CRIMINAL PROCEDURE
AND THE CONSTITUTION
LEADING SUPREME COURT CASES
AND INTRODUCTORY TEXT
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Chapter 2

THE NATURE AND SCOPE OF FOURTEENTH AMENDMENT DUE PROCESS; THE APPLICABILITY OF THE BILL OF RIGHTS TO THE STATES

SECTION 1. THE "FUNDAMENTAL RIGHTS" (OR "ORDERED LIBERTY") AND "INCORPORATION" THEORIES

The first eight amendments were enacted as limitations solely upon the federal government. But some argued that the Fourteenth Amendment had "totally incorporated" all the provisions of the Bill of Rights, i.e., made them fully applicable to the states. As it had done earlier (see Twining v. New Jersey, 211 U.S. 78 (1908)), in Palko v. Connecticut and Adamson v. California, the two cases set forth in this section, the Court emphatically rejected the "total incorporation" view of the history of the Fourteenth Amendment—a view which has never commanded a majority.

Instead, the Court in Palko and Adamson (as well as other cases) adopted what has been called the "fundamental rights" or "ordered liberty" interpretation of the Fourteenth Amendment's due process clause, an approach that prevailed until the early 1960s. This approach finds no necessary relationship between the content of the Fourteenth Amendment and the guarantees of the Bill of Rights. It regards the due process clause as simply incorporating all principles of justice "implicit in the concept of ordered liberty" or "so rooted in the traditions and conscience of our people as to be ranked as fundamental." As applied to criminal procedure, this approach requires, but requires only, that the state afford a defendant "that fundamental fairness essential to the very concept of justice." If the presence of a specific Bill of Rights guarantee is not decisive under this approach, neither is its absence. A particular practice may violate "fundamental fairness" even though it is not specifically prohibited by the Bill of Rights. Under this approach, the Due Process Clause of the Fourteenth Amendment, as Justice Frankfurter emphasized in his Adamson concurring opinion, "has an independent potency."

The cases applying the "fundamental rights" approach recognized the possibility that some of the personal rights safeguarded by the first eight Amendments
against federal action may also be protections against state action, because a
denial of them would be a denial of due process. Thus, the Court held in *Powell v. Alabama* (1932) (discussed in Chapter Five) that, under the circumstances of the
case, defendants charged with and convicted of capital offenses were denied
Fourteenth Amendment Due Process when a state did not afford them the
effective assistance of counsel. “The logically critical thing, however,” pointed out
Justice Harlan years later (dissenting in *Duncan v. Louisiana*, set forth in the
next section), “was not that the rights had been found in the Bill of Rights but
that they were deemed to be fundamental.”

If *Powell v. Alabama* did not hold that the right to counsel was fully
“incorporated into” or implicit in Fourteenth Amendment Due Process, neither
did *Palko* hold that the prohibition against double jeopardy was completely “out”
of the Fourteenth Amendment. As *Palko* illustrates, the Court often had to pass
on state procedures transgressing the “outer edges,” rather than the basic
concept, of a particular Bill of Rights guarantee. It seems most doubtful that in
sustaining such challenged procedures the Court was authorizing the states to
abolish completely—or to avoid the “hardcore” of—e.g., the protection against
double jeopardy, or the privilege against self-incrimination, or the right to trial by
jury in criminal cases.

Rather the Court probably meant that the state rule in question did not
violate the Fourteenth Amendment because the specific provision of the Bill of
Rights invoked by the defendant did not apply to the states to the full extent it
applied to the federal government. To hold that a particular Bill of Rights
guarantee is not totally “incorporated,” i.e., not binding on the states in its
entirety, is not to say it is completely “out” of the Fourteenth Amendment.

The total incorporation position received its strongest support in the *Adam­
son* dissents, especially Justice Black’s memorable dissent. But the *Adamson*
case also produced the most powerful rejection of the total incorporation theory—and
perhaps the most famous articulation of the “ordered liberty”–“fundamental
fairness” approach—concurring Justice Frankfurter’s response to the *Adamson*
dissenters.

**PALKO v. CONNECTICUT**


*JUSTICE CARDozo delivered the opinion of the Court.* * *

Appellant was indicted for the crime of murder in the first degree. A jury
found him guilty of murder in the second degree, and he was sentenced to
confinement in the state prison for life. Thereafter the State of Connecticut
[appealed, pursuant to a state statute permitting appeals “upon all questions of
law arising on the trial of criminal cases, [with] the permission of the presiding
judge”]. [T]he Supreme Court of Errors reversed [finding] error of law to the
prejudice of the state [in excluding certain evidence and] in the instructions to the
jury as to the difference between first and second degree murder.

* * * Before a jury was impaneled [defendant unsuccessfully objected] that
the effect of the new trial was to place him twice in jeopardy for the same offense,
and in so doing to violate the Fourteenth Amendment. [The] jury returned a
verdict of murder in the first degree, and the court sentenced the defendant to the
punishment of death. The Supreme Court of Errors affirmed.

[The] argument for appellant is that whatever is forbidden by the Fifth
Amendment is forbidden by the Fourteenth also. [To] retry a defendant, though
under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment, if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law.

[Appellant's] thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. Hurtado v. California, 110 U.S. 516 (1884). The Fifth Amendment provides also that no person shall be compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. Twining v. New Jersey, 211 U.S. 78 (1908). The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed $20. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether.

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress; or the like freedom of the press; or the free exercise of religion; or the right of peaceable assembly. [In] these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty and thus through the Fourteenth Amendment, become valid as against the states.

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the States has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of
the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. * * * Fundamentally too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. The hearing, moreover, must be a real one, not a sham or a pretense. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. * * * Fundamentally too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. The hearing, moreover, must be a real one, not a sham or a pretense. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. * * * Fundamentally too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. The hearing, moreover, must be a real one, not a sham or a pretense. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. * * * Fundamentally too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. The hearing, moreover, must be a real one, not a sham or a pretense. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. * * * Fundamentally too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. The hearing, moreover, must be a real one, not a sham or a pretense. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. * * * Fundamentally too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. The hearing, moreover, must be a real one, not a sham or a pretense. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. * * * Fundamentally too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. The hearing, moreover, must be a real one, not a sham or a pretense. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. * * * Fundamentally too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. The hearing, moreover, must be a real one, not a sham or a pretense. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. * * * Fundamentally too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. The hearing, moreover, must be a real one, not a sham or a pretense. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. * * * Fundamentally too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. The hearing, moreover, must be a real one, not a sham or a pretense. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. * * *
failure of a defendant to explain or to deny evidence against him to be commented upon by court and by counsel and to be considered by court and jury. The defendant did not testify. The trial court gave its instructions and the District Attorney argued the case in accordance with the provisions just referred to.

We shall assume, but without any intention thereby of ruling upon the issue, that state permission by law to the court, counsel and jury to comment upon and consider the failure of defendant "to explain or to deny by his testimony any evidence or facts in the case against him" would infringe defendant's privilege against self-incrimination under the Fifth Amendment if this were a trial in a court of the United States under a similar law. Such an assumption does not determine appellant's rights under the Fourteenth Amendment. It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights.

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Generally, comment on the failure of an accused to testify is forbidden in American jurisdictions. This arises from state constitutional or statutory provisions similar in character to the federal provisions. California, however, is one of a few states that permit limited comment upon a defendant's failure to testify. That permission is narrow. The California law authorizes comment by court and counsel upon the "failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him." This does not involve any presumption, rebuttable or irrebuttable, either of guilt or of the truth of any fact, that is offered in evidence. It allows inferences to be drawn from proven facts. Because of this clause, the court can direct the jury's attention to whatever evidence there may be that a defendant could deny and the prosecution can argue as to inferences that may be drawn from the accused's failure to testify. However sound may be the legislative conclusion that an accused should not be compelled in any criminal case to be a witness against himself, we see no reason why comment should not be made upon his silence. It seems quite natural that when a defendant has opportunity to deny or explain facts and determines not to do so, the prosecution should bring out the strength of the evidence by commenting upon defendant's failure to explain or deny it.

Appellant sets out the circumstances of this case, however, to show coercion and unfairness in permitting comment. [His] argument here is that he could not take the stand to deny the evidence against him because he would be subjected to a cross-examination as to former crimes to impeach his veracity and the evidence so produced might well bring about his conviction.

It is true that if comment were forbidden, an accused in this situation could remain silent and avoid evidence of former crimes and comment upon his failure
to testify. We are of the view, however, that a state may control such a situation in accordance with its own ideas of the most efficient administration of criminal justice. The purpose of due process is not to protect an accused against a proper conviction but against an unfair conviction. When evidence is before a jury that threatens conviction, it does not seem unfair to require him to choose between leaving the adverse evidence unexplained and subjecting himself to impeachment through disclosure of former crimes. Indeed, this is a dilemma with which any defendant may be faced. If facts, adverse to the defendant, are proven by the prosecution, there may be no way to explain them favorably to the accused except by a witness who may be vulnerable to impeachment on cross-examination. The defendant must then decide whether or not to use such a witness. The fact that the witness may also be the defendant makes the choice more difficult but a denial of due process does not emerge from the circumstances. * * *

Affirmed.

Justice Frankfurter (concurring).

* * * Only a technical rule of law would exclude from consideration that which is relevant, as a matter of fair reasoning, to the solution of a problem. Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and rightminded men do every day violates the "immutable principles of justice" as conceived by a civilized society is to trivialize the importance of "due process."

[For] historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions. It is so, of course, by explicit act of Congress. But to suggest that such a limitation can be drawn out of "due process" in its protection of ultimate decency in a civilized society is to suggest that the Due Process Clause fastened fetters of unreason upon the States. * * *

Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court—a period of 70 years—the scope of that Amendment was passed upon by 43 judges. Of all these judges only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States. [To] suggest that it is inconsistent with a truly free society to begin prosecutions without an indictment, to try petty civil cases without the paraphernalia of a common law jury, to take into consideration that one who has full opportunity to make a defense remains silent is, in de Tocqueville's phrase, to confound the familiar with the necessary.

The short answer to the suggestion that the [Due Process Clause] of the Fourteenth Amendment * * * was a way of saying that every State must thereafter initiate prosecutions through indictment by a grand jury, must have a trial by a jury of 12 in criminal cases, and must have trial by such a jury in common law suits where the amount in controversy exceeds $20, is that it is a strange way of saying it. It would be extraordinarily strange for a Constitution to convey such specific commands in such a roundabout and inexplicit way. * * * Those reading the English language with the meaning which it ordinarily conveys, those conversant with the political and legal history of the concept of due process, those sensitive to the relations of the States to the central government as well as the
relation of some of the provisions of the Bill of Rights to the process of justice, would hardly recognize the Fourteenth Amendment as a cover for the various explicit provisions of the first eight Amendments. Some of these are enduring reflections of experience with human nature, while some express the restricted views of Eighteenth-Century England regarding the best methods for the ascertainment of facts. The notion that the Fourteenth Amendment was a covert way of imposing upon the States all the rules which it seemed important to Eighteenth Century statesmen to write into the Federal Amendments, was rejected by judges who were themselves witnesses of the process by which the Fourteenth Amendment became part of the Constitution. Arguments that may now be adduced to prove that the first eight Amendments were concealed within the historic phrasing of the Fourteenth Amendment were not unknown at the time of its adoption. A surer estimate of their bearing was possible for judges at the time than distorting distance is likely to vouchsafe. Any evidence of design or purpose not contemporaneously known could hardly have influenced those who ratified the Amendment. At the time of the ratification of the Fourteenth Amendment the constitutions of nearly half of the ratifying States did not have the rigorous requirements of the Fifth Amendment for instituting criminal proceedings through a grand jury. It could hardly have occurred to these States that by ratifying the Amendment they uprooted their established methods for prosecuting crime and fastened upon themselves a new prosecutorial system.

Indeed, the suggestion that the Fourteenth Amendment incorporates the first eight Amendments as such is not unambiguously urged. [There] is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out. Nor are we given the calculus for determining which go in and which stay out. If the basis of selection is merely that those provisions of the first eight Amendments are incorporated which commend themselves to individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test. The protection against unreasonable search and seizure might have primacy for one judge, while trial by a jury of 12 for every claim above $20 might appear to another as an ultimate need in a free society. In the history of thought “natural law” has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth. If all that is meant is that due process contains within itself certain minimal standards which are “of the very essence of a scheme of ordered liberty,” <i>Palko v. Connecticut</i>, putting upon this Court the duty of applying these standards from time to time, then we have merely arrived at the insight which our predecessors long ago expressed.

* * * The [Fourteenth] Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them. The Due Process Clause of the Fourteenth Amendment has an independent potency, precisely as does the Due Process Clause of the Fifth Amendment in relation to the Federal Government. It ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth. The Fifth Amendment specifically prohibits prosecution of an “infamous crime” except upon indictment; it forbids double jeopardy; it bars compelling a person to be a witness against himself in any criminal case; it precludes deprivation of “life, liberty, or property, without due process of law.” Are Madison and his contemporaries in the framing of the Bill of Rights to be charged with writing into it a meaningless clause? * * *
A construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom. It would assume that no other abuses would reveal themselves in the course of time than those which had become manifest in 1791. Such a view not only disregards the historic meaning of "due process." It leads inevitably to a warped construction of specific provisions of the Bill of Rights to bring within their scope conduct clearly condemned by due process but not easily fitting into the pigeonholes of the specific provisions.

Judicial review of [the Due Process Clause] of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncracies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offenders accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the State court under review.

JUSTICE BLACK, dissenting.

In my judgment [the Fourteenth Amendment's] history conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights. Whether this Court ever will, or whether it now should, in the light of past decisions, give full effect to what the Amendment was intended to accomplish is not necessarily essential to a decision here. However that may be, our prior decisions, including *Twining*, do not prevent our carrying out that purpose, at least to the extent of making applicable to the states, not a mere part, as the Court has, but the full protection of the Fifth Amendment's provision against compelling evidence from an accused to convict him of crime. And I further contend that the "natural law" formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power. And my belief seems to be in accord with the views expressed by this Court, at least for the first two decades after the Fourteenth Amendment was adopted.

I cannot consider the Bill of Rights to be an outworn 18th Century "strait jacket" as the *Twining* opinion did. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously
interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. If the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process. But rather than accept either of these choices, I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.

Conceding the possibility that this Court is now wise enough to improve on the Bill of Rights by substituting natural law concepts for the Bill of Rights, I think the possibility is entirely too speculative to agree to take that course. I would therefore hold in this case that the full protection of the Fifth Amendment's proscription against compelled testimony must be afforded by California. This I would do because of reliance upon the original purpose of the Fourteenth Amendment.

It is an illusory apprehension that literal application of some or all of the provisions of the Bill of Rights to the States would unwisely increase the sum total of the powers of this Court to invalidate state legislation. The Federal Government has not been harmfully burdened by the requirement that enforcement of federal laws affecting civil liberty conform literally to the Bill of Rights. Who would advocate its repeal? It must be conceded, of course, that the natural-law-due-process formula, which the Court today reaffirms, has been interpreted to limit substantially this Court's power to prevent state violations of the individual civil liberties guaranteed by the Bill of Rights. But this formula also has been used in the past and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government.

Since *Marbury v. Madison* was decided, the practice has been firmly established for better or worse, that courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision thereby affecting policy. But to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of "natural law" deemed to be above and undefined by the Constitution is another. "In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people." *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942).a

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a. In *Rochin v. California*, 342 U.S. 165 (1952), the famous "stomach-pumping" case, Justice Black also criticized what he called the majority's use of a due process test that "empowers this Court to nullify any state law if its application 'shocks the conscience,' offends 'a sense of justice' or runs counter to the 'decencies of civilized conduct.'"
Justice ADAMSON joins in this opinion. * * *

JUSTICE DOUGLAS, with whom JUSTICE RUTLEDGE concurs, dissenting.

While in substantial agreement with the views of Mr. Justice Black, I have one reservation and one addition to make.

I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.

That point, however, need not be pursued here inasmuch as the Fifth Amendment is explicit in its provision that no person shall be compelled in any criminal case to be a witness against himself. That provision, as Mr. Justice Black demonstrates, is a constituent part of the Fourteenth Amendment. * * *

Much can be said pro and con as to the desirability of allowing comment on the failure of the accused to testify. But policy arguments are to no avail in the face of a clear constitutional command. b

Rochin was suspected of selling narcotics. When the police burst into his room, he swallowed two capsules. He was then handcuffed and taken to a hospital where, at the direction of the police, “a doctor forced an emetic solution through a tube into Rochin’s stomach against his will.” This “stomach pumping” produced vomiting—and two capsules that proved to contain morphine. The Court, per Frankfurter, J., ruled that the morphine should have been excluded from evidence because the methods used by the police to obtain it violated Fourteenth Amendment Due Process:

“This is conduct that shocks the conscience: * * * [T]his course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.”

Concurring Justice Black criticized the “nebulous” and “accordion-like” quality of the majority’s approach and maintained that “faithful adherence to the specific guarantees in the Bill of Rights ensures a more permanent protection of individual liberty.” In a separate concurring opinion, Justice Douglas also criticized the majority’s approach: “[W]e cannot in fairness free the state courts from [the specific restraints of the Fifth Amendment privilege against self-incrimination] and yet excoriate them for flouting the ‘decencies of civilized conduct’ when they admit the evidence. This is to make the rule turn not on the Constitution but on the idiosyncrasies of the judges who sit here.”

The “conduct that shocks the conscience” test did not prevent the admission of the evidence in Irvine v. California, 347 U.S. 128 (1954), despite the fact that “few police measures have come to [the Court’s] attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment.” In Irvine the police had surreptitiously entered the home of a suspected bookmaker, installed a concealed microphone in a bedroom, and listened to the conversations of the occupants for over a month.

Because of the “aggravating” and “repulsive” police misconduct in Irvine, dissenting Justice Frankfurter insisted that Rochin was controlling. But Justice Jackson, who announced the judgment of the Court and wrote the principal opinion, responded: “However obnoxious are the facts in the case before us, they do not involve coercion, violence or brutality to the person [as did Rochin,], but rather a trespass to property, plus eavesdropping.”

According to some commentators, the demonstrated incapacity of the Rochin test to deal with the problem of egregious police misconduct was a major reason the Court overruled Wolf v. Colorado, 338 U.S. 25 (1949), and held in Mapp v. Ohio, 367 U.S. 643 (1961), that the federal exclusionary rule in search and seizure cases was binding on the states via the Due Process Clause of the Fourteenth Amendment. See generally Ch. 3.

b. The position taken in Twining and Adamson—that the Fifth Amendment privilege against self-incrimination was not incorporated in the Fourteenth—was rejected in Malloy v. Hogan (1964), discussed at p. 364. Griffin v. California, Ch. 18, § 3, then applied Malloy to overrule the specific holdings of Twining and Adamson, which had permitted comment on a state defendant’s failure to take the stand.
SECTION 2. THE MODERN APPROACH: 
THE SHIFT TO "SELECTIVE INCORPORATION"

Although the Court has remained unwilling to accept the total incorporationists' reading of the Fourteenth Amendment, in the 1960's the "Warren Court" "selectively" "incorporated" or "absorbed" more and more of the specific provisions of the Bill of Rights into the Fourteenth Amendment. "Selective incorporation" combines aspects of both the "fundamental rights" and "total incorporation" approaches. It accepts the basic premise of the fundamental rights proponents that the Fourteenth Amendment encompases only rights that are "of the very essence of the scheme of ordered liberty." It also recognizes that not all rights enumerated in the Bill of Rights are necessarily fundamental and that other rights may be fundamental even though not found in the first eight Amendments. But the "selective incorporation" approach rejects the fundamental rights interpretation insofar as that view emphasizes the "totality of the circumstances" in the particular case.

In determining whether an enumerated right is "fundamental," therefore, the selective incorporation doctrine requires that the Court look at the total right guaranteed by the particular Bill of Rights provision, not merely at a single aspect of that right nor the application of that aspect in the case before it. If a particular guarantee is determined to be "fundamental," that provision is incorporated into the Fourteenth Amendment and applied to the states to the same extent that it applies to the federal government—or, as critics of this approach expressed it, applied "jot-for-jot and case-for-case" (Harlan, J., joined by Stewart, J., concurring in Duncan v. Louisiana, infra); "bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings" (Fortas, J., concurring in Duncan).

Although strongly criticized as an artificial compromise between the fundamental rights and total incorporation approaches, and lacking even the "internal consistency" of the total incorporation view of the Fourteenth Amendment (Harlan, J., dissenting in Duncan), selective incorporation gained the ascendancy in the 1960's. The adoption of this position was accompanied by a movement towards a broader view of the nature of "fundamental procedural rights."

As Justice White pointed out for the Court in Duncan, the question asked was no longer whether the procedural safeguard at issue was "of the very essence of a scheme of ordered liberty" or required by "the ‘immutable principles of justice’ as conceived by a civilized society" or whether "a civilized system could be imagined" without it. Instead, the Court inquired whether the procedural safeguard in question was "fundamental to the American scheme of justice" or "necessary" or "fundamental" "in the context of the criminal process maintained by the American states."

By the time Duncan reached the Court the following Bill of Rights guarantees had been "selectively incorporated" (and thus held enforceable against the states according to the same standards that protect these rights against federal encroachment):

the freedom from unreasonable searches and seizures and the right to have excluded from criminal trials any evidence obtained in violation thereof, Mapp v. Ohio, (1961) (Ch. 3, § 1) and Ker v. California, 374 U.S. 23 (1963);
the prohibition against cruel and unusual punishment, Robinson v. California, 370 U.S. 660 (1962);

the right to the assistance of counsel, Gideon v. Wainwright, (1963) (set forth in Ch. 5);

the privilege against compelled self-incrimination, Malloy v. Hogan, 378 U.S. 1 (1964);

the right to confront opposing witnesses, Pointer v. Texas, 380 U.S. 400 (1965);

the right to a speedy trial, Klopfer v. North Carolina, 386 U.S. 213 (1967); and

the right to compulsory process for obtaining witnesses, Washington v. Texas, 388 U.S. 14 (1967).*

These developments did not escape Justice Black. Concurring in Duncan, he reaffirmed his belief in the "total incorporation" theory, but expressed his willingness to support the "selective incorporation" doctrine "as an alternative": "[I]t keeps judges from roaming at will in their own notions of what policies outside the Bill of Rights are desirable and what are not. And, most importantly for me, the selective incorporation process has the virtue of having already worked to make most of the Bill of Rights protections applicable to the States."

For a recent discussion of the history of the "incorporation" of the various provisions of the Bill of Rights, see Justice Alito's majority opinion in McDonald v. Chicago, 130 S.Ct. 3020 (2010). Consider too, the strongly-worded exchange between concurring Justice Scalia and dissenting Justice Stevens in the same case.

**DUNCAN v. LOUISIANA**


JUSTICE WHITE delivered the opinion of the Court.

[Appellant] was convicted of simple battery [which under Louisiana law] is a misdemeanor, punishable by two years' imprisonment and a $300 fine. Appellant sought trial by jury, but because the Louisiana Constitution grants jury trials only in cases in which capital punishment or imprisonment at hard labor may be imposed, the trial judge denied the request. Appellant was convicted and sentenced to serve 60 days in the parish prison and pay a fine of $150.

* * * Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee. 14 Since we

a. Following Duncan, the Court held applicable to the states various other criminal procedure guarantees (see e.g., fn. a, p. 29). Indeed, Warren Court rulings selectively incorporated all but four of the guarantees dealing directly with criminal procedure. As for one of the four, the Fifth Amendment requirement of prosecution by indictment, the Court reaffirmed the 1880's Hurtado holding this guarantee not fundamental (and decision therefore not applicable to the states). See p. 29. As for the other three (the Eighth Amendment prohibition of excessive bail, the Eighth Amendment prohibition against excessive fines, and the Sixth Amendment guarantee that the jury be selected "from the state and district where the crime shall have been committed, which district shall have been ascertained by law"), the Warren Court simply was not presented with cases requiring a ruling on their incorporation. Indeed, the Court has yet to rule on these three guarantees (although lower courts have done so, unanimously assuming that the Eighth Amendment guarantees are fundamental and dividing on the Sixth Amendment guarantee).

14. In one sense recent cases applying provisions of the first eight amendments to the
consider the appeal before us to be such a case, we hold that the Constitution was violated when appellant's demand for jury trial was refused.

By the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689. * * *

Jury trial came to America with English colonists, and received strong support from them. Royal interference with the jury trial was deeply resented. Among the resolutions adopted by the First Congress of the American Colonies (the Stamp Act Congress) on October 19, 1765—resolutions deemed by their authors to state “the most essential rights and liberties of the colonists”—was the declaration: “That trial by jury is the inherent and invaluable right of every British subject in these colonies.”

The constitutions adopted by the original States guaranteed jury trial. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases. * * *

Jury trial continues to receive strong support. The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so. * * *

We are aware of prior cases in this Court in which the prevailing opinion contains statements contrary to our holding today that the right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction. Louisiana relies especially on Maxwell v. Dow; Palko; and Snyder v. Massachusetts, 291 U.S. 97 (1934). None of these cases, however, dealt States represent a new approach to the “incorporation” debate. Earlier the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection. (The) recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. If immediate relevance for this case are the Court’s holdings that the States must comply with certain provisions of the Sixth Amendment, specifically that the States may not refuse a speedy trial, confrontation of witnesses, and the assistance, at state expense if necessary, of counsel. Of each of these determinations that a constitutional provision originally written to bind the Federal Government should bind the States as well it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States.

When the inquiry is approached in this way the question whether the States can impose criminal punishment without granting a jury trial appears quite different from the way it appeared in the older cases opining that States might abolish jury trial. See, e.g., Maxwell v. Dow, 176 U.S. 581 (1900). A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. Yet no American State has undertaken to construct such a system. Instead, every American State, including Louisiana, uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury’s verdict. In every State, including Louisiana, the structure and style of the criminal process—the supporting framework and the subsidiary procedures—are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial.
with a State which had purported to dispense entirely with a jury trial in serious criminal cases. * * * 

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the commonsense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

Of course jury trial has "its weaknesses and the potential for misuse." We are aware of the long debate, especially in this century, among those who write about the administration of justice, as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings. Although the debate has been intense, with powerful voices on either side, most of the controversy has centered on the jury in civil cases. Indeed, some of the severest critics of civil juries acknowledge that the arguments for criminal juries are much stronger. In addition, at the heart of the dispute have been express or implicit assertions that juries are incapable of adequately understanding evidence or determining issues of fact, and that they are unpredictable, quixotic, and little better than a roll of dice. Yet, the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.

The State of Louisiana urges that holding that the Fourteenth Amendment assures a right to jury trial will cast doubt on the integrity of every trial conducted without a jury. Plainly, this is not the import of our holding. * * *

We would not assert [that] every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. Thus we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial. However, the fact is that in most places more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court. Even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely.
Louisiana’s final contention is that even if it must grant jury trials in serious criminal cases, the conviction before us is valid and constitutional because here the petitioner was tried for simple battery and was sentenced to only 60 days in the parish prison. We are not persuaded. It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States. [But] the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. [In] the case before us the Legislature of Louisiana has made simple battery a criminal offense punishable by imprisonment for two years and a fine. The question, then is whether a crime carrying such a penalty is an offense which Louisiana may insist on trying without a jury. **

In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled [by precedent] to refer to objective criteria, chiefly the existing laws and practices in the Nation. In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500 fine. In 49 of the 50 States crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail. Moreover, in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term **. We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense. Consequently, appellant was entitled to a jury trial and it was error to deny it. **

JUSTICE BLACK, with whom JUSTICE DOUGLAS joins, concurring.

** I said in Adamson that while I would “extend to all the people of the nation the complete protection of the Bill of Rights,” that “[i]f the choice must be between the selective process of the Palko decision applying some of the Bill of Rights to the States, or the Twining rule applying none of them, I would choose the Palko selective process.” And I am very happy to support this selective process through which our Court has since the Adamson case held most of the specific Bill of Rights’ protections applicable to the States to the same extent they are applicable to the Federal Government. **

All of these holdings making Bill of Rights’ provisions applicable as such to the States mark, of course, a departure from the Twining doctrine holding that none of those provisions were enforceable as such against the States. The dissent in this case, however, makes a spirited and forceful defense of that now discredited doctrine.

[In] addition to the adoption of Professor Fairman’s “history,” the dissent states that “the great words of the four clauses of the first section of the Fourteenth Amendment would have been an exceedingly peculiar way to say that ‘The rights heretofore guaranteed against federal intrusion by the first eight amendments are henceforth guaranteed against State intrusion as well.’ ” In response to this I can say only that the words “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” seems to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States. What more precious
“privilege” of American citizenship could there be than that privilege to claim the protections of our great Bill of Rights? * * *

While I do not wish at this time to discuss at length my disagreement with Brother Harlan’s forthright and frank restatement of the now discredited Twin- ing doctrine, I do want to point out what appears to me to be the basic difference between us. His view, as was indeed the view of Twining, is that “due process is an evolving concept” and therefore that it entails a “gradual process of judicial inclusion and exclusion” to ascertain those “immutable principles [of] free government which no member of the Union may disregard.” Thus the Due Process Clause is treated as prescribing no specific and clearly ascertainable constitutional command that judges must obey in interpreting the Constitution, but rather as leaving judges free to decide at any particular time whether a particular rule or judicial formulation embodies an “immutable principle[s] of free government” or is “implicit in the concept of ordered liberty,” or whether certain conduct “shocks the judge’s conscience” or runs counter to some other similar, undefined and undefinable standard. Thus due process, according to my Brother Harlan, is to be a phrase with no permanent meaning, but one which is found to shift from time to time in accordance with judges’ predilections and understandings of what is best for the country. If due process means this, the Fourteenth Amendment, in my opinion, might as well have been written that “no person shall be deprived of life, liberty or property except by laws that the judges of the United States Supreme Court shall find to be consistent with the immutable principles of free government.” It is impossible for me to believe that such unconfined power is given to judges in our Constitution that is a written one in order to limit governmental power.

Another tenet of the Twining doctrine as restated by my Brother Harlan is that “due process of law requires only fundamental fairness.” But the “fundamental fairness” test is one on a par with that of shocking the conscience of the Court. Each of such tests depends entirely on the particular judge’s idea of ethics and morals instead of requiring him to depend on the boundaries fixed by the written words of the Constitution. Nothing in the history of the phrase “due process of law” suggests that constitutional controls are to depend on any particular judge’s sense of values. * * *

Finally I want to add that I am not bothered by the argument that applying the Bill of Rights to the States “according to the same standards that protect those rights against federal encroachment,” interferes with our concept of federalism in that it may prevent States from trying novel social and economic experiments. I have never believed that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the Bill of Rights. [It] seems to me totally inconsistent to advocate on the one hand, the power of this Court to strike down any state law or practice which it finds “unreasonable” or “unfair,” and on the other hand urge that the States be given maximum power to develop their own laws and procedures. Yet the due process approach of my Brothers Harlan and Fortas (see other concurring opinion) does just that since in effect it restricts the States to practices which a majority of this Court is willing to approve on a case-by-case basis. No one is more concerned than I that the States be allowed to use the full scope of their powers as their citizens see fit. And that is why I have continually fought against the expansion of this and Immunities Clause, as well as the Due Process Clause.

a. Although Justice Black cites no case at this point, this appears to be a reference to the famous “stomach-pumping” case of Rochin v. California, discussed in fn. a, pp. 34–35.
Court's authority over the States through the use of a broad, general interpretation of due process that permits judges to strike down state laws they do not like.

In closing I want to emphasize that I believe as strongly as ever that the Fourteenth Amendment was intended to make the Bill of Rights applicable to the States. I have been willing to support the selective incorporation doctrine, however, as an alternative, although perhaps less historically supportable than complete incorporation. The selective incorporation process, if used properly, does limit the Supreme Court in the Fourteenth Amendment field to specific Bill of Rights' protections only and keeps judges from roaming at will in their own notions of what policies outside the Bill of Rights are desirable and what are not. And, most importantly for me, the selective incorporation process has the virtue of having already worked to make most of the Bill of Rights' protections applicable to the States.

JUSTICE FORTAS, concurring * * *

[Although I agree with the decision of the Court, I cannot agree [that] the tail must go with the hide: that when we hold, influenced by the Sixth Amendment, that "due process" requires that the States accord the right of jury trial for all but petty offenses, we automatically import all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts. I see no reason whatever, for example, to assume that our decision today should require us to impose federal requirements such as unanimous verdicts or a jury of 12 upon the States. We may well conclude that these and other features of federal jury practice are by no means fundamental—that they are not essential to due process of law—and that they are not obligatory on the States.

I would make these points clear today. Neither logic nor history nor the intent of the draftsmen of the Fourteenth Amendment can possibly be said to require that the Sixth Amendment or its jury trial provision be applied to the States together with the total gloss that this Court's decisions have supplied. The draftsmen of the Fourteenth Amendment intended what they said, not more or less: that no State shall deprive any person of life, liberty, or property without due process of law. It is ultimately the duty of this Court to interpret, to ascribe specific meaning to this phrase. There is no reason whatever for us to conclude that, in so doing, we are bound slavishly to follow not only the Sixth Amendment but all of its bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings. To take this course, in my judgment, would be not only unnecessary but mischievous because it would inflict a serious blow upon the principle of federalism. The Due Process Clause commands us to apply its great standard to state court proceedings to assure basic fairness. It does not command us rigidly and arbitrarily to impose the exact pattern of federal proceedings upon the 50 States. On the contrary, the Constitution's command, in my view, is that in our insistence upon state observance of due process, we should, so far as possible, allow the greatest latitude for state differences. It requires, within the limits of the lofty basic standards that it prescribes for the States as well as the Federal Government, maximum opportunity for diversity and minimal imposition of uniformity of method and detail upon the States. Our Constitution sets up a federal union, not a monolith.

This Court has heretofore held that various provisions of the Bill of Rights such as the freedom of speech and religion guarantees of the First Amendment, the prohibition of unreasonable searches and seizures in the Fourth Amendment, the privilege against self-incrimination of the Fifth Amendment, and the right to counsel and to confrontation under the Sixth Amendment "are all to be enforced
against the States under the Fourteenth Amendment according to the same standards that protect those rights against federal encroachment." I need not quarrel with the specific conclusion in those specific instances. But unless one adheres slavishly to the incorporation theory, body and substance, the same conclusion need not be superimposed upon the jury trial right. I respectfully but urgently suggest that it should not be. Jury trial is more than a principle of justice applicable to individual cases. It is a system of administration of the business of the State. * * * We should be ready to welcome state variations which do not impair—indeed, which may advance—the theory and purpose of trial by jury.

JUSTICE HARLAN, whom JUSTICE STEWART joins, dissenting.

Every American jurisdiction provides for trial by jury in criminal cases. The question before us is not whether jury trial is an ancient institution, which it is; nor whether it plays a significant role in the administration of criminal justice, which it does; nor whether it will endure, which it shall. The question in this case is whether the State of Louisiana, which provides trial by jury for all felonies, is prohibited by the Constitution from trying charges of simple battery to the court alone. In my view, the answer to that question, mandated alike by our constitutional history and by the longer history of trial by jury, is clearly "no." * * *

The Court’s approach to this case is an uneasy and illogical compromise among the views of various Justices on how the Due Process Clause should be interpreted. The Court does not say that those who framed the Fourteenth Amendment intended to make the Sixth Amendment applicable to the States. And the Court concedes that it finds nothing unfair about the procedure by which the present appellant was tried. Nevertheless, the Court reverses his conviction: it holds, for some reason not apparent to me, that the Due Process Clause incorporates the particular clause of the Sixth Amendment that requires trial by jury in federal criminal cases—including, as I read its opinion, the sometimes trivial accompanying baggage of judicial interpretation in federal contexts. * * *

A few members of the Court have taken the position that the intention of those who drafted the first section of the Fourteenth Amendment was simply, and exclusively, to make the provisions of the first eight amendments applicable to state action. This view has never been accepted by this Court. In my view [the] first section of the Fourteenth Amendment was meant neither to incorporate, nor to be limited to, the specific guarantees of the first eight amendments. The overwhelming historical evidence marshalled by Professor Fairman demonstrates, to me conclusively, that the Congressmen and state legislators who wrote, debated, and ratified the Fourteenth Amendment did not think they were "incorporating" the Bill of Rights and the very breadth and generality of the Amendment’s provisions suggests that its authors did not suppose that the Nation would always be limited to mid-19th century conceptions of "liberty" and "due process of law" but that the increasing experience and evolving conscience of the American people would add new "intermediate premises." In short, neither history, nor sense, supports using the Fourteenth Amendment to put the States in a constitutional straitjacket with respect to their own development in the administration of criminal or civil law.

Although I therefore fundamentally disagree with the total incorporation view of the Fourteenth Amendment, it seems to me that such a position does at least have the virtue, lacking in the Court’s selective incorporation approach, of internal consistency: we look to the Bill of Rights, word for word, clause for clause, precedent for precedent because, it is said, the men who wrote the Amendment wanted it that way. For those who do not accept this "history," a different source of "intermediate premises" must be found. The Bill of Rights is
not necessarily irrelevant to the search for guidance in interpreting the Fourteenth Amendment, but the reason for and the nature of its relevance must be articulated.

Apart from the approach taken by the absolute incorporationists, I can see only one method of analysis that has any internal logic. That is to start with the words “liberty” and “due process of law” and attempt to define them in a way that accords with American traditions and our system of government. This approach, involving a much more discriminating process of adjudication than does “incorporation,” is, albeit difficult, the one that was followed throughout the Nineteenth and most of the present century. It entails a “gradual process of judicial inclusion and exclusion,” seeking, with due recognition of constitutional tolerance for state experimentation and disparity, to ascertain those “immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.”

The relationship of the Bill of Rights to this “gradual process” seems to me to be twofold. In the first place it has long been clear that the Due Process Clause imposes some restrictions on state action that parallel Bill of Rights restrictions on federal action. Second, and more important than this accidental overlap, is the fact that the Bill of Rights is evidence, at various points, of the content Americans find in the term “liberty” and of American standards of fundamental fairness.

[In *Gideon v. Wainwright* (1963), set forth in Ch. 5, § 1, and other cases], the right guaranteed against the States by the Fourteenth Amendment was one that had also been guaranteed against the Federal Government by one of the first eight amendments. The logically critical thing, however, was not that the rights had been found in the Bill of Rights, but that they were deemed, in the context of American legal history, to be fundamental.

Today’s Court still remains unwilling to accept the total incorporationists’ view of the history of the Fourteenth Amendment. This, if accepted, would afford a cogent reason for applying the Sixth Amendment to the States. The Court is also, apparently, unwilling to face the task of determining whether denial of trial by jury in the situation before us, or in other situations, is fundamentally unfair. Consequently, the Court has compromised on the ease of the incorporationist position, without its internal logic. It has simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is “in” rather than “out.”

The Court has justified neither its starting place nor its conclusion. If the problem is to discover and articulate the rules of fundamental fairness in criminal proceedings, there is no reason to assume that the whole body of rules developed in this Court constituting Sixth Amendment jury trial must be regarded as a unit. The requirement of trial by jury in federal criminal cases has given rise to numerous subsidiary questions respecting the exact scope and content of the right. It surely cannot be that every answer the Court has given, or will give, to such a question is attributable to the Founders; or even that every rule announced carries equal conviction of this Court; still less can it be that every such subprinciple is equally fundamental to ordered liberty.18

18. The same illogical way of dealing with a Fourteenth Amendment problem was employed in *Malloy v. Hogan* [discussed at p. 364], which held that the Due Process Clause guaranteed the protection of the Self-Incrimination Clause of the Fifth Amendment against state action. I disagreed at that time both with the way the question was framed and with the result the Court reached. I consider myself bound by the Court’s holding in *Malloy* with respect to self-incrimination. I do not think that *Malloy* held, nor would I consider myself
Examples abound. I should suppose it obviously fundamental to fairness that a "jury" means an "impartial jury." I should think it equally obvious that the rule, imposed long ago in the federal courts, that "jury" means "jury of exactly twelve," is not fundamental to anything: there is no significance except to mystics in the number 12. Again, trial by jury has been held to require a unanimous verdict of jurors in the federal courts, although unanimity has not been found essential to liberty in Britain, where the requirement has been abandoned.

Even if I could agree that the question before us is whether Sixth Amendment jury trial is totally "in" or totally "out," I can find in the Court's opinion no real reasons for concluding that it should be "in." The basis for differentiating among clauses in the Bill of Rights cannot be that only some clauses are in the Bill of Rights, or that only some are old and much praised, or that only some have played an important role in the development of federal law. These things are true of all. The Court says that some clauses are more "fundamental" than others, but it turns out to be using this word in a sense that would have astonished Mr. Justice Cardozo and which, in addition, is of no help. The word does not mean "analytically critical to procedural fairness" for no real analysis of the role of the jury in making procedures fair is even attempted. Instead, the word turns out to mean "old," "much praised," and "found in the Bill of Rights." The definition of "fundamental" thus turns out to be circular.

Since, as I see it, the Court has not even come to grips with the issues in this case, it is necessary to start from the beginning. When a criminal defendant contends that his state conviction lacked "due process of law," the question before this Court, in my view, is whether he was denied any element of fundamental procedural fairness. Believing, as I do, that due process is an evolving concept and that old principles are subject to re-evaluation in light of later experience, I think it appropriate to deal on its merits with the question whether Louisiana denied appellant due process of law when it tried him for simple assault without a jury.

The argument that jury trial is not a requisite of due process is quite simple. The central proposition of Palko, a proposition to which I would adhere, is that "due process of law" requires only that criminal trials be fundamentally fair. Apart from the theory that it was historically intended as a mere shorthand for the Bill of Rights, I do not see what else "due process of law" can intelligibly be thought to mean. If due process of law requires only fundamental fairness, then the inquiry in each case must be whether a state trial process was a fair one. The Court has held, properly I think, that in an adversary process it is a requisite of fairness, for which there is no adequate substitute, that a criminal defendant be afforded a right to counsel and to cross-examine opposing witnesses. But it simply has not been demonstrated, nor, I think, can it be demonstrated, that trial by jury is the only fair means of resolving issues of fact.

The jury is of course not without virtues. It affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law. It eases the burden on judges by enabling them to share a part of their sometimes awesome responsibility. A jury, at times, afford a higher justice by refusing to enforce harsh laws (although it necessarily does so haphazardly, raising the questions whether arbitrary enforcement of harsh laws is better than total enforcement, and whether the jury system is to be defended on the ground that jurors sometimes disobey their oaths). And

bound by a holding, that every question arising under the Due Process Clause shall be settled by an arbitrary decision whether a clause in the Bill of Rights is "in" or "out."
the jury may, or may not, contribute desirably to the willingness of the general public to accept criminal judgments as just.

It can hardly be gainsaid, however, that the principal original virtue of the jury trial—the limitations a jury imposes on a tyrannous judiciary—has largely disappeared. We no longer live in a medieval or colonial society. Judges enforce laws enacted by democratic decision, not by regal fiat. They are elected by the people or appointed by the people’s elected officials, and are responsible not to a distant monarch alone but to reviewing courts, including this one.

The jury system can also be said to have some inherent defects, which are multiplied by the emergence of the criminal law from the relative simplicity that existed when the jury system was devised. It is a cumbersome process, not only imposing great cost in time and money on both the State and the jurors themselves, but also contributing to delay in the machinery of justice. Untrained jurors are presumably less adept at reaching accurate conclusions of fact than judges, particularly if the issues are many or complex. And it is argued by some that trial by jury, far from increasing public respect for law, impairs it: the average man, it is said, reacts favorably neither to the notion that matters he knows to be complex are being decided by other average men, nor to the way the jury system distorts the process of adjudication.

That trial by jury is not the only fair way of adjudicating criminal guilt is well attested by the fact that it is not the prevailing way, either in England or in this country. *

In the United States, where it has not been as generally assumed that jury waiver is permissible, the statistics are only slightly less revealing. Two experts have estimated that, of all prosecutions for crimes triable to a jury, 75% are settled by guilty plea and 40% of the remainder are tried to the court. In one State, Maryland, which has always provided for waiver, the rate of court trial appears in some years to have reached 90%. The Court recognizes the force of these statistics in stating, “We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.” I agree. I therefore see no reason why this Court should reverse the conviction of appellant, absent any suggestion that his particular trial was in fact unfair, or compel the State of Louisiana to afford jury trial in an as yet unbounded category of cases that can, without unfairness, be tried to a court.

Indeed, even if I were persuaded that trial by jury is a fundamental right in some criminal cases, I could see nothing fundamental in the rule, not yet formulated by the Court, that places the prosecution of appellant for simple battery within the category of “jury crimes” rather than “petty crimes.”

[The] point is not that many offenses that English-speaking communities have, at one time or another, regarded as triable without a jury are more serious, and carry more serious penalties, than the one involved here. The point is rather that until today few people would have thought the exact location of the line mattered very much. There is no obvious reason why a jury trial is a requisite of fundamental fairness when the charge is robbery, and not a requisite of fairness when the same defendant, for the same actions, is charged with assault and petit theft. The reason for the historic exception for relatively minor crimes is the obvious one: the burden of jury trial was thought to outweigh its marginal advantages. Exactly why the States should not be allowed to make continuing adjustments, based on the state of their criminal dockets and the difficulty of summoning jurors, simply escapes me.
In sum, there is a wide range of views on the desirability of trial by jury, and on the ways to make it most effective when it is used; there is also considerable variation from State to State in local conditions such as the size of the criminal caseload, the ease or difficulty of summoning jurors, and other trial conditions bearing on fairness. We have before us, therefore, an almost perfect example of a situation in which the celebrated dictum of Mr. Justice Brandeis should be invoked. It is, he said, "one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory \* \* \*\" New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (dissenting opinion). This Court, other courts, and the political process are available to correct any experiments in criminal procedure that prove fundamentally unfair to defendants. That is not what is being done today: instead, and quite without reason, the Court has chosen to impose upon every State one means of trying criminal cases; it is a good means, but it is not the only fair means, and it is not demonstrably better than the alternatives States might devise. \* \* \* \n
SECTION 3. IS THERE A DUE PROCESS RIGHT TO TECHNOLOGY THAT MIGHT ESTABLISH ONE'S INNOCENCE?

DISTRICT ATTORNEY'S OFFICE v. OSBORNE


CHIEF JUSTICE Roberts delivered the opinion of the Court.

[In 1993, respondent Osborne was convicted of kidnapping and sexual assault. He claimed that at trial he had asked his attorney to seek DNA testing of biological evidence on a condom found at the scene of the crime, but she refused.

b. Post-Duncan jury trial cases arguably seemed to confirm Justice Harlan's warning that "selective incorporation" might lead to dilution in federal cases of Bill of Rights "specifics." In Williams v. Florida, 399 U.S. 78 (1970), the Court reconsidered the scope of the right to jury trial, concluded that the fact "that [the] jury at common law was composed of precisely 12 is an historical accident, unnecessary to effect the purposes of the jury system," and concluded that the Sixth Amendment permitted six-person juries in state or federal non-capital felony cases. Concurrence in the result, Justice Harlan charged that "before today it would have been unthinkable to suggest that the Sixth Amendment's right to a trial by jury is satisfied by a jury of six, or less, as is left open, for, by less than a unanimous verdict, a question also reserved in today's decision."

The issues left open in Duncan—whether the jury could be less than 6 and whether a verdict could be less than unanimous—were decided in cases discussed in Chapter 15, § 1. One of those cases, Apodaca v. Oregon, 406 U.S. 404 (1972), produced a result inconsistent with Duncan's selective incorporation analysis although a clear majority favored that analysis. In Apodaca, eight members of the Court—all but newly appointed Justice Powell—adhered to the Duncan approach that each element of the Sixth Amendment Jury Trial Clause applies to the states to the same extent it applies to the federal government, but these eight Justices split 4-4 over whether the Sixth Amendment did require unanimity in federal criminal cases. The deadlock was broken by Justice Powell, but broken in two different directions. He read the Sixth Amendment to require unanimity in federal cases, but concluded that this feature of the Jury Trial Clause is not "so fundamental to the essentials of jury trial" as to require unanimity in state cases as a matter of Fourteenth Amendment Due Process. Justice Powell reached these positions by adopting a Harlan-type approach to Fourteenth Amendment Due Process: "Although it is perhaps late in the day for an expression of my views, I [believe] that, at least in defining the elements of the right to jury trial, there is no sound basis for interpreting the Fourteenth Amendment to require blind adherence by the States to all details of the federal Sixth Amendment standards." Thus, Apodaca produced an 8-1 majority reaffirming the view that the Jury Trial Clause is to be enforced against the states to the same extent it applies to the federal government, a 5-4 majority that would hold that the Sixth Amendment does require a unanimous verdict in federal criminal trials, and a 5-4 majority that upheld a less than unanimous verdict (10-2) in a state case.
His lawyer testified that she refused for various reasons, including her belief her client was guilty. This led her to conclude that further testing would do more harm than good. There was considerable evidence of Osborne’s guilt. Moreover, he confessed to the parole board, which released him after 14 years. Osborne subsequently claimed he lied to the parole board because he hoped his lie would lead to a quicker release. Osborne was recently rearrested for another crime and the state has petitioned to revoke his parole.

[Osborne asked the Alaska Court of Appeals to provide the DNA testing that his trial lawyer had failed to request. But that court denied relief, relying heavily on the fact that Osborne had confessed to some of his crimes in an application for parole. Osborne also brought a federal action under § 1983 claiming that the Due Process Clause entitled him to a form of DNA testing more discriminating than the methods available at the time of his trial. A federal district court concluded that Osborne had a right, but a very limited one, to the testing sought. The U.S. Court of Appeals for the Ninth Circuit affirmed, concluding that the prosecutorial duty to disclose exculpatory evidence extends the government’s duty (or the defendant’s right of access) to post-conviction proceedings. Although it acknowledged that Osborne’s prior admissions of guilt were certainly relevant, the Ninth Circuit concluded that they did not “necessarily trump” the right to obtain post-conviction relief, considering the “emerging reality of wrongful convictions based on false confessions.”]

DNA testing has an unparalleled ability to exonerate the wrongly convicted and to identify the guilty.* It has the potential to significantly improve both the criminal justice system and police investigative practices. The Federal Government and the States have recognized this, and have developed special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal procedure—usually but not always through legislation.

Against this prompt and considered response, the [respondent,] William Osborne, proposes a different approach. [His] approach would take the development [in] this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause. There is no reason to constitutionalize the issue in this way. * * *

DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent. The availability of technologies not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt. The dilemma is how to harness DNA’s power to prove innocence without necessarily overthrowing the established system of criminal justice.

That task belongs primarily to the legislature. * * * Forty-six States have already enacted statutes dealing specifically with access to DNA evidence. [The] Federal Government has also passed the Innocence Protection Act of 2004, which allows federal prisoners to move for court-ordered DNA testing under certain specified conditions. That Act also grants money to States that enact comparable statutes.

[These] laws recognize the value of DNA evidence but also the need for certain conditions on access to the State’s evidence. A requirement of demonstrat-

a. According to the Innocence Project at Cardozo Law School, which represented respondent Osborne, DNA testing has played a role in 240 exonerations and in 103 of those cases the testing also identified the actual perpetrator. Adam Liptak, Court Rejects Inmate Rights to DNA Tests, New York Times, June 19, 2009, p.1.
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ing materiality is common, but is not the only one. The federal statute, for example, requires a sworn statement that the applicant is innocent. States also impose a range of diligence requirements. Several require the requested testing to “have been technologically impossible at trial.” Others deny testing to those who declined testing at trial for tactical reasons.

Alaska is one of a handful of States yet to enact legislation specifically addressing the issue of evidence requested for DNA testing. But that does not mean that such evidence is unavailable for those seeking to prove their innocence. Instead, Alaska courts are addressing how to apply existing laws for discovery and postconviction relief to this novel technology.

First, access to evidence is available under Alaska law for those who seek to subject it to newly available DNA testing that will prove them to be actually innocent. Under the State’s general postconviction relief statute, a prisoner may challenge his conviction when “there exists evidence of material facts, not previously presented and heard by the court, that requires vacation of the conviction or sentence in the interest of justice.” Such a claim is exempt from otherwise applicable time limits if “newly discovered evidence,” pursued with due diligence, “establishes by clear and convincing evidence that the applicant is innocent.”

Both parties agree that under these provisions “a defendant is entitled to post-conviction relief if the defendant presents newly discovered evidence that establishes by clear and convincing evidence that the defendant is innocent.” If such a claim is brought, state law permits general discovery. Alaska courts have explained that these procedures are available to request DNA evidence for newly available testing to establish actual innocence.

In addition to this statutory procedure, the Alaska Court of Appeals has invoked a widely accepted three-part test to govern additional rights to DNA access under the State Constitution. Drawing on the experience with DNA evidence of State Supreme Courts around the country, the Court of Appeals explained that it was “reluctant to hold that Alaska law offers no remedy to defendants who could prove their factual innocence.” It was “prepared to hold, however, that a defendant who seeks post-conviction DNA testing . . . must show (1) that the conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning the defendant’s identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue.” Thus, the Alaska’s courts have suggested that even those who do not get discovery under the State’s criminal rules have available to them a safety valve under the State Constitution.

This is the background against which the Federal Court of Appeals ordered the State to turn over the DNA evidence in its possession, and it is our starting point in analyzing Osborne’s constitutional claims.

[The Due Process Clause] imposes procedural limitations on a State’s power to take away protected entitlements. Osborne argues that access to the State’s evidence is a “process” needed to vindicate his right to prove himself innocent and get out of jail. Process is not an end in itself, so a necessary premise of this argument is that he has an entitlement (what our precedents call a “liberty interest”) to prove his innocence even after a fair trial has proved otherwise. We must first examine this asserted liberty interest to determine what process (if any) is due.

Osborne [does] have a liberty interest in demonstrating his innocence with new evidence under state law. As explained, Alaska law provides that those who use “newly discovered evidence” to “establish[h] by clear and convincing evidence
that [they are] innocent' may obtain "vacation of [their] conviction or sentence in the interest of justice." This "state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right."

The Court of Appeals went too far, however, in concluding that the Due Process Clause requires that certain familiar preconviction trial rights be extended to protect Osborne's postconviction liberty interest. * * *

A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man. At trial, the defendant is presumed innocent and may demand that the government prove its case beyond reasonable doubt. But "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." *Herrara v. Collins* (fn. b infra). The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief. * * * 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. * * * The question is whether consideration of Osborne's claim within the framework of the State's procedures for postconviction relief "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or "transgresses any recognized principle of fundamental fairness in operation." Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.

We see nothing inadequate about the procedures Alaska has provided to vindicate its state right to postconviction relief in general, and nothing inadequate about how those procedures apply to those who seek access to DNA evidence. Alaska provides a substantive right to be released on a sufficiently compelling showing of new evidence that establishes innocence. It exempts such claims from otherwise applicable time limits. The State provides for discovery in postconviction proceedings, and has—through judicial decision—specified that this discovery procedure is available to those seeking access to DNA evidence. These procedures are not without limits. The evidence must indeed be newly available to qualify under Alaska's statute, must have been diligently pursued, and must also be sufficiently material. These procedures are similar to those provided for DNA evidence by federal law and the law of other States. * * *

His attempt to sidestep state process through a new federal lawsuit puts Osborne in a very awkward position. If he simply seeks the DNA through the State’s discovery procedures, he might well get it. If he does not, it may be for a perfectly adequate reason, just as the federal statute and all state statutes impose conditions and limits on access to DNA evidence. It is difficult to criticize the State's procedures when Osborne has not invoked them. [These] procedures are adequate on their face, and without trying them. Osborne can hardly complain that they do not work in practice.

As a fallback, Osborne also obliquely relies on an asserted federal constitutional right to be released upon proof of "actual innocence." Whether such a federal right exists is an open question. We have struggled with it over the years, in some cases assuming, arguendo, that it exists while also noting the difficult questions such a right would pose and the high standards any claimant would have to meet. *House v. Bell; Herrera v. Collins.* In this case too we can assume

b. In *Herrara v. Collins*, 506 U.S. 390 (1993), the Court considered whether federal habeas relief was available for claims of "bare innocence," and if so, when such claims re-
without deciding that such a claim exists, because even if there is no due process problem. Osborne does not dispute that a federal actual innocence claim (as opposed to a DNA access claim) would be brought in habeas. If such a habeas claim is viable, federal procedural rules permit discovery "for good cause." Just as with state law, Osborne cannot show that available discovery is facially inadequate, and cannot show that it would be arbitrarily denied to him.

The Court of Appeals below relied only on procedural due process, but Osborne seeks to defend the judgment on the basis of substantive due process as well. He asks that we recognize a freestanding right to DNA evidence untethered from the liberty interests he hopes to vindicate with it. We reject the invitation and conclude, in the circumstances of this case, that there is no such substantive due process right. "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Osborne seeks to access to state evidence so that he can apply new DNA-testing technology that might prove him innocent. There is no long history of such a right, and "[t]he mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it."

And there are further reasons to doubt. The elected governments of the States are actively confronting the challenges DNA technology poses to our criminal justice systems and our traditional notions of finality, as well as the opportunities it affords. To suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered legislative response. "By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field." We are reluctant to enlist the Federal Judiciary in creating a new constitutional code of rules for handling DNA.

Establishing a freestanding right to access DNA evidence for testing would force us to act as policymakers, and our substantive-due-process rulemaking authority would not only have to cover the right of access but a myriad of other

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Quoted text:

Establishing a freestanding right to access DNA evidence for testing would force us to act as policymakers, and our substantive-due-process rulemaking authority would not only have to cover the right of access but a myriad of other

required relief. Herrera had been convicted of murder and sentenced to death, but claimed that several new affidavits demonstrated that his brother had committed the crime. State law required defendants to bring motions for new trial based on newly discovered evidence within a short time after trial. Herrera had missed this deadline having raised this evidence eight years after trial, so a state challenge to his conviction and sentence was unavailable. He argued in federal court that the execution of an innocent man would violate the Eighth and Fourteenth Amendments, although he alleged no constitutional violation during the state prosecution. A majority of the justices seemed to agree that in extremely unusual circumstances, a claim of innocence, even one unaccompanied by a separate constitutional claim, could compel relief. Justice Rehnquist wrote: "We 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 warrant the execution of a defendant unconstitutional, and warrants federal habeas relief if there were no state avenue open to process such a claim." The "threshold showing for such an assumed right would necessarily be extraordinarily high," and Herrera's showing fell "far short of any such threshold."

In House v. Bell, 547 U.S. 518 (2006), the Court again declined to decide whether federal habeas courts have authority to review a freestanding claim of actual innocence as a basis for invalidating a state conviction or death sentence. Although House had managed to gather new witnesses, as well as DNA and other forensic evidence that "cast considerable doubt on his guilt," so much so that the Court found that it was "more likely than not that no reasonable juror would have convicted him in the light of the new evidence," his was "not a case of conclusive exoneration," and fell "short of the threshold implied in Herrera." The Court did remand the case for consideration of House's other constitutional claims (failure to disclose exculpatory evidence and ineffective assistance of counsel). A federal court subsequently found in Herrera's favor on those claims and ordered him released or retried. In May of 2009, after House had spent more than twenty years on death row, the state prosecutor dropped all charges.
issues. We would soon have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested. Cf. Arizona v. Youngblood, [fn. b, p. 627]. If so, for how long? Would it be different for different types of evidence? Would the State also have some obligation to gather such evidence in the first place? How much and when? No doubt there would be a miscellany of other minor directives.

DNA evidence will undoubtedly lead to changes in the criminal justice system. It has done so already. The question is whether further change will primarily be made by legislative revision and judicial interpretation of the existing system, or whether the Federal Judiciary must leap ahead—revising (or even discarding) the system by creating a new constitutional right and taking over responsibility for refining it. * * * Federal courts should not presume that state criminal procedure will be inadequate to deal with technological change. * * *

JUSTICE ALITO, with whom JUSTICE KENNEDY joins, and with whom JUSTICE THOMAS joins as to Part II, concurring.

I agree with the Court's resolution of respondent's constitutional claim, [but also believe that the] claim also fails for two independent reasons beyond those given by the majority. First, a state prisoner asserting a federal constitutional right to perform [DNA] testing must file a petition for a writ of habeas corpus, not [a § 1983 action], as respondent did here, and thus must exhaust state remedies. Second, [his] claim may be rejected on the merits because a defendant who declines the opportunity to perform DNA testing at trial for tactical reasons has no constitutional right to perform such testing after conviction. * * *

II

[DNA] evidence creates special opportunities, risks, and burdens that implicate important state interests. Given those interests—and especially in light of the rapidly evolving nature of DNA testing technology—this is an area that should be (and is being) explored “through the workings of normal democratic processes in the laboratories of the States.” Justice Stevens argues that the State should welcome respondent’s offer to perform modern DNA testing (at his own expense) on the State’s DNA evidence; the test will either confirm respondent’s guilt (in which case the State has lost nothing) or exonerate him (in which case the State has no valid interest in detaining him). Alas, it is far from that simple. First, DNA testing—even when performed with modern STR technology and even when performed in perfect accordance with protocols—often fails to provide “absolute proof” of anything. * * [That limitation applies] with particular force where, as here, the sample is minuscule, it may contain three or more persons' DNA, and it may have degraded significantly during the 24 or more hours it took police to recover it. Second, the State has important interests in maintaining the integrity of its evidence, and the risks associated with evidence contamination increase every time someone attempts to extract new DNA from a sample. * * * Indeed, modern DNA testing technology is so powerful that it actually increases the risks associated with mishandling evidence. * * * Third, even if every test was guaranteed to provide a conclusive answer, and even if no one ever contaminated a DNA sample, that still would not justify disregarding the other costs associated with the DNA-access regime proposed by respondent. * * * Even without our creation and imposition of a mandatory-DNA-access regime, state crime labs are already responsible for maintaining and controlling hundreds of thousands of new DNA samples every year. * * * The resources required to process and analyze these hundreds of thousands of samples have created severe backlogs in state crime labs across the country. * * *
My point in recounting the burdens that postconviction DNA testing imposes on the Federal Government and the States is not to denigrate the importance of such testing. Instead, my point is that requests for postconviction DNA testing are not cost free. The Federal Government and the States have a substantial interest in the implementation of rules that regulate such testing in a way that harnesses the unique power of DNA testing while also respecting the important governmental interests noted above. * * * When a criminal defendant, for tactical purposes, passes up the opportunity for DNA testing at trial, that defendant, in my judgment, has no constitutional right to demand to perform DNA testing after conviction. Recognition of such a right would allow defendants to play games with the criminal justice system. A guilty defendant could forgo DNA testing at trial for fear that the results would confirm his guilt, and in the hope that the other evidence would be insufficient to persuade the jury to find him guilty. Then, after conviction, with nothing to lose, the defendant could demand DNA testing in the hope that some happy accident—for example, degradation or contamination of the evidence—would provide the basis for seeking postconviction relief. Denying the opportunity for such an attempt to game the criminal justice system should not shock the conscience of the Court. There is ample evidence in this case that respondent attempted to game the system. * * *

Justice Stevens contends that respondent should not be bound by his attorney’s tactical decision and notes that respondent testified in the state postconviction proceeding that he strongly objected to his attorney’s strategy. His attorney, however, had no memory of that objection, and the state court did not find that respondent’s testimony was truthful.

[In] any event, even assuming for the sake of argument that respondent did object at trial to his attorney’s strategy, it is a well-accepted principle that, except in a few carefully defined circumstances, a criminal defendant is bound by his attorney’s tactical decisions unless the attorney provided constitutionally ineffective assistance. Here, the state postconviction court rejected respondent’s ineffective-assistance claim; respondent does not challenge that holding; and we must therefore proceed on the assumption that his attorney’s decision was reasonable and binding.

If a state prisoner wants to challenge the State’s refusal to permit postconviction DNA testing, the prisoner should proceed under the habeas statute, which duly accounts for the interests of federalism, comity, and finality. And in considering the merits of such a claim, the State’s weighty interests cannot be summarily dismissed as “arbitrary, or conscience shocking” [referring to language in Justice Stevens’ dissenting opinion].

Justice Stevens, with whom Justice Ginsburg and Justice Breyer join, and with whom Justice Souter joins as to Part I, dissenting.

The State of Alaska possesses physical evidence that, if tested, will conclusively establish whether [respondent] committed rape and [other crimes]. If he did, justice has been served. [If not, Osborne has needlessly spent decades behind bars while the true culprit has not been brought to justice. [Yet] for reasons the State has been unable or unwilling to articulate, it refuses to allow Osborne to test the evidence at his own expense and to thereby ascertain the truth once and for all.

I

[Osborne] first anchors his due process right in [Alaska’s postconviction statute]. Although States are under no obligation to provide mechanisms for postconviction relief, when they choose to do so, the procedures they employ must
comport with the demands of the Due Process Clause by providing litigants with fair opportunity to assert their state-created rights.

(In) determining that Osborne was not entitled to relief under [Alaska's] postconviction statute, the Alaska Court of Appeals concluded that the DNA testing Osborne wished to obtain could not qualify as "newly discovered" because it was available at the time of trial. [However, as Osborne has made plain, he had requested] a form of DNA testing not yet in use at the time of his trial. [The state appellate court's conclusion to the contrary] was therefore clearly erroneous.

[The] same holds true with respect to the majority's suggestion that the Alaska Constitution might provide additional protections to Osborne above and beyond those afforded under [the state's postconviction statute]. In Osborne's state postconviction proceedings, the Alaska Court of Appeals held out the possibility that even when evidence does not meet the requirements of [the state postconviction statute], the State Constitution might offer relief to a defendant [able] to make certain threshold showings. On remand from that decision, however, the state trial court denied Osborne relief on the ground that he failed to show that (1) his conviction rested primarily on eyewitness identification; (2) there was a demonstrable doubt concerning his identity as the perpetrator; and (3) scientific testing would likely be conclusive on this issue.

[The] first two reasons reduce to an evaluation of the strength of the prosecution's original case—a consideration that carries little weight when balanced against evidence as powerfully dispositive as an exculpatory DNA test. [As for the final reason offered by the state court, the] conclusion that such testing would not be conclusive in this case is indefensible, as evidenced by the State's recent concession on that point.

[Osborne] made full use of available state procedures in his efforts to secure access to evidence for DNA testing so that he might avail himself of the postconviction relief afforded by the State of Alaska. He was rebuffed at every turn. The manner in which the Alaska courts applied state law in this case leaves me in grave doubt about the adequacy of the procedural protections afforded to litigants under [the state's postconviction statute].

II

Wholly apart from his state-created interest in obtaining postconviction relief under [state law], Osborne asserts a right to access the State's evidence that derives from the Due Process Clause itself. Whether framed as a "substantive liberty interest [protected] through a procedural due process right" to have evidence made available for testing, or as a substantive due process right to be free of arbitrary government action, the result is the same: On the record now before us, Osborne has established his entitlement to test the State's evidence.

The liberty protected by the Due Process Clause is not a creation of the Bill of Rights. Indeed, our Nation has long recognized that the liberty safeguarded by the Constitution has far deeper roots. [The] "most elemental" of the liberties protected by the Due Process Clause is "the interest in being free from physical detention by one's own government." *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion).

Although a valid criminal conviction justifies punitive detention, it does not entirely eliminate the liberty interests of convicted persons. * * * Our cases have recognized protected interests in a variety of postconviction contexts, extending substantive constitutional protections to state prisoners on the premise that the Due Process Clause of the Fourteenth Amendment requires States to respect certain fundamental liberties in the postconviction context. [It] is therefore far too
late in the day to question the basic proposition that convicted persons such as Osborne retain a constitutionally protected measure of interest in liberty, including the fundamental liberty of freedom from physical restraint.

Recognition of this right draws strength from the fact that 46 States and the Federal Government have passed statutes providing access to evidence for DNA testing, and 3 additional states (including Alaska) provide similar access through court-made rules alone. These legislative developments are consistent with recent trends in legal ethics recognizing that prosecutors are obliged to disclose all forms of exculpatory evidence that come into their possession following conviction. [The] fact that nearly all the States have now recognized some post-conviction right to DNA evidence makes it more, not less, appropriate to recognize a limited federal right to such evidence in cases where litigants are unfairly barred from obtaining relief in state court. * * * Recent scientific advances in DNA analysis have made "it literally possible to confirm guilt or innocence beyond any question whatsoever, at least in some categories of cases." As the Court recognizes today, the powerful new evidence that modern DNA testing can provide is "unlike anything known before." * * *

Observing that the DNA evidence in this case would be so probative of Osborne's guilt or innocence that it exceeds the materiality standard that governs the disclosure of evidence under Brady v. Maryland [p. 615], the Ninth Circuit granted Osborne's request for access to the State's evidence. In doing so, [it] recognized that Osborne possesses a narrow right of postconviction access to biological evidence for DNA testing "where [such] evidence was used to secure his conviction, the DNA testing is to be conducted using methods that were unavailable at the time of trial and are far more precise than the methods that were then available, such methods are capable of conclusively determining whether Osborne is the source of the genetic material, the testing can be conducted without cost or prejudice to the State, and the evidence is material to available forms of post-conviction relief." That conclusion does not merit reversal.

If the right Osborne seeks to vindicate is framed as purely substantive, the proper result is no less clear. "The touchstone of due process is protection of the individual against arbitrary action of government." When government action is so lacking in justification that it "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense," it violates the Due Process Clause. In my view, the State's refusal to provide Osborne with access to evidence for DNA testing qualifies as arbitrary.

Throughout the course of state and federal litigation, the State has failed to provide any concrete reason for denying Osborne the DNA testing he seeks, and none is apparent. Because Osborne has offered to pay for the tests, cost is not a factor. And as the State now concedes, there is no reason to doubt that such testing would provide conclusive confirmation of Osborne's guilt or revelation of his innocence. [Insofar] as the State has articulated any reason at all, it appears to be a generalized interest in protecting the finality of the judgment of conviction from any possible future attacks. While we have long recognized that States have an interest in securing the finality of their judgments, finality is not a stand-alone value that trumps a State's overriding interest in ensuring that justice is done in its courts and secured to its citizens. * * * DNA evidence has led to an extraordinary series of exonerations, not only in cases where the trial evidence was weak, but also in cases where the convicted parties confessed their guilt and where the trial evidence against them appeared overwhelming.

[The] arbitrariness of the State's conduct is highlighted by comparison to the private interests it denies. It seems to me obvious that if a wrongly convicted
person were to produce proof of his actual innocence, no state interest would be sufficient to justify his continued punitive detention. If such proof can be readily obtained without imposing a significant burden on the State, a refusal to provide access to such evidence is wholly unjustified.

[In] this case, the State has suggested no countervailing interest that justifies its refusal to allow Osborne to test the evidence in its possession and has not provided any other nonarbitrary explanation for its conduct. Consequently, I am left to conclude that the State’s failure to provide Osborne access to the evidence constitutes arbitrary action that offends basic principles of due process.

III

[The] majority [asserts] that this Court’s recognition of a limited federal right of access to DNA evidence would be ill advised because it would “short circuit what looks to be a prompt and considered legislative response” by the States and Federal Government to the issue of access to DNA evidence. [The] majority’s arguments in this respect bear close resemblance to the manner in which the Court once approached the now-venerable right to counsel for indigent defendants. Before our decision in *Powell v. Alabama* (1932) [p. 318], state law alone governed the manner in which counsel was appointed for indigent defendants. [When] at last this Court recognized the Sixth Amendment right to counsel for all indigent criminal defendants in *Gideon v. Wainwright* (1963) [Ch. 5, § 1], our decision did not impede the ability of States to tailor their appointment processes to local needs, nor did it unnecessarily interfere with their sovereignty. It did, however, ensure that criminal defendants were provided with the counsel to which they were constitutionally entitled. In the same way, a decision to recognize a limited right of postconviction access to DNA testing would not prevent the States from creating procedures by which litigants request and obtain such access; it would merely ensure that States do so in a manner that is nonarbitrary.* * *

IV

Osborne has demonstrated a constitutionally protected right to due process which the State of Alaska thus far has not vindicated and which this Court is both empowered and obliged to safeguard. On the record before us, there is no reason to deny access to the evidence and there are many reasons to provide it, not least of which is a fundamental concern in ensuring that justice has been done in this case.* * *

JUSTICE SOUTER, dissenting.

I respectfully dissent on the ground that Alaska has failed to provide the effective procedure required by the Fourteenth Amendment for vindicating the liberty interest in demonstrating innocence that the state law recognizes. I therefore join Part I of Justice Steven’s dissenting opinion.

I would not decide Osborne’s broad claim that the Fourteenth Amendment’s guarantee of due process requires our recognition at this time of a substantive right of access to biological evidence for DNA analysis and comparison. I would reserve judgment on the issue simply because there is no need to reach it; at a general level Alaska does not deny a right to postconviction testing to prove innocence, and in any event, Osborne’s claim can be resolved by resort to the procedural due process requirement of an effective way to vindicate a liberty interest already recognized in state law. My choice to decide this case on that procedural ground should not, therefore, be taken either as expressing skepticism that a new substantive right to test should be cognizable in some circumstances, or as implying agreement with the Court that it would necessarily be premature.
for the Judicial Branch to decide whether such a general right should be recognized.

There is no denying that the Court is correct when it notes that a claim of right to DNA testing, post-trial at that, is a novel one, but that only reflects the relative novelty of testing DNA, and in any event is not a sufficient reason alone to reject the right asserted. Tradition is of course one serious consideration in judging whether a challenged rule or practice, or the failure to provide a new one, should be seen as violating the guarantee of substantive due process as being arbitrary, or as falling wholly outside the realm of reasonable governmental action. See Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). We recognize the value and lessons of continuity with the past, but as Justice Harlan pointed out, society finds reasons to modify some of its traditional practices and the accumulation of new empirical knowledge can turn yesterday's reasonable range of the government's options into a due process anomaly over time. * * *

Changes in societal understanding of the fundamental reasonableness of government actions work out in much the same way that individuals reconsider issues of fundamental belief. We can change our own inherited views just so fast, and a person is not labeled a stick-in-the-mud for refusing to endorse a new moral claim without having some time to work through it intellectually and emotionally. Just as attachment to the familiar and the limits of experience affect the capacity of an individual to see the potential legitimacy of a moral position, the broader society needs the chance to take part in the dialectic of public and political back and forth about a new liberty claim before it makes sense to declare unsympathetic state or national laws arbitrary to the point of being unconstitutional. The time required is a matter for judgment depending on the issue involved, but the need for some time to pass before a court entertains a substantive due process claim on the subject is not merely the requirement of judicial restraint as a general approach, but a doctrinal demand to be satisfied before an allegedly lagging legal regime can be held to lie beyond the discretion of reasonable political judgment.

Despite my agreement with the Court on this importance of timing, though, I do not think that the doctrinal requirement necessarily stands in the way of any substantive due process consideration of a postconviction right to DNA testing, even as a right that is freestanding. Given the pace at which DNA testing has come to be recognized as potentially dispositive in many cases with biological evidence, there is no obvious argument that considering DNA testing at a general level would subject wholly intransigent legal systems to substantive due process review prematurely. But, as I said, there is no such issue before us, for Alaska does not flatly deny access to evidence for DNA testing in postconviction cases.

Standing alone, the inadequacy of each of the State's reasons for denying Osborne access to the DNA evidence he seeks would not make out a due process violation. But taken as a whole the record convinces me that, while Alaska has created an entitlement of access to DNA evidence under conditions that are facially reasonable, the State has demonstrated a combination of inattentiveness and intransigence in applying those conditions that add up to procedural unfairness that violates the Due Process Clause.

SECTION 4. THE RETROACTIVE EFFECT OF A HOLDING OF UNCONSTITUTIONALITY

Prior to Linkletter v. Walker, 381 U.S. 618 (1965), the Supreme Court applied its new constitutional rulings to all cases subsequently considered on appeal (see

4. This Court is not in a position to correct individual errors of the Alaska Court of Appeals or Alaska officials, as § 1983 does not serve as a mechanism to review specific, unfavorable state-law determinations.
The Court’s approach to retroactivity then took a number of twists and turns. *Stovall v. Denno*, 388 U.S. 293 (1967), declined to give retroactive effect to the 1967 “lineup cases” (Ch. 7, § 1) failing to draw a distinction between final convictions attacked collaterally and challenges presented in cases that were still in the process of “direct review” (i.e., cases that were pending before the trial court or on appeal following a conviction). *Stovall* held that the lineup cases “affect only those cases [involving] confrontations for identification purposes conducted in the absence of counsel after [the date of these decisions].” (Emphasis added.)

*Desist v. United States*, 394 U.S. 244 (1969), also perceived no significant distinction between direct review and collateral attack. Thus it ruled that *Katz v. United States*, 389 U.S. 347 (1967) (Ch. 3, § 1), (holding that electronic surveillance is subject to Fourth Amendment restraints regardless of whether the surveillance violated protected areas), should be given what the Court called “wholly prospective application,” i.e., applied only to *police activity occurring after the date of the Katz decision*. However, Justice Harlan wrote what turned out to be a highly influential dissenting opinion. He maintained that “all ‘new’ rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the ‘new’ decision is handed down.”

More than a decade after the *Desist* Court had found no valid distinction for retroactivity purposes between final convictions and cases still pending on direct review, *United States v. Johnson*, 457 U.S. 537 (1982)—relying heavily on Justice Harlan’s dissent in *Desist*—deemed such a distinction persuasive and applied it. *Johnson* dealt with *Payton v. New York*, 445 U.S. 573 (1980) (Ch. 3, § 6) (holding that police must obtain an arrest warrant before entering a suspect’s home to make a routine felony arrest), applying the new ruling to cases still pending on direct review at the time *Payton* was decided.

*Johnson* was reaffirmed in *Shea v. Louisiana*, 470 U.S. 51 (1981). In defending the distinction between a case pending on direct review and one on collateral attack, Justice Blackmun observed for a 5-4 majority: “The one litigant already has taken his case through the primary system. The other [someone like Shea] has not. For the latter, the curtain of finality has not been drawn. Somewhere, the closing must come.”

Answering a question left open in the *Johnson* and *Shea* cases, *Griffith v. Kentucky*, 479 U.S. 314 (1987), applied *Batson v. Kentucky*, 476 U.S. 79 (1986) (Ch. 15, § 2), to all convictions not final at the time of the ruling *even though Batson* was “an explicit and substantial break with the past.” *Batson* had held that a defendant may establish a prime facie case of racial discrimination in the selection of the petit jury on the basis of the prosecution’s use of peremptory
challenges at the defendant's trial.) A 6-3 majority defended its rejection of the "clear break" exception on the ground that "the fact that the new rule may constitute a clear break with the past has no bearing on the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule."

Although Justice Harlan believed that new rulings should always be applied retroactively to cases on direct review (the view adopted in Shea), he was also of the view that generally new rulings should not be applied retroactively on collateral review. In Teague v. Lane, 489 U.S. 288 (1989), seven members of the Court adopted Harlan's basic position with respect to retroactivity on collateral review. However, there was no clear majority as to what the exceptions to this general approach should be.

In a plurality opinion that subsequently was adopted by a majority of the Court, Justice O'Connor, joined by Rehnquist, C.J., and Scalia and Kennedy, J.J., maintained that generally on collateral review a court should evaluate a conviction by reference to "the law prevailing at the time [the] conviction became final," i.e., at the time when the opportunity for direct review was exhausted. In describing the "new rule" concept, the O'Connor plurality stated that "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Later cases made clear that a result was not so dictated simply because it followed from the general rationale of that precedent.

The O'Connor plurality identified two exceptions to its general approach: A new ruling should be applied retroactively to cases on collateral review only (1) if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'" or (2) if it mandates "new procedures without which the likelihood of an accurate conviction is seriously diminished."

As the Court later explained in Sawyer v. Smith, 497 U.S. 227 (1990), "the second Teague exception applies to new 'watershed rules of criminal procedure' that are necessary to the fundamental fairness of the criminal proceeding. [It] is thus not enough under Teague to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also 'alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding Teague. [The] scope of the Teague exception must be consistent with the recognition that '[a]pplication of constitutional rules not in existence at the time a conviction becomes final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.'"

The limited scope of the second Teague exception was underscored in Beard v. Banks, 542 U.S. 406 (2004), where the Court observed that the exception "** is clearly meant to apply only to a small core of rules requiring observance of those procedures [that] are implicit in the concept of ordered liberty." Indeed, added the Court, "we have yet to find a new rule that falls under the second Teague exception. [In] providing guidance as to what might fall within this exception, we have repeatedly referred to the rule of Gideon [the famous right to counsel set forth in Ch. 4, § 1], and only to this rule."

** DANFORTH v. MINNESOTA **


JUSTICE STEVENS delivered the opinion of the Court.

New constitutional rules announced by this Court that place certain kinds of primary individual conduct beyond the power of the States to proscribe, as well as
“watershed” rules of criminal procedure, must be applied in all future trials, all
cases pending on direct review, and all federal habeas corpus proceedings. All
other [criminal procedure rulings] must be applied in future trials and in cases
pending on direct review, but may not provide the basis for a federal collateral
attack on a state court conviction. This is the substance of the “Teague rule”
described by Justice O’Connor in her plurality opinion [in that case]. The question
in this case is whether Teague contrains the authority of state courts to give
broader effect to new rules of criminal procedure than is required by that opinion.
We have never suggested that it does, and now hold that it does not.

[After petitioner’s conviction for first-degree criminal sexual assault had
become final, the Court announced a “new rule” for evaluating the reliability of
testimonial statements in criminal cases, see Crawford v. Washington, 541 U.S. 36
(2004) [Ch. 18, § 2]. Petitioner then sought postconviction relief, contending that
admitting the victim’s taped interview at his trial violated Crawford’s rule. The
Minnesota Supreme Court concluded (1) that under Teague, Crawford did not
apply retroactively and (2) that state courts are not free to give a decision of this
Court announcing a new constitutional rule of criminal procedure broader retroac-
tive application than that given by this Court.]

Our recent decision in Whorton v. Bockting, 127 S.Ct. 1173 (2007) makes clear
that the Minnesota court correctly concluded that federal law does not require
state courts to apply [Crawford] to cases that were final when that case was
decided. [But we granted review] to consider whether Teague or any other federal
rule of law prohibits them from doing so.

* * * A close reading of the Teague opinion makes clear that the rule it
established was tailored to the unique context of federal habeas and therefore had
no bearing on whether States could provide broader relief in their own postconvic-
tion proceedings than required by that opinion. Because the case before us now
does not involve either of the “Teague exceptions,” it is Justice O’Connor’s
discussion of the general rule of nonretroactivity that merits the following three
comments.

First, not a word in Justice O’Connor’s discussion—or in either of the
opinions of Justice Harlan that provided the blueprint for her entire analysis—
asserts or even intimates that her definition of the class eligible for relief under a
new rule should inhibit the authority of any state agency or state court to extend
the benefit of a new rule to a broader class than she defined. Second, Justice
O’Connor’s opinion clearly indicates that Teague’s general rule of nonretroactivity
was an exercise of this Court’s power to interpret the federal habeas statute. * * *

Third, the text and reasoning of Justice O’Connor’s opinion also illustrate
that the rule was meant to apply only to federal courts considering habeas corpus
petitions challenging state-court criminal convictions. * * * Moreover, she justi-
fied the general rule of nonretroactivity in part by reference to comity and respect
for the finality of state convictions. Federalism and comity considerations are
unique to federal habeas review of state convictions.

[The] fundamental interest in federalism that allows individual States to
define crimes, punishments, rules of evidence, an rules of criminal and civil
procedure in a variety of different ways—so long as they do not violate the Federal
Constitution—is not otherwise limited by any general, undefined federal interest
in uniformity. Nonuniformity is, in fact, an unavoidable reality in a federalist
system of government. Any State could surely have adopted the rule of evidence
defined in Crawford under state law even if that case had never been decided. It
should be equally free to give its citizens the benefit of our rule in any fashion
that does not offend federal law.
Sec. 4 THE RETROACTIVE EFFECT

It is thus abundantly clear that the *Teague* rule of nonretroactivity was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings. It was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions. * * * It is important to keep in mind that our jurisprudence concerning the "retroactivity" of "new rules" of constitutional law is primarily concerned, not with the question whether a constitutional violation occurred, but with the availability or nonavailability of remedies. The former is a "pure question of federal law, our resolution of which should be applied uniformly throughout the Nation, while the latter is a mixed question of state and federal law."

[A] decision by this Court that a new rule does not apply retroactively under *Teague* does not imply that there was no right and thus no violation of that right at the time of trial—only that no remedy will be provided in federal habeas courts. It is fully consistent with a government of laws to recognize that the finality of a judgment may bar relief. It would be quite wrong to assume, however, that the question whether constitutional violations occurred in trials conducted before a certain date depends on how much time was required to complete the appellate process. * * *

CHIEF JUSTICE ROBERTS, with whom JUSTICE KENNEDY joins, dissenting.

[This] Court has held that the question whether a particular ruling is retroactive is itself a question of federal law. It is basic that 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." *Marbury v. Madison.* State courts are the final arbiters of their own state law; this Court is the final arbiter of federal law. State courts are therefore bound by our rulings on whether our cases construing federal law are retroactive.

The majority contravenes these bedrock propositions. The end result is startling: Of two criminal defendants, each of whom committed the same crime, at the same time, whose convictions became final on the same day, and each of whom raised an identical claim at the same time under the Federal Constitution, one may be executed while the other is set free—the first despite being correct on his claim, and the second because of it. That result is contrary to the Supremacy Clause and the Framers' decision to vest in "one supreme Court" the responsibility and authority to ensure the uniformity of federal law. Because the Constitution requires us to be more jealous of that responsibility and authority, I respectfully dissent.

[From] *Linkletter* through *Johnson* to *Teague*, we have always emphasized that determining whether a new federal right is retroactive turns on the nature of the substantive federal rule at issue. [When] this Court decides that a particular right shall not be applied retroactively, but a state court finds that it should, it is at least in part because of a different assessment by the state court of the nature of the underlying federal right—something on which the Constitution gives this Court the final say. The nature and scope of the new rules we announce directly determines whether they will be applied retroactively on collateral review. Today's opinion stands for the unfounded proposition that while we alone have the final say in expounding the former, we have no control over the latter.

[The] proposition that the question of retroactivity—that is, the choice between new or old law in a particular case—is distinct from the question of remedies has several important implications for this case. To begin with, whatever intuitive appeal may lie in the majority's statement that "the remedy a state court
chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law,” the statement misses the mark. The relevant inquiry is not about remedy; it is about choice of law—new or old. There is no reason to believe, either legally or intuitively, that States should have any authority over this question when it comes to which federal constitutional rules of criminal procedure to apply.

Indeed, when the question is what federal rule of decision from this Court should apply to a particular case, no Court but this one—which has the ultimate authority “to say what the law is,” Marbury—should have final say over the answer. * * * Retroactivity is a question of federal law, and our final authority to construe it cannot, at this point in the Nation’s history, be reasonably doubted.

Principles of federalism protect the prerogative of States to extend greater rights under their own laws than are available under federal law. The question here, however, is the availability of protection under the Federal Constitution—specifically, the Confrontation Clause of the Sixth Amendment. It is no intrusion on the prerogatives of the States to recognize that it is for this Court to decide such a question of federal law, and that our decision is binding on the States under the Supremacy Clause.

Consider the flip side of the question before us today: If a State interprets its own constitution to provide protection beyond that available under the Federal Constitution, and has ruled that this interpretation is not retroactive, no one would suppose that a federal court could hold otherwise, and grant relief under state law that a state court would refuse to grant. The result should be the same when a state court is asked to give retroactive effect to a right under the Federal Constitution that this Court has held is not retroactive. * * *

Perhaps all this will be dismissed as fine parsing of somewhat arcane precedents, over which reasonable judges may disagree. Fair enough; but I would hope that enough has been said at least to refute the majority's assertion that its conclusion is dictated by our prior cases. This dissent is compelled not simply by disagreement over how to read those cases, but by the fundamental issues at stake—our role under the Constitution as the final arbiter of federal law, both as to its meaning and its reach, and the accompanying duty to ensure the uniformity of that federal law.

Stephen Danforth’s conviction became final before the new rule in Crawford was announced. * * * Whorton v. Bockting [subsequently] held that Crawford shall not be applied retroactively on collateral review. That should be the end of the matter. * * *