Stylistic Changes Throughout.

See pp. 3, 5, 6

To: The Chief Justice
Mr. Justice Frankfurter
Mr. Justice Douglas
Mr. Justice Clark
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Whittaker
Mr. Justice Stewart

From: Black, J.

SUPREME COURT OF THE UNITED STATES

Circulated: ________

No. 236.—October Term, 1960.

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Dollree Mapp, etc., Appellant, v. Ohio.	On Appeal from the Supreme Court of the State of Ohio.

[June —, 1961.]

Mr. Justice Black, concurring.

For nearly fifty years, since the decision of this Court in *Weeks* v. *United States*,[1] federal courts have refused to permit the introduction into evidence against an accused of his papers and effects obtained by "unreasonable searches and seizures" in violation of the Fourth Amendment. In *Wolf* v. *Colorado*, decided in 1948, however, this Court held that "in a prosecution in a state court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[2] I concurred in that holding on these grounds:

> "For reasons stated in my dissenting opinion in *Adamson* v. *California*, 332 U. S. 46, 68, I agree with the conclusion of the Court that the Fourth Amendment's prohibition of 'unreasonable searches and seizures' is enforceable against the states. Consequently, I should be for reversal of this case if I thought the Fourth Amendment not only prohibited 'unreasonable searches and seizures,' but also, of itself, barred the use of evidence so unlawfully obtained. But I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth

[1] 232 U. S. 383, decided in 1914.

[2] 338 U. S. 25, 33.

Amendment but is a judicially created rule of evidence which Congress might negate."[3]

I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. Reflection on the problem, however, in the light of cases coming before the Court since *Wolf*, has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.

The close interrelationship between the Fourth and Fifth Amendments, as they apply to this problem,[4] has long been recognized and, indeed, was expressly made the ground for this Court's holding in *Boyd* v. *United States*.[5] There the Court fully discussed this relationship and declared itself "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself . . . ."[6] It was upon

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[3] *Id.*, at 39–40.

[4] The interrelationship between the Fourth and the Fifth Amendments in this area does not, of course, justify a narrowing in the interpretation of either of these Amendments with respect to areas in which they operate separately. See *Feldman* v. *United States*, 322 U. S. 487, 502–503 (dissenting opinion); *Frank* v. *Maryland*, 359 U. S. 360, 374–384 (dissenting opinion).

[5] 116 U. S. 616.

[6] *Id.*, at 633.

this ground that Mr. Justice Rutledge largely relied in his dissenting opinion in the *Wolf* case.[7] And, although I rejected the argument at that time, its force has, for me at least, become compelling with the more thorough study of the problem brought on by recent cases. In the final analysis, it seems to me that the *Boyd* doctrine, though not required by the express language of the Constitution strictly construed, is amply justified from an historical standpoint, soundly based in reason, and entirely consistent with what I regard to be the proper approach to interpretation of our Bill of Rights—an approach well set out by Mr. Justice Bradley in the *Boyd* case:

> "[C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon."[8]

The case of *Rochin* v. *California*,[9] which we decided four years after the *Wolf* case, authenticated, I think, the soundness of Mr. Justice Bradley's and Mr. Justice Rut-

[7] 338 U. S., at 47–48.

[8] 116 U. S., at 635. As the Court points out, Mr. Justice Bradley's approach to interpretation of the Bill of Rights stemmed directly from the spirit in which that great charter of liberty was offered for adoption on the floor of the House of Representatives by its framer, James Madison: "If they [the first ten Amendments] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." I Annals of Congress 439 (1789).

[9] 342 U. S. 165.

ledge's reliance upon the interrelationship between the Fourth and Fifth Amendments as requiring the exclusion of unconstitutionally seized evidence. In the *Rochin* case, three police officers, acting with neither a judicial warrant nor probable cause, entered Rochin's home and broke down the door to a bedroom occupied by Rochin and his wife for the purpose of conducting a search. Upon their entry into the room, the officers saw Rochin pick up and swallow two small capsules so they immediately seized him and took him in handcuffs to a hospital where they recovered the capsules by use of a stomach pump. Investigation showed that the capsules contained morphine and evidence of that fact was made the basis of his conviction of a crime in a state court.

When the question of the validity of that conviction was brought here, we were presented with an almost perfect example of the interrelationship between the Fourth and Fifth Amendments. Indeed, every member of this Court who participated in the decision of that case recognized this interrelationship and relied on it, to some extent at least, as justifying reversal of Rochin's conviction. The majority, though careful not to mention the Fifth Amendment's provision that "no person . . . shall be compelled in any criminal case to be a witness against himself," showed at least that it was not unaware that such a provision exists, stating: "Coerced confessions offend the community's sense of fair play and decency . . . . It would be a stultification . . . to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach." [10] The methods used by the police thus were, according to the majority, "too close to the rack and the screw to permit a constitutional differentiation," [11] and the case was reversed on the ground that these methods had violated

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[10] *Id.*, at 173.

[11] *Id.*, at 172.

the Due Process Clause of the Fourteenth Amendment in that the treatment accorded Rochin was of a kind that "shocks the conscience," "offend[s] a 'sense of justice'" and fails to "respect certain decencies of civilized conduct."[12]

I concurred in the reversal of the *Rochin* case, but on the ground that the Fourteenth Amendment made the Fifth Amendment's provision against self-incrimination applicable to the States and that, given a broad rather than a narrow construction, that provision barred the introduction of this "capsule" evidence just as much as it would have forbidden the use of words Rochin might have been coerced to speak.[13] In reaching this conclusion I cited and relied on the *Boyd* case, the constitutional doctrine of which was, of course, necessary to my disposition of the case. At that time, however, these views were very definitely in the minority for only MR. JUSTICE DOUGLAS and I rejected the flexible and uncertain standards of the "shock-the-conscience test" used in the majority opinion.[14]

Two years after *Rochin*, in *Irvine* v. *California*,[15] we were again called upon to consider the validity of a conviction based on evidence which had been obtained in a manner clearly unconstitutional and arguably shocking to the conscience. The five opinions written by this Court in that case demonstrate the utter confusion and uncertainty that had been brought about by the *Wolf* and *Rochin* cases. In concurring, MR. JUSTICE CLARK emphasized the unsatisfacory nature of the Court's "shock-the-conscience test," saying that this "test" "makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by guesswork—just

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[12] *Id.*, at 172, 173.

[13] *Id.*, at 174–177.

[14] *Id.*, at 177–179.

[15] 347 U. S. 128.

how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this *ad hoc* approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free." [16]

Only one thing emerged with any clarity at all from the *Irvine* case—that is that seven Justices rejected the "shock-the-conscience" constitutional standard enunciated in the *Wolf* and *Rochin* cases. But this did very little to lessen the confusion in this area of the law because the continued existence of mutually inconsistent precedents together with the Court's inability to settle upon a majority opinion in the *Irvine* case left the situation at least as uncertain as it had been before. Finally, today, we clear up that uncertainty. As I understand the Court's opinion in this case, we again reject the confusing "shock-the-consciene" standard of the *Wolf* and *Rochin* cases and, instead, set aside this state conviction in reliance upon the precise, intelligible and more predictable constitutional doctrine enunciated in the *Boyd* case. I fully agree with Justice Bradley's opinion that the two Amendments upon which the *Boyd* doctrine rests are of vital importance in our constitutional scheme of liberty and that both are entitled to a liberal rather than a niggardly interpretation. The courts of the country are entitled to know with as much certainty as possible what scope they cover. The Court's opinion, in my judgment, dissipates the doubt and uncertainty in this field of constitutional law and I am persuaded, for this and other reasons stated, to depart from my prior views, to accept the *Boyd* doctrine as controlling in this state case and to join the Court's judgment and opinion which are in accordance with that constitutional doctrine.

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[16] *Id.*, at 138. See also *United States* v. *Rabinowitz*, 339 U. S. 56, 66–68 (dissenting opinion).