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Abstract
American system places these constraints on the age old criminal law question: “WHODUNIT?” This article explores these issues.

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This article is co-authored by the Honorable Charles E. Moylan, Jr., Associate Judge of the Maryland Court of Special Appeals

CONSTITUTIONAL CONSTRAINTS ON PROVING "WHODUNNIT?"

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To unlock the mysteries of Criminal-Constitutional Law, we must recognize at the outset that it does not, standing alone, yield to examination. It can be understood only in the context of the society it serves. It has no form or substance of its own. It is simply a set of limitations upon something else, upon the operation of a criminal justice system.[1] To understand Criminal-Constitutional Law, we must know the criminal justice system which it is designed to regulate.

To know in turn the criminal justice system in its purest form, it may help us to scrape away the layers of pre-existing knowledge that obscure far more than they clarify. Imagine yourself as a stranger to our society. Imagine looking in upon a criminal justice system at work and wondering what it is that all those people are doing. Why are the district attorneys, public defenders, police, clerks, sheriffs, and wardens engaged in such bizarre behavior? The answer is all too clear: because at 11:23 p.m. the night before, in an alley four blocks from where you stand, a scream of terror pierced the night air. When the police responded to that scream four minutes later, all they found was a mangled corpse. That was disturbing, of course, to the victim. It was disturbing to the victim's friends and loved ones. At a deeper level, however, it was disturbing to all of us: so much that over the centuries we rose up in righteous wrath, first as a family, then as a clan, then as a tribe and ulti-

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1. More accurately, American Criminal-Constitutional Law is a set of limitations upon the operation of 51 criminal justice systems, one federal system and 50 state systems.

mately as a nation-state, and demanded the answer to one single, all-critical question:

WHODUNNIT?

A criminal justice system is in the business of supplying the answer to that age-old riddle. That is its core reason for being. Who killed the boy? Who stole the pig? Who burned the cottage? All other considerations are mere trappings.

The existence of criminal law is as ancient as organized society itself. As soon as we climbed down from the trees, we herded together into social units. As we forsook the state of nature to enter into what future philosophers would call the social compact, we promulgated, informally if not formally, a set of rules for our mutual protection: Thou shalt not kill! Thou shalt not steal! To enforce those emerging canons of social order, we joined forces against the transgressors of our rules. A transgressor against one was, after all, a potential threat to all. That collective action is the essence of the criminal law. Society itself, with its massed power, proceeds against the outlaw. It is not, "Jones, the victim, versus Smith, the victimizer." It is, "The State versus," "The People versus," "The United States versus." Organized society establishes its rules and imposes an appropriate sanction for a violation: cut off the hand of the thief, hang the murderer, drive assorted felons from the ranks of civilized society into the forest where, as outlaws, every man's hand might be raised against them. Although the forest has all but disappeared, some echoes of outlawry still remain as convicted felons are stripped of the voting franchise, the entitlement to public office, the very credentials to participate in that society whose rules they have broken.

Before the sanction, whatever it may be, can be imposed, however, the proper object of that sanction must be identified. If the crime was perpetrated in the dark of night, society must devise a mechanism to answer the riddle "Whodunnit?" It is now, as it always has been, a two-step process. Identifying and apprehending the probable culprit is the investigative phase. Determining whether that probable culprit is deserving of punishment is the trial phase. In that part of the globe governed by Anglo-American common law, people have experimented over the past 700 years with three mechanisms for answering

the riddle. Trial by battle, in addition to being bloodthirsty, was available only to the Norman aristocracy. Trial by ordeal—fire, water or eating the abominable morsel—enjoyed initial credibility during an age of faith but ultimately generated skepticism as to whether the judgment of God was always accurately reflected by its erratic results. For roughly the past five centuries, we have been experimenting with trial by jury or its variant, trial by judge sitting as a jury.

Over the course of those five centuries, first Anglo-American common law and then American constitutional law imposed two sweeping limitations upon the operations of the trial system. The first, a product of Renaissance thought with its emerging sense of humanitarian fairness, aimed at providing some reasonable guarantee that the system was not selecting a random scapegoat but was truly, "getting the right person." The concern was with the reliability of the trial process. The way to assure reasonably accurate results from that process was the creation of a set of rules that became Common Law Evidence. Those rules established a set of screens and sieves through which filter all that data from the outside world which we, in our collective wisdom, deemed to be competent, relevant and material. It is only that data which is given to the jury of untrained laymen. It allows to pass through the screens only that information which will advance the search for truth, that information which will help to guarantee the accuracy of the jury's verdict. Conversely, it screens out that data which we have determined is incompetent, irrelevant, immaterial or potentially contaminating. It screens out the data which would confuse, delay or hamper the search for truth. The primary concern of Common Law Evidence is with accuracy.

Criminal-Constitutional Law serves a quite distinct purpose. In the United States more than in any other part of the common law world, and largely since the end of World War II, a second fundamental limitation has been imposed upon the criminal justice system. We are no longer content simply with "Getting the right person." We now wish to assure ourselves that Government is "Playing the game by the accepted rules." The enforcement of this limitation is the object of Criminal-Constitutional Law or Constitutional Evidence as contrasted with Common Law Evidence.

The aims of these two fundamental limitations are Accuracy and Fairness. When they can be served simultaneously by a

given course of action, the desirability of that action cannot be denied. The chronic problem is that frequently the pursuit of one ideal is in conflict with the pursuit of the other. Sometimes we can buy more accuracy only at the cost of fairness, or more fairness only at the cost of accuracy. That dilemma, and the never-ending ebb and flow it sets in motion, is the source of both the fascination and the highly controversial character of Criminal-Constitutional Law.

The ideal of Criminal-Constitutional Law can easily be stated. The constitutional commandment to the law enforcement establishment is "Catch criminals fairly!" The spirit of the constitutional imperative is universally acclaimed. Its problem is that it is ambiguous. In the real world of an underpaid and understaffed police force straining to hold back the outlaw tide, in a world of tightened budgets and finite resources, in a world beset by human frailty, it is not always possible to "Catch criminals fairly." What the constitutional imperative fails to spell out is its fall-back position. In those cases where the ideal cannot feasibly be attained, does the commandment then mean "Catch criminals fairly or don't catch them at all!" Or, does it mean, "Catch criminals; fairly when you can, but, in any event, catch them!"

Even here the question is more of degree than of kind. Although frequently obscured by the din of rhetoric, American Criminal-Constitutional debate does not pit the Anarchist against the Fascist. The most ardent Liberal would not sacrifice all accuracy upon the altar of fairness; nor would the most fervent Conservative abandon all fairness in the untempered pursuit of accuracy. The realistic choice is between a modest increase of order at the cost of some liberty, and a modest increase of liberty at the cost of some order. Even the more moderate debate over emphasis, still offers a thoughtful range of choice. It is here, within this band of civilized difference of opinion, that pendulums swing, that constitutional fashions come and go, and that "the felt necessities of [one] time"[2] may no longer be felt in another time. It is the stuff of which the never-ending excitement of Criminal-Constitutional procedure is made.

Criminal-Constitutional Law is essentially negative. It does not presume to establish affirmatively a criminal justice system.

2. O.W. HOLMES, THE COMMON LAW 1 (1881).

That task, by the very nature of our national federation, is left to fifty-one autonomous state and federal societies speaking through fifty-one autonomous legislatures. The substance of criminal law deals with prohibited conduct. What is prohibited varies from one of those sovereign societies to another. Although certain shared precepts of Western Civilization produce a large common denominator of prohibitions within those fifty-one societies, significant differences appear as well. The marijuana-smoking that may be socially acceptable in California may be felonious in Texas. Sabbath-breaking may be more offensive in Arkansas than in New York. The burning of a tobacco shed may have been a far greater economical threat to colonial Maryland than to a New England colony.

The machinery for enforcing that criminal law also varies widely from state to state. The sheriffs who may be the primary law enforcement officers in the rural South and West may be no more than process servers in the urban North. Prosecuting attorneys may be elected or appointed; they may be independent constitutional officers or fillers of posts created by local statute. Juries may range from six to twelve in number and may or may not be required to speak only with a unanimous voice. The line between felony and misdemeanor may be wildly erratic from state to state and the respective consequence of conviction disparate. This incredible variety both in substantive criminal law and in the machinery of criminal justice is an ingrained American characteristic. Criminal-Constitutional Law, as announced by the Supreme Court of the United States, simply imposes a few bedrock limitations upon this incredible variety in the exercise of the police power.

The prominence of the Supreme Court has given rise in recent decades to an understandable temptation to "over-constitutionalize" everything. The foremost impediment to a solid grasp of Criminal-Constitutional Law is the failure to appreciate that there are limitations upon the constitutional limitations. Those limitations are several in number and are so basic that it is often easy to lose sight of them.

The most fundamental limitation should be apparent from the very name "constitutional law." Constitutional law does not establish rights, entitlements, duties or obligations in one citizen vis-a-vis another. Criminal-Constitutional Law does not tell us what should be done. It only tells us a few things that may not be done. Human conduct is regulated by civil and

criminal codes and by the common law. Constitutional law, however, deals with the very constituting of a government. In the act of entering into a social contract, the contracting parties "constitute" themselves into a sovereign society. The basic charter of the Constitution first spells out how that government shall be organized and what powers it shall possess. To ensure that the new government does not become tyrannical, the people who have constituted that government frequently add a bill or declaration of rights to the basic charter of government, spelling out certain things that the newly constituted government may not do. What is basic in the very nature of the process is that both the pluses and the minuses, the granting of power and the withholding of power, are addressed to government and not to private citizens.

The Supreme Court has made it clear that the federal Bill of Rights is directed only to government. Two cases are illustrative examples.

The first deals with both the fifth amendment's privilege against compelled self-incrimination and the fourteenth amendment's due process clause which prohibit law enforcement authorities from extracting an involuntary confession from a suspect. Those prohibitions are now binding upon both the federal and state governments. In *Colorado v. Connelly*,[3] the Supreme Court dealt with a case in which the Colorado Supreme Court had determined that the defendant's federal constitutional rights had been violated when his involuntary confession was received in evidence against him.[4] When the Supreme Court reversed the Colorado court's decision it pointed out that the constitutional limitations, by their very nature, regulate only governmental conduct and are not concerned with involuntariness stemming from private or internal sources.[5]

On August 18, 1983, Francis Connelly approached Denver Police Officer Patrick Anderson and said that he had murdered

3. 479 U.S. 157 (1986).

4. *Id.* at 159. The Colorado Supreme Court held that the constitution "requires a court to suppress a confession when the mental state of the defendant, at the time of the confession, interfered with his 'rational intellect' and 'free will.' " *Id.*

5. Chief Justice Rehnquist, writing the majority opinion, states that the fifth amendment privilege against self-incrimination was not concerned with " 'moral and psychological pressures to confess emanating from sources other than official coercion.' " *Id.* at 170 (quoting Oregon v. Elstad, 470 U.S. 298, 305 (1985)).

someone and wanted to talk about it.[6] Officer Anderson immediately gave Connelly his "Miranda warnings"[7] and advised Connelly that he had the right to remain silent, that anything he said could be used against him in court, and that he had the right to an attorney prior to any police questioning.[8] A very short time later, Detective Stephen Antuna arrived and again advised Connelly of his rights. Connelly insisted on talking.[9]

He said that he had murdered Mary Ann Junta in Denver in November, 1982. Police records showed that the body of an unidentified female had been found in April, 1983, in Denver.[10] Connelly agreed to take the police to the site of the killing. Connelly was held overnight. The next morning, during an interview with the public defender, he became confused and said that "voices" told him to come to Denver to confess.[11] Connelly was sent to a state hospital for evaluation. Initially, he was found incompetent to assist in his own defense, but later was determined to be competent to stand trial.[12]

At a preliminary hearing, Dr. Jeffrey Metzner testified that Connelly was suffering from chronic schizophrenia, at least as of the day before his confession; that this condition interfered with Connelly's ability to make free and rational choices; that his illness did not interfere with his cognitive abilities.[13] Thus, Connelly understood his right not to confess. The trial court decided that Connelly's statements must be suppressed because they were "involuntary."[14] The Colorado Supreme

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6. *Id.*

7. *See* Miranda v. Arizona, 384 U.S. 436 (1966) (police must warn suspect that he has the right to remain silent and may consult an attorney before making any statement).

8. Colorado v. Connelly, 479 U.S. 157, 160 (1986). Moreover, the Court noted that Officer Anderson believed respondent fully understood the nature of his acts. *Id.*

9. *Id.*

10. *Id.* at 160–61.

11. Psychiatric interviews with the respondent revealed that he followed "the voice of God" in coming to Denver from Boston to confess the alleged murder. *Id.* at 161.

12. *Id.*

13. Because respondent's cognitive abilities were not significantly impaired, respondent was capable of understanding his right not to speak to police. *Id.* at 161–62.

14. The trial court ruled that a confession is admissible only if it is a product of defendant's rational intellect and free will. The trial court held that Connelly's psychosis "destroyed his volition and forced him to confess." *Id.*

Court affirmed.[15] The Supreme Court of the United States held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."[16] Since there was no police coercion present in this case, the Supreme Court held that there was no due process violation.[17]

> Our "involuntary confession" jurisprudence is entirely consistent with the settled law requiring some sort of "state action" to support a claim of violation of the Due Process Clause of the Fourteenth Amendment. The Colorado trial court, of course, found that the police committed no wrongful acts, and that finding has been neither challenged by the respondent nor disturbed by the Supreme Court of Colorado. The latter court, however, concluded that sufficient state action was present by virtue of the admission of the confession into evidence in a court of the State.
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> The difficulty with the approach of the Supreme Court of Colorado is that it fails to recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other. The flaw in respondent's constitutional argument is that it would expand our previous line of "voluntariness" cases into a far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision.
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> The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process clause . . . .
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> . . . .
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> We hold that coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment. We also conclude that the taking of re-

15. The Colorado Supreme Court held that the proper test for admissibility is whether the statements are the "product of a rational intellect and a free will." Furthermore, the Colorado Supreme Court ruled that the admission of the confession into evidence was "sufficient state action" to implicate the due process clause of the fourteenth amendment. *Id.*

16. *Id.* at 167.

17. The Court stated that the "crucial element" in confession cases has been police overreaching. *Id.* at 163. The Court added: "[A]ll [confession cases] have contained a substantial element of coercive police conduct." *Id.* at 163–64.

spondent's statements, and their admission into evidence, constitute no violation of that Clause.[18]

The second example deals with the fourth amendment, which prohibits law enforcement authorities from conducting unreasonable searches and seizures.[19] In *Burdeau v. McDowell*,[20] a potential defendant was the victim of an unconscionable search and seizure by private detectives and sought to enjoin the United States Attorney from offering the evidence discovered by the search to a federal grand jury because of the alleged fourth amendment violation.[21] The Supreme Court pointed out that since the acts had been committed by private persons and not by governmental agents, the fourth amendment was simply not applicable.[22]

J.C. McDowell was head of the natural gas division of the Cities Service Company. His office was in the Farmer's Bank Building in Pittsburgh. His employers discharged McDowell for "alleged unlawful and fraudulent conduct in the course of business."[23] In March 1920, a corporate officer of the Cities Service Company took possession of McDowell's office. A safe belonging to McDowell and one belonging to the Farmer's Bank were blown open.[24] Papers belonging to the company and private papers of McDowell's were taken from the safe and desk. Ultimately, these items were given to Joseph Burdeau, Special Assistant to the Attorney General of the United States for the grand jury investigation of the charge against McDowell

18. *Id.* at 165–67 (citations omitted).

19. U.S. CONST. amend. IV. *See infra* text accompanying note 149.

20. 256 U.S. 465 (1921).

21. *Id.* at 473. The detectives took McDowell's "personal private books and papers" by drilling his safe, breaking the locks off of his private desk, and taking files from his file cabinet. *Id.* at 470–71.

McDowell, who won possession of the documents at the district court level, also asserted that the seizure violated his fifth amendment right against compulsory testimony against himself. *Id.* at 471. The Court, however, ruled that neither the fourth nor fifth amendments would bar the government from using the documents in the grand jury proceedings. *Id.* at 476.

22. *Id.* at 475. The Court stated, however, that McDowell did have "an unquestionable right of redress against those who illegally and wrongfully took his private property. . . ." *Id.* Justice Brandeis, dissenting, argued that government officials such as Burdeau must, at a minimum, abide by the rules of conduct for citizens, and therefore, the illegally obtained documents should not be permitted to be used by the government. *Id.* at 477 (Brandeis, J., dissenting).

23. *Id.* at 473 (the opinion did not discuss what the alleged misconduct included).

24. *Id.*

for fraudulent use of the mails.[25]

McDowell filed a petition in court asking that the papers be returned to him, alleging that they were obtained unlawfully and in violation of his legal and constitutional rights.[26] The Supreme Court explained that the origin and history of the fourth amendment showed that it was not intended to be a limitation upon conduct other than governmental conduct.[27]

> The Fourth Amendment gives protection against unlawful searches and seizures, and . . . its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.[28]

If we often overlook the fact that a bill of rights is a list of "Thou Shalt Nots" directed to government as government, we also frequently fail to identify the constitution involved. Fifty-one American criminal justice systems are limited by fifty-one constitutions. As a general proposition, each bill of rights pronounces the "Thou Shalt Nots" for the governmental unit established by the constitution which that bill of rights amends. The Bill of Rights of Virginia states explicitly what the government of Virginia may not do; it does not presume to speak to the government of Oregon. The constitutional fragmentation would pose no difficulty were it not for the fact that the Constitution of the United States of America to some extent overlaps and to some extent overrides the constitutions, the statute law and legal systems of the fifty states that make up the federal Union. It is the hybrid nature of the American federal system that makes American constitutional law so at once so perplexing and so challenging. Criminal-Constitutional Law is that common-denominator set of constitutional limitations emanating from the first ten amendments to the Constitution of the United States, which is the federal Bill of Rights.

The process by which the constitutional limitations inhib-

25. *Id.* at 470.
26. *Id.* at 471.
27. *Id.* at 475.
28. *Id.*

iting one government came to be limitations inhibiting fifty-one governments is important. It reveals the inherent nature of the law we study. In the beginning, the federal Bill of Rights could exert no more control over the government of Pennsylvania than the Pennsylvania Bill of Rights could exert over the government of Connecticut. Each parochial constitution came equipped with its own parochial set of "Thou Shalt Nots." The federal Bill of Rights, moreover, was enacted in response to a very particular political need. To understand the initially limited and largely political role played by the federal Bill of Rights, it is necessary to have some sense of the history and of the politics of the Constitutional Convention of 1787.

Independence had been won a decade earlier, not by a single American nation, but by thirteen separate American states. The only shadow of common authority was the Articles of Confederation drafted by the Continental Congress at the time of the Declaration of Independence and were ratified by 1781. It established a "league of states, allied for common aims, but with each State reserving to itself almost all elements of power. . . ."[29] In the years that followed independence, the feeble and ineffectual character of the Articles of Confederation became painfully clear. There was no executive branch. Except for a court to handle certain admiralty matters, there was no judicial branch. There was a unicameral legislature, with each state casting a single vote with the concurrence of all states necessary for the passage of legislation. What government there was under the Articles of Confederation had no power to tax, to enforce laws generally, or to compel the states to obey the decisions of the federal congress. It was obvious to many, especially among the landed and merchant classes, that a stronger federal confederation was called for. The spectre of Shays' Rebellion in western Massachusetts in 1786 spread the terror of anarchy and accelerated the drive for a stronger central authority.

After a trade convention in Annapolis, attended by only five states, the decision was made to convene a national convention in Philadelphia in May of 1787. Twelve of the thirteen states

29. C. STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES CONSIDERED IN RELATION TO COLONIAL AND ENGLISH HISTORY, 39–40 (1987) (an in-depth look into the making of the Constitution, where it came from, and what powers were given from it) (Reprint of second edition originally published in 1894).

sent representatives to Philadelphia, with only Rhode Island boycotting. Altogether, fifty-five wealthy and highly educated men assembled that summer. They worked in executive session under a strict resolution of secrecy. It was only when their deliberations were finished on September 17, 1787 that the product became public knowledge.

Under the leadership of such Nationalists as John Dickinson, James Wilson, Alexander Hamilton, James Madison, the Philadelphia convention of 1787 produced a proposal for a strong central government. There would be a chief executive elected for a term of four years and eligible for reelection. That executive would have broad powers to appoint judges, to appoint ambassadors, to veto legislation and to serve as commander-in-chief of the armed forces. There would be a national judicial branch, with justices appointed for life. There would be a bicameral legislature, with the voice of the people represented by the lower house and with the voice of the sovereign states represented by the upper house. The proposed central government was in sharp contrast not only to the Articles of Confederation, but also to the strong deference to the legislative branch that had prevailed in all of the states during the first decade of independence. Under these circumstances, it is no surprise that the reaction to the proposed constitution was decidedly mixed. Many of the leading figures from the independence movement such as Patrick Henry, Samuel Adams, Governor Clinton of New York and Governor Randolph of Virginia vehemently opposed the proposed constitution as "a return to tyranny."

The product that had emerged from the Philadelphia Convention, of course, was not a constitution but only a proposed constitution. Citizens of the thirteen sovereign states were invited to read it and to consider it. Delegates were to be elected and ratification conventions to be convened, state by state, to vote upon the proposal. Nine ratifying states were necessary for the federal government to be officially constituted.

The Ratification Struggle that followed for the next nine months was one of the most dynamic chapters in all of American history. Those who approved and were ready to work for ratification were known as the Federalists. Those who deplored the very notion of a strong central government and fought bitterly against ratification were known as the Anti-Federalists. During the great Ratification Struggle of 1787-1788,

the issue hung in precarious balance. After five state conventions voted to ratify, Rhode Island voted against ratification and New Hampshire adjourned without bringing the issue to a vote, the drive for ratification appeared to be dead in the water. The giants of Virginia and New York, moreover, were among the holdouts.

The most influential argument used by the Anti-Federalists was that the proposed Constitution had no bill of rights. They exploited the fear that a powerful central government, uncurbed by express limitations, might easily turn tyrannical. There was no similar fear of the governments of the existing thirteen states, for each of them had a bill or declaration of rights moderating its exercise of governmental power. The problem was simply with the proposed central government itself, potentially gobbling up even more power at the expense of the states. It was at that touchy political moment that the geniuses behind the Federalist cause—Hamilton, Madison and John Jay—went to work. Their initial response, largely through the pages of *The Federalist* papers, was to point out that a bill of rights would be redundant. The proposed government was one of limited powers; if the charter did not spell out a governmental power, such power logically did not exist. The Federalist champions, however, then went further with an overt political ploy. They committed the Federalist Party to the promise that, even if a bill of rights were redundant, they would not hesitate to be redundant if it would serve as psychological reassurance for the doubters. They urged the remaining states to ratify unconditionally. They promised that the first order of business of the new government would be to enact a bill of rights. Ratification followed. The Bill of Rights followed, proposed by the first session of the first Congress of 1789 and ratified as "the Law of the Land" on December 15, 1791. It did not confer power on the federal government to protect citizens from the states. It rather inhibited federal power so as to protect both the citizens and the states from it.

To the delegates attending the ratification conventions it was beyond dispute that the new Bill of Rights was a set of inhibitions only upon the new central government and did nothing to limit the sovereign states. One of those delegates, to the Virginia ratification convention, had been twenty-six-year old John Marshall. That first hand knowledge stood him in good stead as he was called upon, forty-five years later, to

write the Supreme Court decision in the case of *Barron v. Baltimore*.[30] The plaintiff, John Barron, claimed that the defendant City of Baltimore, by municipal actions which damaged the commercial worth of his wharf, had, in effect, taken his "private property . . . for public use, without just compensation."[31] The Supreme Court held unequivocally that the fifth amendment was not addressed to the City of Baltimore.[32] In his opinion, Chief Justice Marshall wrote: "Had Congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments . . . they would have declared this purpose in plain and intelligible language."[33] The Supreme Court held that the "just compensation" clause of the fifth amendment was not applicable to the states:

> The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.
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> If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states . . . .
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> . . . .

30. 32 U.S. (7 Pet.) 243 (1833).

31. The city created embankments and other artificial devises in order to bend the course of water. When these streams flooded, erosion occurred, and eventually washed so much earth into the wharf that the wharf became too shallow to be useful to boats. Plaintiff asserted that his company lost income due to the preceding circumstances and brought suit against the city under a fifth amendment argument. *See id.* at 243–44.

32. *Id.* at 250–51.

33. *Id.* at 250.

> . . . Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.
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> . . . .
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> We are of the opinion that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.[34]

Occasionally, constitutional law is made of extra-constitutional material. Seismic upheavals were soon to rock the very foundation of the federal constitutional system designed by Madison and interpreted by Marshall. Without a word of formal recognition as such, the American Civil War was, in effect, the second Constitutional Convention. Without a word of the Constitution being altered, no individual state could ever again stand toe-to-toe with the United States. In ways unspoken, by means never contemplated by the formal amending process, the blood and the bayonets of Shiloh and Antietam transformed a federation into a nation. The words of the social contract still described a federal republic, but ordinary Americans now thought of themselves as a nation. The gap between the written text and the reality sometimes makes American constitutional law as much an art form as a science. The unseen trap for the student is that the most minute examination of the document will not even suggest its most cataclysmic amendment.

Even in a formal sense, the constitutional landscape altered dramatically with the ratification of the three post-Civil War amendments, 1865, 1868, and 1870. The salient break with the past was that they, unlike the first ten amendments, directly and expressly limited state sovereignty. Two of them had specific and limited purposes. The thirteenth amendment abol-

34. *Id.* at 247–51.

ished slavery. The fifteenth amendment provided that the right to vote should not be denied or abridged "on account of race, color, or previous condition of servitude."[35] The fourteenth amendment, on the other hand, though also directed at the plight of recently freed black men and women, was phrased, particularly in its critical section one, in more general terms.

It is impossible to overstate the impact of the fourteenth amendment. The three most important words in the entire body of the United States Constitution are almost certainly the three words that begin the second sentence of that fourteenth amendment, "No State shall . . . ."[36] That sweeping interdiction contrasts with, for example, the narrow compass of the first amendment, "Congress shall make no law abridging . . . ."[37] Although the fourteenth amendment now embraces vast areas of concern beyond criminal justice, Criminal-Constitutional Law is, with limited exception of criminal practice in the federal courts, exclusively the study of the fourteenth amendment. Its due process clause is the linchpin that makes possible a national curriculum for the study of criminal justice. Without it, there could be only fifty-one fragmented curricula. In one hundred years that amendment, enacted by the Reconstruction Congress for the limited purpose of preventing former Confederate states from abridging the rights of the recently emancipated black men and women, took on awesome and cosmic dimensions. Its potential strength (or its fatal flaw, depending on one's point of view) lay in its ambiguity.

The catalogue of the three things that "No State shall" do was sufficiently vague to accommodate an almost unlimited potential for the interpretative process:

1) No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;
2) nor shall any State deprive any person of life, liberty, or property, without due process of law;
3) nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws.[38]

The conventional shorthand has become, 1) "the privileges

35. U.S. CONST. amend. XV.
36. U.S. CONST. amend. XIV.
37. U.S. CONST. amend. I.
38. U.S. CONST. amend. XIV, § 1.

and immunities clause," 2) "the due process clause," 3) "the equal protection clause."

It did not take creative criminal defense attorneys long to sense the possibility of utilizing one or another of those ambiguous provisions to bring state court criminal proceedings under the scrutiny of the Supreme Court. Of the three clauses, the equal protection clause held the least promise for the criminal law. It was, of course, the cutting edge for the civil rights and the reapportionment reforms but, with the limited exceptions of the right to counsel cases and some aspects of trial by jury, it has had little broad utility for the criminal law.

The privileges and immunities clause seemed to be a promising vehicle for bringing specific protections from the first eight amendments to bear upon state criminal justice procedures. The argument was that rights guaranteed a citizen vis-a-vis the federal government were, by definition, among "the privileges or immunities of citizens of the United States."[39] In 1873, however, the Supreme Court austerely restricted the meaning of privileges and immunities in the *Slaughter-House Cases*.[40] The Louisiana legislature had granted a monopoly to a single slaughterhouse in the New Orleans area.[41] The other slaughterhouses, which were thereby put out of business, claimed that Louisiana had abridged their "privileges and immunities" guaranteed by the fourteenth amendment.[42] They reasoned that since the federal fifth amendment conferred a right not to have private property condemned without just compensation, that such a right was therefore among their "privileges and immunities" as American citizens. If so, a state could not deny such "privileges and immunities" under the fourteenth amendment.[43] The Supreme Court narrowly defined "privileges and immunities" to refer only to such exclusively federal rights as the right to petition Congress, the right to vote in federal elections, the right to interstate travel or commerce, the right to enter federal lands, and the various rights of a citizen while in the custody of federal officers.[44]

39. U.S. CONST. amend. XIV, § 1.
40. 83 U.S. (16 Wall.) 36 (1873).
41. *Id.* at 38–43.
42. *Id.* at 66.
43. *Id.*
44. The Court confined the privileges to those which are fundamental privileges. These fundamental privileges fall under the general headings of the right to own

The privileges and immunities clause never again showed signs of life as a wedge for expanding federal jurisdiction. The future, if any, lay exclusively with the due process clause.

That future was not initially bright. The shifting fortunes of the due process clause over the last 100 years encompass the modern history of Criminal-Constitutional Law. The first attempt to use the due process clause as an instrument for extending federal authority came in *Hurtado v. California*[45] in 1884. Hurtado had been sentenced to death for murder in the first degree, following trial on a criminal information.[46] Hurtado claimed that the due process of law guaranteed by the fourteenth amendment included the fifth amendment provision 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. . . .' "[47] The Supreme Court, in a seven-to-one decision, held that the fourteenth amendment did not include the fifth amendment provision.[48] The Court pointed out that the fifth amendment has, in addition to the grand jury indictment provision, a due process clause of its own.[49] It reasoned 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." [50] It concluded that if the phrase "due process of law" included the idea of a grand jury, then the grand jury provision of the fifth amendment would be rendered superfluous.[51] It rejected the idea that the framers intended to include a redundant protection.

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property; pursue happiness; and protection by the government. If the Court were to reverse the Louisiana Supreme Court, they would become a "perpetual censor" upon all state legislation. This would subject state governments to the control of Congress. The evil that was remedied by the fourteenth amendment was to forbid laws of the states that discriminated against the newly emancipated negroes. *Id.* at 76–83.

45. 110 U.S. 516 (1884).

46. *Id.* at 517–18. The procedure used in the conviction of Hurtado included a filing of information with a magistrate by the district attorney, arraignment before the magistrate where he pled not guilty, and subsequent conviction by jury. This process was the minimum indictment procedure required by California's Constitution, adopted only five years before *Hurtado*. *See* CAL. CONST. of 1879, art. I, § 8.

47. *Hurtado*, 110 U.S. at 534 (quoting U.S. CONST. amend. V).

48. *Id.*

49. *Id.*

50. *Id.* at 535.

51. *Id.*

Another provision of the fifth amendment, the privilege against compelled self-incrimination came before the Supreme Court in 1908 in the case of *Twining v. New Jersey*.[52] In rejecting the claim that the due process clause of the fourteenth amendment embodied the fifth amendment's provision against self-incrimination, the Supreme Court pointed out that "some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action. . . ."[53] It added, "[i]f this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."[54] The Court reiterated the argument from *Hurtado v. California* that "the privilege was not conceived to be inherent in due process of law, but [was] . . . a right separate, independent and outside of due process. Congress, in submitting the amendments to the several States, treated the two rights as exclusive of each other."[55]

What emerged from *Twining v. New Jersey* and came to be formulated more fully in the cases that followed for the next five decades was the "absorption theory" of the relationship between the due process clause and the specific protections of the first eight amendments. That theory reached its culmination of expression in 1937 in the case of *Palko v. Connecticut*.[56]

Frank Palko was indicted for first-degree murder.[57] He was found guilty of second-degree murder, and sentenced to prison for life.[58] The State of Connecticut was not satisfied with a second-degree conviction and appealed to the Supreme Court of Errors (now the Connecticut Supreme Court) which reversed the judgment and ordered a new trial.[59] It found that the trial court had improperly excluded testimony of Palko's and had given erroneous instructions to the jury as to the difference between first and second degree murder.

Pursuant to the decision of the Supreme Court of Errors,

52. 211 U.S. 78 (1908).

53. *Id.* at 99.

54. *Id.*

55. *Id.* at 110 (reiterating the argument from Hurtado v. California, 110 U.S. 516 (1884)).

56. 302 U.S. 319 (1937).

57. *Id.* at 320.

58. *Id.* at 321.

59. *Id.*

Palko was brought to trial again. Before a jury was chosen, Palko objected that the new trial subjected him to trial twice for the same offense, in violation of the fourteenth amendment. His objection was overruled.[60] The jury reached a verdict of guilty of first-degree murder and sentenced Palko to death.[61] The Supreme Court of Errors affirmed the judgment of conviction.[62] Palko appealed to the United States Supreme Court, contesting the Connecticut statute which permitted the state to take criminal appeals. The question presented to the Supreme Court was whether the double jeopardy clause of the fifth amendment applied to the individual states through the due process clause of the fourteenth amendment.[63]

In rejecting Palko's claim, Justice Cardozo, writing for an eight-to-one majority, distinguished between rights that "may have value and importance" and rights that are "of the very essence of a scheme of ordered liberty."[64] Only the latter—those " 'principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' "[65]—are "brought within the Fourteenth Amendment by a process of absorption."[66] The result was while the federal government in a similar case could not appeal to the Supreme Court, this restriction in 1937 did not apply to state governments.

Justice Hugo Black articulated a rival theory in the 1940s in his dissenting opinion in *Betts v. Brady*.[67] Justice Black thought that the fourteenth amendment's due process clause incorporated all of the specific provisions of the first eight amendments.[68] Under Black's theory of "pure incorporation," the due process clause was simply a shorthand reference to the federal Bill of Rights.[69] It included nothing less than all of the provisions of the first eight amendments. It also included nothing more.

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60. *Id.*
61. *Id.* at 322.
62. *Id.*
63. *Id.*
64. *Id.* at 325.
65. *Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1933)).
66. *Id.* at 326.
67. 316 U.S. 455, 474–77 (1942) (Black, J., dissenting).
68. *Id.* at 474 n.1. (citing Twining v. New Jersey, 211 U.S. 78, 98–99, 114 (1908)(Harlan, J., dissenting); Maxwell v. Dow, 176 U.S. 581, 605 (1899)(Harlan, J., dissenting); O'Neil v. Vermont, 144 U.S. 323, 337 (1891)(Field, J., dissenting)).
69. *See id.* at 474.

By the 1960s, a new majority of Justices agreed with Justice Black that appropriate provisions of the first eight amendments should be fully incorporated into the due process clause, but they did not agree that every provision of the first eight amendments should be incorporated. This theory known as "selective incorporation" and the following examples show what has been selected for incorporation and what has not.

The second amendment's right to bear arms has been explicitly rejected for inclusion within the due process clause.[70] The fifth amendment's guarantee of grand jury indictment rejected in *Hurtado v. California*, has never subsequently been made applicable to the states. The seventh amendment's right to a jury trial in civil cases[71] has similarly been rejected for inclusion in the due process clause.[72] The guarantee of the third amendment against quartering soldiers in private homes[73] has never been considered by the Supreme Court for possible inclusion. Although the argument for it may be more persuasive, the prohibition of the eighth amendment against "excessive fines" has not yet been before the Supreme Court for consideration.[74] The ninth and tenth amendments, by their own terms, are inapplicable to the states. The due process clause of the fifth amendment is not a candidate for incorporation since it is directly replicated in the fourteenth amendment.[75]

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70. *See* Presser v. Illinois, 116 U.S. 252 (1886).

71. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

U.S. CONST. amend. VII.

72. Minneapolis & St. L.R.R. Co. v. Bombolis, 241 U.S. 211 (1916).

73. "No soldier shall, in time of peace, be quartered at any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law." U.S. CONST. amend. III.

74. Although the possibly excessive nature of the fine itself has never been a question for the Court, the related problem of imprisoning indigents for the failure to pay fines has been reviewed. Tate v. Short, 401 U.S. 395 (1971), has considered that problem, focusing upon the Equal Protection Clause.

75. There is, however, the intriguing possibility that perhaps the due process clause of the fifth amendment is broader than the due process clause of the fourteenth amendment. In extending the school desegregation ruling of Brown v. Board of Educ., 347 U.S. 483 (1954), to the District of Columbia, the Supreme Court faced an initially intimidating doctrinal hurdle. The *Brown* ruling, applicable to the states, had been based upon the equal protection clause of the fourteenth amendment. The problem with extending that ruling to the District of Columbia was that there was no counterpart equal protection clause limiting the conduct of the federal government.

Without serious concern over choice of theory, the Supreme Court held every provision of the first amendment applicable to the states through the conduit of the fourteenth. Freedom of speech was held applicable in 1925;[76] freedom of the press in 1931;[77] freedom of assembly in 1937;[78] freedom to petition for redress of grievances in 1939;[79] freedom to exercise religion in 1940;[80] and the prohibition against the establishment of religion in 1947.[81]

The rite of passage for the protections regulating the criminal investigative and trial processes, however, was more difficult. The fourth amendment's guarantee against unreasonable searches and seizures was initially deemed absorbed into the due process clause in 1949.[82] Justice Frankfurter reasoned that the protection was "implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."[83] It was an integral part of "the concept of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples."[84] Twelve years later, the status of the fourth amendment was upgraded from a due process right to a right which was fully incorporated.[85]

With respect to fifth amendment rights, the Supreme Court did more than merely upgrade constitutional status; it executed several flat-out reversals of field. The grand jury provision and the federal due process clause has already been discussed. Although it is unclear whether the just compensation clause was incorporated into the due process clause, or was coincidentally part of the inherent content of that clause, it clearly had been applicable to the states since 1897.[86] In 1964, the privilege against self-incrimination was also included.[87]

Bolling v. Sharpe, 347 U.S. 497, 499 (1954), summarily announced that the due process clause of the fifth amendment embraced the notion of equal protection.

76. Gitlow v. New York, 268 U.S. 652, 666 (1925).
77. Near v. Minnesota, 283 U.S. 697, 723 (1931).
78. De Jonge v. Oregon, 299 U.S. 353, 365–66 (1937).
79. Hague v. Committee For Indus. Org., 307 U.S. 496, 531–32 (1939).
80. Cantwell v. Connecticut, 310 U.S. 296, 305 (1940).
81. Everson v. Board of Educ., 330 U.S. 1, 15 (1947).
82. Wolf v. Colorado, 338 U.S. 25, 27–28 (1949).
83. *Id.* at 27, 28.
84. *Id.* at 28.
85. Mapp v. Ohio, 367 U.S. 643, 660 (1961).
86. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 241 (1897).
87. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

The Court analogized the privilege to the fourth amendment prohibition against unreasonable searches and seizures, to the sixth amendment right to counsel, and to the special case of involuntary confessions, all of which had been encompassed within due process. *Benton v. Maryland*,[88] was the last act in the selective incorporation process. Over the dissent of Justice Harlan, it squarely overruled *Palko v. Connecticut*.

John Benton was charged with the crimes of burglary and larceny in 1965.[89] He was tried in Maryland by a jury, which found him not guilty of larceny but convicted him of burglary. Before Benton could appeal, the Maryland Court of Appeals in another case determined that the way jurors were sworn to serve was improper, and Benton was given his choice of either serving his time under the burglary conviction or asking that the entire case be retried. He chose the latter.[90]

At the second trial he was again charged with both larceny and burglary.[91] Benton objected to being retried on the larceny charge because he said the first jury had already found him not guilty and a retrial would violate his constitutional right to be free from being tried twice for the same offense. The trial court disagreed with him and, as luck would have it, the second jury found him guilty of both larceny and burglary. The jury sentenced him to fifteen years on the burglary charge and five years on the larceny charge.[92] The appeals court in Maryland agreed with the trial judge, and the United States Supreme Court agreed to hear the case.[93]

In an opinion by Justice Marshall, the Supreme Court found that the double jeopardy prohibition of the fifth amendment applied to the states, via the fourteenth amendment.

> [W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled.
>
> . . . Once it is decided that a particular Bill of Rights guar-

88. 395 U.S. 784 (1969).
89. *Id.* at 785.
90. *Id.* at 785–86.
91. *Id.* at 786.
92. *Id.*
93. *Id.*

> antee is "fundamental to the American scheme of justice," the same constitutional standards apply against both the State and Federal Governments. *Palko's* roots had thus been cut away years ago. We today only recognize the inevitable.
>
> The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence. As with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries. "[T]he plea of *autrefoits acquit*, or a former acquittal," he wrote, "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." Today, every State incorporates some form of the prohibition in its constitution or common law. As this Court put it in *Green v. United States*, "[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly "fundamental to the American scheme of justice."[94]

Some of the individual items from that package of trial rights found in the sixth amendment also enjoyed a checkered career of initial rejection for due process membership followed by later admission. The right to a speedy trial was incorporated in 1967, without having suffered an earlier rejection.[95] The right to a public trial similarly was welcomed into the due process clause on its first try in 1948.[96] The basic right to trial by jury, however, had originally been rejected for inclusion in 1900.[97] In 1968,[98] the Supreme Court reversed that earlier

94. *Id.* at 794–96 (citations and footnotes omitted).
95. Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).
96. *In re* Oliver, 333 U.S. 257, 266 (1948).
97. Maxwell v. Dow, 176 U.S. 581, 594 (1900).

holding and incorporated the right to trial by jury, although several subsequent decisions, somewhat aberrationally, have restricted the right, and held that the states are not required to insist upon either unanimous jury verdicts[99] or juries composed of twelve persons.[100] The right to an impartial jury was guaranteed in 1961.[101] The right to be informed of the nature and cause of the accusation was made applicable to the states in 1948.[102] The right to confront one's accusers had initially been rejected for inclusion in the fourteenth amendment in 1904,[103] but that decision was reversed in 1965.[104] The right to compulsory process was held applicable to the states upon first consideration in 1967.[105] Although the most fundamental aspects of the right to counsel had been deemed absorbed by due process in 1932,[106] the notion that due process required the appointment of counsel at state expense for indigent defendants charged with felony was rejected by *Betts v. Brady*[107] in 1942. *Betts*, in turn, was flatly overruled by *Gideon v. Wainwright*[108] in 1963.

The passage of the eighth amendment through the conduit of due process has been smoother. In 1947, the eighth amendment prohibition against cruel and unusual punishment became binding on the states.[109] The prohibition against excessive bail was implicitly made applicable to the states in 1971.[110] As has previously been discussed, the prohibition against excessive fines has never yet been directly addressed.

Yet a second basic modification of Justice Black's original incorporation theory had to occur before the due process clause could reach the full flower it enjoys today. Even when the process of selective incorporation brought most of the provisions of the first eight amendments into the fourteenth, it still had

98. Duncan v. Louisiana, 391 U.S. 145, 158 (1968).
99. Apodaca v. Oregon, 406 U.S. 404, 411 (1972); Johnson v. Louisiana, 406 U.S. 356, 358–59 (1972).
100. Williams v. Florida, 399 U.S. 78, 86 (1970).
101. Irvin v. Dowd, 366 U.S. 717, 722 (1961).
102. *In re* Oliver, 333 U.S. 257, 273 (1948).
103. West v. Louisiana, 194 U.S. 258, 262 (1904).
104. Pointer v. Texas, 380 U.S. 400, 403 (1965).
105. Washington v. Texas, 388 U.S. 14, 23 (1967).
106. Powell v. Alabama, 287 U.S. 45, 71 (1932).
107. 316 U.S. 455, 471 (1942).
108. 372 U.S. 335, 339 (1963).
109. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947).
110. Schilb v. Kuebel, 404 U.S. 357 (1971).

not exhausted the full potential of the due process clause. It came to be recognized that due process included some inherent principles not mentioned by the specific provisions of the first eight amendments. The ultimate formulation for the full content of due process came to be "selective incorporation *plus*." Cases decided under this notion covered issues as fundamental as the burden of proof beyond a reasonable doubt, the presumption of innocence and the allocation of the burden of proof to the State. They were principles, however, not alluded to by any of the first eight amendments.

In 1965, all of those competing theories came together in *Griswold v. Connecticut*,[111] in one spectacular doctrinal implosion. A Connecticut statute making the use of contraceptives a criminal offense was held to be unconstitutional. In explaining why, the Court produced six opinions, representing three basic viewpoints that were utterly irreconcilable with each other.

Estelle T. Griswold, the executive director of Planned Parenthood League of Connecticut, and Dr. Buxton, the medical director for the league at its center in New Haven, Connecticut, were arrested in 1961 for giving information, instruction, and medical advice to married persons on the subject of prevention of conception.[112] The State of Connecticut had made this activity a crime by passing a law that prohibited anyone from counseling people on the use of contraceptives.[113] They were both found guilty and were fined one hundred dollars each. They both appealed their convictions, claiming that the law violated their rights under the fourteenth amendment. The lower courts upheld the convictions, and the Supreme Court agreed to hear the case.[114]

Justice Douglas, writing the majority opinion, utilized selective incorporation for a starter but found that none of the incorporated amendments, standing alone, was fatal to the Connecticut statute.[115] As an alternative, he reasoned that the

111. 381 U.S. 479 (1965).

112. *Id.* at 480.

113. *Id.* Connecticut General Statute § 53-32 (1958)(repealed 1971) provided that "[a]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less then fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." *Id.*

114. *Griswold*, 381 U.S. at 480.

115. *Id.* at 484.

first, third, fourth, fifth and ninth amendments give off emanations, or "penumbra" and that a "right to privacy," violated by the Connecticut statute, was to be found in those overlapping penumbra.[116]

> We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.
>
> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.
>
> . . . .
>
> In *NAACP v. Alabama*, we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members. . . .
>
> . . . The right of "association," like the right of belief, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.
>
> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The

116. *Id.* at 484–85.

> right of association contained in the penumbra of the First Amendment is one, as we have seen. . . . The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
>
> The Fourth and Fifth Amendments were described in *Boyd v. United States* as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred in *Mapp v. Ohio*, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people."
>
> . . . These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.
>
> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law can not stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.
>
> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. *Reversed.* [117]

The opinion by Justice Goldberg, joined by Chief Justice

117. *Id.* at 482–86 (citations and footnotes omitted).

Warren and Justice Brennan, agreed that there was a general right to privacy, but found its source primarily in the ninth amendment.[118] Justices Harlan and White wrote separate concurrences, in which they joined the judgment of the Court that the Connecticut statute was unconstitutional, but disagreed completely with the application of selective incorporation principles based either upon penumbras or upon the ninth amendment.[119] They found in the due process clause itself those residual principles that Justice Frankfurter had once described as due process's "independent potency."[120] Justice Black and Justice Stewart, in separate but compatible dissents, disagreed utterly with all of the other positions.[121] Justice Black, whose literal incorporation theory did not permit of any "plus" content, rejected totally the idea of Justices Harlan and White that any basis for striking down the Connecticut statute could be found in the due process clause proper without reference to the first eight amendments.[122] He was equally adamant against Justice Douglas' novel notion that a new constitutional right of privacy could be created out of penumbra from other rights.[123] He thoroughly repudiated, moreover, Justice Goldberg's historical analysis of the ninth amendment as the source of some newly found right to privacy.[124]

Griswold v. Connecticut was not only the doctrinal battlefield on which rival theories of incorporation and absorption would contend.[125] It is also a leading example of another chronic problem area of constitutional law. Constitutional provisions are sometimes vague and their meaning elusive. They may plausibly mean almost anything, the range of meaning limited only by the imagination of the beholder. Justice Robert Jackson once described the major protections of the Bill of Rights

118. " '[T]he enumeration in the Constitution, of certain rights, shall not be *construed* to deny or disparage others retained by the people.' " *Id.* at 492 (quoting U.S. CONST. amend. IV)(emphasis in original).

119. *Id.* at 499 (Harlan, J., concurring), 503–04 (White, J., concurring).

120. *Id.* at 501 (Harlan, J., concurring)(citing Adamson v. California, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring)), 505 (White, J., concurring)(arguing against the effectiveness of the statute: "I wholly fail to see how the ban on the use of contraceptives by married couples in any way reinforces the State's ban on illicit sexual relationships").

121. *Id.* at 507 (Black, J., dissenting), 527 (Stewart, J., dissenting).

122. *Id.* at 508–10.

123. *Id.*

124. *Id.* at 518–20.

125. *Id.*

as a set of "majestic generalities."[126] Granted that most constitutional protections are not detailed blueprints for action, there are, nevertheless, guidelines or rules of interpretation that nonetheless constrain the Justices, who are called upon to flesh out the ambiguous provisions. These guidelines, however, are often inconsistent.

Two very basic and diametrically opposed approaches have contended for dominance. One, represented by *Griswold v. Connecticut* specifically and favored by the Supreme Court under the leadership of Chief Justice Earl Warren generally, can fairly be referred to as the "Living Constitution" approach. Those who advocate this approach maintain that constitutions are deliberately written in broad and arguably vague terms so that they will possess the necessary flexibility to change in order to meet the changing needs of changing times. There will, therefore, be growing and evolving contents for such fundamental ideas as fairness, reasonableness, voluntariness, liberty, privacy, etc. The major criticism of this approach is that it is elitist and countermajoritarian. The charge is that it allows nine justices, and often only five justices, a bare majority of the nine, to make decisions based on their own individual value judgments. The promoters of this approach respond that these decisions are not based upon individual value judgments. They maintain that the majority of the Court is simply declaring the emerging consensus of the American people with respect to basic values. *Griswold v. Connecticut* is a prime example of the open-ended possibilities available under the Living Constitution approach. The promoters of this approach to constitutional interpretation are described as judicial activists. In general terms, they contemplate a broad role for the court in shaping and directing our society.

The opposite of judicial activism is judicial restraint. For the believers in judicial restraint, the role of the courts is far more passive. Judges defer to the more accountable legislative and executive branches when it comes to making policy determinations and value judgments for a society. Basically, the role of the judge is to apply the law made by others. The business of

126. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943). The Court held that compelling a flag salute by public school children whose religious convictions forbade it, violated the first amendment, as applied to the states through the fourteenth amendment's due process clause. *Id.* at 642.

courts is more the resolution of disputes between individual litigants than the making of social choices for a society at large. A cardinal tenet of judicial restraint is that when judges are in doubt as to the meaning of a statutory or constitutional provision, they should seek to discover the intent of the legislators or the framers of the Constitution. That approach is generally referred to as "The Original Understanding" or the Interpretist approach. The key question asked under this approach is, "What did the Framers mean?" To the charge that the Interpretist approach would cause American society "to be bound by the dead hand of the past," the Interpretists respond that the Constitution itself provided an explicit mechanism for keeping it up to date, to meet the changing needs of changing times, in the amendment process set out in article five. To the charge that the formal process is slow and difficult, the Interpretists respond that it was meant to be. They point out further that, notwithstanding the difficulty and the slowness, the Constitution has been successfully amended twenty-six times.

The Interpretists agree with the Living Constitutionalists that it is not always possible, 203 years after the fact, to discover the original understanding of the Framers. They stoutly maintain, however, that the inability to discern the original understanding on all occasions does not exempt the justices from the obligation to follow the original intent on those occasions when it can be discovered. Just as the Living Constitution approach found high favor in the judicial activism of the Court under the leadership of Chief Justice Warren from 1954 to 1969, the Interpretist approach became more popular as greater judicial restraint was practiced under Chief Justices Burger and Rehnquist.

An example of the Interpretist approach is the case of *United States v. Villamonte-Marquez*.[127] On March 6, 1980, customs officers were patrolling the Calcasieu River ship channel which connects Lake Charles, Louisiana, with the Gulf of Mexico.[128] The officers saw a forty-foot sailboat being rocked violently by the wake of a large freighter. The officers approached the sailboat, named Henry Morgan II, and asked a member of the crew if there was a problem and if the members of the crew

127. 462 U.S. 579 (1983).
128. *Id.* at 582.

were all right. The crew members shrugged unresponsively.[129] One of the officers then boarded the ship and asked to see the vessel's registration. While he was looking at the registration the officer smelled what he thought was burning marijuana.[130] The officer then looked through an open hatch and saw what later turned out to be burlap-wrapped bales of marijuana.

The defendant, Jose Reynaldo Villamonte-Marquez, and other members of the crew were arrested and later found guilty of conspiring to import marijuana, importing marijuana, and of conspiring to possess marijuana with intent to distribute it.[131] The defendants appealed to the Fifth Circuit Court of Appeals which reversed the conviction because the court found that the boarding of the sailboat by the officers was done without a reasonable suspicion that there was a violation of the law, and, therefore, was not proper under the fourth amendment.[132]

The Supreme Court reversed, in an opinion written by Justice Rehnquist. As explained by Justice Rehnquist, one avenue of insight into the intent of the Framers is to see what other legislative actions they took and presumably deemed appropriate even as they were drafting the constitutional protections now in question.

> In 1790 the First Congress enacted a comprehensive statute "to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or vessels." Section 31 of that Act provided in pertinent part as follows:
>
> > "That it shall be lawful for all collectors, naval officers, surveyors, inspectors, and the officers of the revenue cutters hereinafter mentioned, to go on board of ships or vessels in any part of the United States, . . . for the purposes of demanding the manifests aforesaid, and of examining and searching the said ships or vessels. . . ."
>
> This statute appears to be the lineal ancestor of the provision of present law upon which the Government relies to sustain the boarding of the vessel in this case. Title 19 U. S.

129. *Id.* at 583.
130. *Id.*
131. *Id.*
132. United States v. Villamonte-Marquez, 652 F.2d 481, 488 (5th Cir. 1981), *rev'd*, 462 U.S. 579 (1983).

> C. § 1581(a) provides that "[a]ny officer of the customs may at any time go on board of any vessel . . . at any place in the United States or within the customs waters . . . and examine the manifest and other documents and papers. . . ."
>
> . . . [W]e also agree with the Government's contention that the enactment of this statute by the same Congress that promulgated the constitutional Amendments that ultimately became the Bill of Rights gives the statute an impressive historical pedigree. . . .[133]

Another way of discerning the intent of either legislators or framers is to look to the legislative history of the law in question, to see what amendments were made or what other amendments were offered and rejected in the course of the drafting process. Those looking for the original understanding, moreover, will regularly refer to the words of the constitutional provisions themselves and to the conditions of the time to which the constitutional provision was responding. This approach is illustrated in *Oliver v. United States*.[134] The Supreme Court was looking at two similar cases, one from Kentucky and one from Maine. Kentucky police officers and federal narcotics agents received reports that marijuana was being raised on the farm of Ray E. Oliver.[135] Narcotics agents and Kentucky state police went to the farm to investigate. When they got to the farm they drove past Oliver's house to a locked gate which had a "No Trespassing" sign.[136] A path led around one side of the gate. The officers walked around the gate and along the road for several hundred yards, they passed a barn and then a camper. At that point, someone who was standing in front of the camper shouted: "No hunting is allowed. Come back up here."[137] The officers shouted back that they were Kentucky state police officers and returned to the camper but did not find anyone. They resumed their investigation of the farm and found a field of marijuana, which was located over a mile from Oliver's home. Oliver was arrested and indicted for manufacturing a controlled substance. The federal district court suppressed the evidence of the discovery of the marijuana field.[138]

133. *Villamonte-Marquez*, 462 U.S. at 584–85 (citations and footnotes omitted).
134. 466 U.S. 170 (1984).
135. *Id.* at 173.
136. *Id.*
137. *Id.*
138. *Id.*

In a similar case police officers in Maine received a tip that marijuana was being grown in the woods behind Richard Thornton's home. Two police officers went into the woods by a path between the Thornton home and a neighboring house.[139] They followed the path through the woods until they reached two marijuana patches fenced with chicken wire. The officers learned that the patches were on Thornton's property and obtained a warrant to search the property and seize the marijuana. Thornton was arrested and indicted, but the trial court would not let the government introduce the marijuana because the court found that the search was unreasonable.[140]

In both cases the government appealed the decisions of the trial courts. In the *Oliver* case the lower appellate court reversed the trial court, making the marijuana admissible in a trial against Oliver.[141] The lower appellate court in the *Thornton* case agreed with the trial court in suppressing the marijuana.[142] The Supreme Court agreed to hear both cases, and in their opinion they agreed with the appellate court in the *Oliver* case and reversed both the trial court and the appellate court in the *Thornton* case, permitting the evidence to be admitted into the trial against both defendants Oliver and Thornton.[143]

One of the critical issues before the Supreme Court was whether the framers of the fourth amendment intended for its protections to cover the "open fields" and real property generally. The tightly reasoned opinion of Justice Powell discerned that those who had enacted the fourth amendment did not intend for it to cover real property.[144] He looked first to the fact that in the drafting process, the Framers had eliminated the broader term "other property" and substituted the more limited term "effects."[145] In a footnote, he then pointed out that the word "effects," as a legal term of art, referred only to per-

139. *Id.* at 174; *see also* State v. Thornton, 453 A.2d 489 (Me. 1982).

140. *Oliver*, 466 U.S. at 175.

141. United States v. Oliver, 686 F.2d 356, 360–61 (6th Cir. 1982), *aff'd*, 466 U.S. 170 (1984).

142. State v. Thornton, 453 A.2d 489, 495–96 (Me. 1982), *rev'd*, 466 U.S. 170 (1984).

143. *Oliver*, 466 U.S. at 184.

144. *Id.* at 177. In footnote seven, Justice Powell explains: "The Framers would have understood the term 'effects' to be limited to personal, rather than real, property." *Id.* at 177 n.7 (citations omitted).

145. *Id.* at 176–77.

sonal property and not to real property. From this, he determined for the majority of the Court that the Framers of the fourth amendment had not intended for the coverage of that amendment to be extended to "open fields" such as those involved in the *Thornton* and *Oliver* cases.[146] Under the Interpretist theory, if the Framers of the fourth amendment did not intend to cover "open fields" in 1789, that is dispositive of the fact that "open fields" are not covered to this day.

Justice Powell's opinion stated:

> The rule announced in *Hester v. United States* was founded upon the explicit language of the Fourth Amendment. That Amendment indicates with some precision the places and things encompassed by its protections. As Justice Holmes explained for the Court in his characteristically laconic style: "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."
>
> Nor are the open fields "effects" within the meaning of the Fourth Amendment. In this respect, it is suggestive that James Madison's proposed draft of what became the Fourth Amendment preserves "[t]he rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures . . . ." Although Congress' revisions of Madison's proposal broadened the scope of the Amendment in some respects, the term "effects" is less inclusive than "property" and cannot be said to encompass open fields.
>
> [Footnote 7: The Framers would have understood the term "effects" to be limited to personal, rather than real, property.]
>
> We conclude, as did the Court in deciding *Hester v. United States*, that the government's intrusion upon the open fields is not one of those "unreasonable searches" proscribed by the text of the Fourth Amendment.[147]

Justice White's concurring opinion stated:

> I concur in the judgment and join Parts I and II of the Court's opinion. These Parts dispose of the issue before us; there is no need to go further and deal with the expectation of privacy matter. However reasonable a landowner's ex-

146. *Id.* at 184.

147. *Id.* at 176–77 n.7 (citations and footnotes omitted).

> pectations of privacy may be, those expectations cannot convert a field into a "house" or an "effect."[148]

By 1970, it was clear that four of the ten amendments that comprised the Bill of Rights applied, in most of their provisions, to the states as well as to the federal government. Two of those amendments, the fourth and to some extent the fifth regulate the investigative phase of criminal justice operations. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[149]

Those provisions of the fifth amendment that deal with criminal justice and that have been made applicable to the states are:

> No person shall . . .
> [1] be subject for the same offence to be twice put in jeopardy of life or limb;
> [2] nor shall be compelled in any criminal case to be a witness against himself.

The fourth amendment places limitations both upon the arrest and upon the non-custodial detention of an individual. It limits the manner in which police may search protected areas or seize protected items from personal chattels to conversation. The fifth amendment, moreover, imposes significant limitations upon custodial interrogation.

In contrast with those two amendments which apply broadly to all "persons," the sixth amendment is reserved only for those persons who qualify as "the accused." The sixth amendment is a package of trial rights, placing constitutional limitations upon what happens at the trial table. It is a package of six such rights:

In all criminal prosecutions, the accused shall enjoy the right to:

> [1] a speedy and public trial,
> [2] by an impartial jury of the State and district wherein the

148. *Id.* at 184.
149. U.S. CONST. amend. IV.

crime shall have been committed, which district shall have been previously ascertained by law,
[3] and to be informed of the nature and cause of the accusation;
[4] to be confronted with the witnesses against him;
[5] to have compulsory process for obtaining witnesses in his favor,
[6] and to have the Assistance of Counsel for his defence.[150]

Those six trial rights, all of which are now binding on the states, in combination with the double jeopardy clause and certain applications of the privilege against compelled self-incrimination, regulate the conduct of the trial.

Once the trial has been completed and a verdict of guilty rendered, the eighth amendment comes largely into play:

[1] Excessive bail shall not be required,
[2] nor excessive fines imposed,
[3] nor cruel and unusual punishments inflicted.[151]

Those four amendments directly regulate the operation of the federal criminal justice system. Through the conduit of the due process clause, they regulate indirectly the operation of fifty state criminal justice systems. The study of those four sets of limitations comprises Criminal-Constitutional Law.

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150. U.S. CONST. amend. VI.
151. U.S. CONST. amend. VIII.