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Postconviction Remedies, Retroactivity, and *Montgomery v. Louisiana*'s Other New Rule

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ABSTRACT

The U.S. Supreme Court has turned its attention back to the law of habeas corpus, with a string of new decisions that emphasize the limited scope of federal habeas relief. But focusing one's sights on only those decisions would overlook what has transpired at the Supreme Court in recent years in state habeas cases coming directly to the Supreme Court from the state postconviction courts. Montgomery v. Louisiana, in particular, shifted the division of power between the Supreme Court and state postconviction courts for questions conventionally considered to be questions of state law. Montgomery, on the surface, is a decision about retroactivity and the effect of new Supreme Court decisions on old state-court criminal sentences. Must those new Supreme Court decisions be a basis for retrospectively invalidating final sentences, even decades later? Montgomery says yes, at least for some new Supreme Court decisions. Below the surface, Montgomery rests on an unstated assumption that where there is a violation of a constitutional right, as revealed by a new Supreme Court decision, a state postconviction court must provide a collateral remedy, at least in some circumstances. This article examines that assumption, its seeming inconsistency with the Supreme Court's recent federal habeas decisions, and its broader implications for what the Constitution has to say about constitutionally required collateral remedies in state and federal habeas courts.

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I. INTRODUCTION

The United States Supreme Court has had much to say about the history and tradition of the writ of habeas corpus lately. The Court has re-focused its sights on whether habeas relief in federal courts ought to be available to those who most often seek it today: state and federal prisoners with already-final criminal convictions.[1] The Court has observed that today's norm of reviewing already-final convictions "would not have been cognizable in habeas at all" at the Founding.[2] In *Brown v. Davenport*,[3] the Court discussed "returning the Great Writ" of habeas corpus "closer to its historic office"[4]—that is, for those indefinitely detained by the executive branch without trial.[5] The Court described today's federal habeas statute, amended by the Antiterrorism and Effective Death Penalty Act of 1996,[6] as a statute that *precludes* habeas relief for state and federal prisoners.[7] In the rare case when AEDPA's conditions are met, the Court said such relief is not *required* unless a prisoner can convince "a federal habeas court that 'law and justice require'" it.[8] And for at least Justices Gorsuch and Thomas, that would be almost never. In *Edwards v. Vannoy*,[9] Justice Gorsuch, joined by Justice Thomas, said that their votes in future federal habeas cases will adhere to the principle that "[t]he writ of habeas corpus

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[1] *See* NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS (2023), https://nij.ojp.gov/library/publications/final-technical-report-habeas-litigation-us-district-courts [https://perma.cc/DL9C-QU6E]; John Scalia, Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000 1 (Bureau of Just. Stats. 2002), https://bjs.ojp.gov/content/pub/pdf/ppfusd00.pdf [https://perma.cc/CR84-96ZD]; Roger A. Hanson & Henry W.K. Daley, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions*, Bureau of Just. Stats. (Sept. 1995), https://bjs.ojp.gov/content/pub/pdf/FHCRCSCC.PDF [https://perma.cc/W8J5-34PK]; Federal Review of State Prisoner Petitions: Habeas Corpus, Bureau of Just. Stats. (March 1984), https://bjs.ojp.gov/content/pub/pdf/hc-frspp.pdf [https://perma.cc/6BQV-N4H5]. "Finality" occurs, or a conviction is "final," once all appeals have been exhausted or the time to appeal has ended.

[2] Jones v. Hendrix, 143 S. Ct. 1857, 1871 (2023).

[3] 142 S. Ct. 1510 (2022).

[4] *Id.* at 1523 (quoting Edwards v. Vannoy, 141 S. Ct. 1547, 1570 (2021) (Gorsuch, J., concurring)).

[5] *See generally* Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901 (2012); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

[6] Pub. L. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2241 *et seq.*).

[7] *Davenport*, 142 S. Ct. at 1524.

[8] *Id.* (quoting 28 U.S.C. § 2243); *see* Crawford v. Cain, 68 F.4th 273, 286–87 (5th Cir. 2023) ("Law and justice do not require habeas relief—and hence a federal court can exercise its discretion not to grant it—when the prisoner is factually guilty.") *reh'g en banc granted*, 72 F.4th 109 (5th Cir. 2023).

[9] 141 S. Ct. 1547 (2021).

does not authorize federal courts to reopen a judgment issued by a court of competent jurisdiction once it has become final."[10] In other words, federal habeas relief as we know it today would be unavailable in all but the most exceptional cases. Then most recently in *Jones v. Hendrix*,[11] the Court denied federal habeas relief to a federal prisoner who argued that the Constitution required it.[12] *Jones* broke new ground in linking what is (and is not) required of federal habeas courts reviewing state and federal prisoners' sentences today with what was required of habeas courts at the Founding.[13]

But not long ago, the Court said seemingly the opposite with respect to constitutionally required postconviction relief in state courts. In *Montgomery v. Louisiana*,[14] a state prisoner similarly argued his long-final sentence was invalid because of a new Supreme Court decision. The Court ruled that the Constitution required the state court to provide a state postconviction remedy.[15] *Montgomery*, like *Jones*, involved an issue of retroactivity. Both cases posed the question: can (or must) new Supreme Court decisions be grounds for unwinding final criminal convictions and sentences? In Henry Montgomery's case, he was sentenced to life-without-parole for a murder he committed when he was 17 years old.[16] Nearly 50 years later, the Supreme Court decided *Miller v. Alabama*, prohibiting mandatory life-without-parole sentences for juveniles.[17] Invoking *Miller*, Montgomery filed a motion in a Louisiana state postconviction court to challenge the constitutionality of his own life-without-parole sentence.[18] The state court refused to reopen Montgomery's long-final sentence based on the new Supreme Court decision, and the Louisiana Supreme Court agreed.[19] The state courts reasoned that *Miller* was a new rule that did not warrant a postconviction remedy for an old sentence.[20] But when Montgomery took his case to the United States Supreme Court, the Court said the Louisiana Supreme Court

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[10] *Id.* at 1573 (Gorsuch, J., concurring).

[11] 143 S. Ct. 1857 (2023).

[12] *Id.* at 1871–73.

[13] *Compare id.*, *with* Felker v. Turpin, 518 U.S. 651, 663–64 (1996) ("[W]e assume, for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789."). Earlier in *Department of Homeland Security v. Thuraissigiam*, the Court took a similarly historical approach in an immigration case, rejecting "use of the writ [that] would have been unrecognizable at th[e] time" of the Founding. 140 S. Ct. 1959, 1963 (2020).

[14] 577 U.S. 190 (2016).

[15] *Id.* at 204–05.

[16] *Id.* at 194.

[17] 567 U.S. 460 (2012).

[18] *Montgomery*, 577 U.S. at 195.

[19] *Id.* at 196–97.

[20] *Id.*

had to reopen Montgomery's sentence.[21] Why? The Constitution required it, according to *Montgomery*.[22] A state postconviction court "may not constitutionally insist that a prisoner remain in jail" by "refus[ing] to give retroactive effect to a substantive constitutional right that determines the outcome of [a] challenge" to the constitutionality of the final criminal judgment against him.[23]

As *Montgomery* illustrates, it would be a mistake to focus solely on the Supreme Court's recent decisions about the limited power of *federal* habeas courts and overlook all that the Supreme Court has said—or has implied—in recent years about *state* habeas courts.[24] The Court has devoted unprecedented attention to cases in the latter category.[25] Cases in the latter category arise out of states' own systems of postconviction review pursuant to state law, distinct from federal habeas review in federal courts pursuant to AEDPA. After a state prisoner is convicted in a state criminal court, the state prisoner will first challenge the constitutionality of his conviction in his state's own courts, including whatever postconviction review scheme the state has made available. Indeed, to be eligible for federal habeas relief later on, a prisoner *must* exhaust any available state postconviction relief first before going to a federal court to

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[21] *Id.* at 204–05.

[22] *Id.*

[23] *Id.* By "substantive constitutional right," *id.*, the Supreme Court meant constitutional rules "'forbidding criminal punishment of certain primary conduct,'" such as a rule that a State could not constitutionally criminalize flag burning, or "'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense,'" such as a rule that a State could not impose the death penalty for non-homicide offenses. *Id.* at 198 (quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989)).

[24] For purposes of this article, I refer to these modern-day state habeas proceedings or state postconviction proceedings as "state postconviction review" where "state postconviction remedies" are available. The state postconviction proceedings, similar to most federal habeas proceedings today, involve state prisoners who were previously convicted and sentenced by a state criminal court and, after the conviction and sentence become final, then seek to collaterally attack that conviction and sentence in state court under the State's own postconviction review regime. I use "state postconviction proceedings" to distinguish these state proceedings from those involving the common-law writ of habeas corpus for those detained without trial. At the Founding, the states uniformly understood that the common-law writ of habeas corpus was available in their state courts to question the legality of the detention for those detained without trial, and those states were a model for the U.S. Constitution's Suspension Clause. *See* Dallin H. Oaks, *Habeas Corpus in the States: 1776-1865*, 32 U. CHI. L. REV. 243, 247–51 (1965); II RECORDS OF THE FEDERAL CONVENTION OF 1787 340–41, 348 (Farrand ed. 1911).

[25] *See* Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 159, 176–83 (2021).

ask for federal habeas review of the same alleged errors in his conviction.[26] The "conventional wisdom" has been that these state postconviction remedies are matters of state law, leaving the state courts with the last word about their scope.[27]

But does that conventional wisdom still hold? Since 2015, the Court has reviewed an unprecedented number of cases coming directly from state postconviction courts, versus from federal habeas courts.[28] It marks a shift from the longstanding view that "the Court usually deems *federal* habeas proceedings"—after the exhaustion of any state postconviction remedies—"to be the more appropriate avenues for consideration of federal constitutional claims."[29] Rather than wait for habeas proceedings to run their course in the lower state and federal courts,[30] the Supreme Court jumps in midstream when it reviews a case directly from a state postconviction court. *Montgomery* was one such case, on review from the Louisiana Supreme Court. Similarly, the recent decision in *Cruz v. Arizona*[31] was on review from the Arizona Supreme Court, and there too, the U.S. Supreme Court concluded state postconviction relief was wrongfully denied.[32]

That unprecedented attention to state postconviction courts presents new questions about the Court's power over state courts and state postconviction remedies. State postconviction proceedings are rife with antecedent questions of state law—for example, procedural rules that limit the amount of time or attempts a state prisoner can seek a postconviction remedy.[33] As a general rule, the failure to comply with a state-law procedural rule will be a question of state law and thus not reviewable by the Supreme Court.[34] Assuming the state-law defect in the prisoners' state postconviction motion is "adequate" and "independent" of the underlying federal constitutional claim, the Supreme Court will not take up that

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[26] *See* 28 U.S.C. § 2254(b) (1996); *see also* 28 U.S.C. § 2244(d)(2) (1996) (tolling federal statute of limitations "during which a properly filed application for State post-conviction or other collateral review . . . is pending").

[27] *See* Foster v. Chatman, 136 S. Ct. 1737, 1759 (2016) (Alito, J., concurring); Coleman v. Thompson, 501 U.S. 722, 729 (1991).

[28] *See* Ahdout, *supra* note 25.

[29] Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring in the denial of petition for certiorari) (emphasis added); Lawrence v. Florida, 549 U.S. 327, 335 (2007); *see generally* 28 U.S.C. §2241 *et seq*.

[30] *See* 28 U.S.C. § 2254(b) (1996).

[31] 598 U.S. 17 (2023).

[32] *Id.* at 29.

[33] Coleman v. Thompson, 501 U.S. 722, 729 (1991).

[34] 28 U.S.C. § 1257(a) (1964); *see generally* Jonathan F. Mitchell, *Reconsidering* Murdock: *State-Law Reversals as Constitutional Avoidance*, 77 U. CHI. L. REV. 1335 (2010).

underlying constitutional question only to issue an advisory opinion.[35] Despite that general rule, both state postconviction decisions in *Montgomery* and *Cruz* purported to rest on the application of state law limiting the availability of state postconviction relief for new Supreme Court decisions, and the Supreme Court reviewed and reversed both.[36] Such decisions blur the line between questions the Supreme Court does and does not review, effectively magnifying the Supreme Court's power over state postconviction courts.[37] Before *Montgomery*, it would have been a rare event for the Supreme Court to require a state-court remedy that is otherwise unavailable under state law.[38] *Montgomery* appears to be the first time the Supreme Court compelled a state court to provide a remedy that is *collateral* in nature, after the criminal proceedings have come to an end, that would otherwise be contrary to the state court's view of its own state-law procedural bars.

The questions raised by the Supreme Court in such cases multiply when trying to reconcile a decision such as *Montgomery* with the Court's other set of recent decisions about limited federal habeas relief in federal courts. While *Montgomery* concluded that a postconviction remedy was constitutionally required,[39] the Court's most recent habeas decision in *Jones* rejected similar constitutional arguments when raised by a federal prisoner seeking federal habeas relief. The Court in *Jones* described the argument that the Constitution requires federal habeas relief to remain available to reopen a final conviction based on a new Supreme Court decision as one that "would extend the writ of habeas corpus far beyond

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[35] *Cruz*, 598 U.S. at 25.

[36] *See* Montgomery v. Louisiana, 577 U.S. 190, 196–97 (2016); *Cruz*, 598 U.S. at 20. Initially, the dispute in *Montgomery* was whether Louisiana's adoption of the federal retroactivity bar and exceptions in *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), for its own state postconviction courts had enough of a federal ingredient to allow the United States Supreme Court's review or whether, once adopted as state law, the state court's application of the retroactivity bar was an unreviewable question of state law. *See* 28 U.S.C. § 1257 (1964). The Supreme Court bypassed that question by concluding that a state postconviction remedy was constitutionally required, irrespective of Louisiana's retroactivity framework. *See Montgomery*, 577 U.S. at 204–05.

[37] *See, e.g.*, *Cruz*, 598 U.S. at 26–29; Foster v. Chatman, 578 U.S. 488, 497–98 (2016).

[38] *See* Daniel J. Meltzer & Richard H. Fallon, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1786 (1991) (collecting examples of when, though "striking[]" the Supreme Court "has sometimes compelled state courts to provide constitutional remedies despite a lack of state law authority for them to do so"); Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1112 (1969).

[39] *Montgomery*, 557 U.S. at 204–05; Jones v. Hendrix, 143 S. Ct. 1857, 1874 (2023).

its scope when the Constitution was drafted and ratified."[40] This article explores whether the distinctions between state postconviction decisions like *Montgomery* and federal habeas decisions like *Jones* are sufficient to explain these divergent results. It asks what power the Supreme Court has to compel state courts to grant state postconviction remedies in ways that diverge from available federal habeas remedies under AEDPA.

In examining the Supreme Court's power to compel state postconviction remedies, I pay special attention to the "retroactivity problem" in habeas cases.[41] The problem is particularly acute in modern-day habeas, one of the few instances in American law in which courts revisit constitutional claims years, or even decades, after the criminal judgment became final. The retroactivity problem is a function of the protracted nature of postconviction proceedings combined with our system of judicial review, where the Supreme Court can pronounce new rules of constitutional law after a criminal judgment becomes final, but before the judgment is carried out. When the Supreme Court's new rules are relevant to already-final criminal judgments, and not just to non-final or future criminal judgments, those new rules become the subject of state postconviction proceedings. Two questions inevitably arise.

The first is a choice-of-law question: Should the new rules or old rules "apply" in the postconviction proceeding? The second is a remedies

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[40] 143 S. Ct. at 1871.

[41] Desist v. United States, 394 U.S. 244, 260 (1969) (Harlan, J., dissenting). Many criticized the Supreme Court's approaches to retroactivity before *Montgomery*. *See, e.g.*, Paul J. Mishkin, *Forward: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 102 (1965); Meltzer & Fallon, *supra* note 38, at 1733–34; Linda Meyer, "*Nothing We Say Matters":* Teague *And New Rules*, 61 U. CHI. L. REV. 423, 423–24 (1994); Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 206 (1998); Jason M. Zarrow & William H. Milliken, *The Retroactivity of Substantive Rules to Cases on Collateral Review and the AEDPA, with a Special Focus on* Miller v. Alabama, 48 IND. L. REV. 931 (2015). More recently, commentators have offered explanations for *Montgomery*'s constitutionalization of retroactivity. *See* Carlos M. Vázquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 VA. L. REV. 905, 905–06 (2017) [hereinafter Vázquez & Vladeck, *Collateral Post-Conviction Review*]; *see also* Carlos M. Vázquez & Stephen I. Vladeck, *Testa, Crain, and the Constitutional Right to Collateral Review*, 72 FLA. L. REV. F. 10, 10 (2021) [hereinafter Vázquez & Vladeck, *Testa & Crain*]; Zarrow & Milliken, *The Retroactivity of Substantive Rules to Cases*, *supra*; 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, 47 (2015); *see also* Ann Woolhandler & Michael G. Collins, *State Jurisdictional Independence and Federal Supremacy*, 72 FLA. L. REV. 73, 116 (2020) (responding in part to Professors Vázquez and Vladeck). As they acknowledge, *Montgomery* requires "revisiting of any number of other assumptions about the contemporary structure of post-conviction remedies." Vázquez & Vladeck, *Collateral Post-Conviction Review*, *supra*, at 915.

question: Even if the new rules "apply" and reveal a constitutional violation, should there be a postconviction remedy? This article assumes that the answer to the first choice-of-law question is that the new rules apply. When the Supreme Court announces a new rule, it is "new" only insofar as the Supreme Court is pronouncing it for the first time. The Court is purporting to tell us what the Constitution has always meant.[42] But the second question of remedies is more elusive, and that becomes this article's focus.

After the Supreme Court issues a new decision, does the Court have the corresponding power to require state courts to provide a collateral remedy to unwind other final criminal judgments called into question by the new decision? In *Montgomery*, the Supreme Court said yes, at least for so-called "substantive" new rules that would invalidate a conviction or sentence.[43] But where does the power to require state postconviction courts to grant postconviction remedies come from? *Montgomery* invoked the Supremacy Clause,[44] but the Supremacy Clause doesn't answer the question. Instead, it elicits another one: What federal law or constitutional right exists that supersedes the provisions of state law limiting collateral relief in such circumstances?[45]

To begin to answer these questions, Part II of this article begins with how the retroactivity problem came to be. As this history reveals, the question of collateral remedies was not thought of as one of constitutional dimension. After all, for federal habeas proceedings, the Supreme Court has long adopted judge-made retroactivity rules to limit federal habeas relief for new Supreme Court decisions, which would suggest that States could do the same for their own state postconviction courts.[46]

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[42] *See, e.g.*, Danforth v. Minnesota, 552 U.S. 264, 290–91 (2008); Am. Trucking Ass'n v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring).

[43] Montgomery v. Louisiana, 577 U.S. 190, 204–05 (2016). In *Cruz*, the Court again rejected a state supreme court's reliance on a state-law procedural bar as a reason not to consider one of the Court's recent decisions. *See* Cruz v. Arizona, 598 U.S. 17, 20–21 (2023). But the Court did not reach the petitioner's constitutional argument that the Constitution required the state supreme court to reach his claim, as the Court held in *Montgomery*. *See id.* at 29; *Montgomery*, 577 U.S. at 205. The Court instead deemed the state supreme court's procedural bar to have been arbitrarily applied and thus an "inadequate" state-law ground for supporting the judgment. *See Cruz*, 598 U.S. at 25–26.

[44] 577 U.S. at 205.

[45] *Id.* at 228 (Thomas, J., dissenting) ("That Clause merely supplies a rule of decision: *If* a federal constitutional right exists, that right supersedes any contrary provisions of state law.").

[46] *See* Teague v. Lane, 489 U.S. 288, 308 (1989) (plurality opinion) (discussing "the function of habeas corpus" and recognizing "that interests of comity and finality must also be considered in determining the proper scope of habeas review"); *Danforth*, 552 U.S. at 282 (concluding *Teague* is a limit on "federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal

Part III then discusses the current state of collateral remedies available in federal court, which is relevant to *Montgomery*'s invocation of the Supremacy Clause and its linking of federal and state habeas remedies.[47] Congress dramatically constricted federal habeas remedies in 1996 with AEDPA.[48] Today, after AEDPA, the federal habeas statutes arguably preclude federal habeas relief for claims based on new Supreme Court decisions. And even if AEDPA *allows* relief for such claims, the Supreme Court recently explained it does not necessarily *require* relief.[49] As Part III concludes, that means *Montgomery* requires state postconviction courts to confer a collateral remedy that AEDPA likely does not require of federal habeas courts hearing the same claims for state and federal prisoners.

Part IV then details how the Supreme Court blurred the line between rights and remedies in *Montgomery*, which in turn blurred the line between questions the Supreme Court ordinarily does and does not review. *Montgomery* held that the U.S. Constitution requires state postconviction courts to confer collateral remedies for violations of certain new Supreme Court decisions (those that announce new "substantive" rules of constitutional law that reject certain crimes or certain categories of punishment as unconstitutional).[50] The Court said these new rules can expose a constitutional error in a final criminal conviction or sentence, which answers the choice-of-law question. But, as this article observes, that is only the first question. *Montgomery* assumed away the second question of remedies by depending on an unstated assumption that where the answer to the choice-of-law question is yes—that a new rule reveals a constitutional error—the answer to the remedies question is also yes—that the Constitution further requires a collateral remedy, even after a criminal judgment is final. Is *Montgomery* correct to assume that? What constitutional principle requires a collateral remedy after finality?

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convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*").

[47] *See Montgomery*, 577 U.S. at 204–05.

[48] Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2241 *et seq*.).

[49] Brown v. Davenport, 142 S. Ct. 1510, 1523 (2022) ("Congress invested federal courts with discretion when it comes to supplying habeas relief—providing that they 'may' (not must) grant writs of habeas corpus, and that they should do so only as 'law and justice require.'") (quoting 28 U.S.C. §§ 2241 (2008), 2243 (1948)).

[50] Montgomery v. Louisiana, 577 U.S. 190, 205–06 (2016). For an example of a new substantive rule prohibiting criminalization of certain conduct, think *Griswold v. Connecticut*, prohibiting the criminalization of contraception. 381 U.S. 479 (1965). For an example of a new substantive rule prohibiting a certain category of punishment, think *Kennedy v. Louisiana*, prohibiting a capital sentence for the crime of rape. 554 U.S. 407 (2008).

Part V explores how *Montgomery* appears to shift the division of power between the Supreme Court and state postconviction courts, and it discusses the possible basis for that shift. Part V.A begins by explaining how postconviction remedies are unique in that they are collateral to an already-final criminal judgment. The constitutional inquiry is thus not simply whether a new Supreme Court decision reveals a problem with an old criminal judgment but also whether the Constitution requires a remedy.

Part V.B explores this reframed inquiry by returning to the available remedies in federal habeas. *Montgomery*, invoking the Supremacy Clause, says 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.'"[51] So what does federal law require? Part V.B.1 discusses the absence of retroactivity remedies in AEDPA, and Part V.B.2 discusses why, even if AEDPA allows some remedy in federal court, it is difficult to see how *Montgomery*'s constitutional holding follows. Part V.B.3 then explores whether the Constitution might separately require a federal remedy, despite AEDPA. While the Supreme Court had long left that question open, the recent decision in *Jones* all but answers it: a criminal sentence by a court of competent jurisdiction "was in itself sufficient cause for a prisoner's continued detention" at the Founding.[52] So still today, according to *Jones*, neither the Constitution's Supremacy Clause nor the Due Process Clause requires further inquiry into the legality of that sentence after it becomes final.[53] As Part V.B.3 concludes, *Jones* leaves little room to reach a different constitutional conclusion for state prisoners' constitutional claims after their sentences are final.

Part V.C addresses what basis there could be for *Montgomery*'s rule for state courts, even if federal law does not require the same for federal habeas courts. Some commentators have posited that *Montgomery*'s constitutional rationale would require every State, even one without postconviction review, to provide some collateral remedies *because* a federal habeas remedy might be lacking.[54] In their view, the potential absence of a federal remedy merely corroborates the state courts' remedial obligations.[55] Part V.C.1 responds to these commentators and explains

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[51] *Montgomery*, 577 U.S. at 204 (quoting Yates v. Aiken, 484 U.S. 211, 218 (1988)).

[52] Jones v. Hendrix, 143 S. Ct. 1857, 1871 (2023) (quotation marks omitted).

[53] *Id*. at 1871–74.

[54] *See* Vázquez & Vladeck, *Collateral Post-Conviction Review*, *supra* note 41, at 911, 934–40 ("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").

[55] *Id.* at 937–40; *see also* James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 1, 7–10 (2007) (explaining that if federal questions are to be heard

why possible due process rationales should be rejected. Part V.C.2 addresses *Montgomery*'s disregard for the criminal proceedings that precede collateral review,[56] during which criminal defendants can seek the benefit of new Supreme Court decisions.[57] And Part V.C.3 concludes with the observation that any lingering concerns about unavailable remedies for newly announced rules are better answered by more robust direct review. Remedying constitutional errors before finality avoids the difficult questions created by the Supreme Court's review of state postconviction cases—questions that extend beyond the problem of retroactivity and ultimately undermine settled norms about Due Process, the Supremacy Clause, and the balance of power between the state and federal courts.

II. HISTORICAL HABEAS REMEDIES AND NEW SUPREME COURT DECISIONS

At the Founding, the writ of habeas corpus served a different purpose than it most often does today. Then, it was the means of obtaining release from illegal custody, principally executive detention *without trial*.[58] Today, federal habeas review is most often sought *after trial* by state and federal prisoners detained pursuant to a criminal conviction and sentence.[59] Today's habeas requests, asking for another round of judicial review after a judicially imposed sentence, ordinarily "would not have been cognizable in habeas at all" at the Founding.[60] As a general rule, a criminal sentence entered by a court of competent jurisdiction was sufficient cause for a prisoner's continued detention and "put an end to the inquiry" about whether someone was lawfully detained.[61] Because of the more limited nature of habeas review early on, courts had little occasion to face questions of retroactivity—that is, whether a claim that was raised or could have been raised during the criminal proceedings could be raised again (and remedied) in collateral review based on a new Supreme Court decision.

Today, such questions of retroactivity are common, given the lengthy period of postconviction review that follows a criminal conviction. As habeas expanded, retroactivity questions multiplied, and different judge-

exclusively by state courts, then state courts cannot be entirely beyond the reach of federal judicial oversight).

[56] Montgomery v. Louisiana, 577 U.S. 190, 204 (2016).

[57] *See* Griffith v. Kentucky, 479 U.S. 314, 322–23 (1987).

[58] *See generally* Tyler, *supra* note 5; *see* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1969 (2020); Boumediene v. Bush, 553 U.S. 723, 739–46 (2008); Hamdi v. Rumsfeld, 542 U.S. 507, 554–63 (2004) (Scalia, J., dissenting).

[59] *See supra* note 1 and accompanying text.

[60] Jones v. Hendrix, 143 S. Ct. 1857, 1871 (2023).

[61] *Id.* (quoting *Ex parte* Watkins, 28 U.S. 193, 202–03 (1830)).

made solutions came about to manage the retroactive application of new Supreme Court decisions, culminating in the Supreme Court's *Teague v. Lane* retroactivity framework.[62] *Teague* announced a general rule that new Supreme Court decisions generally would *not* be grounds for habeas relief, with limited exceptions.[63] But as this Part explores, these solutions to the retroactivity problem were never conceived of as *constitutionally* required until *Montgomery* constitutionalized *Teague* in part.

A. Early Federal Habeas Review and the Siebold *Exception*

At the Founding, federal habeas review was generally unavailable for those imprisoned pursuant to a criminal judgment.[64] It was not until 1867 that federal courts could even entertain habeas petitions from state prisoners.[65] Even in that new application, federal courts' power remained limited. The general rule remained that no writ would issue if the prisoner's custody was pursuant to a judgment of conviction by a state court of competent jurisdiction.[66] As other commentators have observed, so-called "jurisdictional" errors then were a broader set than what we understand as "jurisdictional" today.[67] But still, an important distinction

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[62] Teague v. Lane, 489 U.S. 288, 309–10 (1989) (plurality opinion).

[63] *Id.*; *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1562 (2021) ("To summarize the Court's retroactivity principles: New substantive rules alter the range of conduct or the class of persons that the law punishes. Those new substantive rules apply to cases pending in trial courts and on direct review, and they also apply retroactively on federal collateral review. New procedural rules alter only the manner of determining the defendant's culpability. Those new procedural rules apply to cases pending in trial courts and on direct review. But new procedural rules do not apply retroactively on federal collateral review." (quotation marks and internal citations omitted)).

[64] *Jones*, 143 S. Ct. at 1871.

[65] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. Power to issue writs of habeas corpus for federal detention existed since the Judiciary Act of 1789, 1 Stat. 81–82. For a more detailed history, *see generally* Bator, *supra* note 5.

[66] *See, e.g.*, *Ex parte Watkins*, 28 U.S. at 206 ("the law trusts that court with the whole subject").

[67] *See, e.g.*, Bator, *supra* note 5, at 466–93; *see* Lee Kovarsky, *Habeas Myths, Past and Present*, 101 TEX. L. REV. ONLINE 57, 63–79 (2022) (criticizing recent Supreme Court decisions as telling an oversimplified history of the writ); Jonathan R. Siegel, *Habeas, History, and Hermeneutics*, 64 ARIZ. L. REV. 505, 521–39 (2022) (similar). For example, there were early cases involving prisoners jailed for conduct that the government could not constitutionally punish—an error that today we would not describe as "jurisdictional." *See, e.g.*, *Ex parte* Siebold, 100 U.S. 371 (1879). And there were others involving exercises of judicial power so *ultra vires* that the judgment could be declared void; these were likewise liberally construed as "jurisdictional" defects. *See, e.g.*, Callan v. Wilson, 127 U.S. 540, 547 (1888) (arguing the police court was "without jurisdiction," having convicted him without a jury); *Ex parte* Lange, 85 U.S. 163, 176 (1873) ("If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a

remained between "jurisdictional" errors (going to the power of the court to convict) and "mere errors."[68] Generally speaking, the prisoner's custody would not be deemed in violation of the Constitution so long as the court that convicted him had the "power to convict and sentence."[69] The habeas writ was not a writ of error.[70] It was not enough to claim the state court got it wrong.

Given that limited scope of review, there was no real occasion to ask whether a state court ought to revisit a state criminal conviction based on *new* rules later announced by the Supreme Court. Such courts ordinarily did not even ask whether they ought to be revisited based on *existing* rules.

There is one arguable exception—though it involved a federal prisoner and federal habeas review—that became *Montgomery*'s north star for state prisoners and state habeas review. In *Ex parte Siebold*,[71] the Supreme Court held that the scope of the federal habeas writ was broad enough to encompass the claim that a habeas petitioner's custody was pursuant to a conviction for something that constitutionally could not be

judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment."); *Ex parte* Nielsen, 131 U.S. 176, 183 (1889) (concluding habeas would be available for "a second conviction and punishment of the same crime[,]" "an excess of authority" by the court).

[68] *See, e.g.*, *Ex parte* Parks, 93 U.S. 18, 23 (1876) (citations omitted) ("[I]f the court had jurisdiction and power to convict and sentence, the writ cannot issue to correct a mere error."); *Ex parte* Wilson, 114 U.S. 417, 420–21 (1885) (similar); Andrews v. Swartz, 156 U.S. 272, 276 (1895) (finding that even if there were error, "it would not follow that the court lost jurisdiction" or that "its proceedings must be regarded as void").

[69] *Parks*, 93 U.S. at 23; 28 U.S.C. § 2241(c)(3) (2008). In *Ex parte Lange*, for example, the Supreme Court said it would "ascertain whether . . . the court below had any *power* to render the judgment by which the prisoner is held." 85 U.S. at 166 (emphasis added). The trial court had sentenced Lange to a term of imprisonment *and* a fine for stealing mail bags, even though the statute proscribing his conduct permitted "imprisonment for not more than one year *or* a fine." *Id.* at 164. The writ was warranted on the theory that he had been "twice . . . punished for the same offence." *Id.* at 168. When the court imposed the second punishment, it was as if it was no court at all. By comparison in *Ex parte Coy*, the habeas petitioner raised arguments about the sufficiency of the indictment. 127 U.S. 731, 733 (1888). But those "were questions of which th[e criminal] court had jurisdiction, and which it was its duty to decide" and were thus not a proper ground for habeas relief. *Id.* at 756; *accord* The Ku Klux Cases, 110 U.S. 651, 653–54 (1884) (cannot "convert the writ of habeas corpus into a writ of error, by which the errors of law committed by the court that passed the sentence can be reviewed here"). For a more detailed discussion of the historical understanding of "jurisdiction" as "power," *see* Ryan C. Williams, *Jurisdiction as Power*, 89 U. CHI. L. REV. 1719 (2022).

[70] *See, e.g.*, *In re* Frederich, 149 U.S. 70, 75–78 (1893) (distinguishing proceedings for writ of error from habeas proceeding); *Siebold*, 100 U.S. at 375 (same).

[71] 100 U.S. 371 at 376–77.

made a crime.[72] The decision granting habeas relief depended on a "new" rule, albeit one announced in the habeas petitioners' own case. Siebold and other federal criminal defendants petitioned for writs of habeas corpus on the ground that the election crimes for which they were indicted were unconstitutional.[73] The Supreme Court took an expanded view of "jurisdictional" errors to include their claim. The Court reasoned that "if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes."[74] Accordingly, the Court concluded that what I will call a "*Siebold* claim" or a claim of "legal innocence" was a cognizable ground for federal habeas relief. *Siebold* and his co-defendants were "legally innocent" insofar as the conduct they committed was not lawfully punishable as a crime. The Court distinguished that constitutional defect from a "[m]ere error in the judgment or proceedings."[75]

There are two features of *Siebold* that cannot be overlooked when assessing its implications for collateral remedies that the Constitution *requires*, as compared to what federal law *permits* as a matter of grace. First, *Siebold* held that a federal court *may* remedy such a claim in federal habeas, not that it *must.*[76] *Siebold*'s discussion about the constitutionality of the criminal statute was necessary to the Court's discussion about whether it would *exceed* its habeas jurisdiction by considering the claim in a habeas posture, not that the Constitution compelled it to exercise that habeas jurisdiction.[77] Second, the habeas proceeding was the *Siebold* defendants' only opportunity to contest the constitutionality of the election crimes for which they'd been indicted.[78] While taking a direct appeal before a criminal conviction becomes final is regular practice today, in *Siebold* it was not. The Court observed it "ha[d] no appellate jurisdiction by writ of error over the judgment" against Siebold and the co-

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[72] *See id.*; *see* Kovarsky, *supra* note 68, at 73. A century later, such claims would fall within the "substantive" exception to the retroactivity bar announced in *Teague. See* Part II.B.3, *infra*.

[73] *Siebold*, 100 U.S. at 373–76. While fewer, there were similar claims by state prisoners after the Act of 1867. *See, e.g.*, Brimmer v. Rebman, 138 U.S. 78, 81 (1891) (challenging conviction for selling "unwholesome meat" as in excess of State's criminal power); Minnesota v. Barber, 136 U.S. 313 (1890) (same); Plumley v. Com. of Mass., 155 U.S. 461, 480 (1894) (affirming denial of habeas relief by Massachusetts state court after defendant challenged State's power to outlaw margarine sales).

[74] *Ex parte* Siebold, 100 U.S. 371, 377 (1879).

[75] *Id.* at 375.

[76] *Id.* at 377 ("We are satisfied that the present is one of the cases in which this court *is authorized* to take such [habeas] jurisdiction." (emphasis added)); *see also* Montgomery v. Louisiana, 577 U.S. 190, 220 (Scalia, J., dissenting) (explaining *Siebold* "is a decision about this Court's statutory power to grant the Original Writ, not about its constitutional obligation to do so").

[77] 100 U.S. at 375.

[78] *Id.* at 376–377.

defendants,[79] making the habeas proceeding the only forum for reviewing the statute's constitutionality.[80] But today, a *Siebold* claim about the constitutionality of one's conviction or sentence can be raised on direct appeal. And until 1988, criminal defendants could appeal *as-of-right* to the Supreme Court for claims that they were convicted under an unconstitutional statute.[81] So while in *Siebold*'s time such claims might be heard only in habeas, the same claims today have been redirected to appeals before the criminal judgment becomes final.[82]

B. Expanded Federal Habeas Review and Federal Habeas Remedies

1. *Brown v. Allen* and *Linkletter* Remedies

At the turn of the century, the scope of federal habeas review expanded rapidly. The Supreme Court looked beyond the power of the state criminal court to grant habeas relief in the seminal case of *Frank v. Mangum*,[83] concluding that an alleged Due Process Clause violation—that

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[79] *Id.* at 374.

[80] *Id.*; *see, e.g.*, McKane v. Durston, 153 U.S. 684, 687 (1894) ("An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review."); *see also Montgomery*, 577 U.S. at 233 (Thomas, J., dissenting) ("*Siebold* assumed that prisoners would lack a remedy if the federal habeas statute did not allow challenges to such convictions" and "when Congress authorized appeals as a matter of right in federal criminal cases, the Court renounced *Siebold* and stopped entertaining federal habeas challenges to the constitutionality of the statute under which a defendant was sentenced or convicted."). Professor Gary Peller has drawn the opposite inference—that the scope of the federal habeas writ enlarges or constricts along with available appellate review. *See In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982). But at least for purposes of the retroactivity problem, I take *Siebold* for what it says. The Court reviewed the *Siebold* claim in habeas, lest the claim be entirely foreclosed from review. 100 U.S. at 375.

[81] *See* 28 U.S.C. § 1257(2) (1964) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . [b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."); *see* Supreme Court Cases Selections Act of 1988, Pub. L. 100-352, 102 Stat. 662 (eliminating appeals as of right from state court decisions).

[82] *See, e.g.*, *Ex parte* Friedrich, 149 U.S. 70, 78 (1893) (rejecting habeas petition, and instead inviting appeal, after state supreme court modified the state prisoner's conviction and sentence on appeal, in excess of the court's appellate power); Graham v. Weeks, 138 U.S. 451, 461–62 (1891) (rejecting habeas petition, and instead inviting appeal, for claim that sentences were in excess of that "authorized by law").

[83] 237 U.S. 309 (1915).

a trial was overcome by a mob—would be cognizable in habeas and could be subject to additional factfinding, even if the state criminal court had jurisdiction and earlier rejected the same claim.[84] The Supreme Court reasoned there was "no doubt of the authority of Congress to … liberalize the common-law procedure on habeas corpus in order to safeguard the liberty of all persons," even if it means inquiring beyond "the bare legal review that seems to have been the limit of judicial authority under common-law practice."[85] In the next few decades, federal habeas review expanded further to consider whether state criminal courts had given federal claims a "full and fair adjudication."[86] Then came the Supreme Court's landmark decision in *Brown v. Allen* in 1953.[87] In *Brown,* the Court confirmed that an alleged constitutional error in earlier criminal proceedings could be re-examined by the federal habeas court.[88] That is, a federal habeas court's review of an earlier state-court criminal judgment was not precluded by *res judicata*.[89] Then, in *Fay v. Noia*,[90] the Supreme Court "opened the door" some more by relaxing requirements to exhaust new claims in state courts, thus permitting state "prisoners to relitigate their convictions" in federal court "each time a 'new' constitutional rule was announced by th[e Supreme] Court."[91]

During this same time, the Supreme Court was issuing groundbreaking decisions related to the rights of criminal defendants,

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[84] *Id.* at 331–35. The claim in *Frank* was that the defendant's trial had been overcome by a mob of anti-Jewish sentiment. He sought a new trial, "alleg[ing] disorder in and about the court room, including manifestations of public sentiment" so "hostile to the defendant" that they were alleged "sufficient to influence the jury" and also required the defendant to be absent from the courtroom when the verdict was rendered. *Id.* at 312. The trial court "'acquiesced'" in his absence "'because of the fear of violence that might be done the defendant were he in court when the verdict was rendered.'" *Id*. The Supreme Court, after holding it had power to entertain Frank's claims, rejected them on the merits. *Id.* at 345. For further discussion, relying on Justice Holmes's papers, *see* Eric M. Freedman, *Milestones in Habeas Corpus: Part II Leo Frank Lives: Untangling the Historical Roots of Meaningful Federal Habeas Corpus Review of State Convictions*, 51 ALA. L. REV. 1467 (2000).

[85] *Id.* at 330–31.

[86] *Ex parte* Hawke, 321 U.S. 114, 118 (1944); *see* House v. Mayo, 324 U.S. 42, 48 (1945).

[87] 344 U.S. 443 (1953).

[88] *Id.* at 458.

[89] *Id. See also id.* at 540 (Jackson, J., concurring) ("Once upon a time the writ could not be substituted for appeal or other reviewing process but challenged only the legal competence or jurisdiction of the committing court. We have so departed from this principle that the profession now believes that the issues we actually consider on a federal prisoner's habeas corpus are substantially the same as would be considered on appeal.").

[90] 372 U.S. 391 (1963).

[91] Desist v. United States, 394 U.S. 244, 261 (1969) (Harlan, J., dissenting).

including *Gideon v. Wainwright*,[92] *Miranda v. Arizona*,[93] and *Mapp v. Ohio*,[94] as well as new constitutional minima for capital punishments.[95] The convergence of these two strands of decisions—the expansion of federal habeas review on the one hand and the expansion of constitutional protections for the criminal defendant on the other—created a new problem. As Justice Harlan put it, the "swift pace of constitutional change" made questions of retroactivity abound.[96] Would a habeas petitioner's criminal judgment be kept in place if the judgment comported with Supreme Court decisions when the judgment became final, or could a habeas court invalidate the criminal judgment based on these new Supreme Court decisions after finality?

Initially, the Supreme Court permitted habeas remedies for these new criminal procedure rules.[97] *Gideon*'s right to counsel was applied retroactively in *Gideon* itself, a collateral attack invalidating a final criminal judgment.[98] Likewise, the Court applied new rules guarding against self-incrimination and coerced confessions retroactively to invalidate final convictions.[99] When that became untenable, the Court adopted a case-by-case balancing approach in *Linkletter v. Walker*[100] that weighed (1) the history of the rule, (2) its purpose and effect, and (3) whether applying it retroactively would advance or hinder its operation.[101] In later cases, the Court eschewed distinctions between final and non-final convictions.[102] Importantly, these were rules of judicial administration and not constitutional compulsion. The Court expressly rejected any constitutionally required remedy: "[T]he Constitution neither prohibits nor requires retrospective effect."[103]

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[92] 372 U.S. 335 (1963).

[93] 384 U.S. 436 (1966).

[94] 367 U.S. 643 (1961).

[95] *See* Furman v. Georgia, 408 U.S. 238, 239–40 (1972); *see also* Trop v. Dulles, 356 U.S. 86, 102 (1958).

[96] Pickelsimer v. Wainwright, 375 U.S. 2, 4 (1963) (Harlan, J., dissenting).

[97] *See* Linkletter v. Walker, 381 U.S. 618, 628, 628 n.13 (1965) ("It is true that heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule.").

[98] Gideon v. Wainwright, 372 U.S. 335, 337 (1963).

[99] *Linkletter*, 381 U.S. at 628, 628 n.13.

[100] *Id.* at 629.

[101] *Id.*

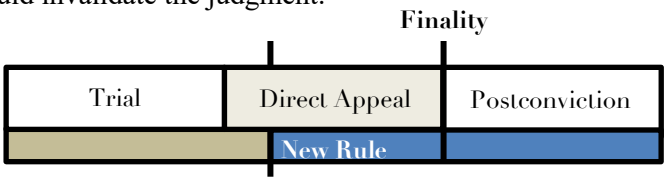
[102] *See e.g.*, Johnson v. New Jersey, 384 U.S. 719, 732 (1966); Stovall v. Denno, 388 U.S. 293, 300 (1967); *see also* Teague v. Lane, 489 U.S. 288, 305 (1989) (plurality opinion) (discussing "*Linkletter* standard's inability to account for the nature and function of collateral review").

[103] *Linkletter*, 381 U.S. at 629.

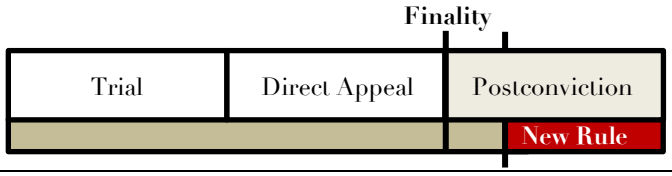
2. Justice Harlan's Constrained Remedies

Criticism of *Linkletter*'s case-by-case approach soon followed.[104] Justice Harlan called the Court's retroactivity precedents "an extraordinary collection of rules" that raised the question of whether they could even "properly be considered the legitimate products of a court of law."[105] He proposed an alternative retroactivity framework in his separate opinions in *Desist v. United States*[106] and *Mackey v. United States*,[107] which the full Court ultimately adopted.

Justice Harlan's alternative framework depended upon whether a conviction was final or not, and it aimed to treat similarly situated defendants the same.[108] For cases still on direct appeal, there would be relief for violations of new rules.[109] Shown in blue in the chart below, so long as the Supreme Court announced the new rule before finality, the new rule could invalidate the judgment.



But shown in red below, for cases on collateral review, if the Supreme Court's decision came after finality, it could *not* invalidate the final criminal judgment already "adjudicated by a court cognizant of the Federal Constitution and duty bound to apply it."[110]



[104] *See* United States v. Johnson, 457 U.S. 537, 548 (1982) ("[r]etroactivity must be rethought") (quoting Desist v. United States, 394 U.S. 244, 258 (Harlan, J., dissenting)); *Teague*, 489 U.S. at 303 ("commentators have 'had a veritable field day' with the *Linkletter* standard, with much of the discussion being 'more than mildly negative.'" (quoting Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1558, 1558 n.3 (1975))).

[105] *Desist*, 394 U.S. at 256–59 (Harlan, J., dissenting).

[106] 394 U.S. 244 (1969).

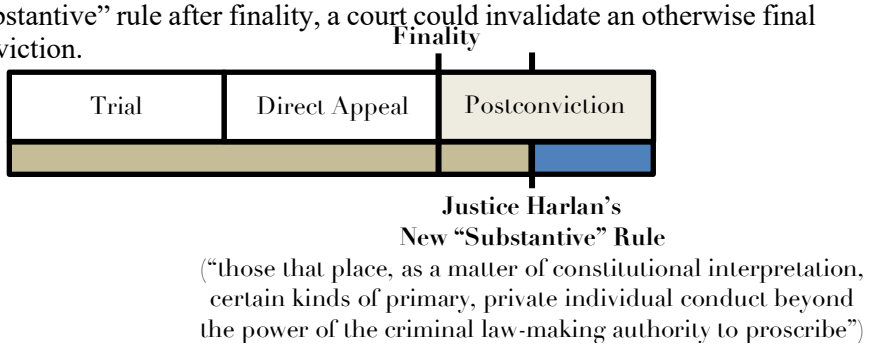
[107] 401 U.S. 667, 691 (1971).

[108] *Desist*, 394 U.S. at 258–63 (Harlan, J., dissenting); *Mackey*, 401 U.S. at 680–94 (Harlan, J., concurring).

[109] *Desist*, 394 U.S. at 258–59 (Harlan, J., dissenting); *Mackey*, 401 U.S. at 680 (Harlan, J., concurring).

[110] *Mackey*, 401 U.S. at 689–90 (Harlan, J., concurring).

Justice Harlan would have allowed for two exceptions for cases on collateral review: (1) especially important procedural rules "implicit in the concept of ordered liberty"[111] and (2) "[n]ew 'substantive due process' rules."[112] (*Montgomery* constitutionalized the latter, reasoning that it is a constitutionally required exception.)[113] Justice Harlan described those "[n]ew '*substantive due process*' rules" as "those 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"—such as the *Siebold* claim that federal elections law unconstitutionally criminalized conduct.[114] Citing *Siebold*, Justice Harlan believed such new rules warranted habeas relief because "the writ has historically been available for attacking convictions on such grounds."[115] Shown below, even if the Supreme Court announced such a new "substantive" rule after finality, a court could invalidate an otherwise final conviction.



For examples of new substantive rules, Justice Harlan cited the Court's decisions in *Street v. New York* (criminal punishment for flag burning unconstitutional),[116] *Stanley v. Georgia* (ruling criminalization of possession of "obscene" films unconstitutional),[117] *Griswold v.*

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[111] *Id.* at 693. The only example of such a rule then and now is *Gideon*. 372 U.S. 335 (1963). In *Edwards v. Vannoy*, the Supreme Court declared that "no new rules of criminal procedure can satisfy the watershed exception" and that the Court "cannot responsibly continue to suggest otherwise to litigants and courts." 141 S. Ct. 1547, 1557 (2021).

[112] *Mackey*, 401 U.S. at 692.

[113] *See* Montgomery v. Louisiana, 577 U.S. 190, 212 (2016).

[114] *Mackey*, 401 U.S. at 692 (emphasis added).

[115] *Id.* at 692–93.

[116] 394 U.S. 576 (1969).

[117] 394 U.S. 557 (1969).

Connecticut (criminalization of contraception unconstitutional),[118] and *Loving v. Virginia* (interracial marriage ban unconstitutional).[119] But importantly, the Supreme Court announced every one of these rules in defendants' *direct appeals*, not in a later collateral attack, except arguably *Loving*.[120] In other words, defendants in cases like *Stanley* and *Griswold* argued for new substantive rules and obtained relief *before* their convictions became final. Justice Harlan's examples of new substantive rules, therefore, are not habeas examples, let alone examples of *constitutionally required* habeas remedies.

3. The *Griffith/Teague* Remedial Framework

The full Court then adopted Justice Harlan's framework. First in *Griffith v. Kentucky*,[121] the Court agreed with Justice Harlan that "a newly declared constitutional rule" must be applied "to criminal cases pending on *direct review*."[122] Convictions not yet final would have the full benefit of any new Supreme Court decision. *Griffith* turned on constitutional concerns: the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication," and the "selective application of new rules" in some appeals but not others "violates the principle of treating similarly situated defendants the same."[123]

Two years later, a plurality of the Court in *Teague v. Lane* agreed with Justice Harlan that there was no similar requirement to apply new decisions retroactively in federal habeas after a conviction is final.[124] Unlike *Griffith*, predicated on constitutional concerns, *Teague* announced a "general rule," predicated on the functions of federal habeas, that

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[118] 381 U.S. 479 (1965).

[119] 388 U.S. 1 (1967).

[120] *Street*, 394 U.S. at 579; *Stanley*, 394 U.S. at 559; *Griswold*, 381 U.S. at 480; *Loving*, 388 U.S. at 4. At the time, the Supreme Court's review of state criminal convictions raising constitutional claims was mandatory, unlike its permissive certiorari jurisdiction today. *See* 28 U.S.C. § 1257(2) (1964) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . [b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."). In *Loving*, the Lovings pleaded guilty, and the trial judge suspended their sentence for 25 years. 388 U.S. at 3. In the period while the sentence was suspended, the Lovings filed a motion in the trial court to vacate the judgment against them as unconstitutional. *Id.* The Virginia courts denied the motion, and the Lovings directly appealed to the United States Supreme Court. *Id.* at 3–4.

[121] 479 U.S. 314 (1987).

[122] *Id.* at 322 (emphasis added).

[123] *Id.* at 322–23.

[124] 489 U.S. 288, 304 (1989).

collateral relief was unavailable for new rules announced after finality.[125] The plurality explained that the other procedural bars in habeas did not turn "on the magnitude of the constitutional claim at issue."[126] Nor would retroactivity after *Teague*.[127]

The plurality adopted Justice Harlan's two exceptions. A collateral remedy would be available for new "watershed" rules of criminal procedure and new "substantive" rules "plac[ing] certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe."[128] But again, the plurality embraced these exceptions as "a matter of grace" and "not constitutional prescription."[129] *Teague* rested on the "function" of habeas without any discussion of "constitutional norms" or due process that would have compelled those exceptions.[130]

In *Penry v. Lynaugh*, the full Court embraced the *Teague* plurality's framework and expanded *Teague*'s exception for new substantive rules.[131] *Penry*, involving the constitutionality of a capital sentence, extended new substantive rules to reach claims about unconstitutional sentences, not just convictions.[132] *Penry* reasoned that "a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all," such that "the first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting *a certain category of punishment* for a class of defendants because of their status or offense."[133] After *Penry*, these categorical sentencing rules—*e.g.*, a rule outlawing life-without-parole sentences for juvenile offenders—were grounds for relief, even though the underlying conviction was valid.[134] *Penry*'s expansion was

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[125] *Id.* at 308–10.

[126] *Id.* at 308.

[127] *Id.* at 307–09.

[128] *Id.* at 311–13. *Teague* limited "watershed" procedural rules to those "without which the likelihood of an accurate conviction is seriously diminished." *Id.*

[129] Montgomery v. Louisiana, 577 U.S. 190, 217 (2016) (Scalia, J., dissenting).

[130] *Compare Teague*, 489 U.S. at 308 (describing retroactivity rules as depending on "the function of habeas corpus" and considerations "determining the proper scope of habeas review"), *with* Griffith v. Kentucky, 479 U.S. 314, 322 (1986) ("failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication").

[131] 492 U.S. 302 (1989).

[132] *See id.* at 314.

[133] *Id.* at 330 (emphasis added). The Court in *Schriro v. Summerlin* phrased *Penry*'s expanded exception as rules that "alter[] the range of conduct or the class of persons that the law punishes." 542 U.S. 348, 353 (2004).

[134] *See* Graham v. Florida, 560 U.S. 48 (2010). For this reason, *Penry*'s rationale that "finality and comity concerns . . . have little force" is overstated. 492 U.S. at 330. A habeas petitioner challenging his sentence would still have a valid conviction and

meaningful for state prisoners because it opened the door to collateral relief for claims based on new Eighth Amendment rules announced by the Court, not only the rare claim challenging the federal constitutionality of the underlying crime.[135]

To summarize, after *Griffith*, *Teague*, and *Penry*, a new rule announced before finality could invalidate a criminal judgment still on direct appeal but could not invalidate a final criminal judgment. In practice, the only exception to *Teague*'s anti-retroactivity rule for cases on collateral review was for new "substantive" rules.[136] A new Supreme Court decision announcing a rule "placing certain conduct beyond the State's power to punish" or "placing a certain class of individuals beyond the State's power to punish" was a basis for a collateral remedy.[137]

Teague/Penry
New "Substantive" Rule
(those "placing certain conduct beyond the State's power to punish" or "placing a certain class of individuals beyond the State's power to punish")

But *Teague*'s exception for new substantive rules did not purport to be an exception adopted by constitutional compulsion.[138] Rather, *Teague*'s anti-retroactivity rule and its limited exceptions were judicially created gap fillers for the federal habeas statute, which at the time was silent on the matter.[139] Then in 1996, Congress stepped in to fill the gaps itself with the Antiterrorism and Effective Death Penalty Act, or AEDPA.

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likely remain in the State's custody. If a sentence is invalid, the State will ordinarily have the option to resentence.

[135] *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008); Roper v. Simmons, 543 U.S. 441 (2005); *Graham*, 560 U.S. 48; Montgomery v. Louisiana, 577 U.S. 190 (2016).

[136] *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1557 (2021) (confirming that the separate exception for watershed procedural rules is an exception only in theory, not in practice).

[137] *Penry*, 492 U.S. at 330.

[138] Teague v. Lane, 489 U.S. 288, 308 (1989) (plurality opinion).

[139] *See* Brown v. Davenport, 142 S. Ct. 1510, 1523 (2022).

III. TODAY'S FEDERAL HABEAS REMEDIES UNDER AEDPA

Detailed further in Part IV, *Montgomery* requires state postconviction courts to adopt, at a minimum, *Teague*'s exception for new substantive rules. In practice, that means new Supreme Court decisions could require state postconviction courts to reopen or vacate final criminal judgments for new Eighth Amendment rules, even after finality. But to understand *Montgomery*, the case must first be placed in context—in particular, it must be viewed against the backdrop of what federal law requires *today* of federal habeas remedies. After *Teague*, Congress enacted AEDPA.[140] The Act substantially constrained federal habeas remedies in ways different than *Teague* did.[141] If, as this Part concludes, federal law no longer requires a federal habeas remedy for new substantive rules, unanswered questions remain about how federal law requires a remedy of state postconviction courts that it does not also require of federal habeas courts open to the same constitutional claims.

AEDPA was the culmination of more than a decade of work by the Supreme Court and Congress to reform federal habeas review.[142] The Act has three features relevant to the question of available federal habeas remedies: (1) a relitigation bar,[143] (2) a bar on second-or-successive petitions,[144] and (3) a one-year statute of limitations.[145]

Relitigation Bar: AEDPA requires deference to state courts that already adjudicated a habeas petitioner's constitutional claim on the merits.[146] Federal habeas relief is unavailable for claims already "adjudicated on the merits in [s]tate court" unless the last state-court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or otherwise "resulted in a decision that was based on an unreasonable determination

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[140] Pub. L. 104-132, 110 Stat. 1214 (1996).

[141] *Compare, e.g.*, *Teague*, 489 U.S. at 308–10 (articulating exceptions for new substantive rules), *with* 28 U.S.C. § 2254(d)(1) (1996) (containing no exceptions for new substantive rules when claim was previously adjudicated on the merits).

[142] In June 1988, Chief Justice Rehnquist appointed retired Associate Justice Lewis Powell to chair the Ad Hoc Committee of the Judicial Conference on Federal Habeas Corpus in Capital Cases, or the "Powell Committee." For Powell Committee materials, including findings delivered to Congress, *see Habeas Corpus Committee*, *Lewis F. Powell Jr. Papers*, WASH. & LEE UNIV., scholarlycommons.law.wlu.edu/habeascorpus/ [https://perma.cc/2L3A-XL4E] (last visited Oct. 3, 2023).

[143] 28 U.S.C. § 2254(d)(1) (1996).

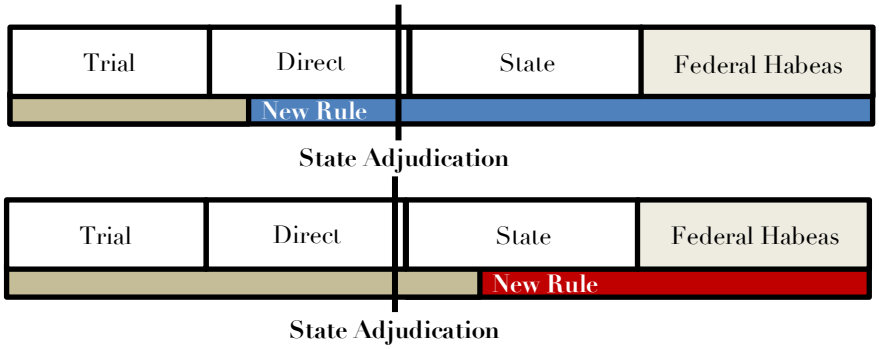
[144] *Id.* § 2244(b).

[145] *Id.* § 2244(d)(1).

[146] *Id.* §2254(d)(1)-(2); *see* Harrington v. Richter, 562 U.S. 86, 102–03 (2011).

of the facts in light of the evidence presented in the State court proceeding."[147]

That deference requirement is express in the text of AEDPA's relitigation bar. It speaks in past tense and is specific to the Supreme Court's decisions—not "federal law" generally.[148] It asks whether the state-court adjudication "*was* contrary to . . . clearly established federal law, as determined by the Supreme Court[.]"[149] Together, those limitations permit relitigation of claims based only on the Supreme Court decisions at the time of the state-court adjudication, not relitigation of claims based on *future* Supreme Court decision.[150] In this way, AEDPA's relitigation bar itself shows that there might be a constitutional error revealed by some later Supreme Court decisions, but there won't be a collateral habeas remedy. Shown below in blue, for a new Supreme Court decision to be grounds for relief, it must precede the state court's adjudication on the merits. It cannot come after, shown in red.



[147] *Id.*

[148] Whether AEDPA precludes relief for new rules would be a harder question if the relitigation bar said simply "Federal law." Federal constitutional law pronounced in a Supreme Court decision today ought to be what it has always been. *See infra* Part V.C.1. A state-court decision that rejected a *Ramos* claim before *Ramos* was no less unconstitutional than the state-court decision in *Ramos*. *See infra* Part V.C.1. But for AEDPA's purposes, the text simplifies the inquiry by depending on the Supreme Court's decisions ("Federal law as determined by the Supreme Court"), avoiding jurisprudential questions about whether future Supreme Court decisions announce what the law was during the state-court adjudication versus what it will prospectively be. 28 U.S.C. § 2254(d)(1) (1996).

[149] 28 U.S.C. § 2254(d)(1) (1996).

[150] Greene v. Fisher, 565 U.S. 34, 39 (2011); Cullen v. Pinholster, 563 U.S. 170, 181–82 (2011) (observing § 2254(d)(1) "refers, in the past tense, to a state-court adjudication" and that "backward-looking language requires an examination of the state-court decision at the time it was made"); Edwards v. Vannoy, 141 S. Ct. 1547, 1562 (2021) (Thomas, J., concurring) (same).

Unlike *Teague* or other AEDPA provisions,[151] the backward-looking text of the relitigation bar contains no exception for new substantive rules announced in future Supreme Court decisions. The relitigation bar, phrased in the negative,[152] thus *precludes* relief if a state court adjudicated the claim reasonably based on existing Supreme Court decisions, even if the Supreme Court later announces a new substantive rule. "[U]nless" the Supreme Court decision existed at the time of the adjudication, the decision is not grounds for habeas relief.[153]

By pinning the availability of federal relief to the last state-court adjudication, not just finality after the time for direct appeals has ended, AEDPA puts it back in the state's hands to decide when and whether to re-adjudicate claims based on new Supreme Court decisions. If, after finality, a state postconviction court decided to re-adjudicate a claim on the merits based on an intervening Supreme Court decision, then that re-adjudication would be reviewable in federal habeas based on the same new rules. Imagine, for example, that the Supreme Court announces new Eighth Amendment rule after a defendant's sentence becomes final. The defendant goes to state postconviction court to challenge his sentence anew, invoking the new rule. The state has adopted a policy of permitting defendants to raise new rules, and so decides the defendant's claim by applying the new Eighth Amendment rule. If the state court rejects the defendant's claim on the merits and he proceeds to federal habeas, AEDPA's relitigation bar will apply. But because of the timing of the adjudication—the result of the state's policy permitting postconviction claims based on new rules—the federal habeas court will ask whether the re-adjudication was contrary to or an unreasonable application of the *new* Eighth Amendment rule applied by the state court.

Greene v. Fisher illustrates the relitigation bar in practice.[154] The habeas petitioner's claim was last adjudicated on the merits by the state intermediary appellate court during the direct appeal.[155] The Supreme Court announced a new rule after the state-court adjudication, and the habeas petitioner sought federal habeas relief.[156] *Greene* held that relief was unavailable because the new rule came after the state court's adjudication. *Greene* explained that permitting relief would rewrite the relitigation bar to ask whether the state court's adjudication "'resulted in a

[151] Teague v. Lane, 496 U.S. 288, 307–08 (1989) (plurality opinion); 28 U.S.C. § 2244(b)(2)(A), (d)(1)(C) (1996).

[152] 28 U.S.C. § 2254(d) (1996) ("An application for a writ of habeas corpus . . . shall not be granted . . . unless . . .").

[153] *Id.*

[154] 565 U.S. 34 (2011).

[155] *Id.* at 39–40.

[156] *Id.*

decision that *became* contrary to, or an unreasonable application of, clearly established Federal law….'"[157]

Even so, the Supreme Court has left open whether there might still be a freestanding claim for habeas relief—outside of AEDPA—for substantive new rules. As recently as *Edwards v. Vannoy*,[158] the Court asked whether a new rule (requiring jury unanimity in *Ramos v. Louisiana*)[159] should apply retroactively under *Teague*, without mentioning AEDPA's relitigation bar.[160] Earlier in *Greene*, the Court declined to opine on whether AEDPA's relitigation bar "would bar a federal habeas petitioner from relying on a decision that came after the last state-court adjudication on the merits, but fell within one of the exceptions recognized in *Teague*."[161] In the context of denying relief, the Court described *Teague* as "quite separate from the relitigation bar" and added that "neither abrogates or qualifies the other."[162]

But because the Court has only ever *denied* relief in these cases, the Court has had no occasion to consider whether AEDPA, though "distinct" from *Teague*,[163] might preclude habeas relief where *Teague*'s exceptions would have permitted it. The Court has never had to grapple with AEDPA's absence of exceptions in the relitigation bar in a case where *Teague*'s exception for substantive new rules might be implicated.[164] AEDPA's syntax (a habeas petition "shall not be granted … *unless*") requires new substantive rules to be listed as permissible grounds for relief.[165] But as written, the only grounds for relief are decisions contrary

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[157] *Id.* at 39–41 (emphasis in original).

[158] 141 S. Ct. 1547 (2021).

[159] 140 S. Ct. 1390 (2020).

[160] *Edwards*, 141 S. Ct. at 1559 (concluding the claim was not excepted). Only Justices Thomas and Gorsuch concurred to explain that the Court's "analysis could have begun and ended with" the relitigation bar's "plain text" because Ramos's claim had already been adjudicated on the merits in state court. *Id.* at 1565 (Thomas, J., concurring). Similarly in *Whorton v. Bockting*, the parties briefed the case to resolve whether AEDPA's relitigation bar incorporated *Teague*'s exceptions, but the Court decided the case on *Teague* grounds, with just one mention of AEDPA. 549 U.S. 406, 414–16, 415 n.3 (2007).

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

[162] *Id.* at 39. Similarly in *Horn v. Banks*, the Court summarily reversed a court of appeals for granting habeas relief without first asking whether relief was *Teague*-barred on the rationale that "the AEDPA and *Teague* inquiries are distinct." 536 U.S. 266, 272 (2002) (per curiam).

[163] *Horn*, 536 U.S. at 272.

[164] 28 U.S.C. § 2254(d)(1) (1996); *see, e.g.*, Brown v. Davenport, 142 S. Ct. 1510, 1518–19 (2022).

[165] That retroactivity-related exceptions do appear in surrounding provisions further confirms that Congress could have, but did not, make new rules a basis for relief for claims adjudicated on the merits. *Compare* 28 U.S.C. § 2244(b)(2), (d)(1)(C), *with id.* § 2254(d); *see also, e.g.*, *id.* § 2264(a)(2) (claims not previously

to or unreasonable applications of existing Supreme Court precedent—a decision "so lacking in justification" based on "a *prior decision* of th[e] Court," such that the state court's error is "beyond any possibility for fairminded disagreement."[166] As written, a state court decision that later *becomes* contrary to a new Supreme Court decision is not a basis for federal relief.[167]

Second-or-successive bar and statute of limitations: AEDPA also generally permits only one collateral attack within one year of a final criminal judgment.[168] A "claim" already raised in federal habeas and presented for a second time in a second habeas petition "shall be dismissed."[169] Likewise, claims must be raised within a year of the final criminal judgment, pausing that one-year clock for any time spent exhausting claims in a state postconviction court.[170] Without exceptions, these limitations would largely solve the retroactivity problem; a habeas petitioner's one collateral attack would run its course shortly after finality.

There are, however, two exceptions. A petitioner may file a second-or-successive habeas petition with a new "claim" not previously presented in the first habeas petition that is based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."[171] There is a similar exception to AEDPA's statute of limitations. If a habeas petition raises a claim depending on a new "constitutional right," then the one-year statute of limitations restarts from "the date on which the constitutional right

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raised may be "consider[ed]" by the federal court if the "failure to raise the claim properly is . . . the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable"); *see* Edwards v. Vannoy, 141 S. Ct. 1547, 1565–66 (Thomas, J., concurring) (citing Russello v. United States, 464 U.S. 16, 23 (1983)).

[166] Harrington v. Richter, 562 U.S. 86, 102–03 (2011) (emphasis added); *see Davenport*, 142 S. Ct. at 1525–26 (reversing Sixth Circuit for failing to consider whether "every reasonable jurist would share its doubts" about harmless error).

[167] *See Edwards*, 141 S. Ct. at 1562 (Thomas, J., concurring).

[168] 28 U.S.C. § 2244(b), (d) (1996).

[169] *Id.* § 2244(b)(1).

[170] *Id.* § 2244(d).

[171] *Id.* § 2244(b)(2)(A). There are additional limitations for that exception, and its scope is subject to some debate. For example, what level of generality one ought to understand "claim." Is the "claim" as general as the stage of the proceedings or the constitutional right invoked, or as specific as the Supreme Court decision upon which it rests? *See, e.g.*, Brannigan v. United States, 249 F.3d 584, 588 (7th Cir. 2001) ("new legal arguments about the same events do not amount to a new claim"); *compare also, e.g.*, Tyler v. Cain, 533 U.S. 656, 666 (2001) ("The most he can claim is that, based on the principles outlined in *Teague*, this Court *should* make *Cage* retroactive to cases on collateral review."), *with id.* at 668–69 (O'Connor, J., concurring) (suggesting that the Court could announce a new substantive rule that, combined with *Teague*, is automatically "made retroactive").

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."[172]

The existence of both exceptions suggests that federal habeas relief is available for new rules in some circumstances. But AEDPA's relitigation bar dramatically limits those circumstances. Explained above, the relitigation bar does not have a similarly worded exception for new Supreme Court decisions issued after a state court adjudicates a claim on the merits. It asks only whether that adjudication on the merits *was* contrary to or an unreasonable application of the Supreme Court's decisions at the time.[173] Accordingly, if a state court already passed on the claim, even before the new Supreme Court decision, then the petitioner might have a *procedural* right to file a habeas petition based on the new rules, given AEDPA's statute-of-limitations and second-or-successive bar exceptions. But he might not have a corresponding *remedy*, given AEDPA's relitigation bar without any similar exceptions.

Imagine, for example, a second-time habeas petitioner who, when he was a juvenile, received a sentence of life without parole for a crime other than homicide. Sentenced before the decision in *Graham v. Florida*,[174] the state court could have reasonably concluded that the sentence was consistent with Supreme Court precedent at the time.[175] But once *Graham* is decided, and suppose it is "made retroactive[],"AEDPA might permit him to file another habeas petition within a certain amount of time after *Graham*.[176] Discussed above, AEDPA's relitigation bar will generally preclude relief if he raised Eighth Amendment arguments about the constitutionality of his sentence at sentencing or on appeal before *Graham*. If, on the other hand, the state court never adjudicated the claim on the merits, then AEDPA's relitigation bar will not apply. In that case,

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[172] 28 U.S.C. § 2244(d)(1)(C) (1996). The statute-of-limitations exception is worded differently than the second-or-successive exception. *Id.* The former runs one year from the Supreme Court's recognition of a "new constitutional *right*," whereas the latter is triggered by a "new constitutional *rule*." *Id.* If "rights" are broader than "rules" announced in Supreme Court decisions, then the statute of limitations begins to run (and could expire) before the second-or-successive bar can be satisfied. *See, e.g.*, United States v. Vargas-Soto, 35 F.4th 979 (5th Cir. 2022).

[173] 28 U.S.C. § 2254(d)(1) (1996); *Greene*, 565 U.S. at 39–40.

[174] 560 U.S. 48 (2010).

[175] *Cf.* Roper v. Simmons, 543 U.S. 551, 572 (2005) (observing that life imprisonment without the possibility of parole was an alternative to the capital sentence that *Roper* declared unconstitutional).

[176] 28 U.S.C. § 2244(d)(1)(C) (1996). Whether the second-or-successive bar would preclude the post-*Graham* petition depends on what the petitioner claimed in his first petition. A "claim" previously presented "shall be dismissed," *id.* § 2244(b)(1), even if there is an intervening change in law. The exception for intervening changes in law applies only to a "claim . . . *not* presented in a prior application." *Id.* § 2244(b)(2) (emphasis added); *see supra* note 171.

assuming the retroactivity exceptions for the second-or-successive bar and statute of limitations are met, AEDPA *permits* relief if a petitioner can no longer exhaust the claim in state court,[177] overcomes his failure to previously raise that claim,[178] and succeeds on the merits based on the new rule. But AEDPA does not *require* relief.[179] According to the Supreme Court's recent decision in *Davenport*, as far as AEDPA is concerned, there is no *required* federal remedy for claims based on new rules.[180]

IV. CONSTITUTIONALIZED COLLATERAL REMEDIES IN STATE POSTCONVICTION COURTS

The response to AEDPA's text has been somewhat elastic: finding new paths to postconviction relief where AEDPA might otherwise preclude it in federal court. The most obvious is in state postconviction courts, including through additional Supreme Court review of those courts. As Professor Payvand Ahdout observed, since 2015, the Court has reviewed an unprecedented number of cases directly from state postconviction courts.[181] These cases come to the Supreme Court for its *de novo* review, before further federal habeas proceedings.[182] For the Supreme Court to have the power to review state postconviction courts, the state-court decision must not only present a question of federal law but also cannot "rest on a state law ground that is independent of the federal question and adequate to support the judgment."[183]

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[177] 28 U.S.C. § 2254(b) (1996).

[178] *See, e.g.*, Murray v. Carrier, 477 U.S. 478, 486–87 (1986); Schlup v. Delo, 513 U.S. 298, 314–15 (1995).

[179] 28 U.S.C. § 2241(a) (2008) ("may be granted"); *id.* § 2243 (1948) ("as law and justice require"); *see* Brown v. Davenport, 142 S. Ct. 1510, 1524 (2022) ("While AEDPA announced certain new conditions to relief, it did not guarantee relief upon their satisfaction."); *see, e.g.*, Crawford v. Cain, 68 F.4th 273 (5th Cir. 2023); *see also* Withrow v. Williams, 507 U.S. 680, 716 (1993) (Scalia, J., concurring in part and dissenting in part). In *Lonchar v. Thomas*, the Supreme Court clarified that such "'equitable' reasons" for denying relief must be "those embodied in the relevant statutes, Federal Habeas Corpus Rules, and prior precedents." 517 U.S. 314, 316 (1996).

[180] *Brown*, 142 S. Ct. at 1524.

[181] Ahdout, *supra* note 25.

[182] *See* Foster v. Chatman, 578 U.S. 488, 522–24 (Alito, J., concurring) (collecting cases for proposition that "[u]ntil recently, this Court rarely granted review of state-court decisions in collateral review proceedings, preferring to allow the clams adjudicated in such proceedings to be decided first in federal habeas proceedings").

[183] Coleman v. Thompson, 501 U.S. 722, 729 (1991); *see* 28 U.S.C. § 1257 (1964). An adequate and independent state-law ground can be either "substantive or procedural." *Coleman*, 501 U.S. at 729. That doctrine can be particularly difficult to apply in state postconviction cases. *See, e.g.*, *Foster*, 578 U.S. at 498–99; *id.* at 521–22 (Alito, J., concurring); *id.* at 524–26 (Thomas, J., dissenting) (debating whether

Before *Montgomery*, questions about the scope of state postconviction review were ones of state law for state courts and federal law for federal courts, including whether postconviction remedies would be available for new rules announced by the Supreme Court after a conviction became final.[184] For a salient example involving such remedies and new Supreme Court decisions, consider *Danforth v. Minnesota*.[185] In *Danforth,* the Supreme Court held that the state was free to provide a remedy.[186] The federal *Teague* framework did not "in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive.'"[187] But then in *Montgomery*, the Supreme Court had to answer the flipside of *Danforth*: What about a state postconviction court's *refusal* to confer a collateral remedy for a claim arguably falling within *Teague*'s exception for substantive new rules? Is that a rule of state law that is also beyond the Supreme Court's review? Or can the Supreme Court require the state court remedy? *Montgomery* held that it was within the Supreme Court's power to require a state court remedy, on constitutional grounds.[188]

In 2015, the Supreme Court granted Henry Montgomery's petition for writ of certiorari to consider whether the rule announced in *Miller v. Alabama* regarding juvenile sentencing was retroactive.[189] In 1970, a jury sentenced Montgomery to life without parole for a murder he committed as a 17-year-old.[190] More than forty years later, the Supreme Court decided *Miller*, holding that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment[]."[191] Invoking *Miller*, Montgomery sought relief in Louisiana state court to correct what he alleged was now an illegal sentence.[192] The Louisiana Supreme Court declined to provide collateral relief because of the state supreme court's own retroactivity rules—rules

state postconviction court's one-sentence decision rested on federal- or state-law grounds).

[184] *See, e.g.*, Danforth v. Minnesota, 552 U.S. 264, 280–82 (2008). On the heels of *Teague* and before *Danforth*, states adopted a smattering of retroactivity rules, some with the "mistaken belief" that they were bound by *Teague* but most not, as catalogued in Professor Mary Hutton's article, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 ALA. L. REV. 421, 460–76 (1993).

[185] 552 U.S. 264 (2008).

[186] *Id.* at 282.

[187] *Id.* (emphasis added).

[188] Montgomery v. Louisiana, 577 U.S. 190, 204–05 (2016).

[189] *Id*. at 193–94.

[190] *Id.*

[191] Miller v. Alabama, 567 U.S. 460, 465 (2012).

[192] *Montgomery*, 577 U.S. at 195–96.

adopted from *Teague*'s federal framework as a matter of state law.[193] Montgomery sought the U.S. Supreme Court's review.[194]

Montgomery came to the Supreme Court in an unusual posture from a state postconviction court.[195] That posture required the Supreme Court to add another question presented about whether it even had power to tell the Louisiana Supreme Court, as compared to lower federal courts, to apply *Miller* retroactively.[196] The Court ordered the parties (and appointed an *amicus*) to address the Court's jurisdiction.[197] Was the state's retroactivity test, albeit one copying *Teague*, an adequate and independent state law ground for denying relief?[198] Or did the state's *Teague* test open the door to U.S. Supreme Court review of the state court's application of *Teague*? *Montgomery* leapfrogged those questions by interposing the federal Constitution. It held that the Supremacy Clause compelled state courts to apply at least *Teague*'s exception for new substantive rules.[199] By constitutionalizing *Teague*'s exception, *Montgomery* necessarily raised a federal question that the state court could not avoid with its own state-law retroactivity bar, *Teague*-sounding or not.

Montgomery held that for a new substantive rule of constitutional law, "the Constitution requires state collateral review courts to give retroactive effect to that rule."[200] By "give retroactive effect," *Montgomery* meant "give a postconviction remedy" for violations of new substantive rules. Applied in Montgomery's case, the Court ordered Louisiana to resentence Montgomery or give him a parole hearing.[201]

The Court provided a few interrelated justifications: "the nature of substantive rules, their differences from procedural rules, and their history of retroactive application."[202] As for the nature of substantive rules, *Montgomery* distinguished new rules of procedure ("designed to enhance the accuracy of a conviction or sentence") from new substantive rules ("set[ting] forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to

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[193] *See* State v. Tate, 130 So.3d 829, 834, 835–41 (La. 2013) (quoting State *ex rel.* Taylor v. Whitley, 606 So.2d 1292, 1297 (La. 1992)).

[194] *Montgomery*, 577 U.S. at 197.

[195] *Id.* at 196–97.

[196] *Id.* at 197.

[197] *Id.*; Order of Mar. 23, 2015, Montgomery v. Louisiana, 575 U.S. 911 (2015).

[198] *See* 28 U.S.C. § 1257 (1964); *see* Michigan v. Long, 463 U.S. 1032, 1037–43 (1983); Three Affiliated Tribes v. Wold Eng'g, 467 U.S. 138, 153–55 (1984).

[199] *Montgomery*, 577 U.S. at 200.

[200] *Id.*

[201] *Id.* at 212.

[202] *Id.* at 200. The Court observed the novelty of the constitutional issue, acknowledging that no case "directly control[s] the question the Court now answers for the first time." *Id.* at 203.

impose").[203] *Montgomery* reasoned that a criminal judgment could still be accurate and lawful even if the trial was wrought with procedural error, but the same could not be said for "substantive" errors: "[W]hen a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is by definition unlawful."[204] As for the history of the problem of retroactivity in habeas, *Montgomery* relied on Justice Harlan's discussion of substantive rules in *Desist* and *Mackey*, plus the Supreme Court's grant of habeas relief in *Siebold*.[205] The Court quoted *Siebold*'s observation that an unconstitutional law is "void" and thus "cannot be a legal cause of imprisonment,"[206] and observed that "[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."[207]

All of those justifications go to the choice-of-law question—whether a new substantive rule should be understood to reveal an existing constitutional defect in the final criminal judgment—but not to the question of remedies. As for the question of remedies, *Montgomery* simply assumed "[i]t follow[ed], as a general principle," that a remedy was required.[208] Before or after finality, according to *Montgomery*, "a court has no authority to *leave in place* a conviction or sentence that violates a substantive rule."[209] *Montgomery* further assumed that this obligation falls to both "federal habeas courts" and "state collateral review courts,"[210] and that "[i]f the 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.'"[211] As for the source of that "duty," *Montgomery* invoked only the Supremacy Clause:

> In adjudicating claims under its collateral review procedures a State may not deny a controlling right asserted under the Constitution, assuming the claim is properly presented in the case. Louisiana follows these basic Supremacy Clause principles in its postconviction proceedings for challenging the legality of a sentence.[212]

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[203] *Id.* at 201.
[204] *Id.*
[205] *Id.* at 202.
[206] *Id.* at 203 (quoting *Ex parte* Siebold, 100 U.S. 371, 376–77).
[207] *Id.* at 204.
[208] *Id.* at 203.
[209] *Id.* (emphasis added).
[210] *Id.* at 204.
[211] *Id.* at 204–05 (citing Yates v. Aiken, 484 U.S. 211, 218 (1987)).
[212] *Id.* at 205.

The dissenting opinions rejected *Montgomery*'s constitutional holding. "[T]he Supremacy Clause cannot possibly answer the question before us here," Justice Scalia wrote, because it only elicits more questions.[213] He observed that "*federal* habeas courts are to review state court decisions against the law and factual record that existed at the time the decisions were made," so why not also state habeas courts?[214] As for *Siebold*, he concluded that "[n]o 'general principle' can rationally be derived from *Siebold* about constitutionally required remedies in state courts because *Siebold* was a decision about the Court's statutory power to grant the Original Writ, not about its constitutional obligation to do so."[215]

Likewise, Justice Thomas framed the question as one not about the underlying constitutional violation but instead, assuming a constitutional violation, "how, when, and in what forum that newfound right can be enforced."[216] He observed that "nothing in the Constitution's text or in our constitutional tradition provides such a right to a remedy on collateral review"[217]—not the Supremacy Clause,[218] not due process,[219] and not Equal Protection.[220] He concluded by limiting *Montgomery*'s reach on the majority's own terms: "As the Court explains, States must enforce a constitutional right to remedies on collateral review only if such proceedings are 'open to a claim controlled by federal law,'"[221] such that "States can stop entertaining claims" on collateral review altogether.[222]

But *Montgomery*'s rule is arguably not limited to its own terms—*i.e.*, only already-open state postconviction courts—if one takes *Montgomery*'s Supremacy Clause rationale to its logical endpoint. Professors Carlos Vázquez and Steve Vladeck have taken *Montgomery* to that logical endpoint.[223] By invoking the Supremacy Clause, they observe, *Montgomery* could be read to require states to provide a forum to seek a

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[213] *Id.* at 217–18 (Scalia, J., dissenting).

[214] *Id.* at 218.

[215] *Id.* at 220.

[216] *Id.* at 228 (Thomas, J., dissenting).

[217] *Id.*

[218] *Id.* (citing Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 324 (2015)).

[219] *Id.* at 230 (first citing *In re* Winship, 397 U.S. 358, 379 (1970) (Black, J., dissenting); then citing United States v. MacCollom, 426 U.S. 317, 323 (1976) (plurality opinion); and then citing Pennsylvania v. Finley, 481 U.S. 551, 557 (1987)).

[220] *Id.* at 231 (first citing Wright v. West, 505 U.S. 277, 292 (1992); and then citing Brecht v. Abrahamson, 507 U.S. 619 (1993)).

[221] *Id.* at 235 (quoting *id.* at 204–05 (majority opinion)).

[222] *Id.* at 236; *see also* Woolhandler & Collins, *supra* note 41, at 79–87 (discussing lack of historical precedent requiring state courts to hear federal claims).

[223] *See* Vázquez & Vladeck, *Collateral Post-Conviction Review*, *supra* note 41, at 926–27.

collateral remedy for claims of "legal innocence"[224] based on new substantive rules, whether the state court has jurisdiction to hear those postconviction claims or not.[225] Nor is *Montgomery*'s constitutionally compelled collateral remedy clearly limited to claims based on new substantive rules. After all, *Montgomery* refers generally to "a controlling right asserted under the Constitution,"[226] not only newly discovered legal innocence claims. Why then wouldn't the Constitution also require a collateral remedy in other circumstances, including actual innocence claims or violations of so-called "old rules"? And if the Constitution requires a state's retroactivity bar to yield, wouldn't it also require other state procedural bars to yield to reach such claims?[227] And, taken to its logical endpoint, doesn't that all mean that there is a "constitutional right to collateral review" in state court, as Professors Vázquez and Vladeck have posited?[228]

The Court avoided those questions in its recent decision in *Cruz v. Arizona.*[229] Like *Montgomery*, the Court granted review in *Cruz* straight from the state postconviction court.[230] And like *Montgomery*, the case involved a retroactivity problem about whether the Arizona Supreme Court should have entertained Cruz's claim that his final sentence should be reopened in light of the Supreme Court's *per curiam* decision in *Lynch*

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[224] By "legal innocence," I mean claims that a habeas petitioner has either (1) been convicted for conduct that cannot be constitutionally punished or (2) been sentenced to a punishment that is categorically unconstitutional. The latter is not innocence, per se, but the notion that one may be "legally innocent of one's sentence" is the rationale behind *Penry*'s expansion of new substantive sentencing rules.

[225] *See* Vázquez & Vladeck, *Collateral Post-Conviction Review*, *supra* note 41, at 926–27 ("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."). Justice Thomas's more limited view, by comparison, was that "[o]nly when state courts have chosen to entertain a federal claim" by providing a cause of action for state postconviction review, "can the Supremacy Clause conceivably command a state court to apply federal law" and that "the Constitution leaves the initial choice to entertain federal claims up to the state courts." Montgomery v. Louisiana, 577 U.S. 190, 235–36 (2016) (citing Osborn v. Bank of United States, 9 Wheat. 738, 821 (1824) (state courts are "tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States")).

[226] *Montgomery*, 577 U.S. at 205.

[227] Though *Montgomery* is not clear on this point. The opinion says that claims must be "properly presented" to warrant a remedy, which presumably would permit a State to insist that the claim satisfies other procedural limitations. *Id.* at 205. So why not also retroactivity?

[228] Vázquez & Vladeck, *Collateral Post-Conviction Review*, *supra* note 41; Vázquez & Vladeck, *Testa & Crain*, *supra* note 41.

[229] 143 S. Ct. 650 (2023)

[230] *Id.* at 20–21.

v. Arizona,[231] decided after Cruz's sentence became final.[232] Citing *Montgomery*, Cruz argued that "state courts may not supplant federal retroactivity in favor of a more restrictive state-law approach" and that Arizona "cannot rely on state law to refuse to give effect to *Lynch*."[233] But the Court's decision in *Cruz* was silent on those arguments. The Court instead took a middling approach. Without invoking the federal Constitution, the Court concluded that *Cruz* was "one of those exceptional cases" in which a state court's application of its own state-law procedural bar was too arbitrary to be an adequate state law ground that would ordinarily stand in the way of the U.S. Supreme Court's review of the underlying federal claim.[234] It thus avoided the question of whether Arizona's procedural bar, if it had been applied non-arbitrarily to deny a postconviction remedy, was constitutionally permissible.[235]

At the same time, the Supreme Court has taken a diametrically different approach from *Montgomery* when confronted with a similar argument that the Constitution requires a federal habeas remedy for a federal prisoner.[236] In *Jones v. Hendrix*, the Court rejected the argument that a federal habeas remedy was constitutionally required in circumstances that have at least some overlapping similarities to

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[231] 578 U.S. 613 (2016).

[232] *Cruz*, 143 S. Ct. at 654–55. *Lynch* summarily reversed the Arizona Supreme Court for refusing to apply the rule announced in *Simmons v. South Carolina*, 512 U.S. 154 (1994), which requires a defendant to be permitted to inform the jury that a life sentence would be without parole in certain circumstances. *See Cruz*, 143 S. Ct. at 654–55.

[233] Brief for Petitioner at 15, 26, Cruz v. Arizona, 598 U.S. 17 (2023) (No. 21-846) (filed June 13, 2023).

[234] *Cruz*, 143 S. Ct. at 658.

[235] Perplexingly, the Supreme Court did not go on to exercise its jurisdiction and decide Cruz's underlying *Lynch* claim. *Compare Cruz*, 143 S. Ct. at 661–62, *with* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 458–66 (1958) (finding application of procedural bar was inadequate and going on to address merits of federal constitutional claim). Without explanation, the Court sent the case back to the Arizona Supreme Court—presumably based on the assumption that the state court would take the first pass on the merits of the *Lynch* claim. *Cruz*, 143 S. Ct. at 661–62. But that assumption only holds if there is some *sub silentio* constitutional element to the Court's decision that Arizona's own retroactivity bar was inadequate, not unlike *Montgomery*'s holding that Louisiana's retroactivity bar violated the Supremacy Clause. *See* Montgomery v. Louisiana, 577 U.S. 190, 205 (2016). Otherwise, the finding of inadequacy is relevant only to the United States Supreme Court's jurisdiction, and the state court is arguably required to do nothing on remand.

[236] Federal prisoners, by virtue of being convicted in federal court, do not exhaust state postconviction remedies. In 1948, Congress established an alternative postconviction remedy for federal prisoners that allowed them to challenge their final convictions and sentences in the court that convicted them, versus the court in the district where they were detained. *See* 28 U.S.C. § 2255 (2008); Jones v. Hendrix, 143 S. Ct. 1857, 1863, 1865–66 (discussing history).

Montgomery.[237] Marcus DeAngelo Jones was convicted of unlawfully possessing a firearm as a felon.[238] Years after his conviction became final, the Supreme Court decided *Rehaif v. United States*,[239] which held that the prosecution must prove as an element of the offense of unlawfully possessing a firearm that the defendant knew he was a felon disqualified from owning a firearm.[240] *Rehaif* was a new *statutory* rule about the meaning of the federal criminal statute, not a *constitutional* one.[241] But the rule still falls within *Teague*'s "substantive" exception insofar as it "narrow[s] the scope of a criminal statute by interpreting its terms."[242] Put another way, *Rehaif* revealed that Jones was "legally innocent" of the felon-in-possession crime for which he was convicted because the prosecution did not prove a required scienter element of the offense—an element that was clarified only after Jones's conviction became final.[243] But by the time *Rehaif* was decided, Jones had already filed his one permissible motion to vacate his sentence, and no exceptions in the federal habeas statute would have permitted him to file another motion based on the new decision in *Rehaif*.[244]

When the federal courts said Jones could not seek habeas relief, based on *Rehaif*, Jones argued that it was unconstitutional: "denying him any opportunity to seek postconviction relief based on" the substantive new rule in "*Rehaif* would violate the Suspension Clause."[245] The Court rejected that constitutional argument, based largely on the fact that habeas review generally would not have been available to Jones at the

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[237] *Jones*, 143 S. Ct. at 1871–73.

[238] *Id.* at 1863–64.

[239] 139 S. Ct. 2191 (2019).

[240] *Id.* at 2195–96, 2200.

[241] *Id.* at 2195–97 (interpreting the term "knowingly").

[242] Schriro v. Summerlin, 542 U.S. 348, 351 (2004); *see, e.g.*, United States v. Waters, 64 F.4th 199, 203 (4th Cir. 2023) (explaining *Rehaif* is "substantive" and thus "applies retroactively on collateral review"). A *Rehaif* claim is eligible for relief on collateral review in a § 2255 motion, which is the postconviction remedy Congress created for federal prisoners in 1948, including because that portion of the federal habeas statute for federal prisoners does not have a relitigation bar paralleling § 2254(d)(1) for state prisoners. *See supra* notes 235–40 and accompanying text.

[243] *See* Jones v. Hendrix, 143 S. Ct. 1857, 1871 (2023).

[244] *Id.* at 1864 (explaining why statute's exceptions didn't apply for statutory *Rehaif* claim versus a new rule of *constitutional* law).

[245] *Id.* at 1871. The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. Jones's argument was that eliminating his opportunity to file a habeas petition would be an unlawful "suspen[sion]" of the writ without meeting the Clause's requirements. *Jones*, 143 S. Ct. at 1871.

Founding.[246] It follows that it need not be available for his *Rehaif* claim.[247] Unlike *Montgomery*, the Court did not traverse the constitutional underpinnings of new substantive rules.[248] Just the opposite: the Court explained that it was a 20th-century innovation for habeas to be used to correct "a substantive error of statutory law" and that "[t]he Suspension Clause does not constitutionalize that innovation of nearly two centuries" after the Suspension Clause was ratified.[249] Simply put, even though Jones was "legally innocent," convicted of a non-crime given the prosecution's failure to prove the required element of scienter, Jones had no constitutional right to postconviction relief.[250]

On the surface, two distinctions separate *Jones* from *Montgomery*. First, the nature of the new rules in *Jones* and *Montgomery* are different. *Jones* involved a statutory error while *Montgomery* involved a constitutional error. In *Montgomery*, the Court emphasized the nature of "categorical *constitutional* guarantees" embodied in new substantive rules that led the Court to conclude that violations of such new rules must be remedied in a state postconviction court.[251] Second, *Jones* involved a successive habeas claim and clear statutory text that Jones's statutory claim was not grounds for a successive habeas claim.[252] But neither is sufficient to fully reconcile their divergent results. The Court's reasoning goes beyond them.

With respect to the Suspension Clause, the Court reasoned that Jones's claim, as a federal prisoner detained pursuant to a criminal conviction, "would not have been cognizable in habeas at all" at the Founding.[253] That was sufficient to reject the argument that the Suspension Clause required a remedy for his legal innocence claim today. Similarly, with respect to the Due Process Clause, the Court again emphasized the collateral nature of the relief Jones sought: "Whether a due process error has occurred *at trial*, however, is an entirely different issue from Congress' power to restrict *collateral review*."[254] The Court reasoned that the Due Process Clause does not even guarantee a direct appeal, so how could it guarantee "the opportunity to have legal issues redetermined in successive collateral attacks on a final sentence."[255] And the Court likewise rejected that the Eighth Amendment created a

[246] *Jones*, 143 S. Ct. at 1871–73.
[247] *Id.*
[248] Montgomery v. Louisiana, 577 U.S. 190, 201–04 (2016).
[249] *Jones*, 143 S. Ct. at 1872–73.
[250] *Id.* at 1871–72.
[251] 577 U.S. at 201.
[252] *Jones*, 143 S. Ct. at 1868.
[253] *Id.* at 1871.
[254] *Id.* at 1874 (second emphasis added).
[255] *Id.*

"freestanding entitlement to a second or successive round of postconviction review."[256] Simply put, according to *Jones*, neither the Suspension Clause nor the Due Process Clause or the Eighth Amendment require a postconviction remedy based on new Supreme Court decisions, even when they announce a substantive rule that would invalidate the conviction.[257] Discussed in greater detail below, it is difficult to reconcile the Court's constitutional rule in *Montgomery* with the implications of *Jones*'s constitutional analysis.

V. THE SUPREME COURT'S POWER OVER STATE-COURT COLLATERAL REMEDIES

Montgomery embeds an assumption that the Constitution requires a collateral state court remedy at least in states with postconviction review (and perhaps in all states). That assumption, alongside *Cruz*'s unexplained middling approach, is a shift in the Supreme Court's treatment of state postconviction courts. Part V.A discusses the basis for the assumption—a conflation of rights and remedies on collateral review. Parts V.B and V.C then focus on what federal law requires of collateral remedies in federal and state courts, distinct from the underlying constitutional violation for which a remedy is sought. This Part concludes that *Montgomery*'s rule that there are *constitutionally* required collateral remedies is on shaky ground.

A. New Rules Versus Remedies

In *Marbury*, Chief Justice Marshall famously wrote that the government will cease to deserve the "high appellation" of a "government of laws, and not of men" if "laws furnish no remedy for the violation of a vested right."[258] The "very essence of civil liberty," according to *Marbury*, "consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[259] In short, *Marbury*'s expectation was that where there is a violation of a right, there is a remedy. But two centuries later, we know that expectation to be more of an "ideal" that "is not always attained," not "an ironclad rule."[260] As Professors Daniel Meltzer and Richard Fallon detailed in their leading article on retroactivity, "cases always have existed in which no effective redress

[256] *Id.*

[257] *Id.*

[258] Marbury v. Madison, 5 U.S. 137, 163 (1803).

[259] *Id.* at 163; *see also* Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

[260] Meltzer & Fallon, *supra* note 38, at 1778.

could be obtained for rights violations committed by the government and its officers," because of sovereign immunity doctrines and others "that are now well entrenched."[261] Consider a defendant who claims on appeal that he was unconstitutionally shackled during his criminal trial. Even if the defendant's claim is meritorious, it will not be redressed if the error was harmless or if he forfeited the argument.[262] \

The daylight between rights and remedies burns even brighter in cases on collateral review. There may be a conceded constitutional violation, including one based upon a new rule of constitutional law, for which habeas offers no remedy.[263] For example, a federal habeas petitioner might have a meritorious Fourth Amendment claim, but such errors are not redressable in federal habeas.[264] A petitioner might raise a claim once, and then with new evidence or new caselaw, raise it again; yet however meritorious, the repeat claim "shall be dismissed."[265] Similarly if a petitioner raises a claim on day 366, after the conviction is final and after state postconviction review, instead of day 365, the petition will be dismissed as untimely absent tolling.[266] These examples of precluding collateral remedies even for meritorious claims reflect well-settled principles of finality and preclusion. A matter already adjudicated will not ordinarily be re-adjudicated to correct an error,[267] even if (or especially if) that re-adjudication is in another forum.[268]

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[261] *Id.* at 1780–86.

[262] For an extended discussion of harmless error doctrine, *see generally* Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117 (2018). While Professor Epps concludes that harmless error is better understood as a "*rights* question," he acknowledges, "[e]ssentially everyone understands harmless error as a remedies question: What relief should a court grant when a defendant's constitutional rights were violated?" *Id.* at 2158.

[263] Consider *Teague*'s default rule, which prohibits habeas relief for meritorious claims if based on new Supreme Court decisions announced after finality. Teague v. Lane, 489 U.S. 288, 308 (1989) (plurality opinion).

[264] Stone v. Powell, 428 U.S. 465 (1976).

[265] 28 U.S.C. § 2244(b)(1) (1996).

[266] *Id.* § 2244(d); *see* Holland v. Florida, 560 U.S. 631 (2010).

[267] *See, e.g.*, Comm'r v. Sunnen, 333 U.S. 591, 597 (1948) ("judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment"); *see also, e.g.*, FED. R. CRIM. P. 33(b) (requiring motions for new trial based on new evidence to be filed within 3 years of a guilty verdict or, if based on something else, within 14 days of a guilty verdict); FED. R. CIV. P. (60)(b)(4), (c) (permitting motion to relieve a party from a final judgment if "the judgment is void" but only within a "reasonable time").

[268] *See, e.g.,* Magnolia Petrol. Co. v. Hunt, 320 U.S. 430, 438 (1943); Rooker v. Fid. Tr. Co., 263 U.S. 413 (1923); D.C. Cir. v. Feldman, 460 U.S. 462 (1983).

1. New Supreme Court Decisions and Collateral Remedies

As Professors Meltzer and Fallon explained, what courts should do with new Supreme Court decisions is also a question of remedies: "The key question is when, if ever, courts should alter the remedies that they give, or withhold adjudication altogether, because judicial recognition of an asserted right would not easily have been predicted. This question should be addressed and answered within the law of remedies."[269] And while, in an ideal world, "the normal complement of legal and equitable remedies should be available" for violations of constitutional rights,[270] that is not always attainable. When a criminal judgment is already final, there are necessarily countervailing considerations that will constrain available remedies to unwind that final judgment.[271] Meaning even if a new rule reveals the existence of a constitutional error in a past trial, a retroactivity bar may render the error non-redressable. There are myriad reasons for that. Primarily, "[w]ithout some bar to retroactivity, no criminal conviction would ever be truly final."[272] As for "regime of law," or rule-of-law concerns, those diminish once a conviction is final; a state court failing to anticipate a new Eighth Amendment precedent, announced after finality, is on altogether different footing than a state court refusing to apply existing Eighth Amendment precedent.[273]

But as Professors Meltzer and Fallon previewed, the Supreme Court's decisions have not been consistent on this front. Mere months after authoring *Teague*, Justice O'Connor authored the plurality opinion in *American Trucking Associations v. Smith*, involving a new rule and the constitutionality of a tax.[274] *American Trucking* showcased the two competing versions of retroactivity. Justice O'Connor's plurality viewed the retroactivity problem as principally the choice-of-law question, while Justice Stevens's dissent viewed it—more accurately—as principally a question of remedies.[275] Justice O'Connor saw her role as choosing between old and new rules for what the law "was" at the relevant time.[276]

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[269] Meltzer & Fallon, *supra* note 38, at 1758.

[270] *Id.* at 1791.

[271] *Id.* at 1743.

[272] *Id.* at 1793.

[273] *Id.* at 1793–94; *compare, e.g.*, Roper v. Simmons, 543 U.S. 551, 572, 578 (rejecting death penalty as unconstitutional while "noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person"), *with* Miller v. Alabama, 567 U.S. 460, 489 (rejecting mandatory life-without-parole as unconstitutional).

[274] 496 U.S. 167 (1990) (plurality opinion).

[275] *See id.* at 171–200; *see also id.* at 205–25 (Stevens, J., dissenting).

[276] *Id.* at 181–82 (plurality opinion) ("the question is not whether equitable considerations outweigh the obligation to provide relief for a constitutional violation, but whether there is a constitutional violation in the first place" (citation omitted)).

That entailed balancing factors included the predictability of the new rule and reliance interests.[277] If the new rule was sufficiently predictable, according to Justice O'Connor, then constitutionality should be judged by the new rules; if not, it should be judged by the old rules.[278]

Justice O'Connor's framing arguably put the Court in the position of lawmaker, beyond its Article III "judicial Power."[279] Framing retroactivity as purely a choice-of-law problem suggests, wrongly, that the Court's "new" rules are "new" because they change the Constitution's meaning.[280] New rules cannot be "new" in that sense; rather, when the Court pronounces a new rule, consistent with Article III, it is "new" only insofar as the Court is pronouncing a constitutional principle for the first time. But in doing so, the Court is purporting to announce a constitutional principle consistent with what the Constitution has always meant.[281]

Justice Stevens's "remedial characterization" of retroactivity in his *American Trucking* dissent was the better framing, especially for collateral habeas remedies.[282] The remedial framing could assume that there was a constitutional violation, as judged by the new rules, and then turn to the next question: What are the "consequences…for the law of remedies" when one seeks relief based on that new rule?[283] Justice Harlan had the same remedies explanation for his approach.[284] Reliance interests and similar considerations were relevant for purposes of determining "what

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[277] *Id.* at 179–82 (applying factors from *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)).

[278] *Id.*

[279] *See id.* at 201 (Scalia, J., concurring) ("The very framing of the issue that we purport to decide today—whether our decision in *Scheiner* shall 'apply' retroactively—presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is. Such a view is contrary to that understanding of 'the judicial Power,' U.S. CONST. art. III, § 1, which is not only the common and traditional one, but which is the only one that can justify courts in denying force and effect to the unconstitutional enactments of duly elected legislatures[.]" (emphasis in original)); *see also* Meltzer & Fallon, *supra* note 38, at 1767 (criticizing inconsistency of Justice O'Connor's choice-of-law approach).

[280] Discussed in Part V.C.1, some commentators have made the same error in explaining *Montgomery* by suggesting that new substantive rules reveal a new constitutional violation, versus revealing that the criminal judgment always was unconstitutional.

[281] *See* Part V.C.I.

[282] *See* Meltzer & Fallon, *supra* note 38, at 1767. Justice Stevens acknowledged that retroactivity has been used in "two senses," both as "a choice of law rule" and as a "remedial principle." *Am. Trucking*, 469 U.S. at 221. But as for the "choice of law rule," there really was no choice as Justice Stevens saw it. *Id.* at 220.

[283] Meltzer & Fallon, *supra* note 38, at 1768.

[284] *See* United States v. Est. of Donnelly, 397 U. S. 286, 295–97 (1970) (Harlan, J., concurring).

relief is appropriate."[285] There was "flexibility in the law of remedies," even if there was little flexibility in applying the "prevailing [albeit new] decisional rule to the cases before them."[286] As Justice Stevens wrote years later in *Danforth*, a habeas case, "our jurisprudence concerning the 'retroactivity' of 'new rules' of constitutional law is primarily concerned, not with the question of whether a constitutional violation occurred, but with the availability or nonavailability of remedies."[287]

Take a concrete example of that remedial framing at work, based on *Ramos v. Louisiana*.[288] Louisiana law permitted non-unanimous juries in criminal cases; that law was *always* unconstitutional, according to *Ramos*.[289] But, as *Ramos* foreshadowed, whether there would be a remedy for a *Ramos* violation depended on the posture of the case.[290] The Court ordered a remedy to be awarded for Mr. Ramos, whose case was on direct review.[291] But what about for cases on collateral review? Citing *Teague*, the Court observed that "newly recognized rules of criminal procedure do not normally apply in collateral review"—meaning, there normally would not be a *collateral remedy*, even if a habeas petitioner can show the same constitutional violation occurred in his trial.[292] That restriction on collateral remedies thus "free[d]" the Court in *Ramos* 'to say what we know to be true about the rights of the accused under our Constitution today, while leaving questions about the reliance interest States possess in their final judgments for later proceedings[.]'"[293] The balancing of "reliance interests" and "finality" was the language of remedies. Then in *Edwards v. Vannoy*, the Court confirmed there was no collateral remedy for a *Ramos* error.[294] As *Ramos* and *Edwards* show, two things can be true at once: a criminal judgment can be constitutionally defective—but for the constitutional error, there would not have been a conviction—and still not have a collateral remedy.

The *Teague* plurality likewise spoke of retroactivity in remedial terms. *Teague* discussed retroactivity as a "threshold question," separate from the merits of the habeas petitioner's Sixth Amendment claim.[295] By "threshold question," *Teague* meant whether the Sixth Amendment claim

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[285] *Id.* (emphasis added).
[286] *Id.* at 279.
[287] Danforth v. Minnesota, 552 U.S. 264, 290–91 (2008).
[288] 140 S. Ct. 1390 (2020).
[289] *Id.* at 1397.
[290] *Id.* at 1407.
[291] *Id.* at 1407–08.
[292] *Id.* at 1407.
[293] *Id.*
[294] 141 S. Ct. 1547, 1562 (2021).
[295] Teague v. Lane, 489 U.S. 288, 300 (1989) (plurality opinion).

was redressable in habeas, even if meritorious.[296] The foundation for that was Justice Harlan's conception of retroactivity as a problem of remedies. As Justice Harlan explained in *Mackey*, deciding whether the violation of a new rule was redressable in a habeas proceeding was a decision depending on the "nature, function, and scope of the adjudicatory process in which such cases arise," not the particular "purpose of the new rule."[297]

2. Reorienting *Montgomery*'s Constitutional Framing

If it is correct that there is daylight between a constitutional violation and the remedies available for that violation, and if it is also correct that the question of retroactivity is principally a question of remedies, then it is not enough to observe that a new rule reveals an old constitutional violation. One must separately ask whether the Constitution requires a *collateral remedy*.

This remedies-focused question is distinct from the choice-of-law question that framed *Montgomery* or the *American Trucking* plurality. The choice-of-law question asks: When the Supreme Court announces a new constitutional rule only *after* the conviction becomes final, was there a constitutional violation at the time of conviction?[298] I assume that the answer to that choice-of-law question is always yes. A Supreme Court decision announcing a new rule can reveal a violation of a constitutional right even in criminal proceedings decided before the new rule was announced. To say otherwise would mean that the Supreme Court is not saying "what the law is" but is instead "prescrib[ing] what it shall be" going forward, which would exceed the Supreme Court's Article III "judicial power."[299]

Montgomery addresses this choice-of-law question by agreeing that a new substantive rule can reveal an error in a criminal judgment.[300] But *Montgomery* failed to go on to separately address the remedial question. *Montgomery* simply declared that "[i]t follows" as a "general principle" that the "court has no authority to leave in place a conviction or sentence that violates a substantive rule," even if already final.[301] *Montgomery* did

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[296] *Id.* at 299.

[297] Mackey v. United States, 401 U.S. 667, 682 (1971) (Harlan, J., concurring).

[298] Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 182 (1990); *see also, e.g.*, Linkletter v. Walker, 381 U.S. 618, 623–24 (1965) (comparing Blackstone's view of the judge as the "discoverer" of existing law to Austin's view of the judge as the creator of new law).

[299] *Am. Trucking*, 496 U.S. at 201 (Scalia, J., concurring); *see infra* Part V.C.1.

[300] Montgomery v. Louisiana, 577 U.S. 190, 201–02 (2016).

[301] *Id.* Professors Vázquez and Vladeck similarly describe decisions announcing new substantive rules as "decisions telling us that the law has always meant what the Court now says it means," such that the conviction was "erroneous from the start." Vázquez & Vladeck, *Collateral Post-Conviction Review*, *supra* note 41, at 948–49.

not articulate what that "general principle" would be, except to invoke the Supremacy Clause: "Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution. If 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.'"[302] That invocation of the Supremacy Clause is not enough to answer the remedies question. Rather, it leads right back to this unanswered question: What *remedy* does "federal law require[]" on collateral review? Parts V.B and V.C explore that question for federal and state courts respectively.

B. Montgomery's Supremacy Clause Logic and the Absent Federal Remedy

By linking the remedial obligations of state and federal courts,[303] *Montgomery* presumed that federal law would obligate federal habeas courts to give collateral remedies for new rules. This Part explores whether that presumption was correct and, even if so, whether it matters.

1. The Absence of a Federal Remedy

Contrary to *Montgomery*'s presumption, and detailed in Part III, a federal habeas remedy will ordinarily be unavailable for claims based on new substantive rules announced after finality. AEDPA's relitigation bar states that relief shall not be granted unless the state court's earlier adjudication of the claim *was* contrary to the Supreme Court's decisions at the time, not that it *became* contrary to Supreme Court decisions issued later.[304] The "clearly established Federal law, as determined by the Supreme Court" are those decisions of the Supreme Court at the time of the adjudication, not thereafter.[305] There is no exception in AEDPA that

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Thus, "applying the new rule 'retroactively' is correcting an historical error." *Id.* at 949. But that goes to the choice-of-law question and does not answer the question of whether the Constitution further requires a collateral remedy.

[302] *Montgomery*, 577 U.S. at 204–05 (quoting Yates v. Aiken, 484 U.S. 211, 218 (1988)).

[303] *Id.* at 204 (state postconviction courts have "no greater power than federal habeas courts").

[304] 28 U.S.C. § 2254(d)(1) (1996); *accord id.* § 2254(d)(2) (assessing factual conclusions based on the "evidence presented *in the State court* proceeding") (emphasis added).

[305] *See* Williams v. Taylor, 529 U.S. 362, 412 (2000) (O'Connor, J., concurring) ("whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1)").

incorporates *Teague*'s pre-AEDPA exception for substantive new rules.[306] AEDPA thus evinces a policy of precluding federal habeas courts from conferring the collateral remedy that *Montgomery* now seemingly requires of state postconviction courts.

At the very least, AEDPA does not *require* federal courts to grant the relief that *Montgomery* requires of state courts.[307] Consider a procedurally defaulted claim—that is, one that the habeas petitioner failed to timely raise earlier in the state courts. The relitigation bar will not apply to that claim because it has not been "adjudicated on the merits."[308] But AEDPA does not necessarily require a remedy. The statute says relief "'may be granted'—not that [it] *shall* be granted—and enjoins the court to 'dispose of the matter as law *and justice* require.'"[309] AEDPA's permissive language would permit denying relief, thereby giving equal treatment to the habeas petitioner who properly raised his claim in state court (and whose claim will be barred by the relitigation bar) and the habeas petitioner who did not.

If it is true that AEDPA precludes relief for new rules in some cases and does not require it for others, then as far as federal *statutory* law is concerned, there is no "clash" between federal and state law that could raise a problem under the Supremacy Clause.[310] There must be some other source of federal law that requires state courts to confer a collateral remedy that is not also required of federal courts open to the same claims.

In explaining *Montgomery*, Professors Vázquez and Vladeck contend that AEDPA is not the only source of federal law for a Supremacy Clause clash. They also identify *Teague* as an alternative source of federal law. They argue that a state's policy that criminal convictions should not be disturbed once final would be at odds with federal policy *as measured by Teague*: "Such a policy, if applied to claims falling within a *Teague* exception, would be at odds with the *federal policy articulated in Teague*, as interpreted in *Montgomery*," and would not be a "'valid excuse'" for deviating from that "federal policy" to deny postconviction relief.[311] But *Teague* is not "federal policy." *Teague* purported to interpret the scope of the statutory federal habeas writ as it existed in the 1980s.[312] Then in 1996,

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[306] *See supra* notes 146–67 and accompanying text.

[307] Brown v. Davenport, 142 S. Ct. 1510, 1524 (2022).

[308] 28 U.S.C. § 2254(d) (1996).

[309] Withrow v. Williams, 507 U.S. 680, 716 (1993) (Scalia, J., concurring in part and dissenting in part); *see supra* notes 178–80 and accompanying text.

[310] Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 325 (2015).

[311] Vázquez & Vladeck, *Collateral Post-Conviction Review*, *supra* note 41, at 934–95 (emphasis added).

[312] *See* Danforth v. Minnesota, 552 U.S. 264, 278–80 (2008). Indeed, such prospectivity-versus-retroactivity rules are ordinarily within Congress's purview. For that reason, a court's decision to apply a rule purely prospectively will engender scrutiny *because* such an act is legislative in nature. *See, e.g.*, Harper v. Va. Dep't of

Congress adopted that interpretation only in part.[313] The relevant policy is AEDPA, and AEDPA's relitigation bar reveals a policy of not disturbing final criminal judgments, without carving out an exception for claims falling within a *Teague* exception.[314]

That leaves the federal Constitution as the only other alternative source of federal law that could require a collateral remedy, despite AEDPA. But before exploring that constitutional question, it is important to address why, even if AEDPA required a remedy for new substantive rules, a state postconviction court does not have to provide coextensive state postconviction relief.

2. The Limited Relevance of an AEDPA Remedy

Even if federal statutory law required federal habeas courts to remedy violations of new substantive rules, it does not necessarily follow that state postconviction courts must provide the same remedy.[315] The suggestion forgets what is really going on in state postconviction review. When Montgomery raised his constitutional claim in state court, he was not invoking federal statutes or seeking a federal writ. He was invoking state law permitting state court jurisdiction over state postconviction claims.

That alone makes *Montgomery* distinguishable from a line of Supremacy Clause cases that restrict a state's power to discriminate against federal causes of action in state courts of general jurisdiction.[316] There is no federal cause of action at issue in *Montgomery*. That feature distinguishes it from other seminal Supremacy Clause cases. Compare

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Tax'n, 509 U.S. 86, 105–07 (1993) (Scalia, J., concurring) ("Prospective decisionmaking [sic] is the handmaid of judicial activism, and the born enemy of *stare decisis*[,]" "promoted as a 'techniqu[e] of judicial lawmaking' in general[.]"); Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring).

[313] *See supra* Part III.

[314] Ultimately, Professors Vázquez and Vladeck acknowledge the AEDPA problem, leading them to their alternative conclusion that, even if a claim cannot be remedied in *federal* habeas, that it must be remedied in *state* habeas: "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." Vázquez & Vladeck, *Collateral Post-Conviction Review*, *supra* note 41, at 936 (citing Gen. Oil v. Crain, 209 U.S. 211 (1908)). It is not clear what remaining constitutional basis there could be for concluding that a postconviction remedy in state court is "[c]onstitutionally required." *See* discussion *supra* Part V.C.

[315] Professors Meltzer and Fallon identified limited instances in which the Supreme Court, as a matter of due process or other constitutional provisions, has required a state court to provide a remedy for a constitutional claim heard in state court. *See supra* cases in Part V.C.

[316] Testa v. Katt, 330 U.S. 386, 392–94 (1947); Haywood v. Drown, 556 U.S. 729, 736–37 (2009) (New York state courts could not exclude correctional officers as defendants in section 1983 action, even though brought in state court).

Testa v. Katt,[317] for example, in which a Rhode Island court refused to grant relief available under the federal Emergency Price Control Act.[318] That violated the Supremacy Clause.[319] Various facts were critical to that conclusion,[320] but most relevant was that the statute at issue was a federal one and Congress had permitted actions to be filed "in any court of competent jurisdiction," including state courts.[321] The Supreme Court applied a similar rule in *Haywood v. Drown*,[322] holding that the Supremacy Clause precluded New York from stripping its courts of jurisdiction over Section 1983 suits seeking money damages from state correctional officers.[323] Federal law permitted such actions in either the state or federal courts.[324]

In contrast to *Testa* and *Haywood*, Congress has *excluded* state courts from conferring federal habeas relief. Only the Supreme Court and lower federal courts may grant a federal habeas writ.[325] There is thus no analogous argument that the state courts are discriminating against

[317] 330 U.S. 386 (1947).

[318] *Id.* at 387–88.

[319] *Id.* at 389–94.

[320] Also relevant were that (1) state courts would have enforced "this same type of claim arising under Rhode Island law"; (2) the state courts would have enforced other damages awards arising from other federal law causes of action; and (3) "Rhode Island courts have jurisdiction adequate and appropriate under established local law to adjudicate this action." *Id.* at 394.

[321] *Id.* at 387 (internal citation omitted).

[322] 556 U.S. 729 (2009).

[323] *Haywood*'s rule was that States "lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies," while acknowledging that States may still adopt "neutral jurisdictional rule[s]" of "judicial administration" and refuse to hear federal claims based on those neutral rules. *Id.* at 735–36. Justice Thomas dissented, finding little historical evidence for the proposition that state courts could be required "to hear federal claims over which the [state] courts lack jurisdiction." *Id.* at 752; *accord* Montgomery v. Louisiana, 577 U.S. 190, 236 (2016) (Thomas, J., dissenting) ("the Constitution leaves the initial choice to entertain federal claims up to state courts, which are 'tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States'" (quoting Osborn v. Bank of the United States, 22 U.S. 738, 821 (1824)).

[324] *Haywood*, 556 U.S. at 731 n.1 (quoting 42 U.S.C. § 1983 (". . . shall be liable to the party injured *in an action at law, suit in equity, or other proper proceeding* for redress" (emphasis added))).

[325] 28 U.S.C. § 2241(a) (2008) ("Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.").

"federal causes of action"[326] in state postconviction review proceedings, because there are no such federal causes of action for states to consider.[327]

The proceedings in *Montgomery* were instead a creature of *state* law, as were the applicable limitations on available relief. And *Montgomery* itself acknowledged that the Supremacy Clause would not invalidate *all* state law limitations. In passing, *Montgomery* agreed that the state's obligation to remedy a federal constitutional claim would be triggered only when the claim is "properly presented."[328] In other words, the state may set at least *some* ground rules for its postconviction remedies, such as time limitations or precluding second-or-successive claims, and insist that claims are "properly presented" consistent with those ground rules. But the essence of *Montgomery*'s holding is that a retroactivity bar stricter than *Teague* is not an available limitation.

3. AEDPA and Constitutional Requirements

By concluding that the Constitution requires state courts to apply new substantive rules,[329] *Montgomery* implicitly suggests federal habeas courts must do the same. But the Supreme Court's recent decision in *Jones* casts substantial doubt on such a suggestion.[330] At the Founding, "a sentence after conviction by a court of competent jurisdiction was in itself sufficient cause for a prisoner's continued detention."[331] In light of that history, according to *Jones*, the Constitution today does not require habeas remedy to address a change in law, even a change that invalidates the conviction.[332] Likewise, in *Montgomery* Justice Scalia explained how courts would depart from existing precedent to say that the Constitution requires federal

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[326] *Haywood*, 556 U.S. at 743 (Thomas, J., dissenting).

[327] Some might contend that States must consider constitutional claims brought by state prisoners under Section 1983 as a substitute for habeas. *Cf. Haywood*, 556 U.S. 740–41. But federal habeas has a preemptive effect. A Section 1983 claim cannot implicate the validity of a conviction or sentence. *See* Heck v. Humphrey, 512 U.S. 477, 487 (1994) (§ 1983 damages suit must be dismissed if it "would necessarily imply the invalidity of his conviction or sentence . . . unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated"); Preiser v. Rodriguez, 411 U.S. 475, 490 (1973) ("Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.").

[328] *Montgomery*, 577 U.S. at 205 ("a State may not deny a controlling right asserted under the Constitution, *assuming the claim is properly presented in the case*" (emphasis added)).

[329] *Id.* at 204–05 (reasoning that no collateral review court, state or federal, may "mandate that a prisoner suffer punishment barred by the Constitution").

[330] Jones v. Hendrix, 143 S. Ct. 1857, 1871–73 (2023).

[331] *Id.* at 1871 (quotation marks and alterations omitted).

[332] *Id.* at 1871–73.

habeas relief for freestanding claims of legal innocence based on new Supreme Court decisions:

> Until today, no federal court was *constitutionally obliged* to grant relief for the past violation of a newly announced substantive rule. Until today, it was Congress's prerogative to do away with *Teague*'s exceptions altogether. Indeed, we had left unresolved the question whether Congress had already done that when it amended a section of the habeas corpus statute to add backward-looking language governing the review of state-court decisions.[333]

As he concluded, *Montgomery*'s suggestion that the Constitution would require a federal habeas remedy contravenes the well-established view that postconviction remedies are "a matter of grace, not constitutional prescription."[334]

As a general rule, "[w]ithin constitutional constraints,"[335] federal habeas is a creature of statute that Congress may limit.[336] Relevant here,

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[333] *Montgomery*, 577 U.S. at 220–21 (Scalia, J., dissenting).

[334] *Id*. at 217; *see, e.g*., Dist. Atty's Office for the Third Jud. Dist. v. Osborne, 557 U.S. 52, 69 (2009) ("Osborne's right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief."); Herrera v. Collins, 506 U.S. 390, 399 (1993); Pennsylvania v. Finley, 481 U.S. 551, 557 (1987); Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981).

[335] Lonchar v. Thomas, 517 U. S. 314, 322–23 (describing "legal principles are embodied in statutes, rules, precedents, and practices that control the writ's exercise. Within constitutional constraints they reflect a balancing of objectives (sometimes controversial), which is normally for Congress to make, but which courts will make when Congress has not resolved the question."). Exactly what "constitutional constraints," circumscribe Congress's power limit the writ is an open question. *Id.* But the Supreme Court has generally raised constitutional concerns in cases involving executive detention without trial, not cases involving detention pursuant to a criminal judgment.

[336] *See Ex parte* Bollman, 8 U.S. 75, 94 (1807) ("[T]he power to award the writ by any of the courts of the United States, must be given by written law"). Those constitutional concerns ordinarily arise in cases involving executive detention without trial, not cases involving detention pursuant to a criminal judgment. *Compare, e.g.*, *Ex parte* McCardle, 74 U.S. 506 (1868) (involving Congress's removal of Supreme Court's appellate jurisdiction over habeas petitions from state prisoners); Felker v. Turpin, 518 U.S. 651, 654 (1996) (concluding limiting "the standards governing the granting of [habeas] relief" for state prisoners did not violate the Suspension Clause), *with* INS v. St. Cyr, 533 U.S. 289, 300 (2001) (raising Suspension Clause concerns after observing that "this case involves an alien subject to a federal removal order rather than a person confined pursuant to a state-court conviction"); Boumediene v.

before 1867, a federal habeas writ was not available to state prisoners in custody pursuant to a state-court criminal judgment.[337] And while today the writ is generally available to review that earlier judgment, the Supreme Court has now said that only those habeas petitioners who satisfy both AEDPA's conditions and establish that "'law and justice' require relief" are eligible.[338] The habeas writ as mentioned in the Constitution's Suspension Clause is not a "one-way ratchet."[339] If the total absence of the writ was permissible for the country's first 100 years, then the absence of a federal habeas remedy for violations of new substantive rules is permissible.

In both *Jones* and earlier in *Felker v. Turpin*,[340] the Supreme Court has rejected constitutional challenges to the absence of federal habeas remedies. *Felker* rejected the argument that AEDPA's second-or-successive bar violated the Suspension Clause.[341] *Felker* assumed for argument's sake "that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789," when habeas review of a final state-court criminal judgment was unavailable.[342] *Felker* concluded that second-or-successive bar was "well within the compass" of the "evolving body of equitable principles informed and controlled by

Bush, 553 U.S. 723, 792 (2008) (removal of habeas jurisdiction for Guantanamo detainees' petitions was an unconstitutional suspension of the writ).

[337] *See supra* Part II.A; *see also Felker*, 518 U.S. at 659 ("Before the Act of 1867, the only instances in which a federal court could issue the writ to produce a state prisoner were if the prisoner was 'necessary to be brought into court to testify,' was 'committed . . . for any act done . . . in pursuance of a law of the United States,' or was a 'subjec[t] or citize[n] of a foreign State, and domiciled therein,' and held under state law." (citations omitted)).

[338] *See* Brown v. Davenport, 142 S. Ct. 1510, 1523 (2022); *see generally supra* Part III.

[339] *St. Cyr*, 533 U.S. at 342 (Scalia, J., dissenting). As Justice Scalia observed in his dissent in *St. Cyr*, "It could be contended that Congress 'suspends' the writ whenever it eliminates *any* prior ground for the writ that it adopted." 533 U.S. at 341. He dismissed that "one-way ratchet" argument as "too absurd to be contemplated," for "surely Congress may subsequently alter what it had initially provided for, lest the Clause become a one-way ratchet." *Id.* at 342, 342 n.5. Commentators have criticized Justice Scalia's rejection of the "one-way ratchet" on the margins, including because it is difficult to reconcile with *Boumediene*. *See, e.g.*, Stephen I. Vladeck, *The Riddle of the One-Way Ratchet*, 12 GREEN BAG 2d 71 (2008) (exploring further the habeas puzzle described in Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251 (2005)). But these criticisms are directed toward Congress's power to remove habeas jurisdiction altogether for federal prisoners including those detained without any Article III review. *See* Paul Diller, *Habeas and (Non-) Delegation*, 77 U. CHI. L. REV. 585, 654 (2010) (advancing functionalist view of Suspension Clause and related problems of delegation to Article I courts).

[340] 518 U.S. 651 (1996).

[341] *Id.* at 654.

[342] *Id.* at 663–64.

historical usage, statutory developments, and judicial decisions" limiting habeas relief for prisoners detained pursuant to a criminal conviction.[343] The Court framed the case as one about Congress's power to "affect the standards governing the *granting* of [habeas] relief," as distinct from "preclud[ing] th[e] Court from *entertaining* an application for habeas corpus relief."[344] Then *Jones* took the next step. The portion of the federal habeas statute at issue in *Jones* stripped jurisdiction to consider Jones's habeas petition.[345] And still, the Court concluded that there was no constitutional defect.[346] To reach that conclusion, *Jones* examined the limited scope of the habeas writ when it was ratified.[347] If those limitations were permissible then, they are permissible now, according to *Jones*.[348]

Before *Jones*, commentators explored how a constitutional challenge to AEDPA's relitigation bar would fare.[349] These critiques tended to ignore the difference between the existence of a constitutional defect and the availability of a collateral remedy to fix that defect.[350] While a full assessment of AEDPA's constitutionality is beyond the scope of this article, it is sufficient to observe that the Supreme Court has long assumed, most recently in *Jones*, that Congress has near plenary power to limit federal habeas remedies for those in custody pursuant to a final judgment entered by a court of competent jurisdiction.[351] The Supreme Court did not find a suspension of the writ in *Felker*'s similar circumstances, nor did it in *Jones*.[352] And with respect to the Due Process Clause, the Supreme Court has also rejected that due process required a collateral remedy for a freestanding claim of actual innocence.[353] Detailed more fully in Part V.C, one would have thought the same logic would have applied in *Montgomery*, too.

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[343] *Id.* at 664 (quoting McClesky v. Zant, 499 U.S. 467 (1991)).

[344] *Id.* at 654 (emphasis added).

[345] *Jones*, 143 S. Ct. at 1864.

[346] *Id.* at 1871–73.

[347] *Id.*

[348] *Id.*

[349] *See, e.g.*, Zarrow & Milliken, *supra* note 41; *see also, e.g.*, Note, *Suspended Justice: The Case Against 28 U.S.C. § 2255's Statute of Limitations*, 129 HARV. L. REV. 1090 (2016) (arguing *Felker*'s rationale would not extend to the statute of limitations for federal prisoners).

[350] *See, e.g.*, Zarrow & Milliken, *supra* note 41, at 934 (discussing that *Teague*'s exception for new substantive rules "has roots in the Due Process Clause and the Suspension Clause").

[351] *See, e.g.*, *Ex parte* Watkins, 28 U.S. 193, 206 (1830); *Jones*, 143 S. Ct. at 1871–73.

[352] *Compare* Felker v. Turpin, 518 U.S. 651 (1996), and *Jones*, 143 S. Ct. at 1871–73, *with* Boumediene v. Bush, 553 U.S. 723 (2008).

[353] Herrera v. Collins, 506 U.S. 390 (1993).

So where does that leave state courts? If state courts have a unique obligation to award a postconviction remedy in their own postconviction courts that a federal habeas court does not share, what is the constitutional basis for that mismatch? *Montgomery*, stopping at the Supremacy Clause, never articulates what that could be.

C. Can the Constitution Require State Collateral Remedies?

Montgomery is not the first time that the Supreme Court has required a state court to provide a remedy contrary to state law. But the situation is "strikingly" rare.[354] As Professors Meltzer and Fallon explored, the Supreme Court "has sometimes compelled state courts to provide constitutional remedies despite a lack of state law authority for them to do so."[355] As examples, they cited *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*,[356] *Ward v. Love County Bd. of County Commissioners*,[357] and *General Oil Co. v. Crain*.[358] But here, the question is whether the rule in those cases extends to *collateral* remedies. Such remedies follow a full criminal trial and appeal and final criminal judgment, as compared to state-court remedies in an ordinary civil case.

That postconviction remedy is not so easily equated with the constitutionally required remedies in *Crain, McKesson*, *Ward*, and similar cases.[359] Equating the two fails to account for the "special problems" presented by postconviction remedies.[360] They are, again, a *collateral* attack to an otherwise final judgment. To say that such a collateral remedy is constitutionally required is to say that due process requires more process than that afforded during the criminal proceedings.[361]

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[354] Meltzer & Fallon, *supra* note 38, at 1786.

[355] *Id.*

[356] 496 U.S. 18 (1990) (concluding due process required a remedy for a tax imposed in violation of the Dormant Commerce Clause).

[357] 253 U.S. 17 (1920) (concluding due process required a refund for unconstitutional tax, even though there was no state law enabling a refund).

[358] 209 U.S. 211 (1908) (concluding U.S. Supreme Court had jurisdiction over suit challenging Tennessee tax as violative of the Dormant Commerce Clause, even after Tennessee Supreme Court dismissed the action for lack of jurisdiction under state law).

[359] *But see, e.g.*, Vázquez & Vladeck, *Collateral Post-Conviction Review*, *supra* note 41, at 937–40 (discussing *Crain*); Vázquez & Vladeck, *Testa & Crain*, *supra* note 41, at 18–21.

[360] Hill, *supra* note 38 (excluding habeas corpus and postconviction remedies from his discussion of constitutionally required remedies "since these present special problems").

[361] *See Jones*, 143 S. Ct. 1874 ("Due process does not guarantee a direct appeal . . . let alone the opportunity to have legal issues redetermined in successive collateral attacks on a final sentence.") (citing McKane v. Durston, 153 U.S. 684 (1894)).

In this Part, I discuss that view of due process and related constitutional issues. Specifically, I examine what appears to be the unstated basis of *Montgomery*'s constitutionally compelled remedy: that a state postconviction court violates the due process rights of the litigants if it refuses a collateral remedy for a claim based on a new substantive rule. This requires further examination of the right violated and, distinct from that, the remedy (Part V.C.1). It also requires accounting for the criminal proceedings and appeal, including the Supreme Court's direct review power, preceding any state postconviction proceedings (Part V.C.2).

1. Due Process and "Substantive New Rules"

a. Springing Constitutional Violations

Montgomery states that, after the pronouncement of a new substantive rule, "a court has no authority to *leave in place* a conviction or sentence that violates [the] substantive rule."[362] Commentators have similarly described new substantive rules as placing "new limits on the power of government to impose punishment for certain types of conduct," such that due process denies "the state the power to *continue* to punish the prisoner for having performed the acts he was found to have performed."[363] They describe Justice Harlan's conception of "new substantive rules" as predicated on a due process theory that "[*c*]*ontinued detention* without jurisdiction, as a concept separate from the underlying constitutional violation, was violative of substantive due process," and that "finality could not overcome a constitutional guarantee to be free from punishment."[364] Professors Vázquez and Vladeck, for instance, describe one view of *Montgomery* as "recognizing that the state *no longer* possesses the power to punish the prisoner," even if it did before the pronouncement of the new rule.[365] This theory is one of a springing constitutional violation. By that logic, once there is a new rule, there is a new constitutional violation that the state court must remedy as a matter of due process, whether before or after a conviction is final.

The springing constitutional violation theory collapses. It assumes that the Supreme Court is in the business of law-*making*, versus saying "what the law is."[366] It supposes that the Supreme Court's decisions create

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[362] Montgomery v. Louisiana, 577 U.S. 190, 203 (2016) (emphasis added).

[363] Vázquez & Vladeck, *Collateral Post-Conviction Review*, *supra* note 41, at 948 (emphasis added).

[364] Zarrow & Milliken, *supra* note 41, at 959 (emphasis added).

[365] Vázquez & Vladeck, *Collateral Post-Conviction Review*, *supra* note 41, at 948 (emphasis added).

[366] Marbury v. Madison, 5 U.S. 137, 177 (1803). Professors Vázquez and Vladeck expressed doubts about this theory on different grounds. As they point out, it would suggest that a State could not repeal or modify its criminal statutes, even as

new rights or impose "new limits" not in place at the time the conviction and sentence became final.[367] That view "is quite foreign to the American legal and constitutional tradition."[368] The "judicial power" is "'not delegated to pronounce a new law, but to maintain and expound the old one.'"[369]

Applied here, a new substantive rule is not "new" in the sense that it is making new law, thereby creating newly enforceable rights. A hypothetical defendant's conviction under a miscegenation law before *Loving* was no less unconstitutional than the defendants' convictions in *Loving*.[370] It would be strange to say—as those who see new substantive rules as springing constitutional violations must—that the hypothetical criminal defendant was lawfully punished before *Loving* and that, up until the day *Loving* is decided, any penalty is constitutional.[371]

A new substantive rule is instead "new" in the sense that it is expounding a principle of law for the first time, but it is not creating that principle of law. Justice Scalia best articulated the point in *American Trucking*:

> To hold a governmental act to be unconstitutional is not to announce that *we* forbid it, but that the *Constitution* forbids it . . . . Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense.[372]

Applied here, the new substantive rule thus reveals an *existing* constitutional error. That error must be deemed to have accrued when the conviction was imposed. To say that it accrued at some later time, by

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a matter of policy. Vázquez & Vladeck, *Collateral Post-Conviction Review*, *supra* note 41, at 948–49. In reality, denying a remedy in such cases might be "unfair" but not "unconstitutional." *Id.* at 949.

[367] *Id.* at 948.

[368] Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 106–07 (Scalia, J., concurring).

[369] *Id.* at 107 (quoting 1 W. BLACKSTONE, COMMENTARIES 69 (1765)); *see* Danforth v. Minnesota, 522 U.S. 264, 271 (2008) (similar).

[370] Loving v. Virginia, 388 U.S. 1, 8 (1967).

[371] *But see* Vázquez & Vladeck, *Collateral Post-Conviction Review*, *supra* note 41, at 948 (describing the springing constitutional theorists view as positing that "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)").

[372] Am. Trucking Ass'n, Inc. v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring).

virtue of a later Supreme Court decision, is antithetical to the Article III judicial power.[373]

There is one possible exception to the notion that the Supreme Court is not creating new rules as much as it is discovering them for the first time. Some of the Supreme Court's Eighth Amendment decisions suggest that the punishments proscribed by the Eighth Amendment evolve over time, in such a way that one might think a punishment that is constitutional when imposed then evolves to unconstitutional later: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[374] But despite the "evolving" terminology, a new Eighth Amendment rule necessarily reveals something unconstitutional about the sentence at the time it was imposed.[375] A punishment cannot become unconstitutional as of the day of the Supreme Court's new Eighth Amendment decision, which would be contrary to the Supreme Court's limited judicial power to "say what the law *is*" rather than "what the law *shall be*."[376].

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[373] Professors Vázquez and Vladeck's posit that a new right to review accrues once the *Supreme Court* definitively recognizes a new substantive rule: "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." Vázquez & Vladeck, *Collateral Post-Conviction Review*, *supra* note 41, at 952. They posit that right is specific to "the effect of *Supreme Court* decisions recognizing new substantive rules." *Id.* But that framing likens the Supreme Court to a legislative body, creating new rights accruing when the Supreme Court says they accrue.

[374] Trop v. Dulles, 356 U.S. 86, 101 (1958); *see also* Estelle v. Gamble, 429 U.S. 97, 102–03 (1976). The Supreme Court's Eighth Amendment decisions are ordinarily substantive new rules—*see* Penry v. Lynaugh, 492 U.S. 302, 329–30 (1989)—and are highly relevant for state prisoners, who are far more likely to rely on new Eighth Amendment rules relevant to the constitutionality of their sentences than others relevant to the constitutionality of their convictions. *See, e.g.*, Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010); Kennedy v. Louisiana, 554 U.S. 407 (2008); Roper v. Simmons, 543 U.S. 551 (2005). The same has not held with respect to federal prisoners, where the Supreme Court has issued new rules interpreting federal criminal statutes that go to the legality of a conviction. *See, e.g.*, Welch v. United States, 578 U.S. 120 (2016); Bousley v. United States, 523 U.S. 614 (1998).

[375] Consistent with this conclusion, the Supreme Court has described its Eighth Amendment holdings in indicative terms, not evolving ones. *See, e.g.*, *Kennedy*, 554 U.S. at 421–22 ("Based both on consensus and our own independent judgment, our holding is that a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments."); *Roper*, 453 U.S. at 578–79 ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.").

[376] Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 107 (1993) (Scalia, J., concurring) (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

To summarize, the springing constitutional violation theory is inconsistent with the exercise of the judicial power by the Supreme Court. A new substantive rule does not create a *new* due process violation that did not exist previously. It reveals a constitutional defect in the conviction at the time it was imposed. As such, we are back to where we began. What constitutional principle requires a collateral remedy when the constitutional defect could have been, but was not, identified on direct review?

b. Due Process and Collateral Review

i. *Herrera* and Greater-Includes-the-Lesser Framings

If we assume, as we must, that a new substantive rule reveals what the law has always been,[377] then the criminal judgment was also constitutionally defective when imposed during the criminal proceedings. And if that's so, then *Montgomery*'s constitutionally required remedy makes sense only if due process, or some other constitutional principle, can compel *another round* of judicial review after the criminal proceedings themselves.

That due process question lurking in *Montgomery* was expressly considered in *Herrera v. Collins*.[378] In *Herrera*, a habeas petitioner claimed actual innocence based on newly discovered evidence.[379] He argued that the absence of a habeas remedy violated the Eighth and Fourteenth Amendments[380]—similar to *Montgomery*'s assumption that the absence of a habeas remedy for new substantive rules, showing the petitioner's "legal innocence," would be unconstitutional. In rejecting that argument, the Court explained that the appropriate question on collateral review "is not whether due process prohibits the execution of an innocent person, but rather whether it entitles petitioner to judicial review of his 'actual innocence' claim."[381] In *Herrera*, the Court answered "no."[382] The Court instead adverted to the availability of executive clemency as the

[377] *See* Danforth v. Minnesota, 552 U.S. 264, 271 (2008); *Am. Trucking*, 496 U.S. at 201 (Scalia, J., concurring).

[378] 506 U.S. 390 (1993).

[379] *Id.* at 393.

[380] *See id.* at 398.

[381] *Id.* at 407 n.6; *see also id.* at 399–400 ("Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears. . . . Thus, in the eyes of the law, petitioner does not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted by due process of law. . . .").

[382] *Id.* at 407–09; *see also* Martinez v. Ct. of Appeal of Cal., 528 U.S. 152, 159–60 (2000); United States v. MacCollom, 426 U.S. 317, 323 (1976) (plurality opinion).

"forum to raise his actual innocence claim" and the "'fail safe' in our criminal justice system."[383]

If, as *Herrera* held and *Jones* more recently confirmed, the Due Process Clause does not require collateral review proceedings to begin with,[384] then the Due Process Clause does not require a collateral remedy. Accordingly, the state may provide many postconviction remedies, some, or none at all. Put another way, if a state could *eliminate* all postconviction remedies, then it follows that the state could *limit* postconviction remedies, so long as it does so in a non-arbitrary way.[385]

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[383] *Herrera*, 506 U.S. at 411, 415. *Herrera* later says that the Court "may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim" but that the evidence in *Herrera* did not approach that threshold. *Id.* at 417. But the Court's opinion does not purport to limit such "state avenue[s]" to state postconviction courts, as shown by the lengthy discussion of executive clemency. *Id.* at 411–15. The availability of clemency would seem to be enough by the Court's analysis. *Id.* at 416–17.

[384] Jones v. Hendrix, 143 S. Ct. 1857, 1874 (2023).

[385] Similar greater-includes-the-lesser arguments can be made—although controversial—for the constitutionality of AEDPA and other jurisdiction-stripping. That is, if Congress need not establish lower federal courts at all, then it can constitutionally strip those courts of jurisdiction to hear certain claims. *See* U.S. CONST. art. III, § 1 ("inferior Courts as the Congress *may* from time to time ordain and establish"). *Compare, e.g.*, Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 PENN. L. REV. 45 (1975); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965), *with* 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 (1981). For a collection of Supreme Court decisions employing a greater-includes-the-lesser rationale, including in the jurisdiction-stripping context, *see* Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L. REV. 227 (1994) (citing Sheldon v. Sill, 49 U.S. 441, 449 (1850); Posadas de P.R. Assocs. V. Tourism Co., 478 U.S. 328, 345–46 (1986); W. Union Tel. Co. v. Kansas *ex rel.* Coleman, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting)). Some will reject this greater-includes-the-lesser argument on the theory that, once the state opens its courts to postconviction review, the Constitution imposes certain minimum due process requirements (including collateral remedies for new substantive rules). *See* Zarrow & Milliken, *supra* note 41, (rejecting *Montgomery*'s court-appointed amicus's greater-includes-the-lesser argument because, if a state's courts are open to habeas claims, then "the Due Process Clause applies"); *see also* Irons v. Carey, 479 F.3d 658, 854–55 (9th Cir. 2007) (Noonan, J., concurring) (similar with respect to AEDPA); *see also, e.g.*, Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 212–13 (rejecting that Congress could commit certain matters to an Article I court, by a "greater-includes-the-lesser" logic, if doing so would implicate the unconstitutional conditions doctrine). That appeared to be part of

Applied to the retroactivity problem, the state could impose a rule precluding postconviction remedies for claims based on new Supreme Court decisions announced after a conviction becomes final. The state must apply that rule in a non-arbitrary way; that is, if the state makes collateral relief available to one petitioner for the violation of a new substantive rule, it cannot arbitrarily deny collateral relief to a similarly situated petitioner.[386] But assuming the rule is applied non-arbitrarily, the rule is within the state's power to limit postconviction remedies—up to the line of eliminating them altogether. No Supreme Court decision before *Montgomery* required the state to make collateral relief available that it would not otherwise make available to *any* similarly situated state habeas petitioner.

Start with the very cases that involve new substantive rules. *Montgomery* described these cases as "best understood as resting upon constitutional premises."[387] But upon closer examination, those cases (unsurprisingly) describe constitutional errors in constitutional terms; they do not also describe available *remedies* for those errors in constitutional terms. Cases involving new substantive rules (*Siebold*) or discussing remedies for new substantive rules (*Mackey* or *Teague*) are about the scope of the federal habeas writ, not the Constitution. The decision to make a collateral remedy available in such cases was based on the rationale that it was *permitted* by statute, not *prescribed* by the Constitution.

When Justice Harlan first described new substantive rules, he discussed the historical scope of the writ and interests such as finality:

> [T]he writ has historically been available for attacking convictions on such grounds. This, I believe, is because it represents the clearest instance where finality interests

Montgomery's unstated rationale too. Montgomery v. Louisiana, 577 U.S. 190, 204 (2016) ("If a state collateral proceeding is open to a claim controlled by federal law . . ."). But it is not enough to observe generally that the Due Process Clause constrains courts. While there will be constitutionally compelled features of any court, no one could contend that due process prohibits *all* procedural or remedial limitations, of here that due process imposes the same obligations on a postconviction court as a criminal court. *See Jones*, 143 S. Ct. at 1874 (rejecting argument); *see Herrera*, 506 U.S. at 398–400 (explaining that habeas petitioner's "claim for relief . . . must be evaluated in the light of the previous proceedings in this case" and cataloguing due process requirements in past criminal proceedings).

[386] That equality principle explains the "adequacy" prong of the Court's doctrine on adequate-and-independent state procedural bars, best exemplified in the random application of a state-law procedural bar in *NAACP v. State of Ala.* ex rel *Patterson*, 357 U.S. 499, 458 (1958). For a state procedural bar to be a valid state-law ground that precludes the Supreme Court's further review, the bar cannot be applied willy-nilly and must instead be "regularly followed." Beard v. Kindler, 558 U.S. 53, 60 (2009) (quotation marks omitted).

[387] *Montgomery*, 577 U.S. at 200.

> should yield. There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose. Moreover, issuance of the writ on substantive due process grounds entails none of the adverse collateral consequences of retrial. . . .[388]

Years later, *Teague*'s adoption of the exception for substantive rules was likewise not predicated on constitutional compulsion. *Teague* is simply a decision "defining the scope of the writ."[389] To be sure, the Supreme Court has explained that a new substantive rule is one clarifying that "the Constitution itself deprives the State of the power" to punish certain conduct or "impose a certain penalty."[390] But whether there will be a collateral *remedy* for that constitutional violation after a conviction is final has always been a separate question.[391]

Even in *Ex parte Siebold* itself—the Supreme Court's early prototype for decision announcing a new substantive rule—the Court did not say habeas relief was constitutionally compelled.[392] Rather, *Siebold* was focused on ensuring that the Court was not going *too far*, in excess of what federal law permitted the Court to entertain for habeas relief.[393] If the Constitution required a freestanding claim for habeas relief based on a new substantive rule, that would have been a far easier rationale in *Siebold* and its progeny. But no decision before *Montgomery* assumed that there was a constitutionally compelled remedy in such circumstances.

ii. State Law and Civil Law Analogies

More broadly, *Montgomery*'s constitutionally required collateral remedy is inconsistent with the Supreme Court's treatment of collateral

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[388] Mackey v. United States, 401 U.S. 667, 692–93 (1971) (Harlan, J., concurring). Justice Harlan's conclusion that "finality interests should yield" for new substantive rules is complicated by *Penry*. *Id.* at 693. A new substantive rule that invalidates a sentence will not void the underlying conviction. It will require a resentencing, potentially by a jury, which could well entail the same "adverse collateral consequences of retrial." *Id.*

[389] Teague v. Lane, 489 U.S. 288, 309 (1989) (plurality opinion) (quotation marks and alterations omitted).

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

[391] *See supra* Part V.A; *see, e.g.*, Danforth v. Minnesota, 552 U.S. 264, 271 (2008) ("What we are actually determining when we assess the 'retroactivity' of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.").

[392] *See supra* notes 72–82 and accompanying text.

[393] Montgomery v. Louisiana, 557 U.S. 190, 220 (2016) (Scalia, J., dissenting) (describing *Siebold* as "about th[e Supreme] Court's statutory power to grant the Original Writ, not about its constitutional obligation to do so").

remedies for new rules of state law or collateral remedies for new rules in civil cases. The Supreme Court has rejected that collateral remedies are required in such cases, including new rules so consequential that they would invalidate a conviction.

In *Wainwright v. Stone*,[394] for example, the Supreme Court found no constitutional problem with a state's refusal to give a collateral remedy for a new rule of state law, akin to a *Siebold* claim on state law grounds. At the time of the convictions in *Wainwright*, Florida courts interpreted Florida criminal law to include the defendants' conduct.[395] After the convictions, the Florida Supreme Court reinterpreted Florida criminal law to exclude the defendants' conduct.[396] The Florida Supreme Court announced it would apply that rule only prospectively and rejected defendants' claims for postconviction relief.[397] As a matter of federal constitutional law, the U.S. Supreme Court held the Florida Supreme Court could deny postconviction relief. The Supreme Court concluded that the state courts were not "constitutionally compelled … to make retroactive its new construction of the Florida statute"—that is, the state courts could not give a postconviction remedy based on the new rule and invalidate the defendants' convictions.[398]

Wainwright's denial of a collateral remedy is consistent with other civil cases, too. For example, in *Chicot County Drainage District v. Baxter State Bank*,[399] the Supreme Court rejected that its newly pronounced constitutional rules could invalidate an earlier settlement. *Chicot* involved a bankruptcy dispute. The parties had previously settled municipal debts pursuant to the bankruptcy code, but then the Supreme Court declared the relevant code provisions unconstitutional.[400] Based on the Supreme Court's intervening decision, one of the settling parties asked for a do-over based on the maxim that "the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties and hence affording no basis for the challenged [settlement] decree."[401] The Supreme Court rejected that argument:

> It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must

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[394] 414 U.S. 21 (1973).

[395] *Id.* at 21–22.

[396] *Id.* at 23.

[397] *Id.*

[398] *Id.* at 23–24.

[399] 308 U.S. 371 (1940).

[400] *Id.* at 374 (citing Ashton v. Cameron Cnty. Water Imp. Dist. No. 1, 298 U.S. 513 (1936)).

[401] *Id.* at 374 (citing Norton v. Shelby Cnty., 118 U.S. 425, 442 (1886)).

> be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.[402]

Animating *Chicot* was the collateral nature of the party's attack: when a new rule is at stake, "determinations of such questions, while open to *direct review*, may not be assailed *collaterally*."[403]

Later, in *Great Northern Railway v. Sunburst Oil*,[404] the Supreme Court rejected the argument that the Constitution required collateral remedies based on new rules. The Supreme Court called it "novel" to claim that due process required a state court to apply newly announced rules retroactively.[405] As Justice Cardozo put it, "[T]he Federal Constitution has no voice upon the subject."[406]

The Supreme Court later relied on *Sunburst*'s rejection of constitutionally required remedies in *Linkletter*, announcing the balancing test for retroactivity in federal habeas.[407] And, despite his criticism of *Linkletter*'s arbitrariness, Justice Harlan saw new rules in habeas the same way. As he wrote in *Mackey*, court's obligations are on direct review, "federal courts have never had a similar obligation on habeas corpus."[408]

iii. Possible Exceptions

All of that said, the Supreme Court has, on occasion, reversed a state postconviction court's judgment on due process grounds. But these decisions are more limited than *Montgomery*'s one-size-fits-all retroactivity rule. The decisions illustrate that states may (but in some instances do not) limit postconviction remedies, and those limitations are permissible so long as they are evenly applied.

In *Yates v. Aiken*,[409] the Court corrected a state postconviction court's refusal to apply an *old* rule in a collateral review proceeding.[410] But *Yates*

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[402] *Id.*

[403] *Id.* at 376 (emphasis added); *see also, e.g.*, *In re* Pulaski Ave., 220 Pa. 276 (Pa. 1908) (refusing to reconsider judgment imposing tax liabilities, once final, even after tax was later found unconstitutional).

[404] Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932).

[405] *Id.* at 364.

[406] *Id.*; *accord* Solem v. Stumes, 465 U.S. 638, 642 (1984) ("retroactive application is not compelled, constitutionally or otherwise").

[407] Linkletter v. Walker, 381 U.S. 618, 628 (1965).

[408] Mackey v. United States, 401 U.S. 667, 682 (1971) (Harlan, J., concurring); *accord Solem*, 465 U.S. at 642.

[409] 484 U.S. 211 (1988).

[410] *Id.* at 215–16.

did not say the collateral remedy was constitutionally compelled in the sense that *Montgomery* assumes. Rather, *Yates* was about arbitrariness. It was arbitrary for the state court to deny the petitioner relief—relief for a claim based on an *old* rule—because the state supreme court had not "placed any limit on the issues that it will entertain" in collateral review.[411]

Yates thus stands for the principle that the postconviction court "ha[d] a duty to grant the relief that federal law requires"[412] because the state had already opened its postconviction courts *without limitation* for the claim at issue. But *Yates* did not abrogate the rule from *Wainwright* and myriad other cases that the state may place limits on its postconviction remedy, and those limits would still be consistent with what "federal law requires" of remedies on collateral review.

Fiore v. White is another example of this arbitrariness principle at work.[413] Pennsylvania convicted Fiore and a co-defendant for operating a hazardous waste facility without a permit.[414] Fiore was convicted first.[415] Then in his co-defendant's appeal, after Fiore's conviction became final, the Pennsylvania Supreme Court issued a decision clarifying one of the statute's elements.[416] Fiore sought post-conviction relief based on that intervening state supreme court decision.[417] The U.S. Supreme Court decided he was entitled to postconviction relief based on the argument that his conviction violated the Fourteenth Amendment's requirement that each of the crime's elements be proven beyond a reasonable doubt.[418] All parties agreed that Pennsylvania "presented no evidence whatsoever to prove th[e] basic element" of the crime that the Pennsylvania Supreme Court later clarified in Fiore's co-defendant's appeal.[419]

Unlike *Montgomery*, the Court in *Fiore* framed the case as one in which "retroactivity [wa]s not at issue" because the Pennsylvania Supreme Court said it was not at issue.[420] Before deciding the due process claim, the Supreme Court certified to the Pennsylvania Supreme Court whether its decision in Fiore's co-defendant's appeal announced a new rule of state law or merely clarified existing law.[421] The Pennsylvania Supreme Court

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[411] *Id.* at 218.

[412] *Id.*

[413] 531 U.S. 225 (2001) (per curiam)

[414] *Id.* at 226–27.

[415] *Id.*

[416] *Id.*

[417] *Id.* at 227–28.

[418] *Id.* at 228–29; Jackson v. Virginia, 443 U.S. 307, 316 (1979). The recent *Jones* decision strongly suggests that the same argument would not hold for *new* rules clarifying elements of the offense in new ways. Jones v. Hendrix, 143 S. Ct. 1857, 1871–74 (2023).

[419] *Fiore*, 531 U.S. at 228–29.

[420] *Id.* at 226 (emphasis added).

[421] *Id.*

answered the latter. That led the Supreme Court to decide that Fiore was entitled to relief, seemingly *because* the clarification to the statute's elements "did not announce a new rule of law," as told by the Pennsylvania Supreme Court.[422]

Similar to *Yates*, *Fiore* is also a decision concerned with arbitrariness. As Professors Vázquez and Vladeck have observed, where there are two defendants "who jointly committed the crime but w[ere] tried separately," there is "a strong argument that failure to give Fiore the benefit" of the rules applied in his co-defendant's case would violate due process.[423] If the rule is an "old" rule, as the Pennsylvania Supreme Court confirmed, then it would be arbitrary to deny Fiore the benefit of that rule while treating his similarly situated co-defendant differently.

In short, due process requires a court to treat similarly situated habeas petitioners the same in postconviction proceedings. But due process does not further require collateral remedies based on an intervening Supreme Court decision, when the state would otherwise preclude such a collateral remedy for all. This conclusion should not be a surprise in view of the entire lifecycle of a criminal case. Postconviction proceedings follow a full criminal trial and an appeal, or a knowing waiver of the same. Discussed next, the time for raising claims seeking the benefit of a new substantive rule is before finality, where there are substantially more constitutional requirements including for the problem of retroactivity.

2. The Non-Collateral Criminal Proceedings

What has been forgotten in this debate over constitutionally required *collateral* remedies are the constitutional requirements that adhere to the criminal proceedings themselves. To argue that the Constitution requires a collateral remedy is contrary to the principle that due process is satisfied by those criminal proceedings.[424] Due process requirements are at their zenith. The criminal defendant is entitled the presumption of innocence, and the prosecution must establish his guilt beyond a reasonable doubt to a unanimous jury.[425] He has the right to challenge the constitutionality of the indictment, the right to counsel, the right to confront witnesses, the right to disclosure of exculpatory evidence, the right not to testify without drawing an adverse inference for that choice, and myriad other rights.[426]

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[422] *Id.* at 228–29.

[423] Vázquez & Vladeck, *Collateral Post-Conviction Review*, *supra* note 41, at 949, 950 n.159.

[424] *See In re* Winship, 397 U.S. 358, 363–64 (1970); *see also* Patterson v. New York, 432 U.S. 197, 208 (1977).

[425] *See generally Winship*, 397 U.S. at 363; Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020).

[426] *See* Herrera v. Collins, 506 U.S. 390, 398–99 (1993) (collecting cases).

Relevant to the problem of retroactivity, there is an additional protection available to defendants as their case moves through direct review. Up until the moment a conviction and sentence becomes final, including on appeal, a criminal defendant may argue that the state has convicted him pursuant to an unconstitutional statute, or that it has imposed an unconstitutional sentence.[427] If the courts agree, then that new rule of unconstitutionality will be applied to his case to invalidate his conviction or sentence, as well as any other case pending on direct review.[428] Even in the era of case-by-case retroactivity, "full retroactivity" was the standard for any such rules "that a trial court lacked authority to convict or punish a criminal defendant in the first place."[429] And since *Griffith*, the failure to apply any "newly declared constitutional rule[s] to criminal cases pending on direct review" is deemed to "violate[] basic norms of constitutional adjudication."[430] *Griffith*, acknowledging that the Supreme Court "cannot hear each case pending on direct review," instructed all "lower courts to apply the new rule retroactively to cases not yet final."[431] That includes state courts, whose "selective application of new rules" would "violate[] the principle of treating *similarly situated* defendants the same,"[432] no less than federal courts.[433]

After *Griffith*, either state courts or the Supreme Court will redress constitutional violations after trial based on new Supreme Court decisions.[434] But, as *Griffith* illustrates, that time is during the criminal proceedings and on appeal, not on collateral review. That observation is consistent with Justice Harlan's own examples of new substantive rules, but these are decisions issued on direct review, before finality.[435] Such examples are grounds for *distinguishing*, not equating, a state court's remedial obligations before finality with those obligations after finality.

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[427] *See* Griffith v. Kentucky, 479 U.S. 314, 322–23 (1987).

[428] *See id.*

[429] United States v. Johnson, 457 U.S. 537, 550 (1982) (citing United States v. United States Coin & Currency, 401 U.S. 715, 724 (1971)).

[430] *Griffith*, 479 U.S. at 322.

[431] *Id.* The Court extended that logic to civil cases in *Harper*, where the Court reasoned that when the Court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review . . . ." Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 97 (1993).

[432] *Griffith*, 479 U.S. at 323 (emphasis added).

[433] *Id. Griffith*'s other rationale was specific to federal courts—that "simply fishing one case from the stream of appellate review" and announcing a new rule to apply only prospectively was inconsistent with federal courts' exercise of Article III power. *Id.* at 322–23.

[434] *Id.*

[435] *See supra* notes 116–20 and accompanying text. Likewise *Montgomery* cites *United States Coin and Currency*, but that too was a decision issued during the defendants' direct appeal. *See United States Coin & Currency*, 401 U.S. at 724 n.13.

Likewise, other well-known instances of constitutionally required state-court remedies are distinguishable from collateral remedies. Consider *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*.[436] *McKesson* involved the constitutionality of a state tax, which the petitioner had paid and then sued for a refund. The Florida Supreme Court agreed the tax was discriminatory, in violation of the Dormant Commerce Clause, but refused to provide a refund based on equitable considerations.[437] The U.S. Supreme Court reversed: Where state law requires a taxpayer to pay first and challenge the tax later, "the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional."[438]

The critical fact in *McKesson* was that the refund suit was the *first opportunity* under state law to challenge the constitutionality of the tax.[439] That distinguishes *McKesson*'s remedy, required by due process, from a collateral remedy following an earlier round of criminal proceedings. *McKesson* required one "meaningful opportunity" to challenge the unconstitutional tax.[440] By analogy here, that meaningful opportunity to challenge the constitutionality of a conviction or sentence is during the criminal proceedings, before the conviction and sentence are final. *McKesson*'s due process rationale does not extend to additional rounds of collateral review and state-court remedies after finality.

Ultimately, *Montgomery* did not grapple with this critical fact: the state has not shut its doors to federal claims altogether; it has shut its doors to a *second round* of federal claims in a collateral proceeding after a full criminal trial and appeal.[441] At that point, the Supremacy Clause no more

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[436] 496 U.S. 18 (1990).

[437] *Id.* at 25–26.

[438] *Id.* at 22; *accord* Ward v. Bd. of Cnty. Comm'rs, 253 U.S. 17, 24 (1920). Interestingly, *McKesson* explained that the remedy could take different forms. The State did not have to reward a refund *per se*; it could instead "assess and collect back taxes from petitioner's competitors who benefited from the rate reductions during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme." *McKesson*, 496 U.S. at 40. That choice of remedies resembles the choice that the State would have had after a pre-deprivation hearing. *Id.* at 31; *see also* Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 211 (1990) (Stevens, J., dissenting) (collecting cases for the proposition that "[t]he remedial effect a decision of federal constitutional law should be given is in the first instance a matter of state law").

[439] *McKesson*, 496 U.S. at 31; *accord* Gen. Oil Co. v. Crain, 209 U.S. 211, 226 (1908).

[440] *McKesson*, 496 U.S. at 31.

[441] *See* Vázquez & Vladeck, *Collateral Post-Conviction Review*, *supra* note 41, at 911 (contending that "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 implicate the non-discrimination principle in *Testa v. Katt*, 330

requires the state to entertain Fourth Amendment claims anew in postconviction proceedings than the Constitution requires the federal habeas courts to consider those claims—which is not at all.[442] By extension, neither the Supremacy Clause nor Due Process requires the state habeas court to ignore its own retroactivity-related remedial limitations any more than the Constitution requires federal habeas courts to ignore Section 2254(d)'s relitigation bar to reach a claim. Both sovereigns may define the scope of such collateral attacks—precisely because they are collateral—which necessarily includes the sovereign's retroactivity-related remedial limitations.

To conclude, a state's limiting collateral remedies cannot be likened to a state's refusal to consider federal claims altogether. Postconviction review is not the first opportunity to raise constitutional claims about a criminal judgment.[443] As Justice Harlan's various examples of substantive rules show, a criminal defendant may contest the constitutionality of his conviction or sentence before the conviction and sentence are final. If the defendant does so and succeeds, any such rule will be applied in his case to invalidate an indictment or criminal judgment.[444] Concerns that such criminal proceedings are insufficient to ensure adequate review of such claims are better directed to the appeal rights of a criminal defendant. Such concerns might warrant reforming the appeal, including by expanding the Supreme Court's review of direct appeals.[445] But such concerns do not warrant constitutionalizing *collateral* review remedies.

3. Parting Thoughts Regarding the Role of the Supreme Court

There are two final "special problems"[446] n habeas that I conclude with. Both relate to the unique and repeated role of the Supreme Court in the lifecycle of the criminal defendants' case.

U.S. 386 (1947), in addition to *Crain*, because it reflects "disagreement with the policies underlying the Constitution").

[442] Stone v. Powell, 428 U.S. 465, 489–94 (1976); *see also, e.g.*, 28 U.S.C. §§2244(b), (d) (1996) (imposing second-or-successive bar and timeliness requirement).

[443] Ineffective assistance claims are arguably on different footing in States that require such claims to be raised in state postconviction review and not before. There are good arguments, grounded in cases such as *McKesson*, that if such claims are detoured to state postconviction proceedings and cannot be raised until then, the state postconviction court must provide a remedy mirroring those available before a conviction is final. *See* McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 31 (1990) (holding due process required remedy in refund suit challenging unconstitutional tax).

[444] *See* Griffith v. Kentucky, 479 U.S. 314, 322–23; United States v. United States Coin & Currency, 401 U.S. 715, 724 (1971).

[445] *See* discussion *infra* Part V.C.3.

[446] Hill, *supra* note 38.

First, a criminal defendant will have the opportunity to present his constitutional claims to the Supreme Court on direct review before his conviction becomes final. As detailed in Part V.C.2, after *Griffith*, every criminal defendant may argue for a new substantive rule of constitutional law to be applied to his conviction or sentence, and to invalidate it, on direct appeal. If the Supreme Court announces a new substantive rule, it will be applied in that case and, likewise, other criminal defendants may ask the Court to grant, vacate, and remand ("GVR") their cases in light of any such new substantive rules.[447] After *Griffith*, all lower courts are required to give defendants the benefit of any such Supreme Court decisions if their cases are still on appeal, assuming the claim was properly preserved and presented.[448]

Some will say that the prospect of the Supreme Court's direct review before a conviction is final is too remote because the Supreme Court's review today is permissive rather than mandatory.[449] The direct appeal is subject to the Court's certiorari jurisdiction, a change from the earlier era of appeals as of right.[450] The Supreme Court's review is thus not guaranteed in the way that it was in *Griswold* or *Loving*. The criminal defendants' chances of success depend on the Supreme Court's granting certiorari,[451] or to summarily GVR the defendants' petition based on a sufficiently similar recent case.

But that critique—that it will prove too difficult to obtain Supreme Court review—is one that calls for improving direct review over state criminal convictions rather than constitutionalizing postconviction remedies. The change from mandatory to permissive appellate jurisdiction in the U.S. Supreme Court did not create a new constitutional obligation for the state postconviction courts to provide a remedy for new substantive rules.

There are obvious benefits to criminal defendants if constitutional claims are raised earlier on direct review. Rather than invalidating convictions or reopening sentences decades after they become final based on new substantive rules, claims that a conviction is constitutionally invalid should be raised by the defendant himself in his direct appeal before the conviction becomes final and before serving years in custody

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[447] *See, e.g.*, Bryant v. Louisiana, 141 S. Ct. 2847 (2021) (mem.) (granting, vacating, and remanding criminal defendant's petition in light of *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020)).

[448] *See supra* notes 121–23 and accompanying text.

[449] *See, e.g.*, Vázquez & Vladeck, *Collateral Post-Conviction Review*, *supra* note 41, at 952.

[450] *See* 28 U.S.C. § 1257 (1964).

[451] *See, e.g.*, Graham v. Florida, 560 U.S. 48, 55 (2010); Miller v. Alabama, 567 U.S. 460, 469 (2012).

for an unconstitutional conviction.[452] Similarly, for new substantive rules that might invalidate a sentence, it benefits all for the resentencing to occur sooner rather than later to avoid memories fading with the passage of time, among other advantages.

To solve that problem, Congress could always return to the prior version of Section 1257 and guarantee that federal forum on direct review for *Siebold*-like claims. If a defendant's appeal "question[s] the validity of a statute of any state"—that is, his crime or category of punishment—"on the ground of its being repugnant to the Constitution, treaties, or laws of the United States," the criminal defendant could have a direct appeal as of right to the Supreme Court before the conviction and sentence are final.[453]

That guaranteed appeal avoids a perverse consequence of the Court's current certiorari review for such constitutional questions. Today, it is possible that criminal defendants who raise such constitutional claims early will be penalized, while those piggybacking on such constitutional claims later will be rewarded. The early objectors are more likely to have their petitions denied and their convictions deemed final because the Supreme Court will often await further indication—*i.e.*, further certiorari petitions raising the same question—before deciding to grant certiorari. A direct appeal would avoid the random selection inherent in the Supreme Court's current certiorari review.

Expanding the Supreme Court's direct review of criminal convictions in this way largely avoids the retroactivity problem. If an appeal to the Supreme Court to challenge the constitutionality of the state crime (or category of punishment) could be guaranteed, there would be no need to confront the question of retroactivity in a later postconviction proceeding. If the claim is raised in the Supreme Court on appeal and succeeds, there will be no further postconviction review. If the claim fails, there would be no basis for revisiting that denial in a second round of review in postconviction review. And if the claim is not raised on appeal, the state and federal courts may declare it procedurally defaulted in postconviction review.

Revising Section 1257 to permit appeals as to the constitutionality of a conviction or sentence would be a better answer to the retroactivity problem than the one *Montgomery* offers. It expands the direct appeal to guarantee a federal forum for the constitutional claim. But because the criminal judgment is not yet final, it does not frustrate finality and comity

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[452] *See supra* notes 117–21 and accompanying text (discussing examples of new substantive rules announced in direct appeal).

[453] *See* 28 U.S.C. § 1257(2) (1964). Today, the Supreme Court retains direct appellate review over a small set of cases appealed from three-judge district courts, 28 U.S.C. § 1253 (1948), most often deployed for cases challenging the constitutionality of congressional or statehouse electoral districts, 28 U.S.C. § 2284(a) (1984).

in the way that *Montgomery* does—there, requiring a state postconviction court to vacate a fifty-year-old sentence or offer a parole hearing because of an intervening Supreme Court decision.[454]

The second unique problem applicable here is the Supreme Court's Original Writ power.[455] *Montgomery* does not contemplate the Court's power to issue an Original Writ and whether that power obviates the need for a constitutionally compelled state court remedy. The existence of the Original Writ is one of those special problems in habeas. It is one of the more "exotic form[s]" of the Supreme Court's appellate jurisdiction,[456] whereby a habeas petitioner can seek relief from the Supreme Court in the first instance.[457]

In theory, claims that a crime or a category of punishment is unconstitutional can be heard by the Supreme Court not only on direct review but also in a petition for an Original Writ. In practice, a habeas petitioner will not seek such relief in the first instance from the Supreme Court because of exhaustion requirements.[458] And today, the Supreme Court would be unlikely to grant habeas relief for claims based on new substantive rules if Section 2254(d) would preclude a lower federal court from doing so.[459]

But still, the Original Writ remains available, and the Supreme Court could use it for any "legal innocence" claim based on one of the Supreme Court's intervening decisions. The Original Writ makes it difficult to understand *Montgomery* on Supremacy Clause grounds, likened to cases in which there was no other means of federal court review.[460] Habeas is

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[454] *Montgomery* posited that redressing claims based on new substantive rules would not frustrate finality because there is no finality interest in "presev[ing] a conviction or sentence that the Constitution deprives the State of power to impose." Montgomery v. Louisiana, 577 U.S. 190, 205 (2016). As an initial matter, that does not account for claims based on new substantive rules that will not succeed. If not finality, comity is at least frustrated by requiring such claims to be heard in a state postconviction court when they could have been raised on direct appeal. *See* Teague v. Lane, 489 U.S. 288, 308–09 (1989) (plurality opinion) (permitting collateral review for new rules "*continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards"). Additionally, *Montgomery* will require a collateral remedy for resentencing, short of voiding the conviction itself. *See generally Montgomery*, 577 U.S. 190. And that resentencing remedy will ordinarily entail revisiting the facts of the crime and any mitigating circumstances sometimes decades after the crime. *Id.*

[455] *See, e.g.*, Felker v. Turpin, 518 U.S. 651, 664–65 (1996).

[456] Lee Kovarsky, *Original Habeas Redux*, 97 VA. L. REV. 61, 62 (2011); *see Ex parte* Bollman, 8 U.S. 75, 100–01 (1807).

[457] 28 U.S.C. § 2241(a) (2008); *see also Bollman*, 8 U.S. at 101.

[458] 28 U.S.C. § 2254(b) (1996); SUP. CT. R. 20.4(a).

[459] *See Felker*, 518 U.S. at 663.

[460] *See* Vázquez & Vladeck, *Collateral Post-Conviction Review*, *supra* note 41, at 935–37 (discussing Gen. Oil Co. v. Crain, 209 U.S. 211, 226 (1908)).

sui generis insofar as the Supreme Court has three ways to review the constitutionality of a criminal judgment in addition to reviewing the state postconviction review court: (1) on direct appeal, (2) as part of federal habeas proceedings coming to the Court from the lower federal courts, and (3) via its Original Writ power. Thus, *Crain*'s concern that a state could evade the Supreme Court's review altogether is not a concern that translates to collateral habeas proceedings today.[461] Regardless of what postconviction relief is available in the state postconviction courts, the Supreme Court retains authority to review state criminal judgments on appeal and even after.

VI. CONCLUSION

The Supreme Court's increased attention on state postconviction courts raises unique questions about the Court's power over those state courts, as best illustrated in *Montgomery.* Before *Montgomery*, the conventional wisdom was that state courts could decide whether to make postconviction remedies available for claims based on newly issued Supreme Court decisions, and the Supreme Court would intercede at the end of federal habeas proceedings if necessary. But with *Montgomery* came a shift. *Montgomery*, more than any other decision, shows the Court's willingness to intercede in the midst of collateral review—at the end of state habeas proceedings and before federal habeas proceedings. *Montgomery*, moreover, constitutionalized state postconviction remedies in an unprecedented way. *Montgomery*'s rule, requiring collateral remedies of state courts, blurs the traditional lines between the state and federal courts. It remains to be seen whether *Montgomery*'s innovation is here to stay. Or whether, as the Court has since indicated in *Jones*, collateral remedies will return to their historic place: as a matter of grace, not constitutional prescription, be it in courts state or federal.

[461] *See Crain*, 209 U.S. at 226 ("If a suit against state officers is precluded in the national courts by the Eleventh Amendment . . . and may be forbidden by a state to its courts as it is contended . . ., without power of review by this Court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its observation."). Further distinguishing *Crain*, there constitutional sovereign immunity also precluded review of the state tax in federal court; compare that to the routine review of state criminal convictions in federal habeas courts.