FEDERALISM AND RETROACTIVITY IN STATE POST-CONVICTION PROCEEDINGS

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FOR AT LEAST THE PAST EIGHT YEARS, the Supreme Court has been aware of a federalism question that remains unresolved: Are state courts required to use *federal* law standards – in particular the standard announced in *Teague v. Lane*[1] – to determine whether decisions of the Supreme Court apply retroactively in *state* post-conviction proceedings? In *Danforth v. Minnesota*, the issue was partly in play, but a majority of the Court decided only that a state could choose to give U.S. Supreme Court decisions *greater* retroactive effect than federal law requires.[2] The majority left for another day the question whether a state might instead give lesser (or even no) retroactive effect to U.S. Supreme Court decisions in state post-conviction proceedings.

Recently, the Court has demonstrated interest in resolving that question. During its 2014 Term, the Court granted certiorari in *Toca v. Louisiana*,[3] which involved a juvenile convicted of murder

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[1] 489 U.S. 288 (1989).

[2] 552 U.S. 264 (2008).

[3] No. 14-6381, *cert. granted* Dec. 12, 2014.

and sentenced to life without parole. The petitioner argued that he must be permitted in Louisiana state post-conviction proceedings to take advantage of the Supreme Court's subsequent decision in *Miller v. Alabama*,[4] holding that sentences of mandatory life with no possibility of parole for juvenile murderers are unconstitutional. The Louisiana Supreme Court held that *Miller* did not apply retroactively in state post-conviction proceedings. When the U.S. Supreme Court granted certiorari, the Court itself added a second question: "Is a federal question raised by a claim that a state collateral review court erroneously failed to find a *Teague* exception?"[5]

Before the case was even fully briefed, however, the parties notified the Court that they had reached an agreement for Toca to plead guilty to lesser offenses and be immediately released. The next day the Supreme Court dismissed *Toca v. Louisiana* as moot.[6]

Several weeks later, the Supreme Court granted certiorari in *Montgomery v. Louisiana*, which also involved whether *Miller v. Alabama* applies retroactively. Again, the Court itself added the *Danforth* question: "Do we have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to our decision in *Miller v. Alabama*, 567 U.S. ___ (2012)?"[7] Unfortunately, *Montgomery* may not actually present the question the Court seems ready to answer because the Louisiana Supreme Court explicitly applied the *Teague* line of cases to determine retroactivity. Neither party in *Montgomery* even argued to the Court that there was no federal question, and the Court has appointed an *amicus curiae* to defend the position that no party has asserted.[8]

This article builds on an amicus brief I drafted for Kansas in *Danforth v. Minnesota* several years ago, and considers whether the federal retroactivity doctrines are binding on the states when it comes to

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[4] 567 U.S. ___, 132 S. Ct. 2455 (2012).

[5] See www.supremecourt.gov (Docket for No. 14-6381).

[6] See Marcia Coyle, *Juvenile Murderers Must Wait for Answer on Sentencing*, Nat'l L.J. online (Feb. 4, 2015).

[7] *Montgomery v. Louisiana*, No. 14-280, *cert. granted* Mar. 23, 2014. See 83 U.S.L.W. 3736 (Mar. 24, 2015).

[8] 83 U.S.L.W. 3762.

the states' own post-conviction proceedings. The article does not take issue with the well-settled propositions that Supreme Court decisions issued before state criminal cases become "final" are binding on the states and their courts, and that the federal courts will apply *Teague* retroactivity principles in federal habeas proceedings.

My conclusion is that there is no federal constitutional bar to the states developing their own retroactivity doctrines for state post-conviction proceedings, whether those doctrines are broader or stricter than a federal habeas counterpart such as *Teague*. So long as state legislatures and state courts make that decision as a matter of state law, there is no federal constitutional principle at stake, and no federal interests are harmed. That said, *Montgomery v. Louisiana* does not seem a proper case in which to decide the issue.

I.
DANFORTH V. MINNESOTA, ITS HOLDING AND IMPLICATIONS

In *Danforth v. Minnesota*,[9] a criminal defendant argued in state post-conviction proceedings that the Minnesota courts should give retroactive effect to the Supreme Court's decision in *Crawford v. Washington*.[10] The Minnesota Supreme Court disagreed, and further held that state courts are precluded from giving Supreme Court cases broader retroactive effect than *Teague* dictates. Before the case reached the Supreme Court, that Court decided *Crawford* did not apply retroactively under *Teague*,[11] but the Court granted certiorari in *Danforth* "to consider whether *Teague* or any other federal rule of law prohibits [the states] from" granting broader relief than *Teague* requires.[12]

A majority of the Court found nothing that precluded states from granting broader retroactive relief. The Court first considered its "somewhat confused and confusing" retroactivity cases between

[9] 552 U.S. 264 (2008).

[10] 541 U.S. 36 (2004).

[11] *Whorton v. Bockting*, 549 U.S. 406 (2007).

[12] 552 U.S. at 269.

1965 and 1987, concluding that its decisions primarily "considered what constitutional violations may be remedied on federal habeas," and those decisions did not "speak to the entirely separate question whether states can provide remedies for violations of these rights in their own postconviction proceedings." The Court considered at some length the basis for the *Teague* retroactivity doctrine, noting that it is "an exercise of this Court's power to interpret the federal habeas statutes," that *Teague* "is plainly grounded in this authority," and that because the doctrine "is based on statutory authority that extends only to federal courts applying a federal statute, it cannot be read as imposing a binding obligation on state courts." Thus, the majority concluded, "the *Teague* rule of nonretroactivity was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings," and "*Teague* speaks only to the context of federal habeas."[13] The majority opinion was written by Justice Stevens, and joined by Justices Scalia, Souter, Thomas, Ginsburg, Breyer and Alito.

Chief Justice Roberts, joined by Justice Kennedy, dissented, and argued effectively the point that is the focus of this article. The Chief Justice viewed the situation as involving a few "bedrock propositions": (1) "whether a particular ruling [of the Court] is retroactive is itself a question of federal law"; (2) "when it comes to any such question of federal law, it is 'the province and duty' of this Court 'to say what the law is'"; and (3) "State courts are therefore bound by our rulings on whether our cases construing federal law are retroactive."[14] The Chief Justice argued that the "interest in reducing the inequity of haphazard retroactivity standards and disuniformity in the application of federal law is quite plainly a predominantly federal interest." Thus, he criticized the majority because its approach would permit different outcomes in different states' post-conviction proceedings even though the same asserted federal right is at issue.[15]

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[13] *Id*. at 271-281.

[14] *Id*. at 291-292 (Robert, C.J., dissenting).

[15] 552 U.S. at 301. The majority's rejoinder was, in my view, convincing: "This assertion ignores the fact that the two hypothetical criminal defendants did not

The Chief Justice closed with an observation that leads to this article:

> Lurking behind today's decision is of course the question of just how free state courts are to define the retroactivity of our decisions interpreting the Federal Constitution. I do not see any basis in the majority's logic for concluding that States are free to hold our decisions retroactive when we have held they are not, but not free to hold that they are not when we have held they are. Under the majority's reasoning, in either case the availability of relief in state court is a question for those courts to evaluate independently.[16]

II.
WHY *TEAGUE* RETROACTIVITY IS NOT CONSTITUTIONALLY REQUIRED IN STATE POST-CONVICTION PROCEEDINGS

A. There is no federal constitutional requirement that states create post-conviction proceedings in criminal cases, nor is there a federal right to have resort to such proceedings

The Constitution does not require the states to provide post-conviction processes or remedies at all. "State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose

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actually commit the 'same crime.' They violated different state laws, were tried in and by different state sovereigns and may – for many reasons – be subject to different penalties. As previously noted, such nonuniformity is a necessary consequence of a federalist system of government." 552 U.S. at 290.

[16] One subsequent commentator has argued that *Teague* retroactivity is a "floor" beneath which the state courts may not go, but which they can choose to exceed as a matter of state law. Christopher N. Lasch, *The Future Of Teague Retroactivity, Or "Redressability," After* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect To New Constitutional Rules Of Criminal Procedure In Postconviction Proceedings*, 46 Am. Crim. L. Rev. 1, 40-42 (2009) (arguing that although *Danforth* leaves the question open, it "seems implausible" that the states "are free to deny retroactivity when the Supreme Court has held retroactive application is mandated under *Teague*.")

than either the trial or appeal."[17] Once a state provides a constitutionally sufficient trial and direct appeal, its federal constitutional obligations are certainly satisfied.[18] Thus, state post-conviction proceedings are a matter of state grace not of federal right, and the states "have no obligation"[19] to provide post-conviction relief at all.[20] The Court has more than once explained the reasons for this constitutional principle: Post-conviction relief is even further removed from the criminal trial than is discretionary direct review. Such proceedings are not part of the criminal process itself, and instead are considered civil in nature.

The distinction between trial/direct review and post-conviction proceedings underlies the Court's decisions holding that there is no constitutional right to counsel in state post-conviction proceedings generally, nor even in capital cases. In fact, the Court has even declined to find a constitutional right to counsel on direct review when the proceeding for which counsel is sought is discretionary,[21] rather than mandatory, under state law.

Thus, both expressly and by implication, the Supreme Court's decisions make clear two very important propositions: First, the Constitution does not require that the states provide any post-conviction proceedings at all. Second, constitutional rights that apply to a criminal trial and mandatory direct review do not automatically apply to post-conviction proceedings.

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[17] *Murray v. Giarratano,* 492 U.S. 1, 10 (1989).

[18] The Supreme Court has declared or suggested on several occasions that even a direct appeal may not be constitutionally required. *See, e.g., Fry v. Pliler,* 551 U.S. 112, 118-119 (2007) (discussing what harmless error standard would apply in federal habeas proceedings "if a State *eliminated appellate review altogether*") (emphasis original); *Abney v. United States,* 431 U.S. 651, 656 (1977) ("it is well settled that there is no constitutional right to an appeal. Indeed, for a century after this Court was established, no appeal as of right existed in criminal cases, and, as a result, appellate review of criminal convictions was rarely allowed.").

[19] *Pennsylvania v. Finley,* 481 U.S. 551, 557 (1987).

[20] *Lackawanna County Dist. Atty. v. Coss,* 532 U.S. 394, 402-403 (2001) (citations omitted) ("there is no constitutional mandate that" states provide post-conviction review.)

[21] *Ross v. Moffitt*, 417 U.S. 600 (1974).

B. The constitutional determinant for retroactivity purposes is whether state criminal proceedings are "final"

The key legal distinction for criminal cases in the retroactivity context is "finality." The Court has held that its decisions apply to any state criminal cases not yet "final," with "finality" defined as conviction and completion of the direct review process.[22] Once "finality" has been reached in state criminal cases, there is no constitutional authority to dictate retroactive application of new decisions.

The Court has divined a constitutional basis for requiring the application of its decisions to all cases not yet *final*, reasoning that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."[23] But once a state criminal conviction has become "final" for federal constitutional purposes, the Constitution demands no more from the states: "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality."[24] State court relief from a criminal conviction and sentence after a case is "final" is dependent on whether states *choose* to provide post-conviction remedies. Any constitutional "right" to post-conviction relief exists, if at all, only through federal habeas proceedings in federal court.

Civil retroactivity cases are inapposite, because in civil cases there generally are no "post-finality" proceedings, and the Court has made clear that its decisions do not and cannot reopen previously final judgments in civil cases. Indeed, the Court has held that the Constitution bars Congress from reopening previously final judgments in civil cases.[25]

Nor does it matter that the civil retroactivity determination "is a matter of federal law."[26] The Court has made such an assertion in

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[22] *See, e.g., Griffith v. Kentucky,* 479 U.S. 314, 320-322 and n. 6 (1987).

[23] *Id*. at 322.

[24] *Teague v. Lane,* 489 U.S. 288, 309 (1989).

[25] *Plaut v. Spendthrift Farms, Inc.,* 514 U.S. 211 (1995).

[26] *American Trucking Ass'n v. Smith*, 496 U.S. 167, 177 (1990); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993).

the context of determining whether a decision would apply to *civil cases* that were *not yet final*. A careful reading of the Court's statements to the effect that retroactivity is a federal question makes clear that all the Court has said is that the question whether one of its decisions applies to cases *still pending* (*i.e.*, not yet final) is a matter of federal law, a proposition that no one contests in either the civil or the criminal context.

The simple current rule of the Court's civil retroactivity cases is that the Court's decisions must be applied to all *non-final* civil cases. That determination is a matter of federal law, and that rule is a federal rule. But nothing in the Court's civil retroactivity cases suggests that the question whether a new criminal procedure decision applies to already "final" decisions now in the stage of state post-conviction proceedings is a matter of federal law.

C. States are free to structure their state post-conviction proceedings as they choose

Because state post-conviction proceedings are a matter of state grace and not of federal right, there is no federal constitutional barrier to a state abolishing post-conviction proceedings altogether. Further, in the post-conviction context, the greater power – to abolish the process – should include the lesser power to limit and restrict the grounds on which relief may be sought. Thus, the states should retain broad discretion to set the terms and conditions on which their courts may grant post-conviction relief pursuant to the proceedings that state law creates.

The Court has on several occasions recognized these propositions, declaring that it would "not question the State's power, in post-conviction proceedings, to reallocate the respective burdens of the individual and the State and to delimit the scope of state appellate review."[27] Similarly, the Court has declared that it is "unwilling to accept" the contention "that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dic-

[27] *Drope v. Missouri,* 420 U.S. 162, 174 (1975).

tates the exact form such assistance must assume."[28] Individual members of the Court, likewise, have emphasized that the states have "wide discretion to select appropriate solutions" in post-conviction proceedings, and that "[n]othing in the Constitution requires the States to provide such proceedings, nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings."[29]

Not surprisingly, the states have developed a diverse array of post-conviction proceedings, with a variety of limitations on what claims are cognizable and under what standards relief may be granted. Indeed, the states are not even uniform in identifying the basis for recognizing post-conviction relief, with some making such relief available by writ of habeas corpus, others using remedies similar to the writ of *coram nobis*, and yet others relying on proceedings that do not fit the two previous categories.[30] Furthermore, both the claims cognizable and the standards for granting relief vary among the states.

Thus, the states should be free to apply their own retroactivity doctrines in their own post-conviction proceedings. And that choice should be a two-way street, including several options: States can create their own retroactivity doctrines that are either *broader or narrower* than *Teague*, or they may decline to recognize retroactivity at all. Certainly, some states might well decide that the *Teague* doctrine is appropriate and practical for use in their post-conviction proceedings. But, as a matter of constitutional federalism principles, states should not be required to reach that conclusion.

Instead, so long as state courts in post-conviction proceedings make retroactivity decisions *as a matter of state law*,[31] there is a strong

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[28] *Finley,* 481 U.S. at 559; *see also Coleman v. Thompson,* 501 U.S. 722, 745-747 (1991) (emphasizing the importance of permitting the states to regulate their own post-conviction proceedings).

[29] *Murray v. Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring); *id.* at 13 (O'Connor, J., concurring).

[30] *See generally* Larry W. Yackle, *Postconviction Remedies* at 13 (1981 & Cum. Supp. 2006/2007) (surveying state post-conviction proceedings).

[31] This may be the insurmountable obstacle presented by the situation in *Montgomery v. Louisiana*: If a state supreme court explicitly embraces the *Teague* doctrine and

argument that there is no federal constitutional principle at stake, and nothing for the Supreme Court to review. Federal interests, however, can and will be vindicated where and when appropriate, most notably in federal habeas corpus proceedings where the federal courts have the power to grant relief on the basis of the Supreme Court's new decisions in appropriate cases. Thus, even accepting that there is a strong federal interest in uniformity of federal law, that interest does not necessarily trump the states' authority to create (or not) post-conviction proceedings that are not constitutionally required and which are governed by state law, not federal law. The federal courts, and the Supreme Court in particular, can always ensure the uniformity of federal law once state criminal defendants reach the *federal habeas process*. The Constitution does not dictate that such federal interests be vindicated in state post-conviction proceedings.

D. Additional considerations

Apart from the structure inherent in the Constitution, several factors suggest that *Teague* retroactivity is not a constitutionally compelled doctrine. Until the Chief Justice's dissenting opinion in *Danforth v. Minnesota*, there was no Supreme Court opinion in which any member of the Court had suggested that *Teague* retroactivity is constitutionally compelled. Nor has the Court seriously questioned that Congress has the power to alter, amend, extend, or eliminate the *Teague* doctrine.

1. *Teague* is inextricably connected to federal habeas proceedings

Teague itself arose in the context of a federal habeas corpus proceeding, not a state post-conviction proceeding, and there are significant constitutional and other differences between federal and state post-conviction proceedings. Repeatedly, in cases addressing *Teague*,

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purports to apply the U.S. Supreme Court's cases in state post-conviction proceedings, it is difficult to see how that decision does not result in federal question jurisdiction under *Michigan v. Long*, 463U.S.1032 (1983), because then what could have been solely a state law question instead is inextricably intertwined with the interpretation of federal law.

even after the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA") in 1996, the Supreme Court has spoken of *Teague* retroactivity as an aspect of the Court's "habeas corpus" jurisprudence, and as a doctrine that "federal courts" must follow in habeas cases.[32]

In the oral argument in *Whorton v. Bockting*, Justice Kennedy asked "[w]hat is the source of the rule in *Teague*? Could Congress overturn the rule in *Teague* if it wanted to and say that nothing is retroactive or that everything is retroactive?"[33] Justice Scalia suggested that "[h]abeas is equitable relief and the Court has a lot of discretion in identifying the boundaries of equitable relief, doesn't it? I assume that's how we got to *Teague*."[34] I agree with Justice Scalia that the short answers to Justice Kennedy's questions are (1) *Teague* is grounded in the Court's equitable powers in federal habeas cases and (2) "yes," Congress presumably could eliminate or compel retroactivity in federal habeas proceedings.

2. If Congress can alter the *Teague* doctrine by statute, the doctrine does not have a constitutional basis

If Congress in fact altered the *Teague* doctrine when it enacted AEDPA, then *Teague* cannot be a constitutional requirement, just as most aspects of federal habeas corpus doctrine are not constitutionally compelled. Furthermore, though members of the Court have disagreed – as a matter of interpreting AEDPA – on the questions whether and, if so, to what extent the statute codified, amended, extended, or eliminated the *Teague* doctrine, no member of the Court appears to question seriously the proposition that Congress has the power to alter the doctrine legislatively.

An example is *Williams v. Taylor*,[35] in which the Court divided over the scope and effect of AEDPA, in part with respect to *Teague*. In a section of the opinion that spoke for a plurality of four Justices,

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[32] *See, e.g., Horn v. Banks,* 536 U.S. 266 (2002) (*per curiam*).

[33] *Whorton v. Bockting,* 549 U.S. 406 (2007), No. 05-595, Oral Arg. Tr. at 7, 8.

[34] Oral Arg. Tr. 8.

[35] 529 U.S. 362 (2000).

there are numerous statements indicating that Congress is free to alter or amend the *Teague* doctrine. For instance, the plurality opinion states that *Teague* "is the functional equivalent of a statutory provision commanding exclusive reliance on clearly established law," and that "[i]t is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final." In footnotes, the plurality observed that "[i]t is not unusual for Congress to codify earlier precedent in the habeas context," and that AEDPA's provisions "make it impossible to conclude that Congress was not fully aware of, and interested in codifying into law, that aspect [*Teague*] of this Court's habeas doctrine."[36]

3. The federal habeas exhaustion requirement does not support compelling states to follow the *Teague* doctrine

The federal statutory requirement that inmates exhaust available state remedies before pursuing federal habeas proceedings is not contrary to this notion. True, the exhaustion requirement may give state courts an opportunity to overturn state convictions on federal law grounds before the defendant ever reaches federal habeas proceedings, but that interest seems most profound in the direct appeal setting. Once the state courts have tried the defendant and given the defendant's conviction a thorough review on direct appeal, the states have far less interest in overturning convictions in collateral proceedings for alleged federal law errors.

In fact, the states could add significantly to the workload of the federal courts simply by abolishing their state post-conviction pro-

[36] *Id.* 379-380 and nn. 11, 12. Also, the Court has held that *Teague* is not "jurisdictional" in the sense that a court must *sua sponte* address *Teague* retroactivity if a state fails to raise it in federal habeas proceedings. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) ("Although the *Teague* rule is grounded in important considerations of federal-state relations, we think it is not jurisdictional in the sense that this Court, despite a limited grant of *certiorari, must* raise and decide the issue *sua sponte*.") (emphasis original). If retroactivity doctrine is not jurisdictional in that regard, again it seems doubtful that there is a constitutional basis for insisting that it be applied in state post-conviction proceedings.

cedures. Imposing federal retroactivity on states that would prefer not to apply such a doctrine could be an incentive for states to move in the direction of abolishing state post-conviction proceedings altogether. Certainly there is no need to argue about *Teague* and its applicability in state courts if there are no state post-conviction proceedings at all.

4. Compelling the states to follow *Teague* in state post-conviction proceedings is akin to forcing the states to do the federal courts' business

Finally, I hesitate to suggest that the Chief Justice's position in *Danforth* is akin to "commandeering" the state courts to do the federal courts' bidding, but in a way that is what would happen, and some of the same concerns are present as in other "commandeering" contexts. For instance, if a state court must in collateral proceedings – on purely federal law grounds and as a result of federal retroactivity doctrine – release an inmate whose state conviction has been upheld on direct appeal, the state court effectively will be held accountable for that reversed conviction by the people of that state.

Yet, no rule of state law, and no rule of federal law established at the time the inmate was convicted and had a direct appeal required that result. Instead, subsequent interpretations of federal law by federal courts are the reason for that result. In some respects, it seems only fair that the federal courts then take "credit" for releasing the inmate, presumably by way of federal habeas proceedings. At least then accountability is clearly lodged with the responsible courts.

III.

Is *Montgomery v. Louisiana* a Proper Case for the Court to Resolve the Constitutional Question?

It is a bit curious, and for the states perhaps unfortunate, that the Court seems determined to address the issue left open in *Danforth* in the context presented by *Montgomery v. Louisiana*. The reason *Montgomery* seems a weak case (from the states' perspective) for con-

sidering the question involves two related aspects of the case. First, the Louisiana Supreme Court, since at least 1992, has held that "the standards for determining retroactivity set forth in *Teague v. Lane* apply to 'all cases on collateral review in our state courts.'"[37] In *Montgomery* itself, the Louisiana Supreme Court explicitly applied the *Teague* doctrine, stating that "[i]n order for a new rule to overcome the bar to retroactivity on collateral review, one of the two *Teague* exceptions must be met."[38]

Second, in light of this situation, in opposing the petition for certiorari, Louisiana not surprisingly did not even argue that there was no federal jurisdiction over the question whether *Miller v. Alabama* applies retroactively. How could Louisiana have made such an argument? If a state supreme court says "we apply a federal rule" and then proceeds to interpret that federal rule, the independent and adequate state ground doctrine of *Michigan v. Long* seems inapplicable. As a result, the Court has appointed an amicus curiae to brief and argue that the Court has no jurisdiction over the case because there is no federal question presented.

I had my own wonderful experience being appointed by the Court to defend a judgment and principle that no party to a case wanted to defend.[39] In light of that relatively recent experience, I predict that (1) the amicus appointed in *Montgomery* will thoroughly enjoy the opportunity, (2) the Court will be grateful to him for providing such service, and (3) the Court will rule against his jurisdiction position *unanimously*. To me, *Montgomery* (like *Toca* before it) is simply not the proper case to resolve the question left open in *Danforth*.

Instead, the Court should wait until a state court or state legislature declines to apply *Teague* retroactivity in state post-conviction proceedings and instead adopts a more restrictive rule. That is the posture in which resolution of the *Danforth* question actually matters.

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[37] *State v. Tate*, 130 So.3d 829, 834 (La. 2013) (internal citations omitted).

[38] *Montgomery v. Louisiana*, No. 14-280, Petition for a Writ of Certiorari Appendix at App. 1.

[39] I was appointed to defend a judgment that an incarcerated individual had no standing to raise a federalism challenge to the federal law under which she was convicted and sentenced in *Bond v. United States*, 564 U.S. ___, 131 S. Ct. 2355 (2011).

Perhaps such a situation will never arise, in which case the Court will never need to resolve the issue.

In *Montgomery*, however, all the Court has to say is "we have jurisdiction because the Louisiana courts explicitly applied the *Teague* doctrine," and then the Court can proceed to either agree or disagree with the Louisiana Supreme Court's application of *Teague* to *Miller v. Alabama*. There is no reason to decide the open *Danforth* question and, if the Court does so, *Montgomery* offers a weaker posture from the states' perspective than could be presented in other situations.

CONCLUSION

Ultimately, the states are free to structure their post-conviction proceedings as they wish, or even to dispense with such proceedings altogether. *Teague* and its progeny reinforce rather than undermine that conclusion. Under fundamental federalism principles, the states' legislatures and their supreme courts are not bound to follow *Teague*. Indeed, as Justice Cardozo once declared in the context of state supreme courts' choices regarding retroactivity of their own decisions under state law, "the federal constitution has no voice upon the subject."[40]

Instead, the states have several options available to them, ranging from declining even to permit federal claims in state post-conviction proceedings, to *choosing* to embrace and adopt the *Teague* retroactivity doctrine, to creating their own retroactivity doctrines for whatever post-conviction proceedings they choose to provide. Whether some choices on that spectrum would be wise or ill-considered is not the constitutional question. Rather, the Constitution makes state post-conviction proceedings a matter of state grace, not of federal right, and the greater power – to not even provide such proceedings – in this instance should include the lesser – to restrict the scope of claims heard and relief available in such proceedings.

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[40] *Great N. Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932).