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I. INTRODUCTION

Legend has it that Joseph of Arimathea caught Christ's blood in a cup used at the Last Supper. Joseph kept the vessel; and men have been searching for it ever since. During the Arthurian Age, Sir Thomas Malory wrote about Lancelot leaving Camelot to find the Grail; however, Lancelot only encountered personal failure. While no one knows where the Grail is, or what it is, or even if it ever existed, the Grail has been sought throughout the ages. It has been suggested that "[t]he home of the Grail is properly in the uncharted country of the soul," and this is probably correct.

The man christened Thoroughgood Marshall found the Grail in his soul and his interpretation of thirty-eight words of the United States Constitution. Justice Marshall came from a more humble background than most of his predecessors on the Court, and was in fact the first member of the Court whose ancestors were African slaves. Thurgood Marshall brought to the Court a viewpoint which, if not
exactly street-hardened,8 represented a side of American life the Court had not previously been exposed to first-hand.9 With influence from Justice Marshall, the Court began to take a look at much of its philosophy which, before Justice Marshall's presence, had been de rigueur. While perhaps equally interesting, none of Justice Marshall's opinions were more thought provoking than those concerning the Due Process Clauses of the Fifth and Fourteenth Amendments.10

Much has been written about Justice Marshall's prowess as a crusader for civil rights, both as a trial lawyer and as a judge. The purpose of this Article is not to revisit that well documented part of his life,11 but to attempt to analyze the depth

8. Justice Marshall came from a two parent family. His father was a hard-working waiter and his mother a teacher for thirty years. See id.


10. Even if Justice Marshall agreed with the decision of the Court, he would write a concurring opinion if he thought that the majority opinion did not sufficiently elucidate a certain point of law. Justice Marshall wrote separately in Memphis Community School District v. Stachura, 477 U.S. 299 (1986), because he was concerned that certain portions of the Court's opinion might be misread as to the amount of damages authorized by the Civil Rights statute. See id. at 313 (Marshall, J., concurring). In Connell v. Higginbotham, 403 U.S. 207 (1971), Justice Marshall wrote separately because he thought that the Court's opinion might be interpreted as an approval of a State's apparent attempt to legislate its citizens' thoughts. See id. at 209-10 (Marshall, J., concurring). In Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984), the Court ordered the release of voir dire proceedings in the case of an African American on trial for the alleged rape of a teenage white girl. See id. at 511-13. Justice Marshall concurred, but wrote separately "to stress that the constitutional rights of the public and press to access to all aspects of criminal trials are not diminished in cases in which 'deeply personal matters' are likely to be elicited." See id. at 520 (Marshall, J., concurring). At times Justice Marshall dissented because he believed the Court did not sufficiently instruct on due process. In Board of Curators v. Horowitz, 435 U.S. 78 (1978), the Court held that a medical student who was fully informed of faculty dissatisfaction with her clinical progress was accorded all the process she was due under the Fourteenth Amendment. See id. at 85. Justice Marshall disagreed with the majority opinion because he thought the Court should remand the case for consideration of substantive due process. See id. at 97 (Marshall, J., concurring in part and dissenting in part). He wrote:

[R]esolution of this case under our traditional approach does not turn on whether the dismissal of respondent is characterized as one for "academic" or "disciplinary" reasons. In my view, the effort to apply such labels does little to advance the due process inquiry, as is indicated by examination of the facts of this case.

Id. at 103 (Marshall, J., concurring in part and dissenting in part). Justice Marshall criticized the Court's "reliance on labels [which] should not be a substitute for sensitive consideration of the procedures required by due process." See id. at 106 (Marshall, J., concurring in part and dissenting in part). In Black v. Romano, 471 U.S. 606 (1985), Justice Marshall again wrote separately because the Court had "not attempted any systematic explanation of when due process requires contemporaneous reasons to be given for final decisions, or for steps in the decision making process, that affect protected liberty or property interests." See id. at 617 (Marshall, J., concurring). In Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), Justice Marshall wrote a separate opinion because he believed that the Due Process Clause entitled the Respondents to more than they asked for. See id. at 548 (Marshall, J., concurring).

11. In fact for the purposes of this Article, Justice Blackmun's dissent in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), will suffice. Justice Blackmun wrote:

I join JUSTICE MARSHALL's perceptive and incisive opinion revealing great sensitivity
of the man's fibre as a jurist. Most of Justice Marshall's opinions dealt with procedural due process, and the word best describing his handling of procedural due process is the essential need for fairness. For Justice Marshall, fairness required a consideration of all interests involved in a situation, regardless of the persons or entities involved. In his own words, "[a]s its very terms make manifest, the Due Process Clause is first and foremost a guarantor of process. It embodies a commitment to procedural regularity independent of result." As his opinions establish, particularly his dissenting opinions, the process passes constitutional muster only if it assures fairness and is not unnecessarily delayed.

Justice Marshall stated the following:

Courts . . . do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequalities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a "natural" and "self-evident" ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom.

With regard to substantive due process Justice Marshall adopted a "rational and reasonable" standard. This test has many of the same characteristics as the

toward those who have suffered the pains of economic discrimination in the construction trades for so long.

I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this Court, the supposed bastion of equality, strikes down Richmond's efforts as though discrimination had never existed or was not demonstrated in this particular litigation. JUSTICE MARSHALL convincingly discloses the fallacy and the shallowness of that approach.

Id. 488 U.S. at 561 (Blackmun, J., dissenting).


Justice Marshall did not believe that he was prevented from considering a due process question merely because a case was said to be moot. "For a case to be moot it must be 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" Indiana Employment Sec. Div. v. Bumey, 409 U.S. 540, 546 (1973) (Marshall, J., dissenting). He would not, however, manufacture a due process argument where it did not exist. In United States v. Culbert, 435 U.S. 371 (1978), Justice Marshall said: "we need not concern ourselves with these potential constitutional difficulties because a construction that avoids them is virtually compelled by the language and structure of the statute." See id. at 374.


“fairness” test.\textsuperscript{18}

It is likely that the indignities suffered by African-Americans generally, and the personal rejections Justice Marshall experienced due to the pigment in his skin, had an effect on his thinking as a jurist. Justice Marshall had an innate sense of what constituted fairness and an uncanny ability to discern what was right from wrong. Justice Marshall was a consummate jurist who found the Holy Grail!

After a brief review of due process jurisprudence at the time Justice Marshall became a Supreme Court Justice, this Article will examine the opinions Justice Marshall wrote about due process of law, and conclude with his appeal for future jurists to follow his lead.

II. DUE PROCESS AT THE TIME JUSTICE MARSHALL BECAME A SUPREME COURT JUSTICE

Due process of law is not a concept that developed quickly in the annals of United States constitutional jurisprudence. Sixty-four years after the Fifth Amendment was adopted, the Supreme Court was still uncertain as to the meaning of “due process.”\textsuperscript{19} John Marshall’s Court was certain that the liberty safe-guarded

\begin{itemize}
  \item [\textsuperscript{18}] While not explicitly using the terms “substantive” and “procedural” due process in the \textit{Atchison, Topeka} case, there is little doubt that the federal statute in question was tested under substantive due process of the Fifth Amendment. \textit{See id.} To fully understand the “rational and reasoned” test, reference must be made to Justice Marshall’s concurring opinion in \textit{Furman v. Georgia}, 408 U.S. 238 (1972), a case involving the constitutionality of the death penalty. \textit{See id.} at 314; infra notes 103-08 and accompanying text. In \textit{Furman}, Justice Marshall said that the state statute involved passed the “rational basis” test of the Fourteenth Amendment-substantive due process. \textit{See Furman}, 408 U.S. at 359 n.141 (Marshall, J., concurring). However, Justice Marshall believed that the statute offended the Eighth Amendment’s Cruel and Unusual Punishment Clause. \textit{See id.} Justice Marshall equated denial of substantive due process with cruel and unusual punishment, because the primary purpose of both constitutional protections is to assure that “punishment may not be more severe than is necessary to serve the legitimate interests of the State.” \textit{See id.} at 359-60 n.141 (Marshall, J., concurring). When Justice Marshall made his determinations under the Fourteenth Amendment’s Equal Protection Clause, he rejected the rational basis test used by the majority, and applied the strict scrutiny standard. \textit{See infra} notes 262-91 and accompanying text. The objective of strict scrutiny in Equal Protection cases is to determine whether \textit{fairness} was applied at the initial tribunal. It is clear from Justice Marshall’s Equal Protection opinions, which are considered in this Article, that Justice Marshall blended a large measure of due process jurisprudence when making his equal protection analysis.

  \item [\textsuperscript{19}] In \textit{Murray’s Lessees v. Hoboken Land and Improvement Co.}, 59 U.S. (18 How.) 272 (1855), the Court considered an action in ejectment. Justice Curtis wrote: “To what principles... are we to resort to ascertain whether this process, enacted by congress, is due process?” \textit{id.} at 276-77. Indulging in a bit of classic circuity, he had previously written: “The words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words ‘by the law of the land,’ in [the] Magna Charta. Lord Coke, in his commentary on those words, says they mean due process of law.” \textit{See id.} at 276 (citations omitted). The states enacted those words from the Magna Charta into their charters. \textit{See Bank of Colum. v. Okely}, 17 U.S. 235, 244 (1819).
\end{itemize}

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by the Fifth Amendment was not extended to the individual states.\textsuperscript{20} Nine years after the adoption of the Fourteenth Amendment the Court still did not have a clear concept of the term.\textsuperscript{21} In 1884, the Court held that the Fourteenth Amendment did not require that a Grand Jury indicted a man prior to his being tried for murder.\textsuperscript{22} At the turn of the century, it was recognized that the """"Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process.""""\textsuperscript{23} A few years later, the Court said that """"[f]ew phrases of the law are so


> Had the people of the several states, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments: the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by the discontented state, and the required improvements would have been made by itself. . . . 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.

\textit{Id.} at 249-50.

\textsuperscript{21} In \textit{Davidson v. New Orleans}, 96 U.S. 97 (1877) Justice Miller said:

> It must be confessed . . . that the constitutional meaning or value of the phrase "due process of law," remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several States and of the United States.

\textit{Id.} at 101-02. Justice Miller was perfectly willing to leave the task of defining the term to the crucible of litigation. See \textit{id.} at 104.

[A]part from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application 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, with the reasoning on which such decisions may be founded. This court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the Federal government, or limitations imposed upon the States.

\textit{Id.}

\textsuperscript{22} In \textit{Hurtado v. California}, 110 U.S. 516 (1884), the Court could be no more definite than to state 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; but it by no means follows that nothing else can be due process of law." See \textit{id.} at 528.


[T]he 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 [sic] of the people, or to the liberty of the citizen, have been found to be no longer necessary.

\textit{Id.} at 385-86. Sixty-six years later, in \textit{Murphy v. Waterfront Commission}, 378 U.S. 52 (1964), the Court indicated that the Due Process Clause of the Fourteenth Amendment protected defendants against

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elusive of exact apprehension as this." As far as procedural due process was concerned, states were “substantially unrestricted” by the Due Process Clause. With regard to substantive due process, in 1927 Justice Holmes delivered his famous “[t]hree generations of imbeciles are enough” opinion to the effect that a feeble-minded person was not denied due process of law in having a salpingectomy performed upon her. Just before Justice Marshall’s appointment, Justice William O. Douglas, an earlier champion of due process, revealed that the boundaries of the concept were far from fixed, stating that whatever its boundaries, due process was still a “mixed bag.”

Early in his Supreme Court career Justice Marshall relied upon Chief Justice Warren’s description of due process of law:

“Due process” is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

Justice Marshall soon set out to give due process of law his own, more definable, character.

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self incrimination apart from the clause of the Fifth Amendment. See id. at 64-65.


25. See 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.” See id.


27. In Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), Justice Douglas rather diplomatically wrote that the Court had never “restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.” See id. at 669. In 1956, Justice Felix Frankfurter, concurring in Griffin v. People of the State of Illinois, 351 U.S. 12 (1956) said: “‘Due Process’ is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society.” See id. at 20-21 (Frankfurter, J., concurring).

28. In West v. Louisiana, 194 U.S. 258 (1904), overruled in part by Pointer v. Texas, 380 U.S. 400 (1965), the Court held that it was not a violation of due process to allow the introduction of the deposition of an absent witness. See id. at 266-67. In United States v. Carolene Products Co., 304 U.S. 144 (1938), in dictum, the Court said “that a statute would deny due process which precluded the disproof in judicial proceedings of all facts that would show or tend to show that a statute deprived the suitor of life, liberty or property.” See id. at 152. Adamson v. People of California, 332 U.S. 46 (1947), overruled in part by Malloy v. Hogan, 378 U.S. 1 (1964), permitted the prosecution to comment on the failure of a defendant to testify, despite a due process objection. See id. at 48.


III. THE ELEMENTS OF FAIRNESS

To imply that Justice Marshall was writing on a clean slate would understate the precedents he found upon his appointment to the Court in 1967. By the time he retired in 1991, however, Justice Marshall exposed a dimension of due process of law not previously discussed. This dimension, which extended to so many different types of cases, is difficult to qualify, and virtually impossible to quantify. Due process gauges were not ipso facto a part of his due process jurisprudence, but he never shied away from exploring whether minimum due process requirements were met in a given case. In some situations, Justice Marshall was an absolutist, while in other situations he believed that due process required a certain symmetry of disposition. Justice Marshall did not often refer to due process in his opinions, though its theme guided his opinions because due process of law was an important part of Justice Marshall's jurisprudence.

A. Governing Principles

1. Due Process is Not Result-Oriented

Justice Marshall was unmoved when a flawed due process procedure achieved a correct result. According to Justice Marshall, if it was possible that a procedure could lead to an improper result, the procedure was not fair, and due process was

31. Considered in this Article are 162 of those cases.

32. The majority in Landon v. Plasencia, 459 U.S. 21 (1982), an immigration case, held that a court's function in this type of case "is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy." See id. at 34-35. Justice Marshall concurred with the Court's holding that the Immigration and Nationality Act permitted the Immigration and Naturalization Service (INS) to proceed against the respondent in an "exclusion" hearing, but he added: The question then remains whether the exclusion proceeding held in this case satisfied the minimum requirements of the Due Process Clause. While I agree that the court need not decide the precise contours of the process that would be constitutionally sufficient, I would not hesitate to decide that the process accorded Plasencia was insufficient. Id. at 38 (Marshall, J., concurring). Justice Marshall thought that because the plaintiff had not been given adequate and timely notice of the charges against her, and of her right to retain counsel and present a defense, she was denied constitutional protection. See id. at 39 (Marshall, J., dissenting).

denied.\textsuperscript{34} For example, Justice Marshall believed that the exclusion of a criminal defendant from a hearing held to determine whether minor sodomy victims were competent to testify at the defendant's trial should not be judged on the basis of what transpired during the hearing, but what might have transpired.\textsuperscript{35} Furthermore, Justice Marshall believed that a procedure which provided the possibility of an increased punishment upon retrial denied due process.\textsuperscript{36} Similarly, an improperly instructed jury denies a defendant due process, regardless of whether the jury would have returned the same verdict had there been a properly instructed jury.\textsuperscript{37} Moreover, Justice Marshall also held that the State's failure to disclose evidence cannot be judged on the basis of whether the result of the trial would have been different had it been disclosed.\textsuperscript{38} Justice Marshall applied a similar rule in a situation where the majority of the Court held that the Due Process Clause was not violated by excluding jurors whose opposition to the death penalty was so strong that it would prevent, or substantially impair, their sentencing duties.\textsuperscript{39} Justice

\textsuperscript{34} In \textit{Holbrook v. Flynn}, 475 U.S. 560 (1986), a case involving courtroom security, he said that "close judicial scrutiny" looks to "whether an unacceptable risk of impermissible factors" is presented, rather than what actually happens in a case. \textit{See id.} at 570 (citing Estelle v. Williams, 425 U.S. 501, 505 (1976)). In \textit{Hilton v. Braunskill}, 481 U.S. 770 (1987), he chided the Court for its analysis being "result-oriented." \textit{See id.} at 783 (Marshall, J., dissenting). \textit{Hilton} demonstrates that Justice Marshall dealt with extant facts and did not contemplate what might occur in the future. "The fact that the ruling might later be reversed does not diminish its current validity. We do not discount federal-court rulings simply because they 'may be overturned on appeal'." \textit{Id.} at 784 (Marshall, J., dissenting).

\textsuperscript{35} \textit{See} Kentucky v. Stincer, 482 U.S. 730, 745 (1987). "The propriety of the decision to exclude the respondent from this critical stage of his trial should not be evaluated in light of what transpired in his absence. To do so transforms the issue from whether a due process violation has occurred into whether the violation was harmless." \textit{Id.}

\textsuperscript{36} \textit{See} Alabama v. Smith, 490 U.S. 794, 803-04 (1989) (Marshall, J., dissenting); \textit{see also} Hetenyi v. Wilkins, 348 F.2d 844, 864 (2d Cir. 1965) (figuring very prominently in Justice Marshall's attempt to incorporate the Bill of Rights into the Fourteenth Amendment).

\textsuperscript{37} \textit{See} Boyde v. California, 494 U.S. 370, 389-98 (1990) (Marshall, J., dissenting). In a dissenting opinion, Justice Marshall wrote:

[It violates due process to affirm his sentence "simply on the frail conjecture that a jury might have imposed a sentence equally as harsh" had they been properly instructed]. To ignore a reasonable possibility that jurors were misled about the range of mitigating evidence that they could consider is to undermine confidence that the jury actually decided that Boyde should be sentenced to death in accordance with the law. \textit{Id.} at 398 (Marshall, J., dissenting) (quoting Hicks v. Oklahoma, 447 U.S. 343, 346 (1980) (emphasis in original)).

\textsuperscript{38} In \textit{United States v. Bagley}, 473 U.S. 667 (1985) Justice Marshall wrote that "[w]hensoever the Government fails, in response to a request, to disclose impeachment evidence relating to the credibility of its key witnesses, the truth-finding process of trial is necessarily thrown askew." \textit{See id.} at 690. In such situations, Justice Marshall believed it is the reliability of the verdict that suffers. \textit{See id.} at 690-91.

\textsuperscript{39} \textit{See} Lockhart v. McCree, 476 U.S. 162, 184-206 (1986) (Marshall, J., dissenting). Justice Marshall called the ruling "a blatant disregard for the rights of a capital defendant [which] offends logic, fairness, and the Constitution." \textit{See id.} at 185 (Marshall, J., dissenting). The fact that no member of the jury might have been anything but partial, or that a "non-biased" selection procedure might have left the defendant with a jury composed of the very same individuals who actually sat on his panel did not alter the fact that it was the method, not the end result, which failed to pass constitutional muster.
Marshall made an exception to the rule, however, where the probability of harm to the defendant was highly unlikely.\textsuperscript{40}

2. All of Society is Involved in Denial of Due Process

Justice Marshall believed that when a certain element of the populous is excluded from the judicial process, those who suffer are not just the persons discriminated against, but society as a whole.\textsuperscript{41} Justice Marshall further extended

See \textit{id.} at 193-94 (Marshall, J., dissenting). Justice Marshall was “puzzled by the difficulty that the majority has in understanding the 'logic of the argument.”’ See \textit{id.} at 194 (Marshall, J., dissenting) (quoting \textit{Lockhart}, 476 U.S. at 178). Justice Marshall noted that the Court in \textit{Witherspoon v. Illinois}, 391 U.S. 510 (1968), opined that there might be two juries—one to determine guilt, and the other (from which those opposed to the death penalty were excluded) to determine the penalty. \textit{Id.} at 203-04 (Marshall, J., dissenting). Justice Marshall stated:

The only two reasons that the Court [in this case] invokes to justify the State's use of a single jury are efficient trial management and concern that a defendant at his sentencing proceedings may be able to profit from “residual doubts” troubling jurors who have sat through the guilt phase of his trial. The first of these purported justifications is merely unconvincing. The second is offensive.

\textit{Id.} at 204 (Marshall, J., dissenting).

\textsuperscript{40} See \textit{Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.}, 455 U.S. 489 (1982), in which the Court, through Justice Marshall, rejected a pre-enforcement challenge to a drug paraphernalia ordinance on the ground that the ordinance was unconstitutionally vague. See \textit{id.} at 495-97. Justice Marshall wrote: “The theoretical possibility that the village will enforce its ordinance against a paper clip placed next to \textit{Rolling Stone} magazine... is of no due process significance unless the possibility ripens into a prosecution.” \textit{Id.} at 503-04 n.21.

\textsuperscript{41} See \textit{Hobby v. United States}, 468 U.S. 339, 350-51 (1984) (Marshall, J., dissenting). Justice Marshall wrote that “injury caused by race and sex discrimination in the formation of grand and petit juries is measured not only in terms of the actual prejudice caused to individual defendants, but also in terms of the injury done to public confidence in the integrity of the judicial process.” \textit{Id.; see also Peters v. Kiff}, 407 U.S. 493 (1972). “With respect to the issue whether petitioner himself was harmed by the violation, the majority concludes that discrimination in the selection of a grand jury foreman ‘can have little, if indeed any, appreciable effect upon the defendant’s ‘due process right to fundamental fairness.’” \textit{Hobby}, 468 U.S. at 354 (Marshall, J., dissenting) (quoting \textit{id.} at 345). Justice Marshall mentioned that the majority had attempted to distinguish \textit{Peters}:

To buttress this distinction, the majority observes that “[u]nlike the grand jury itself, the office of grand jury foreman is not a creature of the Constitution” but was “originally instituted by statute for the convenience of the court.” This observation is useful, I suppose, as a revelation of antiquarian fact; however, it is utterly unconvincing as an explanation of why we must presume, as a matter of law, that discrimination in the selection of grand jury foremen can have no appreciable effect upon a defendant’s right to fair proceedings. Neither the United States district courts nor the United States courts of appeals are creatures of the Constitution; both were established pursuant to statute. I assume, however, that their legislative as opposed to constitutional origins does not attenuate their crucial importance in the federal judicial scheme.

this concept to include situations where a juror was not excluded from the panel, but should have been. 42

There is, moreover, another consideration that the majority fails to address: the peculiar difficulty of detecting the harm caused by racist and sexist practices in the administration of criminal justice. We recognized in Peters v. Kiff, that it is in the nature of discriminatory selection processes "that proof of actual harm, or lack of harm, is virtually impossible to adduce."

Id. at 358 (Marshall, J., dissenting) (quoting Peters, 407 U.S. at 504).

42. In Smith v. Phillips, 455 U.S. 209 (1982), the Court held that due process was not denied when a person applying for a job in the prosecutor's office was left on the jury. See id. at 221. Justice Marshall, in dissent, wrote that "[t]he Court has insisted that defendants be given a fair and meaningful opportunity during voir dire to determine whether prospective jurors are biased-even if they have no specific prior knowledge of bias." See id. at 225 (Marshall, J., dissenting).

The Court has also insisted that the jury be selected from a representative cross-section of the community . . . . The right to a jury drawn from a fair cross-section of the community extends even to defendants who are not members of the excluded class. In Peters v. Kiff, [citation omitted], the defendant challenging the exclusion of blacks was white; in Taylor v. Louisiana, [citation omitted], the defendant challenging the exclusion of women was male. Exclusion is impermissible, not simply because jurors who are not members of the defendant's class may be prejudiced against the defendant, but also because the jury would be deprived of a "perspective on human events that may have unsuspected importance in any case that may be presented."

Id. at 226 (Marshall, J., dissenting).

Justice Marshall continued:

To summarize, the Court has required inquiry into prejudice even when there was no evidence that a particular juror was biased; has regarded the absence of a balanced perspective, and not simply the existence of bias against defendant, as a cognizable form of prejudice; has not always required a particularized showing of prejudice; and has strongly presumed that contact with a juror initiated by a third party is prejudicial. In this case, where there was evidence that juror Smith had a serious conflict of interest, and where that conflict would inevitably distort his perspective on the case, the majority nevertheless holds that the juror's simple assertion, after the verdict, that he was not biased sufficiently protects respondent's right to trial by an impartial jury. This holding is utterly inconsistent with the Court's historical recognition of this "most priceless" right.

Id. at 228 (Marshall, J., dissenting) (quoting Irvin v. Dowd, 366 U.S. 717, 721 (1961)).

Justice Marshall "believe[d] that in cases like this one, where the probability of bias is very high, and where the evidence adduced at a hearing can offer little assurance that prejudice does not exist, the juror should be deemed biased as a matter of law." Id. at 231 (Marshall, J., dissenting).

Furthermore, Justice Marshall concluded in his dissent:

The majority concedes that due process means an unbiased jury, "capable and willing to decide the case solely on the evidence." All respondent has asked for is the opportunity to be tried by such a jury. If the prosecutors had taken the simple step of informing the trial judge that Smith had applied for employment with their office, Smith could have been replaced, and respondent would have received an opportunity to be tried by an impartial jury. Because the prosecutors intentionally failed to so, however, a juror who was almost certainly prejudiced against the respondent participated in the deliberations. If due process really does mean a full and fair opportunity to be tried by an unbiased jury, "capable and willing to decide the case solely on the evidence"—then in this case, due process has been denied.

Id. at 244 (Marshall, J., dissenting) (quoting id. at 217).
3. Governmental Action is Interpreted Broadly

Where the government is so "intertwined" in the action that it authorizes it, conducts it and adopts its results, it is governmental action, and hence subject to the requirements of due process. Justice Marshall endorsed this broad definition of state action and considered the more restrictive version of state action, which prior Supreme Court decisions had espoused, as simply "empty formalism."

Historically, if state action was found, states received considerable latitude under the Due Process Clause of the Fourteenth Amendment, yet always subject to the fairness standard in procedural due process situations.

43. See O'Brien v. Brown, 409 U.S. 1, 13 (1972) (Marshall, J., dissenting). This was a per curiam determination to stay action on petitions for certiorari in light of the traditional right of a political convention to review and act upon the recommendations of the Credential Committee. See id. at 2. Justice Marshall was for assuming jurisdiction and resolving the matter due to important due process questions, but because the Court did not reach the question, he refrained from expressing his views on the merits of the due process challenge. See id. at 13. Even if the Credentials Committee did not deny the petitioners due process, there were other federally protected rights which should have been addressed by the Court, in Justice Marshall's view. See id. at 14.

44. See id. at 13.

45. See Rendell-Baker v. Kohn, 457 U.S. 830 (1982), in which Justice Marshall wrote that "[t]he decision in this case marks a return to empty formalism in state action doctrine. Because I believe that the state action requirement must be given a more sensitive and flexible interpretation than the majority offers, I dissent." See id. at 852 (Marshall, J., dissenting).


47. See Board of Regents v. Roth, 408 U.S. 564, 591 (1972) (Marshall, J., dissenting). For a state to allow a monopoly to be established is a major, but acceptable decision under the proper circumstances. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 366 (1974) (Marshall, J., dissenting). Encompassed within this policy is the State's determination not to permit governmental competition with the selected private company. See id. at 368 (Marshall, J., dissenting). "[W]hen the activity in question is of such public importance that the State invariably either provides the service itself or permits private companies to act as state surrogates in providing it, much more is involved that just a matter of public interest." Id. at 372 (Marshall, J., dissenting). In his dissenting opinion, Justice Marshall recognized that the majority feared that elaborate pretermination hearings might be quite expensive, and ultimately hurt consumers more than help them. See id. at 373 (Marshall, J., dissenting). "The solution to this problem . . . is to require only abbreviated pre-termination procedures for all utility companies, not to free the 'private' companies to behave however they see fit." Id. What was most troubling to Justice Marshall was that the Court's opinion would appear to apply to a broad range of the company's claimed constitutional violations. See id. at 373-74 (Marshall, J., dissenting).

Thus, the majority's analysis would seemingly apply as well to a company that refused to extend services to Negroes, welfare recipients, or any other group that the company preferred, for its own reasons, not to serve. I cannot believe that this Court would hold that the State's involvement with the utility company was not sufficient to impose upon the company an obligation to meet the constitutional mandate of nondiscrimination. Yet nothing in the analysis of the majority opinion suggests otherwise.

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For example, where the Court held that a criminal defendant's state appointed counsel's failure to file a timely application for discretionary review was not state action, Justice Marshall reminded the Court in his dissenting opinion that in a previous decision the Court held that a state criminal trial, initiated and conducted by the state itself, constituted state action within the meaning of the Fourteenth Amendment. Additionally, the Court held that a privately operated school, to which maladjusted high school students were referred by city committees, was not operating under color of state law so as to support a civil rights action under 42 U.S.C. § 1983 for allegedly discharging an employee. In his dissent Justice Marshall wrote: "The school receives almost all of its funds from the State, and is heavily regulated. This nexus between the school and the State is so substantial that the school's action must be considered state action."

Once it was determined that state action was involved, Justice Marshall was intent on holding the state to a high degree of due process fairness, as evidenced in Board of Regents v. Roth and Perry v. Sinderman, two cases decided the same day. In what should be recognized as one of the most piquant expressions of due

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Id. at 374 (Marshall, J., dissenting).


It is true that Cuyler v. Sullivan involved a challenge to the conduct of a private attorney during the trial, while this case involves a challenge to the post-trial conduct of a private attorney. However, post-trial proceedings are an integral part of the criminal process. In my view, the State is just as much implicated in those proceedings as in the trial itself.

Id.

50. See Rendell-Baker, 457 U.S. at 843.
51. Id. at 844 (Marshall, J., dissenting). Justice Marshall took pains to detail the "guidelines" which the state issued. See id. at 845-47 (Marshall, J., dissenting). These "guidelines" covered "almost every aspect of a private school's operations, including financial record keeping, student discipline, medical examinations for students, parent involvement, health care, subjects of instruction, teacher-student ratio, student records, confidentiality of records, transportation, insurance, nutrition, food preparation, toileting procedures, physical facilities, and classroom equipment." See id. at 846 (Marshall, J., dissenting). Justice Marshall further opined that:

A contract with the Massachusetts Department of Mental Health, Drug Rehabilitation Division, requires the school to provide counseling, educational and vocational services for drug abusers. Under a contract with the city of Boston, the school must carry out the educational plan devised by the Boston School Committee for each Boston student placed with the school.

Id. at 846-47 (Marshall, J., dissenting).

52. 408 U.S. 564 (1972).
53. 408 U.S. 593 (1972).
54. See Roth, 408 U.S. at 564; Perry, 408 U.S. at 593. In Roth the Court held that an untenured state-employed university professor was not deprived of liberty or property protected by the Fourteenth Amendment when he was given no reason for the university's failure to renew his one-year contract.
process law, Justice Marshall wrote: "It is not burdensome to give reasons when reasons exist."55

4. Due Process Uses Equitable Remedies

Justice Marshall espoused the belief that equitable remedies may be used for due process violations in certain circumstances.56

See Roth, 408 U.S. at 569. Justice Marshall wrote:

I would go further than the Court does in defining the terms "liberty" and "property."

... [I]t is now firmly established that whether or not a private employer is free to act capriciously or unreasonably with respect to employment practices, at least absent statutory or contractual ... controls, a government employer is different. The government may only act fairly and reasonably.

... [I]t is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action.

Id. at 588-89 (Marshall, J., dissenting) (citations omitted) (emphasis added).

55. See Roth, 408 U.S. at 591 (Marshall, J., dissenting). Justice Marshall further stated:

Whenever an application for employment is denied, an employee is discharged, or a decision not to rehire an employee is made, there should be some reason for the decision. It can scarcely be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected by the government's action.

Id. (Marshall, J., dissenting). In Perry, Justice Marshall adopted his dissenting opinion in Roth. See Perry, 408 U.S. at 605 (Marshall, J., dissenting).

56. In City of Los Angeles v. Lyons, 461 U.S. 95 (1983), Justice Marshall disagreed with the Court's refusal to enjoin enforcement of the city's "chokehold policy." See id. at 113 (Marshall, J., dissenting). The Respondent had been stopped for a traffic violation and placed in a "chokehold." See id. at 97. The majority held that the need for a "balance between state and federal authority counsels restraint [against injunctive relief] in the absence of irreparable injury which is both great and immediate." See id. at 112. Justice Marshall wrote:

Where, as here, a plaintiff alleges both past injury and a risk of future injury and presents a concededly substantial claim that a defendant is implementing an unlawful policy, it will rarely be easy to decide with any certainty at the outset of a lawsuit that no equitable relief would be appropriate under any conceivable set of facts that he might establish in support of his claim.

Id. at 131 (Marshall, J., dissenting). "Apart from the question of standing, the only remaining question presented in the petition for certiorari is whether the preliminary injunction issued by the District Court must be set aside because it 'constitute[s] a substantial interference in the operation of a municipal police department.'" Id. at 131-32 (Marshall, J., dissenting) (quoting Petition for Cert.) (alterations in original).

Under the view expressed by the majority today, if the police adopt a policy of "shoot to kill," or a policy of shooting 1 out of 10 suspects, the federal courts will be powerless to enjoin its continuation. The federal judicial power is now limited to levying a toll for such a systematic constitutional violation.

Id. at 137 (Marshall, J., dissenting) (citation omitted).
5. The Burden, Standard of Proof, and Presumptions

Justice Marshall also believed that the person complaining of a due process violation bears the burden of proof which must be proved by a preponderance of the evidence. Under certain circumstances Justice Marshall further believed that a presumption of constitutionality applied and the person alleging a due process violation had the burden of showing that the state acted in an "arbitrary and irrational way."

6. Absolute Requirements

Justice Marshall was an absolutist and demanded that certain requirements be met in order to insure the fairness that due process demanded.

According to Justice Marshall, every litigant is entitled to a trial by a competent and impartial tribunal. Competency contemplates not only mental acuity, but also jurisdiction over the subject matter and the person. Again fairness

60. See Peters v. Kiff, 407 U.S. 493, 501 (1972); Lee v. United States, 432 U.S. 23, 38 (1977) (Marshall, J., dissenting) (writing that a defendant has "no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process") (quoting Berker v. Wingo, 407 U.S. 514, 527 (1972)). In Tanner v. United States, 483 U.S. 107 (1987), Justice Marshall wrote that "[e]very criminal defendant has a constitutional right to be tried by competent jurors. This Court has long recognized that 'due process implies a tribunal both impartial and mentally competent to afford a hearing, a jury capable and willing to decide the case solely on the evidence before it.'" Id. at 34 (Marshall, J., concurring in part and dissenting in part) (citations omitted). The right to a tribunal extends to those governmental entities established to hear complaints. See SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 742 (1984). Prior to Justice Marshall's ascent to the bench, the Court required that due process assure a fair trial. However, the parameters of that requirement were not settled. See, e.g., Griffin v. Illinois, 351 U.S. 12 (1956). In Griffin, a five-four decision, the Court held that an Illinois statute which denied effective appellate review to the poor, while granting it to all others, was unconstitutional. See id. at 19-20. Four Justices—Chief Justice Warren, Justices Douglas and Clark and the author of a plurality opinion, Justice Black—thought that the statute was unconstitutional based on the Due Process Clause. See id. Justice Frankfurter, on the other hand, based his vote to condemn the statute on the Equal Protection Clause. See id. at 20-21 (Frankfurter, J., concurring). The four dissenting Justices, while acknowledging the desirability of the state's furnishing the indigent appellant with a transcript of testimony, did not see a constitutional requirement to do so. See id. at 26-27. A few years later Justice Douglas, a true champion of due process, seemed to relegate due process to an invidious discrimination ground, while measuring the fairness of procedures on equal protection standards. See Douglas v. California, 372 U.S. 353 (1963); see also Hilton v. Braunskill, 481 U.S. 770 (1987); Ford v. Wainwright, 477 U.S. 399 (1986).
figures preeminently in this calculus. In *Shaffer v. Heitner*, Justice Marshall wrote that due process was denied when the state permitted a court to obtain jurisdiction over a defendant by sequestering his property that happened to be located in the state. Similarly, when a state law allowed for personal jurisdiction via long-arm service over a non-resident defendant with virtually no contacts to the state, Justice Marshall again held that such an exercise of jurisdiction violated the Due Process Clause. In order to be impartial, Justice Marshall stressed that the


62. In *Shaffer*, a stockholders' derivative suit, a Delaware court held that a disgruntled stockholder was permitted to obtain jurisdiction over several corporate officials simply by sequestering shares of their corporate stock—their only contact with the forum state. *See id.* at 189-95. Justice Marshall authored the majority opinion, holding that this action violated due process. *See id.* at 216-17. "Judicial jurisdiction over a thing," is a "customary elliptical way of referring to jurisdiction over the interests of persons in a thing." *See id.* at 207 (quoting RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 56). Hence, in order to justify jurisdiction over the owner of the "thing," the plaintiff must show that the owner has such contacts with the forum state so that the fairness test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), will be satisfied. *See Shaffer*, 433 U.S. at 212. Justice Marshall stressed the importance of the relationship among the defendant, the forum state and the litigation. *See id.* at 204. This reflected a continued departure from *Pennoyer v. Neff*, 95 U.S. 714 (1877). Justice Marshall said that it was not wise to rely upon terms such as *in personam* and *in rem* because their meaning varies from state to state. *See Shaffer*, 433 U.S. at 206. Justice Marshall made it clear, however, that cases in which the "thing" is the subject of the litigation (a true *in rem* action), the presence of the thing in the forum state would be sufficient to give the forum state jurisdiction. *See id.* at 207-08. In cases such as *Harris v. Balk*, 198 U.S. 215 (1905), where the only importance of the "thing" was to furnish a reason for the forum to assume jurisdiction (*quasi-in-rem*), the fairness test must be applied by analyzing the contacts between the owner of the "thing" and the forum. *See Shaffer*, 433 U.S. at 209. Three years later, in *Rush v. Savchuck*, 444 U.S. 320 (1980), Justice Marshall extended *Shaffer*, by holding that a state may not constitutionally exercise *quasi-in-rem* jurisdiction over a defendant by merely attaching the contractual obligation of the defendant contained in an insurance policy. *See id.* at 328-33.


The Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants. It has long been the rule that a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant. The existence of personal jurisdiction, in turn, depends upon the presence of reasonable notice to the defendant that an action has been brought, and a sufficient connection between the defendant and the forum State to make it fair to require defense of the action in the forum.

*Id.* at 91 (citations omitted). Then, turning to the case at hand, Justice Marshall made clear the nature of the problem:

In this case, appellant does not dispute the adequacy of the notice that he received, but contends that his connection with the State of California is too attenuated, under the standards implicit in the Due Process Clause of the Constitution, to justify imposing upon him the burden and inconvenience of defense in California.
tribunal must not have an erroneous or distorted presentation of the facts or the law, and the tribunal must preserve both the appearance and reality of fairness. In addition to a competent and impartial tribunal, Justice Marshall required that the litigants be entitled to a competent and impartial review of the initial determinations made in their cases. Furthermore, those who cannot afford either tribunals of trial or review must be furnished them. Notice was an important requirement of

Like any standard that requires a determination of "reasonableness," the "minimum contacts" test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present. We recognize that this determination is one in which few answers will be written "in black and white. The greys are dominant and even among them the shades are innumerable."


64. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). Justice Marshall referred to the need for courts to "generat[e] the feeling, so important to a popular government, that justice has been done."

*See id.* at 242 (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 172 (1951)).

65. *See Michigan v. Payne*, 412 U.S. 47, 63 (1973) (Marshall, J., dissenting) (noting "[t]he problem, as I see it, is to devise procedures that will permit reviewing courts to determine whether the requirements of the Due Process Clause have been met."). In *Swisher v. Brady*, 438 U.S. 204 (1978), the Court held that a juvenile, subjected to a hearing before a Master, who had no power to enter a final order, was not placed in jeopardy a second time when the Juvenile Court judge who sentenced the juvenile merely reviewed the Master's Report. *See id.* at 215. In his dissenting opinion, Justice Marshall wrote: "Maryland's scheme raises serious due process questions because the judge making the final adjudication of guilt has not heard the evidence and may reverse the master's findings of nondelinquency based on the judge's review of a cold record." *Id.* at 219 (Marshall, J., dissenting). In *United States v. Raddatz*, 447 U.S. 667 (1980), Justice Marshall took a similar position. *See id.* at 695 (Marshall, J., dissenting). In *Gardner v. Florida*, 430 U.S. 349 (1977), Justice Marshall dissented because he thought that the Court had not sufficiently admonished the Florida Supreme Court against merely applying a "rubber stamp" to lower court decisions. *See id.* at 370 (Marshall, J., dissenting). In *Ford v. Wainwright*, 477 U.S. 399 (1986), Justice Marshall, in writing the majority opinion, held that Florida's statute inflicting the death penalty upon an insane person was cruel and unusual punishment in violation of the Eighth Amendment. *See id.* at 416-17. Justice Marshall wrote separately (joined by three other Justices), however, that the statute was also flawed in that it placed the appellate function in the hands of the executive, rather than the judiciary, branch of government. *See id.* at 416. Justice Marshall opposed the death penalty, which he described in *Furman v. Georgia*, 408 U.S. 238 (1972) as "irrevocable." *See id.* at 346 (Marshall, J., concurring). Though not explicitly expressed, Justice Marshall might have further opposed the death penalty because it forever foreclosed any review of the defendant's fate. *See infra* notes 103-08 and accompanying text; *see also* Hilton v. Braunskill, 481 U.S. 770 (1987).

66. In *United States v. Kras*, 409 U.S. 434 (1973), Justice Marshall dissented from the Court's decision which denied bankruptcy proceedings for an indigent who could not afford the filing fee. *See id.* at 460 (Marshall, J., concurring). Justice Marshall said: "I find nothing in the majority's opinion to convince me that due process is afforded a person who cannot receive a discharge in bankruptcy because he is too poor. Even if only one person is affected by the filing fee, he is denied due process." *See id.* at 460 n.2 (Marshall, J., dissenting). In *Ortwein v. Schwab*, 410 U.S. 656 (1973), the Court made the same ruling in connection with a state appellate court filing fee in an action to review the determination of a state agency. *See id.* at 661. Justice Marshall dissented, writing: "It is at least very doubtful that the Due Process Clause permits a State to shield an administrative agency from all judicial review when that agency acts to revoke a benefit previously granted." *See id.* at 665 (Marshall, J., dissenting). Justice Marshall noted that "[a]ppellants assert only that they must have some access to
Justice Marshall's concept of due process fairness. Whether it entailed notice furnished to an accused concerning a pending matter, notice of the disposition of some court to contest the legality of administrative action adversely affecting them. "Id. at 665 n.* (Marshall, J., dissenting) (emphasis in original). However, Justice Marshall felt "that [the] opportunity was denied in this case, and important benefits were thereby taken from appellants without affording them a chance to contest the legality of the taking in a court of law." See id. at 666 (Marshall, J., dissenting). In Ake v. Oklahoma, 470 U.S. 68 (1985), Justice Marshall wrote the majority opinion. He stated the following:

This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

Id. at 76 (emphasis added).

some property right, 68 statutory notice, 69 or notice in a litigated matter, 70 Justice Marshall believed that the notice must be meaningful. For Justice Marshall, meaningful notice was that which provided sufficient time for the recipient to reasonably respond. 71 Justice Marshall, however, allowed some balancing in the matter of what notice was meaningful. 72

Justice Marshall also believed that all parties have the right to a meaningful hearing in a court of law. 73 Accordingly, an accused has the right to confront and

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68. See Mennonite Bd. v. Adams, 462 U.S. 791, 798-99 (1986) (publishing notice of a property sale in a place in which it was unlikely that all persons with a need to know would see it is a denial of due process); Atkins v. Parker, 472 U.S. 115, 157-58 (1984) (Marshall, J., dissenting) (noting that the Code of Federal Regulations rightly required such notice "that allows families to 'adjust household budgets' according to changes in benefit levels . . . and I fail to see how a notice that does not inform recipients of their new benefit levels can serve this purpose." (citation omitted)).

69. See Hughley v. United States, 495 U.S. 411, 422 (1990). Justice Marshall said: "Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." See id. (quoting Crandon v. United States, 494 U.S. 152, 160 (1990)). Justice Marshall keenly studied legislative history to assure himself that judicial interpretation did not exceed legislative intent. See Briscoe v. LaHue, 460 U.S. 325, 349 (1983) (Marshall, J., concurring). Justice Marshall wrote in his dissenting opinion:

It might be appropriate to import common-law defenses and immunities into the statute if, in enacting § 1983, Congress had merely sought to federalize state tort law. But Congress "intended to give a broad remedy for violations of federally protected civil rights." Different considerations surely apply when a suit is based on a federally guaranteed right—in this case, the constitutional right to due process of law—rather than the common law.

Id. (citations omitted). In Landon v. Plasencia, 459 U.S. 21 (1982), an immigration case, Justice Marshall made it clear that the notice provided by the Immigration and Nationality Act was insufficient. "To satisfy due process, notice must 'clarify what the charges are' in a manner adequate to apprise the individuals of the basis for the government's proposed action . . . Respondent was not given notice sufficient to afford her a reasonable opportunity to demonstrate that she was not excludible." Id. at 39 (Marshall, J., concurring in part and dissenting in part) (quoting Wolff v. McDonnell, 418 U.S. 539, 564 (1974)).

70. See Thomas v. Arn, 474 U.S. 140, 155 (1985). Justice Marshall, writing for the Court, said that "a court of appeals may adopt a rule conditioning appeal . . . upon the filing of objections with the district court identifying those issues on which further review is desired," so long as there is (1) "clear notice to the litigants" and (2) "an opportunity to seek an extension of time for filing objections." See id.

71. See Landon, 459 U.S. at 39. Justice Marshall explained that due process requires a party to be adequately notified of the charges against them. See id. Furthermore, in Landon, the Respondent was given insufficient notice as required by due process. See id.

The charges against Plasencia were also inadequately explained at the hearing itself. The Immigration Judge did not explain to her that she would be entitled to remain in the country if she could demonstrate that she had not agreed to receive compensation from the aliens whom she had driven across the border. Nor did the judge inform respondent that the meaningfulness of her departure was an issue at the hearing.

Id. at 39-40.

72. See infra note 96 and accompanying text.


As we have said in a somewhat different context "due process requires, at a minimum,
cross examine witnesses testifying against him, and the right to present evidence on his behalf.

With regard to juries, a meaningful hearing required that the veniremen be questioned about individual racial prejudices. Justice Marshall believed that such inquiry goes to the very core of fairness. Furthermore, a jury should not be

that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. And surely the right to a "meaningful opportunity to be heard" comprehends within it the right to be heard without unreasonable delay. This principle is especially worthy of protection in the antitrust field where it is unmistakably clear that Congress has given courts, rather than agencies, the primary duty to act.


A landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home.


74. See Jenkins v. McKeithen, 395 U.S. 411 (1969), in which Justice Marshall stated: "We have frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process." Id. at 428.

75. In Jenkins, Justice Marshall wrote: "The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause. And, . . . this right becomes particularly fundamental when the proceeding allegedly results in a finding that a particular individual was guilty of a crime." See id. at 429. In Wolff v. McDonnell, 418 U.S. 539 (1974), Justice Marshall asked rhetorically, "how often do we have to reiterate that the Due Process Clause recognizes higher values than speed and efficiency?" See id. at 582-83 (quoting Fuentes v. Shevin, 407 U.S. 67, 90-91 (1972)). "We have held that '[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.'" Id. at 585 (quoting Goldberg v. Kelley, 397 U.S. 254, 269 (1970) (alteration in original)). "[T]he Court refuses to enforce prisoners' fundamental procedural rights because of a legitimate concern for secrecy which must affect only a tiny fraction of disciplinary cases. This is surely permitting the tail to wag the constitutional dog." Id. at 587. "[T]he minimum due process procedural requirements of Morrissey v. Brewer are applicable in the context of prison disciplinary proceedings." Id. at 593; see infra note 125 and accompanying text.


"[O]ur common-law heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well-defined purpose-to provide a reliable determination of guilt." That purpose simply cannot be achieved if the jury's deliberations are tainted by bias or prejudice. Fairness and reliability are assured only if the verdict is based on calm, reasoned evaluation of the evidence presented at trial.

Id. at 225 (quoting Estes v. Texas, 381 U.S. 532, 505 (1965) (alteration in original)). In Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984), Press-Enterprise petitioned for the release of a transcript of voir dire proceedings and the vacatur of an order closing the voir dire
mislead, either by closing arguments of counsel, or by jury instructions. Moreover, due process fairness demands that the prosecution divulge evidence tending to establish the criminal defendant's innocence. Nor can the prosecution offer evidence which unfairly portrays the defendant in a false light, or takes proceedings. See id. at 503. The trial court and the California Court of Appeals denied Petitioner's request. See id. at 504-05. The Supreme Court reversed the California Court of Appeals on the ground that the English tradition of the openness of jury selection has carried over to this country and that openness enhances both the basic fairness and the appearance of fairness so essential in the public confidence in the criminal justice system. See id. at 505. Justice Marshall concurred with the result, but wrote separately to posit that "the constitutional rights of the public and press to access to all aspects of criminal trials are not diminished in cases in which 'deeply personal matters' are likely to be elicited in voir dire proceedings." See id. at 520 (Marshall, J., dissenting) (quoting id. at 511).

78. Delivering the opinion of the Court in Caldwell v. Mississippi, 472 U.S. 320 (1985), Justice Marshall found that where the prosecutor's closing argument in a criminal case leaves the jury with the impression that its decision with respect to a death sentence will not be final because on appeal it may be reversed, the trial lacks the fundamental fairness required by the Due Process Clause. See id. at 340-41. Five years after Caldwell, the Court decided Sawyer v. Smith, 497 U.S. 227 (1990). In Sawyer, Petitioner was convicted and sentenced to death for a brutal murder. See id. at 230. Habeas corpus relief was denied by the United States District Judge partly on the ground that the allegedly offending prosecutorial remarks in the case differed from those in Caldwell, and his conviction became final before that decision. See id. at 232. The defendant appealed to the Fifth Circuit, which affirmed the district court. See id. The Court said that Caldwell created a "new" rule of constitutional law, and hence it could not be used by the petitioner in his habeas corpus hearing. See id. at 240-41. In his dissent, Justice Marshall took pains to establish that the majority's belief that Caldwell established a new rule of constitutional law was incorrect by carefully documenting the Court's error. See id. at 245 (Marshall, J., dissenting). In addition to his sound technical argument, Justice Marshall struck forcefully at the unfairness of the Court's decision. See id. at 254-55 (Marshall, J., dissenting). The jury that sentenced Sawyer to death was deliberately misled about the significance of its verdict. That Sawyer was thus denied a fundamentally fair trial was as apparent when Sawyer's conviction became final as it is today. The Court's refusal to allow a federal habeas court to correct this error is yet another indication that the Court is less concerned with safeguarding constitutional rights than with speeding defendants, deserving or not, to the executioner.

Id. at 259-60 (Marshall, J., dissenting).


80. See Moore v. Illinois, 408 U.S. 786, 801 (1972) (stating that "I believe that in failing to disclose to petitioner certain evidence that might well have been of substantial assistance to the defense, the State denied him a fair trial"); Weatherford v. Bursey, 429 U.S. 545, 562 (1977) (noting that "the integrity of the adversary system and the fairness of trials is undermined when the prosecution surreptitiously acquires information concerning the defense strategy and evidence (or lack of it), the defendant, or the defense counsel"). In United States v. Bagley, 473 U.S. 667 (1985), Justice Marshall also wrote:

When the state does not disclose information in its possession that might reasonably be considered favorable to the defense, it precludes the trier of fact from gaining access to such information and thereby undermines the reliability of the verdict. With a minimum of effort, the state could improve the real and apparent fairness of the trial enormously, by assuring that the defendant may place before the trier of fact favorable evidence known to the government.

Id. at 693 (Marshall, J., dissenting).

81. See Manson v. Brathwaite, 432 U.S. 98, 128-30 (1977) (Marshall, J., dissenting). Justice Marshall dissented from the Court's holding that by admitting into evidence (without objection) a photograph of the defendant which was identified in a photo line-up by an undercover police officer
advantage of its own misdeeds, or requires the defendant to incriminate himself. In United States v. Caceres, 440 U.S. 741 (1979), the Court held that evidence obtained by the Internal Revenue Service (IRS) need not be suppressed despite the IRS violating its own rules requiring approval of electronic surveillance, because the taxpayer violated other IRS regulations. See id. at 473. This decision, Justice Marshall criticized in dissent, "must inevitably erode respect for law among those charged with its administration." See id. at 757 (Marshall, J., dissenting). Citing precedent, Justice Marshall said that:

"[u]nderlying these decisions is a judgment, central to our concept of due process, that government officials no less than private citizens are bound by rules of law. Where individual interests are implicated, the Due Process Clause requires that an executive agency adhere to the standards by which it professes its action to be judged."

Id. at 758 (Marshall, J., dissenting). In a footnote, Justice Marshall added that "although not always expressly predicated on the Due Process Clause, these decisions are explicable in no other terms." Id. at 758 n.1 (Marshall, J., dissenting). Furthermore, Justice Marshall stated:

"If prejudice becomes critical in measuring due process obligations, individual officials may simply dispense with whatever procedures are unlikely to prove dispositive in a given case. Thus the majority's analysis invites the very kind of capricious and unfettered decision making that the Due Process Clause in general and these regulations in particular were designed to prevent."

Id. at 764 (Marshall, J., dissenting). Justice Marshall further added that "when the Government engages to protect individual interests, it may not constitutionally abrogate that commitment at its own convenience." See id. at 765 (Marshall, J., dissenting).

In Jenkins v. Anderson, 447 U.S. 231 (1980), the Court held that the Fifth Amendment (as applied to the States through the Fourteenth Amendment), was not violated by the use of pre-arrest silence to impeach a criminal defendant's credibility. See id. at 240. Justice Marshall disagreed and based his dissent on the conclusion that the defendant's due process rights were violated because of the unfairness of the procedure. See id. at 249 (Marshall, J., dissenting). More specifically, Justice Marshall explained that

"in order for petitioner to offer his explanation of self-defense, he would necessarily have had to admit that it was he who fatally stabbed the victim, thereby supplying against himself the strongest possible proof of an essential element of criminal homicide. It is hard to imagine a purer case of self-incrimination.

See id. at 247 (Marshall, J., dissenting). Justice Marshall opined that since petitioner's failure to report and explain his actions prior to his arrest was not probative of the falsity of his testimony at trial, it was fundamentally unfair and a deprivation of due process to allow the jury to draw from that silence an inference that his trial testimony was false.

Id. at 249 (Marshall, J., dissenting).
7. Balancing Requirements

Inherent in Justice Marshall's due process jurisprudence was a certain amount of balancing of these elements. Justice Marshall did not definitively state a rule as to the timing and the extent of such balancing, but from his opinions, one can discern that Justice Marshall would only allow those who had the capacity to achieve a symmetry of fairness to do the balancing.

For example, even though a criminal defendant is entitled to a speedy trial, some delay in the conduct of the trial is permissible. The trial judge has a certain amount of discretion involving the timing of the trial based on needs such as media coverage, and courtroom security.

A Notice-of-Alibi Rule requires criminal defendants intending to rely upon an alibi to furnish the prosecution with the names and address of witnesses who they intend to call in support of their alibi. Writing for the Court, Justice Marshall placed a proviso on the constitutionality of this rule by requiring that reciprocal


85. See United States v. Lovasco, 431 U.S. 783, 796 (1977). "We . . . hold that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." Id. Justice Marshall, writing for the Court, reconciled the Lovasco holding with the Court's prior stance in United States v. Marion, 404 U.S. 307, 324-25 (1971), which established that proof of actual prejudice resulting from pre-indictment delay merely makes a due process claim concrete and ripe for adjudication. See Lovasco, 431 U.S. at 324-25. Justice Marshall clarified that "[t]he due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." See id. at 790.


The constitutional standard of fairness requires that a defendant have "a panel of impartial, 'indifferent,' jurors." Qualified jurors need not, however, be totally ignorant of the facts and issues involved. "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard."

Id. (citations omitted). "The length to which the trial court must go in order to select jurors who appear to be impartial is another factor relevant in evaluating those jurors' assurances of impartiality." Id. at 802-03. Justice Marshall pointed out that in prior cases the Supreme Court overturned state court convictions obtained in a trial atmosphere that had been utterly corrupted by press coverage. See Sheppard v. Maxwell, 384 U.S. 333, 351-52 (1966); Estes v. Texas, 381 U.S. 552, 542-43 (1965); Irvin v. Dowd, 366 U.S. 717, 728 (1961). Those cases, however, Justice Marshall cautioned, "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." See Murphy, 421 U.S. at 799.

87. See Holbrook v. Flynn, 475 U.S. 560, 570 (1986). Writing for the Court in Holbrook, Justice Marshall found the presence of four armed state troopers sitting in the first row of the spectators' section of the courtroom did not violate that constitutional right of the six defendants in a criminal trial. See id.; see also Caldwell v. Mississippi, 472 U.S. 320, 339 (1985) (stating that if the trial judge is permitted to correct an error a due process violation might be alleviated).

rights be given to criminal defendants. A balancing of rights between the accused and the accuser determines the extent of discovery allowed. Furthermore, Justice Marshall indicated that an unrealistic statutory interpretation will not be tolerated.

Justice Marshall authored an opinion of the Court which held that the fundamental fairness of the Due Process Clause did not require law enforcement agencies to preserve breath samples in order to introduce the results of breath-analysis tests into evidence. Fairness was preserved in this case because no evidentiary advantage was gained by either the prosecution or the defense.

The composition of certain absolute requirements of due process, such as


"The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for a rule which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence."

Id. (quoting Williams, 399 U.S. at 82).

90. See id. "Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, it does speak to the balance of forces between the accused and his accuser." Id. (citations omitted). Justice Marshall stated:

[In the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.]

Id. at 475-76.

91. See id. at 479.

[The State cannot constitutionally force compliance with its scheme on the basis of a totally unsubstantiated possibility that the statute might be read in a manner contrary to its plain language. Thus, in the absence of fair notice that he would have an opportunity to discover the State's rebuttal witnesses, petitioner cannot be compelled to reveal his alibi defense.]

Id. at 478-79. In a footnote, Justice Marshall stated that "merely informing the defendant of the time and place of the crime does not approach the sort of reciprocity which due process demands." Id. at 479 n.12.


93. See id. Justice Marshall wrote:

Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality . . . evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Neither of these conditions is met on the facts of this case.

Id.
notice,\textsuperscript{94} and personal jurisdiction,\textsuperscript{95} by their very nature require a certain balancing. With regard to notice, the objective must be balanced against the limitations of statutory language.\textsuperscript{96} Jurisdiction, \textit{vel non}, must involve a balancing of "various interests and policies," including the defendant's forum-related activities.\textsuperscript{97}

Justice Marshall believed that governmental interests must be balanced against individual deprivation;\textsuperscript{98} but the government interest must be "very important."\textsuperscript{99}

\textsuperscript{94} See supra notes 67-72 and accompanying text.
\textsuperscript{95} See supra text accompanying note 60-66.
\textsuperscript{96} In \textit{Grayned v. City of Rockford}, 408 U.S. 104 (1972), Justice Marshall stated that "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." \textit{See id.} at 108. He added, however, that, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." \textit{See id.} at 110; \textit{Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.}, 455 U.S. 489, 498 (1982). Justice Marshall wrote:

The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.

\textit{Id.} (citations omitted).

\textsuperscript{97} See \textit{World-Wide Volkswagen Corp. v. Woodson}, 444 U.S. 286, 317 (1980) (Marshall, J., dissenting). \textit{World-Wide Volkswagen} might appear to be an extension of \textit{Kulko}. \textit{See supra} note 63 and accompanying text. The Court held that the Due Process Clause prohibits a state court from exercising personal jurisdiction over foreign corporations which sold and distributed a vehicle out-of-state, when the vehicle was involved in an accident in the forum state. \textit{See id.} at 295-99. Justice Marshall dissented because he believed that the majority's reliance on \textit{Kulko} was misplaced; it did not sufficiently analyze the defendants' forum related activities. \textit{See id.} at 313-14 (Marshall, J., dissenting). Justice Marshall called for a balancing of "various interests and policies." \textit{See id.} at 317 (Marshall, J., dissenting).

\textsuperscript{98} In \textit{Bell v. Wolfish}, 441 U.S. 520 (1979), the Court held that the practice of "double bunking" (placing inmates together in facilities that were designed for half their number), pre-trial detainees, as well as other restrictive practices, did not violate the Due Process Clause when such treatment is "rationally related" to some non-punitive purpose. \textit{See id.} at 538-40. In dissent, Justice Marshall wrote that "as with other due process challenges, the inquiry should be whether the governmental interests served by any given restriction outweigh the individual deprivation suffered." \textit{Id.} at 564 (Marshall, J., dissenting). "To make detention officials' intent the critical factor in assessing the constitutionality of impositions on detainees is unrealistic in the extreme." \textit{Id.} at 565 (Marshall, J., dissenting). "By its terms, the Due Process Clause focuses on the nature of deprivations, not on the persons inflicting them." \textit{Id.} at 567 (Marshall, J., dissenting). Justice Marshall called for a balancing test. \textit{See id.} at 569-70 (Marshall, J., dissenting). In \textit{Block v. Rutherford}, 468 U.S. 576 (1984), the Court held that detainees are not deprived of due process where they are denied contact with spouses, relatives and friends and are subjected to random "shake-down" searches in their absence, when the purpose is not punishment, but is reasonably related to a legitimate governmental objective per \textit{Wolfish}. \textit{See id.} at 586, 589-91. In dissent, Justice Marshall said that this is the "fourth time in recent years that the Court has turned a deaf ear on inmates' claims." \textit{See id.} at 596 (Marshall, J., dissenting); \textit{see also} \textit{Rhodes v. Chapman}, 452 U.S. 337 (1981); \textit{Hudson v. Palmer}, 408 U.S. 517 (1984). Justice Marshall thought the outcome
While Justice Marshall did not believe that prisoners were entitled to be informed of the authorities' reasons for denying a request to present witnesses, he believed that a contemporaneous explanation should be prepared and made available to the judge through an "in camera" inspection. Such an arrangement would strike a balance, in Justice Marshall's view, between the important government interest and individual deprivation.

B. The Three Interests Protected: Life, Liberty, and Property

The Due Process Clause of the Fifth and Fourteenth Amendments protects individual life, liberty, and property interests. Justice Marshall said that:

[o]ne of the purposes of the Due Process Clause is to reduce the incidence of error in deprivations of life, liberty or property. One of the ways such error can be reduced, in turn, is by allowing persons whose interests may be affected adversely

of Block was worse than the outcome in Wolfish. See Block, 468 U.S. at 598 (Marshall, J., dissenting).

[A] desire to run a jail as cheaply as possible is not a legitimate reason for abridging the constitutional rights of its occupants . . . .

[N]either petitioners nor the majority have shown that permitting low-risk pretrial detainees who have been incarcerated for more than a month occasionally to have contact visits with their spouses and children would frustrate the achievement of any substantial state interest. Because such visitation would significantly alleviate the adverse impact of the jail's current policies upon respondents' familial rights, its deprivation violates the Due Process Clause.

Id. at 604 (Marshall, J., dissenting) (citations omitted).

99. See Schall v. Martin, 467 U.S. 253, 289 (1984). The Schall Court held that § 320.5(3)(b) of the New York Family Court Act did not violate the Due Process Clause even though it authorizes pretrial detention of accused juvenile delinquents based on a finding that there is a "serious risk" that the juvenile "may before the return date commit an act which if committed by an adult would constitute a crime." See id. at 255. While acknowledging that the Due Process Clause is applicable to juvenile proceedings, the Court based its holding on the doctrine that certain legitimate government objectives are sufficiently important to justify an abridgment of the detainee's liberty interests and that the provision incorporates procedural safeguards sufficient to prevent unnecessary or arbitrary impairment of constitutionally protected rights. See id. at 263, 267-68, 277. In his dissent, Justice Marshall opined that "[i]t is manifest that § 320.5(3)(b) impinges upon fundamental rights. If the 'liberty' protected by the Due Process Clause means anything, it means freedom from physical restraint. Only a very important government interest can justify deprivation of liberty in this basic sense." Id. at 288 (Marshall, J., dissenting) (citation omitted); see Olim v. Wakinekona, 461 U.S. 238, 251-54 (1983) (Marshall, J., dissenting) (noting that while a prisoner has no due process right to be incarcerated in a particular prison, or part thereof, transferring him from a prison close to his family and friends to one a great distance away, violates his due process rights); infra notes 109-48 and accompanying text concerning protected liberty interests; see also Neitzke v. Williams, 490 U.S. 319, 328 (1989).

Justice Marshall further stated that "[i]t is a fundamental tenet of due process that
'[n]o one may be required at peril of life, liberty or property to speculate as to the
meaning of penal statutes.'"102

1. Life

As expressed in his concurrence in *Furman v. Georgia*103 and his dissent in
*Gregg v. Georgia,*104 Justice Marshall believed that the death penalty was excessive
and constituted cruel and unusual penalty in violation of the Eighth Amendment. However, Justice Marshall saw a considerable amount of due process in the Eighth
Amendment,105 but described the death penalty as "irrevocable"106 and reminded
us of the tragedy of being unable to correct a wrong after an innocent person is
executed.107 Justice Marshall spoke again in terms of *fairness.*108 It is not a rash
conclusion to believe that there was a certain amount of due process jurisprudence
in Justice Marshall’s opposition to the death penalty.

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101. *Block,* 468 U.S. at 605 (citation omitted) (Marshall, J., dissenting). In *Schall v. Martin,* 467
U.S. 253 (1984), Justice Marshall phrased the same sentiment as follows: "One of the purposes of
imposing procedural constraints on decisions affecting life, liberty, or property is to reduce the
incidence of error." See id. at 303-04.

U.S. 451, 453 (1939)).


105. See infra notes 341-45 and accompanying text.

106. See *Furman,* 408 U.S. at 346 (Marshall, J., dissenting).

107. See id. at 367-68 (Marshall, J., dissenting). Justice Marshall stated:

No matter how careful courts are, the possibility of perjured testimony, mistaken honest
testimony, and human error remain all too real. We have no way of judging how many
innocent persons have been executed[,] but we can be certain that there were some. Whether
there were many is an open question made difficult by the loss of those who were most
knowledgeable about the crime for which they were convicted. Surely there will be more as
long as capital punishment remains part of our penal law.

Id.

108. See id. at 371 (Marshall, J., dissenting).

At a time in our history when the streets of the Nation’s cities inspire fear and despair,
rather than pride and hope, it is difficult to maintain objectivity and concern for our fellow
citizens. But, the measure of a country’s greatness is its ability to retain compassion in time
of crisis. No nation in the recorded history of man has a greater tradition of revering justice
and fair treatment for all its citizens in times of turmoil, confusion, and tension than ours. This
is a country which stands tallest in troubled times, a country that clings to fundamental
principles, cherishes its constitutional heritage, and rejects simple solutions that compromise
the values that lie at the roots of our democratic system.

Id. (Marshall, J., dissenting).
2. Liberty

The “liberty” protected by the Due Process Clause encompasses a variety of individual rights. When Justice Marshall ascended to the Court in 1967, “liberty,” as protected by the Due Process Clauses, had not been clearly defined.109 Because the Fifth Amendment did not apply to the states, the liberty of not testifying against one’s self had to be furnished through the Due Process Clause of the Fourteenth Amendment.110 The matter which received the most attention under the guise of a protected liberty interest was the freedom to contract.111 *Lochner v. New York*112 had a chilling effect on state legislatures attempting to effect welfare legislation for almost thirty years. However, *Lochner*’s influence over the freedom to contract could not last.113 *West Coast Hotel Co. v. Parrish*,114 while not overruling *Lochner*, abandoned its underpinnings115 and removed all due process prohibitions against

109. See Meyer v. Nebraska, 262 U.S. 390, 402-03 (1923) (finding that a state statute which prohibited the teaching of any language other than English to any child who successfully passed the Eighth Grade was unconstitutional). Justice McReynolds opined:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

*Id.* at 399. Perhaps Justice McReynolds’ explanation of “liberty” was an expansion of Justice Harlan’s description 19 years earlier, in *Jacobson v. Massachusetts*, 197 U.S. 11 (1904), where he said that “[t]he liberty secured by the Fourteenth Amendment . . . consists, in part, in the right of a person ‘to live and work where he will.’” *See Jacobson*, 197 U.S. at 29 (quoting Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897)).


111. One school of thought posits that the right to contract freely fits more comfortably under the “property” component of the Due Process Clause than it does under the “liberty” component. *See Coppage v. Kansas*, 236 U.S. 1, 17-21 (1915).

112. 198 U.S. 45, 61 (1905) (declaring a New York statute setting the maximum number of hours bakers could work unconstitutional).

113. *Lochner* itself carried the seeds of its own destruction; four Justices dissented in that case, including Justice Oliver Wendell Holmes, whose dissent carried the famous words: “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.” *Id.* at 75 (Holmes, J., dissenting).

114. 300 U.S. 379 (1937) (determining that a Washington state minimum wage law for women was valid).

115. *See id.* at 391. Chief Justice Charles Evans Hughes, writing for the Court said:

The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. Liberty under the Constitution is thus necessarily

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economic and social welfare statutes and regulations.  

Justice Marshall made it clear that his concept of "liberty" was not restricted to the right to contract. According to Justice Marshall, "the concept of liberty under the Due Process Clause includes 'the right of the individual to contract, to engage in any of the common occupations of life . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.'"

Justice Marshall's first opportunity as a Justice to express himself on the subject involved a case in which the national Selective Service Board affirmed subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

_id. In Skinner v. Oklahoma, 316 U.S. 535 (1942), the Court struck down a state statute which sterilized habitual criminals and denied their right to procreate. See id. at 536-38. However, the Court struck down the statute on equal protection grounds rather than due process. See id. at 538. The only reference to due process came from Chief Justice Stone, who, in his concurring opinion, stated his belief that its absence from consideration constituted the legislation's real flaw. See id. at 542 (Stone, J., concurring).


117. _See_ City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 461 (1985). In Cleburne, an equal protection case, Justice Marshall said: "The right to 'establish a home' has long been cherished as one of the fundamental liberties embraced by the Due Process Clause." _Id._ (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). _In_ Weaver v. Graham, 450 U.S. 24 (1981), Justice Marshall cited the _ex post facto_ invalidity, U.S. CONSTITUTION Art. I, § 10, cl. 1, as the reason for the decision, rather than the equally applicable violation of a liberty interest under the Due Process Clause of the Fourteenth Amendment. See _id._ at 25. Justice Marshall did not always limit his liberty analysis to discussions of due process. For example, _in_ Touby v. United States, 500 U.S. 160 (1991), Justice Marshall wrote: "Because of the severe impact of criminal laws on individual liberty, I believe that an opportunity to challenge a delegated lawmaker's compliance with congressional directives is a constitutional necessity when administrative standards are enforced by criminal law." _See id._ at 170 (Marshall, J., concurring). He referred to due process specifically at the end of his concurring opinion. See _id._ at 170-71 (Marshall, J., concurring). In _Tashjian v. Republican Party of Connecticut_, 479 U.S. 208 (1986), a case dealing with the First Amendment, Justice Marshall wrote that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." _See id._ at 214 (quoting NAACP v. Alabama, 357 U.S. 449, 460 (1958)). _In_ Davidson v. Cannon, 474 U.S. 344 (1986), Justice Marshall joined Justice Blackmun's dissenting opinion which held that when a prisoner was injured due to the negligence of prison officials in protecting him from other violent prisoners he was deprived of liberty without due process of law. See _id._ at 349-60. _In_ Vance v. Terrazas, 444 U.S. 252 (1980), Justice Marshall recognized that expatriation proceedings threaten one's liberty. See _id._ at 271-72.


119. While in the Second Circuit, Justice Marshall authored _United States v. Mason_, 344 F.2d 673 (2nd Cir. 1965). The decision overturned the incarceration of a Spanish seaman by the U.S. Navy and the Immigration and Naturalization Service's attempt to cooperate with the Spanish Navy pursuant to a Treaty between Spain and the United States. _See id._ at 673. Justice Marshall wrote: "We have not been unmindful of the legitimate diplomatic and strategic interests served by the Treaty. However, these interests can only be satisfied within the limits of our constitutional scheme, which requires that
a local board's "I-A" classification of a conscientious objector, with no reasons given. Though the Court affirmed the Second Circuit, which ruled against the objector on statutory grounds, though the plaintiff alleged a violation of due process, the Court did not refer to these constitutional grounds in its decision. However, Justice Marshall, in his dissent, stated that "where . . . the underlying procedures of the classification system are . . . challenged[,] . . . pre-induction review should be permitted;" for without it an inductee's liberty is taken without a competent tribunal deciding constitutional issues. Though not requiring a definite time limit, the "nature and duration of commitment [must] bear some reasonable relation to the purpose for which the individual is committed" in order to comply with due process of law.

Justice Marshall wrote that "[p]risoners do not shed their basic constitutional rights at the prison gate, but instead retain a residuum of constitutionally protected liberty independent of any state laws or regulations" and that the "freedom from imposition of serious discipline is a 'liberty' entitled to due process protection."

all governmental action resulting in the deprivation of a person's liberty be authorized by law." Id. at 685.

121. See id.
122. Id. at 392-93 (Marshall, J., dissenting).
123. See McNeil v. Director, Patuxent Inst., 407 U.S. 245, 250 (1972)(quoting Jackson v. Indiana, 406 U.S. 715, 738 (1972))(emphasis added). In McNeil, the Petitioner was convicted of two assaults and sentenced to five years imprisonment. See id. at 245. Instead of committing him to prison, the sentencing court, ex parte, referred him to the Institution for an indeterminate term under Maryland's Defective Delinquency Law to determine whether he needed psychiatric treatment before returning to society. See id. The Petitioner had remained in the Institution a year past his term of imprisonment. See id. Writing for the Court, Justice Marshall stated that the Petitioner's due process rights were violated. See id. at 246. Justice Marshall added: "In this case it is sufficient to note that the petitioner has been confined for six years, and there is no basis for anticipating that he will ever be easier to examine than he is today." Id. at 250. "[I]f confinement is to rest on a theory of civil contempt, then due process requires a hearing to determine whether petitioner has in fact behaved in a manner that amounts to contempt." Id. at 251.
125. See Wolff v. McDonnell, 418 U.S. 539, 581 (1974) (Marshall, J., concurring in part and dissenting in part). In Wolff, Justice Marshall uttered the same famous lines that prisoners do not shed their constitutional rights at the prison gate. See id. Justice Marshall was referring to the Court's rulings: (1) a prison "[c]omplex may not prohibit inmates from assisting one another in the preparation of legal documents unless it provides adequate alternative legal assistance"; (2) "inspection of mail from attorneys for contraband"; (3) "advance written notice of the charges against them and a statement of the evidence relied on, the facts found, and the reasons supporting a disciplinary board's decision"; and (4) a hearing and an opportunity to speak in his own defense. See id. at 580-81 (Marshall, J., dissenting). Justice Marshall dissented from part of the Court's opinion because prisoners were not given the right to call, confront, or cross examine witnesses, nor could they present documentary evidence. See id. at 580-82 (Marshall, J., dissenting).
To my mind, the right in one's personal appearance is inextricably bound up with the historically recognized right of "every individual to the possession and control of his own person"... and, perhaps even more fundamentally, with "the right to be let alone-the most comprehensive of rights and the right most valued by civilized men."\(^{126}\)

Moreover, according to Justice Marshall, "all prisoners potentially eligible for parole have a liberty interest of which they may not be deprived without due process, regardless of the particular statutory language that implements the parole system."\(^{127}\) In further support of prisoner's rights, Justice Marshall found that a prisoner transferred to a prison a great distance from his family and friends, violates the prisoner's due process rights.\(^{128}\)

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126. See Kelley v. Johnson, 425 U.S. 238, 253 (1976) (Marshall, J., dissenting) (quoting Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891) and Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). In Kelley, the Court held that a county regulation limiting policemen's hair length did not violate the Fourteenth Amendment. See id. at 238. Justice Marshall accepted the aims of "identifiability" and maintenance of esprit de corps, asserted by the county, but he could find no relationship between the regulation and those goals. See id. at 254 (Marshall, J., dissenting). "To say that the liberty guarantee of the Fourteenth Amendment does not encompass matters of personal appearance would be fundamentally inconsistent with the value of privacy, self-identity, autonomy, and personal integrity that I have always assumed the Constitution was designed to protect." Id. at 251 (Marshall, J., dissenting).


It is self-evident that all individuals possess a liberty interest in being free from physical restraint. Upon conviction for a crime, of course, an individual may be deprived of this liberty to the extent authorized by penal statutes. But when a State enacts a parole system, and creates the possibility of release from incarceration upon satisfaction of certain conditions, it necessarily qualifies that initial deprivation. In my judgment, it is the existence of this system which allows prison inmates to retain their protected interest in securing freedoms available outside prison. Because parole release proceedings clearly implicate this retained liberty interest, the Fourteenth Amendment requires that due process be observed, irrespective of the specific provisions in the applicable parole statute. Id. at 23. Justice Marshall noted that Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973) held that "individuals on probation also retain a liberty interest which cannot be terminated without due process of law." See Greenholz, 442 U.S. at 24. From a constitutional perspective, Justice Marshall saw no difference between the liberty one possesses and the liberty one desires. Id. at 26. The actual holding of Morrissey was that the Due Process Clause of the Fourteenth Amendment required that a state afford an individual an informed hearing before revoking his parole. See Morrissey, 408 U.S. at 480-82. Justice Marshall voted with the majority in Morrissey without writing an opinion (but still joined Justice Brennan's concurrence). See id. at 471. In Gagnon, the Court held that a person on probation is entitled to a hearing when his probation is revoked, but the Court did not address the issue of whether a person on probation is entitled to appointed counsel. See Gagnon, 411 U.S. at 781-82. In Gagnon, Justice Marshall again sided with the majority. See id. at 778.


An inmate's liberty interest is not limited to whatever a State chooses to bestow upon him. An inmate retains a significant residuum of constitutionally protected liberty following
For Justice Marshall, juveniles in detention were afforded the same liberty as adults and the fact that they were always in "some form of custody" did not make their liberty interest any less precious.129

The right to privacy is not specifically mentioned in the United States Constitution, but over the years, the Court has generally agreed that there is a constitutionally protected right to privacy.130 However, there has never been

his incarceration independent of any state law.

There can be little doubt that the transfer of Wakinekona from a Hawaii prison to a prison in California represents a substantial qualitative change in the conditions of his confinement. In addition to being incarcerated, which is the ordinary consequence of a criminal conviction and sentence, Wakinekona has in effect been banished from his home, a punishment historically considered to be "among the severest." For an indeterminate period of time, possibly the rest of his life, nearly 2,500 miles of ocean will separate him from his family and friends. As a practical matter, Wakinekona may be entirely cut off from his only contacts with the outside world, just as if he had been imprisoned in an institution which prohibited visits by outsiders. Surely the isolation imposed on him by the transfer is far more drastic than that which normally accompanies imprisonment.

Id. (citations omitted). Justice Marshall recognized the importance of prisoners' contact with the outside world. In Kentucky Department of Corrections v. Thompson, 490 U.S. 454 (1989), Justice Marshall wrote: "Prison visits have long been recognized as critically important to inmates as well as to the communities to which the inmates ultimately will return." See id. at 468 (Marshall, J. dissenting).

129. In Schall v. Martin, 467 U.S. 253 (1984), the majority upheld a statute as constitutional because its purpose was to detain juveniles who might commit a crime if released. See id. at 253. The fact that the statute also allowed for the detention of juveniles who would not have committed a crime if released did not affect the statute's constitutionality. See id. at 253. The majority's arguments do not survive scrutiny. Its characterization of preventive detention as merely a transfer of custody from a parent or guardian to the State is difficult to take seriously. Surely there is a qualitative difference between imprisonment and the condition of being subject to the supervision and control of an adult who has one's best interests at heart. Id. at 289-90 (Marshall, J., dissenting) (citations omitted). Justice Marshall continued: "Indeed, the impressionability of juveniles may make the experience of incarceration more injurious to them than to adults; all too quickly juveniles subjected to preventive detention come to see society at large as hostile and oppressive and to regard themselves as irremediably 'delinquent.'" Id. at 291 (Marshall, J., dissenting) (footnote omitted). Justice Marshall categorized this as a serious injury to presumptively innocent persons—encompassing the curtailment of their constitutional rights to liberty—and he totally rejected the majority's suggested ad hoc determination of constitutionality. See id. at 308 (Marshall, J., dissenting).

unanimity as to what constitutional provision guarantees the right to privacy.\textsuperscript{131}

Justice Marshall's first opportunity to expressly address the right to privacy came eleven years after joining the Court.\textsuperscript{132} In Zablocki v. Redhail,\textsuperscript{133} the Court was presented with a state statute which forbid marriages by individuals owing back child support unless a court order was entered granting permission.\textsuperscript{134} The state would not grant permission unless proof of compliance with child support obligations was established.\textsuperscript{135} Perhaps overstating precedent set forth in Griswold v. Connecticut,\textsuperscript{136} Justice Marshall found a recognized right to marry included in the "right of privacy," which was implicit in the liberty provision of the Fourteenth Amendment's Due Process Clause.\textsuperscript{137} Thus, the statute was deemed unconstitutional because it violated the Due Process clause.\textsuperscript{138}

In another privacy decision, the Court found that a state statute requiring a physician to notify, if possible, the parents of a dependent, unmarried, minor girl prior to performing an abortion on her violated no constitutional guarantee.\textsuperscript{139} Justice Marshall, in his dissent, said the decision was narrow because it merely found "shortcomings in appellant's complaint and therefore deny[ed] relief."\textsuperscript{140} Justice Marshall took the opportunity, however, to express his personal views

\textsuperscript{131} Justice William O. Douglas, writing for the majority in Griswold, found the basis in a "penumbra" of the Bill of Rights. See id. at 484-85. The concurring Justices found this constitutional right in different parts of the Constitution. See id. at 486-507. Justice Goldberg (joined by Chief Justice Warren and Justice Brennan) found the constitutional right in the Ninth Amendment. See id. at 486 (Goldberg, J., dissenting). Justice Harlan found the constitutional right protected by the "liberty" of the Fourteenth Amendment's Due Process Clause. See id. at 500 (Harlan, J., concurring) (citing Palko v. Connecticut, 302 U.S. 319, 325 (1932)). In Roe v. Wade, 410 U.S. 113 (1973), Justice Blackmun, writing the majority opinion, joined by Justice Marshall, found the right in the Fourteenth Amendment's "liberty" provision. See Roe, 410 U.S. at 153. Thirteen years after Roe, Justice Blackmun, joined by Justices Marshall, Brennan, and Stevens, reiterated that position in his dissent in Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting). Conversely, the majority in Bowers held that the right of privacy does not include the right for consenting adults to engage in homosexual acts in the privacy of their homes. See id. at 195-96. Justice Powell, concurring in Zablocki v. Redhail, 434 U.S. 374 (1978), found the basis for the privacy guarantee in the Fourteenth Amendment's Equal Protection and Due Process provisions. See Zablocki, 434 U.S. at 400 (Powell, J., concurring).

\textsuperscript{132} See Zablocki, 434 U.S. at 374.
\textsuperscript{133} See id.
\textsuperscript{134} See id. at 375.
\textsuperscript{135} See id.
\textsuperscript{136} 381 U.S. 479.
\textsuperscript{137} See Zablocki, 434 U.S. at 384. In the same opinion, Justice Marshall observed that the Court in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), "recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." See Zablocki, 434 U.S. at 385 (quoting LaFleur, 414 U.S. at 639-40).
\textsuperscript{138} See Zablocki, 434 U.S. at 382-87.
\textsuperscript{140} See id. at 425 (Marshall, J., dissenting). The Court determined that the plaintiff lacked standing to challenge the "overbreadth" of the state statute. See id. at 406.
regarding the right to privacy. According to Justice Marshall, the Court had established precedent that a pregnant woman possesses a "fundamental right to choose whether to obtain an abortion or carry the pregnancy to term."

Her choice, like the deeply intimate decisions to marry, to procreate, and to use contraceptives, is guarded from unwarranted state intervention by the right to privacy. Grounded in the Due Process Clause of the Fourteenth Amendment, the right to privacy protects both the woman’s "interest in independence in making certain kinds of important decisions" and her "individual interest in avoiding disclosure of personal matters."

Justice Marshall recognized that the Supreme Court had adhered to the concept of a strong family bond, and hence it may seem incongruent to examine "burdens" imposed by a statute which requires notice to a minor’s parent when she is in trouble.

In Connell v. Higginbotham, Florida imposed a loyalty oath as a prerequisite...
to employment by the State.\textsuperscript{146} The Court held the oath requirement unconstitutional, because it "falls within the ambit of decisions of this Court proscribing summary dismissal from public employment without hearing or inquiry required by due process."\textsuperscript{147} Justice Marshall concurred "plainly and simply on the ground that belief as such cannot be the predicate of governmental action."\textsuperscript{148}

3. Property

Early on, the Court took a narrow view of "property" under the Fourteenth Amendment.\textsuperscript{149} Prior to Justice Marshall ascending to the Court, the Court’s view of property had not changed.\textsuperscript{150} Justice Marshall attempted to influence the Court to broaden the meaning of property in order to extend the application of due process of law.\textsuperscript{151} He wrote six opinions dealing with the impact of the Due Process Clauses on property\textsuperscript{152} and property owners.\textsuperscript{153}

\begin{itemize}
\item \textsuperscript{146} See id. The oath stated: "I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence." See id. at 208.
\item \textsuperscript{147} See id. at 208 (citing Sloczwer v. Board of Educ., 350 U.S. 551 (1956)).
\item \textsuperscript{148} Id. at 210 (Marshall, J., dissenting). "Due process may rightly be invoked to condemn Florida’s mechanistic approach to the question of proof." Id. at 209. He quoted from Justice Robert H. Jackson: "'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" Id. at 209-10 (Marshall, J., dissenting) (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).
\item \textsuperscript{149} In Davidson v. New Orleans, 96 U.S. 97 (1877), a complaint was made regarding the assessment of real property by the city of New Orleans for improving its drainage. See id. at 97-98. The Court noted that the Fourteenth Amendment did not contain the Fifth Amendment’s provision for just compensation, and therefore ruled that so long as the procedural aspect of collecting the tax was complied with "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." See id. at 105.
\item \textsuperscript{150} Down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law . . . . The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation.
\item \textsuperscript{151} In Arnett v. Kennedy, 416 U.S. 134 (1974), Justice Marshall said that an employee has a property interest in his chain of entitlement to continued employment. See id. at 211 (Marshall, J., dissenting). On the other hand, Justice Marshall has also viewed the right to discharge an employee a property interest. See Brock v. Roadway Express, Inc., 481 U.S. 252, 260-61 (1987).
\item \textsuperscript{152} In FCC v. Florida Power Corp., 480 U.S. 245 (1987), Justice Marshall, writing for the majority, noted that there must be a taking of property in order for there to be a constitutional violation under the Due Process Clause. See id. at 253.
Among these property decisions was *Pruneyard Shopping Center v. Robbins* in which Justice Marshall concurred in upholding a city ordinance which prohibited the owner of the shopping center from preventing solicitors from gathering signatures. In his concurrence, Justice Marshall pointed out that in a prior decision, *Martinez v. California*, the Court held that even a pre-existing state law remedy, which may affect property protected by the Due Process Clause, could be changed to conform to a State's interests in fashioning its own rule of law. Of course, an exception to this rule exists where that state interest is wholly arbitrary or irrational.

Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.

In another case, the Court also held that a prisoner whose mail order hobby kit was lost through the negligence of prison officials, had been deprived of his

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154. 447 U.S. 74.
155. See id. at 77 (Marshall, J., concurring).
156. 444 U.S. 277 (1980).
157. See id. at 281-82.
158. See Pruneyard, 447 U.S. at 92.
159. Id. at 92-93 (Marshall, J., concurring) (quoting Munn v. Illinois, 94 U.S. 113, 134 (1887)).

Justice Marshall further noted:

Appellants' claim in this case amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State, notwithstanding the California Supreme Court's finding that state-created rights of expressive activity would be severely hindered if shopping centers were closed to expressive activities by members of the public. If accepted, that claim would represent a return to the era of *Lochner v. New York*, when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result.

*Id. at 93 (Marshall, J., concurring) (citations omitted).* Justice Marshall further stated: "There has been no showing of interference with appellants' normal business operations. The California court has not permitted an invasion of any personal sanctuary . . . . No rights of privacy are implicated. In these circumstances there is no basis for strictly scrutinizing the intrusion authorized by the California Supreme Court." *Id. at 94-95 (Marshall, J., concurring).*

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property right under color of state law. Justice Marshall concurred with the Court’s finding that an available post-deprivation cause of action for damages under state law for negligent deprivation of property without due process of law “may preclude a finding of a violation of the Fourteenth Amendment.” Justice Marshall, however, disagreed with the majority’s conclusion that an adequate state-law remedy existed. Justice Marshall pointed out that the claimant was a state prisoner whose access to information about his legal rights was necessarily limited by his confinement, and there was no proof that he was ever informed about those rights. In this case the prisoner pursued his claim through the prison’s grievance procedure, which, in Justice Marshall’s eyes, failed to provide requisite due process of law.

A case which yielded a similar holding involved the Surface Mining and Control Act. In Hodel v. Virginia Surface Mining and Reclamation Association, the Court was confronted with the constitutionality of this Act which instructed the Secretary of the Interior to immediately order partial or total cessation of surface mining operations if a federal inspection determined that the operation violated the Act or a permit condition required by the Act, so that the operation “creates an immediate danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources . . . .” Justice Marshall writing for the Court, held that the Due Process Clause of the Fifth Amendment was not violated by the Act. The Court noted that while due process ordinarily requires “‘some kind of hearing’” prior to deprivation, summary administrative action may be justified in emergency situations.


161. See id. at 555 (Marshall, J., concurring in part and dissenting in part).

162. See id.

163. See id. at 556 (Marshall, J., concurring in part and dissenting in part).

164. See id.

I believe prison officials have an affirmative obligation to inform a prisoner who claims that he is aggrieved by official action about the remedies available under state law. If they fail to do so, then they should not be permitted to rely on the existence of such remedies as adequate alternatives to a Section 1983 action for wrongful deprivation of property.

Id.


166. See id. at 298.

167. See id. at 303.

168. See id. at 299 (quoting Parratt, 451 U.S. at 540); supra Part III.A.6 (discussing Justice Marshall’s absolute fairness requirements).

169. See id. at 300. Justice Marshall was clear to lay down guidelines when he approved any forgiveness of a hearing requirement. Justice Marshall believed that protection of the health and safety of the public is a paramount governmental interest which justifies the lack of a hearing. See id. The standard for judging the “imminent environmental harm” is very specific. See id. at 301. The relevant
However, Justice Marshall concurred with the Court in Cleveland Board of Education v. Loudermill,170 where the majority held that a terminated school district employee was entitled to a pre-termination opportunity in order to respond to the charges made against them.171 Justice Marshall wrote separately, however, to affirm his belief that "public employees who may be discharged only for cause are entitled, under the Due Process Clause of the Fourteenth Amendment, to more than "just notice and an opportunity to be heard before their wages are cut-off."172 Justice Marshall stated:

To my mind, the disruption caused by a loss of wages may be so devastating to an employee that, whenever there are substantial disputes about the evidence, additional predeprivation procedures are necessary to minimize the risk of an erroneous termination. That is, I place significantly greater weight than does the Court on the public employee's substantial interest in the accuracy of the pre-termination proceeding.173

In National Railroad Passenger Corporation v. Atchison, Topeka And Santa Fe Railway Company,174 Justice Marshall, writing for the Court, held that the Rail inquiry is not whether to issue a cessation order in a particular case, but whether the statutory procedure itself is incapable of affording due process. See id. at 302. Discretion of any official action may be abused, but due process does not require a judicial inquiry prior to exercising discretion. See id. at 303. Any challenge to the imposition of penalties may not be made until those penalties are imposed. See id. at 304-05.

171. See id. at 533.
172. See id. at 548 (Marshall, J., dissenting).

I continue to believe that before the decision is made to terminate an employee's wages, the employee is entitled to an opportunity to test the strength of the evidence "by confronting and cross-examining adverse witnesses and by presenting witnesses on his own behalf, whenever there are substantial disputes in testimonial evidence." Because the Court suggests that even in this situation due process requires no more than notice and an opportunity to be heard before wages are cut off, I am not able to join the Court's opinion in its entirety. Id. (emphasis in original) (quoting Arnett v. Kennedy, 416 U.S. 134, 214 (1974) (Marshall, J., dissenting)); see also supra notes 73-75 and accompanying text (discussing the right to confront and cross-examine witnesses).

173. Loudermill, 470 U.S. at 549. Justice Marshall continued:
I cannot and will not close my eyes today—as I could not 10 years ago—to the economic situation of great numbers of public employees, and to the potentially traumatic effect of wrongful discharge on a working person. Given that so very much is at stake, I am unable to accept the Court's narrow view of the process due to a public employee before his wages are terminated, and before he begins the long wait for a public agency to issue a final decision in his case.

Id. at 551.
Passenger Service Act’s requirement that private railroads reimburse Amtrak for rail travel privileges which it provided to the railroads’ employees, former employees, and their dependents did not constitute the taking of property without due process of law. The Court articulated that for a party to recover where federal economic legislation infringes upon a constitutionally protected contractual right, they must show that: “First, that the statute alters contractual rights or obligations, [and if so,] whether that violation is of constitutional dimension[s]; ... if the alteration is minimal, the inquiry may end at this stage.” The party claiming federal statutory impairment of a private right must also prevail over the presumption of constitutionality. In order to overcome this presumption the complaining party must show that Congress “acted in an arbitrary and irrational way.” Thus, for substantive due process Justice Marshall’s fairness standard is replaced by a “rational, reasoned” standard.

In United States v. Locke, the Court held that The Federal Land Policy and Management Act of 1976 did not take the holders’ property without due process of law, as they alleged in their complaint. The challenged Act required the holders of unpatented mining claims to make annual filings or forfeit their claims. Justice Marshall, writing for the majority, emphasized the Act’s quite adequate notice provisions in deeming it Constitutional.

C. Related Constitutional Provisions

1. Article I, Section 8 [3]

Justice Marshall did not believe that the Commerce Clause lessened the
latitude afforded the states under the Due Process Clause.\textsuperscript{185}

2. Article I, Section 10 [1]

Justice Marshall noted a distinction between the “principles embodied in Fifth Amendment’s due process guarantee[s] [and] the prohibitions against state impairment of contracts under the Contract Clause, and . . . to the extent the standards differ, a less searching inquiry occurs in the review of federal economic legislation.”\textsuperscript{186}

3. The Bill of Rights

Justice Marshall was for complete application of the Bill of Rights to the States by incorporating them into the Due Process Clause of the Fourteenth Amendment.\textsuperscript{187} The First Amendment, Sixth Amendment, Eighth Amendment, and


\textsuperscript{187} While a judge of the Second Circuit Court of Appeals, Justice Marshall faced formidable opposition to his position in a double jeopardy case. See United States ex rel Hetenyi v. Wilkins, 348 F.2d 844, 867-68 (2nd Cir. 1965).

Justice Cardozo, also in a double jeopardy case, opined that there was no wholesale applicability of the Bill of Rights to the states through the Fourteenth Amendment. See Palko v. Connecticut, 302 U.S. 319, 326 (1937). Some, but not all, of those personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action; not because they are enumerated in the Bill of Rights, but because they are implicit in the concept of ordered liberty so essential to due process of law. See id. at 326 n.4.

Legal Scholar, Richard Polenberg refers to \textit{Palko} as “[a]n artistic decision, perhaps, but it was a narrow palette Cardozo brought to his rendering of the Fourteenth Amendment. A later generation of jurists would have a keener appreciation of the created possibilities implicit in its texture and design.” Richard Polenberg, \textit{Cardozo and the Criminal Law: Palko v. Connecticut Reconsidered}, 2 J. SUP. CT. HIST. 92, 104 (1996).

Justice Marshall was one of those jurists. In \textit{Hetenyi} he rejected Cardozo’s due process rationale, and found the questioned procedure violative of the Fifth Amendment’s double jeopardy clause. \textit{Hetenyi}, 348 F.2d at 854. Later, as a Supreme Court Justice, Justice Marshall wrote the opinion of the Court in \textit{Benton v. Maryland}, 395 U.S. 784 (1969), which specifically overruled \textit{Palko}, and was the death-knell for the opponents of incorporating the Bill of Rights into the Due Process Clause of the Fourteenth Amendment. See id. at 793-96.

Professor Chemerinsky has said: “In one sense the selective incorporationists prevailed in this debate; never has the Supreme Court endorsed the total incorporationist approach. However, from a practical perspective, the total incorporationists largely succeed in their objective because, one by one, the Supreme Court found almost all of the provisions to be incorporated.” See CHEMERINSKI, supra note 116, at 381-82.

Although the debate over incorporation raged among Justices and scholars during the 1940's,
of course the Fifth Amendment through its Double Jeopardy, Equal Protection and own due process components, are the most important amendments of the Bill of Rights vis-a-vis due process of law.

4. The First Amendment

Justice Marshall said that the Due Process Clause adopted the principles of the First Amendment, and furnished no greater rights than did the First Amendment. Justice Marshall also said that "it is beyond debate that freedom to engage in association for advancement of beliefs and ideas is an inseparable aspect the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." Justice Marshall found, however, that "secular" reasons will save congressional action from being a direct violation of the First Amendment's Establishment Clause, or an indirect violation of it via the Due Process Clause of the Fifth Amendment.

When the Court upheld a New York statute that required applicants for the practice of law to prove that they possess "the character and general fitness requisite for an attorney and counselor-at-law," the decision drew broad attack from applicants who felt the requirement was vague and overbroad. Justice Marshall disagreed with the majority, agreeing with the applicants that the statute was vague and overbroad. According to Justice Marshall, "[t]he irreducible vices of due process vagueness, aris[e] when those who may be penalized by a legal rule cannot ascertain the rule's scope and avoid its burdens." Conversely, however, the Court struck down a different state statute that required state employees take a loyalty oath to the state. Justice Marshall concurred in judgment, but wrote separately because he felt that the Court left the clear impression that the unconstitutionality of the statute was limited to the

1950's, and 1960's, now the issue seems settled. [With few exceptions] the Bill of Rights do apply to state and local governments and, in almost all instances, with the same content regardless of whether it is a challenge to federal, state, or local actions.

Id. at 385.

188. See Rankin v. McPherson, 483 U.S. 378, 386 (1987). Justice Marshall, writing for the Court, held that a clerical employee, who heard about an attempt on the life of the President in a county constable's office, had the First Amendment right to say, "[i]f they go for him again, I hope they get him." See id. at 381.


194. Wadmond, 401 U.S. at 194-95.

"State’s decision to regard unwillingness to take the oath as conclusive, irrefutable proof of the proscribed belief." Justice Marshall did not believe that due process was afforded by this "mechanistic approach to the question of proof."

During the next term, the Court upheld a Massachusetts loyalty oath requirement for public employees which consisted of two parts: Part I required the affiant to uphold and defend the United States and commonwealth constitutions and Part II required the affiant to agree to oppose the overthrow of the government of the United States and the commonwealth. Justice Marshall found that Part II was "an overbroad infringement of protected expression and conduct." Justice Marshall further stated that "[s]ince the overbreadth of the oath tends to infringe areas of speech and conduct that may be protected by the Constitution, I believe that it cannot stand."

In *Bethel School District v. Fraser*, the Court upheld a punishment of suspension from school for a speech that a school board considered disruptive. The sanctioned student sued under 42 U.S.C. § 1983 on First Amendment and due process grounds, claiming that he had no notice that his speech would subject him to disciplinary sanctions. The Court held that the suspension did not rise to the level of "a penal sanction calling for the full panoply of procedural due process protection applicable to criminal prosecution." Justice Marshall dissented even though he recognized that the school administration "must be given wide latitude to determine what forms of conduct are inconsistent with the school’s educational mission." Justice Marshall noted that there was, however, a First Amendment impact. The presence of speech foreclosed unquestioned acceptance of the school’s assessment of the situation; it demanded an analysis by the Court, and an independent determination as to whether the punishment was justified. Justice Marshall’s assessment of the position the Court should have taken represents a blending of First Amendment and due process jurisprudence.

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197. *Id.*
199. *Id.* at 695 (Marshall, J., dissenting).
202. *See id.* at 678.
203. *See id.* at 679, 686.
204. *See id.*
205. *See id.* at 690 (Marshall, J., dissenting).
206. *See id.*
207. *See id.*
5. The Fifth Amendment

a. Double Jeopardy

Between 1972 and 1989 Justice Marshall dissented in eight cases which involved the impact of due process on the Double Jeopardy clause of the Fifth Amendment. Many of his dissents voiced his concern that the Court was not giving sufficient deference to North Carolina v. Pearce, a 1969 decision which attempted to eradicate vindictiveness in subsequent trials of criminal cases.

More than merely attempting to prevent vindictiveness on the part of the subsequent tribunal, Justice Marshall believed that giving the defendant an unnecessary dilemma involving an appeal offended the double jeopardy prohibition.


209. The Court in Pearce strongly proclaimed that "[d]ue process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." See id. at 725. Justice Marshall joined Justice Douglas' concurring opinion in which Justice Douglas opined that "if for any reason a new trial is granted and there is a conviction a second time, the second penalty imposed cannot exceed the first penalty, if respect is had for the guarantee against double jeopardy." See id. at 726-27 (Douglas, J., concurring).

210. See id. at 727. In Colten v. Kentucky, 407 U.S. 104 (1972), Justice Marshall pointed out that giving a defendant the right to appeal from an inferior court judgment, which entailed the possibility of a more severe sentence was constitutionally flawed. See id. at 124 (Marshall, J., dissenting). "'[I]f the first conviction has been set aside for nonconstitutional error, the imposition of a penalty upon the defendant having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law.'" Id. at 125 (quoting Pearce, 395 U.S. at 724). "A defendant's exercise of a right of appeal must be free and unfettered . . . . [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unwise choice."

Id. (quoting Pearce, 395 U.S. at 724). Catching an echo of equal protection, Justice Marshall espoused that "'[t]his Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasonable distinctions that can only impede open and equal access to the courts.'" Id. at 125 (Marshall, J., dissenting) (quoting Pearce, 395 U.S. at 724). In Chaffin v. Stynchcombe, 412 U.S. 17 (1973), the Court held that the Due Process clause of the Fourteenth Amendment does not prohibit a jury from returning more severe sentences on retrial following a reversal of a prior conviction so long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness. See id. at 23-25. In his dissent Justice Marshall noted that the vindictiveness which the Court was trying to guard against in Pearce was not the only issue in this type of case. See id. at 38 (Marshall, J., dissenting). Justice Marshall believed that creating an unnecessary dilemma for a defendant offends due process: "For, by establishing one rule for sentencing by judges and another for sentencing by juries, the Court places an unnecessary burden on the defendant's right to choose to be tried by a jury after a successful appeal." Id. at 43-44 (Marshall, J., dissenting). "No legitimate state interest is materially advanced by permitting a second jury to enhance punishment without limitations like those placed by Pearce on judges, and such limitations would not substantially affect any such interest." Id. at 46 (Marshall, J., dissenting).
In *Michigan v. Payne*, the Court determined that *Pearce* was not to be applied retroactively to respondent’s conviction. Justice Marshall, in dissent, said that this is not a retroactivity case and that “[t]his case raises the issue of retroactivity only because of the almost unbelievable sluggishness of the appellate process in Michigan.”

*Lee v. United States* involved a bench trial where the judge found the defendant was guilty beyond any reasonable doubt. The judge dismissed the information because the indictment did not allege specific intent required by the applicable statute. Subsequently, the defendant was indicted for the same crime and convicted. The Supreme Court affirmed the decision. Justice Marshall said in dissent that a defendant has “no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process.”

In *Swisher v. Brady*, the Court held that a juvenile subjected to a hearing before a Master, who had no power to enter a final order, was not placed in jeopardy a second time when the Juvenile Court Judge reviewed the Master's

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212. See id. at 49.
213. See id. at 63 (Marshall, J., dissenting).
214. Id. “The issue need not be framed as the ‘retroactivity’ of *Pearce*. The problem, as I see it, is to devise procedures that will permit reviewing courts to determine whether the requirements of the Due Process Clause have been met.” Id. at 64 (Marshall, J., dissenting).

The holding of *Pearce* is a simple one: the Due Process Clause requires States to adopt procedures designed to minimize the possibility that a new sentence after a successful appeal will be based in part on vindictiveness for the defendant’s having taken the appeal. The Court agrees that ‘this basic due process protection is available equally to defendants resentenced before and after the date of the decision in that case.’ The question then is what procedures are required to insure that that protection has been afforded defendants resentenced before *Pearce* was decided. This question, like many of those involving retroactivity, relates to the integrity of the judicial process, not to the limitations placed by the Constitution on police behavior.

*Id.* (citations omitted). With regard to retroactive legislation, in general, Justice Marshall wrote in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), that “[t]he retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.” See *id.* at 17.

216. See *id.* at 25-27.
217. See *id.* at 25.
218. See *id.* at 27.
219. See *id.* at 34.
220. *Id.* at 39 (Marshall, J., dissenting). The “petitioner was needlessly placed in jeopardy twice for the same offense over his objection . . . .” *Id.*

Justice Marshall argued in his dissenting opinion that "Maryland's scheme raises serious due process questions because the judge making the final adjudication of guilt has not heard the evidence and may reverse the master's findings of nondelinquency based on the judge's review of a cold record."\(^{223}\)

In *Heath v. Alabama*,\(^{224}\) a defendant plead guilty to "malice" murder in Georgia in exchange for a sentence of life imprisonment.\(^{225}\) Subsequently, he was tried and convicted of murder in Alabama for the same offense and sentenced to death.\(^{226}\) The Court held that under the "dual sovereignty" doctrine, prosecution by two states for the same conduct is not barred by the Double Jeopardy Clause of the Fifth Amendment because a defendant who violates the peace and dignity of two sovereigns by breaking the law of each, has committed two separate offenses.\(^{227}\) In his dissent, Justice Marshall initially attacked the dual sovereignty doctrine and said that it does not apply in the state/state situation.\(^{228}\) Justice Marshall then chided the Court for "refusing to consider the fundamental unfairness of the process by which the petitioner stands condemned to die."\(^{229}\)

In Justice Marshall's view, double jeopardy can result even in situations where

\(^{222}\) See id. at 219.

\(^{223}\) See id. at 229 (Marshall, J., dissenting). Justice Marshall stated that even if the procedure "avoided" double jeopardy problems, it "violates the Due Process Clause by permitting ultimate factfinding by a judge who did not actually conduct the trial." See id. (Marshall, J., dissenting); supra note 60 and accompanying text (regarding the due process requirement that there be a proper review of trial proceedings).

\(^{224}\) 474 U.S. 82 (1985).

\(^{225}\) See id. at 84.

\(^{226}\) See id. at 85-86.

\(^{227}\) See id. at 93.

\(^{228}\) See id. at 95 (Marshall, J., dissenting).

\(^{229}\) See id. at 101 (Marshall, J., dissenting) (emphasis added). Justice Marshall wrote:

I must confess that my quarrel with the Court's disposition of this case is based less upon how this question was resolved than upon the fact that it was considered at all. Although, in granting Heath's petition for certiorari, this Court ordered the parties to focus upon the dual sovereignty issue, I believe the Court errs in refusing to consider the fundamental unfairness of the process by which petitioner stands condemned to die.

Id. (Marshall, J., dissenting). Justice Marshall opined:

Even where the power of two sovereigns to pursue separate prosecutions for the same crime has been undisputed, this Court has barred both governments from combining to do together what each could not constitutionally do on its own. And just as the Constitution bars one sovereign from facilitating another's prosecution by delivering testimony coerced under promise of immunity or evidence illegally seized, I believe that it prohibits two sovereigns from combining forces to ensure that a defendant receives only the trappings of criminal process as he is sped along to execution.

Id. at 102 (Marshall, J., dissenting) (citations omitted). Justice Marshall further opined:

Georgia's efforts to secure petitioner's execution did not end with its acceptance of his guilty plea. Its law enforcement officials went on to play leading roles as prosecution witnesses in the Alabama trial . . . . Whether viewed as a violation of the Double Jeopardy Clause or simply as an affront to the due process guarantee of fundamental fairness, Alabama's prosecution of petitioner cannot survive constitutional scrutiny.

Id. 102-03 (Marshall, J., dissenting).
the second trial (which resulted in a more severe sentence than the first), is the result of the judge’s attempt to rectify the prosecutor’s misconduct when a more severe sentence is fixed in a subsequent trial. The allegedly good motives of the judge do not alter the rule. Justice Marshall emphasized that due to the difficulties faced by the defendant in proving vindictiveness on the part of trial judges, the actual fact of vindictiveness is not the sine qua non of the defendant’s constitutional right.

230. See Texas v. McCullough, 475 U.S. 134, 149 (1986). Justice Marshall reminded the Court in his dissent of the teachings of North Carolina v. Pearce, 395 U.S. 771 (1969). The Court “[w]ith little more than a passing nod” to that decision which created the presumption “to safeguard due process rights . . . the majority first refuses to apply that rule in a case where those considerations are clearly relevant, and then proceeds to rob that rule of any vitality even in cases in which it will be applied.” See McCullough, 475 U.S. at 145 (Marshall, J., dissenting) (citing Pearce, 395 U.S. 771). Justice Marshall discounted the fact that the defendant elected to be sentenced by the same judge who sentenced him the first time. Vindictiveness must play no part in the sentence he receives after a new trial.

Whether or not that judge had been the sentencing authority in the first proceeding, we would fear that the judge would have had a “personal stake in the prior conviction” and a “motivation to engage in self-vindication,” as well as a wish to discourage “what [s]he regards as meritless appeals.” Moreover, it would not be appropriate to find a waiver of McCullough’s due process right in his exercise of his statutory right to elect his sentencer, especially in a case where defendant’s choice might have been influenced by a desire to avoid being sentenced by a jury from a community that had been exposed to the considerable publicity surrounding his first trial.

Id. at 149-50 (Marshall, J., dissenting) (citations omitted) (quoting Chaffin v. Stychcombe, 412 U.S. 17, 33 n.21 (1973)).

231. See McCullough, 475 U.S. at 150 (Marshall, J., dissenting). Justice Marshall noted the majority opinion’s reasons and stated:

The majority reasons that, “[i]n contrast to Pearce, McCullough’s second trial came about because the trial judge herself concluded that the prosecutor’s misconduct required it. Granting McCullough’s motion for a new trial hardly suggests any vindictiveness on the part of the judge towards him.” Such an observation betrays not only an insensitivity to the motives that might underlie any trial judge’s decision to grant a motion for a new trial, but also a blindness to the peculiar circumstances surrounding the decision to grant a retrial in this case.

Id. at 150 (Marshall, J., dissenting) (citations omitted) (quoting id. at 138-39) (alterations in original).

232. See id. at 155 (Marshall, J., dissenting). “The point is that the possibility they [considerations establishing vindictiveness] did play such a part is sufficiently real, and proving actual prejudice, sufficiently difficult, that a presumption of vindictiveness is as appropriate here as it was in Pearce.” Id. at 151 (Marshall, J., dissenting).

A lot has happened since the final day of the October 1968 Term, the day North Carolina v. Pearce was handed down. But nothing has happened since then that casts any doubt on the need for the guarantee of fairness that this Court held out to defendants in Pearce. The majority today begins by denying respondent the promise of that guarantee even though this case clearly calls for its application. The Court then reaches out to render the guarantee of little value to all defendants, even to those whose plight was the explicit concern of the Pearce Court in 1969. To renege on the guarantee of Pearce is wrong. To do so while pretending not
In *Alabama v. Smith*, a defendant plea bargained and received a sentence of thirty years for two counts to be served concurrently. Later the defendant was successful in having his guilty plea vacated based upon misinformation given to him by the judge during the initial plea bargaining. He was retried on the original three counts before the same judge. Upon retrial, a jury found him guilty on all counts, and the judge sentenced him to life for one count, plus a concurrent life term for the second count and a consecutive term of 150 years on the third count. Despite the presumption of *Pearce*, the Court held that there was no vindictiveness violation of the Due Process Clause because due process requires that vindictiveness against defendant, who successfully attacks his first conviction, plays no part in the sentence he receives in a new trial. The Court stated that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by actions that pose a realistic likelihood of vindictiveness.

**b. Equal Protection**

The Fifth Amendment, unlike the Fourteenth Amendment, does not contain a provision guaranteeing equal protection of the laws of the federal government. Thus, the only way equal protection is applied to Federal laws is through the Due Process Clause of the Fourteenth Amendment. Justice Marshall, as an attorney representing the interest of the NAACP Legal Defense Fund in *Bolling v. Sharpe* to is a shame. I dissent.

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*Id.* at 156 (Marshall, J., dissenting).


234. See id. at 795-96.

235. See id.

236. See id.

237. See id.

238. See id. at 802.

239. See id. at 796.

240. See id. at 803-04 (Marshall, J., dissenting). Justice Marshall did not mention due process per se, but returned to the quest which he and Justice Douglas made in *Pearce*: "[i]f for any reason a new trial is granted and there is a conviction a second time, the second penalty imposed cannot exceed the first penalty, if respect is had for the guarantee against double jeopardy." See id. (quoting North Carolina v. *Pearce*, 395 U.S. 711, 726-27 (1969)) (emphasis in original).


243. 347 U.S. 497. Spottswood T. Bolling sued C. Melvin Sharpe and other school officials arguing that segregation of black children in District of Columbia schools violated his Fifth Amendment right to due process of law. See id. at 498. The defense argued that the fact that the nation's capital had allowed segregation to exist so long in its schools evidenced that Congress never intended integration. See id. at 497; see also ROGER GOLDMAN & DAVID GALLEN, THURGOOD MARSHALL: JUSTICE FOR ALL 96-97 (1992) (discussing Justice Marshall's involvement as an attorney for the NAACP Legal Defense
produced such a result. Not until the Bolling decision in 1954 could a
dfundamental right be protected under either or both clauses. Now, when anyone
is denied a fundamental right, the Due Process Clause is violated and if a law
denies a fundamental right to some while offering it to others, both the Equal
Protection Clause and the Due Process Clauses are violated. Thus, not only was
Justice Marshall acutely attuned to the fact that there was an equal protection
component of the Fifth Amendment, but he felt strongly that equal protection and
due process, as found in both clauses, shared some common ground. Because the
Equal Protection Clause was created in 1868, but not made applicable to the federal
government until 1954, Justice Marshall was not confined to any era’s concept
equality, or, for that matter, to a static notion of due process.

Early in his Supreme Court career, Justice Marshall announced the judgment
of the Court in a case which gave him the opportunity to express his concept of
equal protection in due process terms. When equal protection of the laws is
denied to a certain person or group of persons, not only the ostensibly aggrieved
people suffer, but those indirectly involved suffer as well. Justice Marshall said

244. Justice Marshall, later writing as a Supreme Court Justice, recognized that accomplishment
in several opinions. See Davis v. United States, 411 U.S. 233, 247 n.4 (1973) (Marshall, J., dissenting);
558 (1989) (Marshall, J., dissenting); see also United States v. Clark, 445 U.S. 23, 26 n.3 (1980);

245. Bolling was decided on the same day as Brown v. Board of Education, 347 U.S. 483 (1954).

246. As Justice Marshall stated in Ake v. Oklahoma, 470 U.S. 68 (1985), there are “separate but
related inquiries that due process and equal protection must trigger.” See id. at 76 n.3.

247. See CHEMERINSKY, supra note 116, at 639.

248. See Brown, 347 U.S. 488 and related cases.

stated in his dissenting opinion:
[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In
determining what lines are unconstitutionally discriminatory, we have never been confined to
historic notions of equality, any more than we have restricted due process to a fixed catalogue
of what was at a given time deemed to be the limits of fundamental rights.
Id. at 76-77 (Marshall, J., dissenting) (quoting Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669
(1966)).

250. See Peters v. Kiff, 407 U.S. 493, 505-07 (1972). While it was the opinion of the Court, it was a
plurality opinion because Justice Marshall was joined only by Justices Douglas and Stewart. Justice
White wrote a concurring opinion joined by Justices Brennan and Powell; Chief Justice Burger wrote
dissenting opinion in which Justices Blackmun and Rehnquist joined. See id.

251. In Kiff, a Caucasian was indicted by a grand jury and convicted by a petit jury of burglary. See
id. at 494. In his appeal, Petitioner claimed that black people were excluded from both juries in a
systematic manner, thereby ensuring his indictment and later conviction. See id. at 497. Six Justices
voted to hold the conviction invalid under the Due Process Clause. Justice Marshall’s opinion, though
centering on due process, also clearly demonstrated its relationship to equal protection. See id. Justice

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that a white person who is tried by a jury from which black persons have been excluded is deprived of equal protection of the laws.\textsuperscript{252} Justice Marshall further believed that presuming that an African-American defendant will be prejudiced by a jury from which members of his race have been excluded, without making such a presumption in the reverse situation "takes too narrow a view of the kinds of harm that flow from discrimination in jury selection."\textsuperscript{253} Starting with the premise that a basic requirement of due process is a \textit{fair} trial in a \textit{fair} tribunal,\textsuperscript{254} Justice Marshall reasoned that a judge could not remain consistent with due process and try a case in which he had a "financial stake in the outcome."\textsuperscript{255} Justice Marshall opined that, although in exceptional cases justice might be done, it would not be \textit{fair} to subject a defendant to such potential bias.\textsuperscript{256} Had Justice Marshall stopped at this point, one could detect a due process flavor to his analysis. Justice Marshall, however, went further and demonstrated the juxtaposition of equal protection and due process. Unequal treatment not only lacks \textit{fairness} toward the party involved, but also toward his community, who might also be a party deprived of the rich mixture of all the elements of that community.\textsuperscript{257} Justice Marshall said that the "exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross section of the community."\textsuperscript{258}

The next case Justice Marshall authored could have been decided on equal protection or due process grounds, but the majority decided the case solely on equal

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\textsuperscript{252} Marshall stated that the Court need not consider Petitioner's claimed violation of equal protection rights "in light of her disposition." \textit{See id.} at 497 n.5.
\textsuperscript{253} \textit{See id.} at 498.
\textsuperscript{254} \textit{See id.}
\textsuperscript{255} \textit{See id.} at 501; \textit{see also} notes 60-83 and accompanying text (concerning \textit{fair} trials).
\textsuperscript{256} \textit{See Kiff, 407 U.S. at 502.}
\textsuperscript{257} \textit{See id.}
\textsuperscript{258} \textit{See id.} at 500.

\textit{Id.} Justice Marshall said that the Court in \textit{Williams v. Florida, 399 U.S. 78 (1970),} recognized this principle of jury diversity in connection with Sixth Amendment rights. In a \textit{Kiff} footnote, Justice Marshall quoted \textit{Ballard v. United States, 329 U.S. 187 (1946),} which rejected the exclusion of women from jury service:

"[T]he two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded."

\textit{Kiff, 407 U.S. at 504 n.12} (citations omitted) (quoting \textit{Ballard, 329 U.S. at 193}). When the venire excludes a certain class, the whole class, and not just the defendant, is denied the "privilege of participating equally... in the administration of justice, and the whole class is stigmatized by declaring them unfit for jury service and thereby putting 'a brand upon them, affixed by law, an assertion of their inferiority.'" \textit{Id.} at 499 (quoting \textit{Strauder v. West Virginia, 100 U.S. 303, 308 (1879)}). Justice Marshall's example demonstrates that the whole fabric of a society is weakened by extracting certain components, regardless of their supposed lack of symbiosis.
protection grounds. Justice Marshall's reasoning was that a fundamental right was being violated, specifically the right to marry. The Equal Protection Clause will not permit a violation of such a fundamental right. Justice Marshall used the Due Process Clause, however, to establish that the right was fundamental. The conclusion is inescapable, that in Justice Marshall's thinking, due process is a sine qua non to this type of application of equal protection.

In six cases, three involving the Fourteenth Amendment and three concerning the Fifth Amendment, Justice Marshall used due process under the Equal Protection Clause to strike at the rational basis test for reviewing the constitutional-ity of statutes. For example, in San Antonio Independent School District v. Rodriguez, the Court held that Texas school districts' supplementation of state aid through a property ad valorem tax did not violate the Equal Protection Clause of the Fourteenth Amendment because the Court found that the tax system, though admittedly not perfect, bore a rational relation to a legitimate state purpose.

259. See Zablocki v. Redhail, 434 U.S. 374, 391-96 (1978). Justice Stewart agreed with the Court's holding that the statute was unconstitutional, but reasoned that the basis of its invalidity was the Due Process Clause of the Fourteenth Amendment. See id.

260. A Wisconsin statute mandated that certain residents receive a court order granting permission to marry. See id. at 375. Individuals were denied permission unless proof of compliance with all child support obligations was submitted. See id.

261. See id. at 386. "It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships." Id. Such point having been established, Justice Marshall said that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." See id. at 388. Even when the state interests are legitimate and substantial, where the means selected by the state to achieve those interests impinge upon a fundamental interest—the right to marry in this case—the state statute cannot be sustained. See id.

262. "[T]he right 'to marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." Id. at 384 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)); see also Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); notes 109-48 and accompanying text (concerning liberty interests).

263. In Frontiero v. Richardson, 411 U.S. 677 (1973), 37 U.S.C. sections 401, 403 and 10 U.S.C. sections 1072, 1076 permitted a serviceman to claim his spouse as a dependent in order to obtain certain increased benefits, whether or not she was actually dependent upon him. A servicewoman, however, was not able to claim her husband as a dependent, unless she proved that her husband was actually dependent. See Frontiero, 411 U.S. at 691. The plurality, in which Justice Marshall joined, relied on the Due Process Clause to determine that the federal statutes involved clearly violated the Equal Protection component of the Fifth Amendment. See id.

264. Curiously the "rational basis" test was developed by Justice Douglas, with whom Justice Marshall often agreed. Professor Tushnet explains that the test was developed by New Deal jurists to preserve their New Deal legislation. See TUSNET, supra note 33, at 95.


266. See id. at 55.
his sixty-six page dissent, Justice Marshall stated emphatically that strict scrutiny, rather than rational basis was the appropriate standard of review because a fundamental interest was involved. The Court, he pointed out, considered only interests guaranteed by the Constitution as fundamental, and because public education was not constitutionally guaranteed, it was not a fundamental right.

In *Village of Belle Terre v. Borras*, the Court, using a variation of the rational basis test, held that an ordinance which restricted land use to one-family dwelling violated neither the Equal Protection Clause of the Fourteenth Amendment, nor the unrelated students' rights of association, travel, and privacy under the First Amendment. Justice Marshall believed that both Amendments were violated. "My disagreement with the Court today is based upon my view that the ordinance in this case unnecessarily burdens appellees' First Amendment freedom of association and their constitutionally guaranteed right to privacy." The Fourteenth Amendment was brought into Justice Marshall's paradigm via its interrelated Equal Protection and Due Process Clauses. Justice Marshall believed that a "strict equal protection scrutiny" was the appropriate test to apply. Justice Marshall said that the right of privacy was "implicit" in the Fourteenth Amendment's Due Process Clause because "the freedom of association is often inextricably entwined with the constitutionally guaranteed right to privacy."

In *Bell v. Wolfish*, a case involving prison administration, Justice Marshall again dissented. When assessing the restrictions on detainees, we must consider the cumulative impact of restraints imposed during confinement. Incarceration of itself clearly represents a profound infringement of liberty, and each additional imposition increases the severity of that initial deprivation. Since any restraint thus has a serious effect on detainees, I believe the Government must bear a more rigorous burden of justification than the rational basis standard mandates. At a minimum, I would require a showing that a restriction is substantially necessary to jail administration. Where the imposition is of particular gravity, that is, where it implicates interests of fundamental importance or inflicts significant harms, the Government should demonstrate that the restriction serves a compelling necessity of jail administration.

267. See id. at 70 (Marshall, J., dissenting).
268. See id. at 110 (Marshall, J., dissenting).
270. See id. at 1. "Family" was defined to exclude more than two persons unrelated to each other by blood, adoption, or marriage. See id.
271. See id. at 12 (Marshall, J., dissenting).
272. Id. at 15 (Marshall, J., dissenting).
273. See id. at 12 (Marshall, J., dissenting).
274. See id. at 13 (Marshall, J., dissenting).
275. See id. at 15 (Marshall, J., dissenting); see also note 130 and accompanying text.
277. See id. at 523, 563.
278. Id. at 570 (Marshall, J., dissenting) (citations omitted).
In another case, Richardson v. Belcher, the Court found that section 224 of the Social Security Act, which required a reduction in social security benefits to reflect workmen’s compensation payments, had a rational basis and did not violate the Due Process Clause of the Fifth Amendment. In writing for the dissent, Justice Marshall, adhering to his viewpoint, believed that there was denial of due process under the challenged Act sounding in equal protection. Justice Marshall wrote that the Act “places its severe burden on a single class of disabled persons without adequate justification.” He further wrote:

If the majority’s “rational basis” test in fact is to have any meaning, Congress cannot be permitted to single out recipients of workmen’s compensation for this adverse treatment. The burden of reduced federal benefits—so devastating to the families of the once-working poor—cannot be imposed arbitrarily under the Fifth Amendment. In my view that has happened here.

Similarly, in Marshall v. United States, the Court held that the equal protection component of the Fifth Amendment was not violated by Title II of the National Addict Rehabilitation Act of 1966 (NARA), which excluded from “rehabilitative commitment, in lieu of penal incarceration, addicts with two or more prior felony convictions.” Once again, Justice Marshall thought that the Court was guilty of shortsightedness in using the rational basis test. Drawing upon the Eighth Amendment, which prohibits cruel and unusual punishment, Justice Marshall pointed to the growing awareness that in drug related crimes Eighth Amendment problems exist. Justice Marshall thus hinted that there may be growing support for treatment of drug offenders as a separate class entitled to sensitive recognition,
therefore, triggering due process concerns. In Vance v. Bradley, the Supreme Court noted that section 632 of the Foreign Service Act, which required federal employees covered by the Foreign Service retirement and disability system to retire at age sixty; whereas there was no such requirement for Civil Service Employees covered by the Civil Service retirement and disability system. The Act was challenged on the basis that it violated the equal protection component of the Fifth Amendment. The Court, again using the rational basis test, upheld the statute. In a strong dissent, leaving no doubt that he was dissatisfied with any test which did not consider fundamental rights, Justice Marshall wrote that “[w]hen legislative action affects individual interests of such dimension, a heightened level of judicial scrutiny is appropriate.”

A strict construction approach was finally recognized by members of the Supreme Court in City of Richmond v. J.A. Croson Co., an equal protection case, but one whose spirit was diametrically opposed to that of Justice Marshall. The plurality opinion in Croson said that when legislation uses a classification based on race, and its ostensible purpose is remedial, strict scrutiny is applied to determine whether the racial disparity truly needs remedial treatment or is actually


Mr. Justice Jackson, himself a strong opponent of substantive due process, once argued that the vitality of the Equal Protection Clause as a ground for constitutional adjudication is that it “does not disable any governmental body from dealing with the subject at hand.” Rather, it merely sends the legislature back to the drawing board to draft a statute which more precisely and more even handedly solves the problem. I would not deny Congress the right to limit the NARA program to persons whose criminal activity was a product of their addiction, to those who were likely to be rehabilitated, or to those whose presence in a treatment center would not interfere with the rehabilitation of others. But I would have Congress make a second attempt at drafting a statute which actually furthers these ends.


290. See id. at 95-96.

291. See id. at 96-97.

292. See id. at 112.

293. See id. at 113 (Marshall, J., dissenting). In this case, as in several of his opinions, Justice Marshall did not use the term due process per se, but his characterization of the benefit affected as “among the most important of [a person’s] personal concerns that Government action would be likely to affect” leaves no doubt as to his meaning. See id. Justice Marshall concluded his dissent with the following: “Appellees presented substantial evidence that the mandatory retirement provision has not accomplished the purposes for which it was designed. The Government failed to establish otherwise. Where individuals’ livelihood, self-esteem, and dignity are so critically affected, I do not believe the Government should be relieved of that responsibility.” Id. at 124 (Marshall, J., dissenting).


295. Justice O’Connor announced the judgment of the Court and wrote an opinion in which Justices White, Rehnquist and Kennedy joined. See id. at 476.
"benign." In this particular case, the governing body of the City of Richmond, Virginia established a set-aside program for the benefit of minority contractors. Justice O'Connor found that the situation was "benign," because it was the result of "past societal discrimination." Justice Marshall, in dissent, said that not every legislated classification requires strict scrutiny; only those "governmental actions that themselves are racist." In Jean v. Nelson, a group of Haitian nationals, who were undocumented and unadmitted aliens, claimed that a new policy of the Immigration and Naturalization Service (INS) violated the equal protection guarantee component of the Fifth Amendment because it discriminated against them on the basis of race and national origin. The Court held that it would not consider the constitutional arguments of petitioners, because the circuit court of appeals had remanded the case to the district court for factual determinations as to whether the INS officials exercised their discretion without regard to race or national origin. In dissent, Justice Marshall said that the majority was guilty of "disingenuous evasion.")

296. See id. at 493.
297. See id. at 477-78.
298. See id. at 505.
299. See id. at 551 (Marshall, J., dissenting). Justice Marshall opined:

Racial classifications "drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism" warrant the strictest judicial scrutiny because of the very irrelevance of these rationales. By contrast, racial classification drawn for the purpose of remedying the effects of discrimination that itself was race based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society.

Id. at 552 (Marshall, J., dissenting) (citations omitted) (quoting University of Cal. Regents v. Bakke, 438 U.S. 265, 357-58 (1978)). Justice Marshall, continuing his opinion, stated:

"Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, ... such programs should not be subjected to conventional 'strict scrutiny'--scrutiny that is strict in theory, but fatal in fact."

301. See id. at 848-49. In 1981 the INS changed a thirty year policy of general parole for undocumented aliens seeking admission to this country to a policy (based on no statute or regulation) of detention "without parole for [aliens] who could not present a prima facie case for admission." See id. at 849.
302. See id. at 854-55.
303. See id. at 858 (Marshall, J., dissenting) (quoting United States v. Locke, 471 U.S. 84, 96 (1985)). Justice Marshall said that while a resident alien's ultimate right to remain in the United States is subject to alteration by statute or regulation, it does not follow that he or she is thereby deprived of a constitutional right to procedural due process. See id. at 871 (Marshall, J., dissenting) (citing Kwong Hai Chew v. Colding, 344 U.S. 590, 601 (1953)). "'His status as a person within the meaning and
Justice Marshall wanted the Court to instruct the lower courts on equal protection and due process, because:

[\text{Any limitations on the applicability of the Constitution within our territorial jurisdiction fly in the face of this Court's long-held and recently reaffirmed commitment to apply the Constitution's due process and equal protection guarantees to all individuals within the reach of our sovereignty.} \ldots \text{Indeed, by its express terms, the Fourteenth Amendment prescribes that "[no] State \ldots shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."}]

In an immigration case, \textit{Fiallo v. Bello}, Justice Marshall again demonstrated his blending of due process with equal protection. The Immigration and Nationality Act of 1952 granted a preference status to a certain classification of protection of the Fifth Amendment cannot be capriciously taken from him."'] \textit{Id.} at 871-72 (Marshall, J., dissenting) (quoting \textit{Chew}, 344 U.S. at 601). The decision in \textit{Chew}, said Justice Marshall, was that the alien's due process rights were violated; hence the broad notion that excludable aliens are not within the protection of the Fifth Amendment is dictum. \textit{See id.} (Marshall, J., dissenting). Justice Marshall continued: "[O]ur case law makes clear that excludable aliens do, in fact, enjoy Fifth Amendment protection," without making a distinction between equal protection and due process. \textit{See id.} at 873 (Marshall, J., dissenting). The right of an unadmitted alien to Fifth Amendment due process protection at trial is universally respected by the lower federal courts and is acknowledged by the Government. Surely it would defy logic to say that a precondition for the applicability of the Constitution is an allegation that an alien committed a crime. There is no basis for conferring constitutional rights only on those unadmitted aliens who violate our society's norms. \textit{Id.} (citations omitted). According to Justice Marshall, the notion, moreover, that the Constitution protects an alien from deprivation of property, but not from life or liberty is simply irrational. \textit{See id.} at 874 (Marshall, J., dissenting).

\textit{Id.} at 875-76 (Marshall, J., dissenting) (quoting U.S. CONST. amend. XIV, § 1). Justice Marshall noted the importance of universal application of due process in light of the Fourteenth Amendment analysis which debunked the fiction that freed slaves were not United States citizens. \textit{See id.} at 875 (Marshall, J., dissenting) (citing \textit{Scott v. Sanford}, 60 U.S. 393, 404 (1857)). Justice Marshall said that the Courts are "obliged to determine whether decisions concerning the parole of unadmitted aliens are consistent with due process and cannot 'pass back the buck to an assertedly all-powerful and unimpeachable Congress.'" \textit{See id.} at 876 (Marshall, J., dissenting) (quoting Henry M. Hart, Jr., \textit{The Power of Congress to Limit the Jurisdiction of Federal Courts; An Exercise in Dialectic}, 66 HARV. L. REV. 1362, 1394 (1953)). Justice Marshall opined that "the proper constitutional inquiry must concern the scope of the equal protection and due process rights at stake, and not whether the Due Process Clause can be invoked at all." \textit{See id.} at 876-77 (Marshall, J., dissenting). Justice Marshall stated:

The narrow question presented by this case is whether, in deciding which aliens will be paroled into the United States pending the determination of their admissibility, the Government may discriminate on the basis of race and national origin even in the absence of any reasons closely related to immigration concerns. To my mind, the Constitution clearly provides that it may not. I would therefore reverse the judgment of the Court of Appeals and remand for a determination of the scope of petitioners' equal protection rights.

\textit{Id.} at 881-82 (Marshall, J., dissenting).

Justice Marshall viewed this as invidious discrimination hiding in immigration legislation.\(^\text{307}\)

6. The Sixth Amendment

Justice Marshall believed that the Due Process Clause contained a "looser" standard than the Sixth Amendment,\(^\text{308}\) but that both guaranteed the defendant an impartial jury.\(^\text{309}\)

In *Weatherford v. Bursey*, an incarcerated criminal sued an undercover agent under 42 U.S.C. § 1983 alleging that his Sixth Amendment right to counsel and his Fourteenth Amendment right to a fair trial were violated by the undercover agent who met on two occasions with the plaintiff and his counsel.\(^\text{310}\) The Court held that the Sixth Amendment does not per se prohibit an undercover agent to meet with a defendant's counsel, and that the Due Process Clause does not demand that the prosecution provide defendants with a pre-trial list of witnesses who will testify against the defense.\(^\text{311}\) In his dissent, Justice Marshall treated the two constitutional provisions separately.\(^\text{312}\) Justice Marshall opined that *fairness* was required by the Due Process Clause, and was specifically required in certain fundamental rights such as discovery, stating that "[d]ue process requires that discovery 'be a two-way

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306. See *id.* at 800. United States citizens may petition for parents, children, and siblings, who are aliens, whereas "lawful permanent residents" may petition only for alien children. *See id.*

307. See *id.* at 816 (Marshall, J., dissenting). "When Congress draws such lines among citizens, the Constitution requires that the decision comport with Fifth Amendment principles of equal protection and due process. The simple fact that the discrimination is set in immigration legislation cannot insulate from scrutiny the invidious abridgment of citizens' fundamental interests." *Id.* at 807 (Marshall, J., dissenting).

308. See *United States v. Lavelle*, 306 F.2d 216, 219 n.5 (2d Cir. 1962). What Justice Marshall must have meant by this is that the Due Process Clause, of both the Fifth and Fourteenth Amendments, is more encompassing than is the Sixth Amendment. In *Lavelle*, the issue was whether a criminal defendant waived his right to counsel, and also whether the defendant should have made an allegation regarding his guilt. *See id.* at 217. Justice Marshall wrote that "[a]lthough [the defendant] could not deny that he had committed the offense he did not actually know that he was guilty either." *Id.* at 218-19 (quoting *United States ex rel. Savini v. Jackson*, 250 F.2d 349, 352 (2nd Cir. 1957)). Justice Marshall added that "[i]f such an allegation is unnecessary under the looser standards of the Due Process Clause of the Fourteenth Amendment, it certainly is not required under the Sixth Amendment itself." *Id.* at 219 n.15.

309. See *Mu'Min v. Virginia*, 500 U.S. 415, 439 (1991) (noting the Court's position that pretrial publicity may thwart the Sixth Amendment right to an impartial jury).


311. See *id.* at 545. Specifically, the plaintiff alleged that he was lulled into a false sense of security, interfering with his trial preparations and denying him due process of law. *See id.* at 549.

312. See *id.* at 545.

313. See *id.* at 562 (Marshall, J., dissenting).
street.'” In connection with the Sixth Amendment, Justice Marshall wrote that “it has long been recognized that 'the essence of the Sixth Amendment right is ... privacy of communication with counsel.'” With regard to both these constitutional rights, as was his usual position, it did not matter to Justice Marshall whether or not harm actually resulted from the violation of both of these constitutional rights, the possibility of violation was enough.

In Taylor v. Hayes, the Court held that a judge who punished a trial lawyer for contempt without giving him an opportunity to be heard in defense or mitigation before sentencing him, violated the attorney’s due process rights. The Court held that the attorney should have been given reasonable notice of the charges against him and an opportunity to be heard before a different judge. The lawyer was not entitled to a jury trial, however, since no more than a six month sentence was actually imposed. In dissent, Justice Marshall said that since the fairness of the process was suspect, the Sixth Amendment is triggered, requiring the scrutiny of a jury.

In Middendorf v. Henry, the Court held that there is no Sixth Amendment right to counsel in a summary court-martial, because that proceeding is not a "criminal prosecution." It reversed the circuit court’s holding that the due process standards set by Gagnon v. Scarpelli applied to the case at bar. Justice Marshall, however, was in favor of applying Gagnon’s due process standards to court-martial proceedings. He would have supported these standards by the further application of the Sixth Amendment. In his dissent, Justice Marshall

315. See id. at 563 (Marshall, J., dissenting) (quoting United States v. Rosner, 485 F.2d 1213, 1224 (2nd Cir. 1973)).
316. Justice Marshall stated: But even if I were to agree that unintended and undisclosed interceptions by government witness employees affect neither the fairness of trials nor the effectiveness of defense counsel, I still could not join in upholding the practice. For in my view, the precious constitutional rights at stake here, like other constitutional rights, need "breathing space to survive," and a prophylactic prohibition on all intrusions of this sort is therefore essential. A rule that offers defendants relief only when they can prove "intent" or "disclosure" is, I fear, little better than no rule at all.
317. Id. at 565 (Marshall, J., dissenting) (citations omitted) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).
318. See id. at 488 (1974).
319. See id. at 497.
320. See id. at 498-504.
321. See id. at 495-96.
322. See id. at 505 (Marshall, J., dissenting).
323. See id. at 45-43.
324. See id. at 54, n.3 (Marshall, J., dissenting).
325. See id. at 55-56 (Marshall, J., dissenting).
made it clear that the proceeding was criminal because the serviceperson can be sentenced to life imprisonment.\(^{328}\) It is true that a summary court-martial cannot adjudge confinement in excess of one month, but the Court said that the length of the confinement was wholly irrelevant in determining the right to counsel.\(^{329}\)

In \textit{Wainwright v. Toma},\(^{330}\) a state prisoner's petition for certiorari to the state supreme court was denied because his retained counsel had failed to timely file the petition, even though he had informed the accused that he would do so and the accused relied on his counsel’s promise.\(^{331}\) Without mentioning the Sixth Amendment \textit{per se}, the Court held that a state prisoner does not have a constitutional right to counsel.\(^{332}\) Justice Marshall disagreed and stated: "I believe that a defendant does have a constitutional right to counsel to pursue discretionary state appeals . . . where a criminal conviction is challenged."\(^{333}\) In Justice Marshall's view, even if the specific relief could not be supplied by the Sixth Amendment, the Due Process Clause furnished the same remedy.\(^{334}\)

The Court in \textit{Strickland v. Washington},\(^{335}\) adopted a reasonableness standard to govern the attorney for an accused.\(^{336}\) Justice Marshall's objection to the Court's ruling was that it failed to apply any due process standards to the Sixth Amendment right to counsel.\(^{337}\) He said that it gives practically no indication of what is

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    The right to counsel has been termed "the most pervasive" of all the rights accorded an accused. As a result of the Court's action today, of all accused persons protected by the United States Constitution—federal defendants and state defendants, juveniles and adults, civilians and soldiers—only those enlisted men tried by summary court-martial can be imprisoned without having been accorded the right to counsel. I would have expected that such a result would have been based on justifications far more substantial than those relied on by the Court.

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  \item See \textit{id. at 586}. \(\text{id. at 586}\).
  \item See \textit{id. at 587-88} (citing \textit{Ross v. Moffitt}, 417 U.S. 600 (1974)).
  \item \textit{id. at 588} (Marshall, J., dissenting).
  \item \textit{id. at 589} (Marshall, J., dissenting). Justice Marshall opined:
    I would hold that when a defendant can show that he reasonably relied on his attorney's promise to seek discretionary review, due process requires the State to consider his application, even when the application is untimely. To deny the right to seek discretionary review simply because of counsel's error is fundamentally unfair. Requiring the state courts to consider untimely applications when a defendant can show that he reasonably relied on his counsel will not impose a heavy burden.

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  \item \textit{id.} (Marshall, J., dissenting) (emphasis added).
  \item 466 U.S. 668 (1984).
  \item See \textit{id. at 669}.
  \item See \textit{id. at 707} (Marshall, J., dissenting).
\end{itemize}
Calling upon the due process concept of fairness, Justice Marshall wrote:

I object to the prejudice standard adopted by the Court for two independent reasons. First, it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent.

Second and more fundamentally, the assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures. The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.

In Perry v. Leeke, the Court held that if a trial judge in a criminal trial declares a short recess, he has the absolute discretion to forbid or limit a defendant's consultation with his attorney. Justice Marshall, in his dissent, left no doubt as to the relationship of the Due Process Clause to the Sixth Amendment. He said "[n]eedless to say, the due process concerns underpinning the Sixth Amendment right to counsel are designed to ensure a fair trial for the defendant, not the State."

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338. See id. at 707-08 (Marshall, J., dissenting). Justice Marshall stated:
My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and lower courts that counsel for a criminal defendant must behave "reasonably" and must act like a "reasonably competent attorney," is to tell them almost nothing.
Id. (Marshall, J., dissenting) (citations omitted).
339. Id. at 710-11 (Marshall, J., dissenting).
341. See id. at 284-85. In so holding, the Court distinguished Geders v. United States, 425 U.S. 80 (1976), which held that an overnight prohibition of consultation with counsel violated the Sixth Amendment. See Perry, 488 U.S. at 284-85.
By ensuring a defendant's right to have counsel, which includes the concomitant right to communicate with counsel at every critical stage of the proceedings, the Constitution seeks "to minimize the imbalance in the adversary system." The majority twice disserves this noble goal--by isolating the defendant at a time when counsel's assistance is perhaps most needed, and by ignoring the stark unfairness of according prosecution witnesses the very prerogatives denied the defendant. The Constitution does not permit this new restriction on the Sixth Amendment right to counsel.
Id. at 298 (Marshall, J., dissenting) (citations omitted) (emphasis added).
7. The Eighth Amendment

The Cruel and Unusual Punishments Clause of the Eighth Amendment is fully applicable to the States through the Due Process Clause of the Fourteenth Amendment. Justice Marshall thought of the Fourteenth Amendment provision as more than just a conduit. When discussing the death penalty in Furman v. Georgia, Justice Marshall said that there comes a point in time when a "presumption of constitutionality accorded legislative acts gives way to a realistic assessment of those acts." That time arrives when there is just no rational basis for the legislation. That analysis, in Justice Marshall's view paralleled a substantive due process analysis, with one difference. When he considered the death penalty, he thought it was unconstitutional not only because it was irrational, but because it was also excessive and unnecessary. "The concepts of cruel and unusual punishment and substantive due process become," in Justice Marshall's eyes, "so close[,] as to merge when the substantive due process is stated" in terms of requiring a compelling justification to legitimize capital punishment.

This merger of due process and cruel and inhuman punishment was demonstrated by two cases in which the Court held the complained of acts permissible because they were ostensively justified on the grounds of regulation rather than punishment. In Block v. Rutherford, a case where detainees were deprived of contact with spouses, friends, and relatives, and were subject to random shake-down searches of their quarters in their absence, the Court found that the detainees were not deprived of due process of law because the ostensible reason given by the authorities was that such action was needed for prison security, rather than...
punishment. Justice Marshall dissented. He spoke of due process and cruel and inhuman punishment in equal terms and believed that the majority had a "pinched" concept of both due to their blind reliance on the state's proposed rational basis. In United States v. Salerno, the Court considered the Bail Reform Act of 1984, which allows a federal court to detain an arrestee pending trial if the government demonstrates by clear and convincing evidence at an evidentiary hearing that no release condition will "reasonably assure . . . the safety of any other person and the community." The Respondent argued that his substantive due process right was violated because pretrial detention constitutes impermissible punishment before trial. The Court held that the Act contravened neither the Due Process Clause nor the Eighth Amendment's proscription against excessive bail bonds. In dissent, Justice Marshall stated that dividing the analysis of the Act into two parts—due process and Eighth Amendment—was a "false dichotomy," and "sterile formalism" because it divided a unitary argument into two independent parts and then professed to demonstrate that the parts were individually inadequate. Justice Marshall further argued that the majority had a cramped concept of substantive due process because:

The majority proceeds as though the only substantive right protected by the Due Process Clause is a right to be free from punishment before conviction. The majority's technique for infringing this right is simple: merely redefine any measure which is claimed to be punishment as "regulation" and, magically, the Constitution no longer prohibits its imposition.

351. See id. at 588.
352. See id. at 596 (Marshall, J., dissenting). Justice Marshall wrote:
   Guided by an unwarranted confidence in the good faith and "expertise" of prison administrators and by a pinched conception of the meaning of the Due Process Clause and the Eighth Amendment, a majority of the Court increasingly appears willing to sanction any prison condition for which the majority can imagine a colorable rationale, no matter how oppressive or ill-justified that condition is in fact.
353. 481 U.S. 739.
354. See id. at 741.
355. See id. at 746.
356. See id. at 739.
357. Id. at 759 (Marshall, J., dissenting).
358. Id. at 758 (Marshall, J., dissenting).
359. See id. at 759 (Marshall, J., dissenting).
360. Id. at 760 (Marshall, J., dissenting). Though the majority said that the justification for the Act was not punishment, but regulation, Justice Marshall noted that the very pith and purpose of this statute is an abhorrent limitation of the presumption of innocence. The majority's untenable conclusion that the present Act is constitutional arises from a specious denial of the rule of the Bail Clause and the Due Process Clause in protecting the invaluable guarantee afforded by the presumption of innocence.
361. Id. at 762-63 (Marshall, J., dissenting). Indictment, however, is still a prerequisite to imprisonment:
   Under this statute an untried indictment somehow acts to permit a detention, based on other charges, which after an acquittal would be unconstitutional. The conclusion is inescapable.
Justice Marshall's final attempt to show the merger of due process and equal protection came in *Ford v. Wainwright* in which the Court held that the infliction of the death penalty upon the insane offended the Constitution. The majority based its decision on the Eighth Amendment. In a portion of his opinion, joined only by Justices Brennan, Blackmun, and Stevens, Justice Marshall found that the Florida statute involved also failed the fairness test of the Due Process Clause. Justice Marshall specifically found that the "fundamental requisite of due process of law is the opportunity to be heard," and therefore, a procedure that denies a prisoner to be heard on the issue of insanity is constitutionally flawed. Justice Marshall also believed the procedure was flawed because the "opportunity to challenge or impeach the state-appointed psychiatrists' opinions was denied." The third, and what Justice Marshall thought to be the "most striking defect in the
procedures, was the State’s placement of the decision wholly within the executive branch. 367

IV. CONCLUSION

It is probably unnecessary to attempt a summary of Justice Marshall’s due process jurisprudence, having just catalogued some 162 of his opinions on the subject. A certain sense of completeness, however, seems to compel a short summation.

As this Article has stated and attempted to show, fairness was the basic foundation of Justice Marshall’s concept of procedural due process of law. This was not a new concept in due process jurisprudence; but Justice Marshall brought to the Court a fresh approach to the subject. At a bare minimum, every litigant is entitled to a competent, impartial tribunal,368 competent counsel to protect that person’s rights, and a competent, impartial second tribunal on appeal. The person must be able to confront his or her accuser.369 The person must be allowed to make an independent or an assisted determination of the rights to which he, or she, is or was entitled.370

It is not every right, which when deprived constitutes a lack of due process, but rather only fundamental ones. A fundamental right, whether it deals with substance or procedure, is one which assures that the recipient receives the immediate and mediate rights referred to above. A fundamental right, however, is more. It is a right that the collective thinking of a free society considers essential to a continuation of that free society.371 Justice Marshall was not satisfied that due process was afforded if its absence would have made no difference in the outcome of a proceeding.372 Justice Marshall emphasized that “[w]e recognized long ago that mere access to the courthouse doors does not by itself assure a proper

367. See id. at 416. Justice Marshall explained:
Under this procedure, the person who appoints the experts and ultimately decides whether the State will be able to carry out the sentence that it has long sought is the Governor, whose subordinates have been responsible for initiating every stage of the prosecution of the condemned from arrest through sentencing. The commander of the State’s corps of prosecutors cannot be said to have the neutrality that is necessary for reliability in the factfinding proceeding. Id.


369. See supra notes 74-75 and accompanying text.


371. See Connell v. Higginbotham, 403 U.S. 207, 209-10 (1971). “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or matters of opinion.” Id. (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

372. See supra notes 31-33 and accompanying text.
functioning of the adversary process." Moreover, he was not distracted by linguistics, but remained focused on the preservation of fundamental rights.

Justice Marshall fully realized that the rights of all the governed, as represented by the government, must be balanced against the rights of individual members of that body. He was not overwhelmed, however, by the business of governing.

When the situation was apposite, and the moment fortuitous, it was entirely appropriate for the strong to protect those who, through no fault of their own, were weak. A hierarchy of strength played an important part in Justice Marshall's concept of fairness. He was acutely aware that some people are stronger than others. His severest admonition was for those endowed with the strength to survive to help their less able brothers to survive.

The strong cannot help the weak, however, unless they are truly strong, and remain so. No more eloquent words can describe that axiom than Justice Marshall's own, in his dissenting opinion in United States v. Salerno:

Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be "dangerous." Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power. Over 200 years it has slowly, through our efforts, grown more durable, more expansive, and more just. But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves.

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373. Ake v. Oklahoma, 470 U.S. 68, 77 (1985). Justice Marshall added that "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." Id.

374. Justice Marshall regarded a procedure by what it did, rather than by what someone called it. As an example, when trial de novo was for all intents and purposes an appeal, he said so. See Colten v. Kentucky, 407 U.S. 104, 122-26 (1972). Justice Marshall's thinking was the same thinking that prompted Sigmund Freud to observe that a society can be only as honest as its linguistic habits. See ANN DOUGLAS, TERRIBLE HONESTY: MONGREL MANHATTAN IN THE 1920'S 158 (1995).

375. Justice Marshall acknowledged that prisoners did not have a right to determine the place of their incarceration. See Olim v. Wakinekona, 461 U.S. 238, 251 (1983). He also acknowledged that sufficient security in a criminal trial was a necessity. See Holbrook v. Flynn, 475 U.S. 560, 572 (1986). Even liberty, which Justice Marshall considered a precious right, could be denied where a sufficient governmental interest conflicted. See supra note 98 and accompanying text (discussing Bell v. Wolfish, 441 U.S. 520, 564 (1979) (Marshall, J., dissenting)).

376. See Board of Regents v. Roth, 408 U.S. 564, 591 (1972) (Marshall, J., dissenting). "[I]t is not burdensome to give reasons when reasons exist." Id. at 591.


378. Id. at 767 (Marshall, J., dissenting).
He probably never thought of it in such terms, but in his understanding of the concept of due process of law, Justice Marshall found the Holy Grail that men have been seeking for so many centuries.