Apprendi, Blakely and Federalism

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The Clark Y. Gunderson Lecture is a memorial to a man who devoted his life to legal education and spent thirty years teaching at the Law School. It is supported by a trust fund in the University of South Dakota Law School Foundation established principally by Colonel Gunderson’s family. Professor Rutledge delivered the 2004 Gunderson Lecture at the Law Review’s Symposium on Sentencing and Punishment, which took place at the Law School on November 5, 2004. In addition to Professor Rutledge, attendees included U.S. District Chief Judge Lawrence Piersol, U.S. Attorney James McMahon, and Attorney General Larry Long. Professor Chris Hutton moderated the discussion. What follows is an adapted version of Professor Rutledge’s lecture.

Judge Piersol, U.S. Attorney McMahon, Attorney General Long, Dean Vickrey, Professor Hutton and members of the faculty, students and other guests, especially members of the Gunderson family, thank you for the opportunity to deliver this year’s Gunderson Lecture. It is a great honor.

As I have learned about Colonel Gunderson, I find the opportunity to give this address a particular honor. He left the Law School to serve his country in the 1940s and was instrumental in establishing the Judge Advocate General Corps, the elite corps of lawyers responsible for handling the military’s prosecutions and other legal matters. My invitation here stemmed from a speech that I gave to a group of judge advocate generals and judges at the Judicial Conference of the Court of Appeals of the Armed Forces earlier this year. After that speech, Damian Richard, the symposium editor of your law review, first approached me about participating in this Symposium and later formally extended the invitation from Dean Vickrey to deliver the annual Gunderson Lecture. Given Colonel Gunderson’s background, I find it especially appropriate that the contact which brought me to your beloved law school took place at a forum that Colonel Gunderson probably would have cared so deeply about.

The topic of this year’s symposium is Sentencing and Punishment. This topic could not be more timely. As you know, issues of sentencing and punishment have been a dominant part of the Supreme Court’s docket over the past several years. Last year, a closely divided Supreme Court held in Blakely v. Washington that the State of Washington’s Sentencing Guidelines violated the Constitution’s jury guarantee. That decision, which I will discuss in greater detail, is the most recent in a series of decisions that have expanded the jury’s role in the criminal justice system.

† Assistant Professor of Law, Columbus School of Law, Catholic University of America. I am grateful to Dean William Fox at the Dean’s Research Fund at the Columbus School of Law for generous financial assistance. Douglas Berman, Dwight Sullivan and John Holt provided thoughtful insights on my research on this topic. Lynn Rosenstock, Alan Levine, Holly Kuebler and Nicole Angarella provided.
detail later in my remarks, not only affected Washington’s scheme specifically, but also sent shockwaves throughout the legal and academic community over how it might affect other states’ sentencing schemes and the federal sentencing guidelines. Most recently, since the time of the original lecture, the Supreme Court has held that the Blakely principle applies to the Federal Sentencing Guidelines, with the consequence that the Guidelines are now merely advisory, not mandatory.\(^2\) So I commend the editors of the Law Review for selecting such a fine topic for their symposium.

Within that broad topic, I will be speaking on the specific issue of the Jury Right and Federalism. To those of you who write or work in the area regularly, the connection between these topics will be immediately apparent. To those of you less familiar with the area, let me briefly help you draw the connection.

Most criminal law questions boil down to four basic issues. The first is what to punish: we punish taking someone else’s property, but we don’t punish criminally the use of insulting\(^3\) words? Second, how much do we punish?\(^4\) It is too early to tell the effect of Booker and Fanfan. At bottom, the Court announced three holdings: (1) Blakely applies to the federal guidelines; (2) the guidelines are advisory, not mandatory; and (3) district judges’ sentencing decisions will now be subject to review for reasonableness, rather than de novo review. Booker, 125 S. Ct. at 749-50.

Two aspects of the decision are especially noteworthy. First, though the Court announced that the Guidelines are advisory, not mandatory, it also held that district judges “are bound to impose a sentence within the Guidelines range.” Id. at 750. Second, it is difficult to tell how the “reasonableness” review on appeal will work. It could be quite stringent, requiring district courts to give good reasons before departing from the range suggested by the “advisory” guidelines. See id. Alternatively, it could be quite relaxed, requiring reversal only where the district judge has failed to consult the guidelines or given no reason for a departure. See id.

As I write this footnote on Booker, speculation is rife among Blakely-watchers about whether Justice Breyer persuaded Justice Ginsburg to change her position on the question of remedies following the conference vote. Footnote eight of Justice Stevens’ dissenting opinion provides strong evidence that Justice Breyer did exactly that. Id. at 778 n.8 (Stevens, J., dissenting). That footnote contains the phrase “as the dissent would have us do” — a phrase one normally would see only in a majority opinion. Id. (Stevens, J., dissenting). Normally, when a justice changes positions post-conference, the author of the original opinion for the Court faces the thankless task of “cleaning up” the draft to scrub it of any indications that it once was the opinion for the Court. It appears that this reference slipped through the cracks, providing an exceptional insight into the Court’s internal deliberations on this case. Credit goes to John Wool of the Vera Institute who first noticed this oddity in the Stevens opinion. See DOUGLAS BERMAN, SENTENCING LAW AND POLICY, http://sentencing.typepad.com/ (last visited Feb. 10, 2005) (sentencing weblog maintained by OSU Professor Douglas Berman).

3. See Kent Greenawalt, Punishment, in 3 ENCYCLOPEDIA OF CRIM. & JUSTICE 1282 (Joshua Dressler ed., 2d ed. 2002) (“A second question concerns the necessary conditions for criminal liability and punishment in particular cases.”).
Certain crimes such as murder potentially qualify a suspect for the death penalty while others qualify for prison sentences. A third question, intimately tied to the first two: why do we punish? To deter this particular offender? To deter other offenders? As a form of counterspeech to counteract the undesirable “message” conveyed by a criminal act? Or for some other reason?

And then we come to what I believe is perhaps the most important question and one that is, in my view, too often overlooked in the study of criminal law – what institution should be making each of these decisions? You can imagine a variety of institutions in the criminal law realm: legislatures, prosecutors, judges, and juries. Each plays a role, though that role has evolved over time. For example, we now generally envision legislatures as largely responsible for the first question – what do we punish. But that was not always the case. That responsibility used to be vested, to a far greater extent, in courts. Likewise, we might expect judges to be responsible for determining how much do we punish (typically up to some maximum level set by the legislature). But that too has changed over time, and sentencing commissions, at the federal level and in many states, have assumed a greater share of those responsibilities.

The topic of my presentation – the jury right and federalism – lies at the intersection of several of these philosophical and institutional questions. Specifically, it considers the twin questions of: how much to punish and who decides.

To supply some context, let’s consider a deceptively simple example, the federal carjacking statute:

Whoever ... takes a motor vehicle ... from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –

(1) be fined under this title or imprisoned not more than 15 years, or both,
(2) if serious bodily injury ... results, be fined under this title or imprisoned not more than 25 years, or both, and
(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

Now, you might say that the allocation of power to decide the various criminal law questions in this example is clear. The legislature has answered the “what to punish” question by setting forth the elements of carjacking. The prosecutor’s role is to decide whether she can prove beyond a reasonable doubt that the defendant committed each of the elements of this offense. The jury’s role is limited to fact finder – to decide whether the prosecutor has carried her burden of

4. See, e.g., IMMANUEL KANT, THE PHILOSOPHY OF LAW 447 (W. Hastie trans., 1887) (“But what is the mode and measure of punishment which public justice takes as its principle and standard? It is just the principle of equality, by which the pointer of the scale of justice is made to incline no more to one side than the other.”).
5. For a good synopsis of the views, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.03 at 13-19 (3d ed. 2001).
6. For a classic exposition of these institutional issues, see H.A. Hart Jr., The Aims of the Criminal Law, 23 LAW & CONTEMP. PROBS. 401 (1958).
proving the facts beyond a reasonable doubt. And the judge largely decides the “how much to punish” question within the maximum set by the legislature.

But this relatively simple allocation masks some more subtle distinctions. For example, prosecutors also play a role in the “how much to punish question.” By choosing to charge a suspect with one form of carjacking (perhaps simple carjacking) rather than an aggravated form, the prosecutor, through the charging decision, can influence the amount of punishment meted out to a particular defendant. Likewise, juries can help to decide “how much to punish.” By choosing to convict a defendant of one type of offense rather than another, they are not simply working as fact finders. They are also functioning as law appliers in deciding what type of conviction a particular defendant warrants and, consequently, how severe the punishment can be.

Recent innovations in sentencing policy over the past two decades have added further layers of complexity to this debate. For, consider the two features of the carjacking statute—serious bodily injury and death. We might assume that they are elements of the crime—namely, facts that the jury finds to have been proven beyond a reasonable doubt.

Though the Supreme Court ultimately concluded that these features of the carjacking statute were elements, that conclusion was neither uncontroversial nor obvious.8 In many statutes like this one, legislatures and courts have treated such facts as “sentencing factors” rather than elements. Elements of the offense are facts comprising the definition of a crime. Sentencing factors, by contrast, do not form part of the definition of the crime but, instead, guide the sentencing entity’s discretion once the defendant has been convicted.9

The constitutional rules governing the treatment of these concepts differ in two important respects: (1) the entity that must make the finding and (2) the level of certainty with which the fact must be proven. In the case of elements, the prosecution must prove them to a jury beyond a reasonable doubt. In cases of federal prosecutions, they also must be specified in the indictment. By contrast, these same dictates do not apply to sentencing factors. Instead, sentencing factors typically are proven to a judge under a preponderance of the evidence standard.10

This dichotomy creates a dilemma. A legislature could easily circumvent these restrictions simply by recasting certain facts as sentencing factors rather than elements. For example, under a standard definition of burglary (breaking and entering the home of another at night with the intent to commit a felony therein), each of those facts forms part of the definition of the crime. Unless the jury finds each one beyond a reasonable doubt, the defendant will suffer no punishment. But, if we took our sample burglary statute and redrafted it, so that burglary consisted of “breaking the home of another” and then calibrated the

sentence to the other facts (entering, at night, with the intent to commit a felony),
that would have the effect of stripping several of those determinations from the
jury’s province.

Now it’s important to note that sentencing factors did not develop in a
vacuum. They involved the intersection of two developments in sentencing
policy. The first was a shift away from indeterminate sentencing. At the time of
the founding, a defendant’s sentence was intimately tied to the jury’s verdict.11
Whether the offense was defined at common law or by statute, the English trial
judge enjoyed relatively little sentencing discretion. In the 19th century,
coinciding with penological reforms, we began to witness the rise of
indeterminate sentencing.12 Judges enjoyed wide discretion to decide whether to
sentence the defendant to prison (and if so, for how long). By the middle of the
twentieth century, this system of indeterminate sentencing fell under sharp
criticism.13 These criticisms included the complaint that serious discrepancies
existed in how sentences were meted out, depending often on the sentencing
practices of the individual judge rather than neutral criteria. Attempts at reform
culminated in a series of changes in the 1980s, including the Sentencing Reform
Act of 1984, which created the United States Sentencing Commission.14
Sentencing factors, whether contained in such guidelines or in statutes,
represented one way to channel the sentencer’s discretion.

The second development was a growing legislative preference for the use of
mandatory minimum sentences. At the same time that sentencing reform
advocates were decrying the disparity in indeterminate sentencing, some
congressional officials were castigating judges who, in their view, were too soft
on certain criminals.15 To counteract this trend in judicial leniency, Congress
began to insert mandatory minimum sentences into criminal statutes directly,
which would constrain a sentencer’s discretion and prevent the sentencer from
going below the minimum set by Congress once the jury (or a guilty plea) had
determined the guilt of the defendant.16 Like sentencing factors, mandatory
minimum sentences also constrained a sentencer’s discretion.

Until quite recently, the Supreme Court’s jurisprudence established
virtually no constitutional oversight on sentencing practices (at least non-capital
ones), at the state or federal level. Beginning in the mid-1990s, however, a
growing number of justices on the Supreme Court began to express their

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N.C. L. REV. 621, 636-41 (2004). Juries also controlled development of the criminal law through their
nullification power. See Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury
12. Lillquist, supra note 11, at 641-53.
15. See generally Orrin G. Hatch, The Role of Congress in Sentencing: The United States
Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective
controlled substance offenses).
discomfort with the growing use of sentencing factors.\textsuperscript{17} In their view, the use of such factors in lieu of offense elements stripped the jury of its function as a circuit breaker in the governmental process leading to criminal punishment. Originally anchoring their complaints in the Fourteenth Amendment’s Due Process Clause, they eventually settled upon the Sixth Amendment’s jury guarantee as the basis for their constitutional critique to check on this exercise of legislative power.\textsuperscript{18}

Their critique developed in a series of decisions, and I will highlight three here. The first was \textit{Apprendi v. New Jersey}.\textsuperscript{19} In \textit{Apprendi}, the Court considered the constitutionality of New Jersey’s hate crime law. That law provided a penalty enhancement in cases where a crime was committed with the purpose of intimidating a group or individual because of race. Five justices who previously had signaled their dissatisfaction with such statutes in an earlier federal case held that the New Jersey statute was unconstitutional. The Court framed its holding broadly – any fact, except a prior conviction, that increases the statutory maximum punishment must be proven to a jury beyond a reasonable doubt (the “prior conviction” exception was designed to preserve \textit{Almendarez-Torres}, which held that an offender’s criminal history, unlike other enhancers, traditionally was determined by a judge – a decision that the Court has signaled it may reconsider at some point).\textsuperscript{20}

The implications of this holding were potentially quite profound. \textit{Apprendi} effectively said that certain facts had, as a matter of constitutional law, to be treated as offense elements – and thus found by a jury beyond a reasonable doubt (unless the defendant effectively waived her jury right). The decision threw into doubt nearly fifty federal criminal statutes and dozens of state statutes that, like the statute in \textit{Apprendi}, increased the statutory maximum based on the presence of some fact other than a prior conviction.\textsuperscript{21}

The second case was \textit{Ring v. Arizona}.\textsuperscript{22} \textit{Ring} grew out of a recognition that the logic of \textit{Apprendi} also implicated various states’ capital sentencing schemes.


\textsuperscript{18} \textit{Apprendi} and \textit{Monge} anchored their objections in the Due Process Clause. \textit{Jones}, decided the following term, was the first decision in which the justices who eventually formed the \textit{Apprendi} majority signaled their interest in anchoring the doctrine in the Sixth Amendment. \textit{Jones v. United States}, 526 U.S. 227, 240-52 (1999).

\textsuperscript{19} 530 U.S. 466 (2000).

\textsuperscript{20} Id. at 489. As for the continuing vitality of \textit{Almendarez-Torres}, the Court has hinted that the case may have been wrongly decided. \textit{Id.} at 489 n.15. Justice Thomas, the swing vote who joined the majority in \textit{Almendarez-Torres} to reject the constitutional challenge to the recidivism enhancement, likewise candidly hinted that he believes \textit{Almendarez-Torres} rests on an erroneous premise. \textit{Id.} at 521 (Thomas, J., concurring). Nonetheless, the Court has denied a writ of \textit{certiorari} in cases cleanly presenting the question whether \textit{Almendarez-Torres} should be overruled. \textit{See Colleen P. Murphy, The Use of Prior Convictions After Apprendi}, 37 U.C. DAVIS L. REV. 973, 1015-16 nn.226-30 (2004).


\textsuperscript{22} \textit{Ring v. Arizona}, 536 U.S. 584 (2002).
Of the 38 states with the death penalty, five employed regimes under which the judge, rather than the jury, determined whether the defendant should be sentenced to death. In *Ring*, the Supreme Court held that the Sixth Amendment required the jury to find the aggravating factors necessary for imposition of the death penalty.\textsuperscript{23} *Ring* effectively invalidated the schemes of these five states, which subsequently revised their capital sentencing schemes to require that aggravating factors be proven to a jury beyond a reasonable doubt.\textsuperscript{24}

The third and most recent case was last term’s decision in *Blakely v. Washington*, the constitutional challenge to Washington’s sentencing guidelines scheme that I mentioned previously.\textsuperscript{25} The state of Washington employed a guideline system where the facts of the crime and the defendant’s criminal history determine a recommended sentencing range within the statutory maximum. In Blakely’s case, he pled guilty to various violent crimes, and the recommended sentence under the guidelines was 53 months. Just prior to sentencing, however, the trial judge tagged 37 more months to the sentence because of the presence of certain “aggravating factors” of cruelty and violence. The resulting sentence exceeded that recommended under the Guidelines but still was below the statutory maximum. So, at bottom, *Blakely* presented the question whether the *Apprendi* principle was limited to cases where judicial fact-finding exceeds the statutory maximum punishment for the offense (the view of all federal courts of appeals and all but one state appellate bench at the time) or whether it extended more broadly to any situation where a judicial finding of fact extends the sentence outside some prescribed range (the lone view of a single state supreme court at the time).

The justices from the *Apprendi* majority bucked the dominant trend and opted for the broader interpretation. In an opinion by Justice Scalia, the majority explained that *Apprendi* reflected two principles of historical criminal jurisprudence – (1) that the truth of any accusation be confirmed by a jury and (2) that an accusation, to result in punishment, requires proof of facts. While acknowledging that the statutory maximum for Blakely’s crime was ten years, the majority held that the relevant maximum for *Apprendi* purposes was not that figure but, rather, the range prescribed by the Guidelines – namely the range dictated by the jury’s findings or the defendant’s admissions.\textsuperscript{26} The facts contained in Blakely’s guilty plea, the majority explained, did not authorize the judge to grant an exceptional upward departure. That departure depended, instead, on facts outside the plea and, therefore, violated the *Apprendi* principle.

This trio of cases has supplied us the following constitutional rule, what is sometimes referred to as the *Apprendi* or, more recently, the *Blakely* principle: in any federal or state prosecution, any fact other than a prior conviction that increases the maximum penalty range must, as a matter of constitutional law, be

\textsuperscript{23} Id. at 609.
\textsuperscript{24} Id. at 621 (O’Connor, J., dissenting).
\textsuperscript{25} 124 S. Ct. 2531 (2004).
\textsuperscript{26} Id. at 2538.
proven to the jury beyond a reasonable doubt. (As shorthand, I will refer to this as the "Apprendi" principle for the remainder of my remarks).

Now this may seem like a relatively straightforward and uncontroversial proposition. But it actually has broad reaching implications for how governments structure their criminal codes and how punishment is allocated in our criminal justice system.

Most critically for purposes of my presentation, this principle applies with equal force to the states as to the federal government. The Court anchored this trio of cases in the Sixth Amendment, which, by virtue of the Court’s decision in Duncan v. Louisiana, applies to the states through the Fourteenth Amendment’s Due Process Clause.27

To return to the matrix of issues that we discussed at the outset of my remarks, consider just some of the ways in which the Apprendi principle reallocates the decision making power in state systems of criminal justice:28

- It reallocates a share of the punishment power from state judges to state juries who now (barring a waiver of the jury right) must find nearly all facts that enhance a defendant’s potential punishment. In response, some states now require the jury to determine aggravating factors during trial. Others have developed “sentencing juries” who find facts bearing on the defendant’s sentence even after they have made a separate finding of guilt. Kansas developed such a system after its state supreme court, in a pre-Blakely decision, relied on Apprendi to invalidate Kansas’ sentencing scheme;29

- It restricts state legislatures in their ability to design punishment schemes, perhaps encouraging them to adopt large punishments for narrowly defined crimes with a series of mandatory minima. High statutory maxima avoid the Apprendi problem (but not the Blakely problem, depending on how the state handles criminal sentencing). Mandatory minima channel the sentencing decision and yet do not run afoul of the Sixth Amendment under Harris and McMillan.

- It calls into doubt the constitutionality of several states’ sentencing schemes and throws into disarray other states’ efforts to develop their own sentencing regime. For those states that choose not to follow Kansas’ model of the “sentencing jury,” Blakely pushes them to one of two alternatives. Either they must return to a system of indeterminate sentencing (with guidelines at most serving a non-binding advisory

function); or they must use guidelines to determine a suspect's parole eligibility within the maximum possible prison term authorized by the conviction;

- It may trim state legislatures' ability to craft determinate sentencing schemes that enhance the defendant’s sentence;
- It could strain the budgets of state courts that may have to resolve more cases through trials or cumbersome sentencing hearings;
- Finally, the doctrine could ultimately allocate greater power to state prosecutors who effectively circumvent many of the Court’s newly announced restrictions through creative plea-bargaining and the design of guilty pleas that waive the jury right. This last effect may be the most important. According to the most recent nationwide data, I have found over 90% of all felony convictions in state courts end in guilty pleas.

To put into perspective the impact of this line of cases on principles of federalism, imagine that Congress were to enact the following statute:\(^3\)

1. In a state criminal trial, a jury, not a judge, must find any fact (other than the fact of prior conviction) that increases the statutory maximum penalty for the crime;
2. In a state capital sentencing proceeding, only the jury, not a judge, may make the factual findings of aggravating circumstances necessary to render the defendant eligible for the death penalty;
3. Under state sentencing guidelines, a jury, not a judge, must find any fact (other than prior conviction) that increases the sentencing range beyond that specified in the guidelines.

Defenders of federalism would instantly file a constitutional challenge to this statute. They would bemoan the burdens that such a federal law would place on the states. They would cry “foul” at this unspeakable act of federal overreaching. Justices Scalia and Thomas, among the most ardent defenders of federalism, including in the criminal justice arena, are among the justices who presumably would be most sympathetic to a federalism-based attack on this hypothetical congressional enactment.\(^3\) Yet, ironically, they also are among the most ardent defenders of the \textit{Apprendi} principle, which accomplishes precisely the same anti-federalist result \textit{via} judicial decision.

So the dilemma – especially for the Court, but also for state policy makers affected by the \textit{Apprendi} principle and for litigants – is whether one can harmonize the principle with its anti-federalist implications. I believe that it is possible, though difficult, to harmonize the two principles. The key, in my opinion, is for the Court to begin to reconsider whether every judicial interpretation of the Sixth Amendment also must bind the states. In other words, the Court should build on some of the history surrounding the constitutional jury right and some research on the incorporation doctrine to limit the reach of the


Apprendi doctrine in matters involving the states.

Such an approach should appeal to both Justices Scalia and Thomas. For one thing, it would be truer to the Constitution’s text – the jury right appears not only in the Sixth Amendment but also Article III, suggesting that the Framers especially saw this guarantee primarily as one binding the federal government alone.32 For another thing, it would be more consistent with the history of the Constitution itself: the Framers considered – and rejected – an amendment that would have prohibited the states from depriving a citizen of a right to a jury trial.33 Thus, the text of the Constitution and the history support the notion that the jury right in the federal constitution was never meant to constrain the administration of state systems of criminal justice.

For nearly one hundred and seventy years, that was the governing doctrine. States remained immune from whatever gloss the federal courts chose to put on the jury rights in the federal Constitution. Instead, the jury rights in the states developed in whatever way the state courts chose to interpret analogous provisions of their own constitutions.

Then along came Duncan v. Louisiana.34 Duncan presented the question whether the Sixth Amendment applied to a state where the state’s constitution only required a jury for offenses punishable by death or hard labor (it is worth noting that Louisiana had a right to jury trial in its state constitution). More broadly, Duncan represented one battle in a longer fight occurring on the Court at that time over whether the Due Process Clause incorporated the various provisions of the Bill of Rights. The Court held that the Sixth Amendment did apply to the states.

Not all justices in Duncan, however, embraced that approach. Both Justice Fortas and Justice Harlan argued that, even if the Fourteenth Amendment incorporated some protections reflected in the Court’s interpretation of the Bill of Rights, it need not incorporate all of those protections. In Justice Fortas’s view:

Neither logic nor history nor the intent of the draftsmen of the Fourteenth Amendment can possibly be said to require that the Sixth Amendment or its jury trial provision be applied to the States together with the total gloss that this Court’s decisions have supplied. . . . There is no reason whatever for us to conclude that . . . we are bound slavishly to follow not only the Sixth Amendment but all of its bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings.35

Justice Fortas’s view echoed sentiments that Justice Harlan had expressed in earlier incorporation cases. For example, in a dissent from a decision holding that the Fifth Amendment’s Privilege Against Self Incrimination applied to the states, Justice Harlan explained that:

32. U.S. CONST. art. III, § 2; U.S. CONST. amend. VI.
33. ANNALS OF CONGRESS 452 (Joseph Gales ed., 1789).
34. 391 U.S. 145 (1968).
35. Id. at 171 (Fortas, J., concurring).
The States under our federal system have the principal responsibility for defining and prosecuting crimes. The Court endangers this allocation of responsibility for the prevention of crime when it applies to the States doctrines developed in the context of federal law enforcement, without any attention to the special problems which the States as a group or particular States may face.36

The Fortas/Harlan methodology charts a course for reconciling the values of the jury guarantee with the values of federalism. It does not disincorporate the jury right entirely but limits it to those aspects of the right that, along some criterion, warrant application against the states. Such an approach offers the states greater breathing room to adapt their criminal justice systems to their particular circumstances and encourages the experimentation and diversity among the states that is one of the great hallmarks of our federalist system of government.

Is such an approach even possible? Didn’t the incorporation cases and, specifically, *Duncan v. Louisiana* already settle the question that the Sixth Amendment and the judicial interpretations of it apply to the states in toto?

Until recently, my answer would candidly have been – yes, *Duncan* settled the question. But recent developments in another area of the law – specifically the Privileges or Immunities Clause of the Fourteenth Amendment – have opened the door for the Court to reconsider some of the incorporation jurisprudence from last century.

The Privileges or Immunities Clause provides that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”37 Shortly after the states ratified this Amendment, the Supreme Court largely rendered it a dead letter in the *Slaughterhouse Cases*.38 Six terms ago in *Saenz v. Roe*,39 however, a majority of the Supreme Court revived the clause and relied on it to invalidate a California law restricting benefits to new state residents.40 Important for the *Apprendi* issue, both Justice Scalia and Justice Thomas signed onto the project of resuscitating the Privileges or Immunities Clause.41 Justice Scalia joined the majority, which relied on the clause to invalidate the statute challenged in *Saenz*. Justice Thomas, while dissenting, agreed with the principle that the *Slaughterhouse Cases* read the Privileges or Immunities Clause far too narrowly and expressed a willingness to reconsider the decision.42 Thus, both Justices Scalia and Thomas have gone on record as supporting the Privileges or Immunities Clause as a potential restraint on the conduct of states.

The Court’s resuscitation of the Privileges or Immunities Clause provides

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37. U.S. Const. amend. XIV.
38. 83 U.S. 36 (1873).
40. *Id.* at 502-04.
41. *Id.*
42. *Id.* at 527-28 (Thomas, J., dissenting).
an avenue for beginning the process of decoupling that Justices Fortas and Harlan recognized and that I described above. Once one digs into the history surrounding the Privileges or Immunities Clause, one finds valuable evidence indicating that the drafters of that Clause intended for it, not the Due Process Clause, to serve as the vehicle for incorporating some of the provisions of the Bill of Rights against the states. If one accepts that historical premise, then the Privileges or Immunities Clause suddenly becomes a potentially clean slate on which the Court could write a new era of incorporation jurisprudence, one more sensitive to the federalism concerns raised by the Apprendi-Blakely line of cases. Indeed, Justice Thomas only recently penned an opinion expressing his willingness to revisit the Court's incorporation jurisprudence where it flies in the face of constitutional history. Thus, both justices, perhaps the swing votes in Apprendi matters, are particularly well positioned to be the fonts of a new jurisprudence that better harmonizes the conflicting values of the jury right with federalism.

If you have bought into the project so far, this leaves us with one final question – how is the Court to determine the criterion by which to decide what aspects of the jury right should be incorporated against the states and what aspects should remain limited to federal cases. Justices Fortas and Harlan, the architects of the thesis that I am setting forth here, suggested that the proper criterion is fundamental fairness – that is, incorporate against the states only those constitutional rules that seem to be dictated by notions of fairness. That approach, while certainly plausible, seems unlikely to resonate with a majority of the Court today, particularly Justices Scalia and Thomas, the justices whom I have suggested provide the key to limiting Apprendi's inroads on state prerogatives. If our goal is to appeal to those swing justices, I would submit that history supplies a studier criterion – that is, does the state practice depart from the practice in place at the time the Fourteenth Amendment was ratified? Specifically, does it strip the jury of some fact-finding power that it traditionally enjoyed at that time? Such a historical approach gels with the jurisprudence that Justices Scalia and Thomas generally have developed in addressing the meaning of other provisions of the Civil War Amendments. As I have explained elsewhere, I believe that a historical approach comports reasonably well with current constitutional doctrine and provides a workable guidepost for resolving various post-Apprendi questions.

During the symposium, one of the participants, United States District Judge Laurence Piersol, suggested that my proposal – using the Privileges or Immunities Clause as a font for a new era of "incorporation" – would work

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45. Rutledge, supra note 30, at 104-05.
"much mischief." By this comment, I infer he meant that the approach proposed here would lead courts down a path of reopening a whole range of incorporation doctrines that were believed to be settled — the Fourth Amendment, the exclusionary rule, and the Eighth Amendment, just to name a few examples.

I have tremendous respect for Judge Piersol and take his criticism quite seriously. Ultimately, though, I do not believe that my thesis necessarily leads to the "mischief" that he describes, for two reasons. First, my thesis is subject to a very important limiting principle — namely, one should limit the "disincorporation" (or the reincorporation through the Privileges or Immunities Clause) to those rights where there is clear evidence that the Framers did not intend for a particular right to apply to the states. The jury right here satisfies that test because we have unambiguous textual and historical evidence that the Framers did not intend to apply the federal jury guarantee to the states.

Second, nothing in my proposal bars the states from interpreting their own state constitutions to embrace an Apprendi principle. Thus, it is entirely possible that we may achieve the exact same results under my proposal as we do under Blakely. The difference, however, is that under my proposal those results are achieved through states (whether legislatures or courts) exercising a prerogative about how to organize their criminal justice systems. By contrast, under the current regime, five members of the Court impose that view on the states through a constitutional pronouncement of dubious historical pedigree.

This completes my remarks on the relationship between the jury right and federalism. For those of you unfamiliar with this area of the law, I hope that they have given you a sense of the doctrine and the values at stake. For those of you already familiar with it, I hope that these remarks have deepened your thinking about this important area of constitutional criminal law. At the end of the presentations or after the symposium, I would be happy to answer your questions. Thank you.