THE CONSTITUTIONAL RIGHT TO COLLATERAL POST-CONVICTION REVIEW

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For years, the prevailing academic and judicial wisdom has held that, between them, Congress and the Supreme Court have rendered post-conviction habeas review all but a dead letter. But in its January 2016 decision in Montgomery v. Louisiana, *the Supreme Court may have dramatically upended that understanding in holding—for the first time—that there are at least some cases in which the Constitution itself creates a right to collateral post-conviction review, i.e., cases in which a prisoner seeks to enforce retroactively a "new rule" of substantive constitutional law under the familiar doctrine of* Teague v. Lane.

On the surface, Montgomery *held only that state courts are required to employ* Teague*'s retroactivity framework when and if they adjudicate habeas petitions relying on new substantive rules of federal law. But, in reaching that conclusion, the Court clarified that* Teague*'s holding that new substantive rules of federal law are retroactively applicable on collateral review was grounded in the Constitution, rather than common law or the federal habeas statute—a holding that, as we explain, was both novel and important.*

We next consider which courts—state or federal—have the obligation to provide the constitutionally required collateral review recognized in Montgomery. *Either way, the implications of* Montgomery *are far-reaching. To conclude that the state courts must provide collateral review would run counter to the conventional wisdom that states are under no obligation to permit collateral attacks on convictions that have become final. On the other hand, the conclusion that federal courts must have jurisdiction to grant such collateral review is in significant tension with the Madisonian Compromise. In our view, the Supreme Court's Supremacy Clause jurisprudence establishes that the constitutionally required collateral remedy recognized in* Montgomery *must be available, in the first instance, in state courts,*

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even if the state has not chosen to provide collateral post-conviction relief for comparable state law claims. The state courts also have the constitutional power and duty to afford such relief to federal prisoners, but Congress has the power to withdraw such cases from the state courts by giving the federal courts exclusive jurisdiction over such claims (and should be presumed to have done so). Thus, we conclude that the state courts are constitutionally obligated to afford collateral post-conviction review to state prisoners in the circumstances covered by Montgomery*, and the federal courts should be presumed to have the statutory obligation to afford such review to federal prisoners.*

Finally, we examine some of the important questions raised by the conclusion that state and federal prisoners have a constitutional right to collateral relief. Although the questions are complex, and not all of the answers are clear, the uncertainties surrounding some of the contours of the remedy recognized in Montgomery *should not obscure the fact that this seemingly innocuous holding about the Supreme Court's appellate jurisdiction actually upends a half-century's worth of doctrinal and theoretical analyses of collateral post-conviction review, a result that should have a significant impact on both commentators' and courts' understanding of the relationship between collateral post-conviction remedies and the Constitution.*

INTRODUCTION

For years, the prevailing academic and judicial wisdom has held that, between them, Congress and the Supreme Court have rendered post-conviction habeas review all but a dead letter.[1] At least outwardly, the Court's October 2015 Term seemed to reflect that trend: not only did the Justices side with a federal habeas petitioner in only a single case,[2] but the Court's summary docket was once again replete with sternly worded reversals of lower-court grants of federal habeas relief.[3]

On closer inspection, however, there is a far more interesting story to tell about the October 2015 Term—one in which the Justices took an important step towards expanding the scope of collateral post-conviction review, and indeed towards recognizing, for the first time in the Court's history, that there are circumstances in which such review is constitutionally *required*. This Article will explain why, in a Term dominated by Justice Scalia's passing and its impact, and by landmark rulings (or non-rulings) on abortion,[4] affirmative action,[5] immigration,[6]

[1] See, e.g., Irons v. Carey, 505 F.3d 846, 859 (9th Cir. 2007) (Reinhardt, J., concurring specially); Note, Suspended Justice: The Case Against 28 U.S.C. § 2255's Statute of Limitations, 129 Harv. L. Rev. 1090, 1090 (2016).

[2] See Welch v. United States, 136 S. Ct. 1257 (2016).

[3] See, e.g., White v. Wheeler, 136 S. Ct. 456, 462 (2015) (per curiam) ("[T]his Court again advises the Court of Appeals that the provisions of AEDPA apply with full force even when reviewing a conviction and sentence imposing the death penalty."); cf. Rapelje v. Blackston, 136 S. Ct. 388, 389–90 (2015) (Scalia, J., dissenting from the denial of certiorari) ("The Sixth Circuit seems to have acquired a taste for disregarding AEDPA. We should grant certiorari to discourage this appetite." (citations omitted)).

[4] Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

[5] Fisher v. Univ. of Texas, 136 S. Ct. 2198 (2016).

[6] United States v. Texas, 136 S. Ct. 2271 (2016) (mem.).

and religious freedom,[7] the most lasting constitutional and doctrinal ramifications of the October 2015 Term may ultimately arise from the Court's January 2016 ruling in *Montgomery v. Louisiana*.[8]

On the surface, *Montgomery* is a straightforward case about the retroactive[9] effect of the Supreme Court's 2012 ruling in *Miller v. Alabama*, which had held that the Eighth Amendment prohibits mandatory life sentences without parole for juvenile offenders, even for the crime of murder.[10] Writing for a 6-3 majority in *Montgomery*, Justice Kennedy had little difficulty concluding that *Miller* was a "substantive" ruling under the familiar retroactivity framework of *Teague v. Lane*,[11] and that, as such, it fell within one of the two previously recognized exceptions to *Teague*'s general bar on retroactive enforcement of new rules via habeas. Because the constitutional rule articulated in *Miller* "necessarily carr[ies] a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him,"[12] the *Montgomery* Court held that it could be retroactively enforced through claims for collateral post-conviction relief by prisoners whose convictions, sentences, and direct appeals had become final before *Miller* was handed down.[13]

In order to reach the retroactivity question, though, the Court first had to resolve a thorny (and novel) jurisdictional issue that it had raised on its own motion.[14] Unlike most of the Supreme Court's post-conviction retroactivity cases, *Montgomery* came directly from the Louisiana *state* courts, which had purported to choose, as a matter of *state* law, to apply

[7] Zubik v. Burwell, 136 S. Ct. 1557 (2016) (per curiam).

[8] 136 S. Ct. 718 (2016).

[9] As Justice Stevens cogently explained for the Court in *Danforth v. Minnesota*, 552 U.S. 264, 271 & n.5 (2008), describing efforts by prisoners to take advantage of new rules of constitutional law in terms of "retroactivity" is both confusing and misleading, given that "the source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law." Id. at 271. To avoid even more confusion, however, we follow the (problematic) convention throughout.

[10] 567 U.S. 460 (2012).

[11] 489 U.S. 288 (1989).

[12] *Montgomery*, 136 S. Ct. at 734 (quoting Schriro v. Summerlin, 542 U.S. 348, 352 (2004)).

[13] Id. at 732–36.

[14] Id. at 727.

Teague in state post-conviction proceedings.[15] Why didn't that mean that the state court's conclusion that *Miller* was "procedural" (and therefore not retroactive)[16] rested upon an independent state law ground and was therefore insulated from Supreme Court appellate review?[17]

One answer (which was offered by the parties in *Montgomery* and the Solicitor General as an amicus curiae) might have been that, once Louisiana chose to follow the *Teague* framework as a matter of state law, an erroneous application thereof would not be "independent" of federal law.[18] But Justice Kennedy's majority opinion rested the Court's jurisdiction to review the Louisiana court's decision on a much broader conclusion, holding that *Teague* imposed a mandatory *constitutional* obligation on state courts to give retroactive effect in collateral post-conviction proceedings to new substantive rules of constitutional law: "[W]hen 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."[19] As he continued, "*Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts."[20]

As this Article explains in Part I, this reading of *Teague* was both novel and momentous. Jurists and commentators alike had long assumed that, like so much else of the Supreme Court's post-conviction habeas jurisprudence, the *Teague* framework was merely an interpretation of the federal habeas statute—and that, as such, it was only binding upon the federal courts. The Supreme Court itself had implied as much, stating in

[15] See State ex rel. Taylor v. Whitley, 606 So. 2d 1292 (La. 1992).

[16] See State v. Tate, 130 So. 3d 829 (La. 2013).

[17] See Peter W. Low et al., Federal Courts and the Law of Federal-State Relations 94 (7th ed. 2011).

[18] See Michigan v. Long, 463 U.S. 1032, 1041–42 (1983). The impact of *Michigan v. Long* was briefed by all sides in *Montgomery*. See Brief of Court-Appointed Amicus Curiae Arguing Against Jurisdiction at 6, *Montgomery*, 136 S. Ct. 718 (No. 14-280); Brief of Respondent at 8, *Montgomery*, 136 S. Ct. 718 (No. 14-280); Brief for Petitioner at 44, *Montgomery*, 136 S. Ct. 718 (No. 14-280). It was also discussed at length during oral argument. See Transcript of Oral Argument at 14–17, *Montgomery*, 136 S. Ct. 718 (No. 14-280).

[19] *Montgomery*, 136 S. Ct. at 729 (emphasis added).

[20] Id.

2008 that "[n]ew constitutional rules announced by this Court that place certain kinds of primary individual conduct beyond the power of the States to proscribe . . . must be applied in all future trials, all cases pending on direct review, and all *federal* habeas corpus proceedings."[21] As Part I will demonstrate, however, *Montgomery* expressly extended the applicability of the *Teague* exceptions to *state* post-conviction proceedings—and, in the process, cemented the existence of a reviewable federal question whenever a state court fails to apply what, in the Supreme Court's view, is a new rule of substantive constitutional law applicable to the case at hand.

But, far more than confirm the Supreme Court's appellate jurisdiction over state-court refusals to apply new substantive rules retroactively, *Montgomery*'s reading of *Teague* compels the conclusion that prisoners (both state and federal) have a federal constitutional right to enforce retroactively new substantive rules of constitutional law (such as the one articulated in *Miller*)—and that they therefore have a constitutional right to a collateral post-conviction remedy in cases in which direct relief is no longer available. *Montgomery* confirms that state prisoners (and, by necessary implication, federal prisoners) have a right to such collateral relief if their continued incarceration contravenes a new substantive rule of federal constitutional law.

If the Constitution entitles state and federal prisoners to a collateral post-conviction remedy, then either the state courts or the federal courts must be constitutionally obligated to provide such relief. In Part II, we consider whether the constitutionally required remedy recognized in *Montgomery* is available, as a constitutional matter, in state court or in federal court. With respect to the state courts, the conventional wisdom, as articulated by Justice Alito in a solo concurrence in *Foster v. Chatman*, another habeas case from the same Term, has long been that "[s]tates are under no obligation to permit collateral attacks on

[21] Danforth v. Minnesota, 552 U.S. 264, 266 (2008) (emphasis added). The *Danforth* Court also observed that "Justice O'Connor's opinion clearly indicates that *Teague*'s general rule of nonretroactivity was an exercise of this Court's power to interpret the federal habeas statute." Id. at 278. Tellingly, though, *Danforth* said nothing about whether the exceptions to *Teague's* general rule were also statutory—or were, instead, constitutionally compelled.

convictions that have become final, and if they allow such attacks, they are free to limit the circumstances in which claims may be relitigated."[22]

With respect to the federal courts, it is widely understood to follow from the Madisonian Compromise—that is, the Framers' decision to leave it to Congress to decide whether or not to create lower federal courts—that Article III itself places no limits on Congress's power to restrict the jurisdiction of such courts.[23] If *Montgomery* stands for the proposition that either the state or the federal courts must have jurisdiction to grant collateral relief to prisoners whose continued incarceration contravenes a new substantive rule of federal constitutional law, then it either refutes the conventional wisdom articulated by Justice Alito regarding the state courts or it upends a bedrock principle of constitutional law regarding Congress's power to control the jurisdiction of the lower federal courts.

Where state prisoners are concerned, we conclude that the constitutional obligation falls on the state courts. This conclusion is supported by two lines of cases interpreting the Supremacy Clause. The first establishes that the state courts must entertain federal claims in the absence of a "valid excuse," and that a jurisdictional limitation is not a valid excuse if it discriminates against federal law or otherwise reflects disagreement with the policy underlying the federal law.[24] As we explain in Section II.A, any state law denying its courts jurisdiction to grant collateral relief to prisoners who are incarcerated in contravention of a new rule of substantive federal law would be based, at bottom, on disagreement with the policies underlying the Constitution, as interpreted in *Montgomery*.

[22] Foster v. Chatman, 136 S. Ct. 1737, 1759 (2016) (Alito, J., concurring in the judgment); see also Murray v. Giarratano, 492 U.S. 1, 10 (1989) (plurality opinion) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal."); Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) ("States have no obligation to provide [postconviction] relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well." (citation omitted)). Although Justice Alito was writing only for himself in *Foster*, Chief Justice Roberts, Justice Thomas, and Justice Gorsuch recently endorsed this view. See Johnson v. Alabama, 137 S. Ct. 2292, 2293 (2017) (mem.) (Roberts, C.J., dissenting) (describing state collateral review as "purely a creature of state law that need not be provided at all").

[23] See Sheldon v. Sill, 49 U.S. (8 How.) 441, 448–49 (1850).

[24] See, e.g., Testa v. Katt, 330 U.S. 386, 392–93 (1947).

The same conclusion is supported by a separate line of Supremacy Clause cases establishing that state laws disempowering state courts of general jurisdiction from awarding a constitutionally required remedy do not qualify as adequate state grounds preventing Supreme Court review.[25] These decisions rest on the premise that the state courts of general jurisdiction must be empowered to grant constitutionally required remedies—a category that now includes the collateral remedy recognized in *Montgomery*.

Unlike state legislatures, Congress has the power to deny the state courts jurisdiction over federal claims. It may do this by giving the lower federal courts exclusive jurisdiction over such claims.[26] It is clear, however, that Congress has not given the federal courts exclusive jurisdiction over collateral claims brought by state prisoners on the basis of new rules of federal law. Indeed, Congress's most recent legislation on the subject, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[27] appears to place severe limits on the federal courts' jurisdiction to grant such relief. Although we think AEDPA should be interpreted to authorize the federal courts to grant the constitutionally required relief, we do not think the statute can plausibly be read to give the federal courts *exclusive* jurisdiction to do so. Thus, with respect to state prisoners, we think that, after *Montgomery*, the conventional wisdom repeated by Justice Alito in *Foster v*. *Chatman* is no longer tenable.

As Section II.B explains, the analysis with respect to federal prisoners is more complex in light of the Supreme Court's 1872 decision in *Tarble's Case*, and its apparent holding that state courts are constitutionally unable to grant habeas relief to persons detained by the federal government.[28] Some have argued that it must follow that federal courts are constitutionally empowered to grant habeas relief to persons

[25] See, e.g., Gen. Oil Co. v. Crain, 209 U.S. 211, 228 (1908); see also Reich v. Collins, 513 U.S. 106, 110–13 (1994) (holding that state courts must provide remedy required by the Due Process Clause notwithstanding "the sovereign immunity States traditionally enjoy in their own courts"); McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 26–31 (1990) (same).

[26] See, e.g., 18 U.S.C. § 3231 (2012).

[27] Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 18, 28, 40, 42, and 50 U.S.C.).

[28] Tarble's Case, 80 U.S. (13 Wall.) 397 (1872).

illegally detained by federal officials, and, indeed, that the Court so held in *Boumediene v. Bush*.[29] But this conclusion clashes with the Madisonian Compromise, mentioned above. We endorse an alternative interpretation of *Tarble's Case* that reconciles it with the Madisonian Compromise. Under this interpretation, *Tarble's Case* rests on the conclusion that Congress implicitly withdrew the state courts' jurisdiction to grant habeas relief to federal detainees when it created lower federal courts and gave them jurisdiction to grant such relief.[30] We argue further that *Tarble's Case* and *Boumediene* reflect the Court's strong presumption that Congress would *prefer* that any constitutionally required remedies against federal officials be sought in the federal courts rather than the state courts. Accordingly, federal jurisdictional statutes should be read to authorize the federal courts to grant such relief unless Congress clearly expresses a desire to have such claims adjudicated in the state courts instead.

This analysis leads us to conclude that the default forum established by the Constitution in which to seek constitutionally required remedies against federal officials is the state courts. But, with respect to claims by federal prisoners, this default forum was statutorily displaced when Congress created lower federal courts and gave them habeas jurisdiction. Any jurisdictional limitation restricting the lower federal courts' jurisdiction to grant a remedy should be understood to reflect Congress's view that the remedy in question is constitutionally optional. If the federal courts conclude that the remedy is constitutionally required, they should apply the presumption we have drawn from *Tarble's Case* and *Boumediene* and interpret the statute to authorize the lower federal courts to award the remedy. Thus, in the absence of a clear statement by Congress that it would prefer federal detentions to be challenged in state court, federal courts should construe the federal habeas statutes to permit collateral relief for federal prisoners to the extent such relief is required by the Constitution, as construed in *Montgomery*.

Finally, Part III fleshes out some of the broader doctrinal implications of our analysis in Parts I and II. Our aim is to flag some important issues

[29] 553 U.S. 723, 732, 745 (2008); see, e.g., Lumen N. Mulligan, Did the Madisonian Compromise Survive Detention at Guantanamo?, 85 N.Y.U. L. Rev. 535, 536–39 (2010).

[30] See Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and The Federal System 434 (7th ed. 2015) [hereinafter Hart & Wechsler] (setting forth the "implied exclusion" reading of *Tarble's Case*).

and to offer some preliminary views rather than to discuss the issues exhaustively.

First, what types of claims does *Montgomery* require to be enforceable on collateral review? *Montgomery* itself involved a claim that the prisoner's continued incarceration contravenes a new substantive rule of federal constitutional law. We argue in Section III.A that the right to collateral review also attaches to the other exception to nonretroactivity recognized in *Teague*—for new "watershed" rules of criminal procedure—because, as with new substantive rules of constitutional law, the underlying claim is that the articulation of the new rule vitiates the prisoner's ongoing detention. With respect to federal prisoners, the right to collateral relief also attaches if the defendant's incarceration contravenes a new decision construing the substantive scope of the statute the prisoner was convicted of violating.

A more difficult question is whether a state prisoner is constitutionally entitled to collateral relief when the state courts articulate a new substantive rule of *state* law. Answering this question requires a deeper analysis of the constitutional basis of the Court's decision in *Montgomery*. We think the decision is based, at bottom, on the Court's understanding of the nature of the federal judiciary's role in interpreting constitutional and statutory provisions bearing on the permissibility of primary conduct. We conclude that the Constitution probably does not require the states to regard the role of their courts in the same way. Accordingly, we don't think *Montgomery* establishes a general rule of retroactive applicability of new substantive rules of state law—although it might justifiably lead state courts to interpret their own constitutions to establish such a rule.

Second, we consider in Section III.B at what point the right to a collateral post-conviction remedy recognized in *Montgomery* accrues. Can a prisoner claim a constitutional entitlement to a collateral post-conviction remedy before the Supreme Court has actually recognized a new rule falling within *Teague*'s exceptions? Although *Teague* itself permitted federal habeas courts to entertain a claim seeking initial recognition of such a new rule, and although we think that state courts *should* provide post-conviction remedies in such cases, we believe that, fairly read, the Constitution does not oblige them to do so. As we explain in Section III.B, the constitutional right to collateral relief recognized in *Montgomery* arises upon the Supreme Court's recognition

of a new rule falling within *Teague*'s exception for new substantive rules—and not before that point.

Finally, and perhaps most significantly, we consider in Section III.C the validity of a number of common procedural limitations, as applied to the remedy recognized in *Montgomery*. With respect to any state statutes of limitations, we think *Montgomery* requires that the clock be restarted once the new rule is handed down by the Supreme Court. We also believe that, notwithstanding any state rule barring second or successive collateral post-conviction petitions, *Montgomery* requires federal and state courts (with respect to federal and state prisoners, respectively) to entertain such claims even if the claim had been considered and rejected before the Court's recognition of the new rule. We thus believe that *Montgomery* raises substantial doubts about the validity of some of the limits AEDPA imposes on federal prisoners' ability to raise claims based on new rules in a second or successive petition.

Whether states may deny relief based on procedural default rules presents more complicated questions. Ordinarily, states may regard a claim as procedurally defaulted if it was not raised at trial or on direct review. Must a state waive the procedural default if the Supreme Court recognizes the claim for the first time *after* the prisoner's conviction became final? The Supreme Court has held that federal habeas courts should waive this sort of procedural default if the prisoner lacked the tools with which to construct the argument at the time of his trial.[31] We think that, after *Montgomery*, state courts might be constitutionally required to excuse procedural defaults under the same circumstances.

* * *

Lest we lose sight of the forest, though, we stress that the conclusion that there are *any* circumstances in which the Constitution requires access to collateral post-conviction review represents an enormously important doctrinal advance, calling into question decades of conventional scholarly and judicial wisdom, even if there remains some uncertainty as to the *specific* circumstances that trigger such a constitutional right. Moreover, recognizing the significance of *Montgomery*'s jurisdictional holding should open the door to the revisiting of any number of other assumptions about the contemporary

[31] See Reed v. Ross, 468 U.S. 1, 16 (1984); Engle v. Isaac, 456 U.S. 107, 130–34 (1982).

structure of post-conviction remedies—a task that is far beyond the scope of this Article. Instead, our goal is to explain how and why, in a seemingly innocuous holding about the Supreme Court's appellate jurisdiction, *Montgomery* upends a half-century's worth of doctrinal and theoretical analyses of collateral post-conviction review, a result that could have a significant impact on both commentators' and courts' understanding of the relationship between collateral post-conviction remedies and the Constitution.

I. THE SOURCE OF THE REMEDY FOR "NEW RULES": FROM *TEAGUE* TO *MONTGOMERY*

To understand the significance of *Montgomery*'s jurisdictional holding, it is important to situate that decision against the backdrop of the Supreme Court's evolving approach to retroactivity over the past half-century. This evolution was triggered by the Warren Court's invigoration and incorporation of myriad new constitutional protections in criminal proceedings in the 1960s, which in turn raised complex questions about whether (and when) prisoners already convicted could avail themselves of such "new rules."[32]

Before 1965, the Court had allowed all new rules to be retroactively enforced on direct and collateral review alike.[33] But as the Justices applied the exclusionary rule to the states,[34] recognized a right to counsel in all criminal cases,[35] articulated prophylactic rules limiting custodial interrogations,[36] and so on, they sought to moderate the impact of their jurisprudence by limiting the circumstances in which these new rulings could be applied to judicial proceedings that predated them. After some clumsy first steps,[37] a majority eventually coalesced around a three-factor test for when a new rule would apply retroactively, turning on (1)

[32] See Hart & Wechsler, supra note 30, at 1293 ("The retroactivity question grew in significance during the 1960s as a result of . . . the Warren Court, and that Court's broad and novel criminal procedure decisions, of which Miranda is an example.").

[33] See Danforth v. Minnesota, 552 U.S. 264, 272 (2008); see also id. at 293 (Roberts, C.J., dissenting).

[34] See Mapp v. Ohio, 367 U.S. 643, 643 (1961).

[35] See Gideon v. Wainwright, 372 U.S. 335, 335 (1963).

[36] See Miranda v. Arizona, 384 U.S. 436, 436–37 (1966).

[37] See Linkletter v. Walker, 381 U.S. 618, 618–19 (1965).

the purpose of the new rule; (2) the extent of reliance on the old rule; and (3) the effect on the administration of justice of retroactive application of the new rule.[38] But the Court never explained (perhaps because it could not agree upon) where these factors came from, or the textual source of the imperative that new rules satisfying these factors must be retroactively enforceable.

And, critically for present purposes, the Warren Court's understanding of retroactivity did not differentiate between direct appeals and collateral post-conviction review. As long as the three factors summarized in *Stovall v. Denno* militated in favor of retroactive application, the new rule would apply to all cases on both direct and collateral post-conviction review. Thus, the specific nature of the "new rule," rather than the difference between direct appeals and collateral post-conviction review, was central to the applicability of that rule under the Warren Court's framework.

A. Justice Harlan and the Teague *Framework*

The Court's current approach to retroactivity has its roots in concurring opinions of the second Justice Harlan, who forcefully argued that the distinction between direct and collateral review was of central importance. As he explained in separate opinions in *Desist v. United States*[39] and *Mackey v. United States*,[40] so long as a direct appeal was pending, application of a "new rule" wasn't ever truly retroactive, since courts (including appellate courts) had an obligation (perhaps grounded in the Constitution) to resolve the case before them based on then-extant law.[41] Collateral post-conviction review was different, Harlan argued, because it was an extraordinary remedy in which no such obligation existed, and because countervailing principles of comity and finality dictated at least some deference to the underlying (and completed) criminal proceeding.[42] Thus, as he explained in *Mackey*, new rules should generally *not* be enforceable through collateral post-conviction review.

[38] See Stovall v. Denno, 388 U.S. 293, 297 (1967).

[39] 394 U.S. 244, 256–69 (1969) (Harlan, J., dissenting).

[40] 401 U.S. 667, 675–702 (1971) (Harlan, J., concurring in part and dissenting in part).

[41] See, e.g., id. at 679.

[42] See id. at 681–702.

At the same time, though, Justice Harlan agreed that there should be two circumstances in which new rules *could*—and, indeed, *should*—be retroactively enforceable even through actions seeking collateral post-conviction relief:

> First, . . . those [new rules] that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, must . . . be placed on a different footing . . . because [they] represent[] the clearest instance where finality interests should yield. There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose. . . . Thus, the obvious interest in freeing individuals from punishment for conduct that is constitutionally protected seems . . . sufficiently substantial to justify applying current notions of substantive due process to petitions for habeas corpus.
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> Secondly, I think the writ ought always to lie for claims of nonobservance of those procedures that . . . are "implicit in the concept of ordered liberty." . . . [where] time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction.[43]

In other words, the Harlan approach would have allowed for collateral enforcement of new rules either when the rule vitiates the substantive basis for the defendant's conviction (or sentence), or when it is so fundamental to the procedural fairness of the proceeding that the trial court's failure to have observed it warrants the conclusion that the conviction is not just voidable, but void. Although Harlan marshalled numerous examples of the former, the only example he offered of the latter was the right to appointed counsel for indigent defendants recognized in *Gideon v. Wainwright*.[44]

Most importantly for present purposes, neither of Harlan's lengthy discussions of his proposed retroactivity framework explained the

[43] Id. at 692–93 (citations and footnotes omitted).

[44] See id. at 694 (citing Gideon v. Wainwright, 372 U.S. 335, 349 (1963)).

source of the two exceptions—and whether they were a creature of statute (or federal common law), or might instead, like the enforceability of new rules on direct appeal, be constitutionally compelled. The only hint Harlan provided was that the task before the Court was to "resettl[e] the limits of the reach of the Great Writ,"[45] without clarifying whether he meant the Great Writ enshrined in the Constitution, or the one Congress had provided by statute beginning with the Judiciary Act of 1789.[46]

The Supreme Court took a decisive step toward embracing Harlan's framework in *Griffith v. Kentucky*, holding that new rules should be fully retroactive on direct review, whether or not they satisfied the *Stovall* approach.[47] Two years later, in *Teague v. Lane*, the Court embraced the other half of Harlan's framework, holding that new rules generally are *not* retroactively enforceable through collateral post-conviction review, unless they fall within one of Harlan's two exceptions.[48] As Justice O'Connor wrote for a four-Justice plurality:[49]

> Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions "shows only that conventional notions of finality should not have as *much* place in criminal as in civil litigation, not that they should have *none*."[50]

[45] Id. at 701–02.

[46] On the neglected significance of the divergence between the constitutional ("common-law") writ and its "chimerical statutory twin," see Stephen I. Vladeck, The New Habeas Revisionism, 124 Harv. L. Rev. 941, 978–87 (2011) (reviewing Paul D. Halliday, Habeas Corpus: From England to Empire (2010)).

[47] 479 U.S. 314, 322 (1987).

[48] 489 U.S. 288, 305–07 (1989). The *Teague* Court explained that it adopted the second exception "with a modification," reading it to encompass even fewer rules of criminal procedure than Justice Harlan had likely meant. See id. at 311–12.

[49] Although *Teague* itself only commanded four votes on the relevant holdings, subsequent majorities of the Court have routinely endorsed and relied upon it. See Hart & Wechsler, supra note 30, at 1295.

[50] *Teague*, 489 U.S. at 309 (quoting Henry J. Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments, 38 U. Chi. L. Rev. 142, 150 (1970)).

Teague thereby embraced the rest of Justice Harlan's retroactivity framework[51]—endorsing, but shedding no further light on the source of the exceptions Justice Harlan had outlined in *Mackey*.[52] And although Justice Brennan's dissent argued that Justice O'Connor's opinion was based on a misreading of the federal habeas *statute* (and in any event failed to honor the strong presumption in favor of stare decisis in non-constitutional cases),[53] Justice White's concurrence was more equivocal on the source of Justice Harlan's framework, cryptically noting that some aspects of the Court's retroactivity jurisprudence "appear to have constitutional underpinnings."[54]

B. The Debate Over Teague*'s Exceptions*

Teague's silence as to the provenance of its exceptions—and whether they were grounded in the habeas statute, federal common law, or the Constitution—remained in the background, as most of the academic and judicial commentary on the decision focused on its adoption of the underlying nonretroactivity framework and its broad reading of what constitutes a "new rule."[55] After all, whether *Teague*'s exceptions derived from the federal habeas statute or the Constitution made no difference to *federal* courts; either way, they provided a basis for relief

[51] *Teague* quietly departs from Harlan's framework in one crucial respect (albeit one that is not material here), for its definition of when a Supreme Court decision is a "new rule"—when "the result was not dictated by precedent existing at the time the defendant's conviction became final"—is much more capacious than anything Harlan suggested in *Desist* or *Mackey*, and has the effect of triggering the retroactivity framework in a far greater number of cases. Id. at 301 (emphasis omitted); see also supra note 48 (noting that the Court in *Teague* modified Harlan's second exception).

[52] *Teague*, 489 U.S. at 310 ("[W]e now adopt Justice Harlan's view of retroactivity for cases on collateral review. Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

[53] See id. at 326–27, 332–33 (Brennan, J., dissenting).

[54] Id. at 317 (White, J., concurring in the judgment).

[55] For just a sampling of the voluminous literature on *Teague*, see the sources cited in Hart & Wechsler, supra note 30, at 1299–1300 & nn.7–8. See also Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1738–44 (1991).

on the merits in cases to which they applied.[56] And, until Congress dramatically scaled back the scope of federal post-conviction habeas review in AEDPA, there was little need for state prisoners to resort to *state* collateral post-conviction proceedings to take advantage of new rules of federal constitutional law—federal courts generally provided a much better forum.

In several respects, AEDPA put new pressure on the *Teague* framework. First, it introduced a one-year statute of limitations for all federal post-conviction habeas cases.[57] Second, it dramatically raised the bar for second-or-successive federal habeas petitioners to take advantage of new rules, barring courts of appeals from even authorizing the pursuit of such claims (let alone reaching the merits thereof) unless and until the new rule at issue had already been "made retroactive to cases on collateral review by the Supreme Court."[58] Third, and more generally, AEDPA's constraints on the substantive scope of federal habeas relief created both formal and informal pressures on *state* collateral post-conviction proceedings, raising the question *Teague* had not answered as to how its retroactivity framework should apply in such cases.[59]

How the Supreme Court itself applied *Teague* may also have put pressure on its framework, as the Court repeatedly refused to hold that decisions articulating major new constitutional procedural protections in criminal cases (such as *Ring v. Arizona*,[60] *Crawford v. Washington*,[61] and *Padilla v. Kentucky*[62]) satisfied the second of Justice Harlan's

[56] For a rare exception—and a pre-AEDPA look at *Teague*'s impact on state post-conviction proceedings—see Mary C. Hutton, Retroactivity in the States: The Impact of *Teague v. Lane* on State Postconviction Remedies, 44 Ala. L. Rev. 421 (1993).

[57] See 28 U.S.C. § 2244(d)(1) (2012) (state prisoners); id. § 2255(f) (federal prisoners).

[58] See id. § 2244(b)(2)(A) (state prisoners); id. § 2255(h)(2) (federal prisoners). See generally Stephen I. Vladeck, Using the Supreme Court's Original Habeas Jurisdiction To "Ma[k]e" New Rules Retroactive, 28 Fed. Sent'g Rep. 225 (2016).

[59] Outside the context of *Teague*, AEDPA's narrowing of the scope of federal post-conviction habeas has had an even greater impact on state post-conviction proceedings, leading to the rise of what some have called "the new state postconviction." See Giovanna Shay, The New State Postconviction, 46 Akron L. Rev. 473 (2013).

[60] 536 U.S. 584 (2002).

[61] 541 U.S. 36 (2004).

[62] 559 U.S. 356 (2010).

exceptions—for "watershed" rules of criminal procedure.[63] Unable to enforce these new rules retroactively in *federal* habeas petitions, prisoners turned to state collateral post-conviction proceedings, forcing the question of how *Teague*'s nonretroactivity regime applied in the state courts—if at all.

The Supreme Court answered that question in part in *Danforth v. Minnesota*,[64] holding that states are free to apply new rules retroactively even when such rules do not fall within the *Teague* exceptions. To reach this result, *Danforth* split *Teague*'s framework into two: the general bar against retroactive enforcement of new rules via collateral post-conviction review, and the specific exceptions first identified by Justice Harlan. As Justice Stevens explained, "the case before us now does not involve either of the '*Teague* exceptions.'"[65] Instead, it raised only *Teague*'s "general rule of nonretroactivity," which "was an exercise of this Court's power to interpret the federal habeas statute."[66] And because the federal habeas statute only applies to *federal* habeas petitions, *Teague*'s general rule of nonretroactivity did not bind state courts.[67]

But, with one exception,[68] Justice Stevens's majority opinion in *Danforth* was careful to limit itself to what it called *Teague*'s "general rule," and to leave open whether *Teague*'s "exceptions" were also not binding upon state courts. So understood, *Danforth* left states free to apply retroactively even those new rules that did not fall into one of the *Teague* exceptions (and so were not retroactive under *Teague*). But the Court left open whether states could decline to apply retroactively those new rules that *did* fall into a *Teague* exception (and so *were* retroactive under *Teague*).

[63] See Chaidez v. United States, 568 U.S. 342, 344 (2013) (*Padilla* not retroactive); Whorton v. Bockting, 549 U.S. 406, 409 (2007) (*Crawford* not retroactive); Schriro v. Summerlin, 542 U.S. 348, 349 (2004) (*Ring* not retroactive).

[64] 552 U.S. 264, 266 (2008).

[65] Id. at 277.

[66] Id. at 278.

[67] Id. at 278–79.

[68] The very first sentence of the *Danforth* majority opinion explained, perhaps inartfully, that "[n]ew constitutional rules announced by this Court that place certain kinds of primary individual conduct beyond the power of the States to proscribe, as well as 'watershed' rules of criminal procedure, must be applied in all future trials, all cases pending on direct review, and all *federal* habeas corpus proceedings." Id. at 266 (emphasis added).

C. The Significance of Montgomery

That exact fact pattern presented itself in *Montgomery*, in which a state prisoner sought to avail himself of the Supreme Court's 2012 decision in *Miller v. Alabama*—which had held that the Eighth Amendment forbids the imposition upon a juvenile offender of a mandatory life sentence without the possibility of parole, even for murder.[69] Although Louisiana's state courts had chosen to follow the *Teague* framework in state post-conviction proceedings as a matter of state law,[70] they had also held prior to Montgomery's case that *Miller* did not fall within the first *Teague* exception[71]—and therefore could not be retroactively enforced via collateral post-conviction review.[72] Montgomery's application for collateral state post-conviction relief under *Miller* was therefore denied, a decision from which he petitioned for certiorari.

At the certiorari stage, neither Montgomery nor Louisiana raised concerns about the Supreme Court's jurisdiction to review the state court's application of *Teague*. Instead, the Court raised the issue *sua sponte* when it granted review, adding the jurisdictional question to the grant and appointing an amicus curiae to take the adverse position.[73] The core of the amicus's argument in opposition to jurisdiction was the view that the *entire Teague* framework—including the exceptions—was a construction of the federal habeas statute, and that any doubt on that point was settled in *Danforth*. Thus, he argued, "The federal habeas statute supplied the exclusive source of the *Teague* exceptions to finality,"[74] and "*Danforth*'s rationale explains that *Teague*'s exceptions

[69] See 567 U.S. 460, 465 (2012).

[70] See Taylor v. Whitley, 606 So. 2d 1292, 1296 (La. 1992).

[71] To be sure, Louisiana was not an outlier; by the time the Court granted certiorari, the question of *Miller*'s retroactivity had produced a remarkable 23-20 split in lower-court authority—with 11 state and 12 federal cases holding it to be nonretroactive, and 12 state and 8 federal cases holding it to be retroactive. See Reply Brief for Petitioner at 1, *Montgomery*, 136 S. Ct. 718 (No. 14-280).

[72] See State v. Tate, 130 So. 3d 829, 844 (La. 2013).

[73] See *Montgomery*, 135 S. Ct. 1546 (2015) (mem.); see also Jason M. Zarrow & William H. Milliken, Retroactivity, the Due Process Clause, and the Federal Question in *Montgomery v. Louisiana*, 68 Stan. L. Rev. Online 42, 44–45 (2015) (summarizing the jurisdictional issue shortly after the grant of certiorari).

[74] Brief of Court-Appointed Amicus Curiae Arguing Against Jurisdiction at 23, *Montgomery*, 136 S. Ct. 718 (No. 14-280).

to finality are based on the federal habeas statute."[75] Neither of these statements is correct; as discussed above, *Teague* implicitly and *Danforth* explicitly avoided saying anything about the source of the exceptions to *Teague*, as opposed to the general rule of nonretroactivity. That does not resolve the jurisdictional question *against* the amicus; it merely suggests that it was a matter of first impression in *Montgomery*.

Any doubt on that point was quickly put to rest by Justice Kennedy (one of the two dissenters in *Danforth*),[76] who opened the majority opinion in *Montgomery* by explaining why the answer to the jurisdictional question was not foreordained:

> Neither *Teague* nor *Danforth* had reason to address whether States are required as a constitutional matter to give retroactive effect to new substantive or watershed procedural rules. *Teague* originated in a federal, not state, habeas proceeding; so it had no particular reason to discuss whether any part of its holding was required by the Constitution in addition to the federal habeas statute. And *Danforth* held only that *Teague*'s general rule of nonretroactivity was an interpretation of the federal habeas statute and does not prevent States from providing greater relief in their own collateral review courts. The *Danforth* majority limited its analysis to *Teague*'s general retroactivity bar, leaving open the question whether *Teague*'s two exceptions are binding on the States as a matter of constitutional law.[77]

Turning to the question *Danforth* "left open," *Montgomery* held 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."[78] This was so, Justice Kennedy explained, because "[s]ubstantive rules . . . set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that when a State enforces a proscription or penalty barred by the Constitution, the

[75] Id. at 24.

[76] The other *Danforth* dissenter—Chief Justice Roberts—joined Justice Kennedy's majority opinion in *Montgomery*.

[77] *Montgomery*, 136 S. Ct. at 728–29.

[78] Id. at 729 (emphasis added).

resulting conviction or sentence is, by definition, unlawful."[79] Nor did it make a difference if the state enforcement is "retroactive": "A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees."[80]

Finally, as Justice Kennedy concluded, "[i]f a State may not constitutionally insist that a prisoner remain in jail on federal habeas review, it may not constitutionally insist on the same result in its own postconviction proceedings,"[81] without running afoul of the Supremacy Clause. Thus, "[w]here 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."[82] Because Louisiana had opened its courts to such challenges, the Supreme Court had jurisdiction to review the state courts' refusal to apply *Miller* retroactively (and, ultimately, to reverse that holding).[83]

In what would turn out to be his very last opinion,[84] Justice Scalia (joined in full by Justices Thomas and Alito) dissented on both the jurisdictional question and the merits, arguing with respect to the former that "[n]either *Teague* nor its exceptions are constitutionally compelled. . . . Any relief a prisoner might receive in a state court after finality is a matter of grace, not constitutional prescription."[85] The majority's contrary conclusion, Justice Scalia objected, would not only

[79] Id. at 729–30.

[80] Id. at 731.

[81] Id.

[82] Id. at 731–32.

[83] Technically, the Court could have resolved the jurisdictional question without identifying the source of the right. As we noted above, the mere fact that Louisiana had adopted the *Teague* framework was arguably enough to establish that the state ground was not independent. See supra note 18 and accompanying text.

[84] *Montgomery* was one of four decisions in argued cases handed down on January 25, 2016—the last time the Court issued such rulings before Justice Scalia's passing. And because Justice Kennedy was the senior Justice among the authors of the four majority opinions, *Montgomery* was announced from the bench (and released to the public) last.

[85] *Montgomery*, 136 S. Ct. at 739 (Scalia, J., dissenting).

impose an unprecedented obligation upon *state* courts, but upon *federal* courts as well, since recognition that *Teague*'s exceptions were grounded in the Constitution would deprive Congress of the power "to do away with *Teague*'s exceptions altogether."[86] "Until today," Justice Scalia concluded, "no federal court was *constitutionally obliged* to grant relief for the past violation of a newly announced substantive rule."[87]

In light of Justice Scalia's dissent (and the brief of the Court-appointed amicus), it would be difficult to accuse the *Montgomery* majority of missing the significance of its jurisdictional analysis. The amicus presented the Court with a choice between grounding *Teague*'s exceptions in the federal habeas statute or the Constitution, and Justice Scalia's dissent highlighted the consequences—for both state *and* federal courts—of the majority's holding that *Teague*'s exceptions derive directly from the Constitution. Moreover, both Montgomery and Louisiana (and the United States, as amicus curiae) had offered a narrower ground for jurisdiction—that the state law ground was not truly "independent," since it was interwoven with federal law. Thus, the Court in *Montgomery* consciously rested its jurisdictional holding on broader grounds than may have been strictly necessary, with full awareness of the fact that it was constitutionalizing *Teague*'s exceptions. What it may not have fully appreciated, as we explain in Part II, is just how far-reaching the consequences of that result necessarily are.

II. THE CONSTITUTIONALLY COMPELLED JUDICIAL FORUM

As discussed in Part I, the Court in *Montgomery* held that state (and, necessarily, federal) prisoners have a right not to be incarcerated in contravention of new substantive rules of federal constitutional law, and that this right itself has a constitutional basis. It follows that either state or federal courts, or both, have a constitutional obligation to entertain prisoners' collateral claims that their continued incarceration contravenes new substantive rules initially recognized after the conclusion of their direct appeals. This Part considers whether the Constitution imposes this obligation on the state courts or the federal courts, or both.

[86] Id. at 741.

[87] Id.

Before addressing that question, we briefly consider another possibility: that both federal and state courts have an obligation to provide collateral review and grant collateral relief to prisoners whose continued incarceration contravenes a new substantive rule of constitutional law only if they have been given jurisdiction to entertain collateral claims under state or federal statutes. We believe this possibility is precluded by the Constitution. We do not claim that the principle invoked by the Court in *Marbury v. Madison*, that for every violation of a legal right there must be a remedy,[88] is an unyielding one. We agree with Professors Fallon and Meltzer that this principle is "not an ironclad rule, and [that] its ideal is not always attained."[89] Indeed, as Fallon and Meltzer have argued, *Teague* itself exemplifies the limits of this principle insofar as it denies a collateral remedy for convictions that contravene most new rules of constitutional law.[90] But, as the Court confirmed in *Montgomery*, the Constitution *does* require a collateral remedy for persons incarcerated in contravention of a new *substantive* rule of constitutional law.

The question here is not whether the Constitution requires a remedy for the violation of a constitutional right. It is, rather, whether the Constitution requires a judicial forum for the enforcement of an affirmative remedy the Supreme Court has now held (in *Montgomery*) to be constitutionally required. When the Constitution requires a remedy for the ongoing violation of a constitutional right involving individual liberty, we believe that the Constitution requires that some court be available to provide the remedy. The "necessity" of the conclusion reached by the Court in *General Oil Co. v. Crain* is equally applicable here: "If a [constitutionally required remedy] is precluded in the national courts . . . and may be forbidden by a state to its courts, . . . it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution."[91]

In this Part, we consider whether the constitutional remedy to which persons incarcerated in contravention of new substantive rules of constitutional law are entitled is available, as a constitutional matter, in

[88] 5 U.S. (1 Cranch) 137, 163 (1803).

[89] Fallon & Meltzer, supra note 54, at 1778.

[90] See id. at 1807–20.

[91] 209 U.S. 211, 226 (1908).

the state courts or in the federal courts. We consider this issue separately for two categories of prisoners: those in state custody and those in federal custody.

A. State Prisoners

In *Montgomery*, the Court did not have to decide whether the Louisiana state courts were constitutionally obligated to provide a forum in which state prisoners could seek collateral post-conviction relief on the basis of new substantive rules of constitutional law. As noted above, Louisiana *did* allow state prisoners to obtain collateral review of their convictions for consistency with federal law. For this reason, the Court in *Montgomery* could limit itself to holding that, "[i]f a state collateral proceeding is open to a claim controlled by federal law, the state court 'has a duty to grant the relief that federal law requires.'"[92] As to whether states are *constitutionally* required to open their courts to collateral claims by state prisoners, the conventional view has long been the one expressed by Justice Alito in *Foster v. Chatman*: "States are under no obligation to permit collateral attacks on convictions that have become final, and if they allow such attacks, they are free to limit the circumstances in which claims may be relitigated."[93]

Whether state prisoners have a right to collateral relief based on new rules in *federal* courts under current statutes is highly uncertain. Under the revisions to the habeas statute enacted in 1996 as part of AEDPA, a state prisoner 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

[92] *Montgomery*, 136 S. Ct. at 731 (quoting Yates v. Aiken, 484 U.S. 211, 218 (1988)).

[93] 136 S. Ct. 1737, 1759 (2016) (Alito, J., concurring in the judgment); see also Murray v. Giarratano, 492 U.S. 1, 10 (1989) (plurality opinion) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal."); Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) ("States have no obligation to provide [postconviction] relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well." (citation omitted)). As noted above, see supra note 22, Chief Justice Roberts, Justice Thomas, and Justice Gorsuch now appear to agree with this view. See Johnson v. Alabama, 137 S. Ct. 2292, 2293 (2017) (mem.) (Roberts, C.J., dissenting) (describing state collateral review as "purely a creature of state law that need not be provided at all").

United States."[94] The statute thus does not appear to permit relief on the basis of *any* rules that were recognized by the Supreme Court after the conviction.[95] To be sure, there are plausible grounds for exempting claims falling within the two *Teague* exceptions from this section as a matter of statutory interpretation. Thus far, though, the Court has noted the issue but not resolved it.[96]

Unless the Court reads such an exemption into Section 2254(d)(1), AEDPA raises the constitutional issue addressed in this Part. If AEDPA does not preserve federal habeas review of state convictions for consistency with new substantive rules of constitutional law, and if Justice Alito is right about the freedom of states to close their courts to collateral claims, then some state prisoners may find themselves with no judicial forum in which to seek the remedy the Court in *Montgomery* held was constitutionally required. Either AEDPA is unconstitutional in this regard or the state courts are constitutionally required to afford collateral relief to persons incarcerated in contravention of new substantive rules of federal constitutional law.

In our view, the constitutionally required forum for the remedy the Court recognized in *Montgomery* is the state courts. This conclusion is supported by the Supreme Court's decisions regarding the obligations of the states under the Supremacy Clause to provide a forum for the adjudication of federal claims, as well as by decisions holding that state laws denying their courts the jurisdiction to grant a constitutionally required remedy do not constitute an adequate state ground barring direct review of a state court decision in the Supreme Court. Congress can confer such authority on the federal courts, and can make the federal courts' jurisdiction over such claims exclusive. But unless and until it

[94] 28 U.S.C. § 2254(d)(1) (2012).

[95] This provision applies only to claims that were "adjudicated on the merits in State court proceedings." Id. If the claim was not adjudicated on the merits in the state courts, it is likely that the claim was procedurally defaulted. Although there may be some claims that were not adjudicated on the merits in state courts yet were not procedurally defaulted, the number of such claims is likely very small. In any event, the text of § 2254(d)(1) appears to permit claims based on new rules of constitutional law only if they were not adjudicated in state court and if there was both cause and prejudice to excuse the prisoner's default. On the "cause and prejudice" standard, see Hart & Wechsler, supra note 30, at 1337–45.

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

has done so, the state courts have both the power and the obligation to entertain such claims.

1. Collateral Relief for State Prisoners in State Court

Contrary to the conventional wisdom repeated by Justice Alito in *Foster v. Chatman*, states are not entirely "free to limit the circumstances" in which their courts are open to collateral review of criminal convictions.[97] In *Montgomery*, the Court held that, at a minimum, "[i]f a state collateral proceeding is open to a claim controlled by federal law, the state court 'has a duty to grant the relief that federal law requires.'"[98] Settled precedent further establishes that states are not free to close their courts to collateral claims based on federal law.

a. The Testa *Line of Cases*

First, and most narrowly, it is clear that, once a state opens its courthouse doors to particular classes of claims, it cannot discriminate against *federal* claims. This nondiscrimination feature of the Supremacy Clause, recognized in such cases as *McKnett v. St. Louis & San Francisco R.R. Co.*[99] and *Testa v. Katt*,[100] has been generally accepted by the Court (with the exception of Justice Thomas).[101] Thus, if a state permits collateral review of state criminal convictions on the ground that the conviction contravened state constitutional law principles, then, at a minimum, the state courts must be equally open to collateral relief based

[97] See supra note 22.

[98] 136 S. Ct. 718, 731 (2016) (quoting Yates v. Aiken, 484 U.S. 211, 218 (1988)).

[99] 292 U.S. 230 (1934).

[100] 330 U.S. 386 (1947).

[101] In *Haywood v. Drown*, 556 U.S. 729, 742 (2009) (Thomas, J., dissenting), Justice Thomas, in a portion of his opinion in which he wrote only for himself, maintained that state jurisdictional limits are valid even if they discriminate against federal claims. In the portion of the opinion joined by the other dissenting Justices, he argued that state jurisdictional limits are valid so long as they do not discriminate against federal claims. See id. at 775.

The Virginia Supreme Court appears to have overlooked this nondiscrimination principle in a recent decision by holding that a new substantive rule of federal law cannot be raised via a motion to vacate a sentence because a motion to vacate "is not a state collateral-review proceeding 'open to a claim controlled by federal law,'" even though such motions are available in Virginia to correct a sentence that contravenes a state statute. Jones v. Commonwealth, 795 S.E.2d 705, 719 (Va. 2017) (quoting *Montgomery*, 136 S. Ct. at 731–32), petition for cert. filed, No. 16-1337 (U.S. May 3, 2017).

on analogous principles of federal constitutional law. State jurisdictional limits may be relied on as a "valid excuse" for declining to entertain a federal claim,[102] but a rule that discriminates against federal law is not a valid excuse.

In the view of the other Justices who dissented in *Haywood*, this nondiscrimination principle is the only limit imposed by the Supremacy Clause on the states' ability to exclude federal claims from the jurisdiction of their courts.[103] On this view, the constitutional inquiry would focus on whether the state courts have jurisdiction over "analogous" state law claims. What would count as an analogous state law claim for the other *Haywood* dissenters is not entirely clear. Would a state court be required to entertain a collateral claim based on a "new" substantive rule of federal constitutional law if it has jurisdiction over *any* state constitutional claim? Or would it have to entertain such a claim only if its courts are open to collateral review of "new" substantive rules of state constitutional law? What if the state does not recognize the retroactive effect of new state rules of substantive law?

The Court obviated these questions in *Haywood v. Drown*. At issue in *Haywood* was New York legislation that converted all scope-of-employment damages claims against state corrections officers into claims against the state itself. Given that 42 U.S.C. § 1983 has been interpreted by the Supreme Court not to create a right of action against states, the (unintentional) result of the New York law was to foreclose state-court jurisdiction over § 1983 damages claims against corrections officers. The state argued that its legislation (enacted before the Supreme Court foreclosed § 1983 suits against states) was neutral, and thus a "valid excuse" for dismissing the § 1983 claim. The Court rejected the argument, however, holding that "[e]nsuring equality of treatment is . . . the beginning, not the end, of the Supremacy Clause analysis."[104] "Although the absence of discrimination is necessary to our finding a state law neutral, it is not sufficient."[105] "[E]quality of treatment does not ensure that a state law will be deemed a neutral rule

[102] See *Testa*, 330 U.S. at 392–93 (quoting Douglas v. N.Y., New Haven & Hartford R.R., 279 U.S. 377, 388 (1929)).

[103] See *Haywood*, 556 U.S. at 775 (Thomas, J., dissenting).

[104] Id. at 739 (majority opinion).

[105] Id.

of judicial administration and therefore a valid excuse for refusing to entertain a federal cause of action."[106]

The foregoing statements in *Haywood* suggest that the Supremacy Clause does more than simply bar discrimination against federal claims. But the Court was equivocal about whether a state court's obligation to entertain a federal claim turns on whether it has jurisdiction over "analogous" state-law claims. In holding that the New York jurisdictional limitation contravened the Supremacy Clause, the Court stated that the case "[did] not require [it] to decide whether Congress may compel a State to offer a forum, otherwise unavailable under state law, to hear suits brought pursuant to § 1983."[107] "New York has made this inquiry unnecessary by creating courts of general jurisdiction that routinely sit to hear analogous § 1983 actions."[108] As the Court described its holding: "[H]aving made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy."[109] Thus, narrowly viewed, *Haywood* establishes that an "analogous" state-law claim need not be "identical" to the federal claim.[110] The Court deemed actions against police officers for damages and actions against corrections officers for declaratory or injunctive relief (both permitted by New York law) to be sufficiently analogous to damages actions against corrections officers (which were not permitted). Because the state courts had jurisdiction over the first two types of actions, it could not validly deny its courts jurisdiction over federal claims of the third type, regardless of its reasons for doing so.[111]

[106] Id. at 738.

[107] Id. at 739.

[108] Id.

[109] Id. at 740.

[110] Id. at 740 n.6 ("While we have looked to State's 'common-law tort analogues' in deciding whether a state procedural rule is neutral . . . we have never equated 'analogous claims' with 'identical claims.'").

[111] The Court described its holding in narrow terms in responding to "the dissent's fear that 'no state jurisdictional rule will be upheld as constitutional.'" Id. at 741 (quoting id. at 769–70 n.10 (Thomas, J., dissenting)). The majority stated that "[o]ur holding addresses only the unique scheme adopted by the State of New York—a law designed to shield a particular class of defendants (correction officers) from a particular type of liability (damages) brought by a particular class of plaintiffs (prisoners)." Id. at 741–42.

The foregoing analysis tells us that, if the state courts have jurisdiction to grant collateral relief on other grounds, a law denying state courts jurisdiction over collateral claims based on "new" rules would not qualify as a "valid excuse" that would validate a state court's refusal to entertain a collateral claim based on a new substantive rule of federal constitutional law. Jurisdiction to grant collateral relief of any kind would probably be considered sufficiently analogous to the former claims under the *Haywood* majority's analysis. But it is less clear that a law denying state courts jurisdiction over *all* collateral claims would fail to qualify as a "valid excuse."

In our view, however, the better reading of *Haywood* is as holding that the Supremacy Clause requires state courts to grant collateral relief to state prisoners whose continued incarceration contravenes a new rule falling within a *Teague* exception—even if the state's courts otherwise lack jurisdiction over any and all collateral claims. Although the Court did not expressly reject the idea that a state court must entertain federal claims only if it has jurisdiction to entertain "analogous" claims under state law, its view of what counts as an "analogous" claim was so broad as to effectively read that restriction out of the *Testa* line of cases.

The Court in *Haywood* struck down New York's jurisdictional limitation barring damages actions against corrections officers not just because its courts regularly entertained damage actions against police officers and actions for declaratory and injunctive relief against corrections officers, but also because "New York's constitution vests the state supreme courts with general original jurisdiction . . . and the 'inviolate authority to hear and resolve all causes in law and equity.'"[112] If general jurisdiction over "all causes in law" is sufficiently "analogous" to § 1983 damage claims against corrections officials, then general jurisdiction over causes "in equity" should be sufficiently "analogous" to actions seeking release from incarceration brought by prisoners whose continued incarceration has been rendered illegal by a new rule that is retroactively applicable under *Teague*. Collateral review

[112] Id. at 739 (quoting Pollicina v. Misericordia Hosp. Med. Ctr., 624 N.E.2d 974, 977 (N.Y. 1993)).

of a criminal conviction is, after all, at least analogous to a suit for prospective relief from continued incarceration.[113]

The Supreme Court itself recognized this analogy in *Ex parte Young*, where it cited the many federal habeas cases against state custodians as precedents supporting the jurisdiction of federal courts against state officers for prospective relief from ongoing violations of federal constitutional rights.[114] The difference between a habeas action and an action for injunctive relief is almost purely formal, and, as the Court stressed in *Haywood*, "the Supremacy Clause cannot be evaded by formalism."[115]

Thus, although the Court in *Haywood* concluded that a state court must entertain federal claims only if it has jurisdiction over "analogous" state-law claims, it defined "analogous" very broadly. Federal claims for damages must be entertained if the state has courts of general jurisdiction empowered to entertain actions "at law." It follows that federal claims for prospective relief must be entertained as long as the state has courts of general jurisdiction empowered to entertain suits "in equity." This condition of the state courts' obligation to entertain federal claims would appear to always be met, except perhaps when the federal

[113] See generally Erica Hashimoto, Reclaiming the Equitable Heritage of Habeas, 108 Nw. U. L. Rev. 139, 142 (2014).

[114] The Court drew the analogy between the two types of actions in rejecting the claim that the latter suits were barred by the Eleventh Amendment:

> This supreme authority, which arises from the specific provisions of the Constitution itself, is nowhere more fully illustrated than in the series of decisions under the Federal habeas corpus statute . . . in some of which cases persons in the custody of state officers for alleged crimes against the State have been taken from that custody and discharged by a Federal court or judge, because the imprisonment was adjudged to be in violation of the Federal Constitution. The right to so discharge has not been doubted by this court, and it has never been supposed there was any suit against the State by reason of serving the writ upon one of the officers of the State in whose custody the person was found. . . .
>
> It is somewhat difficult to appreciate the distinction which, while admitting that the taking of such a person from the custody of the State by virtue of service of the writ on the state officer in whose custody he is found is not a suit against the State, and yet service of a writ on the Attorney General, to prevent his enforcing an unconstitutional enactment of a State legislature, is a suit against the State.

209 U.S. 123, 167–68 (1908) (citations omitted).

[115] *Haywood*, 556 U.S. at 742.

claim is of such a novel character that it could not be described as analogous to an action at law or in equity.

In thus effectively abandoning the requirement of an "analogous" state law claim, the Court in *Haywood* was following through on the implications of the rationale of the *Testa* line of cases. The Court's holdings in these cases were at bottom based on the proposition that, by virtue of the Supremacy Clause, the policies underlying federal law are not "foreign" to the states. As Justice Black wrote for the Court in *Testa*, "a state court cannot 'refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress . . . .'"[116] "The suggestion that [an] act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist."[117]

It follows, the Court concluded in *Haywood*, that "a State cannot employ a jurisdictional rule 'to dissociate [itself] from federal law because of disagreement with its content. . . .'"[118] As the Court put the point in *Testa*, "[federal] policy is as much the policy of [the states] as if it had emanated from its own legislature, and should be respected accordingly in the courts of the state."[119] To that end, the Court concluded in *Haywood* that a state law that denies its courts jurisdiction over all damage claims against corrections officials, whether based on federal or state law, reflects the state's judgment that such officials should not be subjected to damage liability—a policy at odds with the federal policy reflected in § 1983. Similarly, it seems to us that a state law that denies its courts jurisdiction to grant collateral relief to a state prisoner, whether on federal or state grounds, reflects a policy that criminal convictions should not be disturbed once "final." Such a policy, if applied to claims falling within a *Teague* exception, would be at odds

[116] Testa v. Katt, 330 U.S. 386, 393 (1947) (quoting Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 222 (1916)).

[117] *Haywood*, 556 U.S. at 736 (quoting Second Emp'rs' Liab. Cases, 223 U.S. 1, 57 (1912)).

[118] Id. (quoting Howlett ex rel. Howlett v. Rose, 496 U.S. 356, 371 (1990)).

[119] *Testa*, 330 U.S. at 392 (quoting Mondou v. N.Y., New Haven & Hartford R.R., 223 U.S. 1, 57 (1912)).

with the federal policy articulated in *Teague*, as interpreted in *Montgomery*. For this reason alone, it would not be a "valid excuse."

This rationale for the *Testa* principle means that a jurisdictional limitation can be a "valid excuse" for rejecting a federal claim only if it does not turn on the content of the law over which the courts are being denied jurisdiction. If a state denies its courts all jurisdiction over a particular class of claim, it is likely that that the state does not recognize the existence of such a claim as a matter of state law. If federal law recognizes the particular class of claim, the nonexistence of the claim as a matter of state law reflects a state policy in conflict with the relevant federal policy.

The Court's explanation of the basis of its holding in *Testa* and *Haywood* therefore must mean that a state's jurisdictional limit would count as a "neutral" rule of administration, and thus a "valid excuse," only if it does not exclude a particular substantive class of cases from the jurisdiction of the state's courts. Examples of such neutral rules would include a rule excluding cases in which the dispute or the parties lack a sufficient connection with the state,[120] or a rule that directed certain types of claims to one state tribunal instead of another.[121] We discuss some possible limitations that might constitute "valid excuses" in Part III, below. But a jurisdictional rule would not be neutral if it reflects hostility to a particular type of claim recognized by federal law. A state law denying its courts jurisdiction over all collateral claims would, it seems to us, reflect hostility to the right to collateral relief recognized by the Court in *Montgomery*.

b. *The* Crain *Principle*

In the present context, the *Testa* line of cases dovetails with a separate line of Supremacy Clause cases establishing that state laws are invalid insofar as they deny state courts of general jurisdiction the power to grant remedies required by the Constitution. Indeed, the latter principle is even more directly on point than the former. The *Testa*/*Haywood* line of cases involved federal *statutory* causes of action. But the holding of *Montgomery* was that state prisoners are *constitutionally* entitled to

[120] See Missouri ex rel. S. Ry. Co. v. Mayfield, 340 U.S. 1 (1950); Douglas v. New York, New Haven & Hartford R.R., 279 U.S. 377 (1929).

[121] See Herb v. Pitcairn, 324 U.S. 117 (1945).

collateral relief if their continued incarceration contravenes a new substantive rule of constitutional law. The conclusion that the state courts must entertain federal claims, subject only to neutral rules of administration that do not reflect hostility to the right, stands on an even stronger footing when the federal claimant seeks a *constitutionally* required remedy.

The Court in *Haywood* framed the issue as concerning the power of *Congress*, by creating a federal cause of action, to compel states to offer a forum for the adjudication of claims over which those courts would not otherwise have jurisdiction.[122] The dissenters in *Haywood* similarly understood the issue to concern the scope of *congressional* power to commandeer state courts.[123] When a constitutionally required remedy is at stake, however, the reasons for insisting on the power and duty of state courts to entertain the claim are even more powerful. After all, when Congress creates a cause of action, it has a strong incentive to set up an adequate judicial enforcement mechanism. If state courts are unavailable because of a state jurisdictional limitation, Congress can, and presumably would, invest the federal courts with jurisdiction over such claims. Constitutionally required remedies, however, should be available even if Congress does not support such remedies strongly enough to give the federal courts the jurisdiction to award them.

A separate line of Supreme Court decisions supports the conclusion that state courts are constitutionally required to entertain suits seeking constitutionally required remedies for violations of federal law, regardless of whether they have jurisdiction under state law to adjudicate analogous suits. The leading case is *General Oil Co. v. Crain*. The plaintiff in *Crain* brought suit against a Tennessee official seeking to enjoin the enforcement of a Tennessee law it claimed was unconstitutional. The Tennessee court dismissed the suit for lack of jurisdiction, relying on a Tennessee statute providing

> [t]hat no court in the state of Tennessee has, nor shall hereafter have, any power, jurisdiction or authority to entertain any suit against the

[122] See *Haywood*, 556 U.S. at 739 ("This case does not require us to decide whether Congress may compel a State to offer a forum, otherwise unavailable under state law, to hear suits brought pursuant to § 1983.").

[123] See id. at 770 (Thomas, J., dissenting) (citing Printz v. United States, 521 U.S. 898, 928 (1997)); id. at 773 (citing Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)).

> [s]tate, or any officer acting by the authority of the [s]tate, with a view to reach the [s]tate, its treasury, funds, or property, and all such suits now pending, or hereafter brought, should be dismissed . . . .[124]

On direct appeal to the Supreme Court, the defendant argued that the state court's decision rested on an adequate and independent state law ground, namely, the state court's lack of jurisdiction over suits against state officials. Only Justice Harlan agreed with this argument.[125] In determining whether a state law may be relied upon as an adequate and independent state ground precluding Supreme Court appellate review, the Court held, "to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws."[126] The Tennessee law denying its courts jurisdiction over a suit to enjoin enforcement of an unconstitutional law was, in the circumstances of the case, invalid. "It being . . . the right of a party to be protected against a law which violates a constitutional right . . . it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by this court."[127]

Crain thus held that, if a plaintiff has a constitutional right to injunctive relief, a state law denying its courts jurisdiction to entertain an action seeking such relief was itself unconstitutional. The Court concluded that the state court had an obligation to entertain a suit seeking that constitutionally required remedy whether or not state law authorized it to do so. Indeed, the state court had an obligation to entertain the action and grant the requested relief even in the face of a state statute explicitly denying it the power to do so.

* * *

In sum, under both the *Testa* and *Crain* lines of cases, we believe that state courts are constitutionally obligated to entertain claims by state prisoners seeking the collateral remedy the Court in *Montgomery* held to be constitutionally required, even if they lack the jurisdiction to entertain such claims under state law. State jurisdictional rules may validly assign jurisdiction over such claims to specific state courts, and states may

[124] *Crain*, 209 U.S. at 216.

[125] Id. at 232–34 (Harlan, J., concurring).

[126] Id. at 226 (majority opinion).

[127] Id. at 228.

impose neutral rules of administration, such as statutes of limitations, so long as those rules do not themselves violate constitutional rights. (We discuss the permissibility of some such rules in Part III.) But *some* court in each state must be open to such claims for at least some reasonable period.

2. *Collateral Relief for State Prisoners in Federal Court*

As with other constitutionally required remedies, Congress may confer jurisdiction on the federal courts to grant collateral relief to state prisoners, and it may even provide that the jurisdiction of the federal courts to grant such relief shall be exclusive. *Montgomery* itself confirms that Congress has not made the federal courts' jurisdiction to grant collateral relief to state prisoners on the basis of new rules of federal law exclusive—a conclusion that necessarily followed from *Danforth*.

The question is whether state prisoners additionally have a constitutional right to collateral relief in federal court if their continued incarceration contravenes a retroactively applicable new rule of federal law. Current federal statutes arguably raise this constitutional question. Federal statutes give the lower federal courts habeas jurisdiction over some claims by state prisoners, but it is unclear whether these statutes authorize the federal courts to grant habeas relief to state prisoners in this situation. Indeed, the Court has expressly left open whether the federal habeas statutes, as amended in AEDPA, "bar a federal habeas petitioner from relying on a decision that came after the last state-court adjudication on the merits, but [falls] within one of the exceptions recognized in *Teague*."[128]

Some scholars have argued that AEDPA is unconstitutional to the extent it precludes federal courts from awarding collateral relief to state prisoners incarcerated in contravention of new substantive rules of constitutional law.[129] But this conclusion runs into another widely held view—that is, that "federal habeas corpus [is] constitutionally gratuitous as a means of postconviction review."[130] This proposition is thought to

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

[129] See Zarrow & Milliken, supra note 73, at 45–46.

[130] Fallon & Meltzer, supra note 55, at 1813 (citing Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93–94 (1807)).

follow from the Madisonian Compromise, under which the Constitution left it to Congress to determine whether to create lower federal courts in the first place. From the premise that the lower federal courts exist only at Congress's pleasure, it is widely understood to follow that the jurisdiction of such courts is entirely within Congress's control. Thus, in *Ex parte Bollman*, the Supreme Court concluded that the power of the federal courts to grant habeas relief must be granted by written law: "[C]ourts which are created by written law and whose jurisdiction is defined by written law cannot transcend that jurisdiction."[131]

The scope of Congress's power to limit the jurisdiction of the federal courts is the subject of much debate.[132] This is not the place to review the contending positions. It suffices to note that the prevailing view is that Article III is satisfied if the Supreme Court retains jurisdiction to review state court decisions denying a federal right.[133] As discussed in the previous section, the state courts have the power and obligation to grant collateral relief to state prisoners based on new substantive rules of constitutional law, and, if they fail to do so, the U.S. Supreme Court may review and reverse their decisions. Congress may confer exclusive jurisdiction over such claims upon the lower federal courts, but it has not done so. Under the prevailing interpretation of Article III, if the Supreme Court has jurisdiction to review state court decisions adjudicating a state prisoner's right to the remedy recognized in *Montgomery*, the Constitution does not require that the lower federal courts also be empowered to grant that remedy.

There are certainly good reasons for Congress to confer jurisdiction on the federal courts to entertain petitions from state prisoners seeking the remedy recognized in *Montgomery*. We also think there are strong arguments for interpreting current statutes to grant the federal courts

[131] 8 U.S. (4 Cranch) at 93.

[132] For a review of the various positions, see Hart & Wechsler, supra note 30, at 295–341.

[133] The position that some federal court must have jurisdiction to entertain federal constitutional claims is defended by, inter alia, Akhil Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205, 206 (1985), and Lawrence Gene Sager, The Supreme Court 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 21–22 (1981). Others argue that Article III places no limits on Congress's power to exclude federal issues from the jurisdiction of the federal courts. See, e.g., Herbert Wechsler, The Courts and the Constitution, 65 Colum. L. Rev. 1001, 1005–06 (1965).

such jurisdiction. Nevertheless, in light of our conclusion that state prisoners have a constitutional right to a remedy in *state* court for a claim based upon a new rule of substantive constitutional law, it is difficult to conclude that *the Constitution* entitles state prisoners to an additional opportunity to enforce such a claim in the lower federal courts.

B. Federal Prisoners

Federal prisoners of course have the same constitutional right to collateral relief for incarcerations that contravene new rules of substantive federal constitutional law as do state prisoners. Thus, *Montgomery* raises the same question for federal prisoners that we discussed above with respect to state prisoners: does the Constitution require that this remedy be available in the federal courts or in the state courts? Although the Court has never expressly resolved whether the *Teague* framework (including its nonretroactivity principle) applies in general to claims brought by federal prisoners under Section 2255,[134] it recently reaffirmed in *Welch v. United States* that federal prisoners are statutorily entitled to habeas relief if their continued incarceration contravenes a new rule falling within *Teague*'s "substantive" exception.[135] (In *Welch*, the question was whether the Court's decision in *Johnson v. United States*, invalidating part of a federal criminal statute on Fifth Amendment vagueness grounds,[136] was "substantive.") In this Section, we consider whether federal prisoners are *constitutionally* entitled to collateral relief in federal court on this ground. We conclude that federal prisoners are constitutionally entitled to this relief in the state courts unless Congress has given the federal courts exclusive jurisdiction to grant such relief.

[134] See, e.g., Chaidez v. United States, 568 U.S. 342, 357 n.16 (2013) (reserving the question whether "*Teague*'s bar on retroactivity does not apply when a petitioner challenges a federal conviction, or at least does not do so when she makes a claim of ineffective assistance"); Danforth v. Minnesota, 552 U.S. 264, 269 n.4 (2008) (reserving "whether the *Teague* rule applies to cases brought under 28 U.S.C. § 2255"); Teague v. Lane, 489 U.S. 288, 327 n.1 (1989) (Brennan, J., dissenting) (noting that the Court "does not address the question whether the rule it announces today extends to claims brought by federal, as well as state, prisoners").

[135] Welch v. United States, 136 S. Ct. 1257, 1264 (2016).

[136] See Johnson v. United States, 135 S. Ct. 2551, 2557–58 (2015).

The case for concluding that federal courts must, as a constitutional matter, be empowered to grant collateral post-conviction relief to prisoners whose continued incarceration contravenes new substantive rules of constitutional law is, in our view, stronger for federal prisoners than for state prisoners. For state prisoners, there is no impediment to state courts granting the constitutionally required collateral relief, and the Supreme Court can exercise appellate review of state court decisions denying them such relief.

The same may not be true with respect to federal prisoners. In *Tarble's Case*, the Supreme Court held that state courts lack the power to issue writs of habeas corpus to federal jailers.[137] If state courts are constitutionally unable to grant federal prisoners the constitutionally required collateral relief, then the Supreme Court may very well lack the power to grant such relief on appeal from state court decisions dismissing such applications. (If the state court correctly dismisses such a claim for lack of jurisdiction, presumably the Supreme Court's only option if it reviews the decision is to affirm.) If some federal court must have jurisdiction (either original or appellate) to grant this form of relief, and if the state courts lack such jurisdiction as a constitutional matter, then it must follow that, notwithstanding the Madisonian Compromise, the Constitution confers such jurisdiction on the lower federal courts.[138] In the view of some scholars, the constitutional need for review of illegal federal detentions, and the inability of the state courts to afford such review, explains the Court's holding in *Boumediene v. Bush* that a federal statute depriving the lower federal courts of jurisdiction over habeas petitions from Guantánamo detainees violated the Suspension Clause.[139]

We think that the reports of the death of the Madisonian Compromise are premature. Such analyses rely at bottom on an interpretation of

[137] Tarble's Case, 80 U.S. (13 Wall.) 397, 409 (1872).

[138] Persons convicted after a criminal trial, unlike persons in executive detention, would also be able to obtain the constitutionally required remedy through an original writ of habeas corpus in the Supreme Court. We discuss this third avenue for obtaining the relief contemplated by *Montgomery* below. See infra note 143.

[139] Boumediene v. Bush, 553 U.S. 723, 792 (2008). See Mulligan, supra note 29. See also Martin H. Redish & Curtis E. Woods, Congressional Power to Control the Jurisdicition of Lower Federal Courts: A Critical Review and a New Synthesis, 124 U. Pa. L. Rev. 45, 108–09 (1975) (drawing a similar conclusion from *Tarble's Case*).

Tarble's Case as holding that state courts are *constitutionally* disabled from granting habeas relief to federal prisoners. But, as the authors of the third edition of Hart & Wechsler's *The Federal Courts and the Federal System* memorably asked: "Why should the dubious tail of *Tarble's Case* wag such a large dog?"[140] In other words, if a constitutional reading of *Tarble's Case* is inconsistent with the Madisonian Compromise, wouldn't it be far more reasonable for the former to give way than the latter?

Indeed, a non-constitutional interpretation of *Tarble's Case* is readily available: Congress had given the lower federal courts jurisdiction to grant habeas relief against federal officials, and the Court in *Tarble's Case* relied on the existence of such jurisdiction to reassure the reader that its holding provided "no just ground to apprehend that the liberty of the citizen will thereby be endangered."[141] *Tarble's Case* is thus best understood as an "implied exclusion" case, where the ouster of state court jurisdiction was inferred from the *existence* of federal jurisdiction. So construed, *Tarble's Case* might well have come out differently had it been decided at a time when there were no lower federal courts, or when those courts lacked jurisdiction over habeas petitions like Tarble's.[142]

[140] Paul M. Bator et al., Hart & Wechsler's The Federal Courts and the Federal System 491 (3d ed. 1988). See also id. (describing *Tarble's Case* as "meandering and poorly reasoned"); Henry L. Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 507 (1954) (describing *Tarble's Case* as a "case of doubtful soundness" in which the Court "discovered in the silence of Congress, or in the Constitution itself, an implied exclusion of the state courts").

[141] *Tarble's Case*, 80 U.S. at 411.

[142] One of us has argued in some detail that the best way to understand the relationship between habeas corpus and the Madisonian Compromise is to appreciate the unique power of the federal courts in and for the District of Columbia—at least until 1970—to issue common-law writs to federal officers. See Stephen I. Vladeck, The Riddle of the One-Way Ratchet: Habeas Corpus and the District of Columbia, 12 Green Bag 2d 71 (2008); see also United States ex rel. Stokes v. Kendall, 26 F. Cas. 702, 713 (C.C.D.D.C. 1837) (No. 15,517) (discussing uniqueness of D.C. Circuit), aff'd, 37 U.S. (12 Pet.) 524 (1838). Unlike the contemporary Article III courts, which required affirmative legislation to be vested with the authority to issue writs of habeas corpus, the D.C. local courts exercised such power at common law, and only lost such power when Congress affirmatively took it away in 1970. See D.C. Code § 16-1901(b) (1970) (taking away the pre-1970 jurisdiction).

This analysis converges with the reading of *Tarble's Case* offered in the text, leading us to the same conclusion. Although the local D.C. territorial courts exercised common law jurisdiction, they existed at all only because Congress created them. If Congress had not created them, the residual common law jurisdiction they exercised would have been

We think that *Boumediene*, too, is best understood as resting on Congress's implied exclusion of state jurisdiction. Upon invalidating Congress's limitation of the federal courts' jurisdiction over habeas claims by Guantánamo detainees, the Court corrected the problem by empowering the lower federal courts to grant the constitutionally required relief rather than authorizing the state courts to do so. We think this (implicit) choice was based on the Court's reasonable assumption that Congress would have preferred that any constitutionally required remedy for federal detainees be sought in the federal rather than the state courts. Indeed, we think that it can safely be assumed that Congress would have this preference for all challenges to the actions of federal officers.

As applied to the constitutionally required collateral remedy recognized in *Montgomery*, this understanding of *Tarble's Case* and *Boumediene* would tell us that the remedy is available as a default matter in the state courts. But the default remedy would be the appropriate remedy only if Congress either failed to create lower federal courts or clearly expressed its preference that the remedy be available in the state courts. Otherwise, as *Tarble's Case* and *Boumediene* suggest, the federal statutes regulating the jurisdiction of the federal courts will be construed to authorize the lower federal courts to grant any constitutionally required remedy against federal officials—to the exclusion of state courts. In short, the default remedy as a constitutional matter is in the state courts, but because Congress is highly unlikely to want state courts to be reviewing federal detentions, the courts will apply a strong presumption, as a matter of statutory interpretation, that the federal courts have jurisdiction to grant any constitutionally required remedy against federal officials.[143]

exercised by the Maryland (or Virginia) courts that operated in the capital region, pre-cession. See Vladeck, supra, at 75–76 & n.13. Thus, here too, the default courts available to provide the relief required by the Constitution, had Congress never created federal courts and endowed them with exclusive jurisdiction, would have been state courts.

[143] In the case of federal prisoners who were convicted in federal court but whose continued incarceration contravenes new substantive rules, there is a third possibility: the Supreme Court would be able to grant habeas relief to such prisoners under its original habeas jurisdiction. In such cases, Supreme Court review could be regarded as appellate rather than original for Article III purposes. See Felker v. Turpin, 518 U.S. 651, 667 n.1 (1996) (Souter, J., concurring). Thus, unlike persons in executive detention, prisoners in

* * *

We emerge from this doctrinal thicket with two distinct—but related—conclusions: first, for state prisoners, the constitutional right to a post-conviction remedy for the enforcement of new rules of substantive constitutional law is one that must be provided, in the first instance, by state courts. Although AEDPA is best read to have preserved the federal courts' power to afford such relief as well, it is clear that Congress did not intend to give the federal courts *exclusive* jurisdiction to grant relief to state prisoners on the basis of new rules. Second, for federal prisoners, although state courts are also the Constitution's default forum for obtaining such relief, we think the Court's decisions in *Tarble's Case* and *Boumediene* are best understood to reflect the (undoubtedly correct) assumption that Congress would prefer any constitutionally required remedy against federal officials to be available in the federal courts rather than the state courts. As long as lower federal courts exist, they should be presumed to have exclusive jurisdiction to grant any constitutionally required remedy against federal officials. The default forum under the Constitution would become available once more only if Congress denied the lower federal courts jurisdiction and clearly expressed its preference that the remedy be available in the state courts. In the absence of such a clear statement, the Court should construe the federal habeas statute to authorize the lower federal courts to afford the constitutionally required collateral relief recognized in *Montgomery*.

custody pursuant to criminal convictions would not be constitutionally limited to review in the state courts or the lower federal courts.

But Congress is unlikely to want such review to be available solely in the Supreme Court rather than the lower federal courts. The Supreme Court's time and resources are limited; assigning to the Court the responsibility to entertain the habeas petitions of federal prisoners raising claims based on new substantive rules of constitutional law would not be a wise allocation of federal judicial resources. Faced with the choice of allowing such review in the lower federal courts or in the Supreme Court, it is safe to assume that Congress would have preferred such review to be available in the lower federal courts. The same rule of statutory construction that justifies an interpretation of the statutes involved in *Tarble's Case* and *Boumediene* as permitting review in the lower federal courts in preference to the state courts would justify an interpretation of the statutes regulating federal habeas review as permitting the constitutionally required review of the claims of federal prisoners to occur in the lower federal courts instead of (or in addition to) in the original jurisdiction of the Supreme Court.

III. THE CONTOURS OF THE CONSTITUTIONALLY COMPELLED REMEDY

In Part I, we explained how *Montgomery* recognized the constitutional basis of the first *Teague v. Lane* exception. In Part II, we demonstrated why that result, when taken together with the Supreme Court's Supremacy Clause jurisprudence, compels the conclusion that state and federal prisoners alike have a constitutional right to a collateral post-conviction remedy where, based upon new substantive rules of constitutional law, their continued incarceration is no longer lawful. In this Part, we turn to some of the broader implications of *Montgomery*'s recognition of a constitutionally required collateral remedy. Because the takeaway from Parts I and II is potentially so momentous, it is impossible to sketch out all of the potential implications that arise from reading *Montgomery* together with the Supreme Court's Supremacy Clause jurisprudence. Instead, our effort here is to identify and offer some preliminary thoughts about what we see as some of the more important key issues.

A. The Types of Claims for Which Prisoners Are Entitled to Collateral Relief

As Part I demonstrated, the Court in *Montgomery* held that prisoners are entitled to collateral relief based on new substantive rules of constitutional law. The core case is one that seeks collateral relief based on a new rule that "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[144] An example would be the new rule recognized by the Supreme Court's decision in *Texas v. Johnson*, holding that the First Amendment prohibits punishment for burning the American flag.[145] In addition, the Court has held that the *Teague* exception for new substantive rules applies to new "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[146] *Montgomery* involved a new substantive rule of this type.

[144] *Teague*, 489 U.S. at 307 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)).

[145] 491 U.S. 397, 406 (1989).

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

The Court in *Teague* recognized a second category of new rules exempt from the bar on retroactive application: "watershed" procedural rules, defined as "those new procedures without which the likelihood of an accurate conviction is seriously diminished."[147] The Court in *Teague* expressed the belief that it was "unlikely that many such components of basic due process have yet to emerge."[148] And, indeed, the Court has yet to recognize a new procedural rule as falling within this category. If the Justices should ever identify a new rule falling into this category, we believe the *Montgomery* holding would extend to such rules as well. After all, they rest on the same basic premise from Justice Harlan's *Desist* and *Mackey* opinions—that the new rule vitiates the basis for the prisoner's incarceration.

With respect to federal prisoners, the "substantive" category applies to new decisions interpreting criminal statutes in a way that narrows the range of conduct the statute makes criminal. For example, the Court in *Bousley v. United States*[149] held that its earlier decision in *Bailey* v. *United States*,[150] interpreting the term "use" in the law making it a crime to use a firearm in certain circumstances, was retroactively applicable to cases on collateral review. Persons who are not guilty of the offense as narrowed by the new decision are entitled to collateral relief.

With respect to state prisoners, a similar question arises as to whether they are entitled to collateral relief on the basis of new substantive rules of *state* law. In other words, does the federal Constitution entitle them to collateral relief if the state's highest court subsequently rules that the statute under which the prisoner was convicted contravenes the state constitution or does not criminalize the conduct the prisoner was found to have committed? Examination of this question helps shed light on the basis and scope of the Court's holding in *Montgomery*. *Montgomery* establishes that the retroactivity of new substantive rules of *federal* law is based on the federal Constitution, but the Court did not explain which provision of the Constitution requires such retroactive application. Does the federal Constitution also require the retroactive application of new

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

[148] Id.

[149] 523 U.S. 614, 621 (1998).

[150] 516 U.S. 137, 144 (1995).

substantive rules of state law, or is the retroactivity of such rules purely a matter of state law?

The issue was teed up but ultimately avoided in *Fiore v. White*.[151] Petitioner William Fiore was convicted of violating a Pennsylvania statute making it a crime to operate a hazardous waste facility without a permit. After Fiore's conviction became final, the Pennsylvania Supreme Court reviewed the conviction of Fiore's business partner, David Scarpone, who was convicted of performing the same acts at the same time. The state court held that the statute did not apply to the conduct. Nevertheless, the Pennsylvania courts refused to afford Fiore collateral relief. Fiore then sought federal habeas relief, arguing that failure to give him the benefit of the new decision of the Pennsylvania Supreme Court violated the Due Process Clause. The district court granted the writ, but the Third Circuit reversed, holding that the "state courts are under no [federal] constitutional obligation to apply their decisions retroactively."[152] The U.S. Supreme Court granted certiorari but, before reaching the merits, asked the Pennsylvania Supreme Court to clarify whether its decision in the *Scarpone* case articulated a new rule of law or instead correctly stated the law as it existed at the time of Fiore's conviction.[153] The Pennsylvania court responded that its earlier decision had not announced a new rule of law, and the U.S. Supreme Court held that Fiore was entitled to habeas relief under *Jackson v. Virginia*,[154] which establishes that a conviction violates the Due Process Clause if not supported by evidence establishing the defendant's guilt beyond a reasonable doubt.[155]

Because the Pennsylvania court had clarified that its later decision *was* retroactively applicable as a matter of state law, the Supreme Court did not have to decide whether the U.S. Constitution requires state courts to give retroactive effect to judicial decisions on substantive questions of state law. We think the answer to that question turns on the source and scope of the constitutional right the Court recognized in *Teague*, and hence of the remedy recognized in *Montgomery*.

[151] 531 U.S. 225, 226 (2001).

[152] Fiore v. White, 149 F.3d 221, 222 (3d Cir. 1998).

[153] Fiore v. White, 528 U.S. 23, 25 (1999).

[154] 443 U.S. 307, 316 (1979).

[155] See *Fiore*, 531 U.S. at 228–29.

On our view, the *Teague* exception for new substantive rules of constitutional law 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. There are (at least) two possible ways to understand the "retroactive" effect of new judicial interpretations of substantive law. The first approach is to understand such decisions as telling us that the law has always meant what the Court now says it means. Thus, the prior decisions interpreting the provision differently and denying the prisoner relief were erroneous from the start. This view seems most consistent with the Court's description of these new rules as having "retroactive" effect; applying the new rule "retroactively" is correcting an historical error, and not simply rendering a forward-looking judgment.

Alternatively, we might understand a court's decision adopting a new interpretation as placing new limits on the power of government to impose punishment for certain types of conduct. On this view, the new decision does not call into question the correctness of the earlier judicial decision when rendered (or the state's incarceration of the prisoner up until the time the new decision was rendered). But the new interpretation *does* deny the state the power to *continue* to punish the prisoner for having performed the acts he was found to have performed. On this second understanding of the effect of a new judicial decision, the court awarding collateral relief is not really giving the new interpretation "retroactive" effect; it is merely recognizing that the state no longer possesses the power to punish the prisoner. So construed, the *Teague* exception gives prospective effect to the new interpretation by ordering the prisoner's release from what is, *from that point forward*, illegal detention. That the Court understands the effect of a new interpretation of substantive federal law in this second way is suggested by its description of its holding as being based on the idea that the state "may not constitutionally insist that a prisoner *remain* in jail,"[156] as well as its statement that, "when a State *enforces* a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful."[157]

[156] Montgomery v. Louisiana, 136 S. Ct. 718, 731 (2016) (emphasis added).

[157] Id. at 729–30 (emphasis added).

The second rationale for entitling the prisoner to the benefit of the new interpretation is more plausible for new constitutional decisions than for new interpretations narrowing the substantive scope of criminal statutes. With respect to new constitutional interpretations, *Montgomery* may reflect the Court's recognition that there is a fundamental unfairness, perhaps of due process ramifications, in continuing to incarcerate an individual for conduct that the state no longer possesses the power to proscribe. With respect to new interpretations narrowing the scope of a federal statute, however, the second rationale would appear to require the conclusion that a prisoner is also constitutionally entitled to the benefit of the subsequent repeal of the statute she was convicted of violating. Although continuing to incarcerate someone for violating a statute that has subsequently been repealed may also be thought to be unfair, it has never been thought to be unconstitutional.[158] Because the Court appears to regard the holding of *Bousley* as merely a straightforward application of the rule established in *Teague*, we think the first of the two approaches described above is the most persuasive conceptualization of the first *Teague* exception.

If *Montgomery* is based on the idea that new judicial interpretations of substantive federal law clarify what the substantive law has always meant, then its applicability to new state court interpretations of state law depends on whether the federal Constitution requires states to regard their judiciaries' new interpretations of state laws in the same way. If any provision of the federal Constitution addresses how states must understand their courts' novel interpretations of state law, presumably it is the Due Process Clause of the Fourteenth Amendment. The Due Process Clause undoubtedly imposes some outer limits in this context. For example, the Due Process Clause prohibits arbitrariness in judicial decision-making. This may mean, for example, that a state cannot validly give one defendant the benefit of a new constitutional or statutory interpretation yet deny the benefit of the new interpretation to someone who jointly committed the crime but was tried separately.[159]

[158] See Comment, Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation, 121 U. Pa. L. Rev. 120, 145 (1972) ("No matter what the nature of the change, ameliorative legislation has never been held to apply to finalized convictions.").

[159] Thus, there would have been a strong argument that failure to give Fiore the benefit of the new rule recognized in Scarpone's case would have violated the Due Process Clause.

We doubt, however, that the Due Process Clause imposes on the states the particular conception of the judicial role in interpreting substantive law that underlies the *Teague* and *Montgomery* holdings. Indeed, the role of the state courts with respect to state law differs significantly from the role of the federal courts with respect to federal law. Of particular relevance here, the state courts as a matter of course engage openly and unapologetically in judicial law-making—for example, when they develop their state's common law. The federal courts' authority to play a law-making role is much more constrained and exceptional. We thus think it likely that the states can, consistently with the Due Process Clause, conceptualize their courts' novel interpretations of their constitutions or statutes as acts of law-making applicable only to primary conduct occurring after the judicial decision was rendered. The Due Process Clause limits the states' freedom not to extend the benefits of a new rule to persons convicted earlier in certain contexts (such as, we think, on the facts of *Fiore v. White*),[160] but we doubt that the Clause imposes a general requirement on the states to give retroactive effect to new judicial interpretations of state law, even when the new interpretation bears on the permissibility of primary individual conduct.

Of course, a state is free to understand judicial decisions adopting new interpretations of state law as the Court in *Teague* and *Montgomery* understood judicial decisions adopting new interpretations of the substantive provisions of the federal Constitution. If a state *does* regard the new judicial interpretations in this way, then *Fiore* tells us that the Due Process Clause requires the state courts to apply those interpretations to persons convicted before the interpretations were rendered. But whether new judicial interpretations of substantive law are retroactively applicable is ordinarily a question of state law not reviewable in federal courts.

B. When Does the Right Accrue?

The petitioners in both *Montgomery* and *Welch* based their (ultimately successful) claims on new decisions of the U.S. Supreme Court that the petitioners in both cases claimed were substantive, although the Court

[160] See supra text accompanying note 159.

had not yet so held with regard to either. This tells us that the right to collateral relief accrues, at the latest, when the Supreme Court recognizes a new rule that is retroactively applicable on collateral review (even if, as in both cases, it was not self-evident that the new rule so qualifies). There is no need to await a Supreme Court decision holding that the new rule is retroactively applicable.

In *Teague*, the Court held that a prisoner raising a substantive claim may ask the habeas court to recognize the substantive right for the first time. Thus, the petitioner in *Penry v. Lynaugh* brought a federal habeas petition raising the claim that the Constitution prohibits imposition of the death penalty on persons with mental disabilities.[161] The Court held that this claim fell within the first *Teague* exception and could thus be raised on collateral review.[162] However, the Court went on to reject the claim on the merits.[163] (The Court reversed itself on the latter point in *Atkins v. Virginia*.[164])

After AEDPA, a prisoner would be able to maintain a first federal habeas petition seeking the initial recognition of a new substantive rule if the claim was not "adjudicated on the merits in state court."[165] As discussed in Part II, it is unclear whether the habeas statute as amended by AEDPA permits claims based on new rules of any kind if the claim *was* adjudicated on the merits in state court. If AEDPA were read to permit claims based upon new rules falling within a *Teague* exception, as we suggest above, it is unclear whether the petitioner would be able to ask the habeas court to recognize that right for the first time or would be limited to enforcing on habeas a new rule that has already been recognized by the Supreme Court. At best, a state prisoner would be able to seek initial recognition of a new rule only in his first federal habeas petition, and only if the petition was brought within one year of when the conviction became final. The statute of limitations trigger for "new rules" begins to run on "the date on which the constitutional right

[161] 492 U.S. 302, 307 (1989).

[162] Id. at 329–30.

[163] Id. at 330–40.

[164] 536 U.S. 304, 321 (2002).

[165] Such a claim would now have to be brought in the petitioner's first federal habeas petition, and it would have to be brought within one year of the date on which the conviction became final.

asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."[166] And the authorization for raising a claim in a second or successive petition applies only if "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."[167] Thus, claims based on new substantive rules may not be raised more than one year after the conviction became final, and may not be raised in a second or successive petition if the new rule has not already been recognized (*and* "made retroactive") by the Supreme Court.

As to collateral claims raised in state court, does *Montgomery* establish that prisoners have the right to seek initial recognition of a right falling within the *Teague* exceptions? We think not. State courts must, of course, entertain at trial all properly raised federal claims or defenses (both substantive and procedural). If the claim was rejected by the court at trial and on direct appeals, the defendant can seek review in the Supreme Court. States may permit such claims to be raised again in collateral proceedings. But, except in unusual circumstances (such as when the claim could not have been raised earlier), we do not think the Constitution requires the states to afford state prisoners an opportunity to *relitigate* the substantive claim in collateral proceedings. Just as state rules of claim and issue preclusion relegate civil litigants to one shot at adjudicating their claims and defenses, states can validly limit criminal defendants to a single opportunity to raise even substantive constitutional claims. A contrary conclusion would permit endless relitigation of claims that were properly rejected under existing federal precedents.

Allowing a state prisoner to seek initial recognition of a new substantive rule on *federal* habeas is justified by the need to afford such prisoners at least one realistic shot at a federal forum in which to raise the claim. (As noted, the Supreme Court may directly review via certiorari the state courts' denial of federal claims at trial, but the Court grants review of very few certiorari petitions. State prisoners cannot be said to have a realistic shot at Supreme Court review of their claims via

[166] 28 U.S.C. § 2244(d)(1)(C) (2012).

[167] Id. § 2244(b)(2)(A).

certiorari.) But all state prisoners had a realistic opportunity—indeed, a right—to have their federal claims adjudicated in the state courts at their trials and direct appeals. The Constitution does not give them a right to a second opportunity in the state courts.

The situation is different after the Supreme Court has rendered a new substantive decision establishing the validity of the petitioner's claim for the first time. Thus, we think that the right recognized in *Montgomery* is a right to obtain collateral relief in state court 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 thus rests on the courts' understanding of the effect of *Supreme Court* decisions recognizing new substantive rules.

C. Procedural Limitations

As discussed in Part II, the states may impose neutral procedural limitations on the enforcement of federal rights in state court. Such procedural rules are valid if they satisfy the requirements of the Due Process Clause as well as the Supremacy Clause's nondiscrimination principle. Federal procedural rules, too, must satisfy the Due Process Clause. Federal jurisdictional limits that might otherwise raise constitutional questions might be deemed valid to the extent federal collateral relief is understood to be constitutionally optional. With respect to federal prisoners, however, the courts properly presume that Congress would prefer collateral review to take place in federal rather than state courts. Thus, courts may (and should) assume that, rather than rely on the state courts to provide federal prisoners the collateral relief required by the Constitution, Congress would prefer that the federal habeas statute be construed to authorize the federal courts to afford federal prisoners the procedures required by the Due Process Clause.

1. Statutes of Limitations

A statute of limitations is an example of such a procedural limitation. As noted, the statute of limitations imposed by AEDPA, for both state and federal prisoners seeking federal habeas relief, requires that habeas claims be raised within one year of the latest of four dates. One of the triggering events is the "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has

been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."[168] A statute of limitations satisfies Due Process if it gives the prisoner "a reasonable opportunity to have the issue as to the claimed right heard and determined."[169] A statute that gives the prisoner one year from the time the right accrues to bring a claim based on a new substantive rule of constitutional law would appear to satisfy this standard.

As long as it is applied in a nondiscriminatory manner, and affords the petitioner enough time, a state statute of limitations can permissibly be applied to petitions seeking state collateral review on the basis of new substantive rules. Because of the nature of a *Montgomery* claim, however, the Constitution requires that any state statute of limitations must, like AEDPA's, begin to run anew upon the Supreme Court's initial recognition of the new rule (which, as we discussed above, is when the right to collateral relief recognized in *Montgomery* necessarily accrues).

2. *Successive Petitions*

AEDPA also placed stringent new limits on the ability of state and federal prisoners to present second or successive federal habeas petitions. These limits potentially present two significant constitutional problems after *Montgomery*. As discussed below, the courts appear to have avoided the first problem through statutory interpretation, but the other problem remains significant.

AEDPA permits the filing of a second or successive federal habeas petition[170] (by state or federal prisoners) only if, as relevant here, "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."[171] But the petitioner would be able to include only claims that were not included in a prior petition, as AEDPA provides

[168] Id. § 2244(d)(1)(C).

[169] Michel v. Louisiana, 350 U.S. 91, 93 (1955) (quoting Parker v. Illinois, 333 U.S. 571, 574 (1948)).

[170] With regard to second or successive petitions, § 2255 incorporates the same requirements as § 2244. See 28 U.S.C. § 2255(h) ("A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals . . . .").

[171] 28 U.S.C. § 2244(b)(2)(A) (2012).

categorically that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."[172] Depending on how one defines a "claim," this provision could have perverse results. Consider a prisoner convicted of burning the American flag before the Court's decision in *Texas v. Johnson* establishing that this conduct is protected by the First Amendment.[173] If his "claim" for purposes of determining the permissibility of a second or successive petition is a "First Amendment" claim, he would be barred from seeking collateral relief after the *Texas v. Johnson* decision if he had unsuccessfully raised a First Amendment claim in his first federal habeas petition, but not if he omitted the claim from his earlier petition. Such a regime would perversely disadvantage the petitioner who had the diligence and foresight to raise the claim earlier, only to have it dismissed under then-prevailing law.

In cases brought by federal prisoners, the courts have (properly, in our view) avoided this problem by (implicitly) defining a "claim" narrowly for purposes of determining the permissibility of a second or successive petition. Thus, none of the cases leading up to *Welch* were rejected on the ground that the petitioners had already raised "vagueness" challenges prior to the Supreme Court's articulation of the underlying new rule.[174] The courts have thus apparently construed the term "claim" narrowly so that, in our hypothetical above, the relevant "claim" would be a "*Texas v. Johnson*" claim, rather than a "First Amendment" claim. Obviously, the petitioner could not have raised a "*Texas v. Johnson* claim" before the *Texas v. Johnson* decision was handed down, so Section 2244 would not bar him from raising the claim now in a second or successive petition. The courts have, in our view, properly adopted this interpretation to avoid perverse results. After *Montgomery*, we think this interpretation is further justified by the need to avoid a significant constitutional question. For the same reasons, in our view, *Montgomery* requires state courts to entertain a petition raising a claim after the

[172] Id. § 2244(b)(1).

[173] 491 U.S. 397, 406 (1989).

[174] In *Welch* itself, the petitioner had anticipated the *Johnson v. United States* vagueness holding by making that argument initially. The fact that it was rejected by the Eleventh Circuit prior to the decision in *Johnson* did not preclude him from raising it anew once *Johnson*, the new rule, was decided.

Supreme Court's recognition of the new substantive rule even if the petitioner had unsuccessfully raised the claim earlier.[175]

The second problem with the AEDPA rule on second or successive petitions unfortunately remains significant. According to AEDPA's text, a prisoner's ability to raise a claim based on a new rule in a second or successive petition depends not just on the Supreme Court's recognition of a right that is retroactively applicable on collateral review, but in addition on the Supreme Court also having held specifically that this new rule is retroactively applicable on collateral review. In *Tyler v. Cain*, Justice O'Connor's controlling concurring opinion made clear that a "new" rule has been "made retroactive on collateral review by the Supreme Court" if the retroactivity of the new rule follows "by strict logical necessity" from the Court's prior decisions establishing when a new rule is retroactively applicable.[176] Thus, if a new rule is clearly substantive, it will have been "made retroactive of collateral review by the Supreme Court" at the moment the Court recognizes the new rule (thanks to prior decisions clearly holding that all "substantive" rules are retroactive). But as *Welch* demonstrates, it will not always be clear *whether* a new rule qualifies as "substantive" or is, instead, procedural, and thus unenforceable through collateral post-conviction review unless it falls within the second *Teague* exception. In such cases, a prisoner may be able to raise the claim in a second federal habeas petition only after the Supreme Court has held in a later case that the new rule is, in fact, retroactively applicable. And, because the one-year statute of limitations begins to run when the Supreme Court initially recognizes the new rule, the prisoner will be able to raise his claim in a second or successive petition only if the Court "makes" the new rule retroactive (in a different case) within a year of the Court's initial announcement of the new rule. If the Court does not render its decision confirming the retroactivity of the new rule within a year of its initial decision recognizing the new rule, prisoners will find themselves with zero time to seek federal habeas relief.

[175] Thus, for example, we disagree with decisions such as that of the Oregon Court of Appeals in *Cunio v. Premo*, 395 P.3d 25 (Or. App. 2017), which concluded that a claim seeking to enforce *Miller v. Alabama* retroactively in a state post-conviction proceeding was barred by the state's rule against successive post-conviction petitions. An appeal in *Cunio* is currently pending before the Oregon Supreme Court.

[176] Tyler v. Cain, 533 U.S. 656, 670 (2001) (O'Connor, J., concurring).

With respect to federal prisoners, we think *Montgomery* now renders this regime constitutionally problematic (if it wasn't already).[177] *Montgomery* establishes that federal prisoners have a constitutional right to collateral relief if their continued incarceration contravenes a new substantive rule of constitutional law (or, we think, a new rule falling within the second *Teague* exception). After *Montgomery*, a federal prisoner would have a good argument that AEDPA's statute of limitations violates the Due Process Clause to the extent it denies him relief because the new rule was not "made retroactive by the Supreme Court" until more than a year after it was initially recognized by the Court. Under the Due Process Clause, prisoners must have "a reasonable opportunity to have the issue as to the claimed right heard and determined,"[178] yet, through the interaction of AEDPA's statute of limitations and its restriction on second or successive petitions, a federal prisoner might find himself with zero time to raise his claim for collateral relief. Because Congress can be presumed to have preferred that a constitutionally required remedy against federal officials be sought in the federal courts, AEDPA's statute of limitations should be construed in a way that provides federal prisoners a constitutionally adequate amount of time to seek the constitutionally required remedy recognized in *Montgomery*.

With respect to state prisoners seeking habeas relief in federal court, AEDPA's regime for second or successive petitions is constitutionally valid (although senseless and harsh) only because federal habeas relief is constitutionally optional to begin with. There is no basis in *Teague* itself for concluding that the right to collateral relief is triggered only after a second Supreme Court decision holding the new rule falls within a *Teague* exception. (Indeed, as discussed above, *Teague* permits prisoners to seek *initial* recognition of new rules falling within the two exceptions via federal habeas.) Thus, we think that state courts are required to provide collateral review of claims based on new rules falling within a *Teague* exception upon the Supreme Court's recognition of the right, without awaiting a second holding that the rule falls within a

[177] See Vladeck, supra note 58 (describing the constitutional and practical difficulties posed by AEDPA's constraints on enforcing new rules through second or successive petitions).

[178] Michel v. Louisiana, 350 U.S. 91, 93 (1955) (quoting Parker v. Illinois, 333 U.S. 571, 574 (1948)).

Teague exception. In our view, *Montgomery* requires the states to waive any limit on second and successive petitions that would preclude or unduly burden a prisoner's right to seek collateral relief on the basis of a new substantive rule of federal constitutional law after the Supreme Court has announced the new rule. Indeed, in light of the obstacles imposed by AEDPA to raising such a claim even in a first federal habeas petition, we think review of a state court's denial of a petition for collateral review on the ground that a newly recognized rule is not applicable on collateral review offers the surest route to a Supreme Court holding that the new rule is retroactively applicable on collateral review.[179] And, if the state has a statute of limitations for collateral relief, a state prisoner would be well advised to pursue state collateral relief instead of federal habeas, lest his time for filing a state petition expire while he is seeking federal review.

3. Procedural Defaults

A more difficult question is whether the state can deem the claim procedurally defaulted if the petitioner did not raise the claim at his trial or in his direct appeals, as most states do. Even if the claim is not supported by Supreme Court precedents directly on point, failure to raise a contemporaneous objection results in forfeiture of the claim as a matter of course. After *Montgomery*, does the Constitution require states to waive procedural defaults based on failure to contemporaneously object if the claim had not been recognized by the Supreme Court at the time of the trial?

The Supreme Court has recognized that the novelty of the claim may be "cause" that would excuse a failure to contemporaneously object under certain circumstances. The novelty of the claim will constitute "cause" if the petitioner at the time of trial lacked the tools with which to construct the argument.[180] In other words, if the Supreme Court's

[179] This would particularly be the case if, as some have argued, the Court's holding in *Tyler* (with respect to claims falling within the second *Teague* exception) also applies to AEDPA's statute of limitations trigger, under which the statute begins to run on "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2244(d)(1)(C) (2012). See Appeals and Writs in Criminal Cases § 15.2 (Stella Lee ed., 3d ed. 2016 update).

[180] See Reed v. Ross, 468 U.S. 1, 12–13 (1984); Engle v. Isaac, 456 U.S. 107, 131 (1982).

recognition of the right was foreshadowed by earlier decisions, the petitioner will be expected to have anticipated the Court's recognition of the right. As a practical matter, this standard means that the default will not be excused for prisoners convicted shortly before the Court's recognition of the new rule, as the Court's recognition of the new rule will usually be an incremental step in the evolution of constitutional doctrine. But a person convicted well before the recognition of the new rule will often have "cause" for his failure to raise the claim, as the precedents at that time of his trial will typically not have evolved to the point that he will have had the "tools with which to construct" the claim.

The Court's decisions defining "cause" have been framed as a basis for permitting habeas review in the federal courts despite a state procedural default.[181] The Court has not said that the state courts themselves are required to excuse procedural defaults because of the novelty of the claim. But, as noted above, the conventional view before *Montgomery* was that the state courts were not required to afford state prisoners collateral review at all. Now that states are required to provide collateral relief for new substantive rules, the question arises whether the "cause" standard articulated by the Court is also applicable in the state courts. There would appear to be a strong case to be made that the Court's standard for regarding the novelty of a new rule to be "cause" for excusing a procedural default is applicable to the state courts as a constitutional matter.

On the other hand, AEDPA might be read to absolve the state courts of the obligation to consider claims that were procedurally defaulted because they were not raised at trial. As discussed above, AEDPA entitles state prisoners to habeas relief based on new substantive rules under the pre-AEDPA standard if the claim was not adjudicated on the merits in state court. If the claim was not raised by the petitioner at trial or direct appeals, then the claim will presumably not have been adjudicated on the merits in state court. If the petitioner raises the claim in a federal habeas petition after the Supreme Court's initial recognition of the right, the federal habeas court will entertain the claim, despite the procedural default, if the petitioner can show "cause." And he will be able to show cause if he lacked the tools with which to construct the argument. Thus, federal habeas relief will be available in precisely those

[181] See Wainwright v. Sykes, 433 U.S. 72, 86 (1977).

cases in which the state courts would be required to entertain the claim if the "cause" standard were imposed on the state courts. If *Montgomery* requires that collateral relief be available in either state or federal courts, then the availability of federal habeas relief in precisely those cases that the state would regard as procedurally defaulted would obviate the question of the state's obligation to excuse the default.

We think the better reading of AEDPA is as offering state prisoners an additional forum for adjudicating their otherwise defaulted claims based on retroactively applicable new rules. To interpret AEDPA as giving the federal courts exclusive jurisdiction over state prisoners' otherwise defaulted collateral claims based on new substantive rules of constitutional law would run counter to the overall thrust of AEDPA, which is to give the state courts the first-line responsibility for enforcing the federal rights of state prisoners.[182] The state courts have a duty under *Montgomery* to provide collateral review of state prisoners' claims based on new substantive rules, and, in so doing, we think they must waive any procedural default based on the prisoner's failure to raise the claim before the Supreme Court definitively recognized it, at least if the prisoner lacked the tools with which to construct the argument at the time of his trial.

CONCLUSION

Many of the implications of reading *Montgomery* together with the Supreme Court's Supremacy Clause jurisprudence will have to be fleshed out over time, as new cases come up testing its implications. This Article is meant to open—but not close—the discussion of the far-reaching consequences *Montgomery* is likely to have on the scope and availability of collateral post-conviction relief in both state and federal courts, especially for claims that the prisoner's continued detention is unlawful based upon new rules of constitutional law.

But *Montgomery* may prove to be even more important *outside* the specific context of retroactivity, for it is the first time the Supreme Court has ever held that at least *some* aspect of collateral post-conviction review is constitutionally required. In the process, *Montgomery*

[182] See, e.g., Cullen v. Pinholster, 563 U.S. 170, 182 (2011) (noting that AEDPA intended to "channel prisoners' claims first to the state courts" and "leaves primary responsibility with the state courts").

necessarily opens the door to a reassessment of any number of features of collateral post-conviction review, most of which have historically been thought to be nothing more than the product of legislative grace. We have argued in this Article that, properly understood, the Supreme Court's recent decision in *Montgomery* constitutionalized the *Teague* exceptions—and recognizes a constitutional right to a collateral post-conviction remedy in such cases for state and federal prisoners alike. By holding that some aspects of post-conviction habeas are constitutionally grounded (and their remedies constitutionally compelled), the *Montgomery* decision potentially raises far-reaching questions about whether *other* aspects of habeas post-conviction review have constitutional underpinnings as well.