THE SUBSTANCE OF *MONTGOMERY* RETROACTIVITY:

THE DEFINITION OF STATES' SUPREMACY CLAUSE OBLIGATION TO ENFORCE NEWLY-RECOGNIZED FEDERAL RIGHTS IN THEIR POST-CONVICTION PROCEEDINGS AND WHY IT MATTERS

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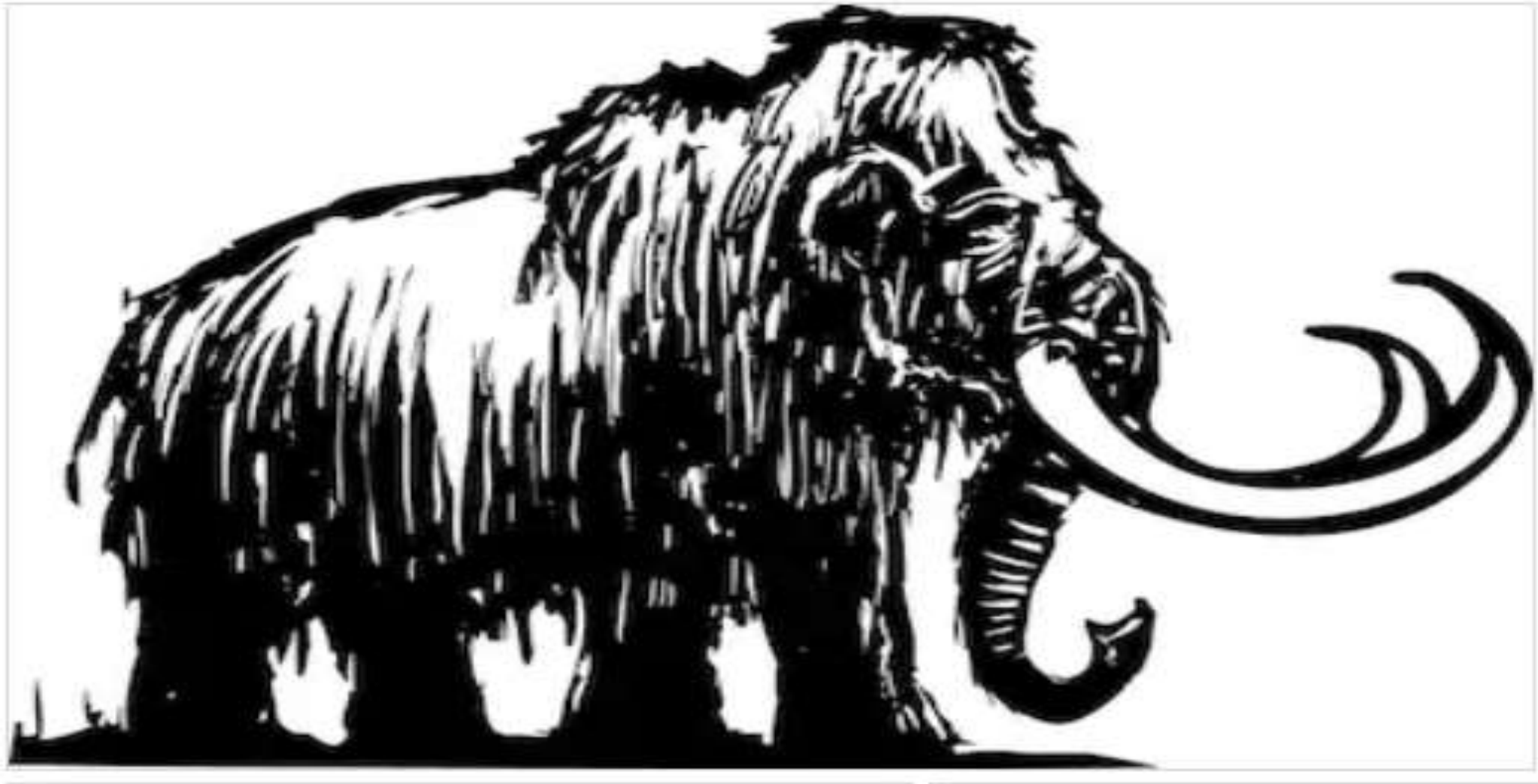
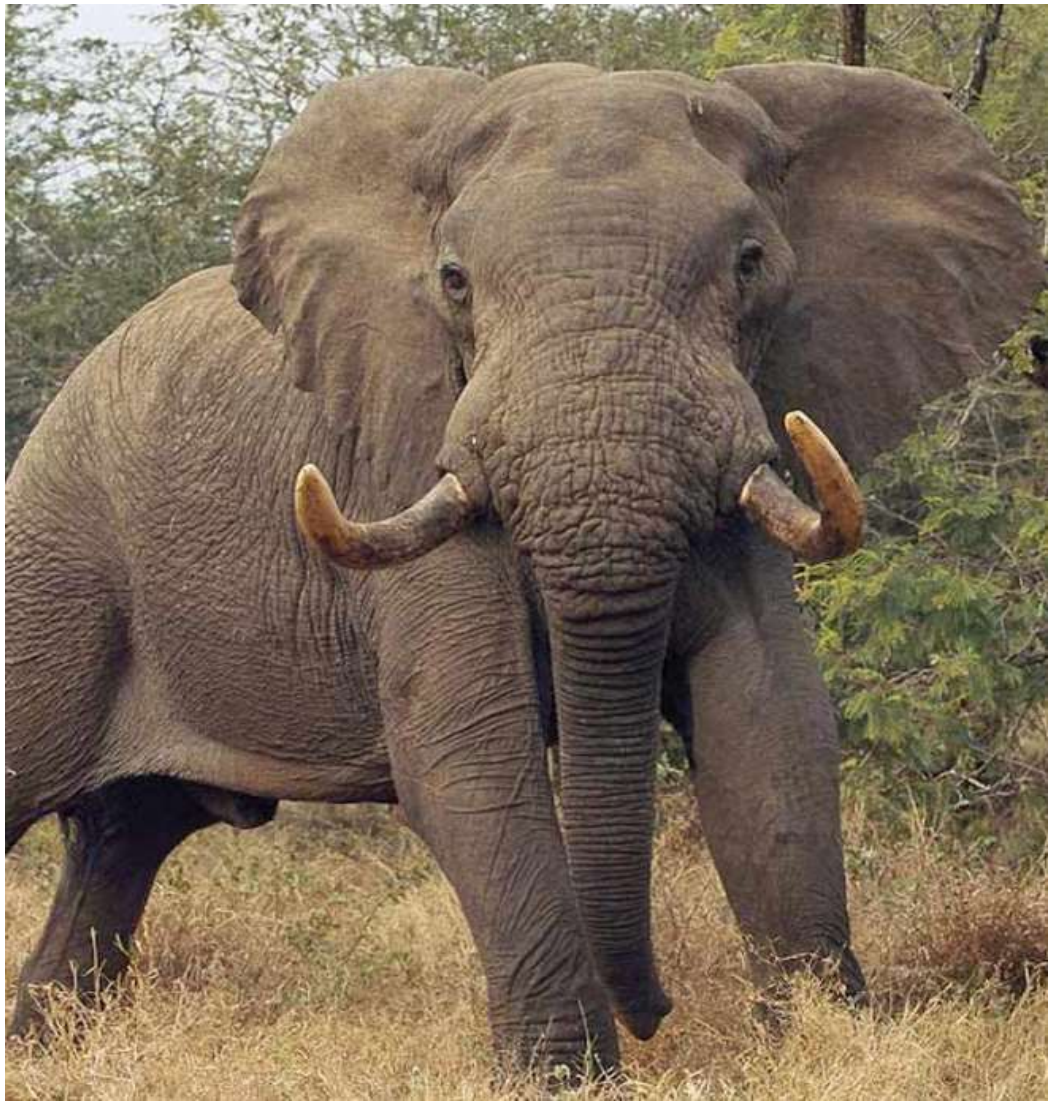


Should retroactivity limits on post-conviction relief be acceptable at all?



If retroactivity limits on post-conviction relief are acceptable, does Teague v. Lane, 489 U.S. 288 (1989), state the appropriate rule?

What new rules of federal constitutional law must be applied retroactively in state post-conviction proceedings in the wake of *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) --- and why should anyone care?

Henry Montgomery, aged 17, flanked by two deputies, awaits the verdict in his trial for the murder of Deputy Charles Hurt in Louisiana in February 1964. Photo: John Boss/The Advocate

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

If a ruling in favor of a federal habeas corpus petitioner would require application of a "new" rule of federal constitutional law (i.e. one that came into existence after completion of the prisoner's direct appeal), then the petition shall be dismissed without consideration of the merits

unless the rule is:

(1)"substantive" or

~~(1) a "watershed" rule of criminal procedure (e.g. Gideon v. Wainwright).~~

So what does “substantive” mean under Teague?

For our purposes, a “substantive” constitutional rule is one which

(1) “forbids criminal punishment of certain primary conduct” (e.g. burning a flag) or

(2) prohibits “a certain category of punishment for a class of defendants because of their status or offense” (e.g. no capital punishment for juveniles, no capital punishment for anyone who rapes and adult woman)

Montgomery v. Louisiana, 136 S.Ct. 718 (2016) (6-3 ruling)

- The Teague exception for "substantive" new rules of constitutional law is a requirement of the Supremacy Clause because States may not "mandate that a prisoner continue to suffer punishment barred by the Constitution."
- "Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge."
- Per Teague, a "substantive" constitutional rule is one which (1) "forbids criminal punishment of certain primary conduct" or (2) prohibits "a certain category of punishment for a class of defendants because of their status or offense."
- Miller stated a substantive constitutional rule because it held that life without parole was an unconstitutional punishment for juveniles whose crimes reflected the transient immaturity of youth.
-  Therefore Louisiana was required to apply Miller on state post-conviction.

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[5] Hanna v. Plumer, 380 U.S. 460, 471 (1965) (“The line between ‘substance’ and ‘procedure’ shifts as the legal context changes.”); Guaranty Trust Co. v. York, 326 U.S. 99, 109–111 (1945) (stating that distinction between substance must be “applied with an eye alert to essentials” of the particular problem at hand, regardless of terms’ use in other contexts, because a “policy so important . . . must be kept free from entanglements with analytical or terminological niceties”).

U.S. Const. art. VI, cl. 2

"This Constitution, and the Laws of the United States … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

A Few Reasons Why State Courts May Decide to Rest a Decision Expanding Defendants' Rights on Federal Grounds

Quite apart from the possibility that the legal arguments are in fact stronger under federal than state constitutional law, there may be constraints on the ability of the state supreme court to rest its decision on state constitutional law that do not apply to its interpretation of the Constitution. For example, various provisions of the state constitutions of California, Florida and Louisiana provide that they shall not be interpreted more expansively than their federal counterparts. Moreover, state supreme courts, which are subject to electoral accountability, may well find it attractive to rely on the federal constitution as a way of shifting the blame for potentially unpopular results to the federal government and taking advantage of the general cultural respect for the commands of the Constitution.

[Six footnotes omitted]

A Few Reasons (Apart From the Statistical Odds Against any Cert. Grant) Why SCOTUS May Not Review a State Court Decision Expanding Federal Constitutional Rights

The government may not seek review; the decision may not be final for purposes of the Court's certiorari jurisdiction; the federal constitutional ruling may not be dispositive of the outcome; or the Justices may decide for prudential reasons to allow the envelope-pushing ruling to stand. Moreover, some Justices have suggested that discretionary review should be granted particularly sparingly when sought by state governments in criminal cases.

[Five footnotes omitted]

I propose: a new “substantive” rule of federal law that a state is required to enforce retroactively in state post-conviction proceedings is one whose policy underpinnings extend beyond enhancing the factual accuracy of particular decisions.

An example

- Hurst v. Florida, 136 S. Ct. 616 (2016) (Florida death penalty statute unconstitutional under Sixth Amendment because jury not required to make factual findings on factors supporting the death sentence), *on remand*
- Hurst v. State, 202 So. 3d 40 (Fla. 2016) (To ensure death penalty is only applied narrowly and reflects community and national standards, Sixth and Eighth Amendments also require jury determination that balance of aggravating and mitigating factors warrants a death sentence and a unanimous sentencing decision)
- *Cert. denied*, Florida v. Hurst, 137 S.Ct. 2161 (2017).

Federal Threats to Inadequate State Post-Convictic Proceedings

1. Structural: State post-conviction systems may be attacked under Sec. 1983 for failure to provide due process.
2. Individual cases:

-Federal habeas petitioner need not exhaust state remedies that are “ineffective to protect the rights of the applicant,” e.g. by not providing fair hearing when facts are in dispute.

-No presumption on federal habeas that state court factfinding was correct if petitioner was not given full and fair opportunity to develop claim.

Federal Incentives for Robust State Post-Conviction Proceedings

-"With respect to any claim that was adjudicated on the merits in State court proceedings" federal writ shall not be granted unless that 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." 28 U.S.C. § 2254(d)(1)

-Determination of whether these standards met is to be made on basis of the State court record. Cullen v. Pinholster, 131 S. Ct. 1388 (2011).

-Therefore, States have significant incentives to conform their post-conviction proceedings to the quality standards of the previous slide. If they do so, their criminal convictions are likely to withstand federal habeas corpus attack.

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