Montgomery and "Substantive" Rights Enforceable Retroactively in State Post-Conviction Proceedings: A Brief Reply to Professor Vázquez

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I thank Professor Vázquez for his truly valuable response to my article proposing a definition of those newly-recognized "substantive" federal constitutional rights that under *Montgomery v. Louisiana*[1] state courts must recognize retroactively in their post-conviction proceedings.[2]

Having identified (I) several practical issues and (II) one doctrinal issue that I left unaddressed, he has then gone on in most cases to suggest possible resolutions of them.

This reply is so short because in large measure I agree with his points. Rather than undermining my central thesis, I believe that they helpfully fill several gaps in my original structure and indicate how courts and scholars might address any that remain.

I. PRACTICALITIES

On the practical front, Professor Vázquez notes that in arguing that the right to the benefits of *Montgomery* should be triggered by the recognition of a new "substantive" constitutional right by the decision of a state's highest court, I did not consider the possibility that the same argument would logically but impractically apply to new constitutional law decisions of state intermediate appellate courts, nor with how to deal with statute of limitations questions that may arise if a state court recognizes a new rule before the Supreme Court does. As he also notes similar questions arise now, and various pragmatic solutions, including the judicious use of stays pending certiorari, are available to deal with them.

More substantively, he suggests that if the recognition of a new federal constitutional right by a state supreme court (as opposed to the U.S. Supreme Court) triggers a state's obligation to permit a state collateral attack on the new

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

[2] *See* Carlos M. Vázquez, *The Scope of the Constitutional Right to Collateral Relief in State Court*, 18.2 OHIO ST. J. OF CRIM. L. 249 (2021) (responding to 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*, 18.2 OHIO ST. J. OF CRIM. L. 207 (2021)).

rule, the incentive of the Supreme Court to grant certiorari in such cases will be increased, and thus my proposal might fail in its objective of increasing the involvement of the states in the articulation of new federal rights in the criminal context.[3]

Professor Vázquez may be right, but there is no harm in trying. As things now stand, states seeking certiorari frequently argue that their supreme courts have over-extended the scope of constitutional rights and that the result will be a massive disruption to their judicial systems. This argument sometimes works and sometimes does not.[4] Given the limited number of cases the Supreme Court accepts for review, the additional argument by the states that the disruption will be increased because the state courts will as a matter of federal law—in addition to whatever state doctrines may apply—be required to apply the new rule retrospectively would seem unlikely to make much difference in the rate of certiorari grants.

II. DOCTRINE

My definition of the newly recognized federal constitutional rights that states must enforce retroactively in state habeas proceedings derives from Supremacy Clause thinking.[5]

A. *The Constitutional Underpinnings of the* Montgomery *Mandate*

But Professor Vázquez quite rightly says[6] that the Supremacy Clause itself does note create substantive rights; it is simply a command that courts enforce whatever substantive rights federal law establishes. So, my proposal would benefit from a more detailed discussion (more detailed than either he or I can indulge in on this occasion) of the constitutional origins of *Montgomery*'s mandate that the states entertain habeas corpus petitions alleging violations of newly-arising "substantive" federal constitutional rights.[7]

There are at least two obvious candidates. Professor Vázquez suggests one in his comment, and I respond here by suggesting another.

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[3] Vázquez, *supra* note 2, at 260.

[4] An example of a situation where it did not appears in Freedman, *supra* note 2, at 239–40 (discussing *Hurst* litigations in Florida).

[5] I noted in my article that the Supreme Court, citing the Supremacy Clause, has long held in strong language that the state courts have an obligation to enforce federal constitutional rights in state habeas proceedings. *See* Freedman, *supra* note 2, at 223 n.68 (citing Robb v. Connolly, 111 U.S. 624, 635–39 (1884)).

[6] Vázquez, *supra* note 2, at 260.

[7] Montgomery, 136 S. Ct. at 731–32.

(1) Professor Vázquez's thought is that the *Teague v. Lane*[8] exception for substantive new rules that *Montgomery* constitutionalized (1) originates in the Due Process Clause, and (2) consists of a prohibition on the incarceration of the legally innocent.[9] On this account, there would be no justification for a different rule respecting the obligations of the state and federal courts, since both are bound by the Due Process Clause.

But in order for this suggestion to lead to the adoption of my definition of "substantive," a court would have to conclude that the Supreme Court has to date been unconstitutionally exiguous in its interpretation of that term under *Teague*. One might reasonably question whether this is likely to happen. Those seeking to expand the rights of state prisoners to assert federal claims in federal court are likely to find more success in arguing for modification of *Teague* as a prudential, not constitutional, matter.[10]

(2) My suggestion is that the constitutional right of state prisoners to assert federal claims in state habeas corpus proceedings, which the Supremacy Clause enforces, originates in the oft-marginalized Privileges or Immunities Clause of the 14th Amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[11]

In the wake of *Slaughter-House*,[12] the set of "privileges or immunities" that the states are forbidden to abridge is tiny, but—as all the Justices sitting on that case agreed—the right to bring a habeas corpus petition asserting a violation of federal rights is one of them.[13] The details of the obligations that this anti-abridgment mandate imposes on the state courts are beyond the scope of this short comment. Whatever they may be, the point for Supremacy Clause purposes is that the 14th Amendment's Privileges or Immunities Clause contains a declaration of federal policy that state post-conviction courts hear claims of violations of federal constitutional rights. That policy, which does not originate in the Due Process

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[8] Teague v. Lane, 489 U.S. 288 (1989).

[9] Vázquez, *supra* note 2, at 259–60.

[10] *See* Freedman *supra* note 2, at 217 n.40, 218 n.44.

[11] U.S. CONST. amend. XIV, § 1.

[12] Slaughter-House Cases, 83 U.S. 36 (1872).

[13] *See* Lee Kovarsky, *Prisoners and Habeas Privileges Under the Fourteenth Amendmen*t, 67 VAND. L. REV. 609, 638–639 (2014) (summarizing Justices' opinions and concluding, "the proposition that the PI Clause included the habeas privilege commanded unanimous support.") The Court's unanimity makes entire sense because one of the evils the framers of the 14th Amendment sought to remedy was that prior to the Civil War the states had failed to enforce federal constitutional guarantees. Thus, in a famous speech on May 10, 1866, the House sponsor of the Amendment, Representative John Bingham, declared, "no state ever had the right . . . to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised that power, and that without remedy." CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

Clause and which imposes different obligations on the state courts than the federal ones, justifies my conclusion that, under the Supremacy Clause, the set of new "substantive" federal constitutional rights that *Montgomery* requires be given retroactive application on collateral review is broader in state court than in federal one.

B. *Enhancing the States' Retroactivity Doctrines*

Professor Vázquez's comment also makes a valuable interim suggestion[14] which I would elaborate into the following proposal. Unless there has been some affirmative post-*Montgomery* holding to the contrary by the state's highest court, each state's retroactivity doctrine should be read as a matter of state law to provide at minimum for retroactive collateral relief when the state recognizes a new federal or state constitutional right that is "substantive" under the definition in my article.[15]

Implementation of this proposal can and should happen now. There is no need to await a definitive articulation of how extensive a definition of "substantive" is required by the Constitution because the proposal does not depend on a federal constitutional command. Rather, it recognizes—and will be a transitional step towards achieving—the structural benefits to our system of criminal adjudication that were the ultimate goal of my article.

III. CONCLUSION

I conclude by again expressing my appreciation to Professor Vázquez for his thoughtful assistance in strengthening my project.

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[14] Vázquez, *supra* note 2, at 260–61.

[15] *See* Freedman, *supra* note 2, at 244–248.