Habeas Corpus — Criminal Procedure — Retroactivity — Edwards v. Vannoy

A fundamental principle of the rule of law (and indeed, rationality) holds that like cases should be decided alike.[1] The law of retroactivity — the application of new legal rules to cases begun or finalized prior to the new rules' announcement[2] — is one of the few, puzzling exceptions to this principle. Last Term, the Supreme Court in *Edwards v. Vannoy*[3] held that the jury unanimity requirement decided in *Ramos v. Louisiana*[4] did not apply retroactively.[5] The Court also went a step further and held that the watershed exception of *Teague v. Lane*,[6] allowing retroactive application of new "watershed rules of criminal procedure,"[7] was completely foreclosed.[8] Given the Court's justifications for its decision — namely, a heightened regard for preserving the finality of state court judgments[9] — as well as the alternative versions of federal collateral review outlined in Justices Thomas's and Gorsuch's concurring opinions, the Court's decision in *Edwards* augurs further cutbacks in the scope of federal habeas review.

In 2007, a Louisiana jury found Thedrick Edwards, a teenager and former honor roll student,[10] guilty of armed robbery, rape, and kidnapping.[11] However, not all jurors had voted to convict — instead, only eleven out of the twelve jurors, and on some charges only ten, had agreed on Edwards's guilt.[12] The lone juror to find Edwards not guilty on all counts was both the only Black juror and the juror closest to Edwards's age.[13] Yet, because Louisiana state law allowed for

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[1] This principle traces back to antiquity, finding some of its earliest formulations in the works of Aristotle. *See* ARISTOTLE, NICOMACHEAN ETHICS bk. V, ch. 3, 1131a10–b16, at 83–84 (Roger Crisp ed. and trans., Cambridge Univ. Press rev. ed. 2017) (c. 384 B.C.E.).

[2] *See* Richard H. Fallon Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1733–34 (1991).

[3] 141 S. Ct. 1547 (2021).

[4] 140 S. Ct. 1390 (2020).

[5] *Edwards*, 141 S. Ct. at 1551.

[6] 489 U.S. 288 (1989).

[7] *Id.* at 311 (plurality opinion). *Teague*'s watershed exception provided for the retroactive application of new procedural rules found to "implicate the fundamental fairness" of a criminal trial and the accuracy of the trial's determination of guilt. *Id.* at 312; *see id.* at 311–13.

[8] *Edwards*, 141 S. Ct. at 1560.

[9] *See id.* at 1565.

[10] Eric Williamson, *Juror No. 12 Wants Her Voice Heard*, UNIV. OF VA. SCH. OF L. (Nov. 18, 2020), https://www.law.virginia.edu/news/202011/juror-no-12-wants-her-voice-heard [https://perma.cc/HB8B-4Z4P].

[11] Edwards v. Cain, No. CV 15-305, 2018 WL 4375145, at *1 (M.D. La. Apr. 24, 2018), *report and recommendation adopted*, No. CV 15-00305, 2018 WL 4373644 (M.D. La. Sept. 13, 2018).

[12] *Edwards*, 141 S. Ct. at 1553.

[13] *See* Brief of Amicus Curiae JonRe Taylor in Support of Petitioner at 1–3, 30, *Edwards*, 141 S. Ct. 1547 (No. 19-5807), 2020 WL 4450445, at *1–3, *30.

nonunanimous jury verdicts in state criminal cases, Edwards was found guilty on all charges and sentenced to life imprisonment without parole.[14]

Eight years later, Edwards filed a petition for federal habeas relief in the U.S. District Court for the Middle District of Louisiana.[15] He argued that his imprisonment as a result of a nonunanimous jury verdict was a constitutional violation requiring remedy.[16] The district court, however, rejected Edwards's argument, holding that his claim was foreclosed by the Supreme Court's decision in *Apodaca v. Oregon*.[17] In *Apodaca*, Justice Powell, writing the controlling opinion,[18] held that the Constitution required a unanimous jury verdict in federal criminal trials but did not require the same in state criminal trials.[19] Following the district court's decision, Edwards appealed to the Fifth Circuit, which denied a certificate of appealability in his case.[20] Edwards then petitioned for a writ of certiorari in the Supreme Court.[21]

While Edwards's petition for certiorari was pending, the Supreme Court decided *Ramos v. Louisiana*.[22] With *Ramos*, Edwards's challenge was transformed.[23] In *Ramos*, the Court overruled *Apodaca* and held that the Fourteenth Amendment incorporated an individual's Sixth Amendment right to a unanimous jury verdict against the states.[24] State criminal trials, like federal criminal trials, now required a unanimous jury verdict for conviction.[25] Edwards's suit thus posed a follow-on question: whether the rights granted to criminal defendants in

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[14] *See Edwards*, 141 S. Ct. at 1553.

[15] *Edwards*, 2018 WL 4375145, at *1. Edwards also applied for postconviction relief in Louisiana state court prior to seeking federal relief, but these petitions, too, were denied. *See id.*

[16] *See id.* at *4–5.

[17] 406 U.S. 404 (1972), *overruled by* Ramos v. Louisiana, 140 S. Ct. 1390 (2020); *see Edwards*, 2018 WL 4375145, at *5. The court also rejected Edwards's claims alleging violations of the Confrontation Clause, his right to an impartial jury, his privilege against self-incrimination, and due process. *See Edwards*, 2018 WL 4375145, at *3–9.

[18] Justice Powell wrote an opinion concurring in the judgment of the plurality, and his opinion came to be viewed as the controlling opinion. *See Edwards*, 141 S. Ct. at 1553.

[19] *See* Johnson v. Louisiana, 406 U.S. 356, 373 (1972) (Powell, J., concurring).

[20] Edwards v. Vannoy, No. 18-31095, 2019 WL 8643258, at *1 (5th Cir. May 20, 2019).

[21] *See* Edwards v. Vannoy, 140 S. Ct. 2737, 2737–38 (2020) (granting cert).

[22] *See Edwards*, 141 S. Ct. at 1553–54 (detailing procedural history).

[23] This is meant literally. The question for which the Court granted cert and the one ultimately decided by the Court was not a question that Edwards had raised before the lower court or in his petition for a writ of certiorari to the Court. *See* Brief of the Roderick & Solange MacArthur Justice Center and Phillips Black, Inc. as Amici Curiae in Support of Neither Party at 5, *Edwards*, 141 S. Ct. 1547 (No. 19-5807), 2020 WL 4450438, at *5.

[24] *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1397, 1410 (2020).

[25] Justice Kavanaugh, concurring with the Court's opinion, noted one of the motivations of the nonunanimous jury rule was to diminish the influence of Black jurors on the outcome of jury proceedings. *Id.* at 1417–18 (Kavanaugh, J., concurring in part). This point was later cited by Justice Kagan in her dissent in *Edwards* as a reason in favor of viewing the Court's decision in *Ramos* as a "watershed exception" and worthy of retroactive application. *Edwards*, 141 S. Ct. at 1575 (Kagan, J., dissenting).

Ramos applied retroactively to final convictions of state prisoners now on federal collateral review.[26]

The Supreme Court held that they did not.[27] The Court's decision in *Teague* had inaugurated a general rule against retroactivity (though with two important exceptions).[28] Adopting *Teague*'s reasoning, Justice Kavanaugh[29] wrote: "[A]pplying 'constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.'"[30] He also zeroed in on the potential costs of *Ramos*'s retroactive application, pointing to retrial costs, public safety risks, and victim retraumatization.[31]

Under the retroactivity framework set forward by the Court's previous decisions, Justice Kavanaugh addressed the retroactivity of *Ramos* in two steps: First, did *Ramos* establish a new rule of criminal procedure or apply a rule that followed from settled precedent?[32] Second, if *Ramos* did establish a new rule of criminal procedure, did it qualify as a watershed exception to the general rule that new rules of criminal procedure do not apply retroactively on collateral review?[33] Justice Kavanaugh first concluded that the Court's decision in *Ramos* introduced a new rule of criminal procedure, rather than followed from settled precedent.[34] The Court devoted relatively little space to this point,[35] as the *Ramos* Court itself had acknowledged that it was overruling its precedent.[36] In so doing, Justice Kavanaugh rejected Edwards's argument that the

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[26] *Edwards*, 140 S. Ct. at 2738 (limiting grant of cert to "[w]hether this Court's decision in *Ramos v. Louisiana* applies retroactively to case on federal collateral review" (citation omitted)).

[27] *Edwards*, 141 S. Ct. at 1551.

[28] *See* Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion). *Teague* established an exception for the retroactive application of "watershed rules of criminal procedure." *Id.* at 311. *Teague* also announced an exception for the retroactive application of new substantive rules. *See id.*

[29] Justice Kavanaugh was joined by Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Barrett.

[30] *Edwards*, 141 S. Ct. at 1554 (quoting *Teague*, 489 U.S. at 309 (plurality opinion)).

[31] *See id.* at 1554–55.

[32] *Id.* at 1555.

[33] *Id.*

[34] *Id.*

[35] *See id.* at 1555–56.

[36] *Id.* at 1556 ("In short, even in *Ramos* itself, the Court indicated that the decision was not dictated by precedent or apparent to all reasonable jurists."). The Court has often hedged on what the correct standard for determining a "new" rule of criminal procedure is. *See* Teague v. Lane, 489 U.S. 288, 301 (1989) (plurality opinion) ("It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes."). *Compare id.* at 301 (noting that a new rule is one that is "not *dictated* by precedent"), *with* Lambrix v. Singletary, 520 U.S. 518, 528 (1997) (noting that a new rule is one that is not "apparent to all reasonable jurists"). Some scholars have attributed this vacillation to the Court's general hesitancy to be seen as a law-making, rather than law-clarifying, institution. *See* Fallon & Meltzer, *supra* note 2, at 1758–63.

Ramos rule was a settled rule because it followed directly from the original meaning of the Sixth Amendment.[37]

Justice Kavanaugh then asked if the *Ramos* rule was a "watershed rule[]" that applied retroactively.[38] Justice Kavanaugh characterized *Teague*'s watershed exception as "extremely narrow" and applicable only when the new rule disturbs the Court's bedrock view of fairness.[39] Justice Kavanaugh then noted that since *Teague*, not a single new procedural rule had been found to fall within the exception's scope, including those announced in *Mapp v. Ohio*,[40] *Batson v. Kentucky*,[41] and *Miranda v. Arizona*.[42] Comparing *Ramos* to the Court's other criminal procedure cases, Justice Kavanaugh concluded that *Ramos* failed to meet *Teague*'s high standard.[43] However, rather than stop at the rule of *Ramos*, the majority's opinion went a step further and declared the watershed exception under *Teague* completely foreclosed. In short, "new procedural rules do not apply retroactively on federal collateral review."[44] Justice Kavanaugh stated that it would be unfair to continue encouraging hope of retroactive application of new procedural rules when such hope consistently failed to materialize in practice.[45] He also discounted any reliance interests in the existence of the exception.[46]

Justice Thomas and Justice Gorsuch concurred with the Court's opinion.[47] Justice Thomas argued that the Court could also have resolved *Edwards* through the text of the Antiterrorism and Effective Death Penalty Act of 1996[48] (AEDPA), the prevailing statute governing federal habeas corpus.[49] Because AEDPA requires federal courts to allow postconviction relief to state prisoners only in cases decided incorrectly based on the evidence or contrary to established federal law, and Edwards's case was decided consistent with federal law at the time of his conviction, AEDPA barred any prospect of federal habeas relief.[50]

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37 *See Edwards*, 141 S. Ct. at 1556.

38 *Id.*

39 *Id.* at 1557 (quoting Wharton v. Bockting, 549 U.S. 406, 417 (2007)).

40 367 U.S. 643 (1961).

41 476 U.S. 79 (1986).

42 384 U.S. 436 (1966); *see Edwards*, 141 S. Ct. at 1557–59.

43 *Edwards,* 141 S. Ct. at 1559.

44 *Id.* at 1562.

45 *See id.* at 1560–61.

46 *Id.* at 1560. The majority opinion concluded with "four responses to the dissent," *id.*, arguing that the Court's decision to overrule *Teague* was faithful to *Ramos*, did not result from ulterior motives, and had no impact on post-*Teague* cases, *see id.* at 1560–61. Finally, the majority argued that, even if its decision foreclosed some postconviction relief claims, "criminal defendants as a group [were] better off" after *Ramos* and *Edwards* taken together. *Id.* at 1562.

47 Justices Thomas and Gorsuch also joined in each other's concurrences.

48 Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

49 *See Edwards*, 141 S. Ct at 1562 (Thomas, J., concurring).

50 *See id.*

Justice Gorsuch reasoned that the *Teague* retroactivity test posed a question the Court "ha[d] no business asking,"[51] finding that retroactive application of decisions through habeas relief would not have squared with the writ's meaning for much of its history.[52] Justice Gorsuch also noted his support for the "traditional rule" of federal habeas review: "A final judgment, after completion of trial and the exhaustion of any direct appellate review, was res judicata, and the sole exception was a lack of jurisdiction."[53] Thus, the Court had strayed from the traditional form of the "Great Writ" in allowing any room for retroactivity at all; *Edwards* was a much-needed course correction.[54] In a footnote, Justice Gorsuch also signaled an inclination to reconsider the justification for *Teague*'s second exception, allowing for retroactive application of novel "substantive rules" as well.[55]

Justice Kagan dissented.[56] Justice Kagan objected to the majority's reasoning that *Ramos* was not a watershed rule, arguing that unlike the other cases cited by the Court, the *Ramos* rule related directly to the fundamental fairness of a criminal trial.[57] Justice Kagan also pointed to the importance of *Ramos*'s overruling of *Apodaca* as a marker of *Ramos*'s status as watershed.[58] Unlike the Court's decisions that "announce a new rule," *Ramos* required the Court to overrule precedent, an extreme step that only a truly monumental rule of criminal procedure would require.[59] Justice Kagan then took aim at the majority's decision to decide a question not posed by the case nor presented squarely by the parties' briefing — namely, the validity of *Teague*'s watershed exception itself.[60] Justice Kagan characterized the Court's decision to overrule the *Teague* watershed exception entirely as one meant to avoid *Ramos*'s retroactivity; all else was pretense.[61] The majority had doubly erred: first, by ruling on a question not presented by the parties; and second, by offering only "the sketchiest of reasons" for doing so.[62]

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[51] *Id.* at 1566 (Gorsuch, J., concurring).

[52] *Id.* at 1568.

[53] *Id.* at 1569 (emphasis omitted) (citing Brown v. Allen, 344 U.S. 443, 543–44 (1953) (Jackson, J., concurring in the result)).

[54] *Id.* at 1567, *see id.* at 1573.

[55] *See id.* at 1571 n.6.

[56] Justices Breyer and Sotomayor joined Justice Kagan's dissent.

[57] *See Edwards*, 141 S. Ct. at 1574–76 (Kagan, J., dissenting). Justice Kagan also noted two instances where the Court had applied "rules that are similarly integral to jury verdicts" retroactively, *id.* at 1576, and highlighted that *Ramos* was strongly based on rectifying past racial injustices, and thus should not apply selectively, *see id.* at 1577–78.

[58] *Id.* at 1575.

[59] *Id.*

[60] *Id.* at 1580–81.

[61] *See id.* at 1581.

[62] *Id.*

The overruling of the *Teague* watershed exception, although perhaps unexpected, effected no real change in the functioning of federal habeas corpus relief. However, the majority's justification for overruling *Teague*, particularly its reliance on the need to preserve the finality of state court judgments,[63] signals a marked shift in the Court's approach to the scope of federal habeas review and a break from the conceptual approach of the *Teague* Court. Such a break portends the reorganization of the federal habeas regime, including the potential overruling of *Teague*'s other exception.

Teague v. Lane coalesced the Court's modern approach to retroactivity.[64] Prior to *Teague*, the Court had taken a scattershot approach to retroactivity,[65] holding some rules retroactive only for the named petitioner while granting blanket retroactivity for others.[66] *Teague* moved the Court away from this unpredictable and uneven approach, instead laying out a clear framework for the Court's approach to retroactivity: a general bar against retroactivity with an exception for watershed procedural rules and another for rules immunizing "primary activity."[67]

Conceptually, *Teague* also clarified the concerns relevant to the scope of federal habeas review. *Teague*'s general bar against retroactivity recognized the importance of finality in preserving criminal law's deterrent effect and ensuring that states were not made to bear the unreasonable costs of continually defending criminal convictions from federal vacatur.[68] *Teague*'s exceptions, however, acknowledged that finality was not the only relevant consideration in need of attention — rather, fairness and protection from wrongful conviction also played important, if

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[63] *See id.* at 1554 (majority opinion).

[64] *See* Teague v. Lane, 489 U.S. 288, 300 (1989) (plurality opinion); *see also* John Blume & William Pratt, *Understanding* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 325, 325–26 (1990–1991).

[65] The primary framework prior to *Teague* was enunciated in *Linkletter v. Walker*, 381 U.S. 618 (1965), which held that the exclusionary rule of *Mapp v. Ohio* did not apply retroactively. *Id.* at 619–20. *Linkletter* rejected a general constitutional rule for retroactivity and introduced instead a case-by-case analysis. *See id.* at 627–29. This led to considerable uncertainty as to both the retroactivity of the rule itself as well as when the question of retroactivity was appropriately raised — whether alongside consideration of the rule itself or as a separate question to be considered by the Court. *See Teague*, 489 U.S. at 302–03 (plurality opinion).

[66] *Compare, e.g.*, Jackson v. Denno, 378 U.S. 368, 377 (1964) (granting retroactivity only to named petitioner), *with* McNerlin v. Denno, 378 U.S. 575, 575 (1964) (per curiam) (granting retroactivity to all with a final judgment). The *Teague* Court recognized the downside of this approach. *See Teague*, 489 U.S. at 300 (plurality opinion) ("These two lines of cases do not have a unifying theme, and we think it is time to clarify how the question of retroactivity should be resolved for cases on collateral review.").

[67] *Teague*, 489 U.S. at 311.

[68] *See id.* at 309–10.

narrow, roles.[69] Later decisions by the Court emphasized the balance between these considerations struck by the federal habeas regime.[70]

In foreclosing *Teague*'s watershed exception entirely, the *Edwards* Court further skewed the federal habeas regime in favor of finality. Practically, the Court's decision moved it closer to an absolute rule against retroactivity, by denying the possibility that any new rule of criminal procedure could merit retroactive application.[71] Conceptually, too, *Edwards* demonstrated the Court's increased solicitude for the virtues of finality. Although the majority opinion acknowledged the stare decisis arguments in favor of preserving *Teague*'s watershed exception,[72] it failed to address any of the underlying fairness or accuracy concerns that the *Teague* Court cited as the the watershed exception's motivation.[73] Instead, the *Edwards* Court focused only on the costs of disrupting final judgments[74] and on the chimerical nature of *Teague*'s watershed exception in application.[75]

Prizing finality absent due consideration for the other values embodied by federal collateral review has its drawbacks.[76] To start, such an approach disregards two concerns the *Teague* Court saw as important enough to merit blackletter recognition: the fairness of a criminal trial and judicial safeguards against wrongful conviction of the innocent.[77] Focusing too heavily on ensuring the finality of state court judgments also ignores the important role played by federal courts since Reconstruction, that of ensuring a forum for the vindication of federal rights.[78]

Though the Court's decision in *Edwards* was ostensibly about one of *Teague*'s narrow exceptions, it also implicates the broader status of

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[69] *See id.* at 312; *see also* Susan Bandes, *Taking Justice to Its Logical Extreme: A Comment on* Teague v. Lane, 66 S. CAL. L. REV. 2453, 2454–59 (1993) (describing the values embodied in *Teague*'s approach to federal habeas).

[70] *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 492–93 (1991).

[71] *See Edwards*, 141 S. Ct. at 1562.

[72] *See id.* at 1561.

[73] *See id.* at 1578 (Kagan, J., dissenting).

[74] *See id.* at 1554–55 (majority opinion).

[75] *See id.* at 1560.

[76] *But see* Sandra Day O'Connor, *Habeas Corpus and Judicial Federalism: Some Thoughts on Finality, Comity and Error Correction*, 1992 PUB. INT. L. REV. 3, 9 (positing an increased role for finality in the Court's approach to the scope of federal habeas review post-*Teague*).

[77] *See* Teague v. Lane, 489 U.S. 288, 312 (1989) (plurality opinion); *see also* Todd E. Pettys, *Killing Roger Coleman: Habeas, Finality, and the Innocence Gap*, 48 WM. & MARY L. REV. 2313, 2340–55 (2007) (arguing that in cases of disputed innocence, the benefits of final judgments are not achieved).

[78] *See* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights — Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 3–6 (1985); *see also* Bandes, *supra* note 69, at 2458 (claiming the *Teague* Court "willfully blind[ed]" itself to the importance of preserving a federal forum for constitutional claims).

the federal habeas regime.[79] The conceptual shift of the *Edwards* Court toward greater concern for securing the finality of state court judgments portends the further narrowing of the scope of federal habeas review. Worry for the finality of criminal judgments will always favor limiting the scope of federal collateral review — the very premise of such review is the reopening of otherwise final state court judgments.[80] Thus, a Court invested primarily in the finality of judgments within the criminal justice system is one invested in narrow, rather than broad, federal collateral review.[81]

Most directly, the approach taken by the *Edwards* Court may have implications for *Teague*'s other exception, which allows for the retroactive application of new rules "alter[ing] 'the range of conduct or the class of persons that the law punishes.'"[82] Even though the *Edwards* majority itself did not dispute the propriety of *Teague*'s other exception,[83] the justifications it offered in favor of overruling *Teague*'s watershed exception logically tee up questioning *Teague*'s substantive exception. Taking finality as the cardinal value governing federal courts' involvement in the criminal justice system leaves little conceptual room between procedural and substantive developments in the law.

The finality concerns animating *Teague*'s general bar against retroactivity — and adopted by the *Edwards* Court in its decision — apply almost without modification to a novel substantive rule of criminal law. Applying a novel substantive rule retroactively would certainly overturn otherwise final convictions.[84] Additionally, depending on the form of the substantive rule, such a retroactive application could prompt states to conduct expensive and cumbersome retrials for which evidence may no longer exist.[85] Lastly, though not mentioned directly by the *Edwards* Court, the same comity concerns that counsel against broad retroactive application of novel procedural rules apply to retroactive application of

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[79] *See* Jonathan R. Siegel, *Habeas, History, and Hermeneutics* 6–15 (George Wash. Univ. L. Sch. Pub. L. & Legal Theory, Paper No. 2021-31; George Wash. Univ. Legal Stud., Research Paper No. 2021-31), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3899955 [https://perma.cc/5KTY-ARAA].

[80] *See* RICHARD H. FALLON JR. ET. AL, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1265 (7th ed. 2015).

[81] *See* Timothy Finley, *Habeas Corpus—Retroactivity of Post-conviction Rulings: Finality at the Expense of Justice*, 84 J. CRIM. L. & CRIMINOLOGY 975, 975–76 (1994); *see also* Bandes, *supra* note 69, at 2457–59.

[82] *Edwards*, 141 S. Ct. at 1562 (quoting Schriro v. Summerlin, 542 U.S. 348, 353 (2004)).

[83] *See id.* at 1555 n.3.

[84] *See, e.g.*, Welch v. United States, 136 S. Ct. 1257, 1265 (2016).

[85] *See* 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, 963 (2015) (noting that retroactive application of substantive rules could spawn litigation concerning an individual's entitlement to the rule and citing the Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), as a relevant example).

novel substantive rules — both frustrate the ability of state courts to render final convictions impervious to federal intervention.[86]

Moreover, the other reason offered by the *Edwards* majority for its foreclosure of *Teague*'s watershed exception, that of the infrequency of the exception's application,[87] applies nearly as well to *Teague*'s other exception as it does to *Teague*'s first.[88] Although, unlike its treatment of *Teague*'s watershed exception, the Court has held *Teague*'s substantive rules exception to apply,[89] it has done so infrequently, meaning that reliance interests in its continued existence are minimal.[90] And the infrequency of the watershed exception's application fails to hold up as an independent reason in favor of its overruling — under this logic, the Third Amendment should also be nullified.[91] Thus, without a more developed theory of federal habeas as a postconviction remedy, the justifications offered by the *Edwards* Court for overruling *Teague*'s watershed exception may directly lead to the cutting back of *Teague*'s other exception.

Of course, there are significant hurdles to the Court cutting back *Teague*'s substantive exception. Namely, this step would require overturning the 2016 case *Montgomery v. Louisiana*,[92] where the Court held that state courts are constitutionally required to give retroactive effect to new substantive rules on state habeas review.[93] However, since the Court's ruling in *Montgomery*, the grounds have shifted considerably — Justices Kennedy and Ginsburg, who formed part of the *Montgomery* majority, have left the Court, while two of *Montgomery*'s dissenters, Justices Thomas and Alito, remain.[94] Moreover, as *Edwards* itself demonstrates, the current Court (or at least a majority of the Justices)

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[86] *See* O'Connor, *supra* note 76, at 9; *see also* William J. Brennan Jr., U.S. Sup. Ct., Federal Habeas Corpus and State Prisoners: An Exercise in Federalism, Second Annual William H. Leary Lecture (Oct. 26, 1961), *in* 7 UTAH L. REV. 423, 425–27 (1961) (describing the tensions between "constitutional principles securing fair and decent state criminal processes to those accused of crime," *id.* at 425, and the demands of federalism); J. Richard Broughton, *Habeas Corpus and the Safeguards of Federalism*, 2 GEO. J.L. & PUB. POL'Y 109, 113 (2004) (describing "the implications for state sovereignty in federal habeas cases" as "inherent in the very nature of the action").

[87] *See Edwards*, 141 S. Ct. at 1560.

[88] *See* Zarrow & Milliken, *supra* note 85, at 934.

[89] *See, e.g.*, Bousley v. United States, 523 U.S. 614, 620–21 (1998).

[90] *Cf. Edwards*, 141 S. Ct. at 1560.

[91] U.S. CONST. amend. III; *cf.* Scott D. Gerber, *An Unavoidably Brief Historiography of the Third Amendment*, 82 TENN. L. REV. 627, 627 (2015).

[92] 136 S. Ct. 718 (2016).

[93] *Id.* at 729.

[94] The dissenters argued that neither *Teague* nor its exceptions were constitutionally required. *See id.* at 737 (Scalia, J., dissenting). This view lines up nicely with Justice Gorsuch's view of the traditional rule of habeas, which similarly holds federal habeas review as only valid through a congressional grant of jurisdiction. *See Edwards*, 141 S. Ct. at 1569 (Gorsuch, J., concurring).

have shown a willingness to overrule precedent where they see appropriate.[95]

There are further reasons to think that *Edwards* may mean that more — perhaps even *Teague* itself — is up for grabs within the federal habeas regime than initially imagined. Importantly, the concurrences of Justice Thomas and Justice Gorsuch in *Edwards* suggest judicial appetite to reconsider the legal basis for *Teague* in favor of an approach more firmly rooted in finality and federalism.[96] And, like *Teague*'s watershed exception, *Teague*'s other exception has no clear connection to the "traditional rule" of habeas, which lacks space for judicial judgments of the novelty of rules,[97] and is arguably contrary to AEDPA's "absolute bar on claims that state courts reasonably denied."[98]

However, what might seem like a loss can also be an opportunity. The Court's willingness to overrule *Teague*'s watershed exception absent any direct request to do so[99] indicate the openness of the current iteration of the Roberts Court to a variety of theories of federal habeas — Justice Thomas and Justice Gorsuch presented possible perspectives, but, importantly, neither of their reasonings ultimately carried the day. By offering alternative theories — particularly, by identifying the role of considerations that countervail the force of finality — advocates can take this opening to frame federal collateral review's purpose for the Court and ensure that a single consideration does not unreasonably dominate the Court's view.

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[95] *See, e.g.*, Ian Millhiser, *Brett Kavanaugh's Latest Decision Should Alarm Liberals*, VOX (May 18, 2021, 8:00 AM), https://www.vox.com/2021/5/18/22440256/brett-kavanaugh-supreme-court-edwards-vannoy-abortion-criminal-justice-constitution-stare-decisis [https://perma.cc/4937-HA9S]. Also instructive on this point was the Court's decision this Term in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). The decision diminished the effect of *Montgomery*'s predecessor, *Miller v. Alabama*, 567 U.S. 460 (2012), on juvenile defendants. *See* Andrew Cohen, *Supreme Court: Let's Make It Easier for Judges to Send Teenagers to Die in Prison*, BRENNAN CTR. FOR JUST. (Apr. 27, 2021), https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-lets-make-it-easier-judges-send-teenagers-die-prison [https://perma.cc/95B7-9AL4].

[96] *See* Siegel, *supra* note 79, at 6–15; *see also* Richard M. Re, *Reason and Rhetoric in* Edwards v. Vannoy, 17 DUKE J. CONST. L. & PUB. POL'Y (forthcoming 2022) (manuscript at 10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3865178 [https://perma.cc/92JK-YNEW].

[97] *See Edwards*, 141 S. Ct. at 1569 (Gorsuch, J., concurring) (explaining that the "traditional rule" of habeas is the notion that "[a] final judgment, after completion of trial and the exhaustion of any direct appellate review, was res judicata, and the sole exception was a lack of jurisdiction" (emphasis omitted)). Justice Gorsuch addressed the ambiguous relationship between *Teague*'s substantive exception and his preferred view of federal habeas directly, noting they are "perhaps" or "perhaps not" connected. *Id.* at 1571 n.6.

[98] *Id.* at 1565 (Thomas, J., concurring) (noting that AEDPA "has no exception for retroactive rights"); *see also* Brief of Respondent at 46–50, *Edwards*, 141 S. Ct. 1547 (No. 19-5807) (arguing that AEDPA's relitigation bar "forecloses retroactive application of *Ramos*," *id.* at 46). However, the question of whether AEDPA bars retroactive relief entirely is one of statutory interpretation, about which reasonable minds may disagree. *See* Zarrow & Milliken, *supra* note 85, at 985.

[99] *See Edwards*, 141 S. Ct. at 1578–81 (Kagan, J., dissenting).