AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 8: The New Deal/Great Society Era – Judicial Power and Constitutional Authority

Duncan v. Louisiana, 391 U.S. 145 (1968)

Gary Duncan, a 19-year-old African American male, was accused and found guilty of simple battery after he allegedly slapped a white teenager. Duncan requested a jury trial, but Louisiana at that time permitted jury trials only in cases where death or hard imprisonment were possible punishments. The maximum punishment for simple battery was two years in prison and a $300 fine. Duncan was sentenced to sixty days in prison and ordered to pay a $150 fine. Under federal law at that time, Duncan would have had a right to a jury trial. For this reason, Duncan challenged his state conviction, claiming that the Sixth Amendment guaranteed a right to a jury trial in cases where the maximum punishment was two years and that the Fourteenth Amendment required states to respect this principle of federal constitutional law.

By the time Duncan *was decided, the Supreme Court had already incorporated almost every other provision of federal constitutional criminal procedure. Moreover, rather than focusing on whether a particular trial or trial procedure was fundamentally fair, Supreme Court decisions during the 1960s determined whether a particular constitutional provision was necessary for a fair trial. Once the justices determined that the constitutional provision articulated a principle of fundamental fairness, states were bound by the entire provision, not just those aspects of the provision that were necessary for a fair trial. Thus, as Justice Harlan pointed out in his dissent,* Duncan *might require that state trials have the same number of jurors as federal trials. As you read Justice White's opinion, does he have a good response to this challenge? Does White also explain, in response to Justice Black, how federal justices may determine which provisions of the Bill of Rights are more fundamental than others?*

JUSTICE WHITE delivered the opinion of the Court.

. . . .

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;[1] the rights of speech, press, and religion covered by the First Amendment;[2] the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized;[3] the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination;[4] and the Sixth Amendment rights to counsel,[5] to a

[1] *Chicago, B. & Q. R. Co.* v. *Chicago* (1897).
[2] See, *e.g., Fiske* v. *Kansas* (1927).
[3] See *Mapp* v. *Ohio* (1961).
[4] *Malloy* v. *Hogan* (1964).
[5] *Gideon* v. *Wainwright* (1963).

speedy[6] and public[7] trial, to confrontation of opposing witnesses,[8] and to compulsory process for obtaining witnesses.[9]

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*, . . . whether it is "basic in our system of jurisprudence," *In re Oliver*. . .; and whether it is "a fundamental right, essential to a fair trial," *Gideon* v. *Wainwright*. . . . 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.[10] . . .

The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that 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:

---

[6] *Klopfer* v. *North Carolina* (1967).

[7] *In re Oliver* (1948).

[8] *Pointer* v. *Texas* (1965).

[9] *Washington* v. *Texas* (1967).

[10] 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*. . .; that state prosecutors may not comment on a defendant's failure to testify, *Griffin* v. *California*. . . ; and that criminal punishment may not be imposed for the status of narcotics addiction, *Robinson* v. *California*. . . . 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*. . . . 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.

> "That trial by jury is the inherent and invaluable right of every British subject in these colonies."

. . . .

The Declaration of Independence stated solemn objections to the King's . . . "depriving us in many cases, of the benefits of Trial by Jury." . . . The Constitution itself, in Art. III, § 2, commanded:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed."

Objections to the Constitution because of the absence of a bill of rights were met by the immediate submission and adoption of the Bill of Rights. Included was the Sixth Amendment which, among other things, provided:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

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.

Even such skeletal history is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court. For example, the Court has said:

> "Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'" [11]

. . . .

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 common-sense 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.

---

[11] *Thompson* v. *Utah* (1898).

. . . .

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 . . . 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, although there appear to have been exceptions to this rule. 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.

The Court today holds that the right to trial by jury guaranteed defendants in criminal cases in federal courts by Art. III of the United States Constitution and by the Sixth Amendment is also guaranteed by the Fourteenth Amendment to defendants tried in state courts. With this holding I agree for reasons given by the Court. I also agree because of reasons given in my dissent in *Adamson v. California*. In that dissent, . . . I took the position . . . that the Fourteenth Amendment made all of the provisions of the Bill of Rights applicable to the States. . . . 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. Among these are the right to trial by jury decided today, the right against compelled self-incrimination, the right to counsel, the right to compulsory process for witnesses, the right to confront witnesses, the right to a speedy and public trial, and the right to be free from unreasonable searches and seizures.

. . . . What I wrote [in *Adamson*] 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. . . . 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. I know from my years in the United States Senate that it is to men like Congressman Bingham, who steered the Amendment through the House, and Senator Howard, who introduced it in the Senate, that members of Congress look when they seek the real meaning of what is being offered. And they vote for or against a bill based on what the sponsors of that bill and those who oppose it tell them it means. The historical appendix to my *Adamson* dissent leaves no doubt in my mind that both its sponsors and those who opposed it believed the Fourteenth Amendment made the first eight Amendments of the Constitution (the Bill of Rights) applicable to the States.

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. Senator Howard, who introduced the Fourteenth Amendment for passage in the Senate, certainly read the words this way. . . .

> "Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution . . . . To these privileges and immunities, whatever they may be -- for they are not and cannot be fully defined in their entire extent and precise nature -- to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments
>
> Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it, are secured to the citizens solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. . . .
>
> . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." Cong. Globe, 39th Cong., 1st Sess., 2765–2766 (1866).

From this I conclude, contrary to my Brother HARLAN, that if anything, it is "exceedingly peculiar" to read the Fourteenth Amendment differently from the way I do.

. . . . I do want to point out what appears to me to be the basic difference between us. His view. . . 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. The origin of the Due Process Clause is Chapter 39 of Magna Carta which declares that "No free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the *law of the land*." . . . As early as 1354 the words "due process of law" were used in an English statute interpreting Magna Carta, . . . and by the end of the 14th century "due process of law" and "law of the land" were interchangeable. Thus the origin of this clause was an attempt by those who wrote Magna Carta to do away with the so-called trials of that period where people were liable to sudden arrest and summary conviction in courts and by judicial commissions with no sure and definite procedural protections and under laws that might have been improvised to try their particular cases. Chapter 39 of Magna Carta was a guarantee that the government would take neither life, liberty, nor property without a trial in accord with the law of the land that already existed at the time the alleged offense was committed. This means that the Due Process Clause gives all Americans, whoever they are and wherever they happen to be, the right to be tried by independent and unprejudiced courts using established procedures and applying valid pre-existing laws. There is not one word of legal history that justifies making the term "due process of law" mean a guarantee of a trial free from laws and conduct which the courts deem at the time to be "arbitrary," "unreasonable," "unfair," or "contrary to civilized standards." The due process of law standard for a trial is one in accordance with the Bill of Rights and laws passed pursuant to constitutional power, guaranteeing to all alike a trial under the general law of the land.

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. . . . 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 . . . 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 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 HARLAN, with 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 States have always borne primary responsibility for operating the machinery of criminal justice within their borders, and adapting it to their particular circumstances. In exercising this responsibility, each State is compelled to conform its procedures to the requirements of the Federal Constitution. The Due Process Clause of the Fourteenth Amendment requires that those procedures be fundamentally fair in all respects. It does not, in my view, impose or encourage nationwide uniformity for its own sake; it does not command adherence to forms that happen to be old; and it does not impose on the States the rules that may be in force in the federal courts except where such rules are also found to be essential to basic fairness.

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 undiscriminating 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. . . .

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[12] 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 suggest that its authors did not suppose that the Nation would always be limited to mid-19th century

[12] 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." The first eight Amendments are so much as mentioned by only two members of Congress, one of whom effectively demonstrated (a) that he did not understand *Barron* v. *Baltimore*, 7 Pet. 243, and therefore did not understand the question of incorporation, and (b) that he was not himself understood by his colleagues. One state legislative committee report, rejected by the legislature as a whole, found § 1 of the Fourteenth Amendment superfluous because it duplicated the Bill of Rights: the committee obviously did not understand *Barron* v. *Baltimore* either. That is all Professor Fairman could find, in hundreds of pages of legislative discussion prior to passage of the Amendment, that even suggests incorporation. [footnote by Justice Harlan]

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.

. . . .

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 19th 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 free government which no member of the Union may disregard." . . . Due process was not restricted to rules fixed in the past, for that "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement." . . . Nor did it impose nationwide uniformity in details. . . . .

. . . .

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. . . . 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. . . .

. . . .

The Court has . . . found among the procedural requirements of "due process of law" certain rules paralleling requirements of the first eight Amendments. For example, in *Powell* v. *Alabama*, 287 U.S. 45, the Court ruled that a State could not deny counsel to an accused in a capital case:

> "The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, *although* it be specifically dealt with in another part of the federal Constitution." *Id*., at 67. (Emphasis added.)

In all of these instances, 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.

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.

. . . .

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. . . .

The obvious starting place is the fact that this Court has, in the past, *held* that trial by jury is not a requisite of criminal due process. In the leading case, *Maxwell* v. *Dow*, 176 U.S. 581, Mr. Justice Peckham wrote as follows for the Court:

> "Trial by jury has never been affirmed to be a necessary requisite of due process of law. . . .

. . . .

Numerous other cases in this Court have assumed that jury trial is not fundamental to ordered liberty.[13]

Although it is of course open to this Court to reexamine these decisions, I can see no reason why they should now be overturned. It can hardly be said that time has altered the question, or brought significant new evidence to bear upon it. The virtues and defects of the jury system have been hotly debated for a long time, and are hotly debated today, without significant change in the lines of argument.

The argument that jury trial is not a requisite of due process is quite simple. The central proposition of *Palko, supra*, a proposition to which I would adhere, is that "due process of law" requires only that criminal trials be fundamentally fair. . . .. 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.

. . . .

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. For England, one expert makes the following estimates. Parliament generally provides that new statutory offenses, unless they are of "considerable gravity" shall be tried to judges; consequently, summary offenses now outnumber offenses for which jury trial is afforded by more than six to one. Then, within the latter category, 84% of all cases are in fact tried to the court. Over all, "the ratio of defendants actually tried by jury becomes in some years little more than 1 per cent."

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%. . . .

---

[13] *E. g., Irvin* v. *Dowd, supra*, at 721; *Fay* v. *New York*, 288; *Palko* v. *Connecticut*, 325; *Snyder* v. *Massachusetts*, 105; *Brown* v. *New Jersey*, 175; *Missouri* v. *Lewis*, 31.

. . . . 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." . . . .

. . . [T]hrough the long course of British and American history, summary procedures have been used in a varying category of lesser crimes as a flexible response to the burden jury trial would otherwise impose.

. . . .

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 petty 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*, ...

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.

. . . .