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Apprendi and Federalism

“In my view this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement.”¹

“[T]he 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.”²

A curious alliances of five justices, first forged five years ago in the fires of *Jones v. United States*,³ has adopted an increasingly aggressive (some might say reckless) jurisprudence interpreting the Sixth Amendment. That jurisprudence, the *Apprendi* doctrine, requires the jury to find any fact (apart from prior conviction) that increases either the statutory maximum sentence or the highest end of a sentencing range under a system of determinate sentencing.⁴ This doctrine, rooted in these five justices’ shared belief that certain forms of sentence enhancements invade the jury’s traditional province, culminated in the Court’s very recent decision in *Blakely v. Washington*.⁵ In *Blakely*, the Court invalidated a section of Washington’s sentencing guidelines. It seems likely in the forthcoming decisions in *United States v. Booker* and *United States v. Fanfan* to extend its reasoning to the upward-adjustment provisions of the federal guidelines.

Since the emergence of the *Apprendi* majority and its newly minted (and evolving) constitutional limits on criminal punishment, many commentators have begun to address its implications for the horizontal relations between the branches of government — between legislators and courts, between judges and juries, and between judges and prosecutors.⁶ Less widely addressed, though equally (if not more) important, has been the *Apprendi* doctrine’s implications for vertical relations, particularly federalism.⁷

This essay seeks to begin to fill that lacuna in the literature.⁸ Part I explains how *Apprendi* undermines principles of federalism, a curious tension because several of *Apprendi*’s strongest defenders, particularly Justices Scalia and Thomas, are also the most ardent protectors of federalism. Part II proposes how these justices can

reconcile their commitments to *Apprendi* and federalism: relying on the Privileges or Immunities Clause, they should hold that the Sixth Amendment aspects of *Apprendi* do not apply to the states except where a state scheme departs from settled historical practice. Part III tests this theory against the existing Supreme Court *Apprendi* jurisprudence and as a tool for solving several current *Apprendi*-related debates developing in state courts. Part IV concludes.

I. The Federalism Challenge for *Apprendi*’s Defenders

Imagine that Congress enacts a federal law that imposes the following mandates on the states:

- (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) In a state statutory sentencing guideline scheme, a jury, not a judge, must find any fact (other than prior conviction) that increases the sentencing range beyond that specified in the guidelines.

Such a statute would undoubtedly evoke howls of protest from federalism apologists. They likely would challenge the law as an unconstitutional intrusion on state sovereignty, and, given the current penchant for federalism in the Supreme Court, they might well succeed. In other contexts, a reliable bloc of five justices has repeatedly invalidated federal intrusions on the states and has reasserted the primacy of states in the administration of criminal justice.⁹

Of course, Congress does not need to enact such a statute, for the *Apprendi* majority has accomplished precisely the same result through a few strokes of a far less democratic pen. The *Apprendi* doctrine represents an exceptional burden imposed on the states by the federal government, here through a binding constitutional decision of the federal judiciary.¹⁰ It reallocates a share of the punishment power from state judges to state juries who now must find nearly all facts that enhance a



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defendant's potential punishment. It restricts state legislatures in their ability to design punishment schemes, perhaps encouraging them to adopt severe punishments for crimes with fewer elements where additional facts trigger mandatory minima. It calls into doubt the constitutionality of nearly twenty states' sentencing schemes and frustrates other states' efforts at developing their own schemes.¹¹ It could strain the budgets of state courts that may have to resolve more cases through trials or cumbersome sentencing hearings.¹² 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 which waive the jury right.¹³

The doctrinal explanation for the impact of the *Apprendi* doctrine on the states may be straightforward — after *Duncan v. Louisiana*, the states must accept the Court's gloss on the Sixth Amendment (what's good for the federal goose is good for the fifty-state gander).¹⁴ Yet two members of the *Apprendi* majority (Justices Scalia and Thomas) also have been among the most loyal members of the "Federalism Five" committed to protecting the states from federal intrusions and preserving their primacy in the administration of criminal justice. At times, both justices have split with the *Apprendi* majority — Justice Scalia in *Harris* and Justice Thomas in the pre-*Apprendi* cases of *Monge* and *Almendarez-Torres* (a vote he later expressed a willingness to reconsider).¹⁵ Can they simultaneously maintain their commitments to *Apprendi* and federalism?

Traditional doctrines do not adequately vindicate the federalism principles here. Doctrines such as retroactivity (which seems likely to apply after *Schiro v. Summerlin*) and procedural default might diminish the doctrine's impact for final convictions.¹⁶ But they do not minimize the impact for state convictions that are not yet final. While some of these non-final convictions might still be upheld under the harmless and plain error rules of *Neder* and *Cotton*, even these doctrines do not fully recoup the costs to the states of the *Apprendi* rule.¹⁷ *Apprendi* and *Blakely* still will burden state courts with new filings, force prosecutors to rethink their charging practices in future cases and compel states to reconsider their sentencing schemes.¹⁸

If these competing values cannot be reconciled, then arguments about the meaning of the *Apprendi* doctrine likely will unfold along horizontal lines — about its impact on the relationship between prosecutors, legislatures, judges and juries. However, if these competing values can be reconciled, the solution may well counsel how Justices Scalia and Thomas, if fully committed to federalism principles, should consider voting in future cases and, consequently, how such cases will be resolved. The next section sketches out a possible solution to their federalist dilemma.

II. The Privileges or Immunities Clause as a Solution to the Federalism Dilemma

In my view, *Apprendi* and federalism can only be reconciled if the Court is willing to decouple its Sixth Amendment jurisprudence from its incorporation jurisprudence. In other words, the Court should develop two strands of jurisprudence on the jury right — a broad Sixth Amendment jurisprudence applicable only to the federal government and a narrower Fourteenth Amendment jurisprudence applicable to the states. Such an approach finds its roots in the Court's old incorporation debates.¹⁹ It also finds support in both the text of the Constitution and the history of the jury right — sources that likely would appeal to Justices Scalia and Thomas. While the Court's incorporation jurisprudence may make it difficult to develop this doctrine in the Due Process Clause, the recent revival of the Privileges or Immunities Clause provides the Court a fresh opportunity to revisit the scope of the incorporation doctrine in light of *Apprendi*.

A. Incorporation and the Sixth Amendment

To identify a solution, we must return to the case where the fissure between the jury right and federalism first developed — *Duncan v. Louisiana*.²⁰ The details of that case are well known. At its narrowest level, *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. More broadly, however, *Duncan* represented one battle in a longer fight between warring camps over the proper understanding of the incorporation doctrine. An alliance of total incorporationists and selective incorporationists carried the day and held that the Sixth Amendment did apply to the case before the Court. As a consequence, for the past thirty-five years, states have been obligated to respect not only the text of the Sixth Amendment itself but whatever guarantees might attach as a result of the judicial gloss on that amendment.

Not all justices in *Duncan* embraced that approach. In separate opinions, both Justice Fortas and Justice Harlan (joined by Justice Stewart) applied a "fundamental fairness" methodology to the issue before the Court. While reaching opposite conclusions, both recognized an essential insight of central importance to the *Apprendi* debate: even assuming that the Due Process Clause incorporates *some* protections reflected in the Court's interpretation of the Bill of Rights, there is no principled reason to assume that it incorporates *all of those* protections. Justice Fortas expressed this view forcefully:

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.²¹

Echoing similar sentiments, Justice Harlan in dissent chided his brethren in the majority for blindly assuming that “the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case” and explained that “[t]here 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.”²² Wholesale incorporation of both the Sixth Amendment and its accompanying jurisprudence, Justice Harlan wrote, “put the States in a constitutional straitjacket with respect to their own development in the administration of criminal or civil law.”²³

Justice Fortas and Harlan instruct that the key to reconciling the values underpinning the right to a jury trial with federalism principles is to decouple the Sixth Amendment from the unreflective incorporation of it.²⁴ Such an approach respects the States’ “primary responsibility for operating the machinery of criminal justice within their borders, and adapting it to their particular circumstances.”²⁵ Additionally, Justice Fortas explained, it “allow[s] the greatest latitude for state differences” and the “maximum opportunity for diversity and minimal imposition of uniformity of method and detail upon the States.”²⁶

B. A New Approach to Incorporation

Justice Harlan of course lost his fight to limit incorporation of an amendment’s jurisprudence (warts and all) through the Due Process Clause. Yet more recent jurisprudential developments, endorsed by both Justices Scalia and Thomas, create fresh opportunities for them to revisit the pro-federalist principles underpinning Justice Harlan’s position. They could build on the Court’s emerging jurisprudence under the Privileges or Immunities Clause to reconcile the *Apprendi* principle with federalism principles.

Following the *Slaughterhouse Cases*, the Privileges or Immunities Clause largely remained a dead letter for more than a century.²⁷ Six terms ago in *Saenz v. Roe*, however, a majority of the Supreme Court breathed new life into the clause.²⁸ In *Saenz*, the Court invalidated a California law limiting the welfare benefits of new arrivals to the State. *Saenz* is important, though, not for this particular holding but because it demonstrates more generally the Court’s willingness to revive the Privileges or Immunities Clause. Both Justice Scalia and Justice Thomas signed onto this project. 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.

Thus, both Justices have gone on record as supporting the Privileges or Immunities Clause as a potential restraint on the conduct of states.

Though the Court has not yet extended the logic of *Saenz* to the criminal context, its resuscitation of the Privileges or Immunities Clause presents Justices Scalia and Thomas with an opportunity to develop a jurisprudence on the jury right more sensitive to state concerns. Some of the scant research surrounding the drafting of the Civil War Amendments has suggested that the drafters intended for those amendments, not the Due Process Clause, to serve as the primary vehicle for incorporating some fundamental rights against the states.²⁹ Following the course suggested by this historical research, the justices could use the clause to develop an alternative incorporation jurisprudence along the lines suggested by Justice Harlan — one that does not incorporate the entire corpus of Sixth Amendment jurisprudence against the states but instead only those that along some criterion warrant incorporation.³⁰

Such an approach should appeal to both Justice Scalia and Thomas. Begin with the text of the Constitution. Though often overlooked, the right to a criminal jury trial actually appears in two places in the Constitution. Most jurists recall that it appears in the Sixth Amendment. Additionally, it also appears in Article III of the Constitution, a fact too often overlooked in the *Blakely* debate. Specifically, Article III, Section 2 Clause 3 requires that the trial of all crimes, except in cases of impeachment, shall be by jury. As a textual matter, then, the codification of the jury right in Article III suggests that the Framers of the Constitution thought that the right was primarily one affecting the federal courts.

History supports this approach too. Again often overlooked is the fact that the Framers considered and rejected a provision of the Constitution that would have prohibited the states from depriving a criminal defendant of the right to a jury trial.³¹ Their rejection of this proposal lends further support to the notion that the jury right in the federal constitution was never meant to constrain the administration of state systems of criminal justice.

Justice Thomas may be particularly receptive to such an approach. In his separate opinion in the *Newdow* case, Justice Thomas suggested a willingness to reconsider the Court’s incorporation jurisprudence concerning the Establishment Clause.³² In his view, the Court’s incorporation jurisprudence had overlooked the fact that the Establishment Clause may have been designed precisely to preserve for the states the power to enact laws governing the establishment of a religion. While *Newdow* concerned the Establishment Clause, the methodology of Justice Thomas’s opinion is crucial. It suggests a broader willingness to revisit the incorporation jurisprudence when that jurisprudence departs from the original understanding of a particular provision of the Bill of Rights.

If the Court revisits its incorporation jurisprudence through the lens of the Privileges or Immunities Clause, what should be the proper criterion for deciding what aspects of the judicial gloss on the Sixth Amendment apply to the states? While Justices Fortas and Harlan anchored their jurisprudence in “fundamental fairness,” the viability of their methodology does not depend on this particular criterion. Rather, as a logical matter at least, any neutral criterion — text, structure, history, or state practice — potentially can supply a principled means for delineating the boundaries between those aspects of the Sixth Amendment that apply across all levels of government and those aspects that apply to the federal government alone. If one accepts the premise that Justices Scalia and Thomas are likely to supply the critical votes on cases implicating the intersection of *Apprendi* and federalism, then appeals to “fundamental fairness” are likely to be unavailing. Instead, history supplies a more likely criterion by which these justices could differentiate between those aspects of the Sixth Amendment jurisprudence that should be incorporated and those that should not. Both justices previously have relied on history to guide their interpretations of the Due Process Clause.³³ In *Saenz*, Justice Thomas relied on history to inform the meaning of the Privileges or Immunities Clause.³⁴

To say, however, that history should guide the incorporation inquiry does not end the debate but merely begins it. Like most historical inquiries, one still must define the body of history and the historical era relevant to the inquiry. Is it the history at the time of the Sixth Amendment’s ratification? At the time of the Fourteenth Amendment’s ratification? An amalgam of the two? Or is it some other data set altogether? Following the logic of the incorporation theory, the most sensible criterion would be the historical practice at the time of the Fourteenth Amendment’s ratification. At least according to the Court, that legal act provided the mechanism by which most provisions of the Bill of Rights came to apply to the states.

III. Applying the Privileges or Immunities Clause

How compatible would this approach be with existing Supreme Court doctrine? Easiest to explain would be *Ring*, *Almendarez-Torres* and *Monge*. The jury’s power to find facts necessary for imposition of capital punishment enjoys a long historical pedigree, and *Ring* involved a handful of states that deviated from that well established historical practice.³⁵ Likewise, recidivism enjoys a long pedigree as a consideration factoring into the judge’s sentencing decision rather than the jury’s guilt determination, so the *Apprendi* principle should not be imposed on the states in those contexts.³⁶

The historical approach is tougher to reconcile with both *Apprendi* and *Blakely*. As the opinions of Justices Thomas and O’Connor demonstrate, the historical pedigree for the rule in *Apprendi* is debatable.³⁷ The historical argument for *Apprendi* works only if one draws on a wide

array of sources from a variety of different historical eras, an approach that departs from the logic of a theory that anchors incorporation in ratification of the Fourteenth Amendment. *Blakely* too is dubious under the historical approach described above.³⁸ Long before *Blakely*, judges enjoyed enormous discretion in deciding how to sentence defendants within the range set by the offense.³⁹ It is therefore unsurprising that the *Blakely* majority did not preoccupy itself with the historical practice of how judges meted out sentences within a prescribed maximum. Instead, it based the holding largely on precedent and treated the case as a mere extension of the *Apprendi* principle in situations where statutorily designed guidelines direct the sentencer’s discretion.

Apart from its moderate coherence with existing Supreme Court doctrine, the historical principle also supplies a means for resolving several “waterfront” debates arising in the lower courts as a result of *Apprendi*. Consider one such debate in the California courts — whether *Apprendi* requires a jury to decide whether a felony is “abnormally dangerous” under this limitation to California’s felony-murder rule. In *People v. Schaefer*, a California Court of Appeals recently concluded that *Apprendi* did not require the jury to make that determination.⁴⁰ Under the methodology proposed here, that was probably the right result but for reasons other than those given by the Court. The *Schaefer* Court spoke in terms of its “long-standing rule that it is a question of law whether a crime is an inherently dangerous felony for purposes of the felony-murder rule.”⁴¹ Yet *Schaefer* cited only a recent decision as evidence of this “long-standing rule,” and the early case law on California’s felony-murder rule is sparse. Nonetheless, it appears that drafters of California’s first felony-murder rule included the traditional limitation from English law that the felony “involve substantial human risk,” an issue that English Courts treated as a question of law.⁴² In light of those traditional limitations, it was appropriate for the courts to retain the power to make the “inherently dangerous felony” determination.

Consider another question left over after *Ring* — whether in a capital sentencing proceeding, *Apprendi* requires the jury to determine that the aggravating factors outweigh the mitigating factors. State courts have split over this issue.⁴³ The majority view is that *Ring* does not require the jury to conduct the weighing because weight is not a fact, unlike, for example, an aggravating factor.⁴⁴ Under the historical approach proposed here, the majority view is likely incorrect. At the time of the Fourteenth Amendment’s ratification, the jury largely performed the capital sentencing function.⁴⁵ In states employing mandatory capital sentencing at that time, the jury performed this role during its guilt determination. In states employing discretionary capital systems at that time, the jury performed this role in its sentencing determination. In both systems, weighing, whether it occurred explicitly or implicitly (if indeed it occurred at all), took place during

the jury's deliberations. Reallocating that power to judges strips the jury of that traditional role and, thus, offends the historical principle offered here.

These two examples illustrate an obvious difficulty of this methodology (or, for that matter, any methodology anchored in history). On the one hand, to the extent the methodology is tied to a particular time period, such as the ratification of the Fourteenth Amendment, the historical evidence during the relevant time period may be scant at best or simply non-existent. On the other hand, to the extent that the methodology is untethered from a particular time period, one runs a relatively greater risk that the historical record may support multiple, perhaps conflicting, conclusions. The historical debate between Justices O'Connor and Thomas in *Apprendi* illustrates this unavoidable pitfall.⁴⁶

Yet historical debates are nothing new to the Court. All of the justices, but especially Justices Scalia and Thomas, regularly engage in such historical debates, for example, in determining the constitutionality of police conduct under the Fourth Amendment or the proper interpretation of a federal statute enacted against various common law norms.⁴⁷ It would be a mistake to discard a methodology that not only holds open a hope of reconciling two competing (and important) constitutional values but also does so in a manner that appeals to the likely swing votes on this issue.

IV. Conclusion

The *Apprendi* principle poses a challenge to justices, such as Justices Scalia and Thomas, who are committed to federalism principles. One might legitimately argue, as they do, that reforms such as sentencing guidelines and sentencing factors strip the jury of some of its traditional powers. Yet *Duncan* forces those justices to consider the impact their expansive interpretation of the Sixth Amendment on the states. To date, their opinions in cases such as *Apprendi* and *Blakely* do not seem to have been sufficiently sensitive to the impact of these decisions on principles of federalism. The approach offered here presents them with an opportunity to refocus on issues of federalism and to attempt to harmonize federalism with their commitment to the jury right. While *Apprendi* and federalism might seem irreconcilable at first, the incorporation debates sparked by Justice Harlan and others chart a path for the swing votes in *Apprendi* cases to harmonize their strong desire to protect the jury with their equally strong desire not to burden the states excessively. The reemergence of the Privileges or Immunities Clause in *Saenz* provides Justices Scalia and Thomas, likely the swing votes in *Apprendi* cases, with the opportunity to reconcile their strong commitment to the *Apprendi* principle with their equally strong commitment to federalism. It provides a vehicle by which these justices might begin to untether their aggressive reading of the Sixth Amendment from its anti-federalist implications—an approach more faithful to both the constitutional text and the constitutional history behind the jury right.

Many standards might supply the governing criteria for “selectively incorporating” the Court’s Sixth Amendment jurisprudence. In my view, history provides the guide most faithful to the logic of the incorporation doctrine and most consistent with jurisprudence of these two justices. Such an approach does a moderately good job at explaining the existing doctrine and provides a principle for addressing “waterfront” issues in the *Apprendi* terrain.

Notes

- ¹ Mapp v. Ohio, 367 U.S. 643, 681 (1961) (Harlan, J., dissenting).
- ² Malloy v. Hogan, 378 U.S. 1, 28 (1964) (Harlan, J., dissenting) (quoting *Abbate v. United States*, 359 U.S. 187, 195 (1959)).
- ³ 526 U.S. 227 (1999).
- ⁴ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
- ⁵ 124 S. Ct. 2531 (2004).
- ⁶ See, e.g., Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33 (2003); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L. J. 1097 (2001); Susan N. Herman, *Applying Apprendi to the Federal Sentencing Guidelines: You Say You Want a Revolution?*, 87 IOWA L. REV. 615 (2002); Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467 (2001); Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings about Apprendi*, 82 N.C. L. REV. 621 (2004); Stephen A. Saltzburg, *Due Process, History and Apprendi v. New Jersey*, 38 AM. CRIM. L. REV. 243 (2001).
- ⁷ *Apprendi* and more recently *Blakely* have inspired an animated “virtual” discussion among law professors over the doctrine’s federalism implications. See Douglas A. Berman, *Blakely, federalism, retroactivity, and pragmatism*, Sentencing Law and Policy web post (Sept. 6, 2004), available at http://sentencing.typepad.com/sentencing.law.and.policy/2004/09/emblakelyem_fed.html.
- ⁸ For one work that addresses the relationship between *Apprendi* and federalism in another context, see Stephanos Bibas, *Apprendi in the States: The Virtues of Federalism as a Structural Limit on Errors*, 94 J. CRIM. L. & CRIMINOLOGY 1 (2003).
- ⁹ See, e.g., *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *United States v. Lopez*, 514 U.S. 549 (1995).
- ¹⁰ For thoughtful discussions of *Blakely*'s impact on the states, see Anne Skove, National Center for States Courts, *Blakely v. Washington: Implications for State Courts* (July 16, 2004), available at <http://www.ncsconline.org/WC/Publications/KIS.SentenBlakely.pdf>; Jon Wool, Vera Institute of Justice, *Aggravated Sentencing: Blakely v. Washington — Legal Implications for State Sentencing Systems* (Sept. 2004); Jon Wool & Don Stemen, Vera Institute of Justice, *Aggravated Sentencing: Blakely v. Washington — Practical Implications for State Sentencing Systems* (Aug. 2004).
- ¹¹ See Wool & Stemen, *supra* note 10, at 1–6.
- ¹² See Skove, *supra* note 10.
- ¹³ For a discussion of how *Blakely* affects prosecutorial practices at the federal level, see Memorandum from James Comey to Federal Prosecutors (July 2, 2004), reprinted at 16 FED. SENT. REP. 357 (2004).
- ¹⁴ 391 U.S. 145 (1968). Of course, *Apprendi*'s decision to root these issues in the Sixth Amendment was not obviously necessary. Indeed, early decisions in this area, especially *Gaudin*, *Monge* and *Almendarez-Torres* all framed the constitutional issue in terms of Due Process, arguably a more flexible tool than the Sixth Amendment (albeit

- incorporated through the Due Process Clause). It was only in *Jones* and later in *Apprendi*, *Harris*, *Ring* and finally *Blakely* that the Court transformed the Due Process issue into a Sixth Amendment one.
- ¹⁵ *Harris v. United States*, 536 U.S. 545 (2002); *Monge v. California*, 524 U.S. 721 (1998); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).
- ¹⁶ 124 S. Ct. 2519 (2004). Though the Supreme Court has not addressed the precise issue, federal appellate courts consistently hold that *Apprendi* does not apply retroactively. See, e.g., *Coleman v. United States*, 329 F.3d 77, 81–90 (2d Cir. 2003).
- ¹⁷ *United States v. Cotton*, 535 U.S. 625 (2002); *Neder v. United States*, 527 U.S. 1 (1999).
- ¹⁸ See *State v. Gould*, 23 P.3d 801 (Kan. 2001); Minnesota Sentencing Guidelines Commission, *The Impact of Blakely v. Washington on Sentencing in Minnesota* (2004) reprinted at 17 FED. SENT. REP. 75 (2004).
- ¹⁹ See Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Discincorporation*, 87J. CRIM. L. & CRIMINOLOGY 63, 71 n.22 (1996). For a classic academic exposition on this theory, see Louis Henkin, *Selective Incorporation in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).
- ²⁰ 391 U.S. 145 (1968).
- ²¹ *Id.* at 171.
- ²² *Id.* at 181.
- ²³ *Id.* at 175–76.
- ²⁴ For a thoughtful academic exposition on these issues, see Latzer, *supra* note 19, at 63.
- ²⁵ *Duncan*, 391 U.S. at 172 (Harlan, J., dissenting).
- ²⁶ *Id.* at 171 (Fortas, J., concurring).
- ²⁷ 83 U.S. 36 (1873).
- ²⁸ 526 U.S. 489 (1993).
- ²⁹ W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1089–1095* (1953) (Clause incorporates first eight Amendments of the Bill of Rights); M. CURTIS, *NO STATE SHALL ABRIDGE 100* (1986) (Clause protects the rights included in the Bill of Rights as well as other fundamental rights).
- ³⁰ For a thoughtful academic exposition on the relationship between the Privileges or Immunities Clause and the incorporation doctrine, see William J. Rich, *Taking ‘Privileges or Immunities’ Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153 (2002).
- ³¹ WILLIAM BRENNAN, *THE BILL OF RIGHTS AND THE STATES 69–70* (1963); *Annals of Cong.* 452 (Gales ed. 1789).
- ³² See *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2328 (2004).
- ³³ For an example of this jurisprudence, see the opinions of Justices Scalia and Thomas in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).
- ³⁴ *Saenz*, 526 U.S. at 522.
- ³⁵ See, e.g., THOMAS A. GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800*, at 30, 122 (1985); 2 J. BISHOP, *NEW COMMENTARIES ON THE CRIMINAL LAW* § 726(3) (8th ed. 1892).
- ³⁶ See *Graham v. West Virginia*, 224 U.S. 616, 623 (1912) (citing several cases surrounding the time of the ratification of the Fourteenth Amendment standing for the proposition that “[t]he propriety of inflicting severer punishment upon old offenders has long been recognized in this country”).
- ³⁷ See *Apprendi*, 530 U.S. at 501–18 (Thomas, J., concurring); *id.* at 547 (O’Connor, J., dissenting).
- ³⁸ For a thoughtful discussion of the uncomfortable historical fit between some aspects of the *Apprendi* doctrine and the history of criminal sentencing, see Stephanos Bibas, *Blakely’s Federal Aftermath*, 16 FED. SENT. REP. 333, 341 (2004).
- ³⁹ See, e.g., Nancy Gertner, *What has Harris Wrought?*, 15 FED. SENT. REP. 83 (2002).
- ⁴⁰ 13 Cal. Rptr. 3d 442, 446–47 (Cal. Ct. App. 2004).
- ⁴¹ *Id.* at 447.
- ⁴² See James A. Pike, *What Is Second Degree Murder in California?*, 9S. CAL. L. REV. 112, 118 (1936).
- ⁴³ Compare *Johnson v. State*, 59 P.3d 450 (Nev. 2002), with *Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004).
- ⁴⁴ See *Ritchie*, 809 N.E.2d at 266–68 (collecting cases).
- ⁴⁵ For a discussion of the jury’s historical sentencing role in capital proceedings, see *Woodson v. North Carolina*, 428 U.S. 280, 291–93 (1976); John W. Poulos, *Liability Rules, Sentencing Factors and the Sixth Amendment Right to a Jury Trial: A Preliminary Inquiry*, 44 U. MIAMI L. REV. 643, 651–52 (1990).
- ⁴⁶ On the perils of using history in the course of advocating a legal position, see the excellent essay by Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History in Law*, 71 CHI.-KENT L. REV. 909, 917–32 (1996).
- ⁴⁷ See, e.g., *Holloway v. United States*, 526 U.S. 1 (1999); *Wilson v. Arkansas*, 514 U.S. 927 (1995).