Montana v. Egelhoff: Abandoning a Defendant's Fundamental Right to Present a Defense

Jeffrey Scott Robinette
NOTE

MONTANA V. EGELHOFF: ABANDONING A DEFENDANT'S FUNDAMENTAL RIGHT TO PRESENT A DEFENSE

The Fifth and Fourteenth Amendments of the United States Constitution prohibit government actions that deprive an individual of life, liberty, or property without due process of law. Through these amendments, the Constitution guarantees that fair procedures will control all government actions aimed at depriving an individual of life, liberty, or property.

1. U.S. CONST. amend. V; id. amend. XIV. The Fifth Amendment states, in relevant part, that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” Id. amend. V. The Fifth Amendment ensures that the federal government will follow adequate procedures if it seeks to impair an individual's constitutionally protected interests. See id.

The Fourteenth Amendment similarly restricts actions by the states, stating:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Id. amend. XIV.


2. See 2 ROTUNDA ET AL., supra note 1, § 14.6, at 12 (describing procedural due process as guaranteeing a “fair decision-making process”). Procedural due process, at a minimum, requires that the government adhere to previously established rules. See id. § 17.1, at 201. Furthermore, the government must provide a neutral decision-maker and an adjudicatory hearing. See NOWAK & ROTUNDA, supra note 1, § 13.1, at 511; see also Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974) (concluding that “some kind of hearing is required at some time before a person is finally deprived of his property interests”). The nature of the hearing that is required depends on the circumstances. See 2 ROTUNDA ET AL., supra note 1, § 17.8, at 250; see also id. § 17.1, at 200 (describing the process due as that which determines the basis for, and legality of, government deprivations of constitutionally protected individual interests); Henry J. Friendly, “Some Kind of Hearing,” 123 U. PA. L. REV. 1267, 1279-95 (1975) (discussing the elements of the hearing required to comply with due process). The essential elements of a fair adjudicatory process may be broadly categorized as (1) adequate notice, (2) a neutral decision maker, (3) an opportunity to make an oral presentation, (4) an opportunity to present evidence or witnesses, (5) an opportunity to confront adverse witnesses or evidence, (6) the right to an attorney, and (7) a reasoned decision. See 2 ROTUNDA ET AL., supra note 1, § 17.8, at 250.
government actions\textsuperscript{3} that impair an individual's life,\textsuperscript{4} liberty,\textsuperscript{5} or property matters, procedural due process may further require (1) compulsory process of witnesses, (2) pre-trial discovery, (3) a public hearing, (4) a transcript of the hearing, (5) a jury, and (6) a heightened burden of proof for the prosecution. \textit{See id.}; \textit{see also infra} notes 8-11 and accompanying text (discussing the Sixth Amendment's requirements in criminal matters).

3. \textit{See U.S. CONST.} amend. V; \textit{id.} amend. XIV. The type of governmental actions that implicate due process may be limited to those actions that affirmatively deprive an individual of constitutionally protected interests. \textit{See Friendly, supra} note 2, at 1295-1304 (distiguishing between situations in which the government deprives an individual of an interest and situations in which the government simply refuses to comply with a request). Due process is required only when an action impairs an individual's life, liberty, or property interests as those categories are defined by the Supreme Court. \textit{See 2 ROTUNDA ET AL., supra} note 1, § 17.1, at 200. If a government action does not impair one of the three categories of individual interests identified in the Constitution, the government is not required to provide any process whatsoever. \textit{See id.} Thus, the first step of any due process inquiry is whether the interest affected by a governmental action deserves due process protection. \textit{See Board of Regents v. Roth, 408 U.S. 564, 570 (1972) (concluding that the range of interests protected by due process is finite); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (reasoning that due process protections are not implicated in all instances); Fuentes v. Shevin, 407 U.S. 67, 84 (1972) (reasoning that the nature of the interest must be encompassed in the categories of interests specifically recognized by the Fourteenth Amendment); Cafeteria Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (noting that a due process analysis must begin with “a determination of the . . . private interest that has been affected by governmental action”).

4. \textit{See U.S. CONST.} amend. XIV, § 1. The Supreme Court has never attempted to define “life” except, perhaps, in the context of the viability of life. \textit{See 2 ROTUNDA ET AL., supra} note 1, § 17.3, at 206. The Supreme Court held that a state may constitutionally deprive a person of life. \textit{See Proffitt v. Florida, 428 U.S. 242, 247 (1976) (rejecting an argument that the imposition of the death penalty violated the Due Process Clause and the Eighth Amendment); see also 2 ROTUNDA ET AL., supra} note 1, § 17.3, at 207 n.8 (discussing additional cases). \textit{See generally Charles L. Black, Jr., Due Process for Death: Jurek v. Texas and Companion Cases, 26 CATH. U. L. REV. 1 (1976) (discussing five Supreme Court cases regarding the constitutionality of the death penalty). A state may constitutionally impose the death penalty if it reserves that penalty only for the most serious of criminal offenses. Cf. Coker v. Georgia, 433 U.S. 584, 592 (1977) (deeming death too harsh a penalty for rape).}

5. \textit{See U.S. CONST.} amend. XIV, § 1. The concept of liberty is the primary limitation on action by the government with regard to individual rights. \textit{See 2 ROTUNDA ET AL., supra} note 1, § 17.4, at 212. At a minimum, due process protection of liberty interests restricts the government from depriving an individual of physical freedom without following fair procedures. \textit{See id.} at 213. In addition, liberty has been interpreted by the Supreme Court to protect other fundamental rights under the theory of substantive due process. \textit{See id.} at 222-23. Fundamental rights are not expressly protected by the Constitution, but are nonetheless granted constitutional stature by the Court because they are deemed essential to the concept of liberty or fairness. \textit{See Faretta v. California, 422 U.S. 806, 819 n.15 (1975) (discussing fundamental rights); 2 ROTUNDA ET AL., supra} note 1, § 17.4, at 222-23 (same); Ratner, \textit{supra} note 1, at 1049-50 (discussing the granting and limiting of rights under due process); \textit{see also Faretta, 422 U.S. at 821 (protecting a defendant's right to self-representation); Harris v. New York, 401 U.S. 222, 225 (1971) (protecting a defendant's right to testify in his own behalf); In re Winship, 397 U.S. 358, 361 (1970) (protecting a defendant's right to be proven guilty beyond a reasonable doubt); Snyder v. Massachusetts, 291 U.S. 97, 98-99 (1934) (protecting a defendant's right to be
The procedures that are required to ensure fairness depend

present at trial). The Court is reluctant, however, to find new fundamental rights. See Dowling v. United States, 493 U.S. 342, 352-53 (1990) (refusing to find an infraction of fundamental fairness where the State introduced evidence relating to a crime for which the defendant had been acquitted).

The Supreme Court has used the concept of liberty to selectively incorporate the individual rights contained in the Bill of Rights into the Fourteenth Amendment, so as to apply them to the states. See JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 2:5, at 2-13 to 2-14 (3d ed. 1996); see also Scott v. Illinois, 440 U.S. 367, 373-74 (1979) (ensuring the Sixth Amendment right to counsel in non-felony cases where a prison term is being imposed); Benton v. Maryland, 395 U.S. 784, 794 (1969) (extending the Fifth Amendment bar against double jeopardy to the states); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (extending the Sixth Amendment right to a trial by jury to the states); Washington v. Texas, 388 U.S. 14, 19 (1967) (extending the Sixth Amendment right of a defendant to present witnesses to the states); Klopfer v. North Carolina, 386 U.S. 213, 226 (1967) (extending the Sixth Amendment right to a speedy trial to the states); Pointer v. Texas, 380 U.S. 400, 407-08 (1965) (extending the Sixth Amendment right to be confronted by adverse witnesses to the states); Malloy v. Hogan, 378 U.S. 1, 3 (1964) (extending the Fifth Amendment privilege against self-incrimination to the states); Robinson v. California, 370 U.S. 660, 667 (1962) (extending the Eighth Amendment prohibition against cruel and unusual punishment to the states); Mapp v. Ohio, 367 U.S. 643, 660 (1961) (extending the Fourth Amendment exclusionary rule to the states); In re Oliver, 333 U.S. 257, 278 (1948) (extending the Sixth Amendment right to a public trial to the states).

The Supreme Court has chosen not to extend, however, all of the rights contained in the Bill of Rights to the states. See Hurtado v. California, 110 U.S. 516, 538 (1884) (refusing to extend the Fifth Amendment right to indictment by a grand jury to the states); see also COOK, supra, § 2:5, at 2-17 ("The right to an indictment by a grand jury remains one of the few Bill of Rights protections not held applicable in state prosecutions."); 2 ROTUNDA ET AL., supra note 1, § 17.1, at 201 n.4 (confirming that the right to indictment by grand jury is the only individual interest concerning criminal matters that has not been incorporated into the concept of liberty).

Despite the Supreme Court's comprehensive incorporation of the Bill of Rights into the concept of liberty, there has been substantial argument concerning the extent to which the Fourteenth Amendment was intended to extend the Bill of Rights to the states. See COOK, supra, § 2:2, at 2-4; WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 2:2., at 35 (1985); RICHARD B. MCNAMARA, CONSTITUTIONAL LIMITATIONS ON CRIMINAL PROCEDURE § 1.01, at 2 (1982). In particular, the due process component of the Fourteenth Amendment has produced several interpretative theories. See COOK, supra, § 2:2, at 2-4 to 2-6. These theories generally focus on whether due process should be limited to the specifically enumerated rights in the Bill of Rights or should have an independent meaning of its own. See id. §§ 2:3 to 2:8, at 2-6 to 2-24 (discerning four different theories from the case law); see also Ratner, supra note 1, at 1049-50 (arguing that these polarized theories are inconsistent with the intent of the Constitution).

6. See U.S. CONST. amend. XIV, § 1. Property interests include interests in all of the traditional forms of real and personal property. See 2 ROTUNDA ET AL., supra note 1, § 17.5, at 234. The government may not deprive an individual of property without providing a fair adjudicatory process. Cf. id. This right also may apply where the property interest is less tangible. See id. at 239-41 (discussing government benefits and the requirement that fair procedures be used to deprive an individual of a government established benefit).
on the circumstances of each case and the weight of the individual and governmental interests at stake. In criminal matters, a defendant's interests are particularly significant, and the Sixth Amendment enumerates several additional specific procedural requirements necessary to ensure fairness. These guarantees include a defendant's right to confront

7. See McElroy, 367 U.S. at 895. In McElroy, the Court concluded that:

[...] Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. Id.; see also 2 ROTUNDA ET AL., supra note 1, § 17.8, at 249 (concluding that the required procedures must be determined by balancing the worth of the procedure to the individual against its cost to society); infra notes 42-44 and accompanying text (discussing the inherent conflict between the interests of the state and a defendant with regard to evidence in a criminal trial). After the Court determines that the right in question deserves due process protection, the Court considers what process is due under the circumstances. See 2 ROTUNDA ET AL., supra note 1, § 17.1, at 201. The procedural process the Court requires differs depending on the individual interests affected by governmental action. See Morrissey, 408 U.S. at 481 (“[N]ot all situations calling for procedural safeguards call for the same kind of procedure.”). The more important the individual interests at stake, the greater the procedural safeguards necessary to protect those interests. See Friendly, supra note 2, at 1278.

8. See Winship, 397 U.S. at 362-64. A defendant in a civil matter generally has only a monetary or property interest at stake, while a defendant in a criminal case may lose life, liberty, or property. See id. (emphasizing the importance of the defendant's interest in a criminal trial to support a heightened burden of proof for the prosecution).

9. U.S. CONST. amend. VI. The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id. Specific guarantees in the Bill of Rights, as well as an independent concept of fundamental fairness imposed by the Due Process Clause, govern the adjudicative process in criminal trials. See 2 ROTUNDA ET AL., supra note 1, § 17.1, at 201; see also supra note 2 (discussing the fairness requirement of due process). The Constitution guarantees fairness through the Due Process Clause, and it defines the elements of a fair trial in criminal cases largely through the Sixth Amendment. See Strickland v. Washington, 466 U.S. 668, 684-85 (1984) (addressing the Sixth Amendment's right to counsel).
adverse witnesses and to compel witnesses to testify.  

10. See U.S. Const. amend. VI. The Confrontation Clause of the Sixth Amendment applies equally in state and federal criminal proceedings. See Pointer, 380 U.S. at 407-08; see also supra note 5 (discussing, inter alia, the extension of the Sixth Amendment to the states).

In its most basic form, the Confrontation Clause confers upon a defendant the right to confront adverse witnesses who testify before the jury at trial. See Snyder, 291 U.S. at 106-07; Peter Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 567, 569-71 (1978) [hereinafter Confrontation] (providing an in-depth analysis of the relationship between the Confrontation and Compulsory Process Clauses of the Sixth Amendment). The Confrontation Clause also ensures the defendant a right to be physically present at trial. See Oliver, 333 U.S. at 272-73; see also Confrontation, supra, at 572-74 (explaining that the Confrontation Clause protects the defendant from ex parte proceedings). The Sixth Amendment does not provide an absolute right to be physically present at trial. See Illinois v. Allen, 397 U.S. 337, 346-47 (1970) (upholding a conviction after the defendant was forcibly removed for disrupting the trial). Perhaps most importantly, the Confrontation Clause ensures that a criminal defendant has the right to cross-examine the State's witnesses against him. See Douglas v. Alabama, 380 U.S. 415, 418-19 (1965) (extending the Confrontation Clause to the states); Dowdell v. United States, 221 U.S. 325, 330 (1911) (reasoning that the Confrontation Clause ensures a defendant the right to be present at trial in order to cross-examine adverse witnesses, but does not ensure a defendant the right to be present in an appellate proceeding where new testimony is not being presented); Motes v. United States, 178 U.S. 458, 474 (1900) (stating that the presentation of witness testimony taken at a previous examining trial is inadmissible for lack of confrontation); Kirby v. United States, 174 U.S. 47, 55-56 (1899) (rejecting previous witness testimony taken at another criminal trial for lack of confrontation); cf. Mattox v. United States, 146 U.S. 140, 151 (1895) (holding that dying declarations and deceased witness' testimony are admissible under some circumstances); see also § 5 John Henry Wigmore, Evidence, § 1395, at 150 (Chadbourn rev. 1974) (concluding that the Sixth Amendment "demands confrontation, not for the idle purpose of gazing upon the witness . . . but for the purpose of cross-examination").

The Court emphasized the importance of the right to cross-examine adverse witnesses in Davis v. Alaska. 415 U.S. 308, 316 (1974). In that case, the defendant sought to introduce the juvenile record of a key prosecution witness to demonstrate bias. See id. at 311. The trial court refused to allow the evidence pursuant to Alaska law, which restricted the disclosure of juvenile records. See id. On appeal, the Supreme Court concluded that the defendant's right to cross-examine was more important than Alaska's law protecting juvenile records. See id. at 320; see also Confrontation, supra, at 580-81 (discussing Davis); Note, Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of Davis v. Alaska, 73 Mich. L. Rev. 1465, 1465-91 (1975) (analyzing Davis).

11. See U.S. Const. amend. VI. The Sixth Amendment provides the criminal defendant the right to compel witnesses to testify on his behalf. See id. This provision, which is referred to as the Compulsory Process Clause, applies in both federal and state criminal proceedings. See Washington v. Texas, 388 U.S. 14, 18-19 (1967); see also supra note 5 (discussing the extension of the Sixth Amendment to the states); infra note 16 (discussing Washington).

The Compulsory Process Clause can be viewed as a mirror image of the Confrontation Clause. See Confrontation, supra note 10, at 569. Whereas the Confrontation Clause ensures that the defendant in a criminal trial is permitted to cross-examine adverse witnesses, the Compulsory Process Clause allows him to produce witnesses in his favor. See id. at 593. Most notably, compulsory process provides a defendant the right to subpoena
The United States Constitution does not expressly guarantee a defendant the right to present a defense. Implicit in the concept of fairness provided in the Fourteenth Amendment and the enumerated rights provided in the Sixth Amendment, however, is a criminal defendant’s constitutional right to present a defense. Although the right to present a witness does not limit the power to subpoena favorable witnesses; rather, it encompasses the ability to elicit testimony from those witnesses at trial. See Washington, 388 U.S. at 19; Confrontation, supra note 10, at 593; see also Alexander Schure, Note, Taylor v. Illinois: Compulsory Process vs. The Preclusion Sanction, 10 Whittier L. Rev. 741, 756-57 (1989) (analyzing the constitutional wording of the Compulsory Process Clause and concluding that it is not limited to the subpoena power).

The right to present witness testimony is not absolute. See Taylor v. Illinois, 484 U.S. 400, 401-02 (1988) (upholding the preclusion of witness testimony as a discovery sanction). A defendant does not have a constitutional right to present testimony “that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.” Id. at 410. In addition, witness testimony must be material and favorable to the defense in order to be constitutionally protected. See United States v. Valenzuela-Bernal, 458 U.S. 858, 872-74 (1982) (holding that the deportation of defense witnesses did not deprive the defendant of compulsory process because he did not show that the lost testimony “would be both material and favorable to the defense”).

12. See Robert N. Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials, 9 Ind. L. Rev. 713, 794-801 (1976) (arguing that the right to present a defense arises from the Due Process Clause); Peter Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 95-101 (1974) [hereinafter Compulsory Process] (arguing that the Sixth Amendment’s Compulsory Process Clause was intended by the Framers of the Constitution to provide a defendant the right to present a defense); see also infra note 45 (discussing the divergent views regarding the origin of a defendant’s right to present a defense).

13. See Crane v. Kentucky, 476 U.S. 683, 690 (1986); see also Clinton, supra note 12, at 713 (reasoning that the Constitution does not expressly grant a defendant the right to present a defense, but the Sixth Amendment assumes such a right). In Crane, the Court reasoned, “[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” 476 U.S. at 690 (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).

English common law provided a defendant only a minimal opportunity to present a defense, possibly because the defendant was not permitted to bear witness against the Crown. See Clinton, supra note 12, at 716-17; Compulsory Process, supra note 12, at 82 (explaining that the accused “had no right to confront the witnesses against him in person; he had no right to summon witnesses in his favor, or, indeed, to present witnesses who were willing to testify voluntarily”). Although English criminal procedure in the seventeenth century took gradual steps toward ensuring a defendant the right to present a defense, Parliament did not address this right until early in the eighteenth century, when it granted criminal defendants accused of treason and related crimes the right to present witness testimony. See Clinton, supra note 12, at 718-20; Compulsory Process, supra note 12, at 87-90. Nonetheless, criminal defendants lacked the right to counsel and the right to compel witness testimony in their favor well into the eighteenth century. See Clinton, supra note 12, at 720.

Early colonial practice similarly paid little attention to an accused’s right to present a defense. See id. at 724. As a result, summary convictions were widespread. See id. at
defense is a well accepted principle in modern criminal jurisprudence, the United States Supreme Court was slow to recognize this right. Not until 1967 did the Supreme Court clearly recognize a right to present a defense in a criminal trial. Once the Supreme Court recognized a right

725-26. By the time the Bill of Rights was adopted, an accused had the right to address the jury in his defense. See id. at 727; Compulsory Process, supra note 12, at 93 (pointing out that by 1750, an accused had the right to subpoena witnesses and place them under oath in Maryland, Massachusetts, Pennsylvania, and Virginia). The Constitution addressed the procedural deficiencies of the time in order to ensure a fairer trial. See Clinton, supra note 12, at 738-39. In so doing, the Constitution did not expressly address a defendant's right to present a defense, because that right already existed. See id.; Compulsory Process, supra note 12, at 95-101 (reasoning that the wording of the Compulsory Process Clause, although not expressly preserving the right to present a defense, was clearly intended to ensure that right).

14. See Clinton, supra note 12, at 742. A "right to be heard" developed in the nineteenth century. Id. at 748. The first cases to recognize the right arose during the Civil War when the United States sought to confiscate property from confederate sympathizers. See id. In Windsor v. McVeigh, 93 U.S. 274, 277 (1876) and McVeigh v. United States, 78 U.S. (11 Wall.) 259, 267 (1870), the Supreme Court reversed lower court orders of forfeiture that were made because the defendant, fearing arrest, appeared before the court by counsel rather than in person. In both cases, the Supreme Court rejected summary orders by relying on the right to be heard, which it referred to as a principle of natural justice. See McVeigh, 78 U.S. (11 Wall.) at 267; Windsor, 93 U.S. at 277; see also Clinton, supra note 12, at 748. Following the McVeigh and Windsor cases, the Court in Hovey v. Elliott, 167 U.S. 409 (1897), clearly held that the Due Process Clause confers a right to be heard in one's defense. Id. at 417-18; see also Clinton, supra note 12, at 749. In Hovey, the trial court struck a party's answer and ordered judgment against him because he failed to turn over money to the court and refused to appear before the court. 167 U.S. at 410-12. Thereafter, the right to be heard was firmly established in civil cases. See Clinton, supra note 12, at 749.

In Cooke v. United States, the Court extended the right to be heard to a federal court contempt proceeding. 267 U.S. 517, 537-38 (1925); see also Clinton, supra note 12, at 750. In Cooke, the Supreme Court reversed a contempt of court order because the lower court did not provide an opportunity to respond to the contempt charge. 267 U.S. at 537-38. In In re Oliver, the Court extended Cooke to a state court contempt proceeding using the Due Process Clause. 333 U.S. 257, 274 (1948); see also Clinton, supra note 12, at 751. In Oliver, the trial court charged a witness with contempt because the witness' testimony contradicted the testimony of a previous witness. 333 U.S. at 259. The lower court failed to provide the witness an opportunity to refute the contempt charge. See id. at 272-73. The Supreme Court determined that the summary sentencing of a witness for contempt constituted a violation of the right to be heard in one's defense. See id. at 273. Thus, Cooke and Oliver established the principle that a person has a fundamental constitutional right to present a defense arising from the Fifth and Fourteenth Amendments. See Clinton, supra note 12, at 751. In fact, in Oliver the Court clearly stated that "[a] person's right to . . . be heard in his defense—a right to his day in court—are basic in our system of jurisprudence." 333 U.S. at 273.

15. See Specht v. Patterson, 386 U.S. 605, 610 (1967); see also Clinton, supra note 12, at 763-64; cf. Oyler v. Boles, 368 U.S. 448, 452 (1962) (upholding a state recidivist sentencing procedure where the Court found sufficient constitutional protection of the right to be heard). In Specht, the Supreme Court extended the right to be heard, developed in civil cases and criminal contempt proceedings, directly to the criminal trial process. 386 U.S. at 609-10. The Court overruled a Colorado sex offender statute that enabled sum-
to present a defense, it began to define the extent to which states could impair that right with procedures and evidentiary rules.\textsuperscript{16}

In the landmark decision \textit{Chambers v. Mississippi},\textsuperscript{17} the United States Supreme Court considered whether the exclusion of critical defense evidence denied a defendant due process of law.\textsuperscript{18} Using two state evidentiary rules, the trial court in \textit{Chambers} suppressed testimony by several defense witnesses.\textsuperscript{19} The evidence tended to demonstrate that a person other than the defendant had committed the crime for which he was charged.\textsuperscript{20} The Supreme Court concluded that the defendant had been denied a fundamental constitutional right to present a defense that in-

\begin{itemize}
\item \textsuperscript{16} See \textit{Clinton}, supra note 12, at 778. Traditionally, the Court disposed of cases dealing with a state’s impairment of a defendant’s ability to present a defense by applying one of the specifically enumerated rights of the Fifth or Sixth Amendments. \textit{See id.} at 756. The Court largely ignored the Due Process Clause as a basis for a defendant’s right to present a defense in a criminal trial. \textit{See id.} at 756; see also supra notes 14-15 (discussing the development of the right to be heard in contempt proceedings).
\item The late recognition of a substantive right to defend oneself may be due to the rarity of summary convictions in American jurisprudence. \textit{See Clinton}, supra note 12, at 751. Historically, at least some kind of defense was permitted prior to convicting an accused criminal. \textit{See id.} at 750-51. Thus, very few cases have squarely raised the issue of a defendant’s constitutional right to present a defense. \textit{See id.} at 751; see also \textit{Confrontation}, supra note 10, at 586 (noting how few Supreme Court cases have actually interpreted a defendant’s right to compulsory process).
\item 16. \textit{See Clinton}, supra note 12, at 778. Traditionally, the Court disposed of cases dealing with a state’s impairment of a defendant’s ability to present a defense by applying one of the specifically enumerated rights of the Fifth or Sixth Amendments. \textit{See id.} at 756. The Court largely ignored the Due Process Clause as a basis for a defendant’s right to present a defense in a criminal trial. \textit{See id.} at 756; see also supra notes 14-15 (discussing the development of the right to be heard in contempt proceedings).
\item Once the Court found a substantive right to defend, it began to use that right to dispose of cases where the state impaired the right by excluding evidence. \textit{See Clinton}, supra note 12, at 764. In the landmark case, \textit{Washington v. Texas}, the defendant sought to call a witness who had already been convicted of murder in the same shooting incident to testify that the defendant did not pull the trigger and had tried to stop the murder. 388 U.S. 14, 16 (1967). Relying on a state statute that prohibited the submission of accomplice testimony, the trial court prohibited the defendant from presenting the testimony. \textit{See id.} at 16-17. The defendant was convicted of murder. \textit{See id.} at 17. On appeal, the Supreme Court concluded that the defendant had been denied his Sixth Amendment right to compulsory process, which the Court simultaneously concluded was incorporated into the Due Process Clause of the Fourteenth Amendment. \textit{See id.} at 17-19; see also \textit{Clinton}, supra note 12, at 765-66. Even after \textit{Washington}, the Court continued to couch a defendant’s procedural rights in the specific guarantees of the Fifth and Sixth Amendments. \textit{See Brooks v. Tennessee}, 406 U.S. 605, 610-13 (1972) (utilizing the Fifth Amendment privilege against self-incrimination and the Sixth Amendment’s right to counsel to find unconstitutional a state statute that required the defendant to testify first, if at all); see also \textit{Clinton}, supra note 12, at 771-72.
\item 17. 410 U.S. 284 (1973).
\item 18. \textit{Id.} at 289-90.
\item 19. \textit{Id.} at 294; see also infra note 45 (explaining the facts of \textit{Chambers} in detail).
cluded a right to present exculpatory evidence. 21

In Montana v. Egelhoff, 22 the United States Supreme Court addressed a defendant's right to present a defense in the context of a state statute that precluded jury consideration of intoxication evidence that negated an essential element of the crime. 23 James Egelhoff was accused of committing two murders after police found him highly intoxicated with

21. See id. at 302. Chambers followed Washington v. Texas and another important case, Webb v. Texas, 409 U.S. 95 (1972). Webb was the first case to rest a defendant's right to present evidence solely on the Due Process Clause, rather than referring to the specifically enumerated rights of the Fifth or Sixth Amendments. See Clinton, supra note 12, at 778. In Webb, the defendant's only witness was a prisoner with an extensive criminal record. 409 U.S. at 95. After the trial judge emphatically warned the witness not to perjure himself, the witness refused to testify altogether. See id. at 95-96. The Supreme Court concluded that the judge's admonishments coerced the witness into refusing to testify and thereby denied the defendant the right to present evidence in his defense. See id. at 98. Like the exclusion of accomplice testimony in Washington, Webb involved the complete exclusion of a defense witness' testimony, and therefore could have been decided on Sixth Amendment grounds. See Clinton, supra note 12, at 781. Chambers is significant because it dealt with only a partial exclusion of witness testimony, and because the Court disposed of the case by referring only to the Due Process Clause. See id. at 791. Chambers, therefore, clearly stands for a defendant's fundamental right to present defense evidence. See id. at 791-92. But see Peter Westen, Compulsory Process II, 74 MICH. L. REV. 191, 207 (1975) [hereinafter Compulsory Process II] (concluding that Washington v. Texas stands for a defendant's "constitutional right to present any evidence that may be deemed to establish the existence of facts in his favor").

Since Chambers, the Court consistently has found a fundamental right to present a defense that includes a right to present defense evidence. In Green v. Georgia, 442 U.S. 95 (1979), the Court considered a case where the trial court excluded critical defense evidence on hearsay grounds. Id. at 96. Once again, the Court reasoned that the exclusion violated the Due Process Clause because the evidence was highly relevant to a critical issue in the case. See id. at 97. In Crane v. Kentucky, the Court held that the exclusion of evidence, pertaining to whether a defendant's confession was voluntary, deprived the defendant of a fair opportunity to present a defense. 476 U.S. 683, 690 (1986). In Rock v. Arkansas, the Court determined that the automatic exclusion of post-hypnotically refreshed testimony violated the defendant's right to present a defense. 483 U.S. 44, 52 (1987). In Taylor v. Illinois, the Supreme Court determined that the preclusion of defense witness testimony as a discovery sanction was a justifiable restriction on the defendant's right to present evidence. 484 U.S. 400, 416 (1988). The Court conducted a searching inquiry, however, in making that determination, and noted that "[t]he right of the defendant to present evidence 'stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States.'" Id. at 409 (quoting Washington v. Texas, 388 U.S. 14, 18 (1967)). Finally, in the landmark case United States v. Nixon, the Court emphasized the importance of a defendant's right to present defense evidence when the Court determined that privileged communications by the President did not outweigh the "fundamental demands of due process of law in the fair administration of criminal justice." 418 U.S. 683, 716 (1974). Thus, Chambers and the cases that have followed it establish that a defendant has a fundamental right to present a defense that includes the right to present evidence.


23. See id. at 2016; see also infra Part II (discussing the case in detail).
two dead victims.\textsuperscript{24} At trial, Egelhoff presented evidence of his intoxication to challenge the State's assertion that he was capable of having committed the killings.\textsuperscript{25} The trial court relied on a Montana statute prohibiting the consideration of evidence of intoxication as it relates to a defendant's mental state,\textsuperscript{26} and issued an instruction that expressly forbade the jury from considering the defendant's intoxication in determining whether he acted knowingly or purposely.\textsuperscript{27} The jury convicted Egelhoff, and he appealed to the Montana Supreme Court, arguing that the statute and concomitant instruction denied him due process of law.\textsuperscript{28}

The Montana Supreme Court agreed with Egelhoff.\textsuperscript{29} Relying on \textit{Chambers}, the court concluded in a unanimous opinion that Egelhoff had been denied a fair opportunity to defend himself against the State's accusations.\textsuperscript{30} The court further reasoned that the instruction had, in effect, lowered the State's burden of proof because it denied Egelhoff an opportunity to raise doubt as to the requisite mental state necessary to commit deliberate homicide.\textsuperscript{31} The State of Montana appealed, and the United States Supreme Court granted certiorari.\textsuperscript{32}

The United States Supreme Court reversed.\textsuperscript{33} In a plurality opinion, Justice Scalia restricted \textit{Chambers} to its facts and refused to apply its

\begin{itemize}
\item \textsuperscript{24} See \textit{Egelhoff}, 116 S. Ct. at 2016 (plurality opinion).
\item \textsuperscript{25} See id. Egelhoff submitted evidence of intoxication arguing that he was physically incapable of shooting the victims. See id.
\item \textsuperscript{26} See id. MONT. CODE ANN. § 45-2-203 (1995) states that:
\begin{quote}
A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed... the substance causing the condition.
\end{quote}
\item \textsuperscript{27} See \textit{Egelhoff}, 116 S. Ct. at 2016 (plurality opinion). The jury instruction read:
\begin{quote}
A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the Defendant proves that he did not know that it was an intoxicating substance when he consumed... the substance causing the condition.
\end{quote}
\end{itemize}

\begin{itemize}
\item Id.  
\item \textsuperscript{29} See \textit{Egelhoff}, 900 P.2d at 263-64.
\item \textsuperscript{30} See id. at 265-66.
\item \textsuperscript{31} See id. at 265.
\item \textsuperscript{33} See \textit{Egelhoff}, 116 S. Ct. at 2024 (plurality opinion).  
\end{itemize}
reasoning to *Egelhoff.* Justice Scalia relied on the common law principle that intoxication should not provide an excuse for criminal conduct and found that the presentation of exculpatory evidence of intoxication is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Thus, Justice Scalia found no right that deserved constitutional protection.

Justice Ginsburg concurred in the judgment. She reasoned that Montana was free to define the elements of its crimes. Since the statute's exclusion of intoxication evidence could be construed as merely redefining the mental elements of deliberate homicide, Justice Ginsburg found that the statute constituted a permissible exercise of state authority. A majority of the Court, therefore, concluded that Montana's exclusion of evidence of intoxication as it relates to a defendant's mental state did not violate Egelhoff's right to present a defense.

This Note considers the constitutional validity of a state statute that excludes exculpatory evidence that is relevant to an essential element of a crime. First, this Note discusses the state of the law in this area before *Montana v. Egelhoff,* and analyzes the impact *Egelhoff* has on a defendant's ability to present exculpatory evidence at trial. Next, this Note questions the Supreme Court's reliance on eighteenth century common

34. See *id.* at 2021-23. Justice Scalia reasoned that the holding in *Chambers* was not that a defendant had a right to defend against the State's accusations whenever critical evidence is excluded, but that erroneous evidentiary rulings can, when taken together, rise to the level of a due process violation. See *id.* at 2022; see also Edward J. Imwinkelried, *Exculpatory Evidence* § 2-2, at 20 n.51 (1990) (criticizing such a narrow reading of *Chambers*).

35. See *Egelhoff,* 116 S. Ct. at 2018 (plurality opinion). Justice Scalia looked to early English common law and determined that intoxication had been unavailable as an excuse. See *id.* He concluded that the unavailability of intoxication evidence to excuse wrongdoing demonstrated that there was no fundamental right to present exculpatory evidence of intoxication. See *id.* at 2018-19. He reasoned that the defendant in this case had failed to prove that the presentation of intoxication evidence is a principle of fundamental justice. See *id.* at 2019.

36. *Id.* at 2017 (quoting *Patterson v. New York,* 432 U.S. 197, 201-02 (1977)). In *Patterson,* the Court upheld a state statute that placed on the defendant the burden of proving an affirmative defense, concluding that state powers concerning criminal matters should not be abridged unless a state violates a fundamental principle of justice. 432 U.S. 197, 201-02 (1977) (citing *Speiser v. Randall,* 357 U.S. 513, 523 (1958)).

37. See *Egelhoff,* 116 S. Ct. at 2023 (plurality opinion). Justice Scalia found no prior cases directly holding that the right to present all evidence bearing on the elements of a crime is fundamental. See *id.*

38. See *id.* at 2024 (Ginsburg, J., concurring).

39. See *id.*

40. See *id.*

41. See *id.* at 2023-24 (plurality opinion); *id.* at 2024 (Ginsburg, J., concurring).
law to determine what constitutes a "fundamental principle of justice" in evidentiary matters, as well as its disregard for *Chambers*, its progeny, and the law of a majority of the states. This Note agrees with the Montana Supreme Court, which provided a better reasoned application of case law and a more sound disposition of the case. Finally, this Note concludes that *Montana v. Egelhoff* creates considerable problems for future courts deciding questions concerning a state's ability to impair a defendant's right to present a defense and to be proven guilty beyond a reasonable doubt.

I. THE RIGHT TO PRESENT EXCULPATORY EVIDENCE PRIOR TO *MONTANA V. EGELHOFF*

An inherent conflict exists between a defendant's right to present exculpatory evidence and a state's interest in administering its criminal justice system. A defendant must be able to present evidence in order to provide an adequate defense. A state must be allowed to create procedures and evidentiary rules that may burden a defendant's ability to present a defense, however, in order to maintain the integrity of the trial process. In *Chambers*, the Supreme Court established that the right to

---

42. See *Taylor v. Illinois*, 484 U.S. 400, 410-11 (1988) (explaining that the principle that supports the defendant's right to present exculpatory evidence also supports the rules of procedure that limit the presentation of evidence); *Compulsory Process II*, supra note 21, at 305-06 (describing the conflict as a multi-faceted one). Professor Westen has identified six conflicting interests regarding the exclusion of evidence. See id. These include: (1) the defendant's interest in presenting evidence, (2) a witness' interest in avoiding the burden of testifying, (3) the public's interest in obtaining justice, (4) the trial court's interest in resolving evidentiary matters, (5) the appellate court's interest in uniform application of the law, and (6) the judiciary's interest in efficiency. See id. Professor Westen suggests that Supreme Court precedent has shown that the defendant's interest should be paramount in balancing these competing interests. See id. at 306.

43. See *Taylor*, 484 U.S. at 409. In *Taylor*, the Court stated that "[t]he right of the defendant to present evidence 'stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States.'" Id. (quoting *Washington v. Texas*, 388 U.S. 14, 18 (1967)). Precluding evidence may in some cases prevent an accused from presenting a defense. See *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (concluding the exclusion of "critical evidence" denied the defendant a fair trial); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (explaining that the right to compel the testimony of witnesses "is in plain terms the right to a defense").

44. See *Taylor*, 484 U.S. at 410-11. For example, a defendant does not have an absolute right to offer testimony that is otherwise inadmissible under a state's rules of evidence. See id. at 410. A state's interest in administering criminal justice through an orderly trial is sufficient "to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence." See id. at 411. Furthermore, the states are primarily responsible for criminal justice. See *Patterson v. New York*, 432 U.S. 197, 201 (1977). This responsibility includes defining the elements of criminal offenses as well as any allowable defenses. See id. In the administra-
present a defense includes a right to present exculpatory evidence.\textsuperscript{45} Chambers failed, however, to establish an analytical framework to address the conflict between the right to present a defense and a state’s
tion of criminal justice through the trial process, a state may exclude evidence through evidentiary rules that serve the interests of fairness and reliability. \textit{See} Crane v. Kentucky, 476 U.S. 683, 690 (1986); \textit{see also} Chambers, 410 U.S. at 302. The state may also exclude evidence to ensure efficiency. \textit{See} Susan F. Mandiberg, \textit{Protecting Society and Defendants Too: The Constitutional Dilemma of Mental Abnormality and Intoxication Defenses}, 53 FORDHAM L. REV. 221, 245 (1984) (reasoning that “states have an interest in avoiding the inefficient use of judicial and community resources”).

\textsuperscript{45} 410 U.S. at 285. The Supreme Court in \textit{Chambers} considered a defendant’s right to present a defense in the context of two evidentiary rulings by the trial court that excluded evidence tending to exonerate the defendant. \textit{See id.} at 291-93. The first evidentiary exclusion involved Mississippi’s voucher rule, which precluded the cross-examination of one’s own witnesses. \textit{See id.} at 296-97. Chambers called McDonald as a witness because McDonald had confessed to police that he committed the crime. \textit{See id.} at 291. On cross-examination, however, McDonald testified that he had subsequently repudiated the confession. \textit{See id.} Chambers sought to redirect, treating McDonald as a hostile witness, but the court ruled that the voucher rule precluded him from treating his own witness as hostile. \textit{See id.} at 296-97. The second evidentiary exclusion involved hearsay testimony. \textit{See id.} at 292. Chambers sought to present testimony by three additional witnesses to whom McDonald had made similar confessions on different occasions. \textit{See id.} at 292-93. The trial court in \textit{Chambers} prevented Chambers from presenting this testimony because it constituted hearsay. \textit{See id.} at 292. Upon review, the Supreme Court concluded that the trial court had applied the voucher and hearsay rules mechanically, so as to exclude otherwise relevant, trustworthy, and probative evidence and thereby denied Chambers a fair opportunity to defend against the state’s accusations. \textit{See id.} at 302.

The Court in \textit{Chambers} held that a defendant has a constitutional right to present a defense that includes a right to present exculpatory evidence. \textit{See id.} The constitutional origin of the right has raised significant debate among commentators. \textit{See Clinton, supra} note 12, at 794 (reasoning that the Due Process Clause of the Fourteenth Amendment is an acceptable source of a defendant’s right to present defense evidence and also concluding that the “penumbras” of the Fifth and Sixth Amendments might be the source of the right); \textit{Compulsory Process, supra} note 12, at 98-101 (arguing that the Compulsory Process Clause of the Sixth Amendment is the source of a defendant’s right to present evidence and was not intended to be limited to witness testimony); \textit{Compulsory Process II, supra} note 21, at 207 (arguing that the Supreme Court recognized the Compulsory Process Clause as guaranteeing a defendant’s right to present relevant evidence in \textit{Washington v. Texas}); \textit{see also IMWINKELRIED, supra} note 34, § 2-2, at 13-29 (explaining that courts have invoked several different constitutional sources for the right to present evidence: the Due Process Clauses, the Sixth Amendment Compulsory Process Clause, the Confrontation Clause, the Fifth Amendment privilege against self-incrimination, and the Eighth Amendment prohibition of cruel and unusual punishment). The Supreme Court acknowledged the debate in \textit{Crane v. Kentucky}, but concluded that the Constitution guarantees criminal defendants a “meaningful opportunity to present a complete defense,” whether rooted in the Fourteenth or the Sixth Amendment. 476 U.S. 683, 690 (1986) (quoting \textit{California v. Trombetta}, 467 U.S. 479, 485 (1984)); \textit{cf.} Strickland v. Washington, 466 U.S. 668, 684-85 (concluding that the Constitution ensures a fair trial through the Due Process Clause, but defines the elements of a fair trial through the Sixth Amendment); United States v. Nobles, 422 U.S. 225, 230-31 (1975) (recognizing the Compulsory Process Clause guarantees an accused the right to present a defense).
ability to impair that right. 46 Nonetheless, an analytical framework has developed since Chambers. 47

When considering a constitutional challenge to a state statute, the Supreme Court first considers whether the particular statute, on its face, explicitly violates an individual's constitutionally protected rights. 48 If the Court finds that a statute facially violates a constitutionally protected right, the Court will strike down the statute. 49 Otherwise, the Court considers whether the statute operates so as to impair any constitutionally protected right. 50 If the Court determines that a statute impairs a constitutionally protected right by operation, the Court balances the defendant's and the state's interests to determine which is more important under the particular circumstances presented by the case. 51

46. See Clinton, supra note 12, at 792-93. The Court in Chambers noted that it was not establishing a new principle of constitutional law. 410 U.S. at 302; see also Clinton, supra note 12, at 796 (arguing that Chambers represents a significant development in the right to present a defense despite the Court's qualification). Irrespective of the Court's apparent self-limitation, the case made clear that a defendant has a right to defend that includes a right to present evidence, and the Court has continued to reiterate that view. See IMWINKELRIED, supra note 34, § 1-2, at 8; see also supra note 21 (discussing cases following Chambers).

47. See infra Parts I.A, I.B (discussing the framework that has developed).

48. See Medina v. California, 505 U.S. 437, 446-48 (1992) (conducting a historical analysis of a state statute that allocated the burden of proof on the defendant to prove incompetence); Patterson, 432 U.S. at 200-01 (conducting an historical analysis of a New York statute that placed the burden of proof on the defendant to show severe emotional disturbance); see also IMWINKELRIED, supra note 34, § 2-3, at 32 (reasoning that a facial analysis entails an objective determination by the Court as to whether a statute is unconstitutional).

49. See infra Part II.A.

50. See infra Part II.B. It is this second inquiry, concerning the operation of state procedures or rules under the specific circumstances of a given case, that is most appropriate in evidentiary exclusion cases. See IMWINKELRIED, supra note 34, § 2-3, at 33; Dale A. Nance, Missing Evidence, 13 CARDOZO L. REV. 831, 879-80 (1991) (reasoning that evidentiary exclusions in a criminal trial should be determined on a case-by-case basis); cf. Montana v. Egelhoff, 116 S. Ct. 2013, 2032 (1996) (Souter, J., dissenting) (pointing out that the plurality ignored the important second step of the due process inquiry).

51. See Cooper v. Oklahoma, 116 S. Ct. 1373, 1382 (1996) (providing a careful balancing of the defendant's and the State's interests in considering an infringement upon a defendant's fundamental right to be tried only if competent); see also IMWINKELRIED, supra note 34, § 2-3, at 31-32 (reasoning that an as-applied balancing test is applicable to evidentiary exclusion cases); Mandiberg, supra note 44, at 236 (reasoning that both a state's interest and a defendant's interest may be compelling depending on the circumstances and suggesting such interests should be balanced in determining whether evidence of mental abnormality or intoxication should be admitted); infra Part II.C (discussing the dissenting opinions in Egelhoff, which asserted that a balancing test should have been used by the Court).

In Medina v. California, the Supreme Court rejected the balancing test set forth in Mathews v. Eldridge, 424 U.S. 319, 442 (1976), to determine the constitutional validity of
A. The First Inquiry: Determining Whether a Statute Explicitly Violates a Constitutionally Protected Interest on Its Face

A court first considers whether a challenged statute explicitly violates a constitutionally protected interest on its face. In *Patterson v. New York,* the Supreme Court stated that it will uphold a statute unless it violates "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Historical practice and traditional notions of fairness are probative as to whether an
individual interest is fundamental. The Court considers the individual interest in light of the historical treatment of that interest under English and early American common law. The Court also may give weight to contemporary practices, such as the law of a majority of the states, in assessing whether a state's treatment of a particular individual interest is supported by historical precedent. If the Court finds that a statute has a significant historical basis, it will be less likely to hold as fundamental the individual interest the statute has violated. If the Court determines that an individual interest historically has been protected, or arises from traditional notions of fairness, it will label the interest fundamental and strike down the statute.

B. The Second Inquiry: Determining Whether a Statute Adversely Impairs Any Constitutionally Protected Interest by Operation

If the Court determines that a statute does not violate a constitutionally protected right on its face, the Court then considers whether the statute "transgresses any recognized principle of 'fundamental fairness' in operation." This inquiry requires the Court to identify the effects of

55. See Cooper, 116 S. Ct. at 1377. The Court has suggested that consideration should be given to the law at the time when the Fifth Amendment was adopted and the Fourteenth Amendment was ratified when conducting an historical analysis of an individual's rights. See Patterson, 432 U.S. at 202.
56. See Cooper, 116 S. Ct. at 1377.
57. See id. In Cooper, the Court considered the constitutional validity of an Oklahoma statute, which required the defendant to prove by clear and convincing evidence that he was incompetent to stand trial. Id. The Court considered the near uniform use of a lesser burden of proof by a majority of the states to conclude that the heightened burden required by Oklahoma was excessive and offensive to traditional principles of justice. See id. at 1380 (citing Medina v. California, 505 U.S. 437, 446 (1992)). Contemporary practice is not considered dispositive as to whether a defendant's interest is fundamental. See Medina v. California, 505 U.S. 437, 447 (1992); see also Martin v. Ohio, 480 U.S. 228, 236 (1987) (asserting that the constitutional validity of a statute is not determined by cataloging the practices of the states). The Court, in fact, has expressed a reluctance to find new fundamental rights. See Dowling v. United States, 493 U.S. 342, 352-53 (1990) (explaining that the category of rights deemed fundamental is very narrow); see also supra note 5 (discussing fundamental rights).
58. See Patterson, 432 U.S. at 202 (upholding a statute with a long common law history).
59. See Cooper, 116 S. Ct. at 1377. In In re Winship, the Court struck down a state statute that lowered the prosecution's burden of proof in juvenile proceedings. 397 U.S. 358, 363-64 (1970). The Court reasoned that a heightened standard of proof is essential to traditional notions of fairness inherent in American criminal justice. See id. at 363; see also supra note 5 (discussing fundamental rights).
the statute upon any constitutionally protected interest previously identified by the Court. Two interrelated fundamental rights may be impaired by the operation of a statute that excludes evidence. These rights are a defendant's right to present a defense and a defendant's right to be proven guilty beyond a reasonable doubt. A state statute that excludes evidence from jury consideration may impair a defendant's ability to present a defense. Thus, the Court in Chambers determined that an otherwise permissible exclusion of hearsay evidence was unconstitutional because it significantly impaired the defendant's ability to present a defense. A statute also may lessen the state's constitutionally

---

61. See Medina, 505 U.S. at 448 (finding no facial violation, the Court turned to consider whether a statute operated so as to impair "any recognized principle of 'fundamental fairness'" (citing Dowling v. United States, 493 U.S. 342, 352 (1990)); Sandstrom v. Montana, 442 U.S. 510, 516-17 (1979) (considering the effects of a jury instruction on the prosecution's constitutionally prescribed burden of proof).

62. See Hughes v. Mathews, 576 F.2d 1250, 1255-57 & n.11 (1978) (discussing the connection between the right to present defense evidence and the right to be proven guilty beyond a reasonable doubt).

63. See supra notes 12-16 and accompanying text (discussing the right to defend).

64. See supra notes 10 and 11 and accompanying text (discussing the defendant's rights to confront adverse witnesses and to compel witnesses to testify).

65. See supra notes 10 and 11 and accompanying text (discussing the defendant's mental state is at issue).

66. 410 U.S. at 302-03 (reasoning that the trial court's exclusion of critical evidence, coupled with its refusal to permit the defendant to cross-examine an adverse witness, denied the defendant a fair trial); see also supra note 45 (discussing Chambers).
prescribed burden of proof. Thus, in Sandstrom v. Montana, the Supreme Court reasoned that a jury instruction did not explicitly violate a fundamental right, but created a presumption that unfairly lowered the state's burden of proof. Therefore, even when no constitutionally protected right is found to be violated on the face of a statute, a statute nonetheless may operate so as to impermissibly impair a defendant's constitutional rights.

C. Balancing a State's Interest in Administering Criminal Law with a Defendant's Constitutionally Protected Interest

If a state statute is found to impair a constitutionally protected interest, the Supreme Court will balance the competing state and individual interests. The Court conducts this balancing by assessing the importance of the individual and state interests, and comparing the interests to determine which is more important under the specific facts presented by the case. A state statute that is found to impair a defendant's constitu-

67. See supra note 64 (discussing state actions the Court found violative of the prosecution's constitutionally prescribed burden of proof). The Supreme Court has long found that a defendant has a fundamental right to be proven guilty beyond a reasonable doubt. See Winship, 397 U.S. at 361-64 (discussing the role of the reasonable doubt standard in the American criminal justice system). The standard provides the foundation of the presumption of innocence. See id.; see also Coffin v. United States, 156 U.S. 432, 452-61 (1895) (discussing the history of the presumption of innocence and the reasonable doubt standard). In Sandstrom, the Court considered the effect of a jury instruction that created a presumption that a person intends the ordinary consequences of his acts. 442 U.S. at 513. The Supreme Court concluded that the instruction operated so as to relieve the State of its constitutionally prescribed burden of proof on the issue of defendant's mental state. See id. at 521. At least one commentator has suggested that the exclusion of relevant exculpatory evidence at trial lessens the state's burden of proof, thereby rendering the presumption of innocence illusory. See Mandiberg, supra note 44, at 233-34.


69. Id. at 521.

70. See Medina v. California, 505 U.S. 437, 448 (1992) (finding no facial violation, the Court turned to consider a statute's operative effect on the defendant's right to a fair trial).

71. See Mandiberg, supra note 44, at 229; see also supra note 51-52 (discussing the application of a balancing test).

72. See Clinton, supra note 12, at 799; Mandiberg, supra note 44, at 229. Some commentators refer to this balancing process as a "sliding scale," because the standard the state interest must meet increases with the importance of the individual interest being impaired. See IMWINKELRIED, supra note 34, § 2-5, at 56-57. Professor Mandiberg argues that a defendant's right to present defense evidence and the state's interest in administering criminal justice are both compelling, and should be balanced against each other by considering the importance of the interests under the circumstances presented in each case. Mandiberg, supra note 44, at 230.
tionally protected rights will not necessarily be found unconstitutional.\textsuperscript{73}

The first step of the balancing process entails weighing the defendant's interest.\textsuperscript{74} The defendant's right to present exculpatory evidence is measured in light of the importance of the evidence under the particular facts of the case.\textsuperscript{75} The importance of excluded evidence depends on the reliability of the evidence, as well as its probative value, in supporting the issue the evidence is offered to prove.\textsuperscript{76} Thus, the more crucial an issue supported by excluded evidence is to the ultimate disposition of the case, the more compelling the defendant's interest.\textsuperscript{77} The availability of alternative evidence to support the issue, on the other hand, tends to detract from the importance of the defendant's interest.\textsuperscript{78}

The second step in the balancing process entails weighing the importance of the state's interest.\textsuperscript{79} The state's interest is measured based on

\textsuperscript{73} See NOWAK & ROTUNDA, supra note 1, § 13.8, at 556. For example, the Court often has supported court-imposed sanctions precluding evidence sought to be introduced by the defendant. See Michigan v. Lucas, 500 U.S. 145, 153 (1991) (finding that the exclusion of evidence pertaining to a defendant's own past sexual conduct with the victim as a sanction for failing to comply with notice and hearing requirements may have been constitutional); Taylor v. Illinois, 484 U.S. 400, 413 (1988) (finding a state's interest in the orderly conduct of the trial process more important than the defendant's interest in presenting testimony precluded by sanction).

\textsuperscript{74} See IMWINKELRIED, supra note 34, § 2-5, at 56; see also Clinton, supra note 12, at 799-800 (reasoning that the importance of excluded evidence must be analyzed based on its importance to the accused's total defense).

\textsuperscript{75} See IMWINKELRIED, supra note 34, § 2-4, at 38 (reasoning that the importance of exculpatory evidence depends on the availability of alternative evidence, the reliability of the evidence, the probative value of the evidence, and the importance of the fact the evidence is offered to prove). In Crane v. Kentucky, the lower court allowed evidence of the defendant's confession, but excluded evidence the defendant sought to present regarding the credibility of that confession. 476 U.S. 683, 686-87 (1986). The Supreme Court reasoned that the excluded evidence was "all but indispensable" to any chance of success for the defense. Id. at 691. Similarly, in Chambers v. Mississippi, the excluded evidence was deemed "critical" to the defense. 410 U.S. 284, 302 (1973).

\textsuperscript{76} See IMWINKELRIED, supra note 34, § 2-4(a), at 38. In Green v. Georgia, the Court reasoned that "substantial reasons existed to assume [the] reliability" of excluded hearsay evidence. 442 U.S. 95, 97 (1979). In Chambers, the Court stressed that excluded testimony "bore persuasive assurances of trustworthiness," and was "critical" to the defendant's case. 410 U.S. at 302.

\textsuperscript{77} See IMWINKELRIED, supra note 34, § 2-4, at 49-50. In Webb v. Texas, the Court found a constitutional violation where the excluded witness was the only source of the proffered evidence. 409 U.S. 95, 98 (1972). In Crane, the Court reasoned that the defendant was "effectively disabled from answering the one question every rational juror need[ed] answered." 476 U.S. at 689. And in Green, the Court found excluded testimony "highly relevant to a critical issue." 442 U.S. at 97.

\textsuperscript{78} See IMWINKELRIED, supra note 34, § 2-4, at 39-40; Mandiberg, supra note 44, at 248 (reasoning that one of the primary inquiries of the balancing test focuses on whether a state could have used less restrictive means to achieve its objectives).

\textsuperscript{79} See IMWINKELRIED, supra note 34, § 2-5, at 56-57.
the necessity of the state statute in achieving legitimate state objectives. Legitimate state objectives are those aimed at increasing the reliability or efficiency of the trial process. Both the importance of the state’s objective and the necessity of the statute in achieving that objective are critical factors. If there are less restrictive means available to meet the state’s objectives, the state interest will be afforded less weight by a court. Conversely, a statute that is necessary to achieve a state’s legitimate objectives will be afforded greater weight.

The final step of the balancing process entails comparing the state and individual interests to determine which is more important. This comparison is made to determine which interest is more important under the particular circumstances presented by the case. The importance of the defendant’s interest sets the standard that the state’s interest must exceed to be deemed constitutionally valid. Some commentators have referred to this approach as a “sliding scale,” because the importance of the state interest that is necessary to overcome the defendant’s interest


81. See supra note 44 (discussing legitimate state interests); see also Mandiberg, supra note 44, at 236 (reasoning that a state’s interests in reliability and efficiency should be considered compelling); cf. Clinton, supra note 12, at 801 (arguing that only a compelling state interest should be allowed to overcome a defendant’s right to present a defense).

82. See Mandiberg, supra note 44, at 230.

83. See id. at 229; see also Cooper v. Oklahoma, 116 S. Ct. 1373, 1380 (1996) (striking down a procedural rule because the state’s interest in the prompt and orderly disposition of its criminal caseload could be achieved at less cost to the defendant’s fundamental rights). Impositions upon a defendant’s constitutional rights should be drawn narrowly. See id. at 1377. The Court is more likely to permit a state practice that affects only a narrow class of defendants. See id. The more broadly applicable a restriction is to a class of evidence, see Crane, 476 U.S. at 690, or to a class of defendants, see Cooper, 116 S. Ct. at 1377, the less weight it will be afforded. See also Rock v. Arkansas, 483 U.S. 44, 61 (1987) (finding unconstitutional the wholesale exclusion of hypnotically refreshed testimony). Professor Mandiberg suggests that a state’s interest in ensuring the reliability and efficiency of the trial process is compelling, but does not justify the “blanket exclusion of negating evidence unless that is the least intrusive means of furthering those interests.” Mandiberg, supra note 44, at 237.

84. See Taylor v. Illinois, 484 U.S. 400, 413 (1988) (reasoning that although alternatives were available, the one chosen by the state was necessary to adequately serve the state’s important interests in limiting prejudice to the prosecution and harm to the adversary system).

85. See IMWINKELRIED, supra note 34, § 2-5, at 56.

86. See id. at 56-57.

87. See id.
increases or decreases depending on the gravity of the defendant's interest under the circumstances presented.\textsuperscript{88}

In summary, a defendant does not have an unfettered right to present evidence.\textsuperscript{99} Rather, a state may adopt procedures and rules that impair a defendant's constitutionally protected rights if the state's interest is sufficiently compelling.\textsuperscript{90}

II. \textit{Montana v. Egelhoff: Ignoring the Effect of Montana's Exclusionary Statute on Egelhoff's Constitutionally Protected Rights}

In \textit{Montana v. Egelhoff},\textsuperscript{91} the Supreme Court considered whether a Montana statute, which excluded exculpatory evidence of intoxication as it related to a defendant's mental state, violated a defendant's fundamental right to present a defense.\textsuperscript{92} James Egelhoff was found by police in the back seat of a car on the side of a highway with two dead victims in the front seat.\textsuperscript{93} The victims were each killed by a single gunshot wound to the head.\textsuperscript{94} Police found Egelhoff's pistol on the floorboard in front of the driver's seat with two expended rounds.\textsuperscript{95} Egelhoff had gunshot residue on his hands, and his gun matched the type used to kill the victims.\textsuperscript{96} He was intoxicated when the police arrived, and registered a blood alcohol content of .36 one hour after police arrested him.\textsuperscript{97} Witnesses stated that Egelhoff had spent the day drinking with the victims.\textsuperscript{98} Egelhoff was charged with two counts of deliberate homicide.\textsuperscript{99}

Egelhoff testified at trial that he was too intoxicated to have commit-
ted the murders. He further testified that he was unable to remember the details of that night due to his intoxication. He insisted that a fourth person was traveling with the group and may have shot the victims. The trial court instructed the members of the jury that they could not consider Egelhoff’s intoxication in deciding whether he had acted knowingly or purposely, the requisite mental states necessary to commit deliberate homicide pursuant to Montana law. The jury found Egelhoff guilty of both counts of deliberate homicide, and the court sentenced him to eighty-four years in prison.

Egelhoff appealed to the Montana Supreme Court, arguing that the statute and instruction violated his due process rights. The Montana Supreme Court agreed and remanded the case for a new trial. The court reasoned that Montana’s exclusionary statute prevented Egelhoff from presenting evidence relevant to an essential element of the crime, and therefore violated his right to present a defense pursuant to Chambers. The court further reasoned that by denying the defendant the right to present evidence, the statute effectively relieved the prosecution of its burden of proof and violated Egelhoff’s right to be proven guilty beyond a reasonable doubt.

A. The Plurality Opinion: Limiting the Constitutional Inquiry to a Facial Analysis

In a five-to-four decision, the United States Supreme Court reversed the Montana Supreme Court and upheld Montana’s exclusionary statute. In an opinion by Justice Scalia, joined by Chief Justice Rehnquist, and Justices Kennedy and Thomas, a plurality of the Court noted the

100. See id.
101. See id.
102. See id.
103. See id.; see also MONT. CODE ANN. § 45-5-102 (1995). The statute states that a person acts purposely when “it is his conscious object to engage in conduct of that nature or to cause such a result,” and a person acts knowingly when “he is aware of his conduct or when he is aware under the circumstances his conduct constitutes a crime; or, when he is aware there exists the high probability that his conduct will cause a specific result.” Id.
104. See Egelhoff, 116 S. Ct. at 2016 (plurality opinion); see also MONT. CODE ANN. § 45-5-102 (1995) (defining the crime of deliberate homicide).
105. See Egelhoff, 116 S. Ct. at 2016 (plurality opinion).
107. See id. at 267.
108. See id. at 265.
109. See id. at 266.
110. See Egelhoff, 116 S. Ct. at 2024 (plurality opinion); id. (Ginsburg, J., concurring).
well-settled principle that relevant evidence may be excluded for "valid reasons." Relying on Patterson v. New York, Justice Scalia reasoned that a state restriction should be questioned only if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." He examined early common law restrictions on the use of intoxication as an excuse, as well as the continued exclusion of intoxication evidence by ten states, to find that jury consideration of evidence of intoxication related to a defendant’s mental state is not a fundamental principle of justice. He concluded that there was no constitutional violation because Montana’s exclusory statute served a legitimate objective in ensuring the reliability of the evidence presented at trial and comported with society’s moral belief that drunk-

111. Id. at 2017 (plurality opinion). Various evidentiary grounds exist for the exclusion of otherwise relevant evidence under the Federal Rules of Evidence, such as prejudice and hearsay. See id.; Fed. R. Evid. 403; Fed. R. Evid. 802. In addition, the Court has recognized constitutional exclusions when a legitimate state interest outweighs a defendant’s right to present evidence. See Egelhoff, 116 S. Ct. at 2017 (plurality opinion). In Taylor v. Illinois, the Court concluded that an evidentiary preclusion sanction outweighed a defendant’s right to present evidence because it was necessary to serve compelling state goals. 484 U.S. 400, 410-11 (1988).


114. See id. at 2018.


116. See Egelhoff, 116 S. Ct. at 2021 (plurality opinion). Justice Scalia’s historical analysis was based on eighteenth century English common law, which prohibited the use of intoxication as an excuse for a crime. See id. at 2018. He recognized that by the end of the nineteenth century, the prominent new American rule allowed evidence of intoxication to negate the element of intent for specific intent crimes. See id. at 2018-19. He acknowledged an argument made by the defendant’s amicus that this new rule was deeply rooted at the time the Fourteenth Amendment was ratified in 1868. See id. at 2019; Brief for National Association of Criminal Defense Lawyers as Amicus Curiae at 23, Montana v. Egelhoff, 116 S. Ct. 2013 (1996) (No. 95-566). Yet, Justice Scalia did not address this argument on its merits. See Egelhoff, 116 S. Ct. at 2019 (plurality opinion). Instead, he reasoned that the burden of proof was on the defendant to show that Montana’s rule violated some principle rooted in tradition and history, which he concluded the defendant had not done. See id.
Catholic University Law Review

Ennness should not provide an excuse for criminal behavior.117

B. The Concurring Opinion: Deferring to the State of Montana by Inferring that It Merely Redefined the Mental Element of Deliberate Homicide

Justice Ginsburg concurred in the judgment of the Court, but based her approval of Montana’s exclusionary statute on a state’s power to define the elements of its crimes and defenses.118 She reasoned that the statute could be characterized as a rule excluding evidence, or as a “redefinition of the elements of deliberate homicide.”119 Accepting the latter of these two characterizations, she determined that it was within the power of the state to define the elements of its criminal offenses.120 Where a plausible constitutionally valid interpretation is available, the Court should accept that interpretation.121 Without further inquiry, she pointed out that a significant minority of the states have upheld similar statutes as legislative changes to the elements of a crime.122 Thus, Justice

---

117. See Egelhoff, 116 S. Ct. at 2020-21. Justice Scalia argued that violent behavior while intoxicated is learned behavior. See id. at 2021 (plurality opinion). Since many jurors may have the same learned belief that drunkenness begets violence, they may also believe that a defendant who was drunk at the time of the incident giving rise to the charge may have been incapable of forming the requisite intent. See id. Therefore, he concluded that such evidence may be unreliable. See id.

118. See id. at 2024-25 (Ginsburg, J., concurring).

119. Id. Justice Ginsburg explained that Montana’s statute could be interpreted in two ways. See id. First, it could be interpreted as an exclusionary statute that precludes a defendant from utilizing evidence of intoxication as it relates to intent. See id. Second, it could be interpreted as a redefinition of the mental element of deliberate homicide. See id. Since the first interpretation raised constitutional questions concerning Egelhoff’s right to present a defense, Justice Ginsburg determined that Montana merely exercised its power to define the mental element of deliberate homicide. See id. Thus, she avoided the constitutional problem presented by construing the case as an evidentiary exclusion. See id.

120. See id. Justice Ginsburg reasoned that Montana’s Supreme Court should have deferred to the legislature, which has primary responsibility for defining the elements of its crimes and providing allowable defenses. See id. at 2025-26. By interpreting the Montana statute as a redefinition, she reasoned that intoxication evidence was no longer exculpatory evidence and therefore did not impair the defendant’s right to present evidence in his defense. See id.

121. See id. at 2025 (citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

122. See id.; see also State v. Ramos, 648 P.2d 119, 121 (Ariz. 1982) (reasoning that state legislatures have “considerable freedom” in determining the mental states of crimes); State v. Souza, 813 P.2d 1384, 1386 (Haw. 1991) (reasoning that the exclusion of evidence of intoxication relating to the mental state of crimes constituted a redefinition by the legislature); Commonwealth v. Rumsey, 454 A.2d 1121, 1124 (Pa. Super. Ct. 1983) (reasoning that the legislature may emphasize concerns, such as a desire to expose intoxicated offenders to more serious liability in defining the requisite mental state of a crime).
Ginsburg agreed with Justice Scalia in concluding that the statute represented a legitimate exercise of state power and did not violate Egelhoff’s constitutional rights.123

C. The Dissenting Opinions: Protecting a Defendant’s Right to Present a Defense and to be Proven Guilty Beyond a Reasonable Doubt

1. Justice O’Connor, Dissenting: Recognizing the Operative Effects of Montana’s Exclusionary Statute on Egelhoff’s Fundamental Rights

Three justices in Montana v. Egelhoff wrote dissenting opinions.124 Justice O’Connor, with whom Justices Stevens, Souter, and Breyer joined, argued that Egelhoff had a fundamental right to present a defense.125 Justice O’Connor concluded that by precluding exculpatory evidence that related to an essential element of the crime charged, Montana’s exclusionary statute unconstitutionally compromised Egelhoff’s ability to present a defense.126 She distinguished an evidentiary exclusion aimed at ensuring the integrity of the trial process, from a blanket exclusion of a type of evidence that is relevant to an essential element of the crime.127 She reasoned that the Montana statute was designed solely to increase the likelihood of a conviction for a class of defendants and therefore served no legitimate state objective.128 She also concluded that

123. See Egelhoff, 116 S. Ct. at 2026 (Ginsburg, J., concurring).
124. Id. at 2026 (O’Connor, J., dissenting); id. at 2032 (Souter, J., dissenting); id. at 2034 (Breyer, J., dissenting).
125. See id. at 2026 (O’Connor, J., dissenting).
126. See id.
127. See id. at 2029-30. Justice O’Connor pointed out that while the common law rule against using intoxication as a defense prevailed from the sixteenth century to the nineteenth century, the rule changed as the criminal law became more refined. See id. She noted that it is well-settled that intoxication evidence is relevant and admissible to determine whether the mental element of a crime was present, citing a New York state court for the proposition that:

where the nature and essence of the crime are made by law to depend upon the peculiar state and condition of the criminal's mind at the time with reference to the act done, drunkenness may be a proper subject for the consideration of the jury, not to excuse or mitigate the offence but to show that it was not committed. Id. at 2030 (quoting People v. Robinson, 2 Park. Crim. 235, 306 (N.Y. Sup. Ct. 1855)).
128. See id. at 2031. According to Justice O’Connor, the sole purpose for the exclusion was to improve the state’s chances of obtaining a conviction against those accused of committing crimes while intoxicated. See id. Montana did not argue otherwise, and did not argue that the rule was aimed at excluding unreliable, cumulative, privileged, or irrelevant evidence. See id. at 2029. Justice O’Connor reasoned that in previous cases, such as Chambers and Washington, the state had at least argued that the excluded evidence was unreliable. See id.; see also Rock v. Arkansas, 483 U.S. 44, 61 (1987) (concluding that the state did not justify its exclusionary statute).
the statute operated so as to relieve the state of its constitutionally prescribed burden of proof. Although Justice O'Connor agreed with Justice Ginsburg that a state is free to define the elements of its offenses, Justice O'Connor reasoned that once a state defines the elements of its crimes, it then should not be permitted to circumvent a defendant's ability to present exculpatory evidence to challenge the existence of those elements.

2. Justice Souter's Dissent: Conducting a Second Inquiry to Balance the Competing State and Individual Interests

Justice Souter also concluded that Montana could have redefined the elements of the crime of deliberate homicide. He was unwilling to accept Justice Ginsburg's assertion, however, that Montana had done so with its exclusionary statute. Instead, he pointed to the Montana Supreme Court's decision, wherein that court expressly determined that the Montana statute did not constitute a redefinition of the elements of deliberate homicide. He reasoned that the Supreme Court should defer to Montana's highest court to interpret Montana law.

Justice Souter explained that the historical analysis conducted by Justice Scalia was only the first of a two-step inquiry. The second inquiry, which he asserted the plurality ignored, is whether Montana's exclusionary statute operated in such a way as to impair any constitutionally pro-

---

129. See Egelhoff, 116 S. Ct. at 2027-28 (O'Connor, J., dissenting). Justice O'Connor reasoned that the Montana statute impaired the defendant's ability to defend by excluding the presentation of a type of evidence that negates an essential element of deliberate homicide, and thereby lightens the prosecution's burden of proof as to the mental element of the crime. See id. at 2028. She explained that the prosecution must normally work to overcome doubts raised by the defense. See id. If the defendant is prevented from introducing evidence that may raise doubts, however, the prosecution will not have to prove its case beyond a reasonable doubt. See id. She concluded that when a defendant is not allowed to present evidence, the jury may in fact impute culpability that does not exist. See id.; see also Montana v. Egelhoff, 900 P.2d 260, 266 (Mont. 1995) (arguing that the jury may be misled into believing that the state has proven the mental state), rev'd, 116 S. Ct. 2013 (1996) (plurality opinion).

130. See Egelhoff, 116 S. Ct. at 2027 (O'Connor, J., dissenting).

131. See id. at 2032 (Souter, J., dissenting).

132. See id.; see also supra notes 125-30 and accompanying text (explaining Justice O'Connor's reasoning).

133. See Egelhoff, 116 S. Ct. at 2032 (Souter, J., dissenting).

134. See id. Justice Souter explained that R.A.V. v. St. Paul, 505 U.S. 377, 381 (1992), and Murdock v. Memphis, 20 U.S. (20 Wall.) 590 (1875), supported his assertion that the Court should defer to the Montana Supreme Court's interpretation of Montana law. See id. at 2033.

135. See id. at 2032.
Justice Souter stated that the right to present evidence in one's defense is a fundamental principle of justice that has been long recognized by the Court. He noted that Montana failed to provide any justification for its statute, which impaired Egelhoff's right to present a defense. He considered two possible justifications, but concluded that neither could overcome the fact that Montana merely had to redefine the elements of deliberate homicide to achieve its objectives, rather than impair Egelhoff's fundamental rights.

3. Justice Breyer's Dissent: Questioning the Objective of Montana's Exclusionary Statute

Justice Breyer, with whom Justice Stevens joined, noted that the Montana statute forces a jury to draw inferences solely from external circumstances, thereby making specific intent unnecessary to obtain a conviction. He reasoned that the statute imposed liability based on a negligence standard rather than on actual mental culpability. He explained that the statute could have anomalous results. Thus, he questioned whether Montana's exclusionary statute served any legitimate state interest.

136. See id. at 2032-33.
137. See id.
138. See id. at 2033-34.
139. See id. Justice Souter reasoned that Montana could have redefined the elements of deliberate homicide so as to give exculpatory evidence no relevance. See id. at 2033. Alternatively, he thought Montana could have provided valid reasons to justify its exclusionary statute. See id. at 2033-34. Justice Souter speculated that Montana might have justified the statute by arguing that it was irrational to allow intoxication evidence as to mental state, but not as a defense, or by arguing that it was confusing to the jury to allow intoxication evidence as it related to mental state but not to allow it as an outright defense. See id. at 2034.
140. See id. at 2035 (Breyer, J., dissenting). Justice Breyer hypothesized that, on the one hand, a jury would convict a drunk driver of deliberate homicide if the driver stopped at a traffic light and then accidentally killed a pedestrian by stepping on the accelerator. See id. In that case, the jury presumably would infer intent or purpose without knowledge of the driver's intoxication. See id. On the other hand, a jury would find a drunk driver who raced down a highway and unknowingly sideswiped another car causing it to crash, not guilty, because the jury would infer, without knowledge of the driver's intoxication, the driver was merely negligent. See id. Justice Breyer noted that despite the anomalous results, the drivers would be equally culpable. See id.
III. A DEFENDANT’S RIGHT TO PRESENT EXCULPATORY EVIDENCE AFTER EGELOFF

The plurality in Montana v. Egelhoff held that a state may impair a defendant’s right to present exculpatory evidence, even if such evidence is relevant to an essential element of the crime.144 In doing so, the plurality restricted Chambers to its facts145 and thereby potentially jeopardized a defendant’s fundamental right to present a defense and to be proven guilty beyond a reasonable doubt.146

A majority of the Court, however, did not restrict the holding in Chambers.147 Unlike the plurality, Justice Ginsburg recognized the constitutional implications of the case on a defendant’s right to present evidence when she specifically avoided raising the constitutional concern by interpreting the Montana statute as a redefinition of the mental state necessary to commit deliberate homicide.148 Thus, the precedential value of the decision on a defendant’s fundamental rights is unclear, except that exculpatory evidence of intoxication may now be restricted by the states without constitutional question.149 The case raises significant questions about the analytical approach the Court will undertake in the fu-

144. See id. at 2023 (plurality opinion). The holding may be more narrowly construed as allowing a state to suppress evidence of intoxication as it relates to a defendant’s mental state. See id. at 2024. If broadly construed, the holding is likely to cause confusion as to the proper test to use to consider the validity of other evidentiary exclusions. See id. at 2021-22.
145. See id. at 2022 (“Chambers was an exercise in highly case-specific error correction.”); see also supra note 34 and accompanying text (discussing the holding in Chambers).
146. See Egelhoff, 116 S. Ct. at 2027 (O’Connor, J., dissenting).
147. See id. at 2024-26 (Ginsburg, J., concurring); see also supra notes 118-23 and accompanying text (providing Justice Ginsburg’s reasoning for concurring in the judgment of the Court).
148. See Egelhoff, 116 S. Ct. at 2024 (Ginsburg, J., concurring). Justice Ginsburg explained that the Court was divided as to how to characterize the question presented by the case. See id. She reasoned that construing the statute as a redefinition of the mental element of deliberate homicide alleviated Justice O’Connor’s due process concerns. See id.
149. See id. (plurality opinion). Concurring opinions can be separated into two categories: concurrences in judgment and simple concurrences. See Igor Kirman, Note, Standing Apart to be a Part: The Precedential Value of Supreme Court Concurring Opinions, 95 COLUM. L. REV. 2083, 2084 (1995). A concurrence in judgment expresses agreement with the majority’s result, but not its reasoning, while a simple concurrence expresses agreement with the majority’s result and reasoning. See id. A concurrence in judgment represents a dissent with regard to discerning the precedential value of a case. See id. In Egelhoff, Justice Ginsburg provided a concurrence in the judgment only. See Egelhoff, 116 S. Ct. at 2024 (Ginsburg, J., concurring). Thus, the reasoning provided by the plurality in Egelhoff should not be considered precedential. See Kirman, supra, at 2084.
ture to determine whether an evidentiary exclusion is constitutionally valid.\textsuperscript{150}

The analytical framework utilized in \textit{Egelhoff} is problematic for two reasons. First, in deciding whether the Montana statute violated a constitutionally protected right on its face, the Court disregarded the longstanding\textsuperscript{151} and wide-spread\textsuperscript{152} practice of allowing a defendant to present evidence of intoxication as it relates to specific intent crimes.\textsuperscript{153} Second,

\begin{itemize}
  \item \textsuperscript{150} See \textit{Egelhoff}, 116 S. Ct. at 2031 (O'Connor, J., dissenting) (reasoning that the Court must consider the effect of a statute on a defendant's fundamental rights in addition to conducting an historical analysis of the statute); \textit{id.} at 2032 (Souter, J., dissenting) (reasoning that the plurality ignored the second due process inquiry).
  \item \textsuperscript{151} See \textit{id.} at 2019 (plurality opinion). During the nineteenth century, the courts significantly modified the common law rule that precluded the use of intoxication as an excuse. See Jerome Hall, \textit{Intoxication and Criminal Responsibility}, 57 HARV. L. REV. 1045, 1049 (1944). In \textit{Regina v. Cruse}, the court instructed the jury that intoxication might disprove the intention required to prove assault with intent to murder. 173 Eng. Rep. 610, 610 (N.P. 1838); see also Hall, \textit{supra}, at 1049.
  \item \textsuperscript{152} In American jurisprudence, the allowance of intoxication evidence to exculpate also can be traced to the nineteenth century. See \textit{Egelhoff}, 116 S. Ct. at 2030 (O'Connor, J., dissenting); see also Aszman v. State, 24 N.E. 123, 125 (Ind. 1890); State v. Donovan, 16 N.W. 206, 206 (Iowa 1883); Pigman v. State, 14 Ohio 555, 557 (1846); Swan v. State, 23 Tenn. (4 Hum.) 128, 133 (1843). Thus, the allowance of intoxication evidence to exculpate intent has a history dating over 150 years. See \textit{Egelhoff}, 116 S. Ct. at 2030 (O'Connor, J., dissenting).
  \item \textsuperscript{153} See \textit{id.} at 2019 (plurality opinion). By the end of the nineteenth century, most states allowed intoxication evidence to exculpate intent. See \textit{Hall}, \textit{supra} note 151, at 1049. In fact, as early as 1881, in \textit{Hopt v. People}, the Supreme Court explicitly recognized the distinction between using intoxication as an excuse and using it to exculpate the mental element of a crime. 104 U.S. 631, 633-34 (1881). In \textit{Hopt}, the Court considered the validity of a jury instruction concerning the intent required to commit first degree murder. \textit{id.} The Court adopted a predominate theme in state court rulings and distinguished the common law rule that called for the wholesale exclusion of intoxication evidence, reasoning:

\begin{quote}
When a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury.
\end{quote}

\textit{id.} at 634.
  \item \textsuperscript{154} See \textit{Egelhoff}, 116 S. Ct. at 2030-31 (O'Connor, J., dissenting). Justice O'Connor pointed out that despite the plurality's historical analysis, "[a]t the time the Fourteenth Amendment was ratified [in 1868], the common-law rule on consideration of intoxication evidence was in flux." \textit{id.} at 2031. Justice Scalia acknowledged, but dismissed this argument, claiming that the burden remained on Egelhoff to show that the new American rule—that intoxication may be considered on the question of specific intent—was so deeply rooted in American traditions as to have become a fundamental principle of justice. See \textit{id.} at 2019 (plurality opinion). The Montana Supreme Court's holding was not premised upon whether Egelhoff had a fundamental right to present evidence of intoxication; rather, the Montana Supreme Court recognized that Egelhoff had a fundamental right to present a defense that included the right to present exculpatory evidence as to the
the Court ignored the fact that an evidentiary exclusion, such as the one provided by Montana's statute in this case, may adversely impair a defendant's fundamental right to present a defense and to be proven guilty beyond a reasonable doubt.154

A. A Defendant's Right to Present Evidence of Intoxication Placed in Proper Perspective

The Court's historical analysis relied primarily on the common law axiom that a defendant should not be allowed to use intoxication as an excuse.155 Justice Scalia extrapolated from that principle that exculpatory evidence of intoxication has no significant tradition or history and, therefore, serves no fundamental principle of justice.156 He failed to distinguish between intoxication as an excuse and evidence of intoxication used as exculpatory evidence in a defense.157 In Egelhoff, the defendant presented evidence of intoxication to challenge the prosecution's assertion that he was capable of having committed deliberate homicide.158 He did not use intoxication as an excuse.159


154. See Egelhoff, 116 S. Ct. at 2027 (O'Connor, J., dissenting). The Montana statute "forestalls the defendant's ability to raise an effective defense." Id. This effect is just as important to the due process analysis as the historical analysis entertained by Justice Scalia's plurality opinion. See id.; see also id. at 2032 (Souter, J., dissenting). The historical analysis is "not the end of the due process enquiry." See id.

155. See id. at 2018 (plurality opinion). Justice Scalia argued that the common law rejection of intoxication as an excuse could not be construed to permit a defendant to show that intoxication prevented him from having the mental state necessary to have committed the crime. See id.

156. See id. at 2018-19.

157. See id. Professor Nemerson reasons that intoxication is relevant to criminal liability in four ways: (1) it might show that the defendant was too drunk to physically commit the crime, (2) it might show an absence of voluntary conduct, (3) it might negate a mental state necessary to prove the crime, and (4) it might provide a claim of excuse on the grounds of insanity. Steven S. Nemerson, Alcoholism, Intoxication, and the Criminal Law, 10 CARDOZO L. REV. 393, 419 (1988). Nemerson distinguishes between the use of intoxication evidence "negativing" the mental element of a crime, and the use of intoxication as an excuse. Id. at 422; see also Montana v. Egelhoff, 900 P.2d. 260, 268 (Nelson, J., concurring) (distinguishing between an affirmative defense and the presentation of exculpatory evidence), rev'd, 116 S. Ct. 2013 (1996) (plurality opinion).

158. See Egelhoff, 116 S. Ct. at 2016 (plurality opinion).

159. See id. Egelhoff attempted to present evidence of intoxication claiming that he was too intoxicated to physically commit the killings. See id. Egelhoff was not able to present evidence of intoxication as to his mental state, however, pursuant to Montana law. See id.; see also MONT. CODE ANN. § 45-2-203 (1995). Furthermore, the lower court instructed the jury that this evidence could not be used in determining whether Egelhoff possessed the requisite mental state to have committed deliberate homicide. See Egelhoff, 116 S. Ct. at 2016 (plurality opinion); see also supra notes 28-31 and accompanying
The use of exculpatory evidence of any kind at trial does not have extensive historical precedent.\textsuperscript{160} A defendant’s ability to defend by presenting evidence did not develop until the nineteenth century.\textsuperscript{161} At the same time, the defendant’s right to present exculpatory intoxication evidence as to his mental state began to develop.\textsuperscript{162} Today, forty states recognize a defendant’s right to use evidence of intoxication to challenge specific intent crimes such as deliberate homicide.\textsuperscript{163} Thus, the use of intoxication evidence to exculpate a defendant’s intent is no more a “widespread experiment,” as Justice Scalia suggested, than is the use of any other exculpatory evidence.\textsuperscript{164} In fact, all exculpatory evidence, including
evidence of intoxication, serves the goals of the adversarial process, which is premised upon the principle that a jury should be permitted to discern the truth. Justice Scalia disregarded this consideration. Instead, he speculated that intoxication evidence may be considered unreliable and reasoned that the exclusion of intoxication evidence serves the same moral imperative served by the early common law prohibition of intoxication as an excuse. This reasoning fails to recognize the moral imperative served by a judicial system that depends on adversarial confrontation and jury scrutiny.

B. The Second Inquiry: Discerning Whether a Fundamental Right is Impaired by the Operation of a Statute

In Montana v. Egelhoff, the Court limited its inquiry to a facial analysis of Montana's exclusionary statute without considering the operative effects the statute had on Egelhoff's constitutional rights. Clearly every evidentiary exclusion has some effect on a defendant's fundamental right to present a defense and to be proven guilty beyond a reason-

165. See United States v. Nixon, 418 U.S. 683, 709 (1974). In Nixon, the Court explained the importance of a defendant's right to present exculpatory evidence, stating: We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

166. See Egelhoff, 116 S. Ct. at 2021-22 (plurality opinion).

167. See id. at 2020-21. Justice Scalia contended that the rule "comports with and implements society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences." Id.

168. See Nixon, 418 U.S. at 709 (emphasizing a preference to develop all relevant evidence). The integrity of the judicial system depends on full disclosure of all the facts in order to ensure that justice is done. See id.; United States v. Nobles, 422 U.S. 225, 230-31 (1975) (extending the preference for full disclosure enunciated in Nixon to the prosecution); see also Nance, supra note 50, at 872-73 (reasoning that the suppression of evidence constitutes an affront to the judicial tribunal and all of the parties that are given the responsibility to resolve a judicial matter).

If a defendant is not allowed to present evidence, he is not able to prepare an adequate defense. And if he is not able to provide a defense, the prosecution will not have to prove its case beyond a reasonable doubt. This relationship between the presentation of defense evidence and the state’s burden of proof explains why evidentiary exclusion cases since Chambers have consistently presumed that a defendant has a fundamental right to present a defense that includes a right to present evidence. Instead of making an extensive facial inquiry to determine whether a defendant has a fundamental right to present a specific type of evidence, as the plurality did in this case, the Court traditionally has balanced the competing state and individual interests to determine which interest is more important under the circumstances presented.

In Egelhoff, the Court failed to consider whether Montana’s exclusionary statute impaired Egelhoff’s fundamental right to present a defense and to be proven guilty beyond a reasonable doubt. Although the Court has decided evidentiary exclusion cases with divergent results, and often has found important state interests supporting such exclusions, the Court consistently has recognized these constitutional

---

170. See Clinton, supra note 12, at 796, 809.
171. See Egelhoff, 116 S. Ct. at 2028 (O’Connor, J., dissenting). Every evidentiary exclusion implicates to some degree a defendant’s right to present a defense. See Clinton, supra note 12, at 796, 809.
172. See Clinton, supra note 12, at 809; see also Mandiberg, supra note 44, at 234-35. Professor Mandiberg argues that “[u]nless doubts about admitting the evidence are resolved in the defendant’s favor, too much unreviewable discretion will be allowed to the prosecution, and the ‘hoop’ that makes up a good part of the presumption of innocence will be a mere formality.” Id. at 235.
173. See supra note 20 (discussing cases following Chambers).
174. See Egelhoff, 116 S. Ct. at 2016 (plurality opinion). In Egelhoff, the Court asked only the narrow question of whether Egelhoff had a fundamental right to present exculpatory evidence of intoxication, but failed to recognize the effect Montana’s statute had on his fundamental rights to defend and to be proven guilty beyond a reasonable doubt. Id. at 2016. Thus, the Court failed to balance Egelhoff’s rights against the state’s interests to determine which was more important under the circumstances presented. See id. at 2021-22. This very narrow approach differs significantly from previous cases, which focused on the broad question of whether the effect of an evidentiary exclusion denied the defendant a fundamental right to present his defense. See supra Part I.C. (describing the balancing test).
175. See Egelhoff, 116 S. Ct. at 2027-28 (O’Connor, J., dissenting).
176. See, e.g., Michigan v. Lucas, 500 U.S. 145, 152-53 (1991) (supporting a preclusion sanction where the defendant failed to comply with notice requirements under state rape shield laws); Taylor v. Illinois, 484 U.S. 400, 414-15 (1988) (supporting the preclusion of witness testimony as a sanction for violating discovery rules); California v. Trombetta, 467 U.S. 479, 491 (1984) (concluding that due process did not require that the police preserve breath samples that might have been presented by the defendant at trial); United States v. Nobles, 422 U.S. 225, 241-42 (1975) (upholding a preclusion sanction for failing to comply
In *Egelhoff*, the Court not only refused to recognize the impairment of these rights, but failed to recognize them when the evidence that was excluded was relevant to an essential element of the crime.\(^{176}\)

*C. A Proper Disposition of Montana v. Egelhoff: Balancing the Competing Interests*

Had the Court considered the operative effects of Montana's exclusionary statute on *Egelhoff*'s constitutionally protected rights, it first would have determined the importance of the competing interests, and then it would have balanced those interests to determine which interest was more important under the facts presented.\(^{179}\)

*Egelhoff*'s interest in presenting intoxication evidence as it related to his mental state was significant in this case.\(^{180}\) The evidence was essential to the heart of his defense, which entailed challenging the State's assertion that he was capable of having committed deliberate homicide as defined by Montana law.\(^{181}\) While he was permitted to introduce evidence of his intoxication to question the State's assertion that he pulled the trigger, he was not allowed to use it to question the State's assertion that he acted purposely or knowingly.\(^{182}\) The evidence in this case was reliable and probative of *Egelhoff*'s intent.\(^{183}\) Furthermore, his intoxicated state was the primary evidence available to him to question the State's assertion that he acted with purpose or knowledge, particularly since he

---

177. See, e.g., Rock v. Arkansas, 483 U.S. 44, 62 (1987) (holding that excluding all hypnotically refreshed testimony violated a defendant's right to testify on his own behalf under the Fifth, Sixth and Fourteenth Amendments); Crane v. Kentucky, 476 U.S. 683, 690-91 (1986) (finding that the exclusion of evidence pertaining to the credibility of a confession violated due process); Davis v. Alaska, 415 U.S. 308, 316-17 (1974) (holding that excluding the cross-examination of a crucial juvenile witness violated the defendant's right to present testimony guaranteed by the Confrontation Clause). In *Taylor*, Justice Brennan concluded, in dissent, that the Court had conducted a searching inquiry into the basis for "every challenged exclusion of criminal defense evidence that has come before it to date." 484 U.S. at 424.

178. See *Egelhoff*, 116 S. Ct. at 2026 (O'Connor, J., dissenting).

179. See *Egelhoff*, 116 S. Ct. at 2026 (O'Connor, J., dissenting) (discussing the balancing test).

180. See *Egelhoff*, 116 S. Ct. at 2026 (O'Connor, J., dissenting). The importance of a defendant's interest is measured in terms of its reliability, probative value, importance to the overall defense, and the availability of alternative evidence to prove the assertion the excluded evidence is presented to prove. See supra Part I.C.

181. See *Egelhoff*, 116 S. Ct. at 2026 (O'Connor, J., dissenting). The intoxication evidence excluded by the Court was relevant to an essential element of the crime that the prosecution was required to prove beyond a reasonable doubt. See id.

182. See id. at 2016 (plurality opinion).

183. See infra note 188 (discussing the reliability of the evidence).
could not remember the events of that night. Thus, the evidence excluded in *Egelhoff* was "critical" to Egelhoff's ability to present a defense, that focused primarily on raising doubt.

Conversely, the state's interest in excluding the evidence was minor. Justice Scalia theorized that intoxication evidence is inherently unreliable and asserted that Montana may have had a valid reason for excluding it. As Justice Souter pointed out, Montana failed to provide any justification for the statute. Justice Ginsburg explained that where any constitutionally valid justification is available, it should be utilized to support a state's laws. The explanation she espoused already had been discarded, however, by Montana's highest court. Thus, it is unclear

---

184. See Montana v. Egelhoff, 900 P.2d 260, 261-63 (Mont. 1995), rev'd, 116 S. Ct. 2013 (1996) (plurality opinion). The State was able to present evidence to prove Egelhoff's ability to pull the trigger. See id. at 262. Evidence of his intoxicated state was the primary means available to him to develop his defense, especially since he had no memory of the events of that night. See id. at 262-63.

185. See *Egelhoff*, 116 S. Ct. at 2031 (O'Connor, J., dissenting) (reasoning that the exclusion removed "too critical a category of relevant, exculpatory evidence from the adversarial process by preventing the defendant from making an essential argument"). The Montana Supreme Court referred to the excluded evidence as "the very evidence that might convince [the jury] that the State had not proven [intent]." *Egelhoff*, 900 P.2d at 268 (Nelson, J., concurring).


187. See id. at 2021 (plurality opinion); see also supra note 117 (discussing Justice Scalia's conclusion that evidence of intoxication may be considered unreliable).

188. See *Egelhoff*, 116 S. Ct. at 2033 (Souter, J., dissenting). In *Crane v. Kentucky*, the Court stated: "In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" 476 U.S. 683, 690-91 (1986) (quoting United States v. Cronie, 466 U.S. 648, 656 (1984)); see also *Rock v. Arkansas*, 483 U.S. 44, 61 (1987) (reasoning that Arkansas had failed to justify the wholesale exclusion of hypnotically refreshed testimony). The State of Montana did not argue, nor did the lower court suggest, that the evidence of Egelhoff's intoxication was unreliable. See Respondent's Brief at 31-32 n.16, Montana v. Egelhoff, 116 S. Ct. 2013 (1996) (No. 95-566). In fact, Montana has found evidence of intoxication to be highly reliable to an entire class of crime involving operating motor vehicles under the influence of alcohol. See id.

189. See *Egelhoff*, 116 S. Ct. at 2025 (Ginsburg, J., concurring).

190. See id. at 2032 (Souter, J., dissenting). As Justice Souter pointed out, the Court should defer to a state's highest court in interpreting the meaning of state laws. See id. Therefore, the Supreme Court of Montana should be the final authority in the interpretation of Montana law. See Stringer v. Black, 503 U.S. 222, 234-35 (1992) (holding that a state supreme court's interpretation of its state's capital sentencing guidelines is controlling). The Supreme Court does not normally "construe a state statute contrary to the construction given it by the highest court of a State." *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974); see also *Bell v. Maryland*, 378 U.S. 226, 237 (1964) (deferring to the state to
whether Montana's exclusionary statute served any legitimate state objective, or whether, as Justice O'Connor reasoned, it was aimed solely at increasing the likelihood of conviction for a class of defendants, such as Egelhoff, who were intoxicated when they committed the crimes for which they were charged. Assuming that Montana's exclusionary statute served some legitimate state interest, the importance of that interest should have been measured in light of available alternatives. Given that Montana simply could have redefined the elements of the crime without affecting a defendant's constitutional rights, it is doubtful that Montana's exclusionary approach could be construed so as to outweigh Egelhoff's need for the evidence to present his defense.

IV. CONCLUSION

In *Montana v. Egelhoff*, the Court considered a statute that excluded evidence of intoxication as it relates to a defendant's mental state. The Court determined that a state may exclude such evidence because a defendant does not have a fundamental right to present evidence of intoxication in his defense. The Court failed, however, to recognize that an evidentiary exclusion may impair a defendant's ability to present a defense, particularly where the evidence is relevant to an essential element of the crime. Further, the Court ignored the adverse effect such an exclusion may have on the presumption of innocence and the prosecution's burden of proof. Thus, in *Montana v. Egelhoff*, the Court departed from the balancing test it had applied in previous cases when a state impaired decide questions of state law and refusing to address federal questions that could be controlled by state law decisions).

191. See Egelhoff, 116 S. Ct. at 2032 (Souter, J., dissenting). Justice Souter explained that "the State's failure to offer a justification for excluding relevant evidence leaves us unable to discern whether there may be a valid reason to support the statute as the State Supreme Court appears to view it." Id.

192. See id. at 2026 (O'Connor, J., dissenting).

193. See id. at 2033-34 (Souter, J., dissenting). Several alternatives are available to a state wishing to punish crimes where intoxication is involved which are less restrictive than a blanket exclusion. See generally Mandiberg, supra note 44, at 252-70. Professor Mandiberg proposes three plausible alternatives available to a state that wants to control intoxication without restricting a defendant's constitutional rights: (1) creating a civil commitment procedure for those who commit crimes while intoxicated, similar to that used for insane offenders; (2) redefining existing offenses so as to make evidence of intoxication irrelevant as a negativing factor; or, (3) creating new offenses specifically for the intoxicated offender. See id.

194. See Egelhoff, 116 S. Ct. at 2033-34 (Souter, J., dissenting). Montana could have taken alternative actions to further its objectives concerning intoxicated offenders, including prosecuting offenders such as Egelhoff for negligent homicide, creating an altogether new crime of intoxicated homicide, or changing the regulation of alcohol. See Respondent's Brief at 34-35, Montana v. Egelhoff, 116 S. Ct. 2013 (1996) (No. 95-566).
a defendant's ability to present a defense. Instead, the Court limited its inquiry solely to a facial analysis of Montana's exclusionary statute and addressed the narrow issue of whether evidence of intoxication has historical roots sufficient to make its presentation a fundamental right. Instead of fully considering this question, the Court concluded that the moral standard served by the preclusion of intoxication as an excuse at early common law applies equally to the exclusion of intoxication evidence today. Thus, *Montana v. Egelhoff* represents a questionable application of precedent, creates uncertainty as to how the Court will analyze evidentiary exclusions in the future, and raises a question as to whether the plurality substituted its own moral judgment as to the culpability of intoxicated offenders for that of the jury.

*Jeffrey Scott Robinette*