

Abstract

In *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), the Supreme Court made a decision of far-reaching importance to the criminal justice system: the Supremacy Clause requires states adjudicating post-conviction attacks to give full retroactive effect to “substantive” new rules of federal constitutional law.

The significance of this holding has so far been under-appreciated because of the assumption that “substantive” has the same narrow meaning in the context of the state’s obligations under the Supremacy Clause as it does under *Teague v. Lane*, 489 U.S. 288 (1989), which sets forth prudential limitations on the claims that the federal courts will entertain when adjudicating federal habeas corpus attacks on state criminal convictions.

But, this article argues, the two contexts are not the same and the assumption is unwarranted. To be sure, rules that are “substantive” under *Teague* are also substantive under *Montgomery*. But because *Montgomery* is based on the Supremacy Clause the class of “substantive” federal rules for *Montgomery* purposes is far broader than it is for *Teague* purposes.

“Substantive” rules under *Montgomery*, I propose, include all those whose policy underpinnings extend beyond enhancing the factual accuracy of particular decisions. Examples include rules whose aims are to discountenance government misconduct (e.g., barring evidence derived from coerced confessions or unreasonable searches) and ones designed to achieve full community participation in the judicial process (e.g., adding new groups to the ones that may not constitutionally be excluded from jury service, and expanding the categories of juror bias that a defendant must be permitted to litigate).

Adopting the proposed definition will have structural benefits to the system of criminal justice adjudication. The *Montgomery* decision will necessarily have the effect of increasing the number of state post-conviction decisions. The broader the definition of “substantive” the more pronounced the effect. The more pronounced the effect the better off the criminal justice system will be, for two reasons. First, state post-conviction decisions will be some extent be able to fill the gap in the normal creation of new rules by lower federal courts that has resulted from the restrictive ruling in *Teague*. Second, the greater the salience of post-conviction decisions, the greater the pressure on the states to improve the quality of their post-conviction systems.

In the interests of making modest but real improvements in the quality of our criminal law, lawyers, legislators, academics, judges, and all individuals concerned about justice should take advantage of every opportunity to secure adoption of the proposal of this article.