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# FREE-STANDING DUE PROCESS AND CRIMINAL PROCEDURE: THE SUPREME COURT'S SEARCH FOR INTERPRETIVE GUIDELINES

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When I was first introduced to the constitutional regulation of criminal procedure in the mid-1950s, a single issue dominated the field: To what extent did the due process clause of the Fourteenth Amendment impose upon states the same constitutional restraints that the Fourth, Fifth, Sixth and Eighth Amendments imposed upon the federal government? While those Bill of Rights provisions, as even then construed, imposed a broad range of constitutional restraints upon the federal criminal justice system,[1] the federal system was (and still is) minuscule as compared to the combined systems of the fifty states.[2] With the Bill of Rights provisions having long been held to apply only to the federal government,[3] the Fourteenth Amendment's due process clause, because it did apply to the states, was the key to providing federal constitutional regulation of the vast bulk of law enforcement activities and criminal proceedings.[4] The Supreme Court had repeatedly held that the Fourteenth Amendment's due process clause had a content that was independent of the Bill of Rights.[5] That clause demanded "fundamental fairness," which could overlap in part with the protections found in the Fourth, Fifth, Sixth and Eighth Amendments, but was much narrower in scope.[6] During the 1950s, as it had for the previous several decades, the Court pursued, on a case-by-case basis, the task of answering the question of precisely how far that overlap did extend.[7]

Then, in the 1960s, the Warren Court instituted a sea change in Fourteenth Amendment jurisprudence. It reformulated the fundamental fairness test to facilitate the "selective incorporation" of individual Bill of Rights guarantees within the Fourteenth Amendment's due process clause, thereby carrying over to the states the same content that those guarantees had as applied to the federal criminal justice system.[8] Applying this "selective incorporation" reformulation, the Supreme Court, over a period of less than a decade, applied to the states almost all the criminal procedure guarantees found in the Bill of Rights.[9] Indeed, only one criminal procedural guarantee—the Fifth Amendment's requirement of prosecution of felony offenses by grand jury

1. *See* 1 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE §§ 2.4(c)-(d), 2.8(b) (2d ed. 1999) [hereinafter TREATISE].

2. *See* 1 *id.* § 1.2(b), at 10-14.

3. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding Bill of Rights does not apply to states); 1 TREATISE, *supra* note 1, § 2.2.

4. *See* 1 TREATISE, *supra* note 1, § 1.2(b), at 10-14.

5. *See* 1 *id.* § 2.4(c)-(d).

6. *See* 1 *id.* § 2.4(e).

7. *See, e.g.*, Chandler v. Fretag, 348 U.S. 53 (1954); Rochin v. California, 342 U.S. 165 (1952); Brock v. North Carolina, 344 U.S. 424 (1953).

8. *See* 1 TREATISE, *supra* note 1, §§ 2.4(a), 2.6(a).

9. As discussed *infra* in the text accompanying note 465, the Court did not have occasion to rule on the incorporation issue as to a few of those guarantees. *See also* 1 TREATISE, *supra* note 1, § 2.6(b).

indictment or presentment—has been held by the Supreme Court not to apply to the states.[10]

With almost all of the guarantees of the Fourth, Fifth, Sixth and Eighth Amendments applied to the states, the focus of the constitutional regulation of criminal procedure has shifted to the content of those guarantees. The bulk of the Supreme Court's criminal procedure rulings have focused on the scope of those guarantees. The opinions in such cases have referred to the due process clause, if at all, only to note in passing that it made the Bill of Rights guarantee in question applicable to the states.[11]

At the same time, however, another group of Supreme Court rulings have looked to the content of due process that stands apart from the incorporated guarantees.[12] Indeed, the post-incorporation years have seen a steady stream of these Supreme Court rulings applying the independent content of due process to the state and federal criminal justice processes. Although their contribution to the constitutional regulation of criminal procedure is not as substantial as the rulings applying the Fourth, Fifth, Sixth and Eighth Amendment guarantees, these due process rulings nonetheless have made a significant contribution to that regulation. For some stages of the process, what has come to be known as "free-standing due process" provides the primary grounding for constitutional regulation.[13]

While the rulings based on free-standing due process have received considerable attention in the academic commentary, almost all of that coverage has focused on the impact of individual rulings on particular stages of the process. Thus, with only a handful of exceptions,[14] the commentary on the Supreme Court's methodology—or lack of methodology—in determining the independent content of due process tends to be found in brief discussions within articles focusing on the potential regulation of particular procedures through free-standing due process. My objective here is to provide a springboard for further exploration of the appropriate role of free-standing due

10. *See infra* text accompanying note 466.

11. *See* 1 TREATISE, *supra* note 1, § 2.6(c), at 573 n.85.

12. *See infra* text accompanying notes 487-538.

13. *See, e.g.*, *infra* text accompanying notes 527-33, describing the due process regulation of sentencing procedures.

14. Donald Dripps and John Nowak, two of the distinguished group of commentators who have been kind enough to respond to this article, are most prominently placed in that handful. *See* Donald A. Dripps, *Miscarriages of Justice and the Constitution*, 2 BUFF. CRIM. L. REV. 635 (1999); Donald A. Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559 (1996); Donald A. Dripps, *At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense*, 1993 U. ILL. L. REV. 261; Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591 (1990); John E. Nowak, *Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & CRIMINOLOGY 397 (1979).

process in the constitutional regulation of the criminal justice process. I hope to do that by providing a fairly complete doctrinal history of the Court's development and application of interpretative guidelines for determining the content of free-standing due process. I apologize for presenting such a narrow history, ignoring the personalities and the political and societal developments that contributed to shaping those guidelines. However, limited space and limited expertise[15] lead me to concentrate on what I know best. Hopefully others will fill in the rest of the picture.

The doctrinal grounding of free-standing due process, as applied to criminal procedure, has been shaped in large part by how the Court viewed the relationship between due process and the criminal procedure "specifics" of the Bill of Rights. The original framing of the content of due process in criminal procedure came out of a case dealing with that relationship. For many decades thereafter, the development and modification of that initial position was shaped by rulings dealing with that relationship. Following the dramatic restructuring of the relationship in the 1960s, a primary concern of the Court was whether the doctrinal base of free-standing due process should be narrowed in light of that restructured relationship. Accordingly, I have divided my doctrinal history into three periods, which are tied to that relationship: (1) *Hurtado v. California*,[16] which presented the Court's initial pronouncements on the role of due process in the regulation of criminal procedure; (2) the period between *Hurtado* and the adoption of selective incorporation in the 1960s; and (3) the period since the adoption of selective incorporation.

## I. THE *HURTADO* CONCEPTION OF DUE PROCESS (PARTICULARLY AS APPLIED TO CRIMINAL PROCEDURE)

*Hurtado v. California*[17] provides the obvious starting point for tracing the Supreme Court's development of guidelines for determining the content of due process as applied to criminal procedure. Although decided in 1884, over a century after the adoption of the Bill of Rights, *Hurtado* was the first major Supreme Court ruling on what due process requires of the criminal process. The Fifth Amendment includes a due process clause, but as of 1884, the Court had never been called upon to apply that clause to the federal criminal process. With the 1868 adoption of the Fourteenth Amendment and its due process clause, a federal constitutional mandate of due process was extended to state criminal justice systems. The state cases were more likely than the federal cases to require federal due process rulings because (1) the constitutional

15. As for the limits of "lawyer" histories, see the discussion in 1 TREATISE, *supra* note 1, § 1.5(a) (introducing an "internal history" of the shaping of the basic structure of the American justice process).

16. 110 U.S. 516 (1884).

17. 110 U.S. 516 (1884).

challenges in a state case could be based *only* on the due process clause and (2) the numerous state systems presented greater potential for adopting some significant departure from the common law tradition. Indeed, the *Hurtado* case was a product of exactly those two distinguishing characteristics.

At issue in *Hurtado* was whether a state could provide for the initiation of capital charges based upon a prosecutor's information, supported by a finding of probable cause by a magistrate at a preliminary hearing, rather than by the grand jury indictment or presentment that would have been required in a federal felony prosecution by the Fifth Amendment.[18] Bentham, in 1824, had launched in England a prominent attack against the grand jury, which had been carried over to this country. The critics characterized prosecution by indictment as cumbersome, unwieldy, expensive and undemocratic (because of its secrecy).[19] In 1859, Michigan was persuaded by this criticism and adopted a change in its constitution that allowed the legislature to authorize prosecution by information for felonies.[20] The Michigan legislature promptly accepted that invitation, and provided that prosecutions for felonies could be either by indictment or by information following a preliminary hearing bindover. Several states, including California, followed suit.[21] The adoption of the Fourteenth Amendment provided a potential federal constitutional grounding for challenging that change. The same change, if presented in the federal system, would not have arisen as a due process question because the Fifth Amendment's first clause dealt specifically with prosecution by indictment.

In *Hurtado*, the Supreme Court (with only Justice Harlan dissenting) held that the California procedure for instituting capital charges, though it did not require prosecution by indictment, nonetheless satisfied the due process requirement of the Fourteenth Amendment. Interestingly, that holding continues to be the law even though the Supreme Court's adoption of the selective incorporation doctrine in the 1960s rendered irrelevant (and often explicitly overruled) all of the other pre-1960s rulings on due process challenges in state cases that would have been treated under specific Bill of Rights guarantees in federal cases.[22] However, what makes *Hurtado*

18. The first clause of the Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.

U.S. CONST. amend. V. The "infamous crime" category includes all felonies. *See* 4 TREATISE, *supra* note 1, § 15.1(b), at 200-07.

19. *See* 3 TREATISE, *supra* note 1, § 8.2(b), at 14-15.

20. 1 SARAH SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 1.5 (2d ed. 1997); RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941, at 66-69 (1963).

21. YOUNGER, *supra* note 20, at 69-71; 1 TREATISE, *supra* note 1, § 1.5(d), at 261-62.

22. *See* 1 TREATISE, *supra* note 1, § 2.6(b), particularly at 564 n.33.

significant in the development of the independent content of due process was not its holding on initiating prosecutions without indictment, but its analysis of the general character of due process in the context of criminal procedure. That analysis provided both a general standard for determining the content of due process that continues to be applied and several specific guidelines for applying that general standard. Though those guidelines subsequently were rejected in large part, the perspective they advanced arguably has been resurrected, to some extent, in the post-incorporation development of guidelines for applying free-standing due process.

*Hurtado* was decided long before the Supreme Court adopted the now common practice of dividing its opinions into several parts, each designated by a Roman numeral and treating a separate argument or issue.[23] Although stylistically quite different as written, Justice Matthews' opinion for the Court in *Hurtado* is readily restructured to fit that format. This would give it four distinct parts. The first three would deal with responses to petitioner Hurtado's claim that prosecution by indictment was a prerequisite of due process as established by (1) the historical understanding of due process, (2) the analysis adopted by the Supreme Court in the earlier due process ruling of *Murray's Lessee v. Hoboken Land & Improvement Co.*,[24] and (3) the recognition of prosecution by indictment in the Fifth Amendment. In the course of responding to these contentions, the *Hurtado* opinion spoke primarily of what the due process did not require of state procedure, but Part IV of a restructured opinion would collect the Court's extensive comments on what it is that due process does require of a state criminal justice process. Each of these four parts of a restructured *Hurtado* opinion is explored below, with an eye to what they suggest as to guidelines for determining the content of due process.

*Part I: The "law of the land"*

As Justice Matthews noted at the outset, petitioner Hurtado's initial contention was that (1) "the phrase 'due process of law' is equivalent to 'law of the land' as found in the 29th chapter of the Magna Charta," and (2) "that by memorial usage, [that clause] has acquired a fixed, definite, and technical meaning" which includes prosecution by indictment. This contention was supported by the 1857 ruling of the Massachusetts Supreme Judicial Court in *Jones v. Robbins*,[25] which had relied heavily on the distinguished commentary of Lord Coke in his *Institutes of the Law of England*.[26]

23. As to that practice, see Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995).

24. 59 U.S. (18 How.) 272 (1855).

25. 74 Mass. (8 Gray) 329 (1857).

26. *See generally* SIR EDWARD COKE, SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (1671 ed.).

The *Hurtado* Court accepted the first prong of this argument, that as Coke had argued, the phrase "due process of law" was the equivalent of the "law of the land" clause found in Chapter 29 of the Magna Charta.[27] That provision stated: "No freeman shall be taken, or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we [not] pass upon him, nor condemn him, but by lawful Judgment of his peers, or by the law of the land."[28] It was more than a century later that the first prominent use of the phrase "due process" appeared in the English law. A statute declared that "[n]o man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of the law."[29] It may well be that the standard reading of due process in England limited that concept to use of a specified process to bring the individual before the court.[30] However, Coke equated due process with the law of the land provision of the Magna Charta and thereby gave that phrase a coverage that extended through the entire process by which a person could be deprived of life, liberty or property. Coke noted that the "true sense and exposition" of the words "but by law of the land" was expressed in a later statute "where the words, by law of the land, are rendered without due process

27. This provision was in Chapter 39 of the original Magna Charta signed by King John in 1215 and is sometimes cited by reference to that Chapter number. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 169 (1968) (Black, J., concurring); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 28 (1991).

28. 9 Hen. 3, ch. 29 (1225). This is the translation set forth by Justice Harlan in his dissent in *Hurtado*, 110 U.S. at 542 (Harlan, J., dissenting). It is based on the translation cited earlier in *Murray's Lessee v. Hoboken Land & Improvement Co*., which also used the phrasing "lawful judgment of his peers *or* law of the land." 59 U.S. (18 How.) 272, 276 (1856) (emphasis added). In 1905, W.S. McKechnie presented the contention that the "or" was an "and." *See* W.S. MCKECHNIE, MAGNA CHARTA 442 (Glasgow 1905), *quoted in* RODNEY MOTT, DUE PROCESS OF LAW 3 (1926). Coke's own translation placed the two phrases in the disjunctive and that is the phrasing followed by the Supreme Court in its earliest interpretations of the due process clause, as well as in its later opinions. *See, e.g.*, Hovey v. Elliott, 167 U.S. 409, 415 (1897); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 28 (1991) (Scalia, J., concurring). The colonial and early state provisions also used the disjunctive. *See, e.g.*, the Massachusetts, New Hampshire, Pennsylvania, and South Carolina provisions, *quoted in* NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS, THE DRAFTS, DEBATES, SOURCES AND ORIGINS, §§ 10.1.3.3.c, 10.1.3.4, 10.1.3.8.b, 10.1.3.10.a (1997). But consider the New York Declaration of Rights, *quoted in* COGAN, *supra*, § 10.1.3.6.a ("but by the lawful Judgment of his Peers, and by the Laws of this Province").

29. 28 Edw. 3, ch. 3 (1354).

30. *See* Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265 (1975) (historical evidence indicates that the statutory due process command referred only to the required use of specific writs recognized in English law as appropriate means of bringing the individual before the court and it thereby sought only to ensure that the individual would have the opportunity to answer the complaint against him); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 194 (1977).

of law."[31] Thus due process, under Coke's view, included not only the proper procedure for bringing the individual before the court to answer the charges against him (as required by the statute), but also such other procedures as fell within the "law of the land."

Coke's interpretation of due process was widely known and accepted in the colonies.[32] Thus, while several of the original states employed the "law of the land" language in their constitutions or statutes, New York was thought to have imposed precisely the same guarantee through the use of due process language in its statutory bill of liberties.[33] That due process language was later included in the New York Ratifying Convention's list of proposed amendments to the Constitution, although the proposed amendments of the states of Virginia, and North Carolina used the traditional phrasing—that "life, liberty, or property" not be deprived "but by law of the land."[34] When Madison drafted proposed amendments based in part on those state recommendations, he used the due process terminology.[35] Madison's proposal was then reshaped by a House Committee of the Whole into a Bill of Rights to be placed at the end of the Constitution, including what became the Fifth Amendment.[36] As Justice Scalia later noted, the First Congress, through the Fifth Amendment's due process clause, presumably was adopting "an affirmation of Magna Charta according to Coke."[37]

31. COKE, *supra* note 26, at 50. Coke interestingly did not cite to the statute cited *supra* note 29, but to a later statute. *See* Jurow, *supra* note 30, at 277 (noting that this reference was "puzzling" because the later statute referred to no man being taken nor imprisoned nor put out of his freehold but with "process of the law"). Coke earlier had stated that Chapter 29 prohibited putting a person out of his freehold, livelihood or liberties "unless it be by lawful judgment, that is verdict of his equals . . . or by the law of the land (that is, to speak it once for all) by the due course and process of law." COKE, *supra* note 26, at 46.

32. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 28 (1991) (Scalia, J., concurring) ("American colonists were intimately familiar with Coke . . . ."); Frank R. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 96 ("It is necessary to pay attention to Coke, not because he was right in describing the law of England, but because the framers may have thought Coke right and incorporated his error into our fundamental law."). Coke's view of due process and the law of the land as equivalent principles was advanced in the most influential of the early American commentaries. *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 9-13 (1827); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1783 (1833).

33. *See* Easterbrook, *supra* note 32, at 96-97; BERGER, *supra* note 30, at 196 (quoting the comment of Alexander Hamilton on New York's combination of a law of the land clause in the New York Constitution and a due process clause in its statutory bill of rights).

34. *See* COGAN, *supra* note 28, §§ 10.1.2.1-10.1.2.4, at 348-49 (1997).

35. *See* HELEN VEIT ET AL., CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 11 (1991) (Madison Resolution).

36. *Id.* at 8 (quoting motion by Sherman to add all amendments to the Constitution as a supplement). *Id.* at 39 (including article VIII of the House Resolution, which became the Fifth Amendment).

37. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 29 (1991) (Scalia, J., concurring). There is no suggestion that the clause would have been viewed differently by those who ratified the

In *Murray's Lessee*,[38] the Court's first detailed analysis of the Fifth Amendment's due process clause, the Court had accepted the equivalency of due process and law of the land and offered the following explanation as to why the First Congress chose the latter language over the former:

> The words, "due process of law," were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in *Magna Charta*. Lord Coke, in his commentary on those words, (2 Inst. 50,) says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land."
>
> The constitution of the United States, as adopted, contained the provision, that "the trial of all crimes, except in cases of impeachment, shall be by jury." When the fifth article of amendment containing the words now in question was made, the trial by jury in criminal cases had thus already been provided for. By the sixth and seventh articles of amendment, further special provisions were separately made for that mode of trial in civil and criminal cases. To have followed, as in the state constitutions, and in the ordinance of 1787, the words of *Magna Charta*, and declared that no person shall be deprived of his life, liberty, or property but by the judgment of his peers or the law of the land, would have been in part superfluous and inappropriate. To have taken the clause, "law of the land," without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on *Magna Charta* had declared to be the true meaning of the phrase, "law of the land," in that instrument, and which were undoubtedly then received as their true meaning.[39]

While Coke was clear in his characterization of due process as the precise counterpart of the law of the land provision in the Magna Charta, he was not so clear in conveying what he believed to be the content of that Magna Charta provision. As generally understood by English courts and writers, Chapter 29 of the Magna Charta prohibited imposing sanctions upon the individual except by jury verdict (*i.e.*, a judgment of his peers) or in accord with alternative procedures clearly established in the standing law (*i.e.*, the law of the land). Its purpose was to prevent the King from forfeiting life, liberty, or property

Amendment, so it generally is accepted that this was the view of the "Framers," including both those who proposed and those who ratified.

38. 59 U.S. (18 How.) 272 (1856).

39. Murray's Lessee v. Hoboken Land Improvement Co., 59 U.S. 272, 276 (1855). *See also* Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, *in* DUE PROCESS: XVIII NOMOS 3, at 11-12 (Roland Pennock & John W. Chapman eds., 1977) (stating that a reasonable inference from the framers' reasoning was "that, as the law of the land [language] had already been employed with one meaning in the Supremacy Clause [of the Constitution], it would be misleading to endow it with another meaning in the Fifth Amendment").

without regard to the law or by simply declaring some new process of his own choosing to be the law.[40] Thus, David Currie has described the law of the land principle as imposing basically a "separation of powers concept against unlicensed executive action."[41] The monarchy was required to proceed through established judicial procedures or such alternatives as were specifically authorized by legislation. So too, the courts, as the agents of the Crown, had to adhere to legal regularity, basing their decisions upon the common law, custom, or statute, and not personal whim.[42] This requirement of adherence to the "standing law" did not prohibit modification of the law by the legislature. The traditional English and colonial view was that the law of the land clause allowed Parliament to institute new procedures.[43] Legal regularity arguably prohibited Parliament from itself passing judgment and imposing punishment on an individual or group of persons,[44] but Parliament could authorize general modification of the common law process or a modification fashioned for particular types of cases.[45] Indeed, colonial enactments modeled after the Magna Charta's Chapter 29 sometimes spoke of prohibiting the

40. *See* Jurow, *supra* note 30, at 273-77; Easterbrook, *supra* note 32, at 95-96; Charles H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27, 28 (1914).

41. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888, at 272 (1985).

42. Although the primary concern of the barons was exercise of authority by the crown "without any process whatever," rather than with "abuses of judicial process," McIlwain, *supra* note 40, at 43, judicial adherence to the standing law also came to be seen as part of the law of the land requirement. *See* 2 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1103-04 (1953) (such adherence meant that the courts were "not to indulge, in the cases covered, in any innovations of the 'process' which were not authorized by acts of Parliament").

43. *See* Raoul Berger, *Law of the Land Reconsidered*, 74 NW. U. L. REV. 1, 2-17 (1979); 2 CROSSKEY, *supra* note 42, at 1103; Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 369-70 (1971). *But see* MOTT, *supra* note 28, at 43-44, 141-42.

44. *See* CHRISTOPHER WOLFE, *The Original Meaning of Due Process*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 213, 221 (Eugene W. Hickock, Jr. ed., 1991) (noting Alexander Hamilton's support of such a prohibition). In this respect, due process would overlap with the prohibition of bills of attainder, but would have a broader reach. *See, e.g.*, Univ. of N.C. v. Foy, 3 N.C. (2 Hayw.) 310, 324 (1804) (holding due process bars the legislature from imposing a forfeiture of rights vested in the trustees of the state's university without a judicial determination that finds them "guilty of any such acts as will in law amount to a forfeiture . . . or . . . a dissolution of the body"). *But cf.* Berger, *supra* note 43, at 13-14.

45. *See* WOLFE, *supra* note 44, at 222. *See also* sources cited *supra* note 43. The assumption here is that limited modifications for types of cases are not aimed at cases involving specific persons. *See also* Van Zant v. Waddell, 10 Tenn. (2 Yer.) 260, 270 (1829) (finding that the law of the land clause requires "a general public law equally binding upon every member of the community . . . under similar circumstances").

imposition of sanctions except by a jury verdict or in accordance with a "known law" adopted by the colonial legislative body.[46]

Coke at times spoke of the law of the land requirement in terms fully consistent with a simple requirement of adherence to process prescribed by the standing law, whatever the content of that process. Thus, he described Chapter 29 as providing that "no man be taken or imprisoned, but *per legem terrae*, that is, by the common law, statute law, or custom of England."[47] The reference to three sources of law, *including* statutory law, certainly suggested that the required process could change with legislative modification. At times, however, Coke also spoke of *per legem terrae* as including some mandated procedures that the Parliament could not alter. He described *per legem terrae* as necessarily including certain procedures known to the common law, and noted that a law which was contrary to the Magna Charta would be "holden for none."[48] Because this view was almost unique to Coke,[49] and arguably rendered due process far more open-ended than the other procedural guarantees contained in the Bill of Rights,[50] various commentators have argued

46. *See, e.g.*, Berger, *supra* note 43, at 8 (citing the Massachusetts and Rhode Island provisions). *See also* COGAN, *supra* note 28, § 10.1.3.1b (setting forth the Connecticut Declaration of Rights of 1776, which stated, "[n]o Man's Goods or Estate shall be taken away from him . . . unless clearly warranted by the laws of this state").

47. *See* COKE, *supra* note 26, at 45.

48. *See* SIR EDWARD COKE, *Introduction* to SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND A2-A7 (1671 ed.). *But cf.* BERGER, *supra* note 30, at 194 (suggesting Coke's reference was narrow—deeming invalid only a statute that, for example, "authorized the imprisonment of a person without the judgment of his peers").

49. *See* Easterbrook, *supra* note 32, at 96 (noting that Coke "was a solitary voice in English law" in giving to *per legem terrae* "some component of natural law that Congress could not evade," but also acknowledging that "the framers may have thought Coke right"); 2 CROSSKEY, *supra* note 42, at 1104 (agreeing that Coke misread the Magna Charta provision, but arguing that the due process clause "pretty clearly" was designed to limit the legislature in its fashioning of procedure). Crosskey notes that a standing law requirement would have been superfluous "in view of the careful provisions in the Constitution for complete congressional supremacy and the Presidential and judicial oaths of office." Also, since "the language of clause is . . . completely general as to the agencies of government it is intended to control," the "reasonable view is that it was, in all probability, read by most persons at the time it was adopted, as in some way limiting government generally, including the legislature, as to the kind of 'process' to be followed in the cases the clause covers." *Id.*

50. Of course, how open-ended would depend upon whether Coke's due process was read as directing the courts to ensure that legislation was consistent with the specifics of the common law or directing the courts to review legislation by reference to such general principles of justice as the courts extrapolated from the common law. *See* discussion *infra* note 117. However, even if adherence to the specifics were demanded, it would be left to the courts to determine which specifics should be included. Thus, either reading would provide considerable flexibility, leading to the conclusion that Coke's due process as a limitation upon legislative modification of the common law was unlikely to have been the objective of a provision that was described by Alexander Hamilton as having a "precise technical import." *See* BERGER, *supra* note 30, at 194.

that the standing law concept of due process is that which the framers most likely had in mind.[51]

If due process was read as requiring no more than adherence to the standing law, that would have been a ready answer to petitioner Hurtado's claim; the California law clearly authorized proceeding without indictment. But the *Hurtado* Court did not even stop to consider such a possibility. Restricting due process to a standing law requirement apparently was foreclosed by previous Supreme Court decisions applying the due process clauses of the Fifth and Fourteenth Amendments in other contexts. While there was occasional language in some of those decisions that could be read as requiring no more than adherence to the standing law,[52] that position had been rejected in other rulings. Although those rulings found no due process violation, they clearly indicated that due process not only required adherence to the standing law, but also placed undefined limits on the procedures that the legislature could authorize as part of the standing law.[53]

The *Hurtado* Court similarly noted that unlike the original Magna Charta provision, which was aimed only at "guard[ing] against executive usurpation and tyranny," the Fifth Amendment due process clause placed limits upon "legislative power."[54] Of course, a due process clause limiting the legislature was not necessarily inconsistent with a due process clause based solely on the standing law concept. For that concept does impose certain limits upon legislative power; it precludes legislative adoption of procedures for individual cases (such procedures would not be the general law of the land),[55] the legislature itself adjudicating the merits of a dispute,[56] or the legislature authorizing the executive or judiciary in their discretion to disregard

*See also* Charles Curtis, *Review and Majority Rule*, *in* SUPREME COURT AND SUPREME LAW 177 (Edmond Cahn ed., 1954) (explaining that when due process was added to the Fifth Amendment, its "meaning was as fixed and definite as the common law could make a phrase," as it referred simply to "a procedural process, which could be easily ascertained from almost any law book").

51. *See, e.g.*, WOLFE, *supra* note 44; Berger, *supra* note 43; Corwin, *supra* note 43.

52. *See, e.g.*, Walker v. Sauvinent, 92 U.S. 90, 93 (1875) ("Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State.").

53. *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How) 272 (1856), discussed *infra* notes 101-04; Davidson v. New Orleans, 96 U.S. 97, 102 (1877) ("[C]an a State make any thing due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the [Fourteenth Amendment] prohibition to the States is of no avail . . . ."). *See generally* Kennard v. Louisiana *ex rel.* Morgan, 92 U.S. 480 (1875) (upholding state procedure because it provided basic elements of an adversary proceeding, not simply because it was authorized by state law).

54. Hurtado v. California, 110 U.S. 516, 532 (1884).

55. *See supra* note 45.

56. *See supra* note 44.

established procedures.[57] *Hurtado* recognized such limits when it noted that due process would be violated by "acts of attainder, bills of pains and penalties, acts of confiscation, acts of reversing judgments, and acts directly transferring one man's estate to another."[58] The *Hurtado* Court also stated, however, that due process went beyond such limitations. It also imposed limits upon legislation prescribing procedures of general applicability. The Court therefore had to respond to the defendant's claim that one of those limits had been violated by California because the law of the land clause historically had insisted upon prosecution by indictment.

The Court characterized petitioner Hurtado's claim as resting on the view that the law of the land clause had a "fixed, definite and technical meaning" that incorporated specific common law procedures,[59] including the process of charging by grand jury indictment or presentment. This stood in contrast to a law of the land clause that insisted only that the process of the standing law be consistent with the most general and basic principles of justice. Petitioner Hurtado sought support for his position in two prior rulings: the Massachusetts Supreme Judicial Court's decision in *Jones v. Robbins*[60] and the Supreme Court's earlier reading of the Fifth Amendment's due process clause in *Murray's Lessee*.[61] The *Jones* opinion rested largely on the reading of the law of the land clause by Coke and others relying on Coke, and the *Hurtado* Court's rejection of *Jones* rested largely on its contrary understanding of the English (and early American) reading of that clause, in contrast to the Court's rejection of Hurtado's reliance upon *Murray's Lessee*, which stressed the character of due process as a constitutional limitation.[62]

*Jones v. Robbins*[63] was a case deserving of attention because it directly supported *Hurtado*'s position and had behind it the "authority of the great name of Chief Justice Shaw" of the Massachusetts Supreme Judicial Court.[64]

57. *See* Jurow, *supra* note 30, at 267.

58. *Hurtado*, 110 U.S. at 536. Such legislation, the Court noted, had not been viewed as "inconsistent with the law of the land" in England, notwithstanding a contrary position attributed to Coke. *Id.* at 531.

59. *Id.* at 521.

60. 74 Mass. (8 Gray) 329 (1857).

61. 59 U.S. (18 How.) 272 (1856).

62. *See* discussion of the Court's analysis of *Murray's Lessee infra* notes 98-132 and accompanying text.

63. 74 Mass. (8 Gray) 329 (1857).

64. Hurtado v. California, 110 U.S. 516, 521-22 (1884). For a discussion of Shaw's reputation, see LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957); JOHN DILLON, THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA 263 (1895).

Massachusetts, unlike several of the other original states,[65] did not have a constitutional provision specifically requiring prosecution by indictment. It did, however, have a constitutional law of the land clause, and in *Jones*, the Supreme Judicial Court, in an opinion by Chief Justice Shaw, had held that clause to require prosecution by indictment for an offense punishable by imprisonment in the state penitentiary. The *Jones* opinion relied heavily upon Coke. It quoted Coke's comment that "law of the land" as used in the Magna Charta meant "without process of law, that is, by indictment or presentment of good and lawful men."[66] While that view was not "conclusive," it was a "construction adopted by a writer of high authority."[67] Coke's explanation had not only been influential in England (thus Blackstone had stated that "informations of every kind are confined by the constitutional law to misdemeanors"[68]), but also in this country. Relying upon Coke, Chancellor Kent had stated in his commentaries, that "law of the land" was "understood to mean due process of law, that is, by indictment or presentment of good and lawful men."[69] The "same view of this clause," Chief Justice Shaw noted, was "taken by Judge [later Justice] Story in his Commentaries."[70]

Responding to *Jones*, Justice Matthews stated that the Massachusetts Court had relied primarily on Coke, but it had "misunderstood" Coke's position.[71] The passage from Coke cited by the *Jones* Court[72] "was not intended to assert that an indictment or presentment of a grand jury was essential to due process of law in the prosecution and punishment of crimes, but was only mentioned as an example and illustration of due process of law as it actually existed in cases in which it was customarily used."[73] This was shown, Justice Matthews noted, by other passages from Coke. In particular, there was Coke's description of

65. *See* 4 TREATISE, *supra* note 1, § 15.1(c), at 216 n.118 (noting that of the original states, three had indictment clauses in their constitutions, most had due process or law of the land clauses, and all utilized prosecution by indictment or presentment).

66. Jones v. Robbins, 74 Mass. (8 Gray) 329, 343 (1857) (quoting COKE, *supra* note 26, at 50).

67. *Id.* at 343.

68. *Id.* at 346 (describing the comments of Blackstone in 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 310 (11th ed. 1797)).

69. *Id.* at 343 (quoting 2 KENT, *supra* note 32, at 9-13). *See also* 2 CROSSKEY, *supra* note 42, at 1103 (quoting Alexander Hamilton's explanation of due process as requiring "indictment or presentment of good and lawful men and trial and conviction in consequence").

70. *Jones*, 74 Mass. (8 Gray) at 343. The reference was to JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1783 (1833). Justice Story there noted that, in light of Coke's explanation of the law of the land clause, the due process clause of the Fifth Amendment "in effect affirms the right of trial according to the process and proceedings of the common law." *Id.*

71. Hurtado v. California, 110 U.S. 516, 522-23 (1884).

72. *See supra* text accompanying note 66.

73. *Hurtado*, 110 U.S. at 523.

due process in the first of what Coke categorized as the nine separate branches of the Magna Charta's guarantee—the prohibition that "no man be taken or imprisoned but *per legem terrae*, that is by the common law, statute law, or custom of England."[74] In explaining this prohibition, Coke had said the following about due process, which he described as presenting "the true sense and exposition" of the phrase "but by law of the land":

> [F]or there is said, though it be contained in the Great Charter, that no man be taken, imprisoned, or put out of his free-hold without process of the law, that is by indictment of good and lawful men, where such deeds be done in due manner, or by writ originall of the common law. Without being brought in to answere but by due process of the common law. No man be put to answer without presentment before justices, or thing of record, or by due process, or by writ originall, according to the old law of the land. Wherein it is to be observed that this chapter is but declaratory of the old law of England.[75]

This passage was viewed as accepting alternatives (*e.g.*, the writ originall) to the initiation of prosecution by indictment or presentments. That such alternatives were consistent with due process was also illustrated, in the Court's opinion, by the accepted practice when Coke wrote.

Coke had referred to the law of the land clause as applying "in all cases of imprisonment for crime,"[76] but that included misdemeanors (subject at the time to much more severe penalties than today).[77] Misdemeanors were prosecuted without indictments, and in a major English decision, a challenge to that procedure based upon Coke's reading of the Magna Charta had been flatly rejected. In support of that ruling,[78] Justice Matthews noted, reference had been made to Coke's own practice on the King's bench as well as the statement elsewhere in Coke's writings that the King could not put a person "to answer, but his court must be apprized of the crime by indictment, presentment, *or other matter of record*."[79] Justice Matthews also cited the law which allowed, upon a coroner's inquisition, a prosecution for murder or manslaughter to be brought "without the intervention of the grand jury."[80] Still another common law exception was found in Coke's comments on the need for

74. *Id.* (quoting COKE, *supra* note 26, at 46).

75. *Id.* at 524 (quoting COKE, *supra* note 26, at 47).

76. *Id.* at 524.

77. While only felonies were punishable by forfeiture of the convicted person's property, misdemeanors were subject to severe sanctions. *See* Tennessee v. Garner, 471 U.S. 1, 13-14 & n.11 (1985); 4 BLACKSTONE, *supra* note 68, at 5-19, 94-101; Horace L. Wilgus, *Arrest Without A Warrant*, 22 MICH. L. REV. 541, 572-73 (1924).

78. That ruling came in *Mr. Prynn's Case*, 87 Eng. Rep. 764 (K.B. 1690). The supporting argument cited by the Court was that of Sir Bartholomew Shower, set forth in the report of *The King v. Berchet*, 89 Eng. Rep. 480 (K.B. 1690). *See Hurtado*, 110 U.S. at 524.

79. *Hurtado*, 110 U.S. at 525 (quoting COKE, *supra* note 26, at 136) (emphasis added).

80. *Id.* (citing The Queen v. Ingham, 122 Eng. Rep. 827 (Q.B. 1864)).

indictment and presentment being limited to "forfeitures of life and liberty at the suit of king."[81] Even as to the crime of murder, which was Coke's primary concern, the common law allowed persons to be "tried, convicted, and executed" on "appeals of murder," *i.e.*, prosecutions brought simply on the initiative of the victim's spouse or heir.[82]

The *Hurtado* Court also took account of leading American authorities. It noted that Chancellor Kent (who had been cited in *Jones*), after quoting Coke, had stated that the "better and larger definition of due process is that it means law in its regular course of administration through courts of justice."[83] That broad description hardly prohibited a practice as well established as prosecution by information. Also cited were similar, very general descriptions of due process advanced by distinguished federal and state judges, none of which referred to grand jury charging.[84] Finally, the state of Connecticut had shown its understanding that the Magna Charta provision did not demand a grand jury indictment or presentment as to all criminal offenses. The Connecticut Constitution, adopted in 1818, included a prohibition against depriving an individual of life, liberty, or property "but by due course of law," yet its provision on grand jury charging required prosecution by indictment or presentment only for crimes carrying a punishment of death or imprisonment for life (*i.e.*, not for felonies generally).[85]

The first Justice Harlan,[86] in his *Hurtado* dissent,[87] argued that if the Magna Charta required trial by jury, it similarly required in a capital case

81. *Id.* at 526.

82. *Id.* The Court noted that this practice had survived in England through the early part of the nineteenth century. In this country, the English statutes allowing an appeal of murder were in force in the colonies of both Pennsylvania and Maryland. The Court did not comment on the infrequency of prosecutions by appeal in England, although noting that the process had never been used in Pennsylvania and only once used in Maryland. *Id.*

Blackstone stated that the appeal was available to victims for prosecuting felonies, and as to murder, by certain relatives of the victim. 4 BLACKSTONE, *supra* note 68, at 308-12. But Blackstone added that the appeal process was "very little in use, on account of the great nicety required in conducting it." *Id.* at 308.

83. *Hurtado*, 110 U.S. at 527 (quoting 2 KENT, *supra* note 32, at 13).

84. *Id.* at 526-27. The Court cited Justice Merrick's dissent in *Jones v. Robbins*, 74 Mass. (8 Gray) 329 (1857), Justice Denio's opinion in *Westervelt v. Gregg*, 12 N.Y. 202 (1854), and Supreme Court Justice Johnson's opinion in *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235 (1819). All used general descriptions of due process similar to those the Court offered. *See* discussion *infra* notes 180-87.

85. *Hurtado*, 110 U.S. at 537. The Court also noted that this provision had been "in force when the Fourteenth Amendment took effect . . . ." *Id. See also infra* text accompanying note 173.

86. John Marshall Harlan, who served on the Court from 1877 to 1911, was the grandfather of John Marshall Harlan, who served on the Court from 1955-1971, and who decidedly did not share his grandfather's views on the content of due process in criminal procedure. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 801 (1969) (Harlan, J., dissenting); Pointer v. Texas, 380 U.S.

prosecution by indictment. He cited in this regard Hawkins, Blackstone, Erskine, and others. He suggested that the Court was being disingenuous in looking at the practice in anything other than capital cases. Various commentators have sided with Harlan, strongly suggesting that the Court was simply wrong in its reading of Coke and others.[88] That conclusion, however, is not nearly so certain.

Of course, prosecution of a felony offense by information, rather than indictment or presentment, clearly was contrary to the English common law and therefore would have been prohibited by the "law of the land" clause insofar as it required adherence to the standing law. It is not so clear, however, that Coke and others saw grand jury screening as one of those elements of process as to which legislative change was forbidden. Coke at times appeared to speak of an authorized alternative as also being appropriate, as in the quotation cited in *Hurtado*,[89] although the reference there may have been to cases that were not felonies, or at least, not capital cases. Perhaps even more troublesome is the language of the Magna Charta clause, which refers to a right to "lawful judgment of his peers *or* by law of the land."[90] The provision appears to be directed to requiring a jury trial or some alternative adjudicatory process consistent with the law of the land. That reference point would not suggest including prosecution by indictment as part of the law of the land alternative, as the indictment process is not a trial-by-jury alternative, but a pre-adjudication procedure.[91]

400, 408-09 (1965) (Harlan, J., concurring). Indeed, the second Justice Harlan was a strong supporter of the view of due process, as set forth by Justice Frankfurter in *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring). Justice Frankfurter described the senior Justice Harlan's position as that of a judge "who may respectfully be called an eccentric exception." *Id.* at 62.

87. *Hurtado*, 110 U.S. at 538.

88. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L. J. 1193, 1248-50 (1992); Easterbrook, *supra* note 32, at 96-97; 2 CROSSKEY, *supra* note 42, at 1103-10.

89. *See* s*upra* text accompanying note 75, where reference is made to the alternative of "writ originall."

90. *See* 9 Hen. 3, ch. 29 (1225) (emphasis added). *See also supra* note 28.

91. Of course, the original use of the term due process, which referred only to the process for bringing the individual before the court to answer charges, also was not a jury trial alternative. *See supra* text accompanying note 29 (quoting 28 Edw. 3, ch. 3 (1354)). One difficulty posed by Coke's commentary on the specific contents of due process was the limited range of procedures that he cited—trial by jury, indictment and process for bringing the individual before the court. *See also* Easterbrook, *supra* note 32, at 97 ("Coke's natural law was a rather tame creature, satisfied with the inalienable rights to indictment and jury trial."). Justice Harlan, in dissent, saw due process as encompassing a much broader range of elements involved in adjudication, including the various elements described in the Sixth Amendment, as he believed to be suggested by *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856).

In any event, whether the *Hurtado* Court misread Coke becomes much less significant in light of the next two parts of the *Hurtado* opinion. There, the Court concluded that the due process clause of the Fifth Amendment was not intended to prohibit legislative modification of even the most basic procedures of common law, and, in particular, it was not intended to mandate what was already guaranteed by the Fifth Amendment's indictment clause. Those conclusions suggest that the Court would have held prosecution by a grand jury charge not to be demanded by due process even if the Court had read Coke (and the American commentators relying on Coke) as stating that such a charging process was demanded by the law of the land clause as one of those parts of the standing law that could not be altered by the legislature.[92] Yet the Court's response to *Jones* was not that Coke's views were offset by other considerations that shaped the content of due process, but that *Jones* had misread Coke. Perhaps, it would have held the specific understanding of Coke to be controlling on the ground that the framers incorporated that understanding even though its general conception of due process did not logically demand that understanding.[93] Even if that were the case, however, reliance on that specific understanding would not have provided much assistance in determining the overall content of due process, as Coke offered only a few examples of the procedures that were essential to the law of the land.[94]

In light of what is said in Parts II and III of the *Hurtado* opinion, Part I of the opinion is significant primarily for its reaffirmance of points made in earlier rulings. Initially, the Court reaffirmed that, though due process was based upon the law of the land concept, that concept here required more than regular adherence to the standing law, as it imposed restraints on what legislatures and courts could include in the standing law. Secondly, in looking to the historical practice in criminal cases, the first portion of *Hurtado* arguably also reaffirmed another point made in earlier cases—that what process was due was different for cases where liberty was at stake as opposed to cases where only property was at stake. The Court focused its examination of English practice only on criminal cases; indictment obviously was not required in proceedings that could result only in a deprivation of property, but that was not considered relevant. Of course, Coke's analysis had treated criminal cases as a separate category, and the Court was responding to the reading of Coke

92. Thus, the *Hurtado* Court's analysis, in what is described here as Parts II and IV of its opinion, presumably allows legislative elimination of trial by jury. *See* discussion *infra* text accompanying notes 151-52. A due process clause that allows the legislature to eliminate jury trial also would allow elimination of grand jury review. Coke also described jury trial as an element of the "law of the land." *See* Easterbrook, *supra* note 32, at 97.

93. *See* 1 TREATISE, *supra* note 1, at 641-43 (discussing the different levels of generality employed by courts and commentators in defining "original intent").

94. *See supra* note 91.

advanced in *Jones*, but the Court did not in any way challenge the separate treatment of criminal cases (although it apparently rejected the contention that capital cases presented a special due process sub-category).[95] To do so would have been inconsistent with *Murray's Lessee*,[96] where the Court had looked to the traditions of the particular type of civil proceeding involved in determining what procedural safeguards were required by due process.[97]

*Part II:* Murray's Lessee *and the significance of common law acceptance*

The second prong of petitioner Hurtado's argument relied on *Murray's Lessee v. Hoboken Land and Improvement Co.*[98] Hurtado argued that, in its description of the content of due process, the Court in *Murray's Lessee* had established standards that would clearly encompass prosecution by indictment or presentment. Although decided in 1856, over a half century after the adoption of the Bill of Rights, *Murray's Lessee* had provided the first major Supreme Court discussion of the procedural content of due process. Of course, *Murray's Lessee* was decided prior to the adoption of the Fourteenth Amendment, but the assumption of Hurtado and the Supreme Court was that precedent interpreting the Fifth Amendment due process clause was equally applicable to the Fourteenth Amendment. Indeed, the premise running

95. The Court's historical analysis of English law, cited to show that Coke had not viewed grand jury charging as an essential of the law of the land, considered the treatment of all criminal cases, including misdemeanors. This may have been a product of Coke's relevant commentary being a part of a discussion that spoke of all criminal cases, but it may also have reflected the view that what was acceptable for one type of criminal case was also acceptable for another. Thus, although Justice Harlan's dissent stressed that the case before the Court was a capital case, the Court deemed relevant in establishing that due process did not require prosecution by indictment the Connecticut constitutional provision which did not require indictment for all felonies, though it did require an indictment in capital cases. *See supra* text accompanying note 85.

Fifteen years later, *Brown v. New Jersey*, 175 U.S. 172 (1899), flatly rejected the contention that due process was violated by extending to capital cases a struck jury procedure that arguably had been used at common law only for non-capital felonies. The Court reasoned:

> A struck jury was not unknown to the common law, though, as urged by counsel for plaintiff in error, it may never have been resorted to in trials for murder. But if appropriate for and used in criminal trials for certain offenses, it could hardly be deemed essentially bad when applied to other offenses. It gives the defendant a reasonable opportunity to ascertain the qualifications of proposed jurors, and to protect himself against any supposed prejudices in the mind of any particular individual called as a juror. Whether better or no [sic] than any other method, it is certainly a fair and reasonable way of securing an impartial jury, was provided for by the laws of the state, and that is all that due process in this respect requires.

*Id.* at 176.

96. 59 U.S. (18 How.) 272 (1855).

97. *See infra* text accompanying note 117. *See also* Davidson v. New Orleans, 96 U.S. 97 (1877), *quoted in* note 193 *infra*.

98. 59 U.S. (18 How.) 272 (1855).

throughout the Court's opinion (and Hurtado's argument) is that the identical language must have the identical content as used in both provisions.[99]

At issue in *Murray's Lessee* was the constitutionality of the Treasury Department's use of an administrative procedure, a distress warrant, to seize the property of a collector of customs based upon an internal audit that found the collector to be owing more than one million dollars that he had collected from importers. The distress warrant process, which was authorized by an 1820 Act of Congress, allowed the Treasury to proceed on its own determination of debt in a form of self-help. The seizure was executed without any opportunity for a hearing, with the warrant giving the collector notice of the purpose of the seizure. The transferees of the collector challenged this procedure, claiming that it violated due process in allowing the Treasury to impose a distraint, without the exercise of the judicial power of the United States.[100]

Justice Curtis' opinion for the unanimous *Murray's Lessee* Court initially noted that, as explained by Coke, the "words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Charta."[101] The opinion then went on to characterize the warrant in question as clearly being "legal process," since "it was issued in

99. In what I have characterized as Part III of the restructured *Hurtado* opinion, the Court notes: "We are to construe this phrase [due process] in the Fourteenth Amendment by the *usus loquendi* [*i.e.*, the customary language] of the Constitution itself," for the "same words are contained in the Fifth Amendment." *Hurtado*, 110 U.S. at 534. Justice Harlan took the same position in his dissent. He noted that this "language [of the Fifth Amendment] is similar to that of the clause of the Fourteenth Amendment now under examination. That similarity . . . evinces a purpose to impose upon the States the same restrictions, in respect of proceedings involving life, liberty and property, which had been imposed upon the general government." *Id.* at 541 (Harlan, J., dissenting). Petitioner Hurtado, in his argument based upon Coke's explanation of due process, similarly assumed that the Fifth and Fourteenth Amendment due process clauses had the same content. That argument assumed that Coke's position shaped the understanding of the Fifth Amendment clause when it was adopted and the Fourteenth Amendment clause was viewed at the time of its adoption as identical to the Fifth Amendment. Of course, it does not follow that the common understanding of the content of the Fifth Amendment's due process clause was identical at the time of the adoption of the Fifth Amendment and at the time of the adoption of the Fourteenth Amendment. Indeed, it is likely that the character of the due process requirement was viewed somewhat differently at those two points in time. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 181-214 (1998); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 39 n.29 (3d ed. 2000); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and Values of Procedural Due Process*, 96 YALE L. J. 455, 463-65 (1986). The apparent assumption of *Hurtado* was that any such difference in perspective at the time of the adoption of the Fourteenth Amendment should not control, and due process should be read in accord with its history and the viewpoint that led to its placement in the Fifth Amendment. *See also* discussion *infra* in text accompanying note 136.

100. *Murray's Lessee*, 59 U.S. at 276.

101. *Id.*

conformity with an Act of Congress."[102] At this point, the due process inquiry would have ended had the Court viewed due process as requiring only adherence to the standing law. However, without explicitly referring to the standing law interpretation, Justice Curtis clearly indicated that due process had a broader reach. "It is manifest," he noted, that, under the due process clause, "it was not left to the legislative power to enact any process which might be devised."[103] That was so because the Fifth Amendment "is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law.'"[104]

Having found that due process imposed limits on the standing law, even where authorized by Congress, Justice Curtis proceeded to briefly describe the Court's approach in determining the content of those limits. His statement in this regard was relied upon heavily by petitioner Hurtado and therefore was quoted in Justice Matthews' *Hurtado* opinion. Justice Curtis had stated:

> To what principles then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.[105]

Two elements of this statement potentially benefited petitioner Hurtado. The *Murray's Lessee* Court had noted initially that it looked to the Constitution itself to determine where a procedure was consistent with due process. Pursuing this inquiry, it had examined two provisions in the Federal Constitution. First, it considered whether the administrative determination of the debt of a receiver of public moneys could be contrary to the Article III vesting of certain jurisdiction in the judiciary. It concluded in this regard that while such a determination could be viewed as "a 'judicial act'" in an "enlarged sense,"[106] it did not come within the Article III reference to "controversies to which the United States shall be a party."[107] Second, the Court asked whether the distress warrant was contrary to the Fourth Amendment because the warrant "was issued without the support of an oath or affirmation," but that was held not to be the case because the Fourth

102. *Id.*

103. *Id.*

104. *Id.*

105. *Murray's Lessee*, 59 U.S. at 276-77, *quoted in* Hurtado v. California, 110 U.S. 516, 528 (1884).

106. *Id.* at 280.

107. *Id.* at 275.

Amendment had "no reference to civil proceedings for the recovery of debts, of which a search warrant is not made part."[108]

The Court's consideration of the Fourth Amendment in *Murray's Lessee* arguably suggested that due process, as applied in the criminal context, required compliance with all the Fourth, Fifth and Sixth Amendment provisions dealing with criminal procedure. That would follow from what *Murray's Lessee* had described as the first step in the due process inquiry—"examine the constitution itself, to see whether the process be in conflict with any of its provisions."[109] Since one of the constitutional requirements incorporated under this analysis would be the Fifth Amendment's grand jury clause, due process would render unconstitutional a statute that allowed prosecution by information.

Several commentators, most notably William Crosskey and Akhil Amar,[110] have advanced exactly such a view of the due process clause of the Fourteenth Amendment, relying in part on *Murray's Lessee*. As far as one can tell from Justice Matthews' opinion, the petitioner Hurtado did not rely on that position. The Court describes Hurtado's argument simply as relying on the second point of reference cited in *Murray's Lessee*—common law procedures "sanctioned by usage" in this country. Justice Harlan's *Hurtado* dissent relied on the same reference point in the *Murray's Lessee* opinion. Although he also argued that the recognition of prosecution by indictment in the Fifth Amendment was strong evidence of it being one of those foundation principles that the majority acknowledged to be required by due process, he did not directly argue that, under *Murray's Lessee*, due process incorporated that and all other procedural guarantees of the Constitution.[111]

108. *Id.* at 285.

109. *Id.* at 277. *See also supra* quotation in text accompanying note 105.

110. *See* Amar, *supra* note 88, at 1224-26; AMAR, *supra* note 99, at 172-73; 2 CROSSKEY, *supra* note 42, at 1108. Amar and Crosskey are the most significant constitutional "originalists" of their respective generations. Each has offered fresh interpretations of the Constitution that are contrary not only to judicial precedent (which is fairly common among academics) but also to basic premises accepted both in that precedent and in conventional academic commentary. On this particular clause, unlike others, their readings were similar. Much the same position also has been taken by others. *See, e.g.*, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 90, 130 (1986). This reading of due process, it should be noted, stands apart from the issue of whether the Fourteenth Amendment was intended to incorporate all of the Bill of Rights, which typically is hinged to the privileges and immunities clause. A noted originalist of the generation standing between Crosskey and Amar, Raoul Berger, takes a quite different view of the original understanding of due process. *See* Berger, *supra* note 43.

111. Justice Harlan did note at one point that the purpose of the Fourteenth Amendment was to "impose upon the States the same restrictions, in respect of proceedings involving life, liberty and property, which had been imposed upon the general [*i.e.*, federal] government." Hurtado v. California, 110 U.S. 516, 541 (1884) (Harlan, J., dissenting). But the point of reference here simply was to the equivalency of the two due process clauses. He also turned to the constitutional

Why was it that neither the Court majority, Justice Harlan's dissent, nor petitioner Hurtado deemed worthy of examination a possible reading of *Murray's Lessee* as having incorporated within due process the procedural limitations found elsewhere in the Federal Constitution? One answer is that such a reading of due process was contrary to the 1875 ruling of *Walker v. Sauvinent*.[112] The Court there held that due process did not preclude the state from providing for a verdict by judge, rather than jury, in a civil case seeking damages in excess of twenty dollars. The *Walker* Court stated that the Seventh Amendment applied to federal trials, but had absolutely no bearing on a state proceeding. Citing *Murray's Lessee*, it noted that the mandate of the Fourteenth Amendment was met "if the trial is had according to the settled mode of judicial proceedings," and that was the case here because the trial judge acted in accordance with the process established by the law of the state.

In stressing that the "law of the land" in state proceedings is the process "regulated by the law of the state,"[113] the *Walker* Court indicated its likely reading of the first inquiry prescribed in *Murray's Lessee* (that as to consistency with the Constitution) though it did not mention that portion of Justice Curtis' opinion in *Murray's Lessee*. Adherence to the standing law in the federal system included compliance with the limits imposed by the Federal Constitution. Even if the distress warrant procedure met the second prong of a *Murray's Lessee* inquiry, finding support in the common law, it would not be consistent with the standing law and therefore would violate due process if it violated some other portion of the Constitution. Thus, the *Murray's Lessee* Court looked not only to the Fourth Amendment,[114] but also to Article III,

amendments as indicators of the "settled usages" of the common law carried over to this country, but the focus here was on what was within the common law, not what was within the Constitution. *Id.* at 542.

In responding to the majority's contention that other amendment provisions should not be rendered superfluous by reading due process as encompassing the procedural rights specified in those provisions, see *infra* quotation accompanying note 140, Justice Harlan argued that the procedural rights specified in the Fifth and Sixth Amendments were among the most essential elements of due process. *See infra* text accompanying note 147. This position, however, did not contend that those rights were made part of due process because that clause incorporated all of the procedural limitations of the Federal Constitution, but because of their general character. Justice Harlan argued that their inclusion in the Bill of Rights should not thereby be taken to indicate that they are not also a part of due process, but rather it indicated that they were viewed as among the most important of the various common law rights protected by due process.

112. 92 U.S. (2 Otto) 90 (1875).

113. *Id.* at 93.

114. The discussion of the Fourth Amendment issue, although apparently considered as part of the due process claim, had elements suggesting it was viewed as a separate claim. The case was before the Court on a single certified question, asking whether the distress warrant proceedings were "sufficient, under the Constitution of the United States and the law of the land, to pass and transfer the title . . . to the premises in question . . . ." *Murray's Lessee*, 59 U.S. at 274. The listing of the plaintiffs' claim by the court reporter referred to their Fourth Amendment

which dealt not with specific procedures, but with the division of authority between the judiciary and the legislature. In a state proceeding, of course, federal constitutional provisions apart from the Fourteenth Amendment (and the Article I prohibitions against Bills of Attainder and ex post facto laws) would not be part of the standing law. Thus, compliance with Bill of Rights provisions was a part of the standing law for the federal system, but not for the state system.[115] As noted in *Walker*, the Federal Constitution's requirement of adherence to the law of the land in state proceedings did not include adherence to the Seventh Amendment, as the Bill of Rights had long been held to apply only to the federal government.

Both petitioner Hurtado and Justice Harlan's dissent looked to the second prong of the inquiry specified in *Murray's Lessee*—looking "to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."[116] The Court in *Murray's Lessee* had found that the summary procedure at issue there, though lacking in some basic prerequisites ordinarily demanded by the common law to deprive a person of property ("regular allegations, opportunity to answer, and trial according to some settled course of judicial proceedings"), satisfied due process in light of the historical acceptance in England and this country of summary seizures against public employees charged with collecting the government's moneys.[117] The opinion indicated that if not for historical

contention as separate from the due process claim, and the Court referred to it as presenting the last "remaining objection." *Id.* at 285.

115. That this was the reasoning of the *Hurtado* Court is suggested by the distinction it draws in describing the meaning of due process as applied to the federal and state governments. *See infra* quotation accompanying note 138. Due process in the federal system is described as referring to "that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, *exercised* within *the limits therein prescribed*, and interpreted according to the principles of the common law." *Hurtado*, 110 U.S. at 535 (emphasis added). As applied to the states under the Fourteenth Amendment, "by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, *exerted within the limits of those fundamental principles of liberty and justice which lie at the base of our civil and political institutions . . . .*" *Id.* (emphasis added). Since the standing law requires that the law meet the requirements of validity for the jurisdiction, federal law must be consistent with the Federal Constitution, but the state law's validity under its own constitution is for the state to decide. Here the only limit imposed by due process is adherence to the fundamental principles that the Court views as limiting legislation even though it may be in accord with the limits imposed by the state.

116. *See Hurtado*, 110 U.S. at 528, 542.

117. *Murray's Lessee*, 59 U.S. at 280. The Court first examined the history in England of the use of "summary method for recovery of debts due to the Crown." *Id.* at 277. Although the Magna Charta had imposed certain limits on summary seizures, a distinction had been drawn between "public defaulters and ordinary debtors." *Id.* at 278. As to balances due from "receivers

acceptance, the summary process at issue there could have violated due process.

Petitioner Hurtado contended that *Murray's Lessee* established a due process prerequisite of historical acceptance of the particular procedure in the type of proceeding in which it was now being used. That prerequisite clearly was not present for prosecution by information in a capital case, as the common law in this country and England confined the use of information charging to misdemeanors. The Court majority responded that Hurtado and Justice Harlan were misreading *Murray's Lessee*. Admittedly, historical acceptance, as found in *Murray's Lessee*, automatically sustained a practice against a due process challenge. This was true "however exceptional [as the procedure] may be, as tested by definitions and principles of ordinary procedure."[118] If some procedure "has been immemorially the actual law of the land . . . [it], therefore, is due process of law."[119] However, historical sanction was not "a characteristic . . . essential to due process of law."[120] A departure from the historical forms of the common law could be entirely consistent with due process. The due process standard was not historical on both sides because that would lock in the common law forms.[121] Such a result, the Court reasoned, would be contrary to the role that the Magna Charta played in inspiring the due process clause, contrary to the character of the common law, and contrary to the flexibility required of a constitutional limitation.

As for the Magna Charta, its law of the land guarantee had served in England solely as a safeguard against "executive usurpation and tyranny."[122] Through legislative action, change was possible. The extension of the American guarantees of due process to also limit the legislature carried with it

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of revenue," the English "law of the land" authorized a summary process "bearing a very close resemblance to what is termed a warrant of distress in the act of 1820," which was at issue here. *Id.* Moreover, that summary process had been carried over to this country, as illustrated not only by the federal statute, but also by various state laws. This history led to the following conclusion:

> Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the constitution some other provision which restrains congress from authorizing such proceedings.

*Id.* at 280.

118. *Hurtado*, 110 U.S. at 528.

119. *Id.*

120. *Id.* at 529.

121. In holding that *Murray's Lessee* did no more than make history a one way street, the *Hurtado* Court ignored another due process ruling that arguably suggested that history was the critical determinant of what processes were both acceptable and unacceptable under due process. *See* CURRIE, *supra* note 41, at 365-66 (discussing the 1878 ruling in Pennoyer v. Neff, 95 U.S. 714 (1878)).

122. *Hurtado*, 110 U.S. at 532.

a need to focus upon the "very substance of individual rights" rather than "particular forms of procedure."[123] "Restraints that could be fastened upon executive authority with precision and detail, might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power."[124]

As for the common law, the "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law."[125] It would be inconsistent with those characteristics to adopt a view of due process that would "deny every quality of the law but its age, and to render it incapable of progress or improvement."[126] To mandate a process that eternally adhered to the common law as it stood at the adoption of the Fifth Amendment was contrary to the lessons taught by the common law, indeed, even as to the grand jury. The grand jury's accusation originally was the practical equivalent of a conviction, with the accused subjected to ordeal and banished even if he managed to survive that. Moreover, "the primitive grand jury heard no witnesses in support of the truth of the charges to be preferred, but presented upon their own knowledge, or indicted upon common fame and general suspicion."[127] However, the growth of the common law had given the grand jury a different role and a different procedure. The lesson learned, the Court noted, is that "it is better not to go too far back into antiquity for the best security for our 'ancient liberties,'" but to allow for "progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government."[128]

The Court also stressed that the very nature of the Constitution warned against reading due process as mandating the particular forms of the common law.[129] In a passage that earned *Hurtado*'s place (for many years) in constitutional law casebooks, Justice Matthews noted:

123. *Id.*
124. *Id.*
125. *Id.* at 530.
126. *Id.* at 529.
127. *Hurtado*, 110 U.S. at 530.
128. *Id.*
129. The Court did not, however, offer the following argument:

> [T]he Constitution expressly incorporates the common law in one instance [the Seventh Amendment right to jury trial in suits at common law]. Thus, we can apply a popular mode of statutory interpretation: Given that the Congress that voted on the Bill of Rights 'knew how' to constitutionalize the common law, we should not be so quick to assume that other constitutional provisions that lack similar language were also meant to incorporate the common law.

Samuel C. Kaplan, *"Grab Bag of Principles" or Principled Grab Bag?: The Constitutionalization of Common Law*, 49 S.C. L. REV. 463, 467-68 (1998). Its failure to do so is somewhat surprising in light of the Court's focus in Part III on the relationship of the due process

> The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of the English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*suum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.[130]

The *Hurtado* Court appeared in this segment of its opinion to not only reject the contention that *Murray's Lessee* had imposed a strict historical test, but also to suggest that departures from the common law process would not necessarily be tested by the basic principles of that process. However, the significance of the references to "other systems" and to a Roman law maxim (albeit one finding common law counterparts[131]) was unclear. The Court also spoke of looking to the "spirit of personal liberty and individual rights" that were "embodied in" and "preserved and developed by" the "progressive growth" of the common law. On the one hand, *Hurtado* could be read as indicating that due process would accept a procedural system that departed completely from the basic structural features of the common law system—a procedural system, for example, that was not adversary, not accusatorial, and did not require lay participation. On the other hand, the Court arguably was saying only that due process would not bar innovations that borrowed from

clause to other Bill of Rights provisions, but it may have been concerned that this type of argument would also challenge that part of *Murray's Lessee* that the Court accepted as a proper reading of due process. *See supra* text accompanying note 119.

130. *Hurtado*, 110 U.S. at 530-31 (emphasis added).

131. *Suum cuique tribuere* ("to render to each his due") was probably viewed by the Court as requiring something akin to the standing law, that each person be accorded the rights due to him in the particular type of proceeding. This maxim had a much broader content. *See* Phillipe Nonet, *Judgment*, 48 VAND. L. REV. 987, 993-94 (1995); Peter Stein, *Justinian's Compilation: Classical Legacy and Legal Source*, 8 TUL. EUR. & CIV. L. FOR. 1 (1993). However, in *Hurtado*, it presumably had the same point of reference for the Court as its use of the phrase "distributive justice." *See infra* note 192. *See also* Wilfried Bottke, *"Rule of Law" or "Due Process" as a Common Feature of Criminal Process in Western Democratic Societies*, 51 U. PITT. L. REV. 419, 426 (1990).

other systems, but retained the basic goals, though not necessarily the forms of the common law process.[132] Under this view, the core of the common law process would still be the touchstone of due process.

As discussed below, in what I designate as Part IV of a restructured *Hurtado* opinion, the Court offered general definitions of the mandate of due process that arguably supported both of the above positions.[133] In explaining why California's charging procedure did not violate due process, the Court cited only the common law roots of magistrate review of the charging decision, and did not mention possible civil system analogies,[134] but that may simply have reflected the actual derivation of the California procedure. The *Hurtado* opinion certainly left open the possibility, as suggested by the Court eight years later, that due process would not preclude a state from going so far as to adopt *in toto* a civil system of adjudication.[135]

*Part III: The structural context of the Fifth and Fourteenth Amendments*

The *Hurtado* majority (and the *Hurtado* dissent) started from the premise that the Fourteenth Amendment due process clause had the same content as the Fifth Amendment due process clause.[136] This led Justice Matthews' majority opinion to offer still another reason for rejecting petitioner Hurtado's contention that due process required prosecution by indictment. If due process required prosecution by indictment, how did one explain the inclusion of the indictment clause in the Fifth Amendment? Justice Matthews reasoned:

> That article [the Fifth Amendment] makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself." It

132. *See* WOLFE, *supra* note 44, at 223. *Hurtado* suggested that "the common law legal procedure's principles were constitutionally protected" while the "forms" were subject to legislature modification "as long as the principles or purposes of the older forms were adequately preserved by the new forms." *Id.*

133. *See infra* text accompanying notes 193-98.

134. *See infra* text accompanying note 218.

135. Hallinger v. Davis, 146 U.S. 314, 321 (1892). The Court stated:

> If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so.

*Id.*

136. *See supra* note 99 and accompanying text.

> then immediately adds: "nor be deprived of life, liberty, or property without due process of law." According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is that, in the sense of the constitution, "due process of law" was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect.[137] Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.[138]
>
> "The Fourteenth Amendment" [as was said by Mr. Justice Bradley in *Missouri v. Lewis*,][139] "does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding."[140]

Although this argument is framed in terms of the relationship of the due process clause to the other clauses in the Fifth Amendment, it is equally applicable to all the other procedural rights specified in the Bill of Rights. The Court's reasoning would apply whether the indictment clause had been placed in the Fifth Amendment or in some other amendment; if due process included prosecution by indictment, that clause, whether located in the Fifth, Sixth, or some other amendment, would still be superfluous. Indeed, in the original drafting of the Bill of Rights, the indictment clause was not located in the same article as the due process clause, but in a separate article dealing with both jury

137. *See infra* text accompanying note 168.

138. *See* discussion *supra* note 115, as to the significance of Court's reference to the Constitution in the preceding sentence and not in this sentence.

139. 101 U.S. 22 (1879).

140. *Hurtado*, 110 U.S. at 534-35.

trial and grand jury indictment.[141] The Senate subsequently shortened the total number of articles. In doing so, it eliminated the separate article on petit and grand juries, placing the jury clause in what became the Sixth Amendment (listing the various rights of the "accused") and the indictment clause in the Fifth Amendment.[142]

In his dissent, Justice Harlan recognized the reach of the Court's argument. The Court's "line of argument," he noted, "would lead to results which are inconsistent with the vital principles of republican government."[143] "If the presence in the Fifth Amendment of a specific provision for grand juries in capital cases, alongside the provision for due process of law" is accordingly "held to prove that 'due process of law' did not, in the judgment of the framers of the Constitution, necessarily require a grand jury in capital cases, inexorable logic would require it to be, likewise, held" that the various rights mentioned in the Fifth and Sixth Amendments' "express provisions" on criminal procedure "were not protected" by due process of law.[144] Justice Harlan listed each of these rights and asked "whether it [will] be claimed that none of these rights were secured by the 'law of the land' or 'due process of law' as declared and

141. Madison started with a series of amendments to be made in the body of the Constitution. He proposed an amendment of Article I, section 9, which included a single sentence containing prohibitions against (1) more than one trial or punishment for the same offense (double jeopardy); (2) a person being "compelled to be a witness against himself"; (3) deprivation of life, liberty and property without due process; and (4) being obliged to relinquish property, except where "it may be necessary for public use," and with "just compensation." The first two prohibitions were separated by a comma, the second from the third by a colon, and the third from the fourth by a semi-colon. The Madison proposal also included an amendment of the Article III provision on jury trial that would have mandated, *inter alia*, prosecution by indictment or presentment for all crimes punishable "with loss of life or member." *See* VEIT ET AL., *supra* note 35, at 12-13.

When the House Committee of the Whole voted to place the amendments at the end of the Constitution, creating a Bill of Rights, *see supra* note 36, the House Resolution included in the eighth article what had been Madison's combination of a double jeopardy clause, self-incrimination clause, due process clause, and requirement of just compensation. Its version separated the first clause from the second and the second from the third by commas and placed a semi-colon after the due process clause to separate it from the just compensation clause. *See* VEIT ET AL., *supra* note 35, at 38-39.

142. VEIT ET AL., *supra* note 35, at 47-49. At this point, the punctuation was again changed to separate the first four clauses by semi-colons, and the fifth (just compensation) by a colon.

The Fifth Amendment might be viewed as collecting in its initial clauses prohibitions that restrict the initiation of criminal prosecutions. The double jeopardy clause restricts the initiation of second prosecutions; the self-incrimination clause stands as a barrier "against the revival of the ex officio oath (or similar procedure) to force the individual, in effect, to bring charges against himself," and the indictment clause limits initiation to cases approved by the grand jury. *See* 1 TREATISE, *supra* note 1, at 514. Due process would fit alongside this grouping because one of its aspects historically had been to insist upon an appropriate initiation of prosecution. *See supra* text accompanying note 30.

143. *Hurtado*, 110 U.S. at 547 (Harlan, J., dissenting).

144. *Id.*

established at the foundation of our government."[145] He added that since the Sixth Amendment imposed an "explicit jury trial command":

> [I]t results from the doctrines of the [majority] opinion . . . that the clause of the Fourteenth Amendment forbidding the deprivation of life or liberty without due process of law, would not be violated by a State regulation, dispensing with petit juries in criminal cases, and permitting a person charged with a crime involving life to be tried before a single judge, or even a justice of the peace, upon a rule to show cause why he should be hanged.[146]

For Justice Harlan, his jury trial illustration not only showed the obvious error in the majority's reasoning, but also suggested why it was that "the framers of the Constitution made express provision for the security of those rights which at common law were protected by the requirement of due process of law, and, in addition, declared, generally, that no person shall 'be deprived of life, liberty or property without due process of law.'"[147] Certain rights "were of a character so essential to the safety of the people that it was deemed wise to avoid the possibility that Congress, in regulating the processes of law, would impair or destroy them."[148] Accordingly, the framers insisted upon their "specific enumeration" while also including the "general requirement of due process of law," which included not only those rights but all others recognized in "the settled usages and modes of proceedings . . . at the time our government was founded."[149]

The *Hurtado* majority obviously found Justice Harlan's response insufficient. Indeed, it did not find it necessary to comment upon either his explanation of why the framers included the combination of "express provisions" and the due process clause or his parade of horribles. Perhaps, they viewed the response to each to be obvious. As for Justice Harlan's explanation of the framers' drafting objectives, if the rights described in the "express provisions" were so obviously fundamental and therefore within due process, why the need to enumerate them for fear that Congress and the courts would not recognize that they were a part of due process? Also, if due process was to serve as a "catchall clause,"[150] why wasn't it placed in a separate

145. *Id.* at 548.

146. *Id.*

147. *Id.* at 550.

148. *Hurtado*, 110 U.S. at 550 (Harlan, J., dissenting).

149. *Id.*

150. *See* LEONARD W. LEVY, JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 66 (1972).

> [T]he history of due process shows that it did mean trial by jury and many of the other traditional rights of accused persons that were specified separately in the Bill of Rights. Its framers were in many respects careless, even haphazard, draftsmen. They enumerated particular rights associated with due process and then added the due process

provision following the listing of the enumerated rights, rather than in the Fifth Amendment (placed alongside some of those procedural rights, with others to follow in the Sixth Amendment)?

As for Justice Harlan's parade of horribles, the jury trial hypothetical had in a sense been answered in prior cases. The Court had already indicated that due process did not require a jury trial in a civil case, as evidenced by the quote from *Missouri v. Lewis* (as well as the ruling in *Walker v. Sauvinent*),[151] notwithstanding the inclusion of a civil jury trial guarantee in the Seventh Amendment. Presumably the same position could be taken as to jury trials in state criminal cases.[152] The Magna Charta, after all, spoke of life, liberty, and property being taken "by lawful judgment of his peers *or* by law of the land."[153] Perhaps, more telling was Justice Harlan's reference to the Sixth Amendment requirement that the accused be informed of the "nature and cause of the accusation." In cases rejecting due process challenges to state civil proceedings depriving persons of property, the Court had strongly suggested that due process required "bringing the party against whom the proceeding is had before the court and notifying him of the case he is required to meet."[154] However, due process could require some form of notice without making either that clause or the Sixth Amendment notice-of-charges clause superfluous.

The *Hurtado* argument against adopting an interpretation that would render the specific procedural guarantees "superfluous" did not preclude a content of due process that partially overlapped with the specific guarantees. If due process imposed a notice requirement of a general character, but the Sixth Amendment required more complete notification in a particular form (*e.g.*,

clause itself, probably as a rhetorical flourish, a reinforced guarantee, and a genuflection toward traditional usage going back to medieval reenactments of Magna Carta.

*Id.*

151. *See supra* text accompanying notes 139 and 112.

152. *See* Maxwell v. Dow, 176 U.S. 581 (1900). Although that ruling dealt only with the size of the state jury, the Court strongly suggested that the right to a jury trial in a criminal case simply was not a "requisite of due process." *Id.* at 603. Later, *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912), citing both *Hurtado* and *Maxwell* for support, noted that "due process does not deprive a State of the power to dispense with jury trial altogether."

153. 9 Hen. 3, ch. 29 (1225) (emphasis added). *See supra* note 28.

154. Kennard v. Louisiana *ex rel*. Morgan, 92 U.S. 480 (1875), *quoted in Hurtado*, 110 U.S. at 533. *See also* Davidson v. New Orleans, 96 U.S. (6 Otto) 97 (1877).

> [W]henever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use . . . and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, *with such notice to the person*, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

*Id.* at 104-05 (emphasis added).

through the indictment) and at a particular time in criminal cases, neither provision would be superfluous. The Sixth Amendment provision would not be superfluous because it required more than the notice guarantee contained within due process. The due process notice requirement would be superfluous as to criminal cases, where the Sixth Amendment's provision would apply, but not as to other proceedings depriving persons of property or liberty, for the Constitution has no Sixth Amendment counterpart for those proceedings. Similarly, due process could require a jury trial for all capital cases, as Justice Harlan urged, and not render superfluous a Sixth Amendment provision that applies to "all criminal prosecutions" and carries with it certain commands as to the size and selecting of the jury.[155] Petitioner Hurtado's grand jury claim, on the other hand, appeared to require a due process interpretation that completely overlapped with an "express provision," as the Fifth Amendment's grand jury clause expressly includes "capital" cases.[156]

Justice Harlan, in raising the hypothetical of a state eliminating trial by jury in capital cases, argued that "[a] State law which authorized the trial of a capital case before a single judge . . . would . . . meet all the requirements of due process of law, as indicated in the opinion of the court; for such a law would not prescribe a special rule for particular persons; it would be a general law which heard before it condemned, which proceeded upon inquiry, and under which judgment would be rendered only after trial . . . ."[157] As discussed below, that listing reflects a fair reading of the procedural content of due process as stated in what I have characterized as Part IV of a restructured *Hurtado* opinion.[158] Justice Harlan might well have asked, if that is all due process requires, doesn't it render the Fifth Amendment's due process clause itself superfluous as to criminal cases? Would not any criminal prosecution that complied with the "express provisions" of the Bill of Rights thereby invariably meet the requirements of due process? It seems likely that the answer of the *Hurtado* majority would be that, except for the requirements

155. In *Maxwell v. Dow*, 176 U.S. 581 (1900), the Court relied heavily on the analysis of *Hurtado* in holding that due process did not preclude a state from using a jury trial of less than twelve in a non-capital case, but did not cite *Hurtado's* argument regarding provision superfluity. That argument, if read as applying only to a complete overlap, would not be applicable. On the other hand, *Powell v. Alabama*, 287 U.S. 45 (1932), did refer to (and basically discard) that superfluity argument in a case involving a claimed due process right to counsel that would be much narrower than the Sixth Amendment, as it would apply to capital cases in which the defendants obviously were unable to represent themselves. Arguably, Powell thought it advisable to refer to the *Hurtado* argument in order to acknowledge earlier rulings having disregarded that argument, but it may also suggest a reading of that argument that substantially weakens its logic by having it preclude even a partial overlap with an express provision. *See* discussion of *Powell infra* notes 290-94 and accompanying text.

156. *See supra* note 18.

157. *Hurtado*, 110 U.S. at 549 (Harlan, J., dissenting).

158. *See infra* text accompanying note 212.

flowing from the "standing law" mandate of due process (a general law, previously established, etc.), the Fifth Amendment requirements for due process, as applied to criminal cases, would, indeed, largely be subsumed within the more extensive reach of the express provisions applicable to criminal cases. The due process clause might add some basic requirements of fairness in adjudication not specified in an "express provision" (*e.g.*, the neutrality of the judge),[159] but those would be few and arguably could also be required under an expansive reading of either the standing law requirement or a particular specific guarantee.[160]

Because of the standing law requirement and, perhaps, a few additional prerequisites of adjudicatory fairness, the *Hurtado* majority's reading of the content of Fifth Amendment due process would not render that clause superfluous in its application to deprivations of "life" (which would encompass only criminal cases). It would, however, give that clause quite limited significance in the constitutional regulation of federal criminal cases. But that also would have been true of the Fifth Amendment clause if the concept of due process had incorporated the content suggested in the writings of Coke, Kent and Story, who focused on jury trial and prosecution by indictment.[161] Unless the due process clause mandated the full range of common law procedures (a position clearly rejected by the Court), it was going to have little significance for federal criminal cases (apart from precluding enforcement deviations from the "standing law"). It was a provision that was applicable to both criminal and civil cases,[162] but really would demand significant procedural content,

159. *See* discussion of *Tumey v. Ohio*, 273 U.S. 510 (1927), *infra* notes 400-05 and accompanying text.

160. Consider, in this regard, the interpretations offered by Justice Black, discussed *infra* notes 445-47 and accompanying text.

161. *See* discussion *supra* notes 62-70, 91. Crosskey had the following to say about the views of early American legal commentators Kent, Rawle and Story on the subject of "due process of law":

> [A]pparently all assumed, without a close examination of the Constitutional text and context, that the "due process" guaranty in the Fifth Amendment was merely one relating to procedure in criminal cases; and because the subject of criminal "process" was so nearly completely covered by the particular "process" guaranties that the Constitution contains, they tended to regard to general "due process" guaranty of the Fifth Amendment as not of much importance.

2 CROSSKEY, *supra* note 42, at 1110-11.

162. *See* 2 CROSSKEY, *supra* note 42, at 1111-12, stating:

> That the "due process" guaranty cannot, however, be limited to criminal cases seems clear. In the first place, the processes of imprisonment and sequestration of chattels were used, when the guaranty was drawn, and still are used, as coercive "processes" in equity. At that date, too, imprisonment for debt was widely practiced; and exemplary, or punitive, damages, are, and always have been, plain deprivations of the property of him who has to pay them. It seems evident, too, that even compensatory damages are of this same

beyond the "express provisions," only as to civil cases.[163] That conception of its role would be consistent with its location in the Fifth Amendment,[164] an amendment which mixed civil and criminal guarantees,[165] although the positioning of the various Bill of Rights guarantees hardly suggests some comprehensive scheme offering a clear directive on content.[166]

character; for the execution of a judgment for such damages involves, necessarily, a deprivation of property for the judgment debtor.

163. It had great significance for civil cases even if the procedural content of due process was limited to the basics of notice, and opportunity to be heard, as suggested in Part IV of the restructured *Hurtado* opinion. *See infra* text accompanying notes 205-12. *See, e.g.*, Hovey v. Elliott, 167 U.S. 409, 417 (1897) (holding due process prohibited court action that struck a civil defendant's answer as a response to what the Court considered to be contempt; and noting that due process clearly "signifies a right to be heard in one's defense"). There were no other federal constitutional provisions imposing such requirements upon the civil process in either the federal or state systems.

164. Although the Virginia, New York and North Carolina recommendations placed their respective law of the land or due process guarantee in a separate provision, see discussion *supra* note 34, Madison's proposed amendments to Article I, Section 9 set forth in a separate paragraph a combination of the double jeopardy prohibition, the due process prohibition, and the just compensation requirement. *See* VEIT ET AL., *supra* note 35, at 12. These guarantees remained together through the House and the grand jury clause was added in the Senate. *See supra* text accompanying note 142.

165. The indictment clause is limited to capital or otherwise infamous crimes, and the "life or limb" language in the double jeopardy clause would also be limited to criminal cases. *See* Ex parte Lange, 85 U.S. (18 Wall.) 163, 169-70 (1873) (applying to all crimes, not just capital and corporal punishment). The prohibition against compelling a person in a criminal case to be a witness against himself did not refer to "criminal case[s]" as originally proposed, but the House later added that language. VEIT ET AL., *supra* note 35, at 31. However, because defendants could not testify in their criminal trials, it was aimed at compulsion at other proceedings, which could include early stages in the criminal case or civil cases. *See* 3 TREATISE, *supra* note 1, at 287 (stating that the privilege had become available to witnesses in civil cases prior to adoption of the Constitution). The due process clause applied to both civil and criminal cases, and the "just compensation" clause applied to civil takings—although it does not deal with procedure. As to its location, see Harry N. Scheiber, *The Takings Clause and the Fifth Amendment: Original Intent and Significance in American Legal Development*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 234 (Eugene W. Hickok, Jr. ed., 1991); AMAR, *supra* note 99, at 78.

166. *See* Miller, *supra* note 39, at 42.

> [I]t is quite probable that the order of clauses in the Bill of Rights was not as carefully conceived as later legalistic minds tend to expect, or as was the original constitutional text, which benefited from a Committee on Style. Within the Bill of Rights as a whole, the provisions relating to criminal law are not gathered together. Within the Fifth Amendment, the clauses seem almost randomly collected, although one could argue that they deliberately begin with guarantees for criminal trials alone, go through a guarantee which is applicable in both criminal and civil situations (the due process clause) and conclude with a noncriminal provision (just compensation).

*Id. Compare* WOLFE, *supra* note 44, at 211 (explaining that "the Bill of Rights has at least some rough order—it is not a mere grab bag of rights," as the first three amendments deal

Because the Court majority and Justice Harlan started from the premise that the Fourth Amendment due process clause should have the same content as the Fifth Amendment clause,[167] the understanding of due process at the time of the adoption of the Fourteenth Amendment was not controlling. If the Congress that proposed the Fourteenth Amendment and the state legislatures that ratified it had views of due process that were in error, measured by the Court's reading of the Fifth Amendment's due process clause, those views become irrelevant. Nonetheless, the majority, after noting the implications of the Fifth Amendment due process clause being placed alongside a grand jury clause, called attention to the likely reading of due process by the Congress that proposed the Fourteenth Amendment. If that Congress wanted to require prosecution by indictment it asked, would it not have included within the Fourteenth Amendment the Fifth's grand jury clause as well as its due process clause.[168] Of course, Justice Harlan argued that the framers of the Fourteenth Amendment would have viewed that as unnecessary, since they accepted Coke's view that due process included prosecution by indictments. However, Justice Harlan also noted that the original framers were not satisfied with relying on the implications of due process and insisted upon "express provisions."[169] Why hadn't the framers of the Fourteenth adopted the same position if they truly had meant to mandate prosecution by indictment and other procedural requirements in the Bill of Rights. There were no intervening Supreme Court opinions stating that due process required indictment and a state case like *Jones* hardly made the matter so clear as to ignore the precaution of including the indictment provision.[170] Commentators who believe that Congress intended to incorporate all the amendments in the Fourteenth Amendment's privileges and immunities clause would say that was unnecessary,[171] but that contention in turn raises the troublesome question of why the due process clause would have been added to the Fourteenth Amendment if it already had been incorporated under the privileges and immunities clause.[172]

with substantive rights, the Fourth and Fifth largely with pretrial procedures, the Sixth and Seventh with trial rights, and the Eighth with other procedural rights).

167. *See supra* note 99 and accompanying text.

168. *See supra* quotation from *Hurtado* in text accompanying note 137.

169. *See supra* text accompanying note 147.

170. *But see* AMAR, *supra* note 99, at 201.

171. *See* 1 TREATISE, *supra* note 1, § 2.3(a), at 491-92 (citing the commentary on this issue).

172. See BERGER, *supra* note 30, at 91-92; CURRIE, *supra* note 41, 346 n.129; Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 140, 159 (1949); AMAR, *supra* note 99, at 172 (noting that there was no redundancy because the procedural guarantees incorporated under the privileges and immunities clause would apply only to citizens and the separate due process clause would apply to all persons).

The *Hurtado* majority also called attention to the fact that the Connecticut constitutional provision limiting mandatory grand jury review to the highest level of felonies, rather than all infamous crimes, was "in force when the Fourteenth Amendment took effect."[173] The suggestion here was that the framers of the Fourteenth Amendment certainly would have been aware that Connecticut did not view due process as incorporating the broader common law grand jury requirement since Connecticut also had a due process clause. Surprisingly, there was no mention in this regard of Michigan having abolished the requirement of mandatory prosecution by indictment or presentment in 1859, even though it also retained a due process clause,[174] and three other states having constitutional provisions that allowed the legislature to eliminate the requirement of prosecution by indictment.[175]

A similar omission is found in Justice Harlan's dissent. He stressed that when the Fourteenth Amendment was adopted, "twenty-seven States expressly forbade criminal prosecutions, by information, for capital cases . . . ."[176] Seventeen did so through constitutional provisions similar to the Fifth Amendment's grand jury clause (although also including in their constitutions due process clauses), and "in the remaining ten States [such prosecutions] were impliedly forbidden" under law of the land or due process clauses.[177] Justice Harlan failed to note, however, that provisions in four of the latter states allowed the prosecution to do away with prosecution by indictment (and that Michigan had done exactly that).[178] Commentators have debated at length the question of what implications can be drawn from the "silence" during the ratification process of those four states (and others considering similar action), with some arguing that it shows clearly that the Fourteenth Amendment was not viewed as applying a grand jury requirement to the states and others contending that it shows only a focus on other matters.[179] The *Hurtado*

173. *Hurtado*, 110 U.S. at 537.

174. *See* sources cited *supra* note 20.

175. 1 BEALE ET AL., *supra* note 20, § 1.5 (noting that those states were Indiana, Kansas and Oregon). *See also* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 87-125 (1949).

176. *Hurtado*, 110 U.S. at 557.

177. *Id.*

178. *See id.*; *see also supra* notes 174-75.

179. This debate extends beyond the grand jury issue. Application of the Bill of Rights to the states also would have raised difficulties for some states as to the Seventh Amendment (civil jury trial), the First Amendment prohibition against establishment of religion and the double jeopardy clause. *See* Fairman, *supra* note 175, at 82-97. The commentators are divided as to whether these state deviations from the Bill of Rights' provisions were sufficiently significant so that one would have expected legislative debate in the ratification process and legislative action thereafter if the legislators had viewed the Fourteenth Amendment as making the Bill of Rights applicable to the states. *Cf.* Fairman, *supra* note 175; BERGER, *supra* note 30, at 77-78; WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE

opinions, apart from the majority's single comment on the Connecticut provision, simply did not address that silence.

*Part IV: "The contents of due process"*

Part IV of a restructured *Hurtado* opinion would consist of the opinion's various descriptions of what due process does require of the criminal justice process. Initially, the Court offered several general descriptions of the restraints that due process would apply to that process, in addition to requiring adherence to the standing law. Thus, it noted that due process prohibits "the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice'";[180] that due process allows legislative change in procedure, "but only with due regard to the landmarks established for the protection of the citizen";[181] that due process accepts the common law tradition which permits changes "in form and process, to accommodate new circumstances" and to give "new expression and greater effect to modern ideas of self-government," where those changes are "consonant to the true philosophy of our historical institutions" by preserving the "spirit of personal liberty and individual right, which they embodied";[182] that due process "guarant[ees], not particular forms of procedure, but the very substance of individual rights to life, liberty, and property";[183] that due process requires adherence to those "general principles of public liberty and private right, which lie at the foundation of all free government[s]";[184] that due process refers to "that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure";[185]

4, 118 (1988); CURTIS, *supra* note 110; Michael P. Zuckert, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1867*, 8 CONST. COMMENT. 149, 160-61 (1981) (book review); AMAR, *supra* note 99, at 197-206. One argument advanced by those giving little or no weight to the silence is that the silence also works against the "fundamental fairness" interpretation of the due process clause because that standard hardly shuts the door on mandating prosecution by indictment as indicated by *Jones*. *Id.*

180. *Hurtado*, 110 U.S. at 527 (quoting Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819)).

181. *Id.* at 528 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 356 (1868)).

182. *Id.* at 530 (discussing the changes that had occurred in the role of the grand jury).

183. *Id.* at 532. The Court similarly noted that legislation "may alter the mode and application, but have no power over the substance of original justice." *Id.* at 532 (quoting TRACT ON PROPERTY LAWS, 6 BURKE'S WORKS 323 (Little & Brown ed.)).

184. *Hurtado*, 110 U.S. at 521.

185. *Id.* at 535. *See also supra* text accompanying note 135.

that due process "refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized";[186] "and that there are rights in every free government beyond the control of the state," with due process accepting "any legal proceeding enforced by public authority . . . in furtherance of the general public good, which regards and preserves these principles of liberty and justice . . . ."[187]

Three characteristics of these general descriptions of due process are noteworthy. First, the descriptions not only make clear that due process imposes limitations on legislation, but they also convey the message that those limitations are not so restrictive as to interfere with legislative efforts to serve the public good. The limitations are confined to only the most basic principles (the true "landmarks"), and allow even these basics to be "adopted to new circumstances." Indeed, these are principles of liberty and justice, "the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure."[188] Moreover, they will be applied sparingly to reach only core violations. For while

> laws that violated express and specific injunctions and prohibitions might without embarrassment be judicially declared to be void, yet any general principle or maxim founded on the essential nature of law, as a just and reasonable expression of the public will, and of government as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and modes of attainment.[189]

Second, the phrasing of these descriptions point to limitations that restrict the substantive objectives of the state law as well as the procedures employed in achieving those objectives. General concepts of "personal liberty and individual right"[190] can serve to restrict the grounding for depriving a person of life, liberty and property, as well as restrict the procedures applied in establishing that grounding. Prior to *Hurtado*, the Court had hinted at the possible adoption of what later came to be known as substantive due process,[191] and *Hurtado* continued to hold open that possibility. The *Hurtado*

186. *Id.* at 536 (quoting Brown v. Levee Commissioners, 50 Miss. 468 (1874)).

187. *Id.* at 536-37 (quoting in part from Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 662 (1874)).

188. *Hurtado*, 110 U.S. at 535.

189. *Id.* at 532. The Court also noted that, while there were certain principles of liberty and justice "beyond the control of the State, . . . any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." *Id.* at 536-37.

190. *See supra* text accompanying note 182.

191. *See, e.g.*, Munn v. Illinois; 94 U.S. 113 (1876); Bank of Columbia v. Okley, 17 U.S. (4 Wheat.) 235 (1819). *See also* discussion of these cases *infra* note 192. Much stronger support for

opinion, though dealing with procedure, cited language in cases and commentary that obviously was concerned with more than procedure.[192]

Third, *Hurtado*'s varied descriptions of the basic limitations imposed by due process are both abstract and opaque. Not only are those limitations described in general terms,[193] but the point of reference for determining their content is unclear. The Court speaks of principles established as fundamental in looking to the substance and structure (but not the form) of the common law,[194] to rights deemed fundamental in the "system of jurisprudence of which ours is derived"[195] and to the foundational principles of "our" institutions.[196] Such statements point to examining the Anglo-American tradition. However, a broader perspective—consistent with the possibility of the legislature looking

the concept was to be found in state cases. *See* James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 326-42 (1999).

192. The Court cited to Cooley, who clearly accepted the concept of substantive due process. *See* COOLEY, *supra* note 181. *See also* Ely, *supra* note 191, at 342-45. The Court relied on *Munn v. Illinois*, 94 U.S. 113 (1876), a case involving a challenge to rate regulation. Although *Munn* upheld the regulation of what were, in effect, public utilities, the case could be read as suggesting that rate regulation would raise a significant due process issue as to businesses that were not "affected by the public interest." *See* CURRIE, *supra* note 41, at 373. *See also* Corwin, *supra* note 43. The Court quoted the definition of due process set forth in *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819), which spoke of rejecting the exercise of governmental power where it was not in accord with "established principles of . . . distributive justice." The phrase "distributive justice" might have referred here simply to the even handed application of the law, as mandated by the standing law principle, but it generally has been viewed as referring to substantive due process. *See* WOLFE, *supra* note 44, at 226. *See also* Easterbrook, *supra* note 32, at 103 ("About to embark on an orgy of substantive due process, it [the *Hurtado* Court] baldly stated that arbitrary acts are not 'law' and so cannot satisfy due process"); Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 541 (1997) ("The fundamental rights approach that the Court adopted when it considered the general issue of the relationship of the Fourteenth Amendment to the Bill of Rights for the first time in the 1884 case of *Hurtado v. California*, was simply a particular application of substantive due process under which all fundamental rights, including the right to contract, were deemed part of the 'liberty' protected against the states by the Due Process Clause of the Fourteenth Amendment.").

193. Indeed the general principles are described so broadly that they are not tied in those descriptions to the particular type of deprivation being imposed. In rejecting petitioner Hurtado's reading of due process, the Court had looked to the common law practice in criminal cases. *See supra* text accompanying note 95. Earlier cases, such as *Davidson v. New Orleans*, 96 U.S. 97, 105 (1877), *quoted in Hurtado*, 110 U.S. at 533-34, similarly referred to "a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." However, when the *Hurtado* Court spoke of due process prohibiting legislative violation of what it described as the "substance of individual right" and "foundational principles of public liberty and private right," it did not speak of those limitations varying with whether life, liberty or property was being taken.

194. *See supra* text accompanying note 182.

195. *See supra* text accompanying note 182.

196. *See supra* text accompanying note 185.

to the "best ideas of all systems"[197]—is suggested when the Court speaks of principles recognized as foundational by "all free government[s]."[198] These differences apparently did not trouble the Court, perhaps because it recognized that such general descriptions had a limited role in determining the content of due process. The Court repeated the *Davidson v. New Orleans*[199] warning that providing a comprehensive definition of due process is "difficul[t], if not impossibl[e],"[200] and that, therefore, it is best to ascertain the content of "such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require."[201]

Somewhat surprisingly in light of the above, the *Hurtado* opinion, at several points, did identify specific prohibitions that would be imposed by due process. It noted, for example, that the legislature could not adopt "a special rule for a particular person or a particular case."[202] There was

> thus exclud[ed], as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation.[203]

These illustrations would appear to follow from the due process command that the deprivation of life, liberty and property be in accord with the standing law.[204] But a further element of due process arguably also is suggested in some of the above illustrations—that due process requires an opportunity for a factual adjudication before a court or a similar tribunal. Thus, the legislature itself could not adjudicate, even though applying general principles, whether particular property belonged to one person or another.

In the course of discussing previous rulings that had found no violation of due process in the procedures there provided, the *Hurtado* Court also offered illustrations of procedural requirements that clearly went beyond adherence to the standing law. In *Kennard v. Louisiana ex rel. Morgan*,[205] it noted, the Court had upheld "a mode of trying the title to an office, in which was no provision for a jury."[206] In concluding that "ample provision has been made

197. *See supra* text accompanying note 130.
198. *See supra* text accompanying note 184.
199. 96 U.S. 97, 105 (1877).
200. *Hurtado*, 110 U.S. at 533.
201. *Id.* at 534 (quoting *Davidson*, 96 U.S. at 104, discussed *supra* note 193).
202. *Id.* at 536.
203. *Id.* at 535-36.
204. *See supra* text accompanying notes 55-58.
205. 92 U.S. 480 (1875).
206. *Hurtado*, 110 U.S. at 533.

for the trial of the contestation before a court of competent jurisdiction,"[207] the *Kennard* Court had noted that this included process

> for bringing the party against whom the proceeding is had before the court, and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defence; for the deliberation and judgment of the court; for an appeal from this judgment to the highest court of the State, and for hearing and judgment there.[208]

While this statement had not rendered all of the cited elements prerequisites of due process, it had indicated that the combination was sufficient, and due process did not require more.

In quoting Daniel Webster's "familiar definition" of due process,[209] the *Hurtado* Court turned to a listing of those procedural components identified as essential to providing due process. Webster, it noted, had described due process as prohibiting a "special rule for a particular case or person" and requiring a "general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial."[210] In light of this reference, Justice Harlan in dissent argued that the majority would even accept as consistent with due process a "State law which authorized the trial of a capital case before a single judge, perhaps a justice of the peace . . . ."[211] After all, he noted, such a law would

> meet all the requirements of due process of law, as indicated in the opinion of the court; for such a law would not prescribe a special rule for particular persons; it would be a general law which heard before it condemned, which proceeded upon inquiry, and under which judgment would be rendered only after trial; it would be embraced by the rule laid down by the court when it declares that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the public good, which regards and preserves those principles of liberty and justice, must be held to be due process of law.[212]

That due process was limited to certain basic elements of a trial-type adjudication was also suggested by the final few paragraphs of Justice Matthews' opinion in *Hurtado*. Here, the Court applied the general principles that it had previously discussed regarding the content of due process to the California process. "Tried by these principles," it noted, "we are unable to say that the substitution for a presentment or indictment by a grand jury of the

207. *Kennard*, 92 U.S. at 483.

208. *Id.*, *quoted in Hurtado*, 110 U.S. at 533.

209. *Hurtado*, 110 U.S. at 535.

210. *Id.* (quoting Webster's argument in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 581 (1819), although not citing that source).

211. *Hurtado*, 110 U.S. at 549.

212. *Id.* at 549-50 (Harlan, J., dissenting).

proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law."[213]

Three factors were cited in support of this conclusion. First, prosecution by information was "an ancient proceeding at common law, which might include every case of an offense of less grade than a felony, except misprision of treason . . . ."[214] The significance of this common law acceptance was not fully explained. Presumably the point was that a procedure so well accepted at common law, even though not for the type of case at hand, was hardly arbitrary or contrary to the most fundamental principles of that "system of jurisprudence of which ours is a derivative . . . ."[215] Interestingly, although the *Hurtado* Court previously spoke of rights fundamental to "all free governments"[216] and stated that due process should not be a barrier to the adoption of innovations absorbing "the best ideas of all systems," including civil systems,[217] it cited only the common law roots of magistrate review of charging decisions with no mention of possible civil law analogies.[218]

The second factor noted by the Court was the function and operation of the California preliminary hearing. The Court noted that "in every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner."[219] A prosecution by information was allowed only "after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to cross-examination of the witnesses produced for the prosecution"[220]—safeguards not present in the indictment process. In adopting this procedure, the legislature had obviously taken account of the interest of the individual in not being put through the burden of a trial where the state lacked a legitimate grounding for prosecution. It simply had used an alternative to grand jury review to protect that interest.

The third factor mentioned, however, implicitly questioned whether a legislative effort to safeguard that interest had been needed to satisfy due

213. *Id.* at 538.

214. *Id.*

215. *See supra* text accompanying note 195. *See also* Brown v. New Jersey, 175 U.S. 172, 176 (1899), *quoted in supra* note 95.

216. *See supra* text accompanying note 184.

217. *See supra* text accompanying note 130.

218. As to the magistrate's role in the classic civil law system particularly in conducting the "preliminary examination," see A. ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 500-10 (J. Simpson trans., 1913). *See also* Stewart Field et. al., *Prosecutors, Examining Judges, and Control of Police Investigations, in* CRIMINAL JUSTICE IN EUROPE A COMPARATIVE STUDY 227 (Phil Fennell et al. eds., 1995).

219. *Hurtado*, 110 U.S. at 538.

220. *Id.*

process. For the Court here noted that the challenged California procedure was "merely a preliminary proceeding," and it could "result in no final judgment, except as a consequence of a regular judicial trial, conducted precisely as in cases of indictments."[221] This statement suggested that due process was only concerned with fairness in the adjudication itself. That limitation also found support in a previously quoted statement from *Davidson v. New Orleans*,[222] that "[i]t is not possible to hold that a party has, without due process of law, been deprived of his property when, as regards to the issues affecting it, he has by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."[223]

### Hurtado *and fundamental fairness*

*Hurtado* often is described as the launching pad for the flexible, evolving conception of due process that later came to dominate the application of due process in both its procedural and substantive context.[224] Indeed, it even has been described as the Supreme Court case that "made judges [through the due process clause] censors over what was 'fundamental' in a judicial procedure."[225] Such characterizations of *Hurtado* find support in the broad language used by the Court in describing due process. Two statements in particular stand out: The description of due process as proscribing "arbitrary exertions of power under the forms of legislation,"[226] and the comment that due process should not override state law which "derives its authority from the inherent and reserved powers of the State" *provided* that those powers are "exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[227] Those

221. *Id.*

222. 96 U.S. 97 (1877).

223. *Hurtado*, 110 U.S. at 534 (quoting *Davidson*, 96 U.S. 97 at 105). *See also supra* note 193.

224. *See, e.g.*, Dripps, *Miscarriages of Justice*, *supra* note 14, at 647; Joseph D. Grano, *Free Will and the Law of Confessions*, 65 VA. L. REV. 785, 891 n.151 (1979); Douglas Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clause Nonjusticiable*, 60 TEX. L. REV. 875, 894 (1982) (though citing as a still earlier source Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819)); Robert R. Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.*, 49 ALA. L. REV. 551, 574 (1998); *see also* CURRIE, *supra* note 41, at 368 (in the procedural domain the Court managed both to construe due process in a manner highly deferential to state legislative judgments and at the same time to establish itself as the protector and definer of "fundamental procedural rights").

225. CURRIE, *supra* note 41, at 368.

226. *Hurtado*, 110 U.S. at 536; *see also supra* text accompanying note 180. The Court added that "[a]rbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude." *Hurtado*, 110 U.S. at 536.

227. *See supra* text accompanying note 185.

statements and others arguably provided the foundation for a highly subjective, expansive and evolving conception of substantive due process that took hold not very long after *Hurtado*.[228] However, the concept of procedural due process set forth in *Hurtado*, at least as applied to criminal cases, was narrow, largely fixed and provided a sharply confined judicial review.

The *Hurtado* Court imposed three significant limitations upon the content of procedural due process as applied to criminal cases. First, it accepted and reaffirmed the conclusion of *Murray's Lessee* that "a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country."[229] Since the "otherwise forbidden" language referred to additional constitutional restraints not applicable to the states,[230] this meant that a federal constitutional limitation (*i.e.*, due process) could only strike down a state process when it departed from the common law. Some commentators have argued that any such limitation on due process is inconsistent with other language in Justice Matthews' opinion, which they read as supporting an evolving "progressive growth" in due process that could result in the rejection of common law procedures as not sufficiently fair.[231] However, the passages in question noted the need for a constitutional

228. As to the subsequent development and application of substantive due process, see DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986, at 40-55 (1990); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997); 8 OWEN M. FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 155-221 (1993).

It is uncertain whether the *Hurtado* Court intended to lay the foundation for such a broad substantive due process doctrine. The Supreme Court's one pre-*Hurtado* use of substantive due process, in the notorious opinion of Chief Justice Taney in the *Dred Scott* case, *Scott v. Sanford*, 60 U.S. (19 How.) 393, 450 (1857), was not mentioned in *Hurtado*. Also, in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873), an opinion by Justice Miller (also a member of the *Hurtado* Court) dismissed in a single sentence a claim that an economic regulation violated due process. However, only a few years after *Hurtado*, the Court, in *Mugler v. Kansas*, 123 U.S. 623 (1887), though it did sustain the economic regulation at issue, appeared to openly recognize the concept. In addition, substantive due process was applied to strike down an economic regulation in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). *See* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.2 (3d ed. 1999). *See also* CURRIE, *supra* note 41, at 375; 7 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, RECONSTRUCTION AND REUNION, 1864-99, at 705-09 (1971). *See also supra* note 192.

229. *Hurtado*, 110 U.S. at 528.

230. *See supra* text accompanying notes 109-15.

231. *See* Easterbrook, *supra* note 32, at 103-04 (noting that this passage has been "taken as an assertion that the demands of due process grow with time," although concluding that was not its purpose); Laycock, *supra* note 224, at 894 ("Easterbrook implausibly claims that *Hurtado* meant only that constitutional rights could contract, not that our understanding of them could expand. One sentence [relating to *Murray's Lessee*] lends some support to such a view, but that is not the fair tenor of the whole opinion."); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 15 (1998) ("[I]n *Hurtado v. California*, the Justices turned

flexibility that would allow the legislature to adjust procedures to take account of new circumstances and refined concepts of justice (possibly borrowed from other systems). There was no suggestion that this was a task for the Court itself in reviewing the procedures of the states. The Court would insist that new procedures were consistent with the foundational principles embodied in "our historical legal institutions,"[232] but, if the legislature decided not to change those institutions, that would remain, a fortiori, consistent with the principles that shaped them.[233]

Second, where the state legislature (or state court) did depart from the common law, the *Hurtado* opinion hardly gave to the Court a blank check in determining whether those changes violated "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[234] Here, a second limiting principle applied. *Hurtado* indicated that, in the procedural arena, those foundational principles were limited to the basics of a trial-type adjudication—notice of the charges, an opportunity to challenge the other side's case and present your own, a competent tribunal rendering decision on consideration of the evidence and the application of the general standing law. Subsequent rulings extending through the first third of the twentieth century consistently cited *Hurtado* as adopting a view of procedural due process that demanded no more.[235] It was this conception of

their back on originalism to ensure the 'progress [and] improvement' of the Constitution 'in this quick and active age.'").

232. *Hurtado*, 110 U.S. at 530.

233. The Court did note that the common law had reshaped the grand jury to make its role more consistent with those principles, and cited this as an illustration that it is better not to go too far back into antiquity for the best securities for our "ancient liberties." *Id.* at 530. But it hardly suggested that this task of bringing the common law up to date, and rendering it "more consonant to the true philosophy of our historical legal institutions" was assigned to the Court rather than the state courts and legislatures. *Hurtado* has been aptly described as an "opinion characterized by seeming sensitivity to historical change, by sweepingly humanistic views on jurisprudence and society, and by confidence in the destiny of the United States . . . ." Miller, *supra* note 39, at 18. But the Court did not suggest that it had been assigned a major role in either instigating or monitoring the legislative and judicial innovations that were a part of its vision of progressive growth in the law and its institutions.

234. *See supra* text accompanying note 135.

235. *See, e.g.*, the following cases, which also relied on *Hurtado*: Jordan v. Massachusetts, 225 U.S. 167, 176 (1912) ("When the essential elements of a court having jurisdiction in which an opportunity for a hearing is afforded are present, the power of a State over its methods of procedure is substantially unrestricted by the due process clause of the Constitution."); Frank v. Magnum, 237 U.S. 309, 326 (1915) ("As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense."); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (due process did permit

due process that arguably would go so far as to allow a state legislature to adopt a civil system of adjudication[236] and would give to due process a minimal role in the constitutional regulation of the federal criminal process, which was subject to the more rigorous adjudication requirements of the express provisions of the Bill of Rights.[237]

Due process, though limited to the basics of adjudication, had a greater potential in the constitutional regulation of state criminal procedure systems, because only the due process clause applied to those systems. But here, *Hurtado*'s third limiting principle restricted the potential for constitutional regulation. The avoidance of provision superfluity required that due process not overlap in content with the express provisions of the Bill of Rights.[238] Thus, the requirements that it imposed as to notice and an opportunity to be heard in defense had to be less than what the Sixth Amendment demanded as to these elements of adjudication. Finally, *Hurtado* had stressed the need to be highly deferential to state legislative judgments in assessing whether the few protected basics had been respected.[239]

Shortly before *Hurtado*, the Supreme Court in *Davidson*[240] had expressed dismay as to the frequency with which state petitioners were pressing due process claims under the Fourteenth Amendment, notwithstanding that the Fifth Amendment's due process clause had "rarely" been invoked during the many decades in which it stood as the Constitution's only due process clause.[241] *Hurtado* recognized that, as to criminal procedure, the due process

various departures from the common law, but "[w]hat may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it").

236. *See supra* text accompanying note 130. *See also supra* note 135.

237. *See supra* text accompanying notes 158-63.

238. *See supra* text accompanying notes 136-55.

239. *See supra* text accompanying notes 187-89.

240. Davidson v. New Orleans, 96 U.S. 97, 103-04 (1877).

241. Justice Miller there noted:

> It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him,

clause had played such a limited role in the federal system because it stood apart from the express provisions of the Bill of Rights and added little additional content. Arguably, the original purpose of the Fifth Amendment's due process had been only to impose the standing law requirement of *per legem terrae*,[242] but such a narrow interpretation had been foreclosed by earlier rulings.[243] However, *Hurtado*'s three limiting principles, although giving due process a somewhat broader content, ensured that the due process clause would continue to have only a limited role in the constitutional regulation of the federal criminal justice system. Of greater importance, those principles precluded placing the Court in the position of being the ultimate arbiter of state criminal procedure (and thereby increasing the flow of petitions from state courts).

In subsequent years, the Court became more and more willing to assume the position of ultimate arbiter and gradually chipped away at the limiting principles of *Hurtado*. Somewhat surprisingly, as discussed infra,[244] once selective incorporation placed the Court squarely in the position of ultimate arbiter, there developed within the Court a movement to return to the philosophy of *Hurtado*, if not its specific limiting principles, in determining the independent content of due process.

## II. THE MODIFICATIONS OF THE PRE-INCORPORATION DECADES

Over the eight decades between *Hurtado* and the adoption of the selective incorporation doctrine in the mid-1960s, there were a variety of developments in the Supreme Court's application of the due process guarantee to the criminal justice process. The vast majority of the Court's rulings came in cases in which state defendants presented challenges which would have been treated under the specific guarantees of the Bill of Rights had they been presented in federal prosecutions. Much of the doctrine adopted in those cases, however, had a bearing that extended beyond determining the degree of overlap between due process and the specific provisions. That doctrine also shaped a scattered group of rulings that did not have a parallel in the specific guarantees and it established a conception of due process that became the starting point for the expansion of free-standing due process in the post-incorporation era. From the

> and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law.

*Id.* at 103-04.

242. *See* 1 TREATISE, *supra* note 1, § 2.4(b).

243. *See supra* text accompanying note 53.

244. *See infra* discussion at notes 480-86, 557-82, and 596-618.

perspective of these consequences, the primary features of the due process rulings in criminal procedure over the pre-incorporation decades were: (1) their continued adherence to *Hurtado*'s general description of the "fundamental rights" protected by due process; (2) their rejection of the *Hurtado* limitations that gave the fundamental rights concept a very narrow content as applied to the criminal justice process; (3) their characterization of due process as an "evolving concept"; (4) their development of a more flexible methodology for determining the content of due process; (5) their application of that methodology in a series of rulings which gave due process a content that stood apart from the content of the specific provisions of the Bill of Rights; and (6) the presentation of a minority viewpoint that challenged the majority's fundamental fairness analysis as intolerably subjective.

### *A. The description of fundamental fairness*

*Hurtado* had offered several different descriptions of the fundamental rights protected by due process. They included: those "general principles of public liberty and private right, which lie at the foundation of all free government";[245]; "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions";[246] and "certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized."[247] Over the pre-incorporation decades, the Supreme Court similarly saw no need to settle upon a single description. In its criminal procedure rulings alone, the Court offered the following descriptions of the rights protected by due process: those "fundamental principle[s] of liberty and justice which inher[e] in the very idea of a free government and . . . the inalienable right[s] of a citizen of such a government";[248] rights "so rooted in the traditions and conscience of our people as to be ranked fundamental";[249] "immutable principles of justice, acknowledged *semper ubique et ab omnibus* whenever the good life is a subject of concern";[250] rights of the "very essence of a scheme of ordered liberty," without which "a fair and enlightened system

245. Hurtado v. California, 110 U.S. 516, 521 (1884).

246. *Id.* at 535.

247. *Id.* at 536 (quoting Brown v. Bd. of Levee Comm'rs, 50 Miss. 468, 479 (1874)).

248. Twining v. New Jersey, 211 U.S. 78, 106 (1908). The Court also referred to rights grounded in "fundamental principles, . . . which have relation to process of law, and protect the citizen in his private right, and guard him against the arbitrary action of government," and to "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." *Id.* at 101-02 (quoting Holden v. Hardy, 169 U.S. 366, 389 (1898)).

249. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

250. *Id.* at 122 (emphasis added). The Court also referred to rights "inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men." *Id.*

of justice would be impossible";[251] rights necessary to provide a defendant with that "fundamental fairness essential to the very concept of justice";[252] rights so fundamental that their violation in a particular case would be "shocking to the universal sense of justice";[253] and rights reflecting "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."[254]

Like the *Hurtado* descriptions, the pre-incorporation descriptions appeared to vary in their point of reference. Some suggested that fundamental character was to be determined by reference to the Anglo-American common law system,[255] others that the proper reference was universal elements of justice, recognized in all civilized systems.[256] Some seemed to focus on historical traditions,[257] while others appeared to also take account of differing contemporary notions of justice.[258] The Court, however, did not view such differences in wording as significant. It simply had expressed the same general principle "many times . . . in differing words."[259] As noted in *Hurtado*, no single definition could be treated as "comprehensive" and the "full meaning" of due process would have to be "gradually ascertained by the process of inclusion and exclusion in the course of decisions of cases as they arise."[260] The Court also continued to point out, as it had in *Hurtado*, that respect for a state's authority to shape its own criminal justice process directed that the judiciary proceed with caution in determining whether a fundamental right has been violated.[261]

As in *Hurtado*, the descriptions of fundamental rights offered over pre-incorporation decades were sometimes formulated with specific reference to

251. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

252. Lisenba v. California, 314 U.S. 219, 236 (1941).

253. Betts v. Brady, 316 U.S. 455, 462 (1942).

254. Malinski v. New York, 324 U.S. 401, 417 (1945) (Frankfurter, J., concurring).

255. *See, e.g.*, *supra* text accompanying notes 249 and 254.

256. *See, e.g.*, *supra* text accompanying notes 248, 250-51 and 253.

257. *See, e.g.*, *supra* text accompanying notes 249-50.

258. *See, e.g.*, *supra* text accompanying notes 253-54.

259. Twining v. New Jersey, 211 U.S. 78, 101 (1908) ("This idea has been many times expressed in differing words by this court . . . .").

260. *Id.* at 100. *See also* Bartkus v. Illinois, 359 U.S. 121, 127 (1959).

261. *See, e.g.*, Twining v. New Jersey, 211 U.S. 78, 106-07 (1908) ("Under the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just, and fitting."); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (similar); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 470 (1947) (Frankfurter, J., concurring) ("When the standards for judicial judgment are not narrower than 'immutable principles of justice which inhere in the very idea of a free government,' . . . [and] 'immunities . . . implicit in the concept of ordered liberty,' . . . great tolerance toward a State's conduct is demanded of this Court.") (citations omitted).

procedure[262] and sometimes expressed in terms that would encompass both substantive and procedural due process.[263] Here again, the Court apparently did not view the distinction as significant. In *Rochin v. California*,[264] the Court announced a somewhat distinct standard[265] in dealing with what later came to be described as a substantive due process issue: When did police actions so invade the individual liberty of a suspect that the government should not be allowed to utilize the evidentiary fruits of those actions?[266] The Court there spoke of due process imposing such a prohibition where the police action constitutes "conduct that shocks the conscience"[267] and thereby violates "the general requirement that [s]tates in their prosecutions respect certain decencies of civilized conduct."[268] However, the *Rochin* opinion also cited more traditional formulations of the fundamental rights standard[269] and *Rochin* neither described its ruling as resting on substantive due process (a description that emerged in later cases[270]), nor suggested that it was formulating a separate standard for due process claims involving the acquisition of evidence.[271]

262. *See, e.g.*, *supra* text accompanying notes 252 and 254; *infra* text accompanying note 279.

263. Thus, in *Palko v. Connecticut*, 302 U.S. 319 (1937), the Court did not shift its description of fundamental rights in explaining why First Amendment rights were protected by due process while various other procedural rights were not.

264. 342 U.S. 165 (1952).

265. *See* Donald A. Dripps, *At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense*, 1993 U. ILL. L. REV. 261, 265-69.

266. For a description of *Rochin*, see *infra* note 433.

267. *Rochin*, 342 U.S. at 172.

268. *Id.* at 173. The Court also noted that, "[d]ue process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice." *Id.* (quoting Chief Justice Hughes "speaking for a unanimous Court" in Brown v. Mississippi, 274 U.S. 278, 285-86 (1936)).

269. *See Rochin*, 342 U.S. at 168. The Court also quoted the standards set forth in *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934), and *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). *See also supra* notes 250-51 and accompanying text.

270. *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998), discussed *infra* at notes 572-75; Graham v. Connor, 490 U.S. 386, 393 (1989); United States v. Salerno, 481 U.S. 739, 746 (1987).

271. Arguably, the Court was simply seeking to explain why the police conduct controverted the fundamental fairness standard without reference to those Fourth Amendment interests which had been held to be protected by due process but not to require evidentiary exclusion when violated. *See infra* notes 297-98. *Rochin* drew an analogy to the Court's coerced confession cases, but did not suggest that "conscience-shocking" was a due process standard to be applied in determining the admissibility of confessions. Nonetheless, a conscious-shocking standard has persisted where the Court is considering police conduct that does not violate a specific guarantee of the Bill of Rights. *See infra* note 488; Dripps, *supra* note 265 (arguing that the *Rochin*

In one respect, the descriptions of the pre-incorporation decades did offer a new insight. Various decisions noted that the fundamental character of a right claimed by a defendant would often depend upon the circumstances of the case. As to some rights, the Court was willing to say that they simply were not protected by due process; that was the case, for example, of prosecution by indictment, the privilege against self-incrimination and the right to jury trial.[272] As to several others, due process required their recognition without regard to the particular circumstances of the defendant or suspect.[273] For many, however, the Court concluded that the particular right might be demanded by due process under some circumstances, but not others. Indeed, the Court noted, "[w]hat is fair in one set of circumstances may be an act of tyranny in others."[274] The primary example of due process rulings stressing the circumstances of the particular case were those involving claims based upon the failure to provide counsel to assist indigent defendants,[275] but essentially the same circumstance-focused approach also was applied to other claims (*e.g.*, that multiple trials could produce burdens violating due process,[276] that the pressures leading to a defendant's confession could be so overbearing that due process should preclude prosecution use of that confession in evidence,[277] and that the character of a seizure of evidence could be so offensive that due process should require the exclusion of that evidence[278]). In these areas, the Court often asked whether, upon an "appraisal of the totality of facts in [the] given case," the result of failing to provide the defendant with the claimed

standard is an anachronism). The *Rochin* standard has not been applied in other substantive due process contexts. *See, e.g.*, the cases cited *infra* note 577.

272. *See, e.g.*, Hurtado v. California, 110 U.S. 516 (1884) (prosecution by indictment); Twining v. New Jersey, 211 U.S. 78 (1908) (privilege against self-incrimination); Maxwell v. Dow, 176 U.S. 581 (1908) (jury trial). As discussed in 1 TREATISE, *supra* note 1, § 2.4(d), most of these rulings came prior to the 1930s, but the same position was taken on occasion in the later decades. See, for example, *Williams v. New York*, 337 U.S. 241, 250-51 (1949), where the Court ruled that due process did not give to the defendant the right to insist that the sentencing judge consider only evidence presented in court in evaluating defendant's past behavior and character. The Court rejected the dissent's argument that this general authority would violate due process in exceptional circumstances—here a capital case in which the judge imposed capital punishment notwithstanding the contrary recommendation of the jury and relied on information contained in a probation report that was not "subject to examination by the defendant." *Id.* at 251.

273. *See, e.g.*, Chandler v. Fretag, 348 U.S. 3 (1954) (right to retained counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (judge without financial interest in conviction).

274. Snyder v. Massachusetts, 291 U.S. 97, 117 (1934).

275. *See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932); Betts v. Brady, 316 U.S. 455 (1942); Uveges v. Pennsylvania, 335 U.S. 437 (1948).

276. *See, e.g.*, Hoag v. New Jersey, 356 U.S. 464, 467 (1958).

277. *See, e.g.*, Payne v. Arkansas, 356 U.S. 560 (1958); Watts v. Indiana, 338 U.S. 49 (1949); Crooker v. California, 357 U.S. 433 (1958).

278. *See, e.g.*, Rochin v. California, 342 U.S. 165, 172-73 (1952); Irvine v. California, 347 U.S. 128 (1954).

protection was a "denial of fundamental fairness, shocking to the universal sense of justice."[279] This led to the common description of due process rulings in criminal procedure cases as applying a "fundamental fairness" standard.[280] This focus on the circumstances of the case was quite different than *Hurtado*, which had indicated that a grand jury's initiation of charges would not be a fundamental right under any circumstances.[281] However, as noted, the focus on circumstances was not universal and *Hurtado* had not suggested that a flat standard of inclusion or rejection was the only way due process could deal with a particular procedural right.

### *B. Rejecting the* Hurtado *limitations*

Though retaining formulations of due process protection consistent with *Hurtado*, over the pre-incorporation decades, the Court overrode each of those *Hurtado* limitations that had sharply restricted the role of due process in the constitutional regulation of criminal procedure. Initially, it rejected the *Hurtado* rule of construction, which worked against a due process "overlap" with the specific guarantees of the Bill of Rights. That rejection opened the door to substantially expanding the reach of the Fourteenth Amendment's due process clause, the only source of constitutional regulation of state procedure. It allowed, in particular, for a due process content that went beyond the basic elements of trial-type adjudication that *Hurtado* had identified as the only likely content of procedural due process. The Court also rejected the *Hurtado* position that the approval of the common law shielded a procedure from a due process challenge. The fundamental fairness analysis was no longer reserved for departures from the common law, but applied even to procedures that had the "sanction of settled usage both in England and in this country."[282]

It was in a substantive due process case, rather than a criminal procedure case, that the Court pushed aside the *Hurtado* rule of construction that due process should not be read to encompass (and therefore render superfluous) the coverage of a specific guarantee of the Bill of Rights. The *Chicago Railroad*

279. Betts v. Brady, 316 U.S. 455, 462 (1942). *See also* Lyons v. Oklahoma, 322 U.S. 596, 605 (1944); Bute v. Illinois, 333 U.S. 640, 666 (1948); Hoag v. New Jersey, 356 U.S. 464, 467-68 (1958).

280. *See, e.g.*, 1 TREATISE, *supra* note 1, § 2.4 and the articles cited therein.

281. Had the Court looked at the particular circumstances, the defendant's case for charging review by a grand jury might have gained strength. *Hurtado* presented a fact situation (a killing in response to an alleged adultery), see *People v. Hurtado*, 63 Cal. 288 (1883), where the defendant might have benefited from the grand jury's power to take account of the community's sense of justice and to "charge . . . a lesser offense" than the evidence might support. *See* Vasquez v. Hillery, 474 U.S. 254, 263 (1986) (recognizing that authority). I am indebted to Donald Dripps for calling the facts of *Hurtado* to my attention.

282. *See supra* text accompanying note 229.

*Case*,[283] decided in 1897, held that due process included a prohibition also found in another provision of the Fifth Amendment—the prohibition against the government taking property without providing just compensation. The Court did not refer to the *Hurtado* rule of construction, but it also did not suggest that the due process prohibition against takings without just compensation was any narrower than the Fifth Amendment prohibition (which would have met *Hurtado*'s concern as to rendering the specific guarantee "superfluous").[284] Not long thereafter, in *Twining v. New Jersey*,[285] the Court spoke to whether the Fifth Amendment privilege against self-incrimination was a fundamental right guaranteed by due process.[286] The Court rejected that contention based on the history of the privilege in English law (which recognized various exceptions to the privilege), the limited recognition of the privilege in the constitutions of the original states and the uniform rejection of the privilege in civilized countries "outside the domain of the common law." It did not start from the premise that the privilege was not within due process because that would render superfluous the Fifth Amendment guarantee. No mention was made of *Hurtado*'s rule of construction. Rather, citing the *Chicago Railroad Case*, the Court noted:

> [I]t is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process. . . . If this is so, it is not because those rights are enumerated in the first eight Amendment[s], but because they are of such a nature that they are included in the conception of due process of law.[287]

In 1932, in *Powell v. Alabama*,[288] the Court faced up to the *Hurtado* standard. By this time, the Court had already held that due process encompassed certain First Amendment rights as well as the Fifth

283. Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897).

284. Justice Harlan's opinion for the *Chicago Railroad* Court mentioned neither *Hurtado* nor the Fifth Amendment provision. Harlan, of course, had dissented in *Hurtado*. The Court had no need to determine whether due process was as extensive as the Fifth Amendment in its definition of a taking, as the critical issue in this case was whether the compensation received by the railroad fell short of being "just." *Id.* at 241.

285. 211 U.S. 78 (1908).

286. The precise issue before the Court was whether due process was violated by a charge to the jury noting that it could draw an inference adverse to the defendant based on his failure to take the stand and refute a direct accusation made against him. The Court did not limit its analysis to this aspect of the privilege, but asked whether the core prohibition against compelling a person to be a witness against himself was a fundamental right protected by due process. *Twining*, 211 U.S. at 82-83.

287. *Id.* at 99.

288. 287 U.S. 45 (1932).

Amendment's just compensation provision.[289] At issue in *Powell* was whether due process encompassed aspects of the defendant's Sixth Amendment right to the assistance of counsel. The Court took note of *Hurtado*'s canon of interpretation, noting that if it "stood alone," it would "be difficult to justify the conclusion that the right to counsel, being thus specifically granted by the Sixth Amendment, was also within the intendment of due process."[290] However, *Hurtado* did "not stand alone,"[291] as the *Chicago Railway* case and the First Amendment cases had "establish[ed] that notwithstanding the sweeping character of the language in the *Hurtado* case, the rule laid down [there] is not without exceptions."[292] The rule of *Hurtado*, the Court noted, was simply an "aid to construction," which must "yield to more compelling considerations whenever such considerations exist."[293] One such compelling consideration was the very fact that the character of the right rendered it one of those "fundamental principles" that met the general standard of due process formulated in *Hurtado*. Though the *Powell* Court also stated that the *Hurtado* rule of construction "in some instances may be conclusive,"[294] that was meaningless if those instances did not extend to any rights in the specific guarantees that otherwise would be deemed "fundamental" and therefore within due process. *Powell* thus politely buried the *Hurtado* rule of construction and it was never again heard from in a due process ruling.

*Hurtado* also had suggested that procedural due process was limited to the basic elements of a trial-type adjudication,[295] but if the door was now open to inclusion of the full range of guarantees found in the Bill of Rights, due process could readily go beyond rights aimed at providing a "fair hearing."[296] The Court went down that path in holding that due process encompassed the

289. *See, e.g.*, Stromberg v. California, 285 U.S. 359, 368 (1931) (freedom of speech); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Near v. Minnesota, 283 U.S. 697, 707 (1931) (freedom of press). *See also* Palko v. Connecticut, 302 U.S. 319, 324 (1937) (listing these rights as absorbed into due process).

290. Arguably, that would not have been true for the limited right to counsel recognized in *Powell*, which was narrower than the right recognized under the Sixth Amendment. *See supra* text accompanying note 155.

291. *Powell*, 287 U.S. at 66.

292. *Id.* at 67.

293. *Id.*

294. *Id.*

295. *See supra* text accompanying notes 209 and 234-37.

296. Rulings into the 1920s offered a vision of procedural due process much like that in *Hurtado*. *See, e.g.*, West v. Louisiana, 194 U.S. 258, 263-64 (1904); Twining v. New Jersey, 211 U.S. 78, 110-11 (1908); Jordan v. Massachusetts, 225 U.S. 167, 176 (1912). The shift occurred in the 1930s. It was one element of a general movement toward more expansive readings of constitutional provisions regulating the criminal process. *See* 1 TREATISE, *supra* note 1, at 617, 622-24.

basic privacy interest safeguarded by the Fourth Amendment[297] (although not the Fourth Amendment's exclusionary rule remedy, absent a violation that "shocks the conscience"[298]), prohibited some forms of cruel and unusual punishments[299] and prohibited the use of confessions obtained through pressures deemed offensive because they overrode the suspect's free will (though there was no reason to doubt the reliability of the confession).[300] Such rulings might have been characterized as imposing substantive due process limitations, as they reflected prohibitions against governmental invasion of certain aspects of human dignity as well as restrictions upon the administration of the criminal justice process.[301] But the Court generally viewed constitutional limitations that regulated the process of criminal investigation, trial and punishment (as compared to constitutional regulation that limited the behavior that could be punished) as involving procedural aspects of due process.[302] In any event, the same general standard for identifying

297. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

298. *Id.*; Rochin v. California, 342 U.S. 165, 172 (1952).

299. Louisiana *ex rel*. Francis v. Resweber, 329 U.S. 459, 462-66 (1947) (plurality, concurring and dissenting opinions all recognize this content, but state action here did not meet that characterization).

300. *See, e.g.*, Spano v. New York, 360 U.S. 315, 323 (1959) (ploy on friendship); Leyra v. Denno, 347 U.S. 556, 561 (1954) (interrogation by psychiatrist was misuse of his position); Blackburn v. Alabama, 361 U.S. 199, 203 (1960) (reliable confessions may nonetheless be excluded). *See* 2 TREATISE, *supra* note 1, § 6.2(b).

301. *See* Thomas C. Grey, *Procedural Fairness and Substantive Rights*, *in* DUE PROCESS, XVIII NOMOS 182, 183 (J. Roland Pennock & John W. Chapman eds., 1977).

> Procedural fairness has both a loose and a strict sense. In its loose sense, the term includes certain rules and principles applicable to dispute-setting procedures that are designed to protect substantive rather than procedural values. I have in mind examples such as these: the criminal defendant's privilege not to testify; the rule excluding from evidence a priest's testimony about a penitent's confession; the rules prohibiting the use of evidence extracted by physical or psychological abuse; and rules prohibiting or restraining the use of evidence obtained by invasion of privacy or trespasses. These are not rules and principles of procedural fairness in the strict sense in which I shall use the term in this paper. They are procedural standards only in that their primary (or sole) application is to dispute-settling procedures. Unlike rules and principles of procedural fairness in the strict sense, they are not aimed at producing more accurate or fair *decisions* of those disputes. They are rather designed to protect various substantive rights and interests from the invasions to which they would be subject if the strictly procedural aims of correct fact-finding and rule-applying were pursued single-mindedly (or subject only to prudential constraints of costs).

*Id. See also* Dripps, *Beyond The Warren Court*, *supra* note 14, at 618 ("[T]here is no separating *Lochner v. New York* from *Gitlow v. New York*, *Roe v. Wade* and *Mapp* or *Miranda*. All are substantive due process cases . . . .").

302. One notable exception was the *Rochin* ruling prohibiting admission of evidence gained through police practices that "shocked the conscience." *See supra* text accompanying note 267. But it was not until the post-incorporation era that the Court began describing *Rochin* as a substantive due process rule. *See supra* note 270. In the pre-incorporation period, the Court did

fundamental rights applied whether the issue was an overlap with the "substantive limits" of the First Amendment or the "procedural" limits of the Fourth Amendment.[303]

*Powell v. Alabama*[304] also marked the demise of the *Hurtado* rule that a process sanctioned by "settled usage" at common law "must be taken to be due process of law."[305] *Powell* involved two claims—that due process required that a defendant be given an adequate opportunity to retain counsel and that due process required that an indigent defendant be provided with court appointed counsel. In sustaining the defendant's right to the assistance of retained counsel (and to an adequate opportunity to obtain such counsel), the *Powell* opinion relied heavily on the historical developments that led to the adoption of the Sixth Amendment and similarly worded state constitutional provisions, noting that those developments reflected the fundamental character of the right to be represented at trial by retained counsel. When the *Powell* opinion turned to an indigent defendant's right to appointed counsel, it did not look to the lessons of history, but instead stressed the logical implications of the due process right to a fair hearing.[306] As the Court later noted in *Betts v. Brady*,[307] at the time of the adoption of the Constitution, the appointment of counsel was a limited practice, typically confined to capital cases (if recognized at all) and not grounded in constitutional provisions.[308] Thus, the

not describe as substantive its ruling in *Rochin* or its rulings on due process prohibiting the admission of coerced confessions, unreasonable searches, or certain types of punishments that were cruel and unusual. *See* cases cited *supra* notes 297 and 299-300.

303. See, for example, cases cited *supra* notes 289, 297, 299-300, and the Court's analysis in *Palko v. Connecticut*, 302 U.S. 319 (1937), discussed *supra* note 263. *See also* Dripps, *Miscarriages of Justice*, *supra* note 14, at 651 (criticizing the Court's use of the "fundamental fairness" standard, a "substantive due process concept, to articulate the proper inquiry into procedural fairness").

304. 287 U.S. 45 (1932).

305. *See supra* note 229. Others disagree as to the timing of this demise. *See* Redish & Marshall, *supra* note 99, at 470 (suggesting that by the time of *Twining* (1908), the Court had adopted an analysis that made "the historical absence or presence of a procedure . . . simply another evidentiary factor, with history providing neither a floor nor a ceiling" to due process); Kaplan, *supra* note 129, at 470 (the Court modified the *Hurtado* principle in *Twining*); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 31 (1991) (Scalia, J., concurring) (observing that a shift in approach had occurred "by the time the Court decided *Snyder v. Massachusetts* (1934)" but unbroken historical usage was not rejected as being dispositive until the mid-20th century with rulings like *Gideon v. Wainwright*). *See also infra* note 312.

306. *See infra* text accompanying note 376. *Powell* did back up this analysis by reference to current practice, noting that every state required appointment of counsel at least in capital cases, but there was no suggestion that this had been a long standing tradition or one viewed as grounded on a fundamental right. *Powell*, 287 U.S. at 73.

307. 316 U.S. 455 (1942).

308. *Betts*, 316 U.S. at 465-67. *See also* 3 TREATISE, *supra* note 1, § 11.1(a).

"settled usage" (at least for non-capital cases)[309] was to leave defendants to fend for themselves when they could not afford counsel.

The *Powell* opinion noted that "[o]ne test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence, subject, however, to the qualification that they be shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation."[310] That test, it noted, "has not been met in the present case."[311] The denial of the opportunity to retain counsel was consistent with the settled usage in England, but not the settled usage in this country, where recognition of a fundamental right to the assistance of retained counsel of choice was widespread at the time of its founding. *Powell* did not consider separately the possible sanction of history for placing an indigent defendant in a position where he had to represent himself (*i.e.*, not providing him with appointed counsel). Perhaps it concluded that this practice also did not have the sanction of settled usage under the *Hurtado* standard because, although it was in fact the practice in both England and this country, only the American law formally took a position on not providing indigents with the assistance of counsel; the English common law had no reason to treat that issue as it did not allow representation even by retained counsel. Logically, however, the rationale of *Hurtado*'s "settled usage" rule should still have applied. If those who adopted the Fifth Amendment's due process assumed that English practice carried over to this country was consistent with due process, they also would have similarly viewed a uniquely American practice that had been well established in the colonies. The *Powell* Court, however, saw no need to even discuss the possibility that *Hurtado*'s settled usage "shield," which had been reaffirmed in several subsequent due process rulings,[312] could be based solely on the settled

309. *Powell* itself involved a capital case, and the Court mentioned that factor in summarizing its holding as to appointed counsel. *Powell*, 287 U.S. at 71. However, the *Powell* Court did not rely on the special consideration of capital cases in the appointment of counsel in early American practice. In *Betts v. Brady*, *see* discussion *supra* text accompanying note 307, the Court extended *Powell* to require appointed counsel in non-capital cases under special circumstances, though noting that American common law had not required appointment in such cases.

310. *Powell*, 287 U.S. at 65.

311. *Id.*

312. *See, e.g.*, Twining v. New Jersey, 211 U.S. 78, 101 (1908) (quoting *Hurtado*); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (finding no settled usage supporting the practice challenged there, looking to both English practice and the "strict common-law rule" carried over to this country, and disparaging the acceptance of the practice in a few states); Ownbey v. Morgan, 256 U.S. 94, 109-12 (1921) (finding settled usage required acceptance of practice even though it departed from the general rule requiring a right to be heard unencumbered by a bond posting requirement).

usage in this country. Arguably it viewed such a shield, like *Hurtado*'s rule of construction on avoiding superfluous readings, as simply a factor to be considered, but not conclusive.

A handful of other pre-incorporation due process cases also held unconstitutional practices that appeared to be sanctioned by "settled usage," at least in the common law of this country. A series of confession cases extended due process to bar confessions even though they would have been accepted under the common law rule that looked to whether the methods used were likely to produce an untrustworthy statement.[313] These rulings, in turn, led the Court in *Jackson v. Denno*[314] to hold that due process required that the voluntariness of a confession first be determined by the judge, although the contrary practice of submitting the voluntariness issue directly to the jury had "more than a century of history behind it."[315] In *Griffin v. Illinois*,[316] the Court relied on due process, in part, to hold unconstitutional a state's failure to provide an indigent convicted defendant with the transcript needed to raise an evidentiary sufficiency challenge on appeal, notwithstanding that the common law did not require appellate review and took no special account of the indigent.[317]

### *C. Due process as an "evolving concept"*

While most of the rulings rejecting practices sanctioned by settled usage took account of the common law tradition that had accepted the practice, they treated that tradition as no more than one factor to be considered in determining whether the defendant had been denied fundamental fairness. Their failure to refer to *Hurtado*'s description of settled usage as a shield was not surprising, because the Court had developed a characterization of due process that implicitly rejected such a shield. In the years following *Powell*, the Court had set forth a conception of due process that could readily justify

313. *See, e.g.*, cases cited *supra* note 300. As to the common law rule and the departure from that rule, see 2 TREATISE, *supra* note 1, § 6.2(a)-(b); Laurence A. Benner, *Requiem for* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 92-101 (1989); YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS 1-25 (1980). The Court's position in these confession cases could also be seen as extending the privilege against self-incrimination to out-of-court pressures that produced a confession, which would also constitute a departure from the common law. *See id.* at 27-77; Miranda v. Arizona, 384 U.S. 436, 500-26 (1966) (Harlan, J., dissenting).

314. 378 U.S. 368 (1964). Although decided in the mid-1960s, *Jackson* came shortly before the Court held the self-incrimination privilege to be fundamental and applicable to the states.

315. *Jackson*, 378 U.S. at 403 (Black, J., dissenting). *See also* Stein v. New York, 346 U.S. 156, 172 (1953).

316. 351 U.S. 12, 20 (1956). *See* discussion *infra* notes 416-23.

317. *See infra* text accompanying note 420.

striking down a procedural practice with strong common law roots.[318] Due process, it had noted, was an "evolving concept," distinguishable from guarantees, such as the double jeopardy prohibition, that were "rooted in history."[319] The term "due process" was said to "formulate[] a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights."[320] Indeed, due process was described as "the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society."[321] It was not "a stagnant formulation of what had been achieved in the past but a standard for judgment in the progressive evolution of the institutions of a free society."[322] Since basic rights do not become petrified as of any one time and "[i]t is of the very nature of a free society to advance in its standards of what is deemed reasonable and right," due process would be viewed as a "living principle, not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights."[323]

This conception of a flexible, evolving due process meant that history did not invariably establish either a "floor []or a ceiling" for due process.[324] The Court could determine that a procedural prohibition or requirement viewed as essential when the Bill of Rights was adopted, considered in the context of modern criminal procedure and modern society, was less an "enduring reflection[] of experience with human nature" than an expression of "the restricted views of Eighteenth-Century England regarding the best methods for the ascertainment of facts."[325] That was consistent with *Hurtado*'s recognition of the potential for departure from historical practice to reflect "a progressive growth and wise adaption to new circumstances and situations" in giving "new expression and greater effect to modern ideas of self-government."[326] But a flexible and evolving conception of due process could also lead the Court to

318. This conception was advanced not only in criminal cases, as illustrated by opinions cited *infra* notes 319-23, but also in cases dealing with federal and state, civil and administrative procedures. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161-65 (1951) (Frankfurter, J., concurring) (collecting cases); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315-20 (1950) (invalidating notice by publication as inconsistent with due process when plaintiff could reasonably ascertain the defendant's address, although service by publication was a longstanding practice in civil procedure); Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950) (finding due process hearing requires a tribunal "which meets at least currently prevailing standards of impartiality").

319. Gore v. United States, 357 U.S. 386, 392 (1958).

320. Betts v. Brady, 316 U.S. 455, 462 (1942).

321. Griffin v. Illinois, 351 U.S. 12, 21 (1956) (Frankfurter, J., concurring).

322. Malinski v. New York, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).

323. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

324. Redish & Marshall, *supra* note 99, at 470.

325. Adamson v. California, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring).

326. *Hurtado*, 110 U.S. at 530. *See also supra* text accompanying notes 128 and 130.

hold fundamentally unfair a practice sanctioned by the common law. That position might be based on a changed context that altered the impact of the practice[327] or on "refinement[s] in our sense of justice."[328] Such a ruling, however, would be contrary to *Hurtado*'s acceptance of "settled usage" as a shield against a due process challenge, particularly where based more on a shift in societal values than a shift in factual context.

While the *Hurtado* Court explained at length why it was rejecting the suggestion in *Murray's Lessee* that would have had due process incorporate the settled usage of the common law,[329] the post-*Hurtado* decisions never offered an extensive explanation as to why they were rejecting the *Hurtado* (and *Murray's Lessee*) position that settled usage provided a shield against a due process challenge. Arguably, the Court viewed such a shield as inconsistent with *Hurtado*'s recognition of the need for change to properly reflect the progressive evolution of free society.[330] If that evolution could justify holding as non-fundamental (and therefore subject to legislative change) "methods of procedure, which at the time the Constitution was adopted were deemed essential to the protection and safety of the people,"[331] then could that evolution also not work in the opposite direction—to establish that practices formerly deemed acceptable were contrary to modern notions of basic fairness?[332] If the recognition that the common law had relied on erroneous assumptions regarding such matters as "the best methods for the ascertainment of facts"[333] could lead to sustaining a state's rejection of a prohibition deemed

327. *See* Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 343 (1957) (noting that this conception of due process allowed consideration of "the unique character in which each generation's problems are presented," and recognized "[s]olutions of the problems of another day are useful but certainly not determinative of today's problems").

328. Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 6 (1956). The author of this article, Justice Walter Schaefer of the Illinois Supreme Court, was a strong supporter of a flexible due process theory and urged the Supreme Court to utilize that conception of due process to "identify the fundamental constitutional values, resolve current conflicts in these social policies, and accommodate future changes in society." Nowak, *supra* note 14, at 399.

329. *See supra* text accompanying notes 120-30.

330. *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 467 (1947) (Frankfurter, J., concurring) (citing to the "classic language" of *Hurtado* in support of the proposition that due process safeguards "run back to [the] Magna Carta but contemplate no less advances in the conceptions of justice and freedom by a progressive society").

331. Holden v. Hardy, 169 U.S. 366, 385-86 (1898). *Holden* reviewed various departures from the common law that had been upheld under such an analysis and cited other departures that had not been challenged. *See* discussion *infra* note 339.

332. *See* discussion *supra* note 330. *See also* Redish & Marshall, *supra* note 99, at 469-70 ("By the time of its decision in *Twining v. New Jersey*, the Court seemed to recognize the deficiencies in the one-directional progress approach adopted in *Hurtado*.").

333. *See supra* text accompanying note 325.

essential at the common law, could not that same recognition lead to a court prohibiting as fundamentally unfair practices formerly accepted at the common law?[334]

The criminal procedure cases characterizing due process as an "evolving concept" came after the Court had completed its notorious and ultimately unsuccessful *Lochner* era practice of rigorous substantive due process review of state economic regulations.[335] That review clearly had recognized a content in substantive due process that went beyond the specific provisions of the Bill of Rights—a content presumably based upon a natural law foundation.[336] Though the Court subsequently had rejected the *Lochner* era rulings, that rejection was based only on the failure of those rulings to give ample deference "to the opinion of other branches of government regarding the legitimate ends of legislation or the proper means for achieving those ends."[337] Thus, the Court had not rejected other substantive due process rulings of the *Lochner* era, dealing with non-economic liberties, that also went beyond the specific provisions of the Bill of Rights.[338] As to criminal procedure, *Hurtado* and

334. *See* Dripps, *Miscarriages of Justice*, *supra* note 14, at 653-54 & n.55:

> Suppose a criminal defendant shows a complete common-law consensus to the effect that a perfectly reliable type of evidence should be excluded. For example, a child abuse defendant moves to bar the victim, now six years old, from testifying. At common law, this would have been the usual result, on the ground that a child of tender years cannot understand the oath and its potentially eternal consequences. Would any court do anything but laugh at the defendant's due process argument, despite its impeccable historical pedigree?
>
> On the other hand, suppose the state excludes reliable defense evidence that would not have been admissible at common law. For example, suppose a state procedural rule has the effect of preventing the defendant herself from testifying. At common law, the defendant could not be sworn as a witness (again on the theory that this made damnation too likely). Could the state justify its rule on the basis of common-law history? Suppose a state barred coconspirators from testifying on one another's behalf. Or prohibited a defendant from cross-examining a witness who gave testimony favorable to the state after being called by the defense? All of these cases actually reached the Supreme Court, and in each the Court struck down the state rules, history notwithstanding.
>
> *See* Washington v. Texas, 388 U.S. 14 (1967) (striking down bar on co-conspirator testimony under the Sixth Amendment compulsory process clause); Chambers v. Mississippi, 410 U.S. 284, 302-03 (1973) (striking down voucher rule on due process grounds); Rock v. Arkansas, 483 U.S. 44 (1987) (striking down on compulsory process grounds ban on testimony by accused who had been subjected to hypnosis prior to trial).

335. As to that practice, *see* 2 ROTUNDA & NOWAK, *supra* note 228, § 15.3.

336. *See generally* J.A.C. Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56 (1931). *See also* CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 143-95 (1930); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928).

337. 2 ROTUNDA & NOWAK, *supra* note 228, § 15.4.

338. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923) (finding infringement on liberty to make educational decisions); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

other cases had already set a proper tone of deference to legislative change.[339] Accordingly, recognizing that due process was also an "evolving concept" as applied to procedure, capable of overriding settled usage as well as allowing legislative change from settled usage, may have been seen as a logical and appropriate extension of what the Court had already recognized in its application of substantive due process.[340]

One point that was not discussed in the pre-incorporation rulings was how this view of due process as a flexible and evolving concept squared with the original understanding of the Fifth Amendment clause.[341] Arguably, the Court saw no need to relate its view of due process to the original understanding of the "law of the land" concept because of the extensive discussion of that understanding in *Hurtado* itself and its continued adherence to the fundamental rights formulation which *Hurtado* had announced. *Hurtado*'s vision of the

339. As to the other cases setting that tone, see *Holden v. Hardy*, 169 U.S. 366 (1898) and the cases cited therein. *See also* discussion *supra* note 331. *Holden* was especially forceful in identifying the need for deference in considering departures from the common law in both procedural and substantive regulation. The Supreme Court noted:

> [I]n passing upon the validity of state legislation under th[e] [Fourteenth] [A]mendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the States methods of procedure, which at the time the Constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection. Even before the adoption of the Constitution, much had been done towards mitigating the severity of the common law, particularly in the administration of its criminal branch. . . .
>
> The present century has originated legal reforms of no less importance [citing the elimination of "special pleading" and "ancient tenures of real estate," the emancipation of married women, the abolishment of imprisonment for debt, witnesses no longer being considered incompetent to testify because parties to the litigation, the simplification of indictments, and the abolition of grand juries in several states]. . . . This case does not call for an expression of opinion as to the wisdom of these changes, or their validity under the Fourteenth Amendment . . . . They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.

*Id.* at 385-87.

340. Kadish, *supra* note 327, at 325.

341. As to why the focus would have been on the original understanding of the Fifth Amendment, rather than the Fourteenth Amendment, see discussion *supra* note 99.

original understanding of the Fifth Amendment's due process clause was not limited, however, to the clause's protection of fundamental rights. In accepting practices sanctioned by "settled usage," *Hurtado* had suggested that the due process clause's protection of fundamental rights was designed basically to mark the limits on departures from the common law, not to give the federal courts the authority to compel such departures through their application of the clause. As *Hurtado* and *Murray's Lessee* viewed the clause, it deemed adherence to the common law as entirely acceptable, and sought only to ensure that any subsequent departures did not contradict those cardinal principles of justice that had helped to shape the common law. In advancing an "evolving" due process, the pre-incorporation cases, if they considered the original understanding to be significant, must have had a quite different vision of that understanding. Martin Redish and Lawrence Marshall, in their article on the "values of due process," have offered a reading of the original understanding that supports the evolving concept of due process advanced in the later decades of the pre-incorporation period. They note:

> There is clear evidence that the framers of the Bill of Rights were aware of their inability to envision each and every scenario that might arise. Indeed, many objected to the amendments for the very reason that they might be understood as embodying the principle *expressio unius est exclusio alterius*. It is therefore not at all unreasonable to suggest that, notwithstanding the Bill of Rights' enumeration of specific procedures, the framers fashioned an open-ended clause to cover both those procedures that they might have accidentally omitted and those that might prove necessary in future times.[342]

Such a reading would not have been unique, as the Court had earlier offered a similar explanation of the prohibition against cruel and unusual punishment,[343]

342. *See* Redish & Marshall, *supra* note 99, at 464. *See also* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 466 (1947) (Frankfurter, J., concurring) (equal protection and due process clauses "are broad, inexplicit clauses of the Constitution, unlike specific provisions of the first eight amendments formulated by the Founders to guard against recurrence of well-defined historic grievances"); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1247 (1995) ("provisions that appear designed more directly to *ends* as such in their proclamations of about how governments are to treat persons, and that represent not the system's *architecture*, but its *aspirations*, ought perhaps to be read through lenses refined by each succeeding generation's vision of how these ends are best understood and realized").

343. Weems v. United States, 217 U.S. 349, 373 (1910). The Supreme Court stated:

> Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no

although the concern there was more in extending a previously established value to new settings than in the possible recognition of new fundamental values.

Other commentators have argued that the character of the Bill of Rights as a whole make such an original understanding of due process most unlikely.[344] They note that neither the background of the adoption of the Bill of Rights nor the contemporary statements of commentators and courts suggest that the Fifth Amendment's due process clause would have been designed to allow judges to add to the extensive list of constitutionally required procedures placed in the Fourth, Fifth, Sixth and Eighth Amendments. Rather, they argue, those sources indicate that the Bill of Rights was offered as a response to those who feared that the new central government would "snatch back the freedoms so recently won in the Revolutionary War."[345] It thus was "a promise that the known rights would not be lost," designed to preserve procedural rights such as jury trial and indictment, and not to give to courts a new authority to "find and enforce whatever procedures judges thought important when the government threatened the people with loss."[346]

### *D. Methodology*

The adoption of a flexible open-ended conception of procedural due process lead to some modifications in the factors considered in determining whether a particular procedural claim reflected a fundamental right.[347] In 1957, Sanford Kadish, in a perceptive analysis of "methodology and criteria in due process adjudication,"[348] identified four sources as most frequently cited

> prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.

*Id.*

344. *See* Easterbrook, *supra* note 32; CROSSKEY, *supra* note 42; Berger, *supra* note 43; Wolfe, *supra* note 44. Although these commentators offer different views of the original meaning of the clause, none suggest a design for the open-ended function advanced by Redish and Marshall. *But see* MOTT, *supra* note 28 (offering some support for that view).

345. Easterbrook, *supra* note 32, at 94-95.

346. *Id.*

347. This arguably was only one strand in the Court's adoption of a more activist stance in applying constitutional limitations to the criminal justice process. Commentators tend to view the post-*Powell* decisions of the pre-incorporation era as much more receptive to finding a denial of fundamental fairness than the pre-*Powell* decisions. *See, e.g.*, 1 TREATISE, *supra* note 1, § 2.4(c)-(d); Nowak, *supra* note 14, at 398. As to the factors that may have contributed to this shift, see Francis A. Allen, *The Supreme Court, Federalism and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213 (1958); Henry P. Weihofen, *Supreme Court Review of State Criminal Procedure*, 10 AM. J. LEGAL HIST. 189 (1966); 1 TREATISE, *supra* note 1, §§ 2.8(c)-2.11, at 622-723.

348. Kadish, *supra* note 327, at 319.

by the Court in determining whether a particular right or prohibition was fundamental. Those were:

> (1) the opinions of the progenitors and architects of American institutions; (2) the implicit opinions of the policy-making organs of state governments; (3) the explicit opinions of other American courts that have evaluated the fundamentality of a given mode of procedure; or, (4) the opinions of other countries in the Anglo-Saxon tradition "not less civilized than our own" as reflected in their statutes, decisions and practices.[349]

Looking to each of these sources arguably was consistent with *Hurtado*, but in some instances, their use was somewhat different than what would have been suggested by *Hurtado*.

Looking to the "opinions of the progenitors and architects of American institutions" was consistent with *Hurtado*'s examination of the views of Coke, Kent and others.[350] Also included in this category was the settled usage of the common law as it existed at the time of the adoption of the Constitution.[351] Of course, the sanction of settled usage no longer ended the due process inquiry, as it would have under *Hurtado*, but that sanction remained an important factor in sustaining a practice against a constitutional challenge.[352] Indeed, in one respect, its scope arguably was expanded, as the Court took account of the sanction of lengthy historical traditions that did not extend so far back as to have been part of the common law at the time of the adoption of the Fifth Amendment.[353]

The position of the common law also could bear upon whether the departure from an earlier practice violated a fundamental right, but here the focus was not simply on whether the practice had been accepted at common law, but on whether its settled usage had been treated as a matter of constitutional right under the early state constitutions or simply as a practice authorized by legislation.[354] This use of history also was consistent with *Hurtado*.

Looking to "the implicit opinions of the policy-making organs of state governments" shifted the focus, in part, from history to the current status of the law throughout the United States. The *Hurtado* majority opinion did not call

349. *Id.* at 328.

350. *See supra* text accompanying note 83.

351. *See, e.g.*, Twining v. New Jersey, 211 U.S. 78 (1908); Snyder v. Massachusetts, 291 U.S. 97 (1934); Betts v. Brady, 316 U.S. 455 (1942).

352. *See, e.g.*, Snyder v. Massachusetts, 291 U.S. 97 (1934); Betts v. Brady, 316 U.S. 455 (1942); Solesbee v. Balkcom, 339 U.S. 9 (1950).

353. *See, e.g.*, Leland v. Oregon, 343 U.S. 790, 796-98 (1952) (state law requiring the defendant to prove that he was insane was consistent with a widespread movement following the liberalization of insanity defense in 1843).

354. *See, e.g.*, Betts v. Brady, 316 U.S. 455, 465-68 (1942); Twining v. New Jersey, 211 U.S. 78, 107-10 (1908).

attention to what state law in 1884 had to say about prosecution by indictment (perhaps because a substantial majority of the states still required prosecution by indictment for all felonies).[355] However, giving weight to a widespread state departure from a right recognized at the time of the adoption of the Constitution certainly was relevant to standards noted in *Hurtado*. Such a consensus would suggest that the departure from the common law had not been "arbitrary,"[356] and that the common law position hardly reflected a fundamental right which our system of jurisprudence "has always recognized."[357] As the Court noted in *Leland v. Oregon*[358]: "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether that practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[359]

The innovative role of a widespread state consensus in the pre-incorporation cases was as evidence that a contrary state provision did violate due process. This role was seen in two quite distinct settings. The first was that in which there was a widespread continued acceptance of a traditional practice, but a small group of states had departed from that practice. *Hurtado* had recognized the need to give states the opportunity to reform the common law in accordance with "modern ideas of self government,"[360] and such a movement would not necessarily capture the immediate attention of a substantial number of states. This would suggest that the failure to be in the mainstream should not work against an innovative state. However, pre-incorporation cases on at least two occasions relied on the continued widespread acceptance of common law positions in holding that state departures from those positions violated due process.[361] While in *Leland v.*

355. The *Hurtado* dissent did look to the status of state law at the time of the adoption of the Fourteenth Amendment. *Hurtado*, 110 U.S. at 556. *See also* discussion *supra* in text accompanying note 176. The majority, however, cited only the Connecticut constitutional provision, which had significance because it was adopted not too long after the Federal Constitution and had been in force when the Fourteenth Amendment was adopted. *Hurtado*, 100 U.S. at 537. *See also supra* text accompanying notes 85 and 173-75.

356. *See supra* text accompanying note 180.

357. *See supra* text accompanying note 186.

358. 343 U.S. 790 (1952).

359. *Id.* at 798 (quoting in part Snyder v. Massachusetts, 291 U. S. 97, 105 (1934), discussed *supra* note 249).

360. *See supra* text accompanying note 128.

361. *See* Tumey v. Ohio, 273 U.S. 510, 528 (1927) (Ohio was one of only a small group of states that had departed from the strict common prohibition against tying the judicial fee structure to convictions.); *In re* Oliver, 333 U.S. 257, 266-72 (1948) (in allowing its one-person grand jury proceeding to be converted into a contempt proceeding against a witness, Michigan stood alone in allowing a closed contempt proceeding).

*Oregon*[362] the Court did sustain a state practice that stood alone in departing from tradition, it did so on the ground that practical significance of the particular departure was not "of such magnitude as to be significant in determining the constitutional question."[363]

A widespread consensus could also be cited as evidence of an evolving sense of justice that rejected a common law practice and thereby rendered constitutionally suspect the few state rulings or statutes that continued to authorize that practice. As Professor Kadish noted, this use of a state consensus "found favor primarily in dissenting opinions."[364] However, a broad consensus favoring a right that was contrary to the practice at common law was cited in occasional majority opinions as further support for an analysis which held the particular right to be constitutionally mandated as a logical prerequisite of fairness.[365]

Consideration of the views of other American courts on the character of a particular right was entirely consistent in one sense with *Hurtado*, which had taken note of the *Jones v. Robbins* decision.[366] *Hurtado*, however, viewed *Jones* as significant only insofar as it found the *Jones* reasoning to be persuasive. The pre-incorporation cases suggested that weight was to be given to a consensus (or lack of consensus) among the state courts as to whether a particular right was fundamental because that consensus (or lack of consensus) was in itself evidence of the ranking of that right in American society.[367] It provided an additional evaluative element, helpful in assessing whether a widespread state prohibition of a particular practice was viewed simply as a product of a policy preference or as a recognition of a "privilege [deemed] so fundamental as to be inherent in every concept of a fair trial."[368]

362. 343 U.S. 790 (1952).

363. *Leland*, 343 U.S. at 798. The Court noted that a strong tradition supported shifting to the defendant the burden of establishing an insanity defense, and the practical difference in Oregon's somewhat heavier burden of proof (proof beyond a reasonable doubt) did not convert a constitutionally acceptable practice into one that violated a fundamental right. *Id. See also supra* text accompanying note 359.

364. Kadish, *supra* note 327, at 331 (citing as illustrations Justice Frankfurter's dissent in Solesbee v. Balkcom, 339 U.S. 9, 14 (1950); Justice Roberts' dissent in Snyder v. Massachusetts, 291 U.S. 97, 123 (1934); and Chief Justice Vinson's dissent in Brock v. North Carolina, 344 U.S. 424, 429 (1953)). At least in the first two cases, there was some question as to whether the overwhelming consensus rejected the specific practice at issue.

365. *See* Powell v. Alabama, 287 U.S. 45, 65 (1932), discussed *supra* in text accompanying note 288 and *infra* in text accompanying note 376; Griffin v. Illinois, 351 U.S. 12, 18-19 (1956), discussed *supra* in text accompanying note 316 and *infra* in text accompanying note 416.

366. *See supra* text accompanying note 63.

367. *See, e.g.*, Snyder v. Massachusetts, 291 U.S. 97 (1934); Wolf v. Colorado, 338 U.S. 25 (1949); Betts v. Brady, 316 U.S. 455 (1942).

368. *See Snyder*, 291 U. S. at 120.

*Hurtado* spoke of due process protecting those "general principles of public liberty and private right, which lie at the foundation of all free government."[369] This suggested that the status of a particular right in the law of other democratic countries would be relevant in determining whether that right was so basic as to be protected by due process. However, *Hurtado* also used language suggesting that the proper frame of reference was the American tradition, or at least was no broader than the tradition in other countries with systems derived from the English common law.[370] In *Twining v. New Jersey*,[371] the Court referred to the fact that the privilege against self-incrimination had "no place in the jurisprudence of civilized and free countries outside the domain of the common law."[372] In later years, the Court came to speak only of the experience in other "English-speaking" countries.[373] Yet other cases, though not referring to specific countries, offered descriptions of due process entirely consistent with *Hurtado*'s suggestion that due process should not preclude legislative borrowing of the "best ideas of all systems,"[374] including civil law systems.[375]

Professor Kadish also took note of another mode of analysis which allowed the Court to find a particular practice fundamentally unfair notwithstanding the contrary indication of the four sources discussed above. At times, the Court relied upon deductive reasoning that started from some basic procedural element that due process obviously demanded. Thus, in *Powell v. Alabama*,[376] the right to the assistance of appointed counsel was deduced from the right to a hearing. Due process obviously included a right to a hearing at which the defendant could present his case and challenge the state's case. However, for many defendants, those opportunities would be meaningless without the assistance of counsel. Accordingly, the Court reasoned, when an indigent defendant fell in that category, due process required that he be given an appointed counsel.[377] This was so, the Court later noted in *Betts v. Brady*,[378] even though the right to counsel recognized at the time of the adoption of the Constitution had not included a right to appointed counsel, and there was no

369. *See Hurtado*, 110 U.S. at 521.

370. *See supra* text accompanying notes 194-96.

371. 211 U.S. 78 (1908).

372. *Twining*, 211 U.S. at 113.

373. *See, e.g.*, Wolf v. Colorado, 338 U.S. 25, 28 (1949). *See also* Stein v. New York, 346 U.S. 156, 199 (1953) (Frankfurter, J., dissenting); Malinski v. New York, 324 U.S. 401, 416-17 (1945) (Frankfurter, J., concurring).

374. *Hurtado*, 110 U.S. at 531. See *supra* text accompanying note 130.

375. *See supra* text accompanying note 135.

376. 287 U.S. 45 (1932).

377. *See id.* at 68-69. *See also* 3 TREATISE, *supra* note 1, § 11.1.

378. 316 U.S. 455 (1942).

consensus among the states on providing counsel for indigents in non-capital cases.[379]

As illustrated by *Powell* and *Betts*, a deductive analysis could lead to mandating a particular procedure that was contrary to the common law tradition, based upon such factors as changes in the institutional structure of the criminal justice process and newly-developed insights into the human experience. It thus allowed for evolution in the content of due process without being able to point to the usual indicia of a fundamental shift in society's sense of fairness. The failure of more states to recognize the need for appointed counsel could be discounted as the product of inertia or even legislative or judicial willingness to allow expediency to override principle. Deductive analysis could also lead to a ruling which did not challenge the general structure of the state's law, but found a combination of special circumstances to have resulted in a denial of a basic element of a fair hearing in the particular case. Thus, state law might properly be based upon the assumption that jurors who are familiar with pre-judicial, pre-trial publicity may put aside what they have learned and render judgment impartially based on the evidence presented, but the particular circumstances of an inflamed community and the responses of jurors on voir dire may lead the court to conclude that the likelihood of juror prejudice was so great in the particular case as to have violated due process.[380]

Commentators suggested that the Court's employment of deductive analysis could lead to the Court openly balancing costs and benefits in determining what was required by due process. It was hoped that the Court would identify the basic values protected by due process, determine the extent to which a particular procedure would implement those values, and then weigh against that benefit the competing interests (frequently administrative) advanced by the state.[381] However, the Court eschewed such an approach, noting the need to be especially cautious in utilizing deductive reasoning where its conclusion did not find support in one or more of the four traditional criteria previously noted. Thus, in *Snyder v. Massachusetts*,[382] the Court was unwilling to hold that defendant's presence at a jury inspection of the scene of the crime was an essential prerequisite of defendant's due process right to defend himself against the charge. The states were divided on the issue, and although the defendant's presence had its advantages, a procedure would not be deemed contrary to the Fourteenth Amendment "because another method

379. *See id.* at 471-73. *See also* 3 TREATISE, *supra* note 1, § 11.1(a).

380. *See, e.g.*, Irvin v. Dowd, 366 U.S. 717 (1961).

381. *See* Kadish, *supra* note 327, at 346-63 (first proposing such a process of "rational inquiry," but also noting the institutional limitations of the Court). *See also* Schaefer, *supra* note 328, at 5-6; Nowak, *supra* note 14, at 401-03 (urging the adoption of such a methodology in the post-incorporation era).

382. 291 U.S. 97 (1934).

may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar."[383]

Although deductive analysis could lead to finding unconstitutional a long-standing, common state practice (as in *Powell*/*Betts*[384]), such rulings were exceptional in the pre-incorporation era.[385] Most of the pre-incorporation cases finding a due process violation based upon a deductive analysis involved state practices so clearly contrary to traditional standards, *e.g.*, the use of perjured testimony,[386] that they obviously lacked support in the common law or the consensus of state law.[387] Where tradition clearly supported a particular practice, the Court often based its analysis entirely on that history,[388] but when it also went on to consider a contention based on a deductive analysis, that did not necessarily produce a conflict with tradition. Indeed, the institutional changes taken into consideration under a deductive analysis could lend further support to the conclusion that the practice in question did not interfere with a fundamental right.[389]

### *E. The "independent content" cases*

Although all due process cases of the pre-incorporation decades rested on the "independent potency"[390] of due process, the vast majority involved claims

383. *Snyder*, 291 U.S. at 105.

384. *See supra* text accompanying notes 304-09.

385. Another such example might be *Griffin v. Illinois*, 351 U.S. 12 (1954), described *infra* in text accompanying note 416. Although the Court majority there stated that only a few states failed to facilitate appeals by indigents, Justice Harlan's dissent argued that at least nineteen states failed to require the free transcripts demanded by the Court's ruling (although at least five expressly recognized a discretionary authority to provide such transcripts).

386. *See* Mooney v. Holohan, 294 U.S. 103, 112 (1935), discussed *infra* in text accompanying note 396.

387. *See, e.g.*, *In re* Murchison, 349 U.S. 133 (1955), discussed *infra* in text accompanying note 406. *See also* Reece v. Georgia, 350 U.S. 85 (1956). In *Reece*, the defendant in a state prosecution was indicted by a grand jury impaneled and sworn eight days before his arrest and reconvened under an order that did not list the defendant as a person whose case was being considered. *Id.* at 89. The defendant had been arrested two days earlier and did not have counsel. The Court found the application of a state rule requiring challenges to the grand jury's composition be made before indictment deprived him of the opportunity to challenge racial discrimination in the composition of the grand jury and therefore denied due process. *Id.* at 89-90.

388. This was particularly true of its earlier pre-incorporation rulings. *See, e.g.*, Twining v. New Jersey, 211 U.S. 78 (1908). It was also the case, however, for some of its later rulings. *See, e.g.*, Adamson v. California, 332 U.S. 46 (1947); Solesbee v. Balkcom, 339 U.S. 9 (1950).

389. *See, e.g.*, Williams v. New York, 337 U.S. 241, 246-47 (1949) (stating that inapplicability of evidentiary rules in sentencing proceeding found support not only in history, but in "modern concepts [of] individualizing punishment," which "made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial").

390. Adamson v. California, 332 U.S. 44, 66 (1947) (Frankfurter, J., concurring).

that would have been considered under specific guarantees of the Bill of Rights had they been advanced in federal cases. There was, however, a comparatively small group of rulings dealing with claims that presumably would not have found a home in the specific guarantees, and therefore would have been presented as Fifth Amendment due process claims in federal cases. In general, the Court did not treat these cases as presenting a separate breed of due process claim and rarely even mentioned that the right claimed did not have a parallel in a specific guarantee.[391]

The successful claims among this group of rulings tended to involve the trial phase of the process, with the Court finding a departure from the basics mentioned in *Hurtado*. In the first such ruling, *Moore v. Dempsey*,[392] the trial was alleged to have been mob dominated, with an "adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result [*i.e.*, a conviction]."[393] In such a situation, the Court reasoned, the trial was a "mask" and due process was denied when "the State Courts failed to correct the wrong . . . ."[394] Although the Court did not refer to *Hurtado*'s discussion of the law of the land, *Moore* was a case in which a defendant had been denied a true application of the "standing law."[395] In *Mooney v. Holohan*,[396] the Court found that much the same principle applied where the state deliberately deceived the trial court and jury by "the presentation of testimony known to be perjured."[397] Here, as in *Moore*, the Court found no need to examine the common law tradition or the consensus of the states, although the practice obviously had no support. "Such a contrivance by a State to procure the conviction and imprisonment of a defendant" was simply "inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."[398] Arguably similar were two cases in which the Court found due process violations because the defendant was

391. For an exception, see *Leland v. Oregon*, 343 U.S. 790, 798 (1952) (noting that it was not being asked "to enforce against the states a right which we have held to be secured to defendants in federal courts by the Bill of Rights").

392. 261 U.S. 86 (1923).

393. *Moore*, 261 U.S. at 89.

394. *Id.* at 91.

395. *But see* Easterbrook, *supra* note 32, at 105. Easterbrook argued:

> In *Moore v. Dempsey* the Court held that kangaroo courts are unconstitutional. There could have been no serious dispute about this outcome: the defendant received neither the (statutory) law of the land nor Coke's minima. The case is significant because of the way it reached the result: the opinion is reasoned wholly as a matter of natural law, with no reference to statutes, historically recognized procedures, or any of the earlier due process decisions.

396. 294 U.S. 103 (1935).

397. *Mooney*, 294 U.S. at 112.

398. *Id.*

convicted without any evidence that the defendant committed the crime charged.[399]

The Sixth Amendment right to jury trial mandates an "impartial jury," but there is no similar express provision as to the neutrality of the judge. However, *Tumey v. Ohio*[400] reasoned that an unbiased decisionmaker was a basic element of a fair hearing, a conclusion that was in accord with *Hurtado*'s description of such a hearing. In determining whether that element was denied when a judge had a "direct, personal, [and] substantial, pecuniary interest"[401] in a conviction, here arising from the magistrate receiving a major part of his fee in the form of court costs imposed upon a convicted defendant, the Court looked to those "settled usages" in the "law of England" that had been followed in this country.[402] Finding in the common law "the greatest sensitiveness over the existence of any pecuniary interest however small or infinitesimal, in the justices of the peace,"[403] and finding further that this "strict principle"[404] had been adopted in this country in all but a small group of states, the Court concluded that "a system by which an inferior judge is paid for his service only when he convicts the defendant has not become so embedded by custom in the general practice either at common law or in this country that it can be regarded as due process of law, unless the costs usually imposed are so

399. In *Tot v. United States*, 319 U.S. 463, 464 (1943), a federal statute made it a crime for certain classes of persons to receive any firearm shipped in interstate commerce after a certain date. The statute further provided that the possession of a firearm by such a person was presumptive evidence (*i.e.*, sufficient to convict) of the firearm having been shipped in interstate commerce in violation of the Act. The Court concluded that there was no rational relationship between the fact proved (possession) and the ultimate fact presumed (the interstate transportation), resulting in a violation of due process. *Id.* at 466. The Court characterized the presumption as arbitrary and therefore contrary to the due process "limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicted." *Id.* at 467. It did not explain what it was in due process that provided the source for that limit. It did suggest that due process required the state to prove its case, noting that it surely would not be permissible for a legislature to command "that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt." *Id.* at 469. *See also* Manley v. Georgia, 279 U.S. 1 (1929).

In *Thompson v. Louisville*, 362 U.S. 199 (1960), the defendant was convicted of disorderly conduct, an offense that required one of three distinct types of conduct. *Id.* at 204. The only evidence offered against the defendant was that he was doing a dance by himself in a local cafe while waiting for a bus. *Id.* at 205. Such behavior clearly did not fit any of the three categories specified in the statute. The Court noted that "[j]ust as [c]onviction upon a charge not made would be [a] sheer denial of due process [citing notice cases], so is it a violation of due process to convict and punish a man without evidence of his guilt." *Id.* at 206.

400. 273 U.S. 510 (1927).

401. *Tumey*, 273 U.S. at 523.

402. *Id.*

403. *Id.* at 526.

404. *Id.* at 528.

small that they may be properly ignored as within the maxim *de minimis non curat lex*."[405]

*In re Murchison*[406] found a similar due process violation in a unique state procedure under which a judge sat as a one-person grand jury in a closed inquiry, initiated a contempt charge against a recalcitrant witness, and then proceeded in a separate, open proceeding to try the contempt charge. The Court took care to distinguish the common law practice which allowed a trial judge to preside in a summary contempt proceeding against a witness, noting that the proceeding here presented unique aggravating circumstances (in particular, the alleged contempt had occurred in a closed proceeding with the judge a key witness). As in *Tumey*, the *Murchison* Court refused to apply a totality of the circumstances approach that would have required a specific showing of prejudice based on a particular ruling as to which the judge was presumably influenced by his interest in the case.[407] It noted that "fairness . . . requires an absence of actual bias in the trial of cases," but in establishing the general principle that "no man is permitted to try cases where he has an interest in the outcome," the common law had "always endeavored to prevent even the probability of unfairness."[408] Here, due process recognized that, "to perform its high function in the best way, 'justice must satisfy the appearance of justice.'"[409]

*Hurtado* had suggested that due process was limited to the basic elements of a trial-type adjudication. However, as previously noted,[410] the Court's movement to a flexible, open-ended conception of due process in the pre-incorporation era led it to gradually absorb within due process aspects of specific Bill of Rights guarantees that went beyond the adjudication of guilt. Initially, the Court illustrated some reluctance to move in the same direction as to procedural rights that had no parallel in the specific guarantees, but it eventually did so. In the 1913 ruling of *Lem Woon v. Oregon*,[411] the Court held that due process was not violated where a felony prosecution was initiated by a prosecutor's information without the prerequisite of a magistrate's finding of probable cause at a preliminary hearing (which had been present in *Hurtado*). Citing *Hurtado*, the *Lem Woon* Court noted that if due process did not require the screening of a charge by the grand jury, neither did it require

405. *Id.* at 531.

406. 349 U.S. 133 (1955).

407. The Court did point to the judge having relied upon his own recollection of the witness' attitude in the grand jury proceeding (which was closed), but it cited that as an illustration of the invariable potential for prejudice when the judge later presided at the contempt trial, not as a prerequisite for finding a due process violation. *Murchison*, 349 U.S. at 138.

408. *Id.* at 136.

409. *Id.* (quoting Offut v. United States, 348 U.S. 11, 14 (1954)).

410. *See supra* text accompanying notes 270-300.

411. 229 U.S. 586 (1913).

magistrate screening at a preliminary hearing. The key apparently was that the defendant would receive a fair hearing in the adjudication of his guilt. In another early case, *McKane v. Durston*,[412] the Court held that due process did not require New York to follow the path of the states that stayed the execution of sentence pending disposition of defendant's appeal.[413] The Court noted: "[A] review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process."[414] The focus apparently was strictly on the adjudication of guilt.Starting in the 1930s, as the Court expanded the absorption of rights found in the specific guarantees, it gradually also expanded the stages governed by other due process restrictions. Two groups of cases went beyond trial-type adjudication in establishing fundamental rights that were distinct from the specific guarantees. In addition, other cases, though not finding a due process violation, strongly suggested that that content of due process, which lacked a parallel in specific guarantees could readily extend to all stages of the criminal justice process.[415]

In *Griffin v. Illinois*[416] and its progeny,[417] the Court extended due process to the appellate process and did so through an analysis that accepted the evolving character of due process. *Griffin* relied in part on due process to hold unconstitutional state prerequisites for appellate review that restricted the availability of such review for those convicted defendants who were indigent. The Court acknowledged that due process did not require a state to provide any appellate review.[418] However, once a state had done so as a general matter, making appellate review "an integral part of the [state] trial system for finally adjudicating the guilt or innocence of a defendant," the state could not draw a distinction based on "poverty," for "an ability to pay costs in advance bears no

412. 153 U.S. 684 (1894).

413. *McKane*, 153 U.S. at 688. *See also* Reetz v. Michigan, 188 U.S. 505, 508 (1903).

414. *McKane*, 153 U.S. at 687.

415. Thus, in *Williams v. New York*, 337 U.S. 241, 252 (1949), the Court held that due process did not preclude a judge's reliance upon out-of-court information in imposing a discretionary sentence. Justice Black's opinion for the Court pointed to the sanction of historical usage (which traditionally gave sentencing judges wide discretion in the sources and types of evidence relied upon) but also justified the grant of such discretion within the context of modern concepts of sentencing, which focused upon individualizing punishment. The latter argument suggested that a contrary position could have been reached, notwithstanding the historical sanction, if changes in the sentencing context had required a new standard of fairness. *See also* Williams v. Oklahoma, 358 U.S. 576, 587 (1959); Solesbee v. Balkcom, 339 U.S. 9, 12-13 (1950).

416. 351 U.S. 12, 24 (1954).

417. *See* Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214, 216 (1958); Barnes v. Ohio, 360 U.S. 252, 258 (1959).

418. *See* McKane v. Durston, 153 U.S. 684, 688 (1894), discussed *supra* in text accompanying note 412.

rational relationship to the defendant's guilt or innocence."[419] While such a distinction obviously had the sanction of historical usage, it was a "misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law."[420] *Griffin* thus was a more dramatic rejection of settled usage than *Powell v. Alabama* and *Betts v. Brady*. Those cases had dealt with settled usage at trial and had overridden that usage by reference to the function of the right to counsel, which was held to have no rational relationship to an indigency distinction.[421] *Griffin* dealt with a later and less significant stage of the process and announced that a state-imposed indigency distinction was contrary to the values underlying the administration of the criminal justice process as a whole. It recognized a general state obligation to assist the indigent in the criminal justice process that arguably found support in the current national sense of justice,[422] but clearly was contrary to accepted tradition until well into the twentieth century, that tradition having treated such state assistance merely as a matter of grace.[423]

In a series of rulings on coerced confessions,[424] the Court similarly extended due process to the investigative process and incorporated new values. Those rulings clearly went beyond the concern of the common law that confessions admitted in evidence not have been obtained by means that render suspect their reliability.[425] Later cases suggest that the Court may simply have been applying an aspect of the privilege against self-incrimination,[426] but the extension of the privilege beyond the compulsion of a court order to testify had not yet been established,[427] and the coerced confession opinions generally did not refer to the self-incrimination privilege.[428] The Court clearly recognized in

419. *Griffin*, 351 U.S. at 17-18.

420. *Id.* at 19.

421. *See supra* text accompanying notes 376-79.

422. *See* Powell v. Alabama, 287 U.S. 45 (1932), discussed *supra* notes 288, 365 and 376-79; Griffin v. Illinois, 351 U.S. 12 (1956), discussed *supra* at notes 365, 385 and 419. As to the other aspects of that obligation, see *Ake v. Oklahoma*, 470 U.S. 68 (1985), *Evitts v. Lucey*, 469 U.S. 387 (1985), *Douglas v. California*, 372 U.S. 353 (1963), and *Ross v. Moffitt*, 417 U.S. 600 (1974).

423. *See generally* REGINALD HEBER SMITH, JUSTICE AND THE POOR (1919); Betts v. Brady, 316 U.S. 455 (1942), discussed *supra* note 309; 1 TREATISE, *supra* note 1, § 1.5(e), at 277.

424. *See, e.g.*, Spano v. New York, 360 U.S. 315 (1959); Leyra v. Denno, 347 U.S. 556 (1954); Blackburn v. Alabama, 361 U.S. 199 (1960).

425. *See supra* note 313.

426. *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964). Although the Fifth Amendment foundation for the exclusion of coerced confession is now commonly cited by the Court, it also continues to refer to due process as a separate grounding for that requirement. *See, e.g.*, Dickerson v. United States, 120 S. Ct. 2326, 2331 (2000); Withrow v. Williams, 507 U.S. 680, 688 (1993); Colorado v. Connelly, 479 U.S. 157 (1986).

427. *See* 2 TREATISE, *supra* note 1, §§ 6.2(a)-(b), 6.5(a).

428. *But see* Justice Black's opinion for the Court in Lyra v. Denno, 347 U.S. 556, 558 & n.3 (1954); Culombe v. Connecticut, 367 U.S. 568, 585 (1961) (Frankfurter, J., separate opinion)

its coerced confession rulings the potential for evolutionary change in society's sense of justice, citing a new perspective on those burdens that would not be tolerated in obtaining a confession from a suspect.[429] Confessions could be deemed coerced "not because such confessions are unlikely to be true but because the methods used to extract them offend [the] underlying principle . . . that ours is an accusatorial and not an inquisitorial system."[430]

### *F. The subjectivity challenge*

In *Adamson v. California*,[431] Justice Black launched a vigorous attack against the fundamental fairness doctrine, stressing *inter alia* its potential for subjectivity.[432] Justice Black contended that the fundamental fairness doctrine permitted the Court to "substitut[e] its own concepts of decency and fundamental justice for the language of the Bill of Rights." Application of the fundamental fairness concept, he noted, "depended entirely on the particular judge's idea of ethics and morals" rather than upon "boundaries fixed by the written words of the Constitution." Although Justice Black thought that many fundamental fairness rulings reflected this basically idiosyncratic approach to adjudication, perhaps his prime examples, as noted in later opinions, were the

("[C]onceptions underlying the rule excluding coerced confessions and the privilege against self-incrimination have become, to some extent, assimilated.").

429. *See* Malinski v. New York, 324 U.S. 401, 416-20 (1945) (Frankfurter, J., concurring).

430. Rogers v. Richmond, 365 U.S. 534, 540-41 (1961). *See also* Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944) ("[I]t is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross-examination for thirty-six hours without rest or sleep in an effort to extract a 'voluntary' confession. Nor can we, consistently with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open court room.").

431. 332 U.S. 46 (1947).

432. Similar objections have been advanced over the years as to the ordered liberty standard as applied to substantive due process. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Poe v. Ullman, 367 U.S. 497 (1961) (Douglas, J., dissenting) (quoting the comments of Justice Roberts, the cases will fall "on one side of the line or the other as a majority of nine Justices appraise conduct as either implicit in the confines of ordered liberty or as lying without the confines of that vague concept"); Robinson v. California, 370 U.S. 660, 689 (1962) (White, J. dissenting) (reading of cruel and unusual punishment clause as a substantive limit on legislative authority to criminalize contrasted to Court's "allergy to substantive due process" in economic regulation, which "prevent[s] the Court from imposing its own philosophical predilections upon state legislatures or Congress"). Those objections obviously influenced Justice Black. *See* Comment, *The* Adamson *Case: A Study in Constitutional Technique*, 58 YALE L.J. 268, 275 (1949) ("Pervading the pages of his [*Adamson*] dissent is Justice Black's distrust of the vagueness and uncertainty of the due process formula. He is haunted by the specter of due process as a clog on state economic legislation. His concern is to prevent a return to that charismatic jurisprudence which enabled the Court to substitute its views on economic policy for those of the legislature.").

totality of the circumstances rulings of *Rochin v. California*[433] and *Irvine v. California*,[434] which applied a "shock the conscience" standard.

Justice Frankfurter, in particular, took sharp exception to Justice Black's characterization of the Court's fundamental fairness analysis as basically subjective. Admittedly, the case-by-case application of the fundamental fairness standard required the exercise of judicial judgment in an "empiric process" for which there was no "mechanical yardstick."[435] That did not mean, however, that judges were "at large" to draw upon their "merely personal and private notions" of justice.[436] In each application of due process, the Court was required to undertake a "disinterested inquiry pursued in the spirit of science."[437] Justice Frankfurter emphasized that, in conducting that inquiry, the Court was subject to the very important limits of reasoned results, the limited role of judicial review,[438] "deference to the judgment of the state court

433. 342 U.S. 165 (1952). In *Rochin*, the police, having "some information" that defendant was selling narcotics, entered his home without a warrant and forced open the door to his bedroom. *Id.* at 166. When the surprised defendant immediately shoved into his mouth two capsules believed to be narcotics, the police grabbed him and attempted to extract the capsules, which defendant then swallowed. The police then took the protesting defendant to a doctor, who forced an emetic solution into defendant's stomach, causing him to vomit up the capsules. *Id.* Describing the total course of police action as "conduct that shocks the conscience," the Court held that due process no more permitted the use of the capsules in evidence than it would a coerced confession. "Due process," the Court added, was a principle that "precludes defining . . . more precisely than to say that convictions cannot be brought about by methods that "offend a sense of justice." *Id.* at 173.

434. 347 U.S. 128 (1954). In *Irvine*, the plurality described the police action as flagrant and deliberate misconduct, but held that it was not so offensive as to violate due process. *Id.* at 131. The police in *Irvine* had made repeated illegal entries into defendant's home for the purpose of installing secret microphones, including one in his bedroom, from which they listened to his conversations for over a month. *Id.* The plurality distinguished *Rochin* as a case involving "coercion, violence . . . [and] brutality to the person" rather than, as here, a "trespass to property, plus eavesdropping." *Id.* at 133. However, Justice Frankfurter, who had written for the Court in *Rochin*, concluded that the two cases were not distinguishable. *Id.* at 145-46. Though "there was lacking [in *Irvine*] physical violence, even to the restricted extent employed in *Rochin*," the police had engaged in "a more powerful and offensive control over Irvine's life than a single limited physical trespass." *Id.* The division of the Court in *Irvine*, Justice Black later noted, revealed that the "ad hoc approach" of the Court in *Rochin* and *Irvine* consisted of no more than determining whether "five justices are sufficiently revolted by local police action" to "shock [the victim of that action] into the protective arms of the Constitution." Mapp v. Ohio, 367 U.S. 643, 665 (1961) (Black, J., concurring).

435. *Irvine*, 347 U.S. at 147 (Frankfurter, J., dissenting).

436. *Rochin*, 342 U.S. at 170.

437. *Id.* at 172.

438. *Id.* at 170.

> Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process . . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising a

under review,"[439] and the very character of due process (a "large untechnical concept" which directed the Court to enforce "those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant on social institutions"[440]). Due process "thus conceived . . . [was] not to be derided as a revival of 'natural law.'"[441]

Justice Frankfurter also argued out that due process, under the fundamental fairness conception, presented an interpretative task not that much different from other provisions in the Constitution. He noted:

> In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content. Thus the requirements of the Sixth and Seventh Amendments for trial by jury in the federal courts have a rigid meaning . . . . When the gloss has thus not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges. Even more specific provisions, such as the guaranty of freedom of speech and the detailed protection against unreasonable searches and seizures, have inevitably evoked as sharp divisions in this Court as the least specific and most comprehensive protection of liberties, the Due Process Clause.[442]

Justice Black, on the other hand, argued that the difference was not one of degree, but of assuming an unauthorized authority. He acknowledged that provisions like the "reasonableness" clause of the Fourth Amendment did "require courts to chose between competing policies." However, there was "no express constitutional language granting judicial power to invalidate every state law of every kind deemed 'unreasonable' or contrary to the Court's notion of civilized decencies."[443]

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judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions.

*Id.* at 170-71 (citations omitted).

439. Malinski v. New York, 324 U.S. 401, 417 (1945) (Frankfurter, J., concurring).

440. Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., concurring).

441. *Rochin*, 342 U.S. at 171.

442. *Id.* at 169.

443. *Id.* at 175-77 (Black, J., concurring). In this respect, Justice Black's objection went beyond simply criticizing the majority standard as subjective; it also contended that the due process clause was not intended to have the character attributed to it by the majority. *Id.*

Justice Black offered a two-pronged reading of due process as an alternative to the traditional fundamental fairness position. First, due process would be read as incorporating all of the guarantees of the Bill of Rights.[444] For Justice Black, that would have included some interpretations that extended substantially beyond the traditional reading of those guarantees and encompassed protections the majority had arrived at through the content of due process that it believed to extend beyond any Bill of Rights provision.[445] While total incorporation eliminated the alleged subjectivity in determining which specific guarantees or which aspects of specific guarantees stated fundamental principles that were included within Fourteenth Amendment due process, it did not respond to the Fifth and Fourteenth Amendment guarantees including an additional evolving content defined by reference to the fundamental fairness standard. The second prong of Justice Black's alternative responded to this avenue of subjectivity. Apart from incorporation, he noted, due process did no more than grant "a right to be tried by independent and unprejudiced judges using established procedures and applying valid pre-existing law."[446] Here, Justice Black offered a combination of (1) a broad view of the standing law concept that encompassed prosecutorial or judicial efforts to undermine the defendant's exercise of rights,[447] (2) a decision based on some evidence of guilt,[448] and (3) a requirement of judicial neutrality.[449] Thus, the Black alternative probably came close to the position that had been advanced in *Hurtado*. It did not include, however, such requirements as proof beyond a reasonable doubt,[450] although here (as elsewhere[451]) Justice Black's position had not been consistent through his long tenure on the Court.[452]

444. Adamson v. California, 332 U.S. 46, 68, 74-75 (1947) (Black, J., dissenting).

445. Thus, in *Rochin v. California*, 342 U.S. 165 (1952), Justice Black found a violation of the privilege against self-incrimination because he did not limit that safeguard to the compulsion of testimony. *See* discussion *supra* note 433. Similarly, in *Tot v. United States*, 319 U.S. 463, 473 (1943), Justice Black concluded that the presumption violated the defendant's Sixth Amendment right to a jury trial. *See* discussion *supra* note 399. He also saw the coerced confession prohibition as resting on the self-incrimination clause. *See supra* note 320.

446. Duncan v. Louisiana, 391 U.S. 145, 169 (Black, J., concurring).

447. *See, e.g.*, Mooney v. Holohan, 294 U.S. 103 (1935), discussed *supra* in text accompanying note 396; North Carolina v. Pearce, 395 U.S. 711, 743-44 (1969) (Black, J., concurring) (stating due process prohibits judicial vindictiveness based on defendant's exercise of rights).

448. *See* Thompson v. Louisville, 362 U.S. 199 (1960) (Black, J., majority), discussed *supra* note 399.

449. *See In re* Murchison, 349 U.S. 133 (1955) (Black, J., majority), discussed *supra* note 406.

450. *See In re* Gault, 387 U.S. 1, 62 (1967) (Black, J., concurring); *In re* Winship, 397 U.S. 358, 382 (1970) (Black, J., dissenting). *See also* HUGO BLACK, A CONSTITUTIONAL FAITH 30-34 (1968); Roger W. Haigh, *Defining Due Process of Law: The Case of Mr. Justice Hugo Black*, 17 S.D. L. REV. 1, 18-25 (1972).

Justice Black's alternative did not gain majority support. However, his criticism of the subjectivity potential of traditional fundamental fairness analysis did contribute to the subsequent development and adoption of the selective incorporation doctrine,[453] which produced all but a small part of what Justice Black had sought through total incorporation. His criticism arguably also helped shape the later resistance to a continued application of an evolving fundamental fairness analysis in determining the content of due process that stands apart from the incorporated guarantees.

## III. THE POST-INCORPORATION ERA

During the 1960s, the prevailing due process position was restructured with the adoption of the selective incorporation doctrine.[454] That doctrine rested on two major modifications of the previously established fundamental fairness analysis. The first related strictly to the overlap of due process and the specific guarantees. Where a due process claim rested on a right protected by a specific guarantee, the traditional approach had been to assess the possibly fundamental character of only that aspect of the guarantee denied by the state in the particular case. Moreover, the Court often assessed the significance of that element of the guarantee in light of the special circumstances of the individual case. The selective incorporation doctrine, on the other hand, focused on the total guarantee rather than on the particular aspect presented in an individual case. It assesses the fundamental nature of the guarantee as a whole, rather than the fundamental nature of any one requirement of the guarantee. Consider, for example, the situation presented in *Palko v. Connecticut*.[455] Applying the fundamental fairness doctrine, the Court there asked whether the ordered liberty standard required protection against "that kind of double jeopardy"[456]—a retrial following an appellate reversal of an initial acquittal for legal error—that had been imposed upon the defendant before it. Applying the selective incorporation doctrine, the Court instead

451. *See* John Hart Ely, *Constitutional Interpretation: Its Allure and Impossibility*, 53 IND. L. REV. 399, 423-24 (1978) (arguing that Justice Black had not been consistent in his views on due process, as evidenced by a comparison of his opinion in *In re Winship*, 397 U.S. 358 (1970), and his other opinions which had concluded that "convictions by biased tribunals, under vague statutes, or based upon 'no evidence' or perjured testimony or other evidence known to be false violate due process, even though none of these defects is specifically mentioned anywhere in the Constitution").

452. *See, e.g.*, Leland v. Oregon, 343 U.S. 790, 802-07 (1952) (Frankfurter & Black, JJ., dissenting) (arguing that state could not shift to defendant the burden of establishing insanity that would relieve him of liability).

453. *See infra* text accompanying note 469.

454. *See* 1 TREATISE, *supra* note 1, § 2.5(b).

455. 302 U.S. 319 (1937).

456. *Palko*, 302 U.S. at 328.

would ask whether the ordered liberty standard encompasses the basic concept underlying the Fifth Amendment's overall prohibition against double jeopardy.[457]

The difference in the scope of the right assessed necessarily carried over to the scope of the ruling under the selective incorporation doctrine. A fundamental fairness ruling theoretically should go no farther than to establish due process protection parallel to the one aspect of the Bill of Rights guarantee presented in the particular case. Selective incorporation, however, judging the guarantee as a whole, produces a ruling that encompasses the full scope of the guarantee. When a guarantee is found to be fundamental, due process, in effect, "incorporates" that guarantee, and carries over to the states precisely the same prohibitions as apply to the federal government under that guarantee. Under selective incorporation, a ruling that a particular guarantee is within the "ordered liberty" concept makes applicable to the states "the entire accompanying doctrine" previously developed in applying that guarantee to federal criminal prosecutions.[458] This led some commentators to describe the incorporation element of selective incorporation as having a "wholesale character."[459]

The second modification of the selective incorporation doctrine related to the frame of reference utilized in determining whether a claimed right was indeed "fundamental."[460] While the traditional analysis often asked whether a "fair and enlightened system of justice" would be "impossible" without a particular safeguard,[461] selective incorporation "proceed[s] upon the . . . assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common law system that has been developing contemporaneously in England and in this country."[462] Accordingly, it directs a court to test the fundamental nature of a right within the context of that common law system of justice, rather than against some hypothesized "civilized system" or some foreign system growing out of different traditions. The question to be asked, the Court has noted, is whether "a procedure is necessary to an Anglo-American regime of ordered liberty."[463] Consistent with this approach, considerable weight is given to the very presence of a right within the Bill of Rights, since that

457. *See* 1 TREATISE, *supra* note 1, § 2.5(a), at 540-41.

458. Malloy v. Hogan, 378 U.S. 1, 16 (1964) (Harlan, J., dissenting).

459. Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 794-95 (1970); Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253, 291 (1982).

460. 1 TREATISE, *supra* note 1, § 2.5(a), at 541-42.

461. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

462. Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968).

463. *Id.*

presence in itself establishes that historically a substantial body of opinion viewed that right as essential to the fairness of the common law system.

Applying the two modifications of the selective incorporation, the Supreme Court during the 1960s concluded that due process fully incorporated: the Fourth Amendment provisions on search and seizure; the Fifth Amendment prohibitions against double jeopardy and compelled self-incrimination; the Sixth Amendment rights to a speedy trial, to a public trial, to an impartial jury, to be informed of the nature and cause of the accusation, to confrontation of adverse witnesses, to compulsory process for favorable witnesses, and to the assistance of counsel; and the Eighth Amendment prohibition of cruel and unusual punishment.[464] The Court has left unresolved the possible incorporation of the Sixth Amendment's "vicinage" provision (requiring that the jury be "of the State and district wherein the crime shall have been committed"), and the Eighth Amendment prohibitions against excessive bail and excessive fines, although it has strongly indicated that at least the Eighth Amendment prohibitions will be deemed fundamental (and incorporated) when that issue is squarely presented in an appropriate case.[465] Of all the specific guarantees aimed at the criminal justice process, only the Fifth Amendment requirement of prosecution by indictment or presentment quite clearly will not be incorporated. That aspect of *Hurtado* repeatedly has been affirmed.[466]

There are those who argue that the selective incorporation doctrine has no coherent constitutional rationale.[467] They contend that selective incorporation constitutes no more than a result-oriented modification of the previously rejected total incorporation theory—a doctrine devised to achieve total incorporation, minus the pragmatically troubling civil jury trial and grand jury guarantees. The Court wanted to expand Fourteenth Amendment protection to encompass all but those few guarantees that would cause the greatest disruption if applied to the states, and selective incorporation was created and accepted because it could eventually lead to exactly that result. Selective incorporation, these critics argue, is a doctrine that lacks the textual and historical support of either total incorporation or fundamental fairness, a doctrine justified only by its end product.

464. *See* 1 TREATISE, *supra* note 1, § 2.6(a) (collecting cases).

465. *See* 1 *id.*, § 2.6(b) (discussing the relevant rulings).

466. *See* 4 *id.*, § 15.1(c), at 220 n.141.

467. *See, e.g.*, *Duncan*, 391 U.S. at 171 (Harlan J., dissenting); Charles Rice, *The Bill of Rights and the Doctrine of Incorporation*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 11, 14 (Eugene W. Hickok, Jr. ed., 1981); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 937 (1965); RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 11-18 (1989). *See also* Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1964).

While the Supreme Court majority never responded to such criticism, individual justices did so in separate opinions.[468] One point frequently made in those opinions was that selective incorporation would reduce the potential for impermissible subjective judgments in defining due process.[469] Taking a page from Justice Black's argument favoring total incorporation, justices supporting selective incorporation maintained that utilizing selective incorporation would avoid much of the subjectivity inherent in the application of the fundamental fairness doctrine. They noted initially that the selective incorporation doctrine, in contrast to the fundamental fairness doctrine, would not look to the "totality of the circumstances" in a particular case in determining whether a right is necessary to "ordered liberty." To permit evaluation of a right in light of "the factual circumstances surrounding each individual case" led, in their view, to judgments that were "extremely subjective and excessively discretionary."[470] Selective incorporation was also said to reduce subjectivity by focusing on the fundamental nature of the Bill of Rights guarantee as a whole, rather than on a particular aspect of the guarantee. "[O]nly impermissible subjective judgments," it was argued, "can explain stopping short of the incorporation of the full sweep of the specific [guarantee] being absorbed."[471] Finally, under selective incorporation, once a guarantee was held fundamental, discretion was reduced because the Court's analysis thereafter would rest on the language and history of the guarantee. There was no need for reference, in case after case, to an "evolving standard" of due process. This was deemed significant even if one assumed, as Justice Frankfurter had argued, that the determination of fundamental fairness is guided by objective evidence of pervasive notions of justice. Selective incorporation, once applied, would still offer the advantage of "avoid[ing] the impression of personal, ad hoc adjudication by every court which attempts to apply the vague contents and contours of 'ordered liberty' to every different case that comes before it."[472]

The concerns expressed as to the role of subjectivity in the application of the traditional fundamental fairness standard also bore upon the application of that standard to claims that did not rest upon an incorporated guarantee. Admittedly, the two modifications of fundamental fairness that provided the

468. *See, e.g.*, Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 274-75 (1960) (4-4 decision) (Brennan, J.); Cohen v. Hurley, 366 U.S. 117, 154 (1961) (Brennan, J., dissenting); Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (Douglas, J., concurring); Pointer v. Texas, 380 U.S. 400, 410 (1965) (Goldberg, J., concurring). The lack of any full-fledged exposition of the rationale of selective incorporation in a majority opinion may be explained in part by the composition of the majority in the earlier selective incorporation cases. *See also* 1 TREATISE, *supra* note 1, § 2.6(a), at 560 n.5.

469. *See* 1 TREATISE, *supra* note 1, § 2.5(d).

470. *Pointer*, 380 U.S. at 413 (Goldberg, J., concurring).

471. *Cohen*, 366 U.S. at 154 (Brennan, J., dissenting).

472. Henkin, *supra* note 467, at 77.

foundation for selective incorporation did not necessitate a reexamination of the analysis utilized in determining the "independent content" of due process.[473] Yet, if subjectivity concerns had indeed been a driving force in producing such a basic change as selective incorporation, that certainly would suggest at least a reconsideration of the "looseness" of the due process guidelines applied in determining the content of free-standing due process.

Pragmatic considerations also suggested a likely reconsideration of those guidelines. Selective incorporation had dramatically altered the constitutional landscape in which the fundamental fairness standard was now being applied. The state criminal justice systems were subject to far more extensive constitutional regulation through the application of the Bill of Rights. The due process standard that governed the application of free-standing due process—the fundamental fairness standard—had been developed largely in the context of determining the overlap between due process and the specific guarantees. When the Court had focused on the "evolving" character of due process, that enabled it not only to recognize rights that had not been recognized at common law, but also to conclude that certain rights recognized in the common law tradition were no longer deemed basic to fairness.[474] With selective incorporation, the flexible, open-ended due process could grow in only one direction—adding to the rights protected under the Bill of Rights.[475]

The Court's decisions in the post-incorporation era have, indeed, considered several major reformulations of due process doctrine as applied to criminal procedure, with some accepted and some rejected. The most important of these involved: (1) characterizing free-standing due process as a disfavored concept to be construed narrowly; (2) granting a preemptive impact to the specific guarantees; (3) returning to *Hurtado*'s shield for practices in accord with settled usage; and (4) adopting a utilitarian balancing test which has been applied in other fields of procedural due process.

The Court's treatment of each of these proposed formulations is discussed below. All were advanced within the framework of basically the same type of general descriptions of the character of fundamental rights as were offered first in *Hurtado* and then in the pre-incorporation era rulings. The favored standard

473. As to those modifications, see *supra* text accompanying notes 454-63. The second modification did bear upon free-standing due process insofar as past decisions had failed to focus on fundamental character within the Anglo-American system, *see supra* note 463, but that had not been a concern in the rulings pre-incorporation rulings on claims not having a parallel in the specific guarantees. *See, e.g.*, cases cited *supra* notes 392, 396, 400 and 406.

474. *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 466 (1947) (Frankfurter, J., concurring).

475. Similarly, Justice Black's view of a very limited independent due process had been presented as part of a reading of due process that dramatically extended its reach by incorporating the Bill of Rights. *See supra* text accompanying notes 444-52. However, Justice Black's reading stood only to add a narrow coverage to the incorporated Bill of Rights guarantees.

of the post-incorporation cases has been that set forth in *Patterson v. New York*:[476] A state practice violates due process only if it "offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental."[477] As in *Hurtado* and the pre-incorporation cases,[478] the statement of this standard often has been accompanied by language noting the need to give deference to the states in their shaping of their criminal justice processes.[479]

### *A. Making free-standing due process a disfavored concept*

In reviewing substantive due process claims, the Court has stated that, "[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking . . . are scarce and open-ended."[480] In the post-incorporation era, the Court sometimes has offered a similar view of its role in determining the content of free-standing due process. In *Dowling v. United States*,[481]

476. 432 U.S. 197 (1977).

477. *Patterson*, 432 U.S. at 201-02. *Patterson* cited this formulation as derived from a line of cases going back to Justice Cardozo's opinion in *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The *Patterson* formulation was cited by the Court in refusing to apply to criminal justice cases the utilitarian balancing analysis applied to due process claims in other fields. *See* Medina v. California, 505 U.S. 437, 445 (1992), discussed *infra* in text accompanying note 675. The *Patterson* formulation had been fairly popular prior to *Medina*. *See, e.g.*, Schad v. Arizona, 501 U.S. 624, 641 (1991). It has almost always been cited in post-*Medina* rulings. *See, e.g.*, Montana v. Egelhoff, 518 U.S. 37, 43 (1996); Cooper v. Oklahoma, 517 U.S. 348, 355 (1996); Herrera v. Collins, 506 U.S. 390, 407 (1993).

478. *See supra* text accompanying notes 188-89 and 261.

479. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 407 (1993) ("'[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition,' we have 'exercis[ed] substantial deference to legislative judgments in this area.'"); Medina v. California, 505 U.S. 437, 445-46 (1992); Patterson v. New York, 432 U.S. 197, 201-02 (1977).

480. *See* Collins v. Harker Heights, 503 U.S. 115, 125 (1992). Cases repeating this position include *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998), and *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion). *See also* Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986), stating:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.

481. 493 U.S. 342 (1990).

Justice White's opinion for the Court noted:[482] "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate 'fundamental fairness' very narrowly."[483]

That perspective was repeated and further explained in Justice Kennedy's opinion for the Court in *Medina v. California*:[484]

> In the field of criminal law, we "have defined the category of infractions that violate 'fundamental fairness' very narrowly" based on the recognition that, "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Dowling v. United States* [citation omitted]. The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.[485]

The Court's description of free-standing due process as having "limited operation," with fundamental fairness defined "very narrowly," might suggest that constitutional regulation through free-standing due process would be confined to a narrow slice of the criminal justice process. However, constitutional regulation through free-standing due process actually extends today to every phase of the process.[486] While a full review of the free-standing due process rulings is impracticable in this format, the brief survey that follows illustrates this extraordinary range.

At the investigatory stage, free-standing due process restricts the state's utilization of lineups, showups, and other identification procedures insofar as they present a "substantial likelihood of irreparable misidentification,"[487] prohibits police practices that are so "outrageous" as to "shock the conscience,"[488] imposes restrictions on the obtaining of confessions that

482. Justice White was one of the members of the Court most frequently noting the need for caution in expanding substantive due process. See, for example, his opinion for the Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), *quoted in supra* note 480, and his dissenting opinion in *Moore v. City of East Cleveland*, 431 U.S. 494, 544 (1977).

483. *Dowling*, 493 U.S. at 352.

484. 505 U.S. 437 (1992).

485. *Medina*, 505 U.S. at 443.

486. *See* McGautha v. California, 402 U.S. 183, 204 (1971) (Douglas, J., dissenting) (the "stream of law on procedural due process" has continuously "grown larger with the passing years.").

487. *See* Stovall v. Denno, 388 U.S. 293, 302 (1967) and its progeny, discussed in 2 TREATISE, *supra* note 1, § 7.4.

488. *See* Rochin v. California, 342 U.S. 165 (1952), discussed *supra* in text accompanying notes 264 and 433; Moran v. Burbine, 475 U.S. 412, 433-34 (1986) ("misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States"); United States v. Russell, 411 U.S. 423, 431-32 (1973) (considering possibility of

arguably are separate from the self-incrimination prohibition,[489] and mandates against the intentional destruction or failure to preserve evidence recognized to be exculpatory,[490] and actions directed at making it more difficult for the defendant to locate potentially favorable witnesses.[491] At the charging stage, due process prohibits unjustified extensive delay in charging that results in prejudice to the defense in preparing its case,[492] and bars charging decisions that are the product of prosecutorial vindictiveness.[493]

At the pretrial stage, free-standing due process governs procedural elements of the motion to suppress,[494] ensures that the defense receives reciprocal discovery when it is required to provide discovery to the prosecution,[495] provides the indigent defendant with access to experts as needed to evaluate and present a contention resting on scientific expertise (*e.g.*, insanity),[496] recognizes a defense right to obtain pretrial governmental records determined by the trial court to contain material exculpatory information,[497] imposes on the prosecution a duty to disclose to the defense or court material

police involvement in a crime that is "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction"). Though related to procedure, these prohibitions are today described as resting on substantive rather than procedural due process. *See* County of Sacramento v. Lewis, 523 U.S. 833 (1998), discussed *infra* in text accompanying note 572 .

489. *See* Dickerson v. United States, 120 S. Ct. 2326, 2330 (2000) ("Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment . . . . We have never abandoned this due process jurisprudence . . . ."); Colorado v. Connelly, 479 U.S. 157, 163 (1986) ("[t]he Court has retained this due process focus, even after holding . . . that the Fifth Amendment privilege against compulsory self-incrimination applies to the States."); Miller v. Fenton, 474 U.S. 104, 109-10 (1985). *See also* Mincey v. Arizona, 437 U.S. 385, 398 (1978) (holding use of involuntary statement to impeach defendant violates due process).

490. *See* Arizona v. Youngblood, 488 U.S. 51, 58 (1988).

491. *See* Webb v. Texas, 409 U.S. 95, 98 (1972) (judicial discouragement of witness from testifying); United States v. Valenzuela-Bernal, 458 U.S. 858, 872-74 (1982) (holding government action denying defendant access to witnesses, here by deportation, subject to regulation by due process and compulsory process clauses).

492. *See* United States v. Marion, 404 U.S. 307, 324 (1971); United States v. Lovasco, 431 U.S. 783, 790 (1977).

493. *See* Blackledge v. Perry, 417 U.S. 21, 28 (1974); United States v. Goodwin, 457 U.S. 368, 384 (1982).

494. *See* Lego v. Twomey, 404 U.S. 477, 489 (1972) (burden of proof); Jackson v. Denno, 378 U.S. 368, 395 (1964) (decision-maker).

495. *See* Wardius v. Oregon, 412 U.S. 470, 479 (1973).

496. *See* Ake v. Oklahoma, 470 U.S. 68, 87 (1985).

497. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987).

exculpatory evidence that is within its possession or control,[498] and prohibits state timing requirements for motions that are so stringent as to deny the defendant a reasonable opportunity to raise a constitutional objection.[499]

Notwithstanding the number of specific guarantees in the Fifth and Sixth Amendments applicable to the trial, a wide variety of due process limitations add considerably to the constitutional regulation of the trial. Initially, due process governs many of the structural components of the trial. Due process imposes the requirement of an unbiased judge[500] and contributes to the constitutionally mandated procedures designed to ensure that the jury is not tainted by prejudicial pretrial publicity.[501] Due process also contributes in part to the defendant's right to be present at various stages of the trial,[502] prohibits forcing upon the defendant an unnecessary physical setting that conveys a prejudicial message to the jury,[503] and limits the trial court's authority to exclude the defendant from the courtroom because of his misbehavior[504] and to try him in absentia when he has failed to appear for trial.[505] The constitutional right of the defendant to testify on his own behalf is also grounded in part on due process.[506] Constitutional standards governing the defendant's

498. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); United States v. Bagley, 473 U.S. 667, 675 (1985); Kyles v. Whitley, 514 U.S. 419, 421 (1995). As to the application of this responsibility to pretrial discovery, see 4 TREATISE, *supra* note 1, § 20.3(m).

499. *See* Reece v. Georgia, 350 U.S. 85, 89-90 (1955), discussed *supra* note 387.

500. *See* Tumey v. Ohio, 273 U.S. 510, 535 (1927), discussed *supra* note 400; Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971).

501. In its first ruling after the incorporation of the Sixth Amendment jury trial right, which dealt with the impact of prejudicial pretrial publicity on prospective jurors, the Court relied on the due process clause. Murphy v. Florida, 421 U.S. 794, 799-800 (1975). The Court also relied on due process in striking down a statute that precluded use of the remedy of a venue change. *See* Groppi v. Wisconsin, 400 U.S. 505, 507-08 (1971). This followed reliance on due process in pre-incorporation cases dealing with pretrial publicity issues. *See* Irvine v. Dowd, 366 U.S. 717, 728 (1961); Rideau v. Louisiana, 373 U.S. 723, 727 (1963) (neither suggesting that the standards being applied were borrowed from the Sixth Amendment). However, later post-incorporation decisions dealing with pretrial publicity issues relied on the Sixth Amendment guarantee of an impartial jury. *See* Patton v. Yount, 467 U.S. 1025, 1026 (1984); Mu'Min v. Virginia, 500 U.S. 415, 417 (1991).

502. United States v. Gagnon, 470 U.S. 522, 529 (1985) (noting that the right therefore is not limited to situations in which the defendant is "actually confronting witnesses or evidence against him," but also includes other trial related proceedings at which the defendant's presence will contribute to his opportunity to defend himself).

503. *See* Estelle v. Williams, 425 U.S. 501, 512 (1976); Holbrook v. Flynn, 475 U.S. 560, 572 (1986).

504. *See* Illinois v. Allen, 397 U.S. 337, 343-44 (1970).

505. *See* Taylor v. United States, 414 U.S. 17, 20 (1973).

506. *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987), recognized a constitutional right of a defendant to testify at his or her trial based upon the confluence of the Fourteenth Amendment's due process clause, the Sixth Amendment's compulsory process clause and the Fifth Amendment's guarantee against compulsory self-incrimination.

competence to stand trial, including the test for competency, the necessity for a competency hearing, and applicable standard of proof on that issue, also are a product of due process.[507] The state's authority to televise trials over the objection of the defendant is also subject to the constitutional regulation of due process.[508]

The state's obligation to establish guilt by proof "beyond a reasonable doubt" is still another due process requirement.[509] This leads, in turn, to due process regulation of the use of presumptions,[510] the shifting of the burden of proof to the defense on particular issues,[511] the designation of alternatives in the proof of the means or mental state of the crime,[512] and the explanation given to the jury of the reasonable doubt standard.[513]

Due process also contributes to the constitutional regulation of trial presentations. Due process is violated, for example, where the prosecution introduces material testimony known to be false,[514] fails to bring to the attention of the court or defendant evidence within its possession or control that contradicts its key evidence or undercuts the credibility of its key witnesses,[515] seeks to draw an adverse inference from the defendant's exercise of his *Miranda* rights,[516] or presents a closing argument "so infected with unfairness" as to undermine confidence in the jury's verdict.[517] The trial judge may violate due process by excluding evidence critical to the defendant's

507. *See* Drope v. Missouri, 420 U.S. 162, 174-75 (1975); Medina v. California, 505 U.S. 437, 453 (1992); Cooper v. Oklahoma, 517 U.S. 348, 369 (1996).

508. *See* Chandler v. Florida, 449 U.S. 560, 582 (1981).

509. *See In re* Winship, 397 U.S. 358, 367 (1970).

510. *See* Sandstrom v. Montana, 442 U.S. 510, 524 (1979); Francis v. Franklin, 471 U.S. 307, 326 (1985).

511. *See* Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975); Patterson v. New York, 432 U.S. 197, 215 (1977); Martin v. Ohio, 480 U.S. 228, 236 (1987).

512. *See* Schad v. Arizona, 501 U.S. 624, 627 (1991).

513. *See* Cage v. Louisiana, 498 U.S. 39, 40-41 (1990); Victor v. Nebraska, 511 U.S. 1, 22 (1994). *But see* Sullivan v. Louisiana, 508 U.S. 275, 280 (1993) (speaking of a Sixth Amendment right to a jury verdict of guilt beyond a reasonable doubt that is denied by a constitutionally defective reasonable doubt instruction). *Sullivan* was written by Justice Scalia, who takes a narrower view of free-standing due process than the Court majority. *See infra* text accompanying notes 597-607.

514. *See* Mooney v. Holohan, 294 U.S. 103, 112-13 (1935), discussed *supra* in text accompanying note 396; Alcorta v. Texas, 355 U.S. 28, 31 (1957); Giglio v. United States, 405 U.S. 150, 153 (1972).

515. *See* United States v. Bagley, 473 U.S. 667, 669 (1985); Brady v. Maryland, 373 U.S. 83, 87 (1963).

516. *See* Doyle v. Ohio, 426 U.S. 610, 611 (1976).

517. *See* Donnelly v. DeChristoforo, 416 U.S. 637, 639 (1974); Darden v. Wainwright, 477 U.S. 168, 181-82 (1986).

presentation of a defense,[518] taking unnecessary actions that "effectively dr[ive] a [defense] witness off the stand,"[519] or tolerating courtroom behavior that produces a "carnival atmosphere" prejudicial to the defense.[520]

Of course, far more prosecutions are resolved by guilty plea than by trial.[521] Here, the due process clause is the dominant source of constitutional regulation. Due process establishes the minimum amount of information that must be given to the defendant prior to accepting his plea,[522] requires that the record provide a factual basis for the plea under certain circumstances,[523] determines what pressures can be imposed upon a defendant without rendering his plea involuntary,[524] determines at what point there exists a plea agreement which can be "broken,"[525] and requires relief for a plea bargain that has been breached by the prosecutor or court.[526]

When the process moves to the sentencing stage, most trial-type rights (*e.g.*, confrontation) do not apply and due process becomes the primary source of constitutional regulation. Due process governs the range of conduct and type of information that may be considered by the sentencing judge,[527] the need for notifying the defendant of the information that the judge will consider in making the sentencing decision,[528] the need to ensure that information relied upon is accurate,[529] and the need to provide the defendant with an opportunity to be heard and to offer his own evidence.[530] Due process also sets the minimum burden of proof the government must bear where the sentencing statute calls for a sentence enhancement based on a judge or jury finding of a particular aggravating circumstance,[531] as well as the minimum procedural rights that must be granted to the defense where the sentencing statute imposes an extended or alternative term upon a finding of dangerousness or

518. *See* Chambers v. Mississippi, 410 U.S. 284, 302 (1973), discussed *infra* in text accompanying note 584; Crane v. Kentucky, 476 U.S. 683, 690 (1986), discussed *infra* note 591.

519. Webb v. Texas, 409 U.S. 95, 98 (1972).

520. Sheppard v. Maxwell, 384 U.S. 333, 358 (1966).

521. *See* 1 TREATISE, *supra* note 1, § 1.3(o).

522. *See* Henderson v. Morgan, 426 U.S. 637, 647 (1976); Boykin v. Alabama, 395 U.S. 238, 243 n.5, 244 (1969).

523. *See* North Carolina v. Alford, 400 U.S. 25, 38 (1970).

524. *See* Brady v. United States, 397 U.S. 742, 750 (1970); Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

525. *See* Mabry v. Johnson, 467 U.S. 504, 509-10 (1984).

526. *See* Santobello v. New York, 404 U.S. 257, 262-63 (1971).

527. *See* Williams v. New York, 337 U.S. 241, 245-52 (1949). *See also* North Carolina v. Pearce, 395 U.S. 711, 723 (1969); United States v. Grayson, 438 U.S. 41, 49 (1978).

528. *See* Gardner v. Florida, 430 U.S. 349, 358-62 (1977).

529. *See* Williams v. New York, 337 U.S. 241, 244 (1949); Townsend v. Burke, 334 U.S. 736, 740-41 (1948).

530. *See* McGautha v. California, 402 U.S. 183, 217-20 (1971).

531. *See* McMillan v. Pennsylvania, 477 U.S. 79, 84-85 (1986); Specht v. Patterson, 386 U.S. 605, 609-10 (1967); Apprendi v. New Jersey, 120 S. Ct. 2348, 2362-63 (2000).

recidivism.[532] Many of the special procedural guarantees attaching to capital sentencing also are prescribed by due process.[533]

Once the process moves beyond the trial court, free-standing due process constitutes the almost exclusive source of constitutionally mandated procedural rights. The right of a defendant to representation by appointed counsel (if indigent) or retained counsel on a first appeal of right is established by due process,[534] which also demands certain minimum standards in allowing withdrawal by counsel who believes the appeal is frivolous.[535] The due process clause also establishes the prohibition against the vindictive exercise of judicial or prosecutorial discretion directed at defendants who exercise their right to appeal.[536]

Due process also regulates the structure of subsequent proceedings that involve modification of the sentence. It requires the appointment of counsel under some circumstances in probation revocation proceedings.[537] It also requires that the state procedure for probation or parole revocation include a prompt preliminary hearing, a final revocation hearing within a reasonable time, a neutral and detached hearing body, advanced written notice of the charges, disclosure of the evidence on which the decisionmaker relies, a

532. *See* Oyler v. Boles, 368 U.S. 448, 452 (1962); Specht v. Patterson, 386 U.S. 605, 610 (1967).

533. *See* Beck v. Alabama, 447 U.S. 625, 637-38 (1980) (holding unconstitutional a statute that prohibited lesser included offense instructions in capital cases); Simmons v. South Carolina, 512 U.S. 154, 161-62 (1994) (holding that where the state had raised the spectre of defendant's future dangerousness, due process was violated by refusing to instruct jury that, as an alternative to death sentence, a sentence of life imprisonment carried with it no possibility of parole); Morgan v. Illinois, 504 U.S. 719, 727-28 (1992) (holding that due process required the trial court, on defendant's request, to inquire into prospective jurors' views on capital punishment as an aspect of the due process clause's "independent" requirement of decisionmaker impartiality, which is demanded "regardless of whether the Sixth Amendment requires it," and which clearly extends to the capital sentencing jury); Lankford v. Idaho, 500 U.S. 110, 127 (1991) (holding that due process was violated where at the time of the sentencing hearing, the defendant did not have adequate notice that the judge might sentence the defendant to death). *See also* Gardner v. Florida, 430 U.S. 349, 362-64 (1977) (White, J. concurring) (relying partly on due process and partly on the Eighth Amendment in holding unconstitutional the trial court's consideration of a confidential presentence report, not disclosed to the defense, in deciding to impose a death sentence).

534. *See* Evitts v. Lucey, 469 U.S. 387, 395-96 (1985); Douglas v. California, 372 U.S. 353, 355-56 (1963); Ross v. Moffitt, 417 U.S. 600, 607 (1974).

535. *See* Smith v. Robbins, 120 S. Ct. 746, 760 (2000); Anders v. California, 386 U.S. 738, 744 (1967).

536. *See* North Carolina v. Pearce, 395 U.S. 711, 725 (1969); Blackledge v. Perry, 417 U.S. 21, 27 (1974).

537. *See* Gagnon v. Scarpelli, 411 U.S. 778, 787-90 (1973).

limited right of confrontation and cross-examination, and a right of the probationer or parolee to appear and present evidence in his own behalf.[538]

Does this survey describe a free-standing due process that has "limited operation" and is defined "very narrowly"? Of course, the terms "limited" and "narrow" may be used in a comparative sense, and in many of the free-standing due process rulings, the Court certainly imposed restraints that were much narrower than the restraints the dissenters would have imposed.[539] It is also true that many of the due process rulings (although certainly not all[540]) make a defense showing of likely prejudice an element of the constitutional violation,[541] in contrast to rulings under most (but not all[542]) specific

538. *See* Morrissey v. Brewer, 408 U.S. 471, 486-89 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 786-87 (1973). The decision on parole release can, under some circumstances, be subject to due process requirements as to procedure. *See* 5 TREATISE, *supra* note 1, § 26.10(b)-(d).

539. *See, e.g.*, McGautha v. California, 402 U.S. 183, 249-50 (1971) (Brennan, J., dissenting); Manson v. Brathwaite, 432 U.S. 98, 128 (1977) (Marshall, J., dissenting); United States v. Bagley, 473 U.S. 667, 714 (1985) (Stevens, J., dissenting); Schad v. Arizona, 501 U.S. 624, 655-56 (1991) (White, J., dissenting). It goes almost without saying that the rulings tend to be narrower than what the majority of academic commentators would require. But that is true of rulings under the specific guarantees as well. In recent years, the academic commentary may be somewhat more balanced, but the dominant thrust (at least as I read that commentary) is to seek a revival of the philosophy of the Warren Court.

540. Consider for example, the following cases finding per se violations of due process without any form of "prejudice" or "harmless error" inquiry and without insisting upon an element that would indicate likely prejudice in the particular case: Penson v. Ohio, 488 U.S. 75, 85-89 (1988) (denying the appointment of counsel on appeal); Mullaney v. Wilbur, 421 U.S. 684, 702-04 (1975) (improperly shifting of burden of proof); Wardius v. Oregon, 412 U.S. 470, 475-76 (1973) (lacking reciprocity in discovery); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (judge having a financial interest in a criminal conviction); Jackson v. Denno, 378 U.S. 368, 389 (1964) (no judicial determination of voluntariness of confession).

541. *See, e.g.*, United States v. Lovasco, 431 U.S. 783, 795-96 (1977) (establishing a due process violation through delay in bringing charges generally requires a showing of actual prejudice); Ake v. Oklahoma, 470 U.S. 68, 82-83 (1985) (due process right to assistance of psychiatric experts requires preliminary showing that defendant's mental condition is "seriously in question"); United States v. Bagley, 473 U.S. 667, 678 (1985) (due process violation based on prosecutor's failure to disclose exculpatory evidence requires showing of a reasonable probability of different outcome if evidence had been disclosed); United States v. Valenzuela-Bernal, 458 U.S. 858, 873 (1982) (due process violation based on interference with possible witness must meet reasonable probability standard); United States v. Gagnon, 470 U.S. 522, 526-27 (1985) (due process right to appointed counsel at probation revocation requires showing of circumstances suggesting need for counsel's assistance); Stovall v. Denno, 388 U.S. 293, 301-02 (1967) (due process violation in a lineup requires "substantial likelihood of irreparable misidentification"); Henderson v. Morgan, 426 U.S. 637, 644-47 (1976) (due process violation in failure to inform defendant of element of crime to which he pleaded guilty where element is critical as to possible defense or reduction in level of crime); North Carolina v. Alford, 400 U.S. 25, 38 (1970) (due process requires showing of factual basis for plea where defendant seeks to enter plea while claiming innocence); Estelle v. Williams, 425 U.S. 501, 512-13 (1976) (due process is violated where defendant is forced to appear in court in a setting likely to be

guarantees, which typically describe constitutional violations without regard to prejudicial impact (although those violations may then be subject to a harmless error analysis on appellate review).[543]

Another feature that "narrows" many free-standing due process rulings is the use of a "totality of the circumstances" analysis that takes account of various factors beyond the element of likely prejudice (*e.g.*, administrative justifications and the overall "character" of the actions of the responsible officials) and therefore largely limits rulings to the particular facts of the particular case.[544] However, many other free-standing due process rulings are not tied to the totality of the circumstances, but announce a general prohibition of a particular type of governmental action (though often combined with the additional prerequisite of a likely showing of prejudice).[545] Moreover, a totality of the circumstances analysis is not unique to due process cases; basically the same approach is applied in certain settings under specific

prejudicial, such as in prison uniform); Beck v. Alabama, 447 U.S. 625, 636-37 (1980) (due process violated by failing to instruct a jury on finding a lesser offense where evidence placed in dispute is a factor that separated capital and non-capital murder); Darden v. Wainwright, 477 U.S. 168, 180-81 (1986) (due process violated by closing argument that "so infected the trial with unfairness" as is likely to influence the outcome).

In some instances, prejudice is inherent because the prohibited adverse impact by definition otherwise would not have occurred. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 725 (1969) (prohibiting vindictive sentencing); Blackledge v. Perry, 417 U.S. 21, 27 (1974) (prohibiting vindictive charging). In others, the due process violation requires an intent to subvert the process and therefore cause prejudice. *See, e.g.*, Mooney v. Holohan, 294 U.S. 103, 112 (1935) (knowingly using perjured testimony); Arizona v. Youngblood, 488 U.S. 51, 57-59 (1988) (purposely destroying exculpatory evidence).

542. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 684-87 (1984) (ineffective assistance of counsel requires prejudice showing); Barker v. Wingo, 407 U.S. 514, 530-34 (1988) (including prejudice as one component in speedy trial balancing test). *See also* 1 TREATISE, *supra* note 1, § 2.6(e) (discussing use of "due process" methodology, including a prejudice showing, in applying specific guarantees).

543. *See* 5 TREATISE, *supra* note 1, § 27.6(c)-(e).

544. See, for example, the standards applied in determining whether (1) confessions were coerced, *see* cases cited *supra* note 300; (2) judicial failure to control actions of the press, spectators and others resulted in a trial setting that denied due process, *see supra* note 520; (3) the conditions of defendant's appearance at trial resulted in a violation of due process, *see* Holbrook v. Flynn, 475 U.S. 560, 568 (1986); (4) the circumstances surrounding pretrial publicity and the seating of jury were such as to have required the trial court to have sustained challenges to seated jurors or to have granted a change of venue, *see* cases cited *supra* note 501; and (5) police conduct was so outrageous as to preclude prosecution or exclude the evidentiary fruits of that conduct, *see* cases cited *supra* note 488.

545. As for due process violations stated as a general prohibition and not requiring any showing of prejudice, see, for example, cases cited *supra* note 540. As for due process violations stated as general prohibitions but requiring an element indicative of prejudice, see the following cases (all discussed *supra* note 541): *Ake v. Oklahoma*, 470 U.S 68 (1985); *Beck v. Alabama*, 447 U.S. 625 (1980); *Blackledge v. Perry*, 417 U.S. 21 (1974).

guarantees, most notably the Fourth Amendment.[546] Much the same holds true for the "narrowing" impact of the requirement of a bad purpose on the part of the governmental actor. That requirement is found in only a small group of due process standards,[547] and also is not unique to due process rulings.[548]

Finally, free-standing due process rulings might be characterized as "narrow" in that they tend to focus on the value of adjudicatory fairness (looking primarily to protect against the conviction of the innocent),[549] rather than on the broader range of values reflected in the whole of the specific

546. *See, e.g.*, 2 TREATISE, *supra* note 1, § 3.3(a)-(c) (character of probable cause); 2 *id.* § 3.10 (voluntariness standard as applied to consent searches). *See also* 2 *id.* § 18.2 (balancing test in speedy trial cases); 2 *id.* § 25.2(c) (double jeopardy's manifest necessity standard for mistrials, as applied to traditional areas of trial court discretion).

547. *See, e.g.*, Arizona v. Youngblood, 488 U.S. 51, 57-58 (1988), discussed *supra* in text accompanying note 490; Blackledge v. Perry, 417 U.S. 21, 27-28 (1974), discussed *supra* in text accompanying note 493; North Carolina v. Pearce, 395 U.S. 711, 725 (1969), discussed *supra* in text accompanying note 536.

548. *See, e.g.*, Oregon v. Kennedy, 456 U.S. 667, 679 (1982). *See generally* 5 TREATISE, *supra* note 1, § 25.2(e).

549. Free-standing due process requirements implementing this value would include: (1) providing the defendant with notice of the case against him (including an open presentation of the case), *see, e.g.*, Lankford v. Idaho, 500 U.S. 110, 127 (1991), discussed *supra* note 533; Gardner v. Florida, 430 U.S. 349, 358-62 (1977), discussed *supra* note 528; Morrissey v. Brewer, 408 U.S. 471, 486-89 (1972), discussed *supra* note 538; (2) providing the defendant with a "meaningful opportunity to present a complete defense," *see, e.g.*, Crane v. Kentucky, 476 U.S. 683, 690 (1986), discussed *infra* note 591; Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987), discussed *supra* note 497; Chambers v. Mississippi, 410 U.S. 284, 294 (1973), discussed in text accompanying *infra* note 584; Rock v. Arkansas, 483 U.S. 44, 51-53 (1987), discussed *supra* note 506; Ake v. Oklahoma, 470 U.S. 68, 76 (1985), discussed *supra* note 496; United States v. Valenzuela-Bernal, 458 U.S. 858, 872-74 (1982), discussed *supra* note 491; Wardius v. Oregon, 412 U.S. 470, 479 (1973), discussed *supra* note 495; Taylor v. United States, 414 U.S. 17, 20 (1973), discussed *supra* note 505; (3) providing an unbiased decisionmaker, *see, e.g.*, Tumey v. Ohio, 273 U.S. 510, 535 (1927), discussed *supra* note 500; Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971), discussed *supra* note 500; Murphy v. Florida, 421 U.S. 794, 799-800 (1975), discussed *supra* note 501; Estelle v. Williams, 425 U.S. 501, 512 (1976), discussed *supra* note 503; Sheppard v. Maxwell, 384 U.S. 333, 358 (1966), discussed *supra* note 520; (4) protecting against evidentiary gaps or proof deficiencies that could lead to the conviction of the innocent, *see, e.g.*, Brady v. Maryland, 373 U.S. 83, 87 (1963), discussed *supra* note 515; Stovall v. Denno, 388 U.S. 293, 302 (1967), discussed *supra* note 487; Arizona v. Youngblood, 488 U.S. 51, 58 (1988), discussed *supra* note 490; United States v. Marion, 404 U.S. 307, 324 (1971), discussed *supra* note 492; Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975), discussed *supra* note 511; Sandstrom v. Montana, 442 U.S. 510, 524 (1979), discussed *supra* note 510; Cage v. Louisiana, 498 U.S. 39, 40-41 (1990), discussed *supra* note 513; Apprendi v. New Jersey, 120 S. Ct. 2348, 2362-63 (2000), discussed *supra* note 531; Evitts v. Lucey, 469 U.S. 387, 395-96 (1985), discussed *supra* note 534; and (5) prohibiting state actions that restrict the defendant's ability to utilize the standing law, *see, e.g.*, Blackledge v. Perry, 417 U.S. 21, 30-31 (1974); North Carolina v. Pearce, 395 U.S. 711, 724 (1969), discussed *supra* note 536; Reece v. Georgia, 350 U.S. 85, 89-90 (1955), discussed *supra* note 499; Jackson v. Denno, 378 U.S. 368, 376-77 (1964), discussed *supra* in text accompanying note 314.

guarantees. But here again, the description is not complete, as there are strands of free-standing due process doctrine, such as the prohibition of coerced confessions,[550] that do look to "dignitary" values.[551] Also, various specific guarantees, such as the Sixth Amendment right of confrontation, might as readily be described as focusing primarily on the value of adjudicatory fairness.[552]

While the above perspectives must be strained to justify describing free-standing due process as "defined narrowly" and having "limited operation," other perspectives readily undermine such a characterization. As compared to the due process regulation of criminal procedure originally envisaged in *Hurtado*, or even that established in the pre-incorporation era under a more flexible conception of due process, the terms "limited" and "narrow" are hardly applicable to today's precedent. Free-standing due process extends far beyond the regulation of the trial. Moreover, as to the trial, it has moved beyond the basics of adjudicative fairness and adherence to the standing law, even as those elements were liberally interpreted in the pre-incorporation decades. The coverage of due process has moved from prohibiting prosecutorial lawlessness in the knowing use of perjured testimony to prohibiting prosecutorial negligence in failing to disclose exculpatory evidence.[553] It has moved from requiring that a judgment of conviction be based on some evidence[554] to requiring that it be based on proof beyond a reasonable doubt as to all elements of the crime.[555]

In light of such developments, it is not surprising that the Court appears to have "retired" its description of free-standing due process as having only "limited operation" with infractions defined "very narrowly." It continues to speak to the need for restraint, but prefers to do so without reference to the vague contours of due process. Instead, it stresses the primary responsibility of the states in shaping their own criminal justice systems. It notes, for example, that due process rulings should be careful to "evaluate state procedures one at a

550. *See supra* notes 300 and 489. Consider also the cases discussed *supra* note 488.

551. As to the distinction between adjudicatory and dignitary values, see Kadish, *supra* note 327, at 346-47. Of course, certain adjudicatory values (*e.g.*, allowing the defendant to present his defense) have obvious dignitary elements. *See* 1 TREATISE, *supra* note 1, § 1.4(c)-(d), discussing the values underlying adversarial adjudication in an accusatorial structure.

552. *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 845 (1990); Kentucky v. Stincer, 482 U.S. 730, 736 (1987); Delaware v. Fensterer, 474 U.S. 15, 18 (1986). Of course, confrontation is an element of an adversary system, which also serves other values, including respect for individual autonomy. *See* 1 TREATISE, *supra* note 1, § 1.4(c), at 184.

553. As to the application of this due process requirement to prosecutorial negligence, see the discussion in 5 TREATISE, *supra* note 1, § 24.3(b).

554. *See supra* text accompanying note 399.

555. *See* Jackson v. Virginia, 443 U.S. 307, 316 (1979) (federal constitutional review of the sufficiency of the evidence standard). *See also* cases cited *supra* note 511.

time, as they come before us," and not "cavalierly 'impede the States ability to serve as laboratories for testing solutions to novel legal problems.'"[556]

### *B. Giving preemptive effect to the specific guarantees*

The range of regulation imposed under free-standing due process could also be restricted by giving a preemptive impact to the incorporated specific guarantees of the Bill of Rights. The broadest preemption doctrine would hold that due process cannot be used to carry the values of a specific guarantee beyond the limits imposed by that guarantee. This position has never been suggested by any member of the Court,[557] and it is contrary to various Court rulings, such as the extension of right to counsel to later stages of the process at which the defendant is no longer an "accused" in a "criminal prosecution."[558] A narrower position would hold that where a specific guarantee regulates a particular procedure, it preempts the regulation of that procedure and due process has no role to play. That position has found support in *Graham v. Connor*[559] and its progeny.

*Graham* involved a § 1983 action[560] to recover damages for injuries sustained when officers allegedly used excessive force during the course of an investigatory stop. The Supreme Court held that in determining whether the officer's use of force violated the Constitution, the lower court should look to

556. Smith v. Robbins, 120 S. Ct. 746, 758-59 (2000) (citing other opinions expressing similar sentiments). *See also* Herrera v. Collins, 506 U.S. 390, 407 (1993) ("'[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition,' we have 'exercised substantial deference to legislative judgments in this area.'").

557. Such a position could be drawn, however, from Justice Scalia's comments on substantive due process in a concurring opinion, joined by Justice Thomas, in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 471 (1993):

> It is particularly difficult to imagine that "due process" contains the substantive right not to be subjected to excessive punitive damages, since if it contains *that* it would surely also contain the substantive right not to be subjected to excessive fines, which would make the Excessive Fines Clause of the Eighth Amendment superfluous in light of the Due Process Clause of the Fifth Amendment.

Although Justice Scalia distinguished the incorporation of specific guarantees in the Bill of Rights, as well as procedural due process, it could be similarly said that if Fifth Amendment due process provides a right to counsel on first appeal of right, *see supra* note 534, it would certainly also contain the right to counsel at trial and thus render superfluous the Sixth Amendment guarantee.

558. *See, e.g.*, cases cited *supra* notes 534 and 537. Similarly, some of the values underlying the speedy trial requirement are extended by the due process limitation on delay in the bringing of charges. *See* cases cited *supra* note 492. *See also* United States v. MacDonald, 456 U.S. 1, 11 (1982).

559. 490 U.S. 386 (1980). *See* Toni M. Massaro, *Reviving Hugo Black? The Court's "Jot for Jot" Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086, 1090-91 (1998).

560. 42 U.S.C. § 1983 (1994).

the "objective standard of reasonableness" imposed by the Fourth Amendment rather than the substantive due process standard that had been applied in the pre-incorporation *Rochin* decision (the "shock the conscience" standard).[561] The Court reasoned: "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."

The reach of *Graham* was clarified in *Albright v. Oliver*[562] and *County of Sacramento v. Lewis*.[563] *Albright* presented a § 1983 action in which the plaintiff alleged that he had been denied "substantive due process" (through a denial of his "liberty interest") when a detective relied upon statements of a notoriously unreliable informant to file felony charges against him, to obtain an arrest warrant based on those charges, and to testify against him at a preliminary hearing. A splintered Supreme Court required dismissal of the plaintiff's complaint, with varying positions taken on the application and character of the *Graham* doctrine. A plurality opinion for four justices concluded that plaintiff's claim, in essence, was one of improper arrest, and therefore *Graham* required that it be resolved only under the Fourth Amendment (which the plaintiff had failed to raise). The plurality opinion reasoned that: the Fourth Amendment addresses "pretrial deprivations of liberty";[564] those "deprivations go hand in hand with criminal prosecutions";[565] an accused is not "entitled to judicial oversight or review of the decision to prosecute";[566] and the plaintiff therefore was presenting, in actuality, a claim centering on the issuance of the arrest warrant and the resulting restraint on his liberty. The plurality mentioned initially that the plaintiff had not raised a procedural due process claim, but did not comment on whether that claim would stand apart from the Fourth Amendment claim.[567]

Four other justices found the *Graham* doctrine inapplicable in *Albright*, reasoning that the defendant had a separate liberty interest in avoiding an unfounded prosecution (although two concurred in the dismissal because there

561. For a description of *Rochin* and that standard, see *supra* notes 264 and 433.

562. 510 U.S. 266 (1994).

563. 523 U.S. 833, discussed *infra* text accompanying note 572.

564. *Albright*, 510 U.S. at 274.

565. *Id.*

566. *Id.*

567. Justice Scalia, who joined the plurality opinion, stated in a separate concurring opinion that he thought it "unlikely that the procedures constitutionally 'due' with regard to an arrest consist of anything more than what the Fourth Amendment specifies, but petitioner has in any case not invoked 'procedural' due process." *Id.* at 275.

had been no possible violation of due process with respect to that interest).[568] Justice Souter, the remaining member of the Court, concluded that this case did not present a due process claim which could be separated from a Fourth Amendment claim, but that substantive due process could apply under different circumstances.[569] Justice Souter therefore concluded that *Graham* supported dismissal, but he provided a majority for the position that *Graham*'s preemption rule does not apply to an alleged invasion of liberty, even though it follows from an alleged Fourth Amendment violation, if it involves a burden distinct from that imposed by the allegedly illegal search or seizure.[570] Justice Souter also characterized *Graham* as a rule of "judicial self-restraint" rather than a rule of mandatory preemption, and that also may have reflected a majority position.[571]

568. Justice Kennedy, joined by Justice Thomas, concurred in the judgment. *Albright*, 510 U.S. at 281. He reasoned that due process does not "include a standard for the initiation of prosecution." *Id.* at 282. This was evidenced by the common law, which while it provided for "grand jury indictment and speedy trial . . . did not provide a specific evidentiary standard applicable to a pretrial hearing on the merits of the charges or subject to later review by the courts." *Id.* Moreover, insofar as the common law of torts might reflect some notion of due process protection against malicious prosecution, prior precedent established that a state actor's "random and unauthorized" deprivation of such an interest could not be challenged under 42 U.S.C. § 1983 so long as the state provides "an adequate post-deprivation remedy" (here found in the state's tort remedy). *Id.* at 283-86.

In dissent, Justice Stevens, joined by Justice Blackmun, argued that freedom from prosecution except upon probable cause is a deeply-rooted substantive liberty interest protected by Fourteenth Amendment due process. *Id.* at 291. While *Hurtado* held that due process does not require states to proceed by grand jury indictment, it had allowed the states to do so "only if the substance of the probable cause requirement remains adequately protected." *Hurtado*, 510 U.S. at 292. Here the state had established procedures to ensure that probable cause was present, but, as evidenced by cases such as *Mooney v. Holohan*, discussed *supra* note 396, which involved the prosecution's knowing use of perjured testimony, "state[] compliance with facially valid procedures" should not invariably "meet the demands of due process, without regard to the substance of the resulting probable cause determination." *Albright*, 510 U.S. at 298.

Justice Ginsberg, who joined the plurality opinion, countered in a separate concurring opinion with a description of the various elements of the case that supported "viewing this case through a Fourth Amendment lens." *Albright*, 510 U.S. at 276.

569. Justice Souter, in his concurring opinion, stressed that all injuries claimed by *Albright* flowed solely from his wrongful arrest and were not compounded by the use of false or misleading testimony at any other stage in his prosecution. He cautioned that in other cases, where the assertion of baseless charges against an arrestee produced damage that did not flow from the arrest, a substantive due process claim might be available. *Albright*, 510 U.S. at 289.

570. This was the position of at least Justices Souter, Stevens, Blackmun, Kennedy and Thomas. *Albright*, 510 U.S. at 281-316.

571. Justice Souter pointed to earlier rulings in which the Court had "rejected the view that applicability of one constitutional amendment pre-empts the guarantees of another . . . ." (quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 49 (1993) and Soldal v. Cook County, 506 U.S. 56, 70 (1992)). He agreed, however, that as a matter of "judicial self-restraint," the Court should follow a "rule of reserving due process for otherwise homeless substantive

In *County of Sacramento v. Lewis*,[572] the Court was unanimous in agreeing that *Graham* did not apply (although it was divided as to the proper content of substantive due process analysis).[573] At issue there was a § 1983 claim alleging deprivation of an automobile passenger's "substantive due process right to life" due to police recklessness in a high-speed chase. *Graham* only requires looking to the specific guarantee, the Court noted, when the claim in question is "covered" by that guarantee. The Fourth Amendment covers only "searches and seizures," and here there had been neither. A Fourth Amendment seizure does not occur with a chase by pursuing police, as a seizure requires a "termination of an individual's freedom of movement."[574] Therefore, the Court concluded, "*Graham's* more-specific-provision rule" was no bar to looking to the applicable substantive due process standard (the "shock the conscience" standard of *Rochin*).[575]

The combination of *Lewis* and *Albright* clearly leave huge portions of the criminal justice process subject to potential regulation by free-standing due

claims." *Albright*, 510 U.S. at 287. The plurality opinion may have implicitly accepted the same view of *Graham.* It acknowledged the Court's consideration of a substantive due process claim in another criminal case, *United States v. Salerno*, 481 U.S. 739 (1987). In considering the constitutionality of the preventive detention provisions of the Federal Bail Reform Act of 1984, the *Salerno* Court rejected on the merits contentions raised under both the Eighth Amendment's bail clause and substantive due process. *Id.* at 747-54. It did not suggest that the applicability of the Eighth Amendment to pretrial detention meant that substantive due process could play no role in regulating preventative detention. *Id.*

In *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993), as Justice Souter noted, the Court had rejected the contention that due process could impose no procedural prerequisites for a civil forfeiture beyond the prerequisites of the Fourth Amendment relating to the seizure of property. The Court there noted that certain wrongs can affect more than one Amendment and that it had previously rejected the view that "the applicability of one constitutional amendment pre-empts the guarantee[] of another." *Id.* at 49. Distinguishing *Graham* and *Gerstein v. Pugh*, discussed *infra* at note 578, the Court stated:

> *Gerstein* and *Graham* concerned not the seizure of property but the arrest or detention of criminal suspects, subjects we have considered to be governed by the provisions of the Fourth Amendment without reference to other constitutional guarantees. In addition, also unlike the seizure presented by this case, the arrest or detention of a suspect occurs as part of the regular criminal process, where other safeguards ordinarily ensure compliance with due process.

*Id.* at 50.

572. 523 U.S. 833 (1998).

573. *County of Sacramento*, 523 U.S. at 833. Justices Stevens, Scalia and Thomas did not join Justice Souter's opinion for the Court, which distinguished *Graham*. *Id.* at 859-60. However, Justice Stevens' separate opinion focused on the issue of immunity, and Justices Scalia and Thomas objected to the Court's substantive due process analysis. *Id.* at 859-60. Neither of the separate opinions expressed disagreement with the Court's treatment of the *Graham* issue. *Id.*

574. *Id. See also* Brower v. County of Inyo, 489 U.S. 593 (1989).

575. *County of Sacramento*, 523 U.S. at 842-45. *See supra* text accompanying notes 264-71, as to the *Rochin* standard.

process without concern as to *Graham*. Stages such as sentencing and appeal, for example, generally are not "covered" by specific guarantees and therefore would be exempt from the *Graham* doctrine on the same reasoning that exempted the high-speed chase in *Lewis*. Where the specific guarantees do "cover" the particular process at issue, *Albright* holds open the possibility of free-standing due process still contributing to the regulation because it looks to a different interest of the individual. Moreover, when neither of these distinctions applies, there remains the distinction between substantive due process and procedural due process. The *Graham* doctrine is tied to substantive due process. Where the constitutional violation is presented not as a claim for compensation by the injured victim, but as a grounding for a procedural remedy administered within the criminal justice process (*e.g.*, exclusion of evidence or dismissal of the prosecution), due process claims tend to be characterized as "procedural" even though they challenge governmental activity similar to that involved in *Graham* (misuse of police authority in making an arrest) and *Albright* (misuse of prosecutorial authority in bringing charges).[576] The Court has characterized relatively few restrictions relating to the administration of the criminal justice process as resting on substantive due process.[577]

576. Thus, challenges to vindictive prosecution, raised in the context of seeking a dismissal of charges, have not been characterized as presenting a substantive due process issue. *See* cases cited *supra* note 493. So too, the coerced confession prohibition is viewed as an aspect of procedural due process, accepted by justices who generally reject substantive due process. Compare, for example, the position taken by Justice Scalia in the cases of *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), discussed *supra* note 573, and *Arizona v. Fulimante*, 499 U.S. 279 (1991). *See also* Herrera v. Collins, 506 U.S. 390, 408 n.6 (1993) (stating that although the execution of an innocent person may be a substantive due process claim, whether the state must consider an allegation of innocence based on newly discovered evidence raises a procedural due process claim); Montana v. Egelhoff, 518 U.S. 37 (1996) (involving state prohibition against jury considering evidence of involuntary intoxication in determining whether defendant had required mental element; majority proceeds on due process analysis, applying *Patterson* standard, *see supra* note 476, with reference to various procedural due process rulings; Justice Ginsberg, concurring, views the state rule as the equivalent of redefining the mental element to treat intoxication as the counterpart of the required mental element in a sober person, presenting what would generally be viewed as a substantive due process claim, although she does not refer to the issue as presenting a substantive due process claim).

577. The *Rochin* limit is the primary example of a free-standing substantive due process restriction in the area of police enforcement practices. *See supra* text accompanying note 270. A few other procedures that impose restraints on individuals in connection with the administration of the criminal justice process also have been described as involving free-standing substantive due process issues. *See, e.g.*, Riggins v. Nevada, 504 U.S. 127, 134-38 (1992) (finding that substantive due process prohibits forcing a defendant to continue taking antipsychotic drugs during trial absent a showing of medical appropriateness and consideration of other alternatives). The *Riggins* majority relied on the defendant's liberty interest in avoiding unwanted medication. Justices Thomas and Scalia dissented, noting that the violation of any such interest does not warrant a remedy of reversal of a conviction, as the defendant had shown no interference with his

In *Gerstein v. Pugh*,[578] a case decided long before *Graham*, the Court suggested the possible general application of a *Graham*-like preemption principle within the context of procedural due process. *Gerstein* involved a Florida procedure that permitted the prosecutor to charge a non-capital offense by information, without a prior preliminary hearing. Under this procedure, a person arrested without a warrant would not obtain a judicial determination of probable cause until he was arraigned on the information, which might be delayed a month or more after his arrest. A lower federal court had held that the prolonged detention of the arrested person solely on the basis of the prosecutor's information violated the Fourth Amendment. It directed the Florida courts to provide the arrested person with a prompt preliminary hearing. The Supreme Court agreed that a prompt judicial determination of probable cause was a Fourth Amendment prerequisite for "extended restraint of liberty following an arrest."[579] However, the adversary preliminary hearing was not necessary, as illustrated by the acceptability of *ex parte* issuance of arrest warrants. Justice Stewart, in a concurring opinion, questioned the latter conclusion. The magistrate's determination did not relate simply to the initial arrest (as in the issuance of an arrest warrant), but also "the continuing incarceration of a presumptively innocent person."[580] Justice Stewart further noted that a series of civil due process rulings had required more substantial hearings prior to the seizure of property or the termination of benefits. He was not prepared to say "that the Constitution extends less procedural protection to an imprisoned human being than is required to test the property of garnishing a commercial bank account . . . [or suspending] a driver's license."[581]

The majority's response to Justice Stewart, though placed in a footnote, was telling. The Court noted:

> Mr. Justice Stewart objects to the Court's choice of the Fourth Amendment as the rationale for decision and suggests that the Court offers less procedural protection to a person in jail than it requires in certain civil cases. Here we deal with the complex procedures of a criminal case and a threshold right guaranteed by the Fourth Amendment. The historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-created benefits. The Fourth Amendment was tailored explicitly

ability to consult with counsel or other trial unfairness. *Id.* at 149-50. *See also* United States v. Salerno, 481 U.S. 739, 741 (1987) (finding that denial of bail pending trial raised issue of substantive due process limits on continued custodial control).

578. 420 U.S. 103 (1975).

579. *Gerstein*, 420 U.S. at 114.

580. *Id.* at 127 (Stewart, J., concurring, joined by Justices Douglas, Brennan and Marshall).

581. *Id.* at 126-27. Justice Stewart argued that it was sufficient to hold the Florida procedure unconstitutional and there was no reason at this point to decide whether an *ex parte* determination would be satisfactory.

> for the criminal justice system, and its balance between individual and public interests always has been thought to define the "process that is due" for seizures of person or property in criminal cases, including the detention of suspects pending trial.[582]

This passage could have constituted the foundation for building a procedural due process counterpart to *Graham*. At the least, it would suggest that before ruling on a free-standing due process claim, the Court would ask whether a specific guarantee spoke to the practice in question, and if so, whether that guarantee's more specific focus on the criminal justice process made its command the "process that is due" in criminal cases.

The response of the *Gerstein* majority, however, largely has been forgotten. The Court not only has failed in some areas to consider the possible application of a specific guarantee,[583] it has occasionally noted its preference for resting its finding of unconstitutionality on due process grounds and thereby avoiding the need to determine whether the state's procedure also violates a specific guarantee. Thus, in *Chambers v. Mississippi*,[584] the Court relied on the "totality of the circumstances" analysis of due process to find unconstitutional the combined impact of restricting defendant's cross-examination of a hostile defense witness and precluding testimony of other defense witnesses, noting that it therefore had no need to consider whether the state evidentiary rules which had produced those limitations violated the Sixth Amendment rights of confrontation and compulsory process. In *Pennsylvania v. Ritchie*,[585] involving the extent of the state's obligation to provide the defense with subpoena access to possibly favorable agency records, the Court noted that "[b]ecause the applicability of the Sixth

582. *Id.* at 125 n.26. The majority went on to distinguish the civil cases, noting:

> Moreover, the Fourth Amendment probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct. The relatively simple civil procedures (*e.g.*, prior interview with school principal before suspension) presented in the cases cited in the concurring opinion are inapposite and irrelevant in the wholly different context of the criminal justice system.

*Id.* at 125.

583. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68 (1985) (in requiring access to experts, Court does not consider whether Sixth Amendment right to counsel would include such a requirement); Henderson v. Morgan, 426 U.S. 637 (1976) (failure to consider possible application of Sixth Amendment notice requirement in determining what information regarding the offense must be given to a defendant pleading guilty). *See also* cases cited *supra* note 510 (addressing the limits on use of presumptions without considering possible application of Sixth Amendment right to jury trial as Justice Black earlier suggested, *see* discussion *supra* note 445). *See also* discussion *supra* in text accompanying note 512 (discussing placing limits on allowing a finding of guilt based on alternatives means of commission without considering possible application of Sixth Amendment right to jury trial).

584. 410 U.S. 284 (1973).

585. 480 U.S. 39 (1987).

Amendment [compulsory process clause] to this type of case is unsettled," it preferred to turn to a "due process analysis," where "precedents addressing the fundamental fairness of trials established a clear framework for review."[586] Similarly, a series of procedural rulings relating to capital punishment have been grounded on due process in preference to determining whether those procedures are required by the Eighth Amendment limitation upon the imposition of capital punishment.[587]

In still other areas, the Court's post-incorporation rulings initially relied on due process and subsequently turned to a specific guarantee as an alternative grounding for imposing basically the same constitutional limitations. In developing constitutional standards governing the seating of prospective jurors exposed to prejudicial pretrial publicity, the Court relied on due process in its first post-incorporation ruling,[588] but then relied on the Sixth Amendment right to an impartial jury in applying and expanding upon those standards in later decisions.[589] Judicial action discouraging a defense witness from testifying was held to violate due process in an early post-incorporation ruling,[590] but a later case looked to both due process and the compulsory process clause of the Sixth Amendment in reviewing government action that denied the defendant access to a potential witness.[591] Due process also has been combined with specific guarantees in explaining the scope of a particular defense right. Thus,

586. It added, however, that compulsory process would certainly provide "no *greater* protections in this area than those afforded by due process." *Ritchie*, 480 U.S. at 56 (emphasis added).

587. *See* cases cited *supra* note 533. *See also* Herrera v. Collins, 506 U.S. 390 (1993). In *Herrera*, the plurality opinion "assume[s] for the sake of argument . . . that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant habeas relief if there were no state avenue open to process the claim," *id.* at 417, but does not state whether the unconstitutionality would be based on due process or the Eighth Amendment, though previously characterizing the right to a new-trial hearing as a procedural due process issue. *See supra* note 576. Justice O'Connor's concurring opinion notes that executing a person known to be innocent would violate both the *Rochin* standard of due process, discussed *supra* notes 264-71, and *Patterson* standard of due process, discussed *supra* text accompanying note 476, as well as the Eighth Amendment's standard of "contemporary standards of decency." *Herrera*, 506 U.S. at 419. Justice Blackmun, in dissent, relies on both the *Rochin* standard and Eighth Amendment standard. *Id.* at 430.

588. *See supra* note 501.

589. *See, e.g.*, Patton v. Yount, 467 U.S. 1025, 1026 (1984); Mu'Min v. Virginia, 500 U.S. 415, 417 (1991).

590. Webb v. Texas, 409 U.S. 95 (1972).

591. *See* United States v. Valenzuela–Bernal, 458 U.S. 858 (1982). *See also* Crane v. Kentucky, 476 U.S. 683 (1986), where the Court held unconstitutional the exclusion from trial of evidence concerning the circumstances surrounding the defendant's confession. The Court noted in this regard that "whether 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,'" which the state had violated. *Id.* at 690.

*Rock v. Arkansas*[592] announced that a defendant has a constitutional right to testify at his or her trial produced by the confluence of the Fourteenth Amendment's due process clause, the Sixth Amendment's compulsory process clause and the Fifth Amendment's guarantee against compulsory self-incrimination. The defendant's right to be present at every stage of the trial similarly has been described as the combined product of the right of confrontation under the Sixth Amendment and due process, with the latter adding to the scope of the right.[593] The prohibition against admission of coerced confessions is said to retain a due process grounding, notwithstanding the extension of the self-incrimination privilege to custodial interrogation, although it is not clear what due process today adds to the prohibition.[594]

While many of the cases described above were decided before *Graham*, almost all came after *Gerstein*. Moreover, apart from distinguishing *Gerstein* and *Graham* in a civil forfeiture case,[595] the Court has made no effort to tie the two cases together.

### *C. A proposed return to the shield of "settled usage"*

In *Pacific Mutual Life Insurance Co. v. Haslip*,[596] a 1991 civil case presenting a due process challenge to a state's common law method of assessing punitive damages, Justice Scalia, in a concurring opinion,[597] urged that free-standing due process analysis return to the lesson of *Murray's Lessee*, as explained in *Hurtado*: If a procedure has a strong common law pedigree, that necessarily makes it the law of the land and consistent with due process.[598] *Hurtado*, Justice Scalia noted, had introduced the flexible due process analysis of "fundamental justice," but only for judging what due process requires "when traditional procedures are dispensed with."[599] Justice Scalia acknowledged that "[i]n the ensuing decades . . . the concept of 'fundamental fairness' under the Fourteenth Amendment became increasingly decoupled from the traditional historical approach."[600] He attributed that development to the Court carrying over to the states through selective incorporation prior

592. 483 U.S. 44 (1987).

593. United States v. Gagnon, 470 U.S. 522, 526 (1985) (noting that the right therefore is not limited to situations in which the defendant is "actually confronting witnesses or evidence against him," but also includes other trial related proceedings at which the defendant's presence will contribute to his opportunity to defend himself).

594. *See supra* note 489.

595. *See* United States v. James Daniel Good Real Prop., 510 U.S. 43 (1993), discussed *supra* note 571.

596. 499 U.S. 1 (1991).

597. The quotations that follow come from Justice Scalia's discussion of the development of due process jurisprudence in Part II of his opinion. *Pac. Mut.*, 499 U.S. at 28-39.

598. *See supra* text accompanying note 229.

599. *Pac. Mut.*, 499 U.S. at 32.

600. *Id.* at 34.

interpretations of incorporated guarantees that "had departed from their strict common law meaning."[601] That application, he argued, was distinguishable from determining the independent content of due process.[602] In the latter context, he argued, "no procedure firmly rooted in the practices of our people can be so 'fundamentally unfair' as to deny due process of law."[603]

Justice Scalia appeared to add one significant modification to *Hurtado*'s announced shield for settled usage. Justice Scalia spoke of "unbroken historical usage,"[604] suggesting that the shield would not extend to a practice

601. *Id.* at 35. *See also supra* note 305. Contrary to Justice Scalia's suggestion, that development was not limited to due process cases looking to specific guarantees. *See supra* text accompanying notes 313-17.

602. Justice Scalia reasoned on this score:

> To say that unbroken historical usage cannot save a procedure that violates one of the explicit procedural guarantees of the Bill of Rights (applicable through the Fourteenth Amendment) is not necessarily to say that such usage cannot demonstrate the procedure's compliance with the more general guarantee of "due process." In principle, what is important enough to have been included within the Bill of Rights has good claim to being an element of "fundamental fairness," whatever history might say; and as a practical matter, the invalidation of traditional state practices achieved through the Bill of Rights is at least limited to enumerated subjects.

*Pac. Mut.*, 499 U.S. at 35. Justice Scalia also argued that carrying over a "disregard for the procedure of the ages" from the interpretation of specific guarantees to the interpretation of the independent content of due process was an ironic development "since some of those who most ardently supported the incorporation doctrine did so in belief that it was a means of avoiding, rather than producing, a subjective due process jurisprudence." *Id.* at 34. He cited, in particular Justice Black's criticism of a "natural law" formula of due process. *Id.*

603. *Id.* at 38. Justice Scalia did not thereby reject the fundamental fairness standard. That standard remained applicable in determining whether a departure from historical practice violates due process and whether a practice with no historical analogue violates due process. *See* Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgment*, 33 B.C. L. REV. 981, 995 (1992) (Justice Scalia's challenge was to the Court's rejection of the "first axiom of *Hurtado* by elevating fundamental fairness from its limited role as a test for weighing the constitutionality of government procedures which depart from tradition, to the universal benchmark of due process"). Of course, where departures do occur, Justice Scalia will give great weight to tradition in determining what is fundamental. *See* Martinez v. Court of Appeal of California, 528 U.S. 152 (2000) (Scalia, J., concurring) (suggesting that unconstitutionality of a state denying a defendant the right to proceed pro se might more appropriately have been based on due process, rather than the Sixth Amendment; framers, "who were suspicious enough of governmental power—including judicial power—that they insisted upon a citizen's right to be judged by an independent jury of private citizens, would not have found acceptable the compulsory assignment of counsel by the Government to plead a criminal defendant's case").

604. *Pac. Mut.*, 499 U.S. at 35. *See also* Schad v. Arizona, 501 U.S. 624 (1991) (Scalia, J., concurring).

> Submitting killing in the course of a robbery and premeditated killing to the jury under a single charge is not some novel composite that can be subjected to the indignity of "fundamental fairness" review. It was the norm when this country was founded, was the norm when the Fourteenth Amendment was adopted in 1868, and remains the norm today.

that had basically been abandoned.[605] In *Rock v. Arkansas*,[606] the Court, relying in part on due process, had recognized a constitutional right of a defendant to testify in his own behalf. That right directly contradicted a common law prohibition of testimony by the defendant, a position that had long since been abandoned throughout the United States. The Court was divided as to whether a prohibition of hypnotically refreshed defendant testimony infringed impermissibly on that right (with Justice Scalia joining the dissenters, who argued that it did not). There was no division, however, as to recognizing the basic right and finding support for it in due process.

Justice Scalia stood alone in *Pacific Mutual*.[607] For the majority, Justice Blackmun concluded that even though the common procedure for assessing punitive damages was "well established before the Fourteenth Amendment was enacted"[608] and continued to be widely used, that did not preclude an inquiry to determine whether the method as applied violated due process. In light of the longstanding acceptance of the common law method, it would be inappropriate to declare that method "so inherently unfair as to deny due process and be per se unconstitutional," but "[i]t would be just as inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional."[609] Justice Blackmun quoted in this connection *Williams v. Illinois*,[610] a criminal case, where the Court had noted: "'[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial

> Unless we are here to invent a Constitution rather than enforce one, it is impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is "due." If I did not believe that, I might well be with the dissenters in this case.

*Id.* at 651.

605. *See* Burnham v. Superior Court, 495 U.S. 604, 622 (1990) (Scalia, J.) ("perpetuation of ancient forms" could conceivably be unconstitutional when that perpetuation "is engaged in by only a very small minority of the States"). *See also* David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377 (1999). Justice Scalia, in his non-judicial writings, has described himself as a "faint hearted" originalist, using public flogging as an example of a historical practice permissible at ratification, but unlikely to be sustained if reenacted by a legislature today. *Id.* at 1396-97. He suggested, however, a rejection of an historical practice must be based on "the hard proof in 'extant legislation'" that social perception has so evolved that the practice now is viewed as unconscionable. *Id.* at 1397. This basically limits any departures to situations in which "societal mores have changed so significantly that a historical practice now is either basically forbidden by statutes or no longer imposed by state action . . . ." *Id.*

606. 483 U.S. 44 (1987), discussed *supra* note 506.

607. 499 U.S. at 43. He has, however, persisted in his position. *See* Weiss v. United States, 510 U.S. 163 (1994) (Scalia, J., concurring, joined by Thomas, J.); Schad v. Arizona, 501 U.S. 624 (1991) (Scalia, J., writing separately).

608. *Pac. Mut.*, 499 U.S. at 17. *See* discussion *infra* note 619 as to the use of this timeframe.

609. *Pac. Mut.*, 499 U.S. at 18.

610. 399 U.S. 235 (1970).

adherence to it through the centuries insulates it from constitutional attack.'"[611] Justice O'Connor also relied upon *Williams v. Illinois* in her more extensive rebuttal of Justice Scalia's position.[612] Justice Kennedy, in another separate opinion, noted that he agreed with Justice Scalia that "the judgment of history should govern the outcome in the . . . current case," but could not "say with the confidence maintained by Justice Scalia . . . that widespread adherence to a historical practice always forecloses further inquiry when a party challenges an ancient institution or procedure as violative of due process."[613]

Although refusing to go as far as Justice Scalia urged, the Supreme Court in its post-incorporation rulings, particularly over roughly the last decade, has given substantial weight to the approval of history in applying free-standing due process to state criminal procedure. The Court has described historical acceptance as providing a "strong indication" that the practice in question does not offend a fundamental principle of justice.[614] Indeed, Justice O'Connor, who strongly criticized Justice Scalia's position in *Pacific Mutual*,[615] has stated that "history creates a strong presumption of continued validity."[616] In one instance, where a procedure had deep common law roots, that helped to sustain it even though all but a few states had departed from that common law tradition.[617] Moreover, when the Court over the last decade has spoken of

611. *Williams*, 399 U.S. at 239, *quoted in Pac. Mut.*, 499 U.S. at 17. Justice Scalia responded that *Williams* had indeed "held unconstitutional the centuries-old practice of permitting convicted criminals to reduce their prison sentences by paying fine," but that ruling had been grounded in an equal protection analysis and the "Equal Protection Clause and other provisions of the Constitution, unlike the Due Process Clause, are not an explicit invocation of the 'law of the land' and might be thought to have some counter-historical content." *Pac. Mut.*, 499 U.S. at 38.

612. *Pac. Mut.*, 499 U.S. at 60. Justice O'Connor dissented on the merits, arguing that the state's common law scheme for assessing punitive damages failed to provide the jury with sufficient guidance to meet due process standards. *Id.* She praised the majority for correctly rejecting Justice Scalia's argument "that a practice with a long historical pedigree is immune to reexamination" and stressed the "flexible" character of due process, which allowed it to adjust to "time, place, and circumstances." *Id.* She acknowledged that "history creates a strong presumption of continued validity," but viewed that presumption as overcome in this case. *Id.*

613. *Pac. Mut.*, 499 U.S. at 40. Justice Kennedy noted that Justice Scalia's historical approach "has much to commend it," but that was not because an historical sanction was itself due process. *Id.* "Historical acceptance of legal institutions," he noted, "serves to validate them not because history provides the most convenient rule of decision but because we have confidence that a long accepted legal institution would not have survived if it rested upon procedures found to be irrational or unfair." *Id.*

614. *See* Schad v. Arizona, 501 U.S. 624 (1991). *See also* Montana v. Egelhoff, 518 U.S. 37, 43-48 (1996) (acceptance at common law at the time of the adoption of the Constitution and at the time of the adoption of the Fourteenth Amendment would present "what might be called an *a fortiori* argument in favor of the State"); Herrera v. Collins, 506 U.S. 390, 408 (1993).

615. *See supra* text accompanying note 612. *See also* Medina v. California, 505 U.S. 437, 453 (1992) (O'Connor, J., concurring).

616. *See Pac. Mut.*, 499 U.S. at 41 (O'Connor, J., dissenting).

617. *See* Martin v. Ohio, 480 U.S. 228 (1987).

history supporting a particular procedure, even the dissents have not countered by noting that due process constitutes an "evolving concept" that can overturn history.[618]

In one sense, the Court in the post-incorporation era may have broadened the potential for historical acceptance sustaining a challenged practice. In determining whether a particular state practice has the endorsement of history, the Court has looked to the standards of the common law as they existed at the times of the adoption of both the Fifth Amendment and the Fourteenth Amendment.[619] Presumably, a clearly established acceptance at either point would be entitled to considerable weight. Since the independent content of the two due process clauses is thought to be the same, evidence that a process was not viewed as violating the Fifth Amendment when it was adopted should also be relevant to interpreting the Fourteenth Amendment. So too, if a practice was unknown when the Fifth Amendment was adopted, but was well

618. Frankfurterian descriptions of due process, *see* discussion *supra* in text accompanying notes 319-23, have largely been ignored in the state criminal procedure cases of the last decade. Writing separately in *Medina v. California*, 505 U.S. 437 (1992), *see infra* text accompanying note 685, Justice O'Connor did quote from Justice Frankfurter's *Griffin v. Illinois* description of due process as the guarantee "least frozen-in-history" and "most absorptive of powerful social standards of a progressive society," *see supra* note 321, but she also included Justice Frankfurter's additional comment that "neither the unfolding content of 'due process' nor the particularized safeguards of the Bill of Rights disregard procedural ways that reflect a national historic policy." *Medina*, 505 U.S. at 454 (O'Connor, J., concurring) (quoting Griffin v. Illinois, 351 U.S. 12, 20-21 (1956)). *See also supra* note 612 (discussing Justice O'Connor's dissent in *Pac. Mut.*, 499 U.S. at 60).

The most notable exception is Justice Souter's dissent in *Montana v. Egelhoff*, 518 U.S. 37, 74 (1996). After acknowledging that the state's position was in accord with common law as it stood "when the Fourteenth Amendment's Due Process Clause was added to the Constitution," Justice Souter noted:

> That is enough to show that Montana's rule . . . contravenes no principle "so rooted in the traditions and conscience of our people" as they stood in 1868, "as to be ranked as fundamental." But this is not the end of the due process enquiry. Justice Harlan's dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 542 (1961) teaches that the "tradition" to which we are tethered is a "living thing." What the historical practice does not rule out as inconsistent with "the concept of ordered liberty," must still pass muster as rational in today's world.

*Id.* at 74-75 (citations omitted).

619. *See, e.g.*, Patterson v. New York, 432 U.S. 197, 201 (1977) (citing to the common law rule "when the Fifth Amendment was adopted . . . and when the Fourteenth Amendment was ratified"); Martin v. Ohio, 480 U.S. 228 (1987) (same); Herrera v. Collins, 506 U.S. 390 (1993) (English common law rule adopted in American colonies and carried forward by the states). *See also* Montana v. Egelhoff, 518 U.S. 37, 43-48 (1996) (finding that state practice was consistent with common law in England and this country at the time of the adoption of the Constitution, so even if it was assumed that common law was "no longer generally applied" at the time of the adoption of the Fourteenth Amendment," that only cut off "what might be called an *a fortiori* argument in favor of the State").

established and widely accepted when the Fourteenth Amendment was adopted, that is evidence that it was not viewed as violating due process (either Fifth or Fourteenth Amendment) at that time.[620]

The post-incorporation decisions have also looked to the sanction of historical usage in determining whether a particular procedural right is "fundamental" and therefore demanded by due process. The Court has frequently noted that "historical practice is probative of whether a procedural rule can be characterized as fundamental."[621] A principle that has "deep roots in our common law heritage" is more readily characterized as "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[622] Moreover, while "trial practices" may change and still remain true to the "principles" underlying the Anglo-American criminal justice system, those original practices often help to explain the core of such principles.[623]

Reliance on the lessons of historical practice has led the Court to both establish a general principle as fundamental and to accept a particular practice as historically sanctioned by settled usage even though that practice tends to reduce that general principle to a matter of form in particular settings. This willingness to let the common law control—both as to its general principles and its acceptance of pragmatic exceptions to those principles—probably explains the functional inconsistency in the Court holding fundamental the requirement of proof beyond a reasonable doubt and yet allowing the shifting

620. Consider, however, the dissenting opinion of Justice O'Connor in *Apprendi v. New Jersey*, 120 S. Ct. 2348, 2380 (2000). In a concurring opinion, Justice Thomas relied heavily on historical usage in arguing that due process requires treating as an element of a crime (and therefore requiring proof beyond a reasonable doubt) "every fact that is by law a basis for imposing or increasing punishment." *Id.* at 2368. He offered in support consistent rulings "from the founding to roughly the end of the Civil War" (citing primarily cases from the 1840s onward) and the continuation of the understanding of these cases well into the twentieth century. *Id.* at 2369 & n.2. In response, Justice O'Connor noted, *inter alia*, that "Justice Thomas divines the common law understanding of the Fifth and Sixth Amendment rights by consulting decisions rendered by American courts well after the ratification of the Bill of Rights, ranging primarily from the 1840s to the 1890s." *Id.* at 2383. Such decisions "fail[ed] to demonstrate any settled understanding . . . under the . . . preexisting common law." *Id.* Apparently, the understanding at the time of the adoption of the Fourteenth Amendment was not crucial. Justice Thomas responded that relying on post-1840 decisions to show the understanding "at the time of the founding" was appropriate because that time frame produced the proposed modifications that first brought this principle into dispute. *Apprendi*, 120 S. Ct. at 2369.

621. Medina v. California, 505 U.S. 437, 446 (1992). *See also* Cooper v. Oklahoma, 517 U.S. 348, 356 (1996); Herrera v. Collins, 506 U.S. 390, 408 (1993).

622. *Medina*, 505 U.S. at 446.

623. *See* Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), concluding that various aspects of the common law (rules of pleading, the character of sentencing discretion, and jury practice) establish that factors which increase the level of punishment are elements of the crime and therefore require proof beyond a reasonable doubt.

of burdens to the defendant if the proper form is followed.[624] So too, when the Court in its latest term concluded that due process requires proof beyond a reasonable doubt as to any factor that raises the maximum sentence, but an exception exists as to recidivist statutes (under which prior convictions raise the maximum sentence), it looked to history both in establishing the general principle and recognizing the pragmatic exception for recidivist statutes.[625]

In the pre-incorporation era, the Court appeared to give as much weight to the contemporary consensus of state law as to common law pedigree.[626] In the post-incorporation decisions, consensus remains a relevant factor, but arguably less significant than the sanction of historical practice. As in the pre-incorporation period, the key is a significant widespread acceptance of a practice, not necessarily acceptance by a majority of the states.[627] Where a number of states accept a particular practice, that constitutes a "concrete indicator"[628] that the practice is not contrary to the "conscience of our people."[629] Nonetheless, in general, the significance of a consensus in state practice appears to be tied to its relationship to historical tradition (where such tradition is available).[630]

624. *See* Mullaney v. Wilber, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197 (1977); Martin v. Ohio, 480 U.S. 228 (1987). The functional inconsistencies in these rulings has been widely recognized, though commentators disagree as to the appropriate handling of the issue consistent with the general principle. *See, e.g.*, Ronald J. Allen, *The Restoration of* In re Winship*: A Comment on Burdens of Persuasion in Criminal Cases*, 76 MICH. L. REV. 30 (1977); Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Issues*, 94 HARV. L. REV. 321 (1980); John Calvin Jeffries, Jr. & Paul B. Stephen, *Defenses, Presumptions, and Burdens of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979); Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665 (1987) (also citing the commentary).

625. *See* Apprendi v. New Jersey, 120 S. Ct. 2348 (2000). The ruling on recidivist statutes, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), came before the Court had adopted a definition of elements that included maximum sentence enhancers, but the Court in *Apprendi* described the recidivism statutes as a "limited exception." Justice Thomas in a concurring opinion argued that the common law did not actually recognize such an exception, and the majority acknowledged that the case may have been "incorrectly decided." Thus, it could be reopened, and if so, what exactly was the historical practice is likely to be a critical issue.

626. *See supra* text accompanying notes 355-65.

627. *See, e.g.*, North Carolina v. Alford, 400 U.S. 25 (1970); Spencer v. Texas, 385 U.S. 554, 556 (1967); Mu'Min v. Virginia, 500 U.S. 415, 426-27 (1991).

628. *See* Shad v. Arizona, 501 U.S. 624, 640 (1991) (speaking of "history" and "widely shared practice").

629. *See supra* text accompanying note 476.

630. There are, of course, situations in which the procedural steps in question have no ready common law counterpart. Here the consensus may weigh heavily. *See, e.g.*, Mu'Min v. Virginia, 500 U.S. 415 (1991) (noting that various jurisdictions had refused to require an individual voir dire of jurors in cases involving pretrial publicity, and refusing to impose such a requirement as a matter of due process); Chandler v. Florida, 449 U.S. 560 (1981) (citing state support, as reflected

The contemporary consensus appears to be given the greatest weight where it reflects widespread acceptance of a practice that also has deep roots in our common law heritage.[631] This combination is not conclusive,[632] but as the Court has noted: "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it."[633] Where a very strong contemporary consensus rejects a procedure (*i.e.*, where all but a few states reject it), and that rejection follows a position well established at common law, that consensus will contribute significantly to the case against the procedure.[634] Such a consensus will be discounted, however, if the Court concludes that practice in question, though different in form, does not truly depart from the fundamental principle that shaped the different approach followed at common law and in the vast majority of the states.[635]

Where the common law and the contemporary consensus point in different directions, the historical sanction has tended to trump the contemporary consensus.[636] In *Medina v. California*,[637] speaking to such a situation, the

in *amici* briefs of state officials, in allowing continuing experimentation in televising trials, and rejecting claim that televising constitutes a per se violation of due process).

631. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 410-11 (1993) (noting that common law and current rules in many states sharply limit time for "a new trial motion based on newly discovered evidence"); Schad v. Arizona, 501 U.S. 624, 639-41 (1991) (noting the continued acceptance of the common law definition of murder that treated the intent to kill and the intent to commit a felony as alternative aspects of mens rea and allowed for verdict without requiring a jury to select between them).

632. *See, e.g.*, *Schad*, 501 U.S. at 62 ("This is not to say that either history or current practice is dispositive.").

633. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 17 (1991) (quoting Sun Oil v. Wortman, 486 U.S. 717, 730 (1988)). *See also* McGautha v. California, 402 U.S. 183, 203 (1971) (stating that "it requires a strong showing to upset this settled practice of the Nation").

634. *See, e.g.*, Cooper v. Oklahoma, 517 U.S. 348, 360-61 (1996) (noting that the Oklahoma requirement that defendant prove his competency to stand trial by clear and convincing evidence was contrary to "late 18th century" precedents, which suggested use of a standard more favorable to the defendant, and was contrary to "contemporary practice," with only four of fifty states imposing such a heavy burden); Beck v. Alabama, 447 U.S. 625, 635 (1980) (stating that Alabama's practice was unconstitutional and was "unique in American criminal law" and contrary to the common law).

635. *See, e.g.*, Leland v. Oregon, 343 U.S. 790 (1952), discussed *supra* note 363. The Court has frequently noted that the states are free to take new approaches, provided they do not violate principles of justice deemed fundamental, and as to that determination, "history and current practice" may be strong indicators, but "this is not to say that either history or current practice is dispositive." Schad v. Arizona, 501 U.S. 624, 642 (1991). So too, the Court has stated that the fact "that [a state's] approach has been adopted in few other States does not render [the state's] choice unconstitutional." McMillan v. Pennsylvania, 477 U.S. 79, 90 (1986).

636. The *Rochin* "shock the conscience" standard would appear to look solely to contemporary sense of justice and thus give great weight to a contemporary consensus, but it was not presented as an alternative to a *Patterson* type standard, but as an application of such a

Court characterized "contemporary practice" as being "of limited relevance to the due process inquiry" and cited in support *Martin v. Ohio*[638] and *Patterson v. New York*.[639] In both cases, the challenged state procedure (involving the allocation of the burden of proof) was consistent with the traditional common law position, which prevailed when both the Constitution and the Fourteenth Amendment were adopted, but that position subsequently had been rejected by the vast majority of states (all but two in *Martin*). In both cases, the Court sustained the state practice, noting that the abandonment of the common law view by a majority of states did not render that position inconsistent with due process, which "require[s] that only the most basic procedural safeguards be observed . . . ."[640] The question of constitutionality, the Court noted, "is not answered by cataloging the practices of . . . [the] States."[641]

On the other side, where a state practice is widely accepted, but contrary to a common law standard, that acceptance arguably should have far more than "limited relevance" in light of the recognition, starting with *Hurtado*, that due process does not lock the states into common law forms, which may well have been the product of the conditions and the times in which they were developed rather than a fundamental principle of justice.[642] The Court has sometimes been wary, however, of a newly adopted innovation, lacking a significant tradition, which departs from a structural feature of the common law. Thus, in *Apprendi v. New Jersey*,[643] the Court concluded that such an innovation lost sight of the basic premise of requiring proof beyond a reasonable doubt and would not be sustained. This was so notwithstanding various changes in

standard. *See* discussion *supra* note 271; Donald A. Dripps, *Does Police Pursuit Shock the Conscience?*, TRIAL, Aug. 1998, at 66. ("Shocking the conscience of contemporary justices, however, might not be enough to prevail, because history and tradition might indicate that current consciences are overly squeamish about coercive state actions.").

637. 505 U.S. 437 (1992).

638. 480 U.S. 228 (1987).

639. 432 U.S. 197 (1977).

640. *Patterson*, 432 U.S. at 210.

641. *Martin*, 480 U.S. at 236 (1987). *See also* Montana v. Egelhoff, 518 U.S. 37, 48 (1996).

642. *See supra* text accompanying notes 130 and 326. *See also* Rock v. Arkansas, 483 U.S. 44, 51 (1987) (relying in part on due process to establish a defendant's right to testify under oath at his own trial). Although the Court in *Rock* relied on various factors besides the unanimous rejection of the common law rule that disqualified the defendant from being a witness, it did cite to that rejection and did note that it was now the "considered consensus of the English-speaking world . . . that there [is] no rational justification" for the common law rule. *Id.* at 50 (quoting Ferguson v. Georgia, 365 U.S. 570, 582 (1961)). Of course *Rock* was not based solely on due process. *See supra* note 506.

643. 120 S. Ct. 2348 (2000), discussed *supra* note 625. *Apprendi* relies heavily upon *Jones v. United States*, 526 U.S. 227 (1999), which contained an extensive discussion of the relevant common law history.

sentencing philosophy and structure that supported the innovation,[644] and arguably would have lead a Court adhering to the *Hurtado* philosophy to sustain the innovation as a rational attempt at "wise adaptation to new circumstances . . . ."[645] Indeed, the *Apprendi* majority appeared not to give any weight to the fact that the New Jersey sentencing structure there held unconstitutional had counterparts in many states.[646] It may well be that a critical element here is whether the widespread departure from the common law tradition is presented as some recent innovation seeking to accommodate administratively some pressing political concern of the day, or as a well established, gradually developed new perspective on fairness with a tradition of its own.[647]

Prior to incorporation, the Court would apply a mode of deductive reasoning to impose due process requirements that did not have support in the common law or the current consensus.[648] That analytical device has continued to be used in the post-incorporation era in much the same manner. The Court has started with a structural prerequisite clearly established as part of due process (*e.g.*, notice) and asked whether a particular practice is required or prohibited as a logical extension of that structural prerequisite.[649] The same question has also been asked in cases that have relied upon historical practice and contemporary consensus,[650] but deductive reasoning is more significant as

644. *See Apprendi*, 120 S. Ct. at 2397-99 (Breyer, J., dissenting). *See also* Jacqueline E. Ross, *Unanticipated Consequences of Turning Sentencing Factors into Offense Elements: The* Apprendi *Debate*, 12 FED. SENT. R. 197 (Jan./Feb. 2000).

645. *Hurtado*, 110 U.S. at 530.

646. A forthcoming article by Nancy King and Susan Klein notes that *Apprendi* threatens dozens of existing federal and state statutes. *See* Nancy J. King & Susan R. Klein, *Après* Apprendi, 12 FED. SENT. REP. 331 (2000). In *Carless v. United States*, 120 S. Ct. 2739 (2000), certiorari was granted, judgment was reversed, and the case was remanded for further consideration in light of *Apprendi*, evidencing the Court's apparent awareness of *Apprendi*'s application beyond the "hate crime" provision presented in *Apprendi*.

647. *Compare* Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), discussed *supra* note 643, *with* Rock v. Arkansas, 483 U.S. 44 (1987), discussed *supra* note 642.

648. *See supra* text accompanying notes 376-80.

649. *See, e.g.*, Cooper v. Oklahoma, 517 U.S. 348, 355 (1996) (considering practice's relationship to the prohibition against trying incompetent person); Gagnon v. Scarpelli, 411 U.S. 778, 786-87 (1973) (considering practice's relationship to the right to a hearing); Wardius v. Oregon, 412 U.S. 470, 474 (1973) (considering practice's relationship to basic goals of adversary system).

650. *See, e.g.*, Medina v. California, 505 U.S. 437, 448-52 (1992). Another mode of this analysis starts with a structure that is clearly not required by due process and asks whether it follows that that particular procedure also is not required. *See, e.g.*, Martinez v. Court of Appeal, 120 S. Ct. 684, 693 (2000) (Scalia, J., concurring) (noting that because there is no due process right to appeal, leaving the states free even to adopt a review "which consists of a nonadversarial reexamination of convictions by a panel of experts," states certainly can insist on adversarial review with each side represented by counsel, denying the defendant's right to proceed pro se).

the primary grounding for rulings that ignore those factors. In the post-incorporation era, decisions departing from historical practice have been far more likely to be based on deductive reasoning than characterization of due process as an evolving concept.

In some instances the Court has turned to the logical extension of due process basics where looking to historical practice would not have been fruitful. Apart from those practices so commonplace as to be widely recognized in the literature,[651] a practice is not appropriately characterized as part of our common law heritage simply because there is little or no common law precedent specifically prohibiting the practice. Thus, when the Court has before it such practices as a judge failing to inform a murder defendant that the judge was considering a death sentence even though the prosecutor had recommended life imprisonment,[652] or the police intentionally destroyed evidence known to be exculpatory,[653] one would not expect the Court to discuss the relevance of historical practice or even contemporary consensus. Arguably, the same would be true of other actions viewed as unusual, if not unique, such as the failure of the judge to control the disruptive conduct of newsmen within the courtroom.[654] However, no reference was made to common law traditions or a possible contemporary consensus in various other rulings where deductive reasoning was employed to "requir[e] States to institute procedures that were neither required at common law nor explicitly commanded by the text of the Constitution."[655] Thus, post-incorporation due process rulings have: extended the concept that the state had a duty to offset indigency barriers to the exercise of rights;[656] prohibited unjustified and prejudicial delay in the bringing of charges, notwithstanding compliance with the statute of limitations;[657] required a prosecutor who increase charges on a

651. *See, e.g.*, Williams v. New York, 337 U.S. 241, 246 (1949) (noting that courts in this country had traditionally "practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence" considered in sentencing, and citing in this connection law review literature as well as two collections of cases).

652. Lankford v. Idaho, 500 U.S. 110, 120 (1991).

653. Arizona v. Youngblood, 488 U.S. 51, 54 (1988).

654. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966).

655. *See* Medina v. California, 505 U.S. 437, 454 (1992) (O'Connor, J., concurring). At times, dissenters would have relied upon deductive reasoning to override practices sanctioned at the common law, but the majority relied upon history to refuse to do so. *See, e.g.*, Montana v. Egelhoff, 518 U.S. 37 (1996), including Justice Souter's dissent, *Egelhoff*, 518 U.S. at 74, *quoted in supra* note 618.

656. *See* Ake v. Oklahoma, 470 U.S. 68 (1985), discussed *supra* text accompanying note 496; Douglas v. California, 372 U.S. 353 (1963), discussed *supra* text accompanying note 534; Gagnon v. Scarpelli, 411 U.S. 778, 786-87 (1973), discussed *supra* text accompanying note 537. As for the pre-incorporation recognition of this principle, see *supra* text accompanying note 365.

657. *See* United States v. Marion, 404 U.S. 307, 317-18 (1971); United States v. Lovasco, 431 U.S. 783, 795 (1977).

trial de novo to explain that increase,[658] and a judge to explain a sentence which is higher than the sentence that the judge previously imposed on a prior conviction for the same offense that had subsequently been reversed on appeal;[659] required the prosecution to disclose evidence within the government's possession that is material and exculpatory;[660] mandated that a state under special circumstances allow testimony and questioning concerning another person's confession to the crime charged against the defendant, notwithstanding preclusion under traditional evidentiary standards;[661] prohibited admission of lineup identification evidence where it presents a substantial likelihood of irreparable misidentification (thereby rejecting a state position that simply puts the reliability issue to the jury);[662] and mandated a broad range of hearing requirements for the revocation of probation and parole.[663] While historical practice would not have been available as to all of these issues, it was most likely available as to several. The widespread state acceptance of a contrary position certainly was a distinct possibility as to all. Neither factor was viewed as needing to be discussed, apparently because each would be trumped by the logical imperative of a structural feature of due process.[664]

The Court has noted, however, that it is limited in its imposition of new requirements based upon a deductive analysis. An acknowledged structural requirement hardly provides a "yardstick" which can be used in a

658. *See* Blackledge v. Perry, 417 U.S. 21, 30 (1974).

659. *See* North Carolina v. Pearce, 395 U.S. 711 (1969), *as modified by* Texas v. McCullough, 475 U.S. 134, 140 (1986).

660. *See* Brady v. Maryland, 373 U.S. 83 (1963); United States v. Bagley, 473 U.S. 667 (1985). This arguably is an area in which the historical practice was uncertain, as judicial decisions were not likely to deal directly with the issue on a widespread basis. *See* 1 TREATISE, *supra* note 1, § 2.7, at 600 n.151. However, the Court did not look to possible indicators of a tradition that allowed the prosecutor to keep its discoveries to itself provided that it did not introduce false evidence, such as the absence of any such disclosure requirement in defense discovery authority (none existed at common law), or the failure to distinguish evidence that had been in the prosecutor's possession on new trial motions based on newly discovered evidence. *See* 4 TREATISE, *supra* note 1, § 20.1(a) (discovery); 5 *id.* § 24.6(d) (new trial motions).

661. *See* Chambers v. Mississippi, 410 U.S. 284 (1973).

662. *See* Stovall v. Denno, 388 U.S. 293 (1967).

663. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973), discussed *supra* text accompanying note 537; Morrissey v. Brewer, 408 U.S. 471 (1972), discussed *supra* text accompanying note 538. In *Morrissey*, the Court did take note of state practice in a footnote, noting that a "number of States are affected by no legal requirement to grant any kind of hearing" and others simply required "some type of hearing," presumably indicating that these jurisdictions would not meet the requirements of the Court. *Id.* at 489 n.15.

664. *But see* Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 894-95 (1979) ("If a societal consensus has not developed on a concrete issue, it seems likely either that the particular application does not follow inexorably from the general principle, or that the general principle is not exactly what the court supposes.").

"mechanical" fashion to test the validity of a challenged procedure.[665] Rather, determining the imperatives of such a requirement requires "'a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.'"[666] Decisions must take account of the "past course of decisions" that have construed that prerequisite. [667] They also must recognize that reasonable minds may differ on what process is needed to implement the structural basics of a fair adjudicatory process, and the Court therefore cannot "engage in a finely tuned review of the wisdom" of the challenged state practice.[668] Thus, the Court has noted that "a state procedure 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection'" to the defendant,[669] and that "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."[670] The Court also has stressed in various contexts that the focus must be on the operation of the practice in the individual case, and a state practice therefore should not be deemed to violate due process unless it conflicts with a structural prerequisite of fairness in a manner that actually causes substantial prejudice to the particular defendant.[671]

In sum, while the Court has refused to return to the *Hurtado* shield of "settled usage," its post-incorporation rulings do reflect a general pattern of increased reliance upon historical acceptance, both in rejecting and sustaining constitutional challenges. The sanction of history has served to sustain practices that had been abandoned as outmoded by all but a small group of states. It has sustained as well practices that were recognized at common law though apparently inconsistent with general principles elsewhere reflected in the common law. On the other side, although the Court has continued to speak of the need to give the states leeway to search for novel solutions to practical problems, the sanction of history has proven a more formidable obstacle to state innovations at odds with historical practice, at least where such innovations have only limited support among the states and are characterized as substantive rather than formalistic. As in the pre-incorporation era,

665. Lankford v. Idaho, 500 U.S. 110, 121 (1991).

666. *Id.* at 121 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring)).

667. *Id.*

668. Estelle v. McGuire, 502 U.S. 62, 72 (1991).

669. Medina v. California, 505 U.S. 437, 451 (1992) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). *See also* Spencer v. Texas, 385 U.S. 554, 564 (1967) (same).

670. *Medina*, 505 U.S. at 451 (quoting Patterson v. New York, 432 U.S. 197, 208 (1977)).

671. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 678 (1985); Ake v. Oklahoma, 47 U.S. 68, 82-83 (1985); United States v. Lovasco, 431 U.S. 783, 795-96 (1977); Manson v. Brathwaite, 432 U.S. 98, 112-16 (1977).

however, the treatment of historical sanction has not been consistent. Although the Court has been less willing to discount that sanction by characterizing due process as an open-ended, evolving concept, it has continued to discount (or simply ignore) historical sanction in utilizing deductive reasoning to impose new constitutional mandates (including some that are contrary to the contemporary consensus as well as to historical practice).

### *D. Utilitarian balancing*

In *Mathews v. Eldridge*,[672] a case involving an administrative proceeding, the Court announced a three-factor balancing standard, which it later characterized as "a general approach for testing challenged state procedures under a due process claim."[673] Under *Mathews*, once a court determines that a litigant has at stake an interest protected by due process, its task is then to analyze and balance three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[674]

*Mathews* did not prescribe precisely where the balance should be struck, but the greater the defendant's interest, the greater the risk of error under the challenged procedure, and the greater the potential for substantially reducing that risk through a modification that imposes minimal costs for the state, the greater the likelihood that the modification will be required under due process.

Although the Supreme Court considered numerous due process challenges to state criminal procedures in the fifteen-year period between *Mathews* and *Medina v. California*,[675] it utilized the *Mathews* balancing test in only one of those cases, and its use there was not debated.[676] In *Medina*, the applicability of the *Mathews* standard was viewed as a central issue in resolving a due

672. 424 U.S. 319 (1976).

673. Parham v. J.R., 442 U.S. 584, 599 (1979).

674. *Mathews*, 424 U.S. at 335 (1976) (citing Goldberg v. Kelly, 397 U.S. 254, 263-71 (1970)). *See generally* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

675. 505 U.S. 437 (1992).

676. That case was *Ake v. Oklahoma*, 470 U.S. 68 (1985), discussed *supra* text accompanying note 496. As noted in *Medina*, the Court also referred to *Mathews* in a federal criminal case. *See* United States v. Raddatz, 447 U.S. 667 (1980). In rejecting *Mathews*, the *Medina* Court noted that it was not "disturbing the holding in *Raddatz* and *Ake*, [as] it is not at all clear that *Mathews* was essential to the results reached in those cases." *Medina*, 505 U.S. at 444.

process challenge to a state law that allocated to the defense the burden of establishing that the defendant was incompetent to stand trial.[677] The *Medina* majority rejected the contention that such a law should be judged under the *Mathews* balancing test. *Mathews*, the Court concluded, was inappropriate for this case and criminal cases in general. The "Bill of Rights," it noted, "speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the due process clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order."[678] Accordingly, free-standing due process should be construed "'very narrowly' based on the recognition that, '[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.'"[679]

The *Medina* majority concluded that the appropriate standard for judging the independent content of due process in criminal cases was the "narrower inquiry" of the traditional fundamental fairness standard, as set forth in *Patterson v. New York*,[680] a case which also involved a due process challenge on a burden-of-proof issue. *Patterson* suggested that "because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area."[681] It therefore had endorsed an approach "far less intrusive than that approved in *Mathews*."[682] Under that approach a state procedure is "'not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[683] Applying the *Patterson* standard, the *Medina* majority looked to both the historical treatment of the burden of proof as to incompetency and the logical implications of the prohibition against the trial of an incompetent defendant (a "recognized principle of 'fundamental fairness'"),

677. Although the majority viewed this as an issue that should be resolved, two concurring justices and two dissenting justices disagreed. The concurring justices (O'Connor, J., joined by Souter, J.) argued that the state law was constitutional under the *Mathews* test, just as the majority found it constitutional under a traditional fundamental fairness standard. *Id.* at 454-56. The dissenters (Blackmun, J., joined by Stevens, J.) argued that the parties had improperly framed the issue as involving a choice between the two standards, as the state law was unconstitutional under the rationale of earlier precedent dealing with the incompetency issue. *Id.* at 459.

678. *Id.* at 443.

679. *Id.* at 443 (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)). *See also supra* notes 483-85.

680. 432 U.S. 197 (1977). As the *Medina* Court noted, *Patterson* was decided after *Ake*, discussed *supra* note 676, but did not refer to the *Mathews* standard. *Medina*, 505 U.S. at 445.

681. *Medina*, 505 U.S. at 445-46.

682. *Id.* at 446.

683. *Id.* at 445 (quoting *Patterson*, 432 U.S. at 201-02).

and concluded that neither provided a basis for holding that the state's allocation of the burden of proof to the defendant violated due process.[684]

Justice O'Connor wrote separately in *Medina* in support of applying *Mathews* to criminal cases. She acknowledged that the *Mathews* balancing test did not refer to historical practice, and that history commonly played an important role in criminal cases.[685] However, historical endorsement was not conclusive, as the majority appeared to acknowledge. "Against the historical status quo," the Court seemingly would "allow some weight to be given countervailing consideration of fairness in operation," but these were "considerations much like those . . . evaluated in *Mathews*."[686] The troubling aspect of the Court's rejection of *Mathews*, Justice O'Connor suggested, was not its preference for a standard that first looked to the "traditions of our people," but to its "intimation that the balancing of equities is inappropriate in evaluating whether state criminal procedures amount to due process."[687]

Justice Blackmun in dissent also expressed concern that the rejection of *Mathews* might be seen as a rejection of balancing. He argued that "the Court's reliance on *Patterson*" should not be viewed as condemning "the basic balancing of the government's interests against the individual's interest that is germane to any due process inquiry."[688] He noted that *Patterson*, "[w]hile unwilling to discount the force of tradition and history," had not adopted "an exclusively tradition-based approach to due process analysis."[689] The "Court in *Patterson* [also] looked to the 'convenience' to the government and 'hardship or oppression' to the defendant," aspects of the governmental and individual interests that had to be weighed against each other in "determ[ining] what process is due."[690]

The *Medina* majority's decision not to apply the *Mathews* standard to criminal justice cases obviously rested, in part, on the failure of that standard to acknowledge the role of history and tradition in the definition of due process in the criminal justice field. However, the *Mathews* analysis could play a role

684. *Id.* at 446-53.

685. *See supra* text accompanying note 616.

686. *Medina*, 505 U.S. at 454 (O'Connor, J., concurring). Justice O'Connor noted, moreover, that criminal cases can sometimes present a "new administrative regime" as to which there is "no historical practice," such as guideline sentencing. *Id.* at 453-54. *Mathews*, she argued, would be most helpful in analyzing due process claims in that context. *Id.*

687. *Id.* at 453 (O'Connor, J., concurring).

688. *Id.* at 460.

689. *Id.* at 460 (Blackmun, J., dissenting).

690. *Id.* Consider, however, Bruce J. Winick, *Presumptions and Burdens of Proof in Determining Competency to Stand Trial: An Analysis of* Medina v. California *and the Supreme Court's New Due Process Methodology in Criminal Cases*, 47 U. MIAMI L. REV. 817, 826 (1993) (viewing *Medina* as having rejected *Mathews* in favor of an "exclusively historical approach" and reading Justice O'Connor's opinion as challenging the Court's failure to take account of the growth potential in due process).

alongside history and tradition, as evidenced by the Court's application of the *Mathews* analysis to aspects of civil process that also have deep roots in our common law heritage.[691] The more critical concern for the *Medina* Court, as suggested by Justices O'Connor and Blackmun, was the use of balancing in the *Mathews* analysis. In applying the fundamental fairness standard, the *Medina* majority looked not only to historical practice, but also to the logical implications of a basic principle of fairness, the prohibition against forcing to trial an incompetent defendant. This required it to explore the extent to which allocating the burden to the defendant posed a risk to the implementation of that principle. Such an assessment would also be required under the *Mathews* standard, but there the Court would also evaluate the potential for reducing that risk by shifting the burden to the prosecution and the cost to the state of doing so. The *Medina* majority, in contrast, stressed that the question before it was not whether the state could do more to implement the prohibition against trying the incompetent, but simply whether the state's procedure substantially undercut that prohibition. If it did not, deference to the state's legislative judgment required its constitutional acceptance no matter how much more might have been achieved at little or no cost to the state.

In the course of applying the traditional fundamental fairness standard as prescribed by *Medina*, a court, in its analysis of the impact of the challenged state procedure upon the structural prerequisites of fairness, is likely to consider many of the same factors as it would in applying *Mathews*.[692]

691. *See, e.g.*, United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993), applying the *Mathews* inquiry to a challenge to the procedures used in a civil forfeiture proceeding. Although the forfeiture there was connected to the use of the subject property in a criminal transaction, the civil nature of the proceeding served to distinguish *Medina. Id.* at 66. Indeed, the Court also looked to the civil character of the proceeding in determining the appropriate role of due process regulation. *Id.* at 52. It rejected the government's argument that since the seizure of forfeitable property was subject to the Fourth Amendment, due process should not add additional requirements. *Id.* at 49. The Court distinguished *Gerstein v. Pugh*, 420 U.S. 103 (1975), discussed *supra* note 571, where the Court had viewed the Fourth Amendment as the exclusive source of constitutional regulation of the custody that followed a warrantless arrest. *Id.* at 50.

692. Consideration of the initial *Mathews*' factor—the private interest at stake—is inherent in a deductive analysis of the structural prerequisites of fundamental fairness as applied to the criminal process, *i.e.*, to proceedings that involve the private interest of avoiding a criminal conviction and its accompanying sanctions. At least one aspect of the second factor—the risk of erroneous deprivation under the current procedure—is an aspect of determining the extent to which the procedure may undercut the basic structural objective of avoiding conviction of the innocent. Consideration of alternatives is more problematic, but possible in the course of assessing the impact of the current procedure. Thus, the *Medina* Court, in exploring the impact of the burden allocation upon possibility of forcing to trial an incompetent person, compared the placement of that burden on the defendant and on the prosecution. *See also* Cooper v. Oklahoma, 517 U.S. 348, 355-56 (1996) (risks imposed by requiring defense showing by clear and convincing evidence rather than preponderance standard). Finally, the third factor, the state's

However, it will do so from a perspective that prohibits only a serious undermining of the structural prerequisite rather than one that considers whether the state has struck a reasonable balance in failing to produce a procedure that would better implement that structural prerequisite. It will do so from a perspective which states that "a state procedure 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection'" to the defendant,[693] and that the states are entitled to substantial deference in their judgments as to what is an appropriate balance between liberty and order in light of their "considerable expertise in matters of criminal procedure" and usual grounding of the "criminal process . . . in centuries of common-law tradition."[694] In this sense, the *Medina* Court does appear to eschew balancing and to utilize an inquiry that is "narrower."[695]

## IV. THE LESSONS OF HISTORY

Over the roughly twelve decades since *Hurtado*, the Court has considered a wide range of guidelines for determining the independent content of due process. Of course, those guidelines were considered in quite different contexts. *Hurtado* considered guidelines for a due process content that could not overlap with the specific guarantees of the Bill of Rights; the pre-incorporation cases following *Hurtado* considered guidelines for a due process content that would both encompass some aspects of the restrictions imposed by certain specific guarantees and add restrictions that had no parallel in those guarantees; and the post-incorporation decisions considered guidelines for a due process content that went beyond the specific guarantees, but operated alongside an additional content that applied to the states in their full scope almost every one of those specific guarantees. Even though the first two stages dealt with a regime of constitutional regulation quite different than the post-incorporation stage, no feature of the guidelines considered during those earlier stages precluded their adoption or continued application during the post-incorporation stage. Indeed, most of the guidelines accepted during those first two stages remain open to consideration, if not actively supported, by the current Court.

Taking account of the guidelines considered in all three stages, a wide range of positions have been open to the Court, with most remaining viable

interest, may be considered in determining whether the state has made a rational decision, insofar as rationality is an aspect of due process. *See, e.g.*, Schad v. Arizona, 501 U.S. 624 (1991).

693. *Medina*, 505 U.S. at 451 (quoting *Snyder*, 291 U.S. at 105). *See also* Spencer v. Texas, 385 U.S. 554, 564 (1967).

694. *Medina*, 505 U.S. at 445-46, discussed *supra* text accompanying note 681.

695. *See supra* text accompanying note 680. The inquiry prescribed by *Medina* may be "narrower" in that it makes it less likely that the Court will consider *all* of the factors noted in *Mathews*, although it conceivably might. *See supra* note 692.

today. Putting aside minor variations in approach, and looking only to major lines of division, that range includes at least the following four possibilities for setting the overall role of free-standing due process in the constitutional regulation of criminal procedure: (1) a due process standard that insists only upon a few basic elements of trial-type adjudication (along with adherence to the standing law concept), and otherwise allows adoption of a wide variety of rational procedures, including those borrowed from the civil system; (2) a standard that gives free-standing due process a limited range of operation and encourages narrow rulings in those areas, possibly reaching at points beyond concern for adjudicatory fairness, but focusing primarily on ensuring that the adjudicatory process does not convict the innocent and doing so primarily by adding those core elements of the common law not contained in the Bill of Rights specifics (*e.g.*, proof beyond a reasonable doubt) and precluding practices that clearly threaten the reliability of the process (*e.g.*, the failure to disclose material exculpatory evidence); (3) a due process standard, operating alone or in conjunction with the second standard noted above, that gives a preemptive influence to the specific guarantees, taking the form of either (i) precluding additional regulation by free-standing due process (or perhaps only free-standing substantive due process) where the subject matter is regulated by a specific guarantee or (ii) simply preferring to ground constitutional restraints on the specific guarantees rather than on free-standing due process in areas of possible overlap; and (4) a due process standard that defines the content of free-standing due process as encompassing both the basic procedural protections of the common law and such additional protections as are suggested by a more refined contemporary conception of justice (perhaps applying a cost/benefit analysis to determine what new procedures are needed to implement both the values of the common law and the added values of contemporary conceptions of justice).

A similar range is suggested when one looks to specific factors that might be weighed in determining the content of free-standing due process. Consider, for example, the significance of historical sanction of the particular procedure being challenged. The sanction of settled usage (which may be limited to acceptance at common law at the time of the founding, may also include acceptance at the time of the adoption of the Fourteenth Amendment, or may even extend to encompass all long-standing traditions) may operate: (1) as a shield against a due process challenge; (2) as a highly influential factor favoring constitutionality, which may be overridden only where changes in the structure of the process have eliminated the justification for the procedure or the procedure is a historical idiosyncrasy, inconsistent with traditional values of the common law process; and (3) as a highly influential factor, but also subject to being overridden by the emergence of a contemporary sense of justice reflecting different values (with that emergence evidenced by such factors as a shift of the states away from the traditional practice). Similarly,

where a state practice substantially departs from a core feature of the common law, the Court has considered guidelines that would: (1) treat that departure as suspect unless the Court determines that the value underlying that feature of the common law is otherwise being accommodated; (2) treat that feature as suspect absent widespread support for the departure among the states; and (3) treat the departure as acceptable provided it has a rational grounding and does not deny the basics of an adjudication (notice, right to present evidence, etc.).

Some of the positions set forth above clearly have been rejected, and arguably none reflects perfectly the current state of Supreme Court precedent. Yet that hardly forecloses considering the question of which of these positions (or some other) most appropriately frames the content of free-standing due process in a post-incorporation world. I believe that something can be said for and against each of the above positions, and how they are finally evaluated depends, in large part, on how one resolves several general issues of constitutional interpretation (*e.g.*, the appropriate character of judicial review, including the proper role of originalism) and several issues of constitutional interpretation especially relevant to the subject of criminal procedure (*e.g.*, the special significance of the criminal process to the preservation of individual liberty, and the extent to which the Court has less or more expertise in this area than in others).[696] Others (including several of the commentators responding to this article[697]) have given such issues far more attention than I, and I therefore leave evaluating the wisdom of these different positions in their capable hands. I will concentrate on a less controversial aspect of the history set forth above—what it says about the judicial "craft" of the Supreme Court.

Over a period of almost 120 years, one would expect the style of opinion writing to change, as it has.[698] However, certain basics in appellate judicial

696. *See* 1 TREATISE, *supra* note 1, § 2.9.

697. *See, e.g.*, Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149 (1998); Ronald J. Allen, *Constitutional Adjudication: The Demands of Knowledge and Epistemological Modesty*, 88 NW. U. L. REV. 436 (1993); Dripps, *Miscarriages of Justice*, *supra* note 14; Donald A. Dripps, *Beyond the Warren Court*, *supra* note 14; Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 1003-22 (1989). Nowak, *supra* note 14; 2 ROTUNDA & NOWAK, *supra* note 228; ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE (1997); Margaret L. Paris, *Trusts, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3 (1996); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996); Carol S. Steiker, *The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771 (1998).

698. *See* Victoria F. Nourse, *Making Constitutional Doctrine in a Realist Age*, 145 U. PA. L. REV. 1401 (1997); Schauer, *supra* note 23.

opinions, such as the focus on clarity and explanation, remain constant.[699] Therefore, where particular features reappear in opinions spread over many decades and those features, at least on the surface, seem to be contrary to such basics, that arguably suggests something substantive about the subject matter. Two such features found in rulings on the independent content of due process have been: (1) unacknowledged departures from guidelines established or suggested in earlier rulings; and (2) a generality in the statement of guidelines that has produced unresolved ambiguities.

### *A. Unacknowledged departures*

It is hardly surprising that guidelines for interpreting due process as applied to criminal procedure should change over a period of 120 years. Substantial change might be expected simply as a result of changes in personnel, major shifts in the Court's approach to judicial review, and changes in the application of substantive and procedural due process outside of the criminal justice field. In addition, as previously noted,[700] the adoption of selective incorporation so altered the role of free-standing due process in the regulation of criminal procedure as to make almost certain the reconsideration of previously established guidelines, if not their complete revision.

What is surprising is a dominant feature of the opinions adopting new and different guidelines. Those opinions rejected prior guidelines simply by taking a new approach; they did not acknowledge that the Court was departing from reasoning of the earlier opinions. The acknowledgment that the Court had shifted course came, if at all, long after the change was initially adopted. The rejections of the positions taken in *Hurtado* provide three examples of such unacknowledged departures.

*Hurtado* established that (1) procedures that had the sanction of historical usage were per se consistent with due process,[701] and (2) due process did not mandate procedural rights that were to be found in the specific guarantees;[702] it also strongly suggested that (3) the procedural content of due process was limited to such basics as notice and opportunity to be heard.[703] During the pre-incorporation decades, each of these propositions was rejected. The second proposition was rejected only thirteen years after *Hurtado*, with no reference to *Hurtado*'s contrary reasoning.[704] Eventually, in the *Powell* ruling, decided almost fifty years after *Hurtado*, the Court recalled what had been said in

699. *See* Shauer, *supra* note 23. *See generally* ROBERT A. LEFLAR, APPELLATE JUDICIAL OPINIONS (1974); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

700. *See supra* text accompanying notes 473-75.

701. *See supra* text accompanying notes 118-20 and 211.

702. *See supra* text accompanying notes 136-40 and 238.

703. *See supra* text accompanying notes 202-23 and 235.

704. *See supra* text accompanying note 283.

*Hurtado* about due process overlapping with specific guarantees, noted that post-*Hurtado* rulings had departed from that proposition, and politely put it to rest.[705]

*Hurtado's* first proposition was treated similarly. Over the years, the historical practice came to either be ignored or to be described as a relevant factor (but not as a shield for procedures that had the sanction of settled usage). Indeed, this rejection of Hurtado's settled-usage guideline was achieved with so little discussion of the applicable standard that commentators have disagreed as to exactly when that rejection occurred.[706] Justice Scalia's concurring opinion in *Pacific Mutual Life Insurance Co. v. Haslip*[707] was the first to note that what *Hurtado* had said on this issue had long since been rejected by the Court. The Court has yet to acknowledge that *Hurtado* initially suggested a narrow procedural due process, much more closely tied to procedural basics than the broad ranging due process of today.

The practice of disregarding the analysis of earlier rulings is also seen in other major shifts in the Court's approach to determining the independent content of due process. Over the decades of the 1930s, 1940s, and 1950s, the Court moved to characterizing due process as an evolving concept.[708] In doing so, it did not acknowledge that the earlier cases which similarly had spoken of due process and legal change had done so only with reference to providing the flexibility needed to accommodate legislative change. When referring to the character of the restraints imposed by due process, those opinions had not spoken of recognizing new fundamental concepts of justice, but simply of preserving those most basic principles recognized in the common law.[709]

Similarly, when the Court in *Gerstein*[710] suggested that the process which was due on a criminal procedure issue was that prescribed in an incorporated guarantee speaking specifically to that issue (there the Fourth Amendment), it did not acknowledge the seemingly contrary approach of earlier post-incorporation rulings that had chosen to rely on due process rather than look to what the specific guarantees required.[711] So too, when later cases continued to follow that pre-*Gerstein* approach,[712] they did not acknowledge either *Gerstein*

705. *See supra* text accompanying notes 288-94.

706. *See supra* note 305.

707. *See supra* note 600.

708. *See supra* text accompanying notes 318-23.

709. *See, e.g.*, *supra* text accompanying note 130; *supra* notes 235 and 241.

710. *See supra* text accompanying note 582.

711. *See, e.g.*, Chambers v. Mississippi, 410 U.S. 284 (1973), discussed *supra* text accompanying note 584; Groppi v. Wisconsin, 400 U.S. 505 (1971), discussed *supra* note 501; Webb v. Texas, 409 U.S. 95 (1972), discussed *supra* text accompanying note 590.

712. *See, e.g.*, Pennsylvania v. Ritchie, 480 U.S. 39 (1987), discussed *supra* text accompanying note 585; Ake v. Oklahoma, 470 U.S. 68 (1985), discussed *supra* note 583.

or those post-incorporation cases that had reached the due process issue only after first finding the specific guarantees inapplicable.[713]

When the Court in the post-incorporation era decided that free-standing due process should have a limited operation in light of the extensive regulation of the criminal justice process by the incorporated guarantees, it described that position as one the Court had been following—at least in the post-incorporation era. No mention was made of Warren Court and Burger Court decisions of that era that apparently viewed the role of free-standing due process much more broadly. These were decisions that found in free-standing due process a grounding for extending the policies of specific guarantees beyond the stated limits of those guarantees,[714] apparently ignoring the "careful balance" those guarantees had struck between "liberty and order" in the language that limited their scope.[715] Giving free-standing due process a limited role also suggests that rulings should be grounded on the specific guarantees, rather than due process, where possible; yet no mention was made of earlier rulings in the post-incorporation era that had ignored that possibility.[716]

There is every reason to believe the Court was fully aware of what it was doing when it failed to mention the contrary guidelines suggested in earlier cases.[717] Although there were dissents in some of those cases, the dissents also did not point to the inconsistent guidelines offered in earlier cases. The implication of such silence is that the Court simply did not attach any precedential weight to its general descriptions of the character of due process. The rulings in the earlier cases, including what was said there about the particular procedural rights at issue, was not contrary to what the Court was now saying about different procedural rights. Further commentary in earlier opinions on the general character of due process was to be cited or disregarded depending upon its persuasiveness, but it did not have to be distinguished, or

713. *See, e.g.*, cases cited *supra* note 492.

714. *See, e.g.*, cases cited *supra* notes 492, 534, 537 and *supra* text accompanying notes 557-58.

715. *See* Medina v. California, 505 U.S. 437, 443 (1992), *quoted in supra* note 485.

716. *See, e.g.*, cases discussed *supra* notes 584-88.

717. Very often some of the very same Justices had been members of the Court that rendered the earlier rulings. Also, some of the critical opinions, such as Justice Matthews opinion in *Hurtado v. California*, 110 U.S. 516 (1984), were among the Court's most prominent. *See, e.g.*, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 467 (1947) (Frankfurter, J., concurring) (noting "the classic language of Mr. Justice Matthews in *Hurtado*"). While the first introduction of law clerks, and then the substantial increase in their numbers, would have had an impact on opinion writing, those developments should have given the Justices a broader rather than a narrower recall of the subtleties of past decisions (assuming they wanted that information). *See generally* WILLIAM DOMARSKI, IN THE OPINION OF THE COURT, chs. 2 & 3 (1996) (discussing role of law clerks in shaping the content of opinions, and noting law clerk influence in expanding the range of citations).

criticized and rejected.[718] Insofar as *stare decisis* had any role to play in this area of constitutional law,[719] it certainly did not encompass such expressions of judicial philosophy. There was no need to speak to the general philosophy or rationale of past opinions where the specific rulings in those opinions were not being challenged. It was sufficient that today's opinion set forth the guidelines accepted by the current majority, recognizing those guidelines would have no power over future majorities beyond their power of persuasion.

### *B. Unresolved ambiguities*

From the very outset, as reflected in *Hurtado*, the Court has relied on guidelines that are open to alternative interpretations. In describing fundamental rights, *Hurtado* used phrases that appeared to offer alternative points of reference for determining whether a particular procedural right was so clearly fundamental as to be protected by due process. At one point, the Court suggested that the proper frame of reference was the Anglo-American common law tradition and at another, it was the universality of the right to all civilized systems.[720] That ambiguity was carried forward in later descriptions of the character of fundamental rights.[721] It was not even acknowledged by the Court until *Duncan v. Louisiana*,[722] decided eight decades after *Hurtado*, where the majority concluded (in a footnote) that the proper reference point was the "Anglo-American regime of ordered liberty."[723]

The interpretive guidelines for free-standing due process have been filled with similar inconsistencies or ambiguities, which the Court has found no need to resolve. Consider, for example, the following: (1) in looking to historical practice, is the key time frame the common law at the time of the adoption of the Constitution (that which would have been known to those who ratified the Fifth Amendment) or is the common law at the time of the adoption of the Fourteenth Amendment equally significant, at least where the practice in question was not known at the time of the founding, but was well established

718. The Court here arguably has been drawing a distinction between its general guidelines and the "reasons" offered for the particular ruling (*i.e.*, why it was that a particular procedural right was or was not fundamental). Under this view, the "reasons" given for a ruling are narrower than the Court's complete "explanation" of how it arrived at the ruling. Relying on that distinction arguably is inconsistent, however, with the purposes underlying the basic requirement that an appellate court offer reasons for its ruling. *See generally* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995); Schauer, *supra* note 23; Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140 (1994); Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979).

719. *See* 1 TREATISE, *supra* note 1, at § 2.9(a).

720. *See supra* text accompanying notes 194-98.

721. *See supra* text accompanying notes 255-56.

722. 391 U.S. 145 (1968).

723. *Duncan*, 391 U.S. at 150 n.14. *See also* discussion of *Duncan supra* note 463.

prior to the adoption of the Fourteenth Amendment;[724] (2) insofar as its suspect character requires greater caution in relying upon substantive due process, as suggested by *Graham v. Connor*,[725] what distinguishes substantive due process limits (*e.g.*, *Rochin*[726]) from procedural due process limits when the particular limit is being applied in the context of a criminal prosecution (why is it, for example, that the Court has not viewed *Graham* as having a bearing upon the due process grounding for excluding coerced confessions);[727] and (3) what is needed to establish that a general concept is so clearly at the core of due process and a particular procedural right is so essential to implementing that concept as to basically override the historical rejection of that procedural right (indeed, in some instances, to render that historical practice not even worth discussing)?[728]

Similar unanswered questions are posed in the Court's shaping of its rulings. For example, what considerations lead to the formulation of some due process standards as per se prohibitions and others as prohibitions resulting in a due process violation only where the circumstances suggest a likely prejudicial impact.[729] Why, in this connection, is the due process right to appointed counsel on a probation revocation proceeding tied to a showing of likely need and a due process right to appointed counsel automatic on a first appeal of right?[730] Why is the knowing introduction of perjured testimony at trial a per se violation, requiring a reversal of a conviction (absent a showing of harmless error), and the knowing failure to introduce exculpatory evidence a due process violation requiring a new trial only upon a defense showing of a reasonable probability that a different verdict would have been reached except for the prosecutor's failure to disclose?[731]

The failure to answer such questions may be the product of an inability to muster a majority for a single position. More likely, however, that failure reflects the view that the guidelines better serve the institutional needs of the Court by not answering such questions. Over the years, some Justices have been far less comfortable in applying the due process clause than others. But even those Justices who have shown the strongest interest in restricting the

724. *See supra* note 99 and text accompanying notes 167-68 and 619-20.

725. *See supra* text accompanying note 559.

726. *See supra* note 270.

727. *See supra* notes 576 and 577.

728. *See, e.g.*, cases cited *supra* notes 656-64.

729. *See supra* text accompanying notes 540-41 and 671.

730. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973), discussed *supra* text accompanying note 537, and Evitts v. Lucey, 469 U.S. 387 (1985), discussed *supra* text accompanying note 534. *See also* 3 TREATISE, *supra* note 1, § 11.1(b) (noting use of "flat lines" in determining scope of due process right to counsel in postconviction proceedings except for *Gagnon*).

731. *See* United States v. Bagley, 473 U.S. 667, 682 (1985) (noting this distinction); Kyles v. Whitley, 514 U.S. 419 (1995).

scope of judicial review under free-standing due process, such as Justices Black and Scalia, have recognized that some leeway in the exercise of judgment is inevitable.[732] The task of formulating guidelines for applying due process to the criminal justice process appears to be viewed as directed more at setting a tone than giving detailed directions. Scholars may desire to draw significant meaning from every different shading of language, but that has not been the history of the Court's own reading of its language. It has utilized standards stated with sufficient breadth and with sufficient shading of outlook as to accommodate major shifts in approach as changes in the Court's composition produces major shifts in the perspective of the Court majority. This has allowed the Court to adhere, for example, to *Hurtado*'s initial definition of fundamental rights for almost 120 years while modifying from one generation to the next the role of the independent content of due process.

The Court's traditional approach to formulating due process guidelines apparently has its benefits,[733] but it would be refreshing (and perhaps even helpful to the courts and legislatures engaged in shaping the state criminal justice systems) if a Court majority some day would surprise us with an opinion along the following lines:

> We, of course, continue to apply the fundamental fairness doctrine in determining the content of due process not dictated by incorporated provisions of the Bill of Rights. Over the years, we have hardly been consistent in our interpretation of that standard and we cannot promise consistency for a future Court with a different composition. But a majority today has settled on an interpretation of fundamental fairness that we will apply in our future decisions. What follows are the guidelines we will utilize in determining what constitutes a denial of fundamental fairness. These guidelines, as we will point out, are not consistent with certain guidelines noted in past opinions. We do not reject the results reached in those cases, but do reject those guidelines inconsistent with ours. At the same time, we should note that we are not attempting to bind our successors. Whatever weight is given to *stare decisis* in constitutional law obviously does not apply to due process guidelines (as opposed to due process rulings), but clarity and consistency for the tenure of a particular group of judges is preferable to vagueness, a constant shifting, and a mere facade of continuity.

732. *See supra* notes 446-50 and 603.

733. For example, the development of standards for determining the content of free-standing due process arguably has been no less result oriented than the development of the selective incorporation doctrine, yet the Court here certainly has not faced the same type of criticism. *See supra* text accompanying note 467 as to the character of criticism produced by the selective incorporation doctrine.