AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 8: The New Deal/Great Society Era—Foundations/Scope/Incorporation

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

Gary Duncan, a nineteen-year-old African-American, was arrested for battery after he allegedly slapped Herman Landry, a white boy who had been involved in an apparent racial dispute with Duncan's younger cousins. At trial, Duncan's request for a jury trial was denied. The trial judge, accepting the account of the incident offered by the white witnesses who testified, sentenced Duncan to sixty days in prison and ordered him to pay a $150 fine. Federal law at that time required a jury trial in all criminal cases other than petty crimes where the maximum punishment was less than six months. The maximum punishment for simple battery in Louisiana was two years. Duncan appealed his conviction to the Supreme Court of the United States, claiming that states were obligated by the due process clause of the Fourteenth Amendment to provide jury trials whenever a federal court would be obligated to provide a jury trial under the Sixth Amendment.

The Supreme Court by a 7-2 vote declared that Duncan was unconstitutionally convicted. Justice White's majority opinion applied the fundamental fairness test in a new way. Instead of determining whether Duncan's trial was fundamentally fair, White considered whether the jury trial provision of the Sixth Amendment was necessary for fundamental fairness. After concluding that a jury trial was a necessary element of a fair trial, he ruled that any trial which violated the Sixth Amendment guarantee also violated the due process clause of the Fourteenth Amendment.

Consider whether this reasoning is sound. Was Justice Harlan's dissent correct when he asserted that many particulars of the Sixth Amendment are not necessary for fundamental fairness, that a trial by a jury of ten persons would not be unfair even though the Sixth Amendment requires a twelve-person jury? Harlan also claimed that only two intellectually coherent positions exist for settling controversies over state constitutional criminal procedure. These are total incorporation, which insists that every provision of the Bill of Rights is fully incorporated, and fundamental fairness, which insists due process hinges on the fairness of the practice, not on whether the practice is forbidden by the Bill of Rights. Is this correct? Note Harlan's warning in Duncan *that incorporation might lead to the dilution of constitutional rights, as courts began to interpret more narrowly Bill of Rights liberties in an effort to give states more leeway. Two years later, the precise situation Harlan feared took place. The Justices in* Williams v. Florida *(1970) ruled that the Sixth Amendment permitted six-person juries. Harlan's concurring opinion agreed that as a matter of fundamental fairness, states were permitted by the due process clause to abandon twelve-person juries, but he insisted the majority's interpretation of the Bill of Rights "dilute[ed] constitutional protections within the federal system."*

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

speedy and public trial, to confrontation of opposing witnesses, and to compulsory process for obtaining witnesses.

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. State of Alabama* (1932), ... 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.[1]

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. . . . Royal interference with the jury trial was deeply resented. Among the resolutions adopted by the First Congress of the American Colonies (the Stamp Act Congress) on October 19, 1765—resolutions deemed by their authors to state 'the most essential rights and liberties of the colonists' was the declaration:

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

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

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 . . . .

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

. . .

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

---

[1] 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. . . . 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. . . . 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. . . . A criminal process which was fair and equitable but used no juries is easy to imagine. . . . 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. (Footnote by Justice White)

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. . . . 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.

. . .

The State of Louisiana urges that holding that the Fourteenth Amendment assures a right to jury trial will cast doubt on the integrity of every trial conducted without a jury. Plainly, this is not the import of our holding. Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. Thus we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial. However, the fact is that in most places more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court. . . .

[The rest of the opinion maintained that Duncan's trial violated the Sixth Amendment. Justice White concluded that whenever a person could be sentenced to two years in prison, a jury trial was required, even if the actual sentence was much less].

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* (1947). 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 v. New Jersey* (1908) 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 FORTAS

. . .

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

. . . The Due Process Clause commands us to apply its great standard to state court proceedings to assure basis fairness. It does not command us rigidly and arbitrarily to impose the exact pattern of federal proceedings upon the 50 States. On the contrary, the Constitution's command, in my view, is that in our insistence upon state observance of due process, we should, so far as possible, allow the greatest latitude for state differences. It requires, within the limits of the lofty basic standards that it prescribes for the States as well as the Federal Government, maximum opportunity for diversity and minimal imposition of uniformity of method and detail upon the States. Our Constitution sets up a federal union, not a monolith.

. . . Jury trial is more than a principle of justice applicable to individual cases. It is a system of administration of the business of the State. While we may believe (and I do believe) that the right of jury trial is fundamental, it does not follow that the particulars of according that right must be uniform. We should be ready to welcome state variations which do not impair—indeed, which may advance—the theory and purpose of trial by jury.

JUSTICE HARLAN, whom JUSTICE STEWART joins, dissenting.

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

The 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.

. . .

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[1] 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 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. . . .

. . . 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. . . .

---

[1] Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," *Stanford Law Review* 2 (1949): 5. 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* (1833), 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 [Sec.] 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]

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.