

CHAPTER 1

BASIC PRINCIPLES



I. A CRIMINAL CASE

This course covers the procedures that are employed in a criminal case. An important threshold question is whether a sanction that has been chosen is properly classified as “criminal” for purposes of assigning procedural rights. An answer that is frequently given is that criminal cases require proof beyond a reasonable doubt, whereas civil and administrative cases generally do not. But this answer is too circular to be helpful. Proof beyond a reasonable doubt is required once a case is identified as criminal.

Another answer is that the label “criminal” implies jail and prison. But jail and prison are not the usual penalties for many lesser criminal offenses. It is at least generally true that if jail and prison are prescribed penalties for a violation of the law, the law is criminal. But, fines, restitution and other sanctions might be employed as criminal sanctions. If the existence or absence of jail and prison penalties does not determine whether or not a case is criminal, could the determinative factor be whether a penalty is a “punishment” or not? This would appear to be somewhat closer to the mark. Yet, deciding whether a sanction is a punishment itself may present difficulties. Moreover, punitive damages and civil fines are hardly unknown to American law. Thus, the penalty aspect alone cannot identify a criminal case.

Legislative Designation

Something more is needed to identify criminal cases. That something is so obvious that it may appear unsatisfactory at first—it is the label that the legislature chooses to give a sanction. If the legislature calls something criminal, presumably it wants the public to treat an offense as criminal. When this happens, the special procedures of criminal cases will be invoked. See generally Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 *Hastings L.J.* 1325 (1991) (proceeding is criminal where labeled as such by the legislature). The question remains, however, whether the legislature’s designation of a sanction as other than criminal should always be dispositive.

Civil Penalty: United States v. L.O. Ward

Usually it is a defendant who argues that his alleged violation is criminal; as such he is seeking to take advantage of certain constitutional rights that are only available in criminal prosecutions. In *United States v. L.O. Ward*, 448 U.S. 242 (1980), for example, the Supreme Court held that a penalty imposed upon persons discharging hazardous substances into navigable waters was a civil penalty and, therefore, that a reporting requirement for violators did not violate the Fifth Amendment's privilege against compelled self-incrimination. The Court said that the question whether a penalty is criminal or civil is a matter of statutory construction.

Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. In regard to this latter inquiry, we have noted that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground."

The Court accepted the congressional label of "civil," although Justice Stevens dissented.

Commitment of Sex Offenders: Allen v. Illinois and Kansas v. Hendricks

In *Allen v. Illinois*, 478 U.S. 364 (1986), the Court held that commitment proceedings under the Illinois Sexually Dangerous Persons Act were not criminal, and therefore that the Fifth Amendment self-incrimination clause did not prevent the use of the defendant's compelled statements in the case. In *Allen*, the Court found that the legislature's characterization of the statute as civil and treatment-oriented was crucial, even though persons committed under the Act were kept in a maximum security institution that also housed prisoners in need of psychiatric care.

The Court relied heavily on *Allen* in *Kansas v. Hendricks*, 521 U.S. 346 (1997). *Hendricks* challenged a Kansas statute imposing involuntary civil commitment on sexual predators. *Hendricks* was committed under the Act just before he was to be released from prison, where he had been incarcerated after a series of sex crime convictions. *Hendricks* argued that the civil commitment violated his constitutional right against double jeopardy, and also that it operated as an ex post facto law (because the civil commitment statute was passed well after the sexually abusive acts

had been committed). Both of these constitutional claims are triggered only when the state imposes criminal “punishment” on the citizen. The case therefore boiled down to whether the involuntary commitment statute was civil or criminal in nature.

Justice Thomas, writing for five members of the Court, held that the statute was civil rather than criminal in nature. He wrote as follows:

Here, Kansas’ objective to create a civil proceeding is evidenced by its placement of the Sexually Violent Predator Act within the Kansas probate code, instead of the criminal code, as well as its description of the Act as creating a “civil commitment procedure.” * * *

Although we recognize that a civil label is not always dispositive, we will reject the legislature’s manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State’s intention to deem it “civil.” *United States v. Ward*. * * * *Hendricks*, however, has failed to satisfy this heavy burden.

As a threshold matter, commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence. The Act’s purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes, either to demonstrate that a “mental abnormality” exists or to support a finding of future dangerousness. * * * In addition, the Kansas Act does not make a criminal conviction a prerequisite for commitment—persons absolved of criminal responsibility may nonetheless be subject to confinement under the Act. An absence of the necessary criminal responsibility suggests that the State is not seeking retribution for a past misdeed. * * *

Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are, by definition, suffering from a “mental abnormality” or a “personality disorder” that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement. And the conditions surrounding that confinement do not suggest a punitive purpose on the State’s part. The State has represented that an individual confined under the Act is not subject to the more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily committed patient in the state mental institution.

Justice Thomas emphasized that involuntary confinement could be “civil”, even if it might be permanent:

Hendricks focuses on his confinement's potentially indefinite duration as evidence of the State's punitive intent. That focus, however, is misplaced. Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others. If, at any time, the confined person is adjudged "safe to be at large," he is statutorily entitled to immediate release.

Justice Thomas summed up as follows:

Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent. We therefore hold that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive. Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and ex post facto claims.

Justice Breyer, joined by Justices Stevens, Souter and Ginsburg, dissented in *Hendricks*. Justice Breyer contended that the Kansas procedure was punitive because Hendricks received no treatment for his illness.

Registration of Sex Offenders—Civil Regulation or Criminal Punishment?: Smith v. Doe

In *Smith v. Doe*, 538 U.S. 84 (2003), the Court upheld Alaska's version of a "Megan's Law" against a challenge that it violated the Ex Post Facto Clause (a clause that applies only to criminal punishment). Megan's Laws, adopted by legislatures throughout the country, require those convicted as sex offenders to register with their state of residence. Information about the offenders is then published over the internet. Alaska's version required sex offenders to register even if they were convicted before the date of the legislation. The Court, in an opinion by Justice Kennedy for five Justices, held that the statutory scheme was civil rather than punitive, and therefore the Ex Post Facto Clause did not apply. Justice Kennedy relied upon *Hendricks* and declared that "an imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate nonpunitive governmental objective." The Court also noted that the Alaska law simply requires registration; it "imposes

no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint.”

Justice Kennedy rejected the argument that the registration system was punitive because it was tantamount to probation or supervised release, which clearly are aspects of the criminal justice system. He distinguished registration as a sex offender from probation or supervised release as follows:

Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction. By contrast, offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision. Although registrants must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so. A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual’s original offense. * * * It suffices to say the registration requirements make a valid regulatory program effective and do not impose punitive restraints in violation of the *Ex Post Facto* Clause.

Justice Thomas wrote a short concurring opinion.

Justice Souter concurred in the judgment. He noted that the Alaska scheme did present some indications of punishment. For example, some of the provisions were located in the criminal code; the touchstone for regulation was the commission of a past crime rather than current dangerousness; and the statute made written notification of the registration requirement a condition of a guilty plea to any sex offense. He also noted that the publication of sex offender status on the internet might be seen to bear “some resemblance to shaming punishments that were used earlier in our history to disable offenders from living normally in the community.” Justice Souter, however, concluded as follows:

To me, the indications of punitive character stated above and the civil indications weighed heavily by the Court are in rough equipoise. * * * What tips the scale for me is the presumption of constitutionality normally accorded a State’s law. That presumption gives the State the benefit of the doubt in close cases like this one, and on that basis alone I concur in the Court’s judgment.

Justice Stevens dissented in *Smith*. He declared as follows:

No matter how often the Court may repeat and manipulate multifactor tests that have been applied in wholly dissimilar cases

involving only one or two of these three aspects of these statutory sanctions, it will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders *and on no one else* as a result of their convictions are not part of their punishment. In my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty, is punishment.

Justice Ginsburg, joined by Justice Breyer, wrote a separate dissent in *Smith*. She argued that the registration and reporting requirements are comparable to conditions of supervised release or parole, and that the public notification regimen called to mind the shaming punishments of the past. She concluded as follows:

What ultimately tips the balance for me is the Act's excessiveness in relation to its nonpunitive purpose. * * * The Act applies to all convicted sex offenders, without regard to their future dangerousness. And the duration of the reporting requirement is keyed not to any determination of a particular offender's risk of reoffending, but to whether the offense of conviction qualified as aggravated. The reporting requirements themselves are exorbitant: The Act requires aggravated offenders to engage in perpetual quarterly reporting, even if their personal information has not changed. And meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation.

Criminal Procedure Issues in a Civil Context

Occasionally, constitutional guarantees covered in the criminal procedure course will arise in a civil context. The most prevalent situation is an action for damages brought against a police officer under 42 U.S.C. § 1983 for violation of the plaintiff's constitutional rights. For example, if the plaintiff claims that he was wrongly arrested or illegally searched, the court applies Fourth Amendment principles in the same way as if a criminal defendant moves to suppress evidence allegedly obtained in violation of the Fourth Amendment. Many such cases will be discussed throughout this book.

II. TWO SPECIAL ASPECTS OF CONSTITUTIONAL LAW: THE INCORPORATION DOCTRINE AND RETROACTIVE APPLICATION OF CONSTITUTIONAL DECISIONS

Most of the cases you will read in this course are decisions of the United States Supreme Court. Before discussing the constitutional law developed by the Supreme Court in these decisions, we believe it is useful to analyze the practical *impact* of a constitutionally-based decision by the Supreme Court. The impact of a Supreme Court decision is governed by two general principles—incorporation and retroactivity. Under the doctrine of incorporation, a constitutionally-based decision ordinarily will bind both the states and the Federal government. Retroactivity principles, on the other hand, determine the extent to which the Court's decision will have an effect on official activity occurring before the date of the decision.

A. INCORPORATION

Few individual rights were guaranteed by the original Constitution prior to the adoption of the Bill of Rights. But the ratification of the first ten Amendments in 1791 provided procedural protections that comprise much of what will be examined in this book.

In *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), Chief Justice Marshall, writing for the Court, concluded that the Bill of Rights applied only against the Federal government and not against the states. After the Civil War and the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, a new question arose: whether these Amendments, particularly the Fourteenth, incorporated the Bill of Rights protections, thus making them applicable against the states. Early cases, like the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), took a narrow view of the Amendments.

For approximately three quarters of a century the Court struggled to interpret the open-ended language of the Fourteenth Amendment. In 1884, in *Hurtado v. California*, 110 U.S. 516, the Court held that California could permit criminal proceedings to be instituted by information, rather than by grand jury indictment—that is, the constitutional right to be indicted by a grand jury did not apply to the states. And in 1908, the Court, in *Twining v. New Jersey*, 211 U.S. 78, held that the privilege against self-incrimination was not binding on the states.

In *Palko v. Connecticut*, 302 U.S. 319 (1937), Justice Cardozo wrote for the Court to uphold a state procedure that permitted the state to appeal in a criminal case and obtain a new trial. He assumed that the

Double Jeopardy Clause of the Fifth Amendment would have invalidated such an appeal and retrial by the Federal government, but found that the states could take a different approach. Discussing the question whether the Bill of Rights was “absorbed” into the Fourteenth Amendment, Justice Cardozo wrote that 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.” But according to Justice Cardozo, the Double Jeopardy Clause was not one of those guarantees “implicit in the concept of ordered liberty.”

A decade after *Palko*, a majority of the Court reaffirmed *Twining* in *Adamson v. California*, 332 U.S. 46 (1947). Justice Black, joined by Justice Douglas, dissented. Justice Black argued that the language of the first section of the Fourteenth Amendment was intended to assure that no state could deprive its citizens of the privileges and protections of the Bill of Rights. Also, Justice Black rejected what he called the “natural law” formula of *Palko*, which invited the Court to recognize rights “implicit in the concept of ordered liberty” and yet not found in the Bill of Rights.¹ Responding to the opinion by Justice Black and its appendix of constitutional history, Justice Frankfurter took vigorous exception to Black’s argument.²

Justices Black and Frankfurter continued to disagree for years over the relationship of the Bill of Rights and the Fourteenth Amendment, with Justice Frankfurter generally prevailing on the theory that the Amendment did not make the Bill of Rights applicable to the States, but that it did incorporate such protections as were “implicit in the concept of ordered liberty.” See, e.g., *Wolf v. Colorado*, 338 U.S. 25 (1949); *Rochin v. California*, 342 U.S. 165 (1952); *Irvine v. California*, 347 U.S. 128 (1954); *Breithaupt v. Abram*, 352 U.S. 432 (1957).

In the 1960’s a shift took place: the Warren Court—without ever formally abandoning the fundamental fairness standard—began to incorporate more and more Bill of Rights guarantees into the Fourteenth Amendment, under an approach referred to by Justice Black as “selective incorporation.” The Court paid little attention to the facts of the case presenting the incorporation issue, and proceeded instead to determine whether the right asserted was fundamental to the American system of

¹ Justice Murphy, joined by Justice Rutledge, also dissented. Justice Murphy would have reserved the right to recognize procedural protections not explicitly recognized in the Bill of Rights. Later, Justice Douglas also would move to this position.

² Justice Frankfurter relied heavily on the historical analysis in Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *Stan.L.Rev.* 5 (1949). Both Justice Black and Professor Fairman are criticized in Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 *Sup.Ct.Rev.* 119. Professor Amar has written an important article that criticizes the Fairman view and concludes that the Fourteenth Amendment was designed to apply the Bill of Rights protections to the States. See Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *Yale L.J.* 1193 (1991).

justice; if so, it was incorporated through the Fourteenth Amendment to apply to the states. Moreover, the Court almost always insisted that, once incorporated, the scope of the Constitutional guarantee would be the same in state as in Federal cases: every detail of the incorporated provision was applicable “jot-for-jot” to the states.

The current approach of the Court, as well as the competing theories, are well illustrated by *Duncan v. Louisiana*. *Duncan* held that the right to jury trial, guaranteed by the Sixth Amendment, is binding on the states. That particular holding is not the subject of attention here [see Chapter 10 for that part of the case]; rather, the focus is on how the Court reached its result on incorporation. The change in the Court’s analysis over time is well-described by the long footnote in the majority opinion.

DUNCAN V. LOUISIANA

Supreme Court of the United States, 1968.
391 U.S. 145.

MR. JUSTICE WHITE delivered the opinion of the Court.

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I

The Fourteenth Amendment denies the States the power to “deprive any person of life, liberty, or property, without due process of law.” In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State;^a the rights of speech, press, and religion covered by the First Amendment;^b the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized;^c the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination;^d and the Sixth Amendment rights to counsel,^e to a speedy^f and public^g trial, to confrontation of opposing witnesses,^h and to compulsory process for obtaining witnesses.ⁱ

^a *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

^b See, e.g., *Fiske v. Kansas*, 274 U.S. 380 (1927).

^c See *Mapp v. Ohio*, 367 U.S. 643 (1961).

^d *Malloy v. Hogan*, 378 U.S. 1 (1964).

^e *Gideon v. Wainwright*, 372 U.S. 335 (1963).

^f *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

^g *In re Oliver*, 333 U.S. 257 (1948).

^h *Pointer v. Texas*, 380 U.S. 400 (1965).

ⁱ *Washington v. Texas*, 388 U.S. 14 (1967).

I The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,” *Powell v. Alabama*, 287 U.S. 45, 67 (1932); whether it is “basic in our system of jurisprudence,” *In re Oliver*, 333 U.S. 257, 273 (1948); and whether it is “a fundamental right, essential to a fair trial,” *Gideon v. Wainwright*, 372 U.S. 335, 343–344 (1963). The claim before us is that the right to trial by jury guaranteed by the Sixth Amendment meets these tests. The position of Louisiana, on the other hand, is that the Constitution imposes upon the States no duty to give a jury trial in any criminal case, regardless of the seriousness of the crime or the size of the punishment which may be imposed. 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.^j Since we 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.

H * * * 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

^j In one sense recent cases applying provisions of the first eight Amendments to the 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. For example, *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) stated: “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 * * *. Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them.” 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. It is this sort of inquiry that can justify the conclusions that state courts must exclude evidence seized in violation of the Fourth Amendment, *Mapp v. Ohio*, 367 U.S. 643 (1961); that state prosecutors may not comment on a defendant’s failure to testify, *Griffin v. California*, 380 U.S. 609 (1965); and that criminal punishment may not be imposed for the status of narcotics addiction, *Robinson v. California*, 370 U.S. 660 (1962). Of 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. See cases cited *supra*. 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.

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.

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MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

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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. I do not believe that it is necessary for me to repeat the historical and logical reasons for my challenge to the *Twining* holding contained in my *Adamson* dissent and Appendix to it. What I wrote there in 1947 was the product of years of study and research. My appraisal of the legislative history followed 10 years of legislative experience as a Senator of the United States, not a bad way, I suspect, to learn the value of what is said in legislative debates, committee discussions, committee reports, and various other steps taken in the course of passage of bills, resolutions, and proposed constitutional amendments. My Brother Harlan's objections to my *Adamson* dissent history, like that of most of the objectors, relies most heavily on a criticism written by Professor Charles Fairman and published in the *Stanford Law Review*. 2 *Stan.L.Rev.* 5 (1949). I have read and studied this article extensively, including the historical references, but am compelled to add that in my view it has completely failed to refute the inferences and arguments that I suggested in my *Adamson* dissent. Professor Fairman's "history" relies very heavily on what was *not* said in the state legislatures that passed on the Fourteenth Amendment. Instead of relying on this kind of negative pregnant, my legislative experience has convinced me that it is far wiser to rely on what *was* said, and most importantly, said by the men who actually sponsored the Amendment in the Congress. * * *

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" seem 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? I suggest that any reading of "privileges or immunities of citizens of the United States" which excludes the Bill of Rights' safeguards renders the words of this section of the Fourteenth Amendment meaningless. * * *

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 *Twining* 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 principl[e] 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 personal 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. * * *

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.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

* * *

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. I have raised my voice many times before against the Court's continuing indiscriminating insistence upon fastening on the States federal notions of criminal justice and I must do so again in this instance. With all respect, the Court's approach and its reading of history are altogether topsy-turvy.

* * * I believe I am correct in saying that every member of the Court for at least the last 135 years has agreed that our Founders did not consider the requirements of the Bill of Rights so fundamental that they should operate directly against the States. They were wont to believe

rather that the security of liberty in America rested primarily upon the dispersion of governmental power across a federal system. The Bill of Rights was considered unnecessary by some but insisted upon by others in order to curb the possibility of abuse of power by the strong central government they were creating.

The Civil War Amendments dramatically altered the relation of the Federal Government to the States. The first section of the Fourteenth Amendment imposes highly significant restrictions on state action. But the restrictions are couched in very broad and general terms: citizenship; privileges and immunities; due process of law; equal protection of the laws. * * * Where does the Court properly look to find the specific rules that define and give content to such terms as "life, liberty, or property" and "due process of law"?

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, often expressed elsewhere, 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^k and the very breadth and generality of the Amendment's provisions suggest 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" * * *. 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

^k Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *Stan.L.Rev.* 5 (1949). Professor Fairman was not content to rest upon the overwhelming fact 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." He therefore sifted the mountain of material comprising the debates and committee reports relating to the Amendment in both Houses of Congress and in the state legislatures that passed upon it. He found that in the immense corpus of comments on the purpose and effects of the proposed amendment, and on its virtues and defects, there is almost no evidence whatever for "incorporation." * * *

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. * * *.

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 * * * 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 free government which no member of the Union may disregard. * * *

* * *

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.
* * *

NOTE ON INCORPORATION

The Court has never accepted Justice Black's view that the Fourteenth Amendment incorporates the entirety of the Bill of Rights. So for example, the right to indictment by grand jury is not binding on the states. The Seventh Amendment jury trial right is not binding upon the states in civil cases. And the Bail Clause of the Eighth Amendment has not yet been incorporated into the Fourteenth Amendment by the Supreme Court. But, the "fundamental fairness" approach of *Palko* and *Adamson* has given way to a selective incorporation view that, as Justice Black correctly notes in *Duncan*, has moved the Court a long way toward the total incorporation result that he advocated.

If Justice Black was wrong about the intent of the drafters of the Fourteenth Amendment and they did not intend incorporation, is there any rhyme or reason to the selective incorporation idea? If there is, it has to be

that the Court has been willing to assume that the drafters of the Fourteenth Amendment wanted to enforce against the states only those portions of the Bill of Rights whose fundamentality remained evident many years after the first ten Amendments were adopted. Does that kind of prescience seem likely?

Justice Black argued that incorporation of the Bill of Rights is preferable to a case-by-case, fundamental fairness approach, because the latter gives rise to judicial subjectivity in applying the vague term “due process.” Are the Bill of Rights protections less susceptible to judicial subjectivity? For instance, does the term “unreasonable searches and seizures” in the Fourth Amendment provide more limitation on judicial subjectivity than the term “due process”?

Incorporation of the Second Amendment Right to Bear Arms: McDonald v. City of Chicago

The Court had occasion to revisit its history with respect to incorporation in *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), in which Justice Alito summarized the holding for a 5–4 Court:

Two years ago, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home. The City of Chicago (City) and the village of Oak Park, a Chicago suburb, have laws that are similar to the District of Columbia’s, but Chicago and Oak Park argue that their laws are constitutional because the Second Amendment has no application to the States. We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.

Four Justices agreed that the Due Process Clause required incorporation while Justice Thomas relied upon the privileges and immunities clause of the Fourteenth Amendment. In a plurality portion of his opinion, Justice Alito noted that Justice Black’s “total incorporation” theory was never adopted by the Court, and that “the Court eventually moved in that direction by initiating what has been called a process of ‘selective incorporation.’” He quoted from *Duncan* and explained that the Court no longer asks whether *any* “civilized system [can] be imagined that would not accord the particular protection” and instead asks “whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice.”

Justice Stevens's dissenting opinion also examined the Court's approach to due process and incorporation and wrote: "In my judgment, this line of cases is best understood as having concluded that, to ensure a criminal trial satisfies essential standards of fairness, some procedures should be the same in state and federal courts: The need for certainty and uniformity is more pressing, and the margin for error slimmer, when criminal justice is at issue."

NOTE ON STATE CONSTITUTIONAL PROTECTIONS

The Supreme Court has the final say in interpreting federal constitutional protections concerning criminal procedure. But state courts have sometimes provided enhanced protection of constitutional rights through reliance on state constitutions. Of course, state courts cannot construe their own constitutions to provide *less* protections than those granted by the Bill of Rights. But state courts, construing their own constitutions, can provide greater protections than those set by the Supreme Court's construction of the Bill of Rights.

While some states have been more active than others, virtually every state has rejected at least one Supreme Court decision as insufficiently protective of the rights of citizens. Many of these decisions will be discussed in the context of particular Supreme Court rulings, *infra*.

It must be remembered that if the state court explicitly relies on state constitutional law to provide more protection to citizens than the Federal Constitution, the state court's decision on this matter cannot be reviewed by the Supreme Court. This is because there is no Federal question that would control the case. But the state court must be explicit that it is relying on state law. If it appears that the state court may have been relying in whole or part on Federal law, then the Supreme Court can take the case and reject the state court's construction. See generally *Michigan v. Long*, 463 U.S. 1032 (1983) (state court must place explicit reliance on state law in order to avoid Supreme Court review; otherwise it will be presumed that the state court was construing Federal constitutional law).

For extensive discussions about what has come to be called "state court activism," see Brennan, J., *State Constitutions and the Protection of Individual Rights*, 90 Harv.L.Rev. 489 (1977); *Symposium on Emerging Issues in State Constitutional Law*, 65 Temple L.Rev. 1119 (1992); *Symposium, Independent State Grounds: Should State Courts Depart From the Fourth Amendment in Construing Their Own Constitutions, and if so, on What Basis Beyond Simple Disagreement With the United States Supreme Court's Result?*, 77 Miss. L.Rev. 1 (2007). For a critical view, see Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich.L.Rev. 761 (1992).

B. RETROACTIVITY

1. The Impact of New Decisions

When the Supreme Court reviews the conduct of government officials in a criminal case, the legal rule it promulgates will obviously apply to all similar government conduct arising after the date of the decision—otherwise the decision would be nothing but an advisory opinion. But an important question is whether the legal rule should also be applied to government conduct occurring *before* the date of the decision. The question of retroactive application is one of competing policies and interests.

For example, when the Supreme Court overrules a prior decision that had permitted certain police behavior, the Court might be concerned that law enforcement officers, who relied on the case law existing at the time of their conduct, in fact acted as competent officers should. The Court might, therefore, be reluctant to see the government disadvantaged as a result of justifiable reliance by government agents. The Court also might be concerned that trial courts that relied on the old rule may be burdened with numerous retrials once the new decision is announced—assuming a retrial is even possible given the passage of time.

On the other hand, if a decision is important enough to be called a “constitutional decision,” it is arguable that it ought to benefit all those who suffered the conduct now found to be wrongful.

For many years, the Supreme Court’s position on retroactive application was complicated and often inconsistent. But one rule that the Court always has followed, at least to this point, is to give the benefit of the new rule to the litigant who establishes it—even though that constitutes retroactive application. The Court has done so for two reasons: 1) to provide litigants with incentives to improve past decisions of the Court, because few litigants would ask the Court to establish a new rule that they could not use; and 2) to assure that there is a concrete case or controversy before the Court.

2. Prior Supreme Court Law on Retroactivity, and the Harlan Approach

In *Stovall v. Denno*, 388 U.S. 293 (1967) and *Desist v. United States*, 394 U.S. 244 (1969), the Court refused to apply its decisions requiring counsel at certain lineups and its holding in an earlier Fourth Amendment case, *Katz v. United States*, 389 U.S. 347 (1967), to other cases still pending on direct review. Rather, the Court applied its earlier decisions to reach only the police activity that followed the announcement of the new rules. Essentially, the rulings were given only prospective

effect, other than for the litigants in the cases in which the new rule was established.

Justice Harlan dissented in *Desist* and concluded that new constitutional rules must be applied, at a minimum, to all cases pending on direct review when the rules are handed down. (A case is on “direct review” when it is still on appeal from a judgment of conviction. This includes all appellate activity up to and including the Supreme Court’s denial of a writ of certiorari). Justice Harlan charged that a decision to apply a ruling on direct review of one case (i.e., the case before the Court), but not to all other similarly situated cases, is an assertion of legislative, not adjudicatory, power. Justice Harlan argued further that, as a general matter, a new rule should *not* be applied in collateral attack (i.e., habeas corpus) proceedings. (Habeas corpus proceedings usually involve federal court review of a state judgment of conviction, and are brought after a defendant’s direct appeals through the state appellate courts and the United States Supreme Court have been rejected or foregone; see the discussion in Chapter 13). Justice Harlan identified two situations in which the presumption of nonretroactivity of new rules to habeas corpus cases could be overcome; these were exceptions to the general principle of nonretroactivity in habeas cases. The first exception encompassed habeas corpus petitioners who sought the benefit of a new rule that is so fundamental that it is “implicit in the concept of ordered liberty” (quoting Justice Cardozo’s opinion in *Palko*). The second exception covered a petitioner who relied upon a new rule to demonstrate that the conduct for which he was tried was constitutionally protected, so that a trial should never have occurred in the first place. Justice Harlan’s view is fully discussed and analyzed by the Court in *Teague v. Lane*, below.

3. Current Supreme Court Approach to Retroactivity

In a series of cases, the Court finally adopted the Harlan approach to retroactivity, with one slight modification as to the “fundamental fairness” exception to non-retroactivity on habeas. In *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Court held that its decision the previous term in *Batson v. Kentucky*, 476 U.S. 79 (1986) (defendant could establish a prima facie case of racial discrimination based on the prosecution’s use of peremptory challenges in a single case), would be applied retroactively to all cases still pending on direct review when the decision was announced. Although *Batson* overruled a decision that had withstood attack for more than twenty years, the Court declined to follow *Stovall* and other cases that had barred some or all defendants from benefitting from recently announced decisions even while pursuing direct review. Instead the Court adopted Justice Harlan’s analysis of direct review: a new rule is applicable to all cases that are still under court review, up to the time that a petition for certiorari in the United States

Supreme Court has been denied or the time to file such a petition has run out. Justice Blackmun wrote in *Griffith* for six Justices. The Court's analysis in *Griffith* is discussed in *Teague v. Lane*, immediately below, where the Court adopted the Harlan view that new rules are generally inapplicable to habeas cases. It should be noted, however, that the effect of *Griffith* has been limited in Fourth Amendment cases, as will be discussed in the notes following the next case.

The applicability of *Teague* has been limited somewhat by subsequent Congressional legislation restricting habeas corpus relief. Yet *Teague* is still important because that legislation was promulgated in the spirit of *Teague* (which is generally to limit the retroactive effect of new rules in habeas corpus cases), and there are some situations in which the legislation is inapplicable, thus rendering *Teague* the governing principle. The effect of the legislation is discussed in a Note following *Teague*.

TEAGUE V. LANE

Supreme Court of the United States, 1989.
489 U.S. 288.

JUSTICE O'CONNOR delivered the opinion of the Court.

In *Taylor v. Louisiana*, 419 U.S. 522 (1975), this Court held that the Sixth Amendment required that the jury venire be drawn from a fair cross section of the community. * * * The principal question presented in this case is whether the Sixth Amendment's fair cross section requirement should now be extended to the petit jury. Because we adopt Justice Harlan's approach to retroactivity for cases on collateral review, we leave the resolution of that question for another day.

* * *

Petitioner, a black man, was convicted by an all-white Illinois jury of three counts of attempted murder, two counts of armed robbery, and one count of aggravated battery. During jury selection for petitioner's trial, the prosecutor used all 10 of his peremptory challenges to exclude blacks.

On appeal, petitioner argued that the prosecutor's use of peremptory challenges denied him the right to be tried by a jury that was representative of the community. The Illinois Appellate Court rejected petitioner's fair cross section claim. The Illinois Supreme Court denied leave to appeal, and we denied certiorari.

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois. Petitioner repeated his fair cross section claim * * *. [Both the District Court and the Court of Appeals en banc denied *Teague's* claim for habeas relief. The Court of Appeals held that the Constitution's fair cross-section

requirement was limited to the jury venire—the pool from which the jury that sits in the case (the petit jury) is drawn].

* * *

Petitioner's * * * contention is that the Sixth Amendment's fair cross section requirement applies to the petit jury. * * * Petitioner * * * contends that the *ratio decidendi* of *Taylor* cannot be limited to the jury venire, and he urges adoption of a new rule. Because we hold that the rule urged by petitioner should not be applied retroactively to cases on collateral review, we decline to address petitioner's contention. π arg.
H

* * *

In the past, the Court has, without discussion, often applied a new constitutional rule of criminal procedure to the defendant in the case announcing the new rule, and has confronted the question of retroactivity later when a different defendant sought the benefit of that rule. In several cases, however, the Court has addressed the retroactivity question in the very case announcing the new rule. These two lines of cases do not have a unifying theme, and we think it is time to clarify how the question of retroactivity should be resolved for cases on collateral review.

* * *

In our view, the question “whether a decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision.” Mishkin, Foreword: the High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 64 (1965). Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated. Thus, before deciding whether the fair cross section requirement should be extended to the petit jury, we should ask whether such a rule would be applied retroactively to the case at issue. * * *

It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. Given [prior case law stating] that “[f]airness in [jury] selection has never been held to require proportional representation of races upon a jury,” application of the fair cross section requirement to the petit jury would be a new rule.

Not all new rules have been uniformly treated for retroactivity purposes. Nearly a quarter of a century ago, in *Linkletter v. Walker*, 381 U.S. 618 (1965), the Court attempted to set some standards by which to determine the retroactivity of new rules. * * * The *Linkletter* retroactivity standard has not led to consistent results. Instead, it has been used to limit application of certain new rules to cases on direct review, other new rules only to the defendants in the cases announcing such rules, and still other new rules to cases in which trials have not yet commenced. * * *

Application of the *Linkletter* standard led to the disparate treatment of similarly situated defendants on direct review. For example, in * * * *Johnson v. New Jersey*, 384 U.S. 719, 733–735 (1966), the Court held, under the *Linkletter* standard, that *Miranda* would only be applied to trials commencing after that decision had been announced. Because the defendant in *Johnson*, like the defendants in *Miranda*, was on direct review of his conviction, the Court's refusal to give *Miranda* retroactive effect resulted in unequal treatment of those who were similarly situated. * * *

In *Griffith v. Kentucky*, 479 U.S. 314 (1987), we rejected as unprincipled and inequitable the *Linkletter* standard for cases pending on direct review at the time a new rule is announced, and adopted the first part of the retroactivity approach advocated by Justice Harlan. We agreed with Justice Harlan that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." We gave two reasons for our decision. First, because we can only promulgate new rules in specific cases and cannot possibly decide all cases in which review is sought, "the integrity of judicial review" requires the application of the new rule to "all similar cases pending on direct review." * * * Second, because "selective application of new rules violates the principle of treating similarly situated defendants the same," we refused to continue to tolerate the inequity that resulted from not applying new rules retroactively to defendants whose cases had not yet become final. Although new rules that constituted clear breaks with the past generally were not given retroactive effect under the *Linkletter* standard, we held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."

* * *

Justice Harlan believed that new rules generally should not be applied retroactively to cases on collateral review. * * * Given the "broad scope of constitutional issues cognizable on habeas," Justice Harlan argued that it is "sounder, in adjudicating habeas petitions, generally to

apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation.” As he explained * * * “the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this deterrence function, * * * the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place.”

Justice Harlan identified only two exceptions to his general rule of nonretroactivity for cases on collateral review. First, a new rule should be applied retroactively if it places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.” Second, a new rule should be applied retroactively if it requires the observance of “those procedures that . . . are ‘implicit in the concept of ordered liberty.’”

* * *

We agree with Justice Harlan’s description of the function of habeas corpus. “[T]he Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error.” Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review. * * *

* * * Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.

* * *

The “costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus * * * generally far outweigh the benefits of this application.” In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore, * * * “[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.”

We find these criticisms to be persuasive, and we now adopt Justice Harlan’s view of retroactivity for cases on collateral review. Unless they fall within an exception to the general rule, new constitutional rules of

criminal procedure will not be applicable to those cases which have become final before the new rules are announced.

* * *

Petitioner's conviction became final in 1983. As a result, the rule petitioner urges would not be applicable to this case, which is on collateral review, unless it would fall within an exception.

The first exception suggested by Justice Harlan—that a new rule should be applied retroactively if it places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe”—is not relevant here. Application of the fair cross section requirement to the petit jury would not accord constitutional protection to any primary activity whatsoever.

or exception
doesn't apply

The second exception suggested by Justice Harlan—that a new rule should be applied retroactively if it requires the observance of “those procedures that * * * are ‘implicit in the concept of ordered liberty,’” (quoting *Palko v. Connecticut*)—we apply with a modification. * * *

* * * Were we to employ the *Palko* test without more, we would be doing little more than importing into a very different context the terms of the debate over incorporation. Reviving the *Palko* test now, in this area of law, would be unnecessarily anachronistic. * * * [W]e believe that Justice Harlan's concerns about the difficulty in identifying both the existence and the value of accuracy-enhancing procedural rules can be addressed by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished.

Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge. * * *

* * * Because the absence of a fair cross section on the jury venire does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction, we conclude that a rule requiring that petit juries be composed of a fair cross section of the community would not be a “bedrock procedural element” that would be retroactively applied under the second exception we have articulated.

and
upon
it apply

Were we to recognize the new rule urged by petitioner in this case, we would have to give petitioner the benefit of that new rule even though it would not be applied retroactively to others similarly situated. * * *

If there were no other way to avoid rendering advisory opinions, we might well agree that the inequitable treatment described above is “an

insignificant cost for adherence to sound principles of decision-making." But there is a more principled way of dealing with the problem. We can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated. We think this approach is a sound one. Not only does it eliminate any problems of rendering advisory opinions, it also avoids the inequity resulting from the uneven application of new rules to similarly situated defendants. We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions we have articulated. * * *

[The opinion of JUSTICE WHITE, concurring in part and concurring in the judgment, is omitted.]

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins in relevant part, concurring in part and concurring in the judgment.

* * *

In general, I share Justice Harlan's views about retroactivity. * * * I am persuaded that the Court should adopt Justice Harlan's analysis of retroactivity for habeas corpus cases as well for cases still on direct review.

I do not agree, however, with the plurality's dicta proposing a "modification" of Justice Harlan's fundamental fairness exception. * * *

* * * I cannot agree that it is "unnecessarily anachronistic" to issue a writ of habeas corpus to a petitioner convicted in a manner that violates fundamental principles of liberty.

* * *

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

* * * Out of an exaggerated concern for treating similarly situated habeas petitioners the same, the plurality would for the first time preclude the federal courts from considering on collateral review a vast range of important constitutional challenges; where those challenges have merit, it would bar the vindication of personal constitutional rights and deny society a check against further violations until the same claim is presented on direct review. * * *

* * *

[F]rom the plurality's exposition of its new rule, one might infer that its novel fabrication will work no great change in the availability of federal collateral review of state convictions. Nothing could be further

from the truth. * * * Few decisions on appeal or collateral review are “dictated” by what came before. Most such cases involve a question of law that is at least debatable, permitting a rational judge to resolve the case in more than one way. Virtually no case that prompts a dissent on the relevant legal point, for example, could be said to be “dictated” by prior decisions. * * * The plurality’s approach today can thus be expected to contract substantially the Great Writ’s sweep.

* * *

Commentary on the Teague Rule

In *Collins v. Youngblood*, 497 U.S. 37 (1990), the Court held that the rule in *Teague*, prohibiting retroactive application or promulgation of new rules to habeas corpus cases, was not jurisdictional and therefore would not be raised by the Court *sua sponte*.

Note that under the Harlan-*Teague* view, defendants are subject to different treatment depending on the efficiency of the appellate courts in the state in which they are convicted. The slower the appellate system, the more likely that the defendant would benefit from new rules, because it is more likely that the case will still be on direct review when the new rule is promulgated.

A different criticism of the Harlan approach, as applied to cases on direct review, is that if new rules are generally applicable to cases not finalized, the cost of a new rule will often be significant. That may deter the Court from promulgating new rules in the first place. See *Jenkins v. Delaware*, 395 U.S. 213 (1969) (non-retroactivity provides an impetus for the “implementation of long overdue reforms which otherwise could not be practicably effected.”); *People v. Mitchell*, 80 N.Y.2d 519, 591 N.Y.S.2d 990 (1992) (rejecting the Harlan view as a matter of state law and holding that a new rule is not applicable to other cases on direct review: denying retroactive effect to new rules “permits this Court to expand the protection accorded defendants when we might otherwise hesitate to do so because retroactive application threatens to wreak more havoc in society than society’s interest in stability will tolerate.”). See also Heytens, *Managing Transitional Moments in Criminal Cases*, 115 *Yale L.J.* 922 (2006) (noting that the *Griffith* view of retroactivity to cases on direct review has led courts to counter by finding that defendants have forfeited their right to appeal by failing to raise the issue at trial—even though the trial was conducted before the new rule became law).

The academic commentary on *Teague*’s limitation on habeas review has been almost uniformly negative. Some examples are: Liebman, *More Than “Slightly Retro”: The Rehnquist Court’s Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 *N.Y.U. Rev. of Law & Social Change* 537 (1991); Dubber, *Prudence and Substance: How the Supreme Court’s*

New Habeas Retroactivity Doctrine Mirrors and Affects Substantive Constitutional Law, 30 Am.Crim.L.Rev. 1 (1992); Meyer, "Nothing We Say Matters": *Teague* and New Rules, 61 Univ.Chi.L.Rev. 423 (1994).

What Is a "New Rule"?

After *Teague*, new rules are generally inapplicable to those whose convictions have been finalized—including the petitioner who initially brings the claim for a new rule on collateral review. However, Justice Harlan, whose views were generally adopted in *Teague*, emphasized that some "new" holdings are not "new" at all, but are merely applications of well-settled principles to different fact situations, and therefore these holdings must apply retroactively to all defendants.

The Court, following Justice Harlan's approach, has mandated that when a decision merely applies settled precedent it is not a "new" rule at all, and is thus completely retroactive. See *Yates v. Aiken*, 484 U.S. 211 (1988). The rationale is that if a constitutional rule is not "new", the state court should have applied it correctly, and therefore the failure to apply it is proper grounds for habeas relief. The difficulty is in determining if a rule is "new" or merely an old rule applied to a different fact situation. In *Teague*, the Court stated that a case announces a new rule when it was not dictated by existing precedent. *

In *Butler v. McKellar*, 494 U.S. 407 (1990), the Court expounded further on the *Teague* definition of a "new" rule. The issue was whether *Arizona v. Roberson* was a new rule or merely an application of *Edwards v. Arizona*³ to a somewhat different fact situation. *Edwards* held that once a person in custody has requested counsel, the police may not conduct further interrogation unless counsel is provided or the suspect initiates communications. *Roberson* held that the *Edwards* rule applied even when the officer wants to question the suspect about a crime unrelated to that for which he has been arrested. When *Butler* was tried in state court, *Edwards* had been decided, but *Roberson* was not decided until *Butler's* conviction had been finalized. *Butler*, who confessed to a crime unrelated to that for which he was arrested, argued that the rule in *Roberson* should be retroactively applied to him, on the ground that the *Roberson* Court itself had stated that the rule was not new but merely an application of *Edwards*.

Chief Justice Rehnquist, writing for the majority, stated that a rule is "new" if reasonable minds could have differed about the result of the decision before it was rendered. The majority held that *Roberson* was a new rule, because reasonable-minded lower courts before *Roberson* had differed about whether *Edwards* would apply to questioning about *

³ Both of these cases are discussed in the material on confessions in Chapter 3.

unrelated investigations. The fact that the majority in *Roberson* characterized its decision as indistinguishable from *Edwards* and as a refusal to create an "exception" was not dispositive. According to the Chief Justice, "courts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by lower courts." He stated that "[t]he 'new rule' principle * * * validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."

Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, dissented in *Butler*.

Refusal to Promulgate a New Rule as a Decision on the Merits

When the Court refuses to decide a question in a habeas case because to do so would result in the promulgation of a "new rule," has the Court given an opinion on the merits of the proposed rule itself? For example, in *Teague*, did the Court, by refusing to decide the issue of whether the fair cross section requirement applied to the petit jury, effectively signal to the lower courts its view about the merits of such a claim? If you were a lower court judge, would you be inclined to adopt a "new rule" in a direct review case after the Supreme Court had declined to adopt the rule in a habeas case?

The Supreme Court has given some indication that a refusal to render what would be a "new rule" on habeas is similar to a rejection of the proposed rule on the merits. In *Johnson v. Texas*, 509 U.S. 350 (1993), the Court considered a question of the constitutionality of a capital sentencing statute on direct review. This question was identical to that which the Court had, earlier in the same term, refused to consider on habeas review on the ground that granting relief would require promulgation of a "new rule." Acting on direct review "without the constraints of *Teague*," the Court rejected the constitutional claim on the merits, relying on "much of the reasoning" in the previous habeas case. Justice O'Connor, the author of *Teague*, wrote a dissent in *Johnson* for four Justices. She argued that "cases that reject a claim as requiring a new rule cannot constitute stare decisis on direct review," since a rejection on habeas means only that the issue is "susceptible to debate among reasonable minds."

Is it possible to separate the question of whether a proposed rule is "new" from the question whether a proposed rule is meritorious? See Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 No.Car.L.Rev. 371 (1991) (whether a rule is new requires a view into the merits of the rule).

*The Teague Rule and Statutory Limitations
on Habeas Corpus Relief*

The result mandated by *Teague* and *Butler* essentially has been codified as part of the substantive limitations imposed on habeas corpus relief by the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA). AEDPA severely limits Federal habeas review over state court determinations of constitutional law, but the rule is now phrased as merit-based rather than retroactivity-based. The Act provides, in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Court, in an opinion by Justice O'Connor, declared that the AEDPA essentially codified a standard of review of state court decisions that is equivalent to the "new rule" jurisprudence of *Teague*. Under AEDPA, a federal court cannot grant relief unless the state court decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In *Williams*, Justice O'Connor declared that "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1). The one caveat, as the statutory language makes clear, is that § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence." Consequently, if a habeas petitioner is claiming that a state court misapplied constitutional law that was not clearly established by the United States Supreme Court at the time, the habeas petition must be denied—because the state court decision is not "contrary to" clearly established law as defined by the Supreme Court. It follows that the *Teague* "new rule" jurisprudence has been codified, for all practical purposes, by AEDPA.

Note that in AEDPA there are no exceptions provided comparable to the two limited exceptions permitting retroactive application in *Teague*, i.e., "watershed" rules of constitutional law, or rules that hold certain

conduct beyond criminal proscription. The rationale for rejecting these exceptions, according to an official at the Justice Department who was instrumental in drafting the provision, is that the *Teague* exceptions are so narrow that they can never be invoked as a practical matter. The result under AEDPA is that a habeas petitioner cannot seek to invoke a rule of law unless it was already clearly established at the time of the trial—and it makes no difference whether the rule of law proposed by the habeas claimant is a “watershed” rule or a rule that holds certain conduct beyond criminal proscription.

Finally, note that *Teague* itself remains directly applicable in cases where AEDPA does not apply. For example, where a state court never considered a defendant’s claim on the merits, the standard of review set forth in AEDPA is by its terms inapplicable. However, for habeas corpus relief to be granted in such a situation, the petitioner’s claim must still be based on constitutional law as it existed at the time of his conviction. Any attempt to extend that then-existing law will run into the “new rule” jurisprudence of *Teague* and its progeny. Thus, in *Weeks v. Angelone*, 176 F.3d 249 (4th Cir. 1999) the habeas petitioner claimed that his due process rights were denied by the state court’s failure to provide him an expert in ballistics to assist in his defense. This claim was not covered by AEDPA because the state court had never considered it on the merits, even though asked to do so. But the constitutional claim was still barred by *Teague*, because the law existing at the time of the petitioner’s conviction provided only that a defendant was entitled, upon a sufficient showing of need, to a state-appointed *psychiatrist* to assist in the defense. This precedent did not mandate appointment of *non-psychiatric* experts. Extending Supreme Court precedent to provide a guarantee of a non-psychiatric expert would constitute a “new rule”, barred by *Teague*.

Retroactivity of Fourth Amendment New Rules Does Not Justify Exclusion: Davis v. United States

In *Davis v. United States*, 131 S.Ct. 2419 (2011), the defendant sought the application of a new rule that was handed down while his case was still on direct review. The new rule, if applied, would mean that a police search of the defendant’s car—which was legal at the time—violated the Fourth Amendment. The Court held that while the new rule of law applied to the search of Davis’s car, that did not mean that the evidence should have been excluded. The Court ruled that the “good faith” exception to the exclusionary rule applied, and because the police thought they were complying at the time, their conduct could not be deterred by the exclusionary rule. Thus, the Court distinguished the law, which was applicable, and the remedy of exclusion, which was not. *Davis* is discussed more fully in the materials on the Fourth Amendment exclusionary rule, and its good faith exception, in Chapter 2.

Can States Apply a New Supreme Court Rule Retroactively Even if the Supreme Court Does Not? Danforth v. Minnesota

In *Danforth v. Minnesota*, 552 U.S. 264 (2008), the Court held that *Teague* does not prevent states from giving *more* retroactive effect to new rules than would be given by the Supreme Court. *Danforth* involved a collateral attack under state (rather than federal habeas) law of a finalized conviction. After the conviction was final, the United States Supreme Court decided a case on the confrontation clause that, if applicable, would result in reversal of the state conviction. It was a new rule and so would not be applicable on federal habeas review. But Justice Stevens, writing for the Court, found that *Teague* “was tailored to the unique context of federal habeas and therefore had no bearing on whether States could provide broader relief in their own postconviction proceedings than required by that opinion.” He concluded as follows:

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, joined by Justice Kennedy, dissented. He argued that the new rule was, after all, a federal rule, and therefore the decision of retroactivity must be one of federal law. He also noted that if states can vary on whether to hold a new rule retroactive or not, the federal law will vary from state to state.

***Retroactive Application Against the Defendant?:
Lockhart v. Fretwell***

The cases and statute discussed above deal with whether a defendant can, through retroactive application, receive a benefit from a change in law. But what about changes in law that are *detrimental* to a defendant? In *Lockhart v. Fretwell*, 506 U.S. 364 (1993), the Supreme Court, in an

opinion by Chief Justice Rehnquist, held that detrimental changes in the law must be applied retroactively against petitioners on habeas review. The Chief Justice distinguished *Teague* and reasoned as follows:

Teague stands for the proposition that new constitutional rules of criminal procedure will not be announced or applied on collateral review. * * * [T]his retroactivity rule was motivated by a respect for the States' strong interest in the finality of criminal convictions, and the recognition that a State should not be penalized for relying on the constitutional standards that prevailed at the time the original proceedings took place. The "new rule" principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.

A federal habeas petitioner has no interest in the finality of the state court judgment under which he is incarcerated: indeed, the very purpose of his habeas petition is to overturn that judgment. Nor does such a petitioner ordinarily have any claim of reliance on past judicial precedent as a basis for his actions * * *. The result of these differences is that the State will benefit from our *Teague* decision in some federal habeas cases, while the habeas petitioner will not.

Justice Stevens, joined by Justice Blackmun, dissented and argued that an "even-handed approach to retroactivity would seem to require that we continue to evaluate defendants' claims under the law as it stood at the time of trial." He reasoned that under *Teague*, a defendant may not take advantage of subsequent changes in the law when they are favorable to him, therefore "there is no self-evident reason why a State should be able to take advantage of subsequent changes in the law when they are adverse to his interests." The dissenters concluded that a "rule that generally precludes defendants from taking advantage of post-conviction changes in the law, but allows the State to do so, cannot be reconciled with this Court's duty to administer justice impartially."