Casey, 487 U.S. 131, 151 (1988). *See* Freedman, supra note 3, at 224.

[51] Montgomery v. Louisiana, 136 S. Ct. 718, 732 (2016). The Supremacy Clause is not mentioned in that part of the opinion (Part III) discussing whether the rule first announced in *Miller v. Alabama* is substantive.

[52] *Id.* at 729 ("The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.").

Professor Vladeck and I expressed the view that the right not to be subjected to continued detention "rests at bottom on the Court's understanding of the nature of the role of the federal courts in interpreting constitutional or statutory provisions addressing primary conduct."[53] We thought that the right reflected the Court's view that, when a federal court interprets a statute or constitutional provision, it is stating what the provision has always meant, not articulating a new constitutional or statutory rule operating only prospectively. Thus, a prisoner being detained for conduct that the court has now determined is constitutionally protected has always been detained in the absence of a violation of law. (We made this point in the course of explaining our conclusion that state prisoners do not necessarily have a right not to be detained for conduct that a *state* court has subsequently held is protected by the *state* constitution. State courts may well have the power under state law to render purely prospective interpretations of the state constitution.)[54] If so, then the right not to be subjected to continued detention rests on Article III of the Constitution, which vests the federal judicial power in the federal courts and presumably tells us that federal courts interpret rather than make the law.[55]

But this is at best a partial source for the right not to be subjected to continued detention when the conviction contravenes a new substantive rule of law, as it does not explain why the right does not extend to convictions that contravene new rules of procedural law. If a federal court's interpretation of federal law tells us what that law has always meant, then why isn't a prisoner's continued detention unlawful when his conviction was obtained through procedures that we now know to have always been unconstitutional? The Court has not offered a complete explanation, and I cannot develop one here. But it does appear that the Court has concluded that a detention is not unconstitutional if the procedures were flawed, even if flawed on constitutional grounds, unless the flaws are very likely to have resulted in the detention of someone who is innocent. (Hence the exception for "watershed" procedural rules "without which the likelihood of an accurate conviction is seriously diminished.")[56] If so, then *Teague* and *Montgomery* both rest on the notion that it is unconstitutional to detain the innocent—a right that

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[53] Vázquez & Vladeck, *supra* note 1, at 947.

[54] *Id.* at 948.

[55] I realize that the distinction between interpreting and making law is highly contested, and that this explanation of *Teague* is in tension with the terminology the Court itself uses in this context, which refers to "new" rules of constitutional law. Nevertheless, I think this is the most convincing explanation of the first *Teague* exception. *Cf.* Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring) ("If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all . . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.").

[56] *Teague*, 489 U.S. at 313.

presumably has its home in the Due Process Clause.[57]

Whatever the basis for concluding that it is unconstitutional to continue to detain someone convicted for conduct now known to be constitutionally protected, but not someone whose trial was infected with (most) procedural flaws of a constitutional nature, I doubt that the Supremacy Clause has much to do with the distinction. I do not doubt that the Supremacy Clause seeks to "vindicat[e] federal public policy goals by insuring that states do not act in ways that frequently and predictably defeat a federal right,"[58] but I do not think the Clause has a role to play in defining the scope of the right implicated in *Montgomery*—the right not to be subjected to continued detention.

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Even if the constitutionally required right to collateral relief recognized in *Montgomery* is triggered only by recognition of a new rule by the U.S. Supreme Court, the states are still free to decide, as a matter of state law, that prisoners have a right to collateral relief from continued incarceration that contravenes new rules of federal constitutional law recognized by the state's highest court. And even if the constitutionally-required remedy extends only to the narrower class of "substantive" rules contemplated by *Teague,* states are free to recognize, as a matter of state law, a collateral remedy for a broader class of new federal rules. *Danforth v. Minnesota* stands for the proposition that states can extend a remedy for violations of federal constitutional rights beyond the minimum required by federal law.[59] The Court in *Danforth* applied that principle to procedural rules that are not retroactive under *Teague*; it held that states are free to give retroactive effect to such decisions by the U.S. Supreme Court, even if federal law does not itself require such retroactive effect.[60] *A fortiori*, states are free to give retroactive effect to new substantive decisions rendered by the highest state court even if federal law does not require that such decisions be given retroactive effect. Indeed, in the absence of a contrary indication in state law, it may make sense to presume that, within a given state, recognition of new substantive decisions of federal law by the highest state court do give rise to a right to collateral relief.[61] This state-law

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[57] *But cf.* Herrera v. Collins, 506 U.S. 390, 407 n.6 (1993) (leaving open the question of whether it is unconstitutional to continue to detain—or even execute—someone who can convincingly prove her innocence).

[58] Freedman, *supra* note 3, at 236.

[59] Danforth v. Minnesota, 552 U.S. 264, 275 (2008) ("Neither *Linkletter* nor *Teague* explicitly or implicitly constrained the authority of the States to provide remedies for a broader range of constitutional violations than are redressable on federal habeas.").

[60] *Id.* at 277.

[61] *See supra* note 3.

presumption would achieve the same benefits as would accrue from acceptance of Professor Freedman's proposal. But, if Professor Vladeck and I are right, states can overcome that presumption by clearly stating that new substantive decisions by state supreme courts do not trigger a right to collateral review. That is because, if we are right, there is no constitutionally compelled right to collateral relief in state court on the basis of a broader category of "substantive" claim than recognized in *Teague* and *Penry*, nor for new substantive rules of federal constitutional law recognized by a state's highest court but not yet recognized by the U.S. Supreme Court.