



HOFSTRA LAW REVIEW

Volume 42, Page 731
Published 2014

The Collapsing Constitution

Michael D. Cicchini

Recommended citation:

Michael D. Cicchini, *The Collapsing Constitution*, 42 HOFSTRA L. REV. 731 (2014)

This article is also available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol42/iss3/1/>

Other works by the author are available at: <https://cicchinilaw.com/articles>

THE COLLAPSING CONSTITUTION

*Michael D. Cicchini**

I. INTRODUCTION

We live in a hyper-vigilant, tough-on-crime society where the government uses expansive criminal codes to pursue arrests, convictions and punishment—even for crimes where no person or property was harmed in any imaginable sense of the word. One of our defenses against an aggressive and over-reaching government is the Constitution. But while the substantive criminal codes of our federal and state governments are growing exponentially, our constitutional protections are collapsing—or, perhaps more accurately, have collapsed.

Alarmingly, all levels of the judiciary—especially the Supreme Court—have contributed to this constitutional collapse. And the Court’s justices are fully aware of what they are doing. For example, in one recent case, four justices dissented because the majority’s decision turned our Fourth Amendment right of privacy into “a chimera,” or delusion.¹ About a year later in a second case, four justices dissented because the majority’s decision turned our Fifth Amendment right against self-incrimination “upside down.”² Less than a year after that, in a third case, part of those earlier majorities dissented because the new majority’s decision reduced our Sixth Amendment right of confrontation

* J.D., *summa cum laude*, Marquette University Law School (1999); C.P.A., University of Illinois Board of Examiners (1997); M.B.A., Marquette University Graduate School (1994); B.S., University of Wisconsin—Parkside (1990). Michael Cicchini is a criminal defense lawyer, the author of *TRIED AND CONVICTED: HOW POLICE, PROSECUTORS, AND JUDGES DESTROY OUR CONSTITUTIONAL RIGHTS* (Rowman & Littlefield Publishers 2012), and a coauthor of *BUT THEY DIDN’T READ ME MY RIGHTS! MYTHS, ODDITIES, AND LIES ABOUT OUR LEGAL SYSTEM* (Prometheus Books 2010). He is the author of numerous articles on criminal and constitutional law, which are available at www.CicchiniLaw.com. He also writes at The Legal Watchdog Blog, available at www.thelegalwatchdog.blogspot.com.

1. *Herring v. United States*, 555 U.S. 135, 157 (2009) (Ginsburg, J., dissenting) (citing *United States v. Calandra*, 414 U.S. 338, 361 (1974) (Brennan, J., dissenting)).

2. *Berghuis v. Thompkins*, 560 U.S. 370, 412 (2010) (Sotomayor, J., dissenting).

to “a shambles.”³ Most recently in a fourth case, an unlikely coalition of four justices dissented, this time because the majority’s decision blatantly violated “the very heart of the Fourth Amendment.”⁴

The courts—again, courts at all levels of both our state and federal judiciaries—contribute to this constitutional collapse in at least three ways. First, courts often refuse to find constitutional violations, even in cases where the facts and the legal precedent overwhelmingly demonstrate that a violation has, in reality, occurred. Dissenting justices on the Supreme Court have argued that, in refusing to acknowledge these constitutional violations, their colleagues are guilty of “not only a gross distortion of the facts,” but also “a gross distortion of the law.”⁵

Second, when courts have no choice but to concede that a constitutional violation has occurred, they are eager to create an exception into which the offending government agent’s behavior will fit. In this context, dissenting justices on the Supreme Court have argued that their colleagues’ “distorted view creates an expansive exception” to the particular constitutional rule at issue, thus allowing the Court to circumvent our rights.⁶ Further, these expansive exceptions can have the perverse effect “to burden uniquely the sole group for whom the [Constitution’s] protections ought to be most jealously guarded: people who are innocent of the State’s accusations.”⁷

And third, even when courts are forced to acknowledge a constitutional violation and further cannot find or create an exception to the rule, they can simply refuse to grant the defendant any remedy for the violation of his rights. Dissenting justices on the Supreme Court have argued that, quite obviously, a constitutional right ceases to be “something real” when it is stripped of all meaningful remedies for its violation.⁸

II. WHAT VIOLATION?

The first and easiest way that a court can bypass a criminal defendant’s constitutional rights is simply to hold that, despite the facts of a particular case and even Supreme Court precedent, no constitutional violation occurred. This judicial tactic is best illustrated in the context of the Fifth Amendment.

3. *Michigan v. Bryant*, 131 S. Ct. 1143, 1168 (2011) (Scalia, J., dissenting).

4. *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013) (Scalia, J., dissenting).

5. *Bryant*, 131 S. Ct. at 1174.

6. *Id.* at 1173.

7. *King*, 133 S. Ct. at 1989.

8. *Herring v. United States*, 555 U.S. 135, 157 (2009) (Ginsburg, J., dissenting).

Whenever the police interrogate an in-custody suspect, they must first advise him of his numerous *Miranda* rights,⁹ including the right to remain silent. When a suspect invokes that right, the police must stop their questioning; if they do not cease their questioning, the judge must exclude the defendant's statement from the state's case-in-chief at the subsequent criminal trial (As an interesting aside, this remedy is typically a small price for the government to pay; the government is nearly always better off if the police ignore a suspect's invocation and instead interrogate him).¹⁰

But whether a suspect is in custody and is even entitled to a reading of the *Miranda* rights in the first place is often open to debate. This debate turns on an easily manipulated, fact-intensive, hindsight analysis. For example, was the suspect politely invited into the interrogation room before voluntarily entering and willingly answering questions? This (surprisingly common) judicial finding would lead to the conclusion that he was *not* in custody and therefore *not* entitled to a reading of his rights. Conversely, did the suspect (or the hypothetical reasonable person in his position) believe that he had no choice but to follow the orders of the armed and uniformed police officers who demanded to speak with him? This (surprisingly rare) judicial finding could lead to the conclusion that he *was* in custody and therefore *was* entitled to a reading of his rights.

Some situations, however, are not really open for debate. For example, when a defendant is incarcerated and serving a sentence, he is unquestionably in the sole custody and control of the government. Therefore, before the police may interrogate him, they must first read him his rights. Despite this inescapable conclusion, the Supreme Court still held that such in-custody interrogations, without *Miranda* warnings, do not violate the Fifth Amendment. In so doing, the Court created a new, absurd rule that completely eviscerates the policy and protections of *Miranda v. Arizona*:¹¹ an in-custody suspect is not entitled to a reading of his rights unless he is in "custody within custody."¹² The result: even when the police take a prisoner from his jail cell, withhold his prescribed and life-preserving medications, and ignore his repeated statements that he does not wish to talk, *Miranda* warnings are not necessary. Rather, the prisoner simply failed to qualify for the elusive status of being in custody within custody.¹³

9. *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966).

10. See Michael D. Cicchini, *The New Miranda Warning*, 65 SMU L. REV. 911, 940 (2012).

11. 384 U.S. 436 (1966).

12. *Howes v. Fields*, 132 S. Ct. 1181, 1194 (2012) (Ginsburg, J., dissenting).

13. See *id.* at 1195.

As another example, in cases where the police do, in fact, advise a suspect of his *Miranda* rights, whether the suspect actually invokes one of those rights is sometimes open to debate as well. When analyzing these situations after the fact, some courts have held that statements such as: “I think I would like to talk to a lawyer,”¹⁴ or “Could I get a lawyer?”¹⁵ are (surprisingly) not sufficient to invoke the right to counsel. Why were these statements insufficient? Because, the courts claim, a reasonable police officer simply could not be expected to know that the suspect was asking for a lawyer. This, of course, is disingenuous. When an interrogator informs a suspect that he has the right to lawyer “prior to” and “during any questioning,”¹⁶ how could the interrogator possibly interpret that particular response—Could I get a lawyer?—as anything *other than* a request for a lawyer?

But some invocations of *Miranda* rights are even clearer. Consider the situation where the police ask the suspect to sign a form acknowledging and waiving the right to remain silent. When the suspect refuses to sign the form, and then remains silent through nearly three hours of police interrogation, he is obviously invoking his right to remain silent. Despite this inescapable conclusion, the Supreme Court has still held that the continued interrogation does not violate the Fifth Amendment. Instead, the Court created yet another absurd rule that turns longstanding precedent (and logic) on its head: a suspect’s refusal to sign a waiver form along with his decision to remain silent is not sufficient to invoke the right to remain silent; instead, such behavior constitutes a *waiver* of that right.¹⁷ This leads to the question: “What in the world must an individual do to exercise his constitutional right to remain silent . . . ?”¹⁸ While we do not know the answer to that question, we do know this: actually *exercising* the right is not legally sufficient to *invoke* the right.

In short, no matter how clear-cut the precedent, and no matter how favorable the facts for the defense, there is no guarantee that a defendant is entitled to his constitutional protections—even in the rare case where he is able to appeal a trial court’s ruling all the way to the Supreme Court. Instead, there is a substantial risk that the courts at all levels will simply dispense with his rights by concluding that there was no constitutional violation—law and facts be damned.

14. Clark v. Murphy, 331 F.3d 1062, 1069, 1071 (9th Cir. 2003).

15. United States v. Wesela, 223 F.3d 656, 661-62 (7th Cir. 2000).

16. Miranda v. Arizona, 384 U.S. 436, 470 (1966).

17. Berghuis v. Thompkins, 560 U.S. 370, 375, 385 (2010).

18. Soffar v. Cockrell, 300 F.3d 588, 603 (5th Cir. 2002) (DeMoss, J., dissenting).

III. EXCEPTIONS THAT SWALLOW THE RULE

In cases where a court must find that a constitutional violation has, in fact, occurred, it can simply carve out an exception into which the government agent's illegal behavior will fit. Consider, for example, the Fourth Amendment's protection against unreasonable searches and seizures through its warrant requirement. When the police obtain a warrant and then search a suspect's home, the sworn statements in support of the warrant are often devoid of probable cause, and the warrant itself often fails to identify the place to be searched or the items to be seized. Yet, despite these gross defects, courts routinely excuse the constitutional violation under one of the broadest exceptions of all: the good faith exception. That is, the mere act of drafting a warrant and getting a judge to sign it—no matter how lacking in probable cause or otherwise defective the warrant might be—constitutes sufficient good faith on the part of the police to excuse the constitutional violation.¹⁹

The good faith exception gives judges the incentive to sign any warrant that law enforcement drafts and places before them. In fact, the colossal cut-and-paste errors in some warrants (and in the affidavits in support of those warrants) are strong evidence that judges are not even reading the documents before dispensing with the suspect's privacy rights via a stroke of the judicial pen. That is, if judges would actually read the warrant, and compare it to the officer's (allegedly) sworn statements made in the affidavit in support of the warrant, the errors would be so obvious that the judge would refuse to sign it in the first place.

All of the players in the criminal justice system—defense lawyers, police, prosecutors, and judges—are fully aware that the majestic language of the Fourth Amendment is now a mere platitude. In fact, one judge is even reported to have taken the next logical step by pre-signing a stack of warrants for the police to use however they wished.²⁰ In reality, this practice is not substantively different than the already common practice of signing a warrant without reading it and without scrutinizing the officer's affidavit in support of it. The only difference is that pre-signing is more convenient for the police and the judge.

However, pre-signing a stack of warrants is a bit too brazen, even for the government. Such a practice, if allowed, would destroy even the illusion that the Fourth Amendment still offers us some protection.

19. See, e.g., *United States v. Merritt*, 361 F.3d 1005, 1011, 1013 (7th Cir. 2004).

20. See R. Robin McDonald, *Judge Targeted for Issuing Blank Warrants*, DAILY REP. ONLINE (Aug. 13, 2012), http://www.dailyreportonline.com/PubArticleDRO.jsp?id=1202567040654&Judge_targeted_for_issuing_blank_warrants&slreturn=20130501205935.

Therefore, the government launched an ethics investigation of this particular judge and his alleged pre-signing practice. The investigation, however, was short-lived. The judge resigned a mere two weeks after his reelection, thus terminating the ethics inquiry.²¹

But the empty formality of obtaining even a pre-signed warrant is fast becoming a thing of the past. The police can now rely on so many judicially-created exceptions—including consent to search, third-party consent to search,²² search incident to arrest, protective sweep, abandonment, plain-view, hot-pursuit, other exigent circumstances, and the inevitable discovery exceptions—that the warrant requirement is now the exception, rather than the rule.²³

In addition to all of these exceptions, the Supreme Court recently created a new, “vast and scary” exception that permits the government to search our bodies and collect and store our DNA, *without a warrant*, whenever the police can satisfy the amazingly low standard of probable cause for an arrest.²⁴ The Court’s justification for this new, unimaginably broad exception is that DNA samples, much like fingerprints, could in theory permit the government to *identify* the arrested suspect from whom the DNA was collected. However, this newly created identification exception is not based on anything even loosely resembling reality.

First, as a legal matter, the particular DNA-collection statute that the Court upheld as constitutional does not allow for “identification” as one of the uses of the DNA; instead, using it for that purpose (or for any other purpose not specifically permitted by the statute) would be punishable by “up to five years’ imprisonment.”²⁵ Second, as a practical matter, the actual DNA results are not even available to the government until several months *after* an arrestee has already been identified by other means and his criminal case has commenced.²⁶ Therefore, instead

21. Consent Order, *In re Inquiry Concerning Judge Bryant Cochran* (Aug. 15, 2012), available at <http://www.abajournal.com/files/B.pdf>.

22. Government abuse of the third-party consent to search exception was recently approved by the Supreme Court. When a person refuses to allow the police to search his residence, the police can simply remove the objector by arresting him, and then obtain consent from someone else who remains on the premises. *Fernandez v. California*, No. 12-7822, slip op. at 2 (U.S. Feb. 25, 2014) (Ginsburg, J., dissenting) (“Instead of adhering to the warrant requirement, today’s decision tells the police they may dodge it, nevermind ample time to secure the approval of a neutral magistrate.”).

23. See, e.g., Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, U. ILL. L. REV. 363, 375 (1999) (referring to the exclusionary rule as “Swiss cheese”).

24. *Maryland v. King*, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., dissenting).

25. *Id.* at 1983.

26. *Id.* at 1984 (explaining that DNA was not available for use until long after “bail had been set, King had engaged in discovery, and he had requested a speedy trial . . . by definition, King could not have been *identified* by this match”).

of serving any legitimate purpose, the result of this newest exception to our rights is this: “your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason.”²⁷

While the Fourth Amendment may have the greatest number of judicially-created exceptions designed to swallow the original rule, it is not even the best example. Consider the Sixth Amendment right of confrontation, which, for our purposes, equates to the defendant’s opportunity to cross-examine his accuser in court. Without that opportunity for actual face-to-face, in-court confrontation, the accuser’s statement should be excluded from evidence. After all, talk is cheap, and it would be even cheaper if prosecutors were allowed to win convictions by having the police recreate on the witness stand what they claim the accuser said about the defendant.

The courts, however, seem to want convictions, regardless of the quality of the evidence presented. Therefore, the Supreme Court created an exception to the right of confrontation: the police can repeat the accuser’s hearsay statement at trial if the police obtained the statement *not* in the investigation of a past crime, but rather in response to an “ongoing emergency.”²⁸ The result: courts now label nearly every situation as an ongoing emergency. Even where the police are questioning an accuser about a crime long after-the-fact, and the police even admit that they questioned the accuser not to render any aid or resolve an ongoing emergency, but rather “to find out who did this, period,”²⁹ the Court will still force the facts into its “expansive exception.”³⁰ And because all imaginable situations have now become “emergencies [or] faux emergencies,”³¹ the rule of confrontation is swallowed by its newest exception.

IV. RIGHTS WITHOUT REMEDIES

Despite the common use of these two judicial tactics—refusing to find a constitutional violation or, when a violation is found, creating an exception to the constitutional rule—a third tactic is even more unsettling. Even when a court must acknowledge that a constitutional violation occurred, and even when there is no exception into which the government agent’s behavior will fit—a rare set of facts, indeed—the

27. *Id.* at 1989.

28. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

29. *Michigan v. Bryant*, 131 S. Ct. 1143, 1172 (2011) (Scalia, J., dissenting).

30. *Id.* at 1173.

31. *Id.* at 1174.

court still has another arrow in its quiver: it can simply acknowledge the constitutional violation, but then strip the underlying constitutional right of its only meaningful remedy. Our Supreme Court has already taken the lead on this front, and has blazed the trail for lower courts to follow.

When the Court strips our fundamental rights of their only meaningful remedies, it does not honestly and explicitly state what it is doing. Such honesty would be the functional equivalent of admitting that it is eliminating the underlying rights. What good is a right, after all, if there is no way to enforce it and no remedy when it is violated? So instead, the Court completely ignores the underlying right itself, and craftily shifts its focus. The new focus, however, will vary depending on the government's needs and the specific type of constitutional violation.

Consider, once again, the Fourth Amendment. In some cases, the courts are forced to acknowledge that the police violated the defendant's right of privacy. Typically though, courts lack the fortitude to do even that much, often starting their opinions with the catchphrase: "We assume *without deciding* that a [constitutional] violation occurred."³² And in some of these instances where the courts decide (or assume) the defendant's right of privacy was violated, they will be unable to fit the police behavior into one of the numerous, judicially-created exceptions.

In these cases, the courts can still deny defendants relief by simply ignoring the underlying right and its violation, and instead shifting focus to a tangential issue—in the case of the Fourth Amendment, the purported goal of deterring future police misconduct. That is, the courts hold that when the police violate a defendant's privacy rights, and when there is no exception into which the police conduct can fit, the remedy of suppressing evidence is still, in theory, available. However, suppression of evidence—a defendant's only meaningful remedy—should be the trial courts' "last resort," and is only justified if it would deter police misconduct in the future.³³

Even on its face, there are several fundamental problems with this rather peculiar approach. First, the Court completely misses the mark by ignoring the person—the defendant—whose rights the police just violated, and instead focuses on hypothetical defendants whose rights the police might violate in the future.³⁴ The absurdity of this approach is easily demonstrated with a simple analogy. If, for example, the Court used this type of reasoning to deny a corporate plaintiff a remedy in a

32. *State v. Kosterman*, 831 N.W.2d 825 (Wis. Ct. App. 2013) (emphasis added).

33. *Herring v. United States*, 555 U.S. 135, 140-41 (2009) (majority opinion) (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (internal quotation marks omitted)).

34. See Christian Halliburton, *Leveling the Playing Field: A New Theory of Exclusion for a Post-PATRIOT Act America*, 70 MO. L. REV. 519, 539 (2005).

breach of a commercial contract lawsuit, our nation's business community simply would not tolerate it; the political pressure would quickly change the Court's way of thinking.

Second, it is naïve to believe that a judge's ruling in a courtroom could deter or otherwise shape police conduct on the streets. Police officers care little about what happens inside of a courtroom several months, or even years, after they make their arrests. The police have their own culture and their own set of values.³⁵ The police value arrests, removing contraband from the community, and obtaining information from the suspects that they arrest. None of these things are affected by a judge's decision months or years after the fact. Defense lawyers, police, prosecutors, and even some trial judges know this. Only in our country's courts of appeal, and in parts of legal academia, does the myth of deterrence exist.

Third, even if deterrence was a possibility, and even if the Court was serious about using deterrence to help formulate the proper remedy for a constitutional violation, it still completely fails to understand the concept. That is, the Court has held that deterrence can only be achieved by suppressing evidence in cases of intentional and egregious police misconduct. But in reality, this is the very situation where suppression of evidence could *not* deter future police misconduct.

Consider the example used by the Court in support of its reasoning. Suppose a police officer knows that he has no legal grounds to enter and search a home, and further believes that no court would give him a search warrant to do so. Despite this, he openly and blatantly violates the defendant's privacy rights by entering and searching the home. This, the Court believes, is so egregious that suppression of the evidence in the subsequent criminal trial *would* deter this type of misconduct in the future.³⁶

However, when considering whether to suppress evidence, the egregiousness of the misconduct does not correlate with the deterrent effect. In reality, the opposite is true: this type of egregious misconduct is the one scenario where suppression would not, and *could not*, deter future misconduct.³⁷ When faced with the same choice again, the officer will make the same decision: enter and search the home without legal grounds, and let the court suppress the evidence later at the subsequent criminal trial. Why? Because if the police officer respects the Fourth Amendment and does not search, he will not obtain any contraband and

35. See Slobogin, *supra* note 23, at 394.

36. *Herring*, 555 U.S. at 139-40 (citing *Weeks v. United States*, 232 U.S. 383, 398 (1914)).

37. See Michael D. Cicchini, *An Economics Perspective on the Exclusionary Rule and Deterrence*, 75 MO. L. REV. 459, 474-75 (2010).

will not make any arrest. However, if he violates the Fourth Amendment and commits the misconduct by entering and searching the home, he gets the contraband and the arrest. Even if, months or years later, the suspect-turned-defendant is able to resist the lure of a plea bargain and is able to convince a judge to suppress the evidence, the police are still far better off than if they had honored the defendant's Fourth Amendment rights: they still have the contraband.

Deterrence in this context, therefore, is an illusion. However, it is an illusion that the Court is eager to perpetuate. Focusing on deterrence of future wrongs allows the Court to ignore the underlying constitutional right and the defendant whose rights were violated, while at the same time maintaining the myth that the Fourth Amendment still exists.

The absurdity of the Court's thinking is even more evident when shifting gears from police misconduct (occurring before the criminal case is even filed) to prosecutor misconduct at trial. When a prosecutor commits misconduct at trial sufficient to warrant a mistrial, the defendant will ask the judge to bar retrial. That is, the defendant argues that he has once been subjected to jeopardy and the prosecutor, instead of playing by the rules of criminal procedure, committed misconduct and caused the mistrial. The prosecutor should not be rewarded with another try at a conviction; instead, retrial should be barred.

If a trial judge could ever deter a government agent's misconduct, surely, this is the opportunity to do so. Unlike the police officer, the prosecutor appears in front of the trial judge nearly every day. And unlike the suppression of evidence that would occur months or even years after the fact in cases of police misconduct, the remedy of barring retrial would occur immediately after, or at least very close to, the prosecutor's misconduct. Finally, unlike the police, prosecutors care a great deal about convictions in the courtroom. That is why prosecutors file and try cases against defendants. To take away the chance at a conviction when a prosecutor commits misconduct would, surely, deter prosecutor misconduct in future cases.

Despite this, in cases of prosecutor misconduct, the Court completely abandons the concept of deterrence as it no longer suits the government's needs. Instead, the Court shifts the point of inquiry from deterrence to what is best described as attempted mind reading. In deciding whether retrial is barred—the only meaningful remedy for a defendant who was just denied a fair trial by the prosecutor—the Court instead looks at the prosecutor's state of mind at the time of the misconduct. Was the prosecutor attempting to “prevail at . . . trial by

impermissible means?”³⁸ If yes, this is permitted, and he is allowed to retry the defendant after having his free kick at the cat that resulted in a mistrial.³⁹ Conversely, was the prosecutor “intend[ing] to ‘goad’ the defendant into moving for a mistrial?”⁴⁰ This, the Court believes, is not acceptable, and the prosecutor would *not* be permitted to retry the defendant.⁴¹

The problems with this bizarre standard are numerous. First, the Court is, once again, ignoring the defendant, whose rights the prosecutor just violated. Second, how exactly should a trial judge go about reading the prosecutor’s mind? (Just asking the question demonstrates the problem.) And third, even if the judge could accurately read the prosecutor’s mind, the Court’s test has been set up in such a way as to automatically deny the defendant the remedy of a final acquittal, and the prosecutor will be allowed to retry him every time.

More specifically, what prosecutor would have preferred merely to provoke a mistrial request and then retry the case, rather than win a conviction by improper means and be done with the case? The test is so absurd that even a trial judge who honestly attempted to apply the law would have to conclude that the prosecutor was cheating to win, rather than cheating in order to do it all over again at a second trial.⁴² And based on this reasoning, the defendant’s right to due process becomes a right without a remedy as the prosecutor, with the full and near-limitless arsenal of government resources, gets a fresh start and another try at a conviction.

V. CONCLUSION

The constitutional collapse, in all of its forms, was not caused by trial and appellate courts alone. To the extent those courts have been contributing to the collapse, they have largely been following the examples set by our Supreme Court. Further, this constitutional collapse is not attributable to a single political party. Within a recent nine-month period, our constitutional rights suffered at least two major blows in two different Supreme Court decisions. As stated earlier in Part I, in one of

38. Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 936 (1998).

39. *Oregon v. Kennedy*, 456 U.S. 667, 669-70 (1982).

40. *Id.* at 676.

41. *Id.*

42. *Id.* at 688 (Stevens, J., concurring) (“It is almost inconceivable that a defendant could prove that the prosecutor’s deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the defendant.” (footnote omitted)).

those cases the dissent attacked the majority for reducing our Constitution to “a shambles.”⁴³ The author of that opinion was Justice Antonin Scalia,⁴⁴ the hyper-conservative Ronald Reagan-appointee and former bureaucrat in the Richard Nixon and Gerald Ford administrations. In the other case, the dissent blasted the majority for turning our constitutional protections “upside down.”⁴⁵ The author of that opinion was Justice Sonia Sotomayor,⁴⁶ the liberal Barack Obama-appointee, and former Bill Clinton-appointee to the Second Circuit Court of Appeals.

As further—and perhaps conclusive—evidence that politics is not driving the constitutional collapse, both Justices Scalia and Sotomayor joined forces to dissent from the Court’s most recent trampling of our rights. Their reason: the Court’s decision destroys “the very heart of the Fourth Amendment,” and the majority’s attempt to justify its holding “taxes the credulity of the credulous.”⁴⁷

But debating whether the constitution has been reduced “to a shambles,” or merely “turned upside down,” or, as another justice stated, turned into “a chimera,” is a meaningless linguistic exercise. In reality, all of the justices were correct. The problem is that our Constitution has devolved from the broad, firm, core principles that once protected all of us, to a series of easily manipulated rules and exceptions that have turned our rights into “hollow constitutional guarantee[s].”⁴⁸ Further, “what has been taken away from [these defendants] has been taken away from us all.”⁴⁹ Worse yet, the disintegration of the Constitution commonly harms those “who are innocent of the State’s accusations.”⁵⁰

This current state of constitutional law permits judges at all levels to determine the outcome they want to achieve—often a conviction at the trial court level, or the affirmance of a conviction at the appellate court level—and then gives them numerous fact-intensive tests, broad

43. See *supra* Part I; see also *Michigan v. Bryant*, 131 S. Ct. 1143, 1168 (2011) (Scalia, J., dissenting) (asserting that the Court’s opinion “distorts our Confrontation Clause jurisprudence and leaves it in a shambles”).

44. See *Bryant*, 131 S. Ct. at 1168.

45. See *supra* Part I; see also *Berghuis v. Thompkins*, 560 U.S. 370, 412 (2010) (Sotomayor, J., dissenting) (asserting that the Court’s “decision turns *Miranda* upside down”).

46. *Berghuis*, 560 U.S. at 391.

47. *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013) (Scalia, J., dissenting).

48. *Bryant*, 131 S. Ct. at 1173.

49. *Id.* at 1176.

50. *King*, 133 S. Ct. at 1989.

exceptions, and even remedy-stripping tactics to reach that predetermined outcome. Justice Scalia, in the context of the Sixth Amendment, has complained that our nation's highest Court should not be engaging in such low-level, fact-intensive analysis to decide issues of enormous constitutional significance.⁵¹ But that is the small price that he and his fellow justices will have to pay in order for the judiciary to keep its stranglehold on our constitutional rights.

51. *Bryant*, 131 S. Ct. at 1175-76 (lamenting the fact-intensive nature of the Court's analysis in the Sixth Amendment context, Justice Scalia complained: "I do not look forward to resolving conflicts in the future over whether knives and poison are more like guns or fists for Confrontation Clause purposes, or whether rape and armed robbery are more like murder or domestic violence.").