

## ABSTRACT

Title of Dissertation: HUMAN RIGHTS OR AMERICAN PRIVILEGES?:  
THE SUPREME COURT'S EVOLVING USE OF  
UNIVERSAL REASONING

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Rights interpretation is intimately bound up with questions about the basis of rights. Within the context of American constitutionalism, questions about the universality of rights are especially pressing. Does constitutional interpretation properly involve reasoning from universalistic principles, or should it be limited to particularly American preferences, traditions, texts, and practices? This study examines how the Supreme Court justices have approached this question. To the extent that public law studies consider the Court's use of universalistic reasoning, they typically fall under the rubric of "natural law" jurisprudence in a discrete issue area or time period. "Natural law" often carries associations, such as an emphasis on property rights, that may unnecessarily constrict the field of investigation. This dissertation is not aimed at a pre-determined version of universalistic jurisprudence, or at a single time period or issue area. Rather, it shows that universalistic reasoning has played an important role in the Court's rights jurisprudence across a wide range of issue areas from the Court's earliest rights decisions to the present day. With an expanded focus, this study demonstrates patterns and shifts in the use of universalistic reasoning, and axes of disagreement between the justices, that transcend boundaries between issue areas. By exploring the

Court's jurisprudence through the prism of questions about the grounding of rights, this dissertation sheds light both on constitutional law and on fundamental tensions between universalistic and particularistic bases of rights.

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EVOLVING USE OF UNIVERSAL REASONING

by

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With love and gratitude,

to my father and mother:

Jim and Ann Simon

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# **Chapter 1**

## **Introduction**

This study examines the role of universalistic reasoning (“UR”)<sup>1</sup> in the U.S. Supreme Court’s jurisprudence. To the extent that public law studies consider the Court’s use of UR, they typically fall under the rubric of “natural law” jurisprudence in a discrete issue area or time period. Most commonly, studies concentrate on the natural law jurisprudence of the Marshall Court and the era of economic due process (roughly the late nineteenth century to the late 1930s). “Natural law” or “natural rights,” in the context of American jurisprudence, carry certain associations, such as an emphasis on property rights, which may restrict the scope of investigation. This study examines the Marshall Court and economic due process, but incorporates them into a broader examination, concentrating not on a specific version of universalistic reasoning, but, on the Court’s use of UR, in whatever form it might take. It demonstrates that UR has played a more important role in the Court’s jurisprudence than has generally been recognized, from the Court’s earliest rights decisions to the present day, across a wide range of issues areas. Moreover, significant connections emerge which transcend doctrinal boundaries. By investigating the Court’s use of UR across time periods and issue areas, this research illuminates the important role UR has played, and continues to play, in the Court’s jurisprudence, and sheds light on the interrelationship between UR and fundamental tensions within American constitutionalism.

The following sections: (A) describe the topic’s nature and salience; (B) explain the study’s contribution to the public law literature; (C) describe the questions to be investigated, and the approach to conducting the research; and (D) summarize the findings and conclusions.

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<sup>1</sup> The dissertation uses abbreviations for a number of oft-repeated phrases--they are listed in a key to abbreviations following the text.

A. The Nature and Salience of the Topic

1. Tensions Concerning Universality as a  
Basis of Rights in American Constitutionalism

The language of rights is pervasive in American political discourse. From capital punishment to abortion, appeals to constitutional protections place the meaning of rights at the heart of salient controversies. Constitutional interpretation is intimately bound up with questions about the basis of rights (Smith 1985, 91). While each rights issue has its own context, all interpretive debates turn on underlying questions concerning the basis of rights. When one accepts that a legislative act may be invalidated if it violates individual rights, one presumes the existence of rights with authority to override public policies. What is the source of that authority? Understanding the basis of rights is critical to discerning the relevant considerations in making determinations about the meaning and application of rights. For instance, if rights are based in popular sovereignty, then the preferences of the people are pivotal. One might refer to the understandings of those who enacted legal texts, or consult dominant public opinions. On the other hand, if rights emanate from universalistic principles of justice, then interpretation entails ascertainment of the content and implications of those principles. In short, to discern rights' meanings, we must understand their basis.

This study's focus on UR is based on the premise that universality is important to tensions in American constitutionalism. The research investigates the use of UR, with an eye toward whether the Court's jurisprudence reflects such tensions, and, if so, what may be learned about them. This section discusses elements of American constitutionalism that potentially pull in different directions. However, while the study aims to break new ground with respect to analysis of the Court's approach to UR, this brief introductory

section does not purport to advance new findings with respect to roots of American constitutionalism. Rather, it explains the salience of questions about universality. The term “American constitutionalism,” of course, is extraordinarily general, papering over numerous controversies. The discussion, here, also does not intend to enter these controversies, but, rather, to highlight points of view that have played roles in American constitutional thought, and that are potentially in tension.

One important principle in this context is that the governed must not be subject to the arbitrary, unrestrained will and discretion of the lawmaker. The rules or principles that bind the lawmaker, therefore, should have a source of authority that is independent of, and superior to, the lawmaker (Reid 1988, 48; Grey 1978, 849-50). Given the role played in American lawmaking by elected representatives, it follows that constitutional constraints on the lawmakers should be independent of, and superior to, the will of momentary majorities and temporarily empowered government officials. The importance of this appeal to independent constraints, in turn, places importance on identifying the source of authority for those constraints.

In identifying sources of constraints on lawmakers, American constitutional thought provides bases for arguments pointing in more than one direction. One way of understanding the basis of constraints is in terms of universal rights. It is widely recognized that natural rights played a role in the political discourse of the Founding era. During the period in which the colonists declared their independence and framed a national constitution, influential political figures often appealed to natural rights, which were understood as universal, immutable, and inalienable (Hamburger 1989, 261-62; Sherry 1987, 1132; Reid 1986, 89; Cover 1975, 36; Grey 1975, 716; Haines 1930, ch. 3,

sec. 1). Emanating from God, human nature, reason, or a combination, natural rights were superior to positive law (Reid 1986, 87-88; Grey 1975, 715). The importance of natural rights was reflected in the arguments Americans made against British policies (Gerber 1995, 20; Wright 1926, 526; Wagner 1925, 565-66.). In 1761, for example, James Otis appealed to natural rights in arguing against the validity of writs of assistance (a procedure giving British officials wide-ranging search powers). In 1774, the Declaration and Resolves of the First Continental Congress included “the immutable laws of nature” as a source of the rights claimed in that document, including life, liberty, and property. The Declaration of Independence proclaims “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness,” and states that the protection of these rights is the purpose for which men institute government.

The importance of natural rights was reflected in early state constitutions, some of which echoed the Declaration’s assertion that the protection of natural rights is government’s basic purpose (Gerber 1995, 90; Jaffa 1994, 31). The Constitution of Massachusetts (1780), for instance, stated in the Preamble:

The end of the institution, maintenance, and administration of government is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquility, their natural rights and the blessings of life . . .

Article I of the document declared:

All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

Similarly, Virginia's Declaration of Rights (1776) opened with the following proclamation of natural rights as the basis of government:

A declaration of rights made by the representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to them and their posterity, as the basis and foundation of government.

Section I. That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Both sides in the ratification debate over the national constitution referred, at times, to natural rights in their arguments (Wright 1926, 529-30). In Federalist No. 2, for example John Jay wrote:

Nothing is more certain than the indispensable necessity of government, and it is equally undeniable, that whenever and however it is instituted, the people must cede to it some of their natural rights in order to vest it with requisite powers.

While stressing their cession, the statement recognized natural rights and their vital connection to the institution of government. In Federalist No. 44, James Madison evoked the Declaration's social contractarian philosophy in stating:

Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation.

The arguments of prominent Anti-Federalists, including George Mason, Patrick Henry, Luther Martin, and Elbridge Gerry, also sometimes drew on natural rights (Gerber 1995, 65-66; Wright 1926, 529). Anti-Federalists argued that a bill of rights was necessary to

protect natural rights, while Federalists countered that such rights did not require enumeration (Gerber 1995, 66-67). The Ninth Amendment<sup>2</sup> is viewed by some scholars as recognition by the Framers of certain inherent rights that, for their efficacy, do not depend upon textual articulation (E.g., Sherry 1987, 1162-65; Corwin 1948, 11). More broadly, many scholars view the constitutional enterprise as an attempt to realize the Declaration's commitment to natural rights (E.g., Konvitz 2001 160; Gerber 1995, 59; Zuckert 1994, 4). The constitutional discourse of the period following ratification often included appeals to principles of natural justice (Powell 1993, 964). While the relative importance of natural rights in the Founding remains controversial,<sup>3</sup> it is necessary here only to observe that natural rights thought was an element in the blend of ideas that gave rise to American constitutionalism.

Roots of American constitutionalism also support arguments for constraints on government based in popular sovereignty--the idea that the exercise of governmental authority finds its legitimacy in expressions of consent by the governed. Theorists influential in pre-Revolutionary America posited that people in a state of nature entered into political communities via constitutional contracts limiting the legitimate powers of government (Hamburger 1989, 260-61). Reflecting these ideas, the Declaration states, to secure the inalienable rights of life, liberty, and the pursuit of happiness:

Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish

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<sup>2</sup> “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”

<sup>3</sup> Scholars debate, for example, the relative roles of liberalism and republicanism (*see, e.g.*, Gibson 2001 and 2000; Carrese 2000; Zuckert 1994; Smith 1985; Bailyn 1967), and the extent to which natural rights thought shaped the Founding. *See, e.g.*, Corwin 1965; McDowell 1993; Stockton 1971 (minimizing the extent of natural rights thought in the *Federalist Papers*.).

it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Not only do the people form government, but their consent is critical to the government's legitimacy, and they can choose to alter or abolish a government that is destructive of its proper ends. During the Founding era, enacted constitutions were understood as manifesting the will of the people (Sherry 1987, 1149-51). The Articles of Confederation and earlier state constitutions had been adopted by legislatures, but the use of special conventions to ratify some state charters linked fundamental law more directly to the people as a source of authority (Griffin 1996, 12). In ratification debates, Federalists stressed the theme of popular sovereignty (Griffin 1996, 20). The Constitution, which declares itself the "supreme Law of the Land," was ratified by popular conventions in the states, and could be amended only by procedures requiring super-majorities of democratically representative institutions. The Preamble also indicates that the supreme law emanates from popular will:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Political thought at the Founding also supported arguments appealing to tradition as a basis of rights. The British had long viewed customary practices embodied in their "ancient constitution" as the basis of restraints on the exercise of official power (Zuckert 1994, 54-55). The colonists drew on this view of constitutional restraints, appealing to British customs and colonial practices in their objections to England's policies.



Parliamentary actions inconsistent with long-standing constitutional practices were criticized as threats to rule of law (Reid 1986, 73). In listing grievances against the King, the Declaration cites violations of practices sanctioned by English practice. The adoption of the common law system--with its doctrine of *stare decisis*, and reverence for the value of rules crafted through time and experience--reflects the role of tradition in law.

While natural rights, popular sovereignty, and tradition all enjoyed status, the Founding generation largely viewed various bases of rights as equally supportive of the same rights claims.<sup>4</sup> In objecting to English policies, colonists frequently advanced arguments in combination, and without careful distinction (Rakove 1997, 292-93; Smith 1985, 41). Early state constitutions also reflected an eclectic approach, drawing on natural rights, British and colonial practices, the common law, and the enactment of written rules distributing and limiting governmental powers. Early state court decisions interpreting rights, too, relied on a loose combination of text, long-standing practices, and natural law (Sherry 1987, 1134-35). Similarly, the Framers understood fundamental law as rooted variously in divine law, natural law, common law or customary practices, and the written text as an enacted expression of popular sovereignty (Sherry 1987, 1156).

If there is consensus on the content of rights, and different bases of rights are understood as leading to the same substantive outcomes, then, as a practical matter, those bases may be employed interchangeably. However, in the absence of consensus, different bases of rights will be marshaled in support of opposing interpretations. As bases for rights, universalistic principles and popular sovereignty are potentially in tension. The tension is evident in the political philosophy of John Locke, whose writings

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<sup>4</sup> Colonists appealed to a wider range of bases of rights, including rights of Englishmen, the emigration purchase and contract, and colonial charters. Reid 1986, 66.

were influential with the colonists (Zuckert 1994, xviii). For Locke, men in the state of nature are equal, with no one possessing authority to rule over others. The legitimate exercise of political authority depends upon agreement to enter into a political community. The people may withdraw their consent if government fails to fulfill its principal ends. Limits on the legitimate exercise of political authority, however, are not grounded only in consent. People consent to be governed for the specified end of protecting their natural rights--including life, liberty, and property. After the establishment of government, natural rights remain the standard for evaluating legitimacy. Even after people enter into political society:

the power of the society, or legislative constituted by them, can never be supposed to extend farther, than the common good; but is obliged to secure every one's property . . . And so whoever has the legislative or supreme power of any common-wealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees; by indifferent and upright judges, who are to decide controversies by those laws (Locke's *Second Treatise of Government*, ch. 9, § 131).

While legitimacy requires consent, government is also constrained by certain inherent principles. It may not rule arbitrarily, but only in accordance with requirements of rule of law, and it retains legitimacy only so long as it continues to protect natural rights, its *raison d'être*. Nature and consent both restrain government, making it difficult to identify a single grounding of rights as bedrock (Smith 1985, 16).

Tension between consent and nature also runs through the Declaration, with Lockean elements recognizable. The Declaration's rights exist independently of government, positive law, or acts of human will. Men institute governments "to secure these rights" The goal of securing universal rights is so basic to government "[t]hat

whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government.” After the formation of government, rights remain a standard for evaluating government's legitimacy.

However, the Declaration indicates a second requirement for legitimacy. Governments “deriv[e] their just powers from the consent of the governed.” Unlike natural rights, consent hinges on human choices. The people not only form government, but are entitled to decide when its actions are so contrary to its basic ends that it must be overthrown. If the people’s judgment is the test of legitimacy, then consent restrains government (Zuckert 1994, 10). Identifying multiple criteria for legitimacy engenders uncertainty concerning sources of obligations (Smith 1985, 43-44).

The Constitution, too, reflects the Framers’ beliefs both in popular sovereignty and standards independent of popular will (Reck 1989, 483-84). The Preamble’s opening words--“We the People”--indicate that the establishment of the Constitution is an act of popular sovereignty. At the same time, the Preamble’s identification of the Constitution’s ends--which include establishing justice, promoting the general good, and securing liberty--suggests standards existing independently of will (Reck 1989, 484-86; 1985, 70-71). Constitutional protections were understood by many as declarative of rights existing independently of positive law (Sherry 1987, 1156-57). And the Ninth Amendment implies the existence of rights existing regardless of enumeration.

Tension between natural rights and popular sovereignty can be understood, more broadly, as tension between universalistic and particularistic bases of rights. Particularistic reasoning grounds rights in considerations specific to a given political community. In the context of American constitutionalism, particularistic reasoning looks

to the American people's desires, history, traditions, or other considerations unique to American circumstances. By contrast, universalistic reasoning grounds rights in considerations transcending the American experience. UR, for example, may ground rights in principles inherent in the concept of freedom. The approach is universalistic in that, as a criterion of evaluation, it looks to a concept or purposive standard that does not hinge entirely on an accounting of the American people's preferences and practices.

Universalistic and particularistic bases of rights are in tension because universalistic ends must be implemented within a specific polity. The ends of government may be expressed in universalistic terms, but they can be pursued only through particularistic means (acts of volition by a specific people). Realization of universal rights requires establishment of government and rule of law. This entails enactment of positive laws, which are particularistic. They are made by a specific people, and embody expressions of lawmakers' will. They are made for a specific people, binding only those subject to the polity's authority. Universal principles operate at a high level of generality, but rule of law requires guidelines specific enough to direct behavior. As Thomas Aquinas recognized in the thirteenth century, positive laws are required to apply universal principles with greater concreteness and specificity than the principles alone can provide (Rommen 1947, 52-55; Haines 1930, ch. 1, sec. 2).

Debate over universality, of course, did not originate in the American context, but dates to ancient times. Before Socrates, for example, Heraclitus of Ephesus (c. 536-470 B.C.) spoke of a fixed, eternal order governing human events, and of a higher divine law that set standards for human ethics (Rommen 1947, 6). The question of whether justice is rooted in nature, or in conventions of human making, was a recurring topic of debate in

Greece (Wiltshire 1992, 12; d'Entrèves 1970, 27). Pointing to discrepancies in laws between polities, fifth-century Sophists argued against the notion that universal principles of justice emanate from gods or nature (McIlwain 1932, 14). In Plato's *Republic*, Thrasymachus advances a version of this position, contending that the rules of justice are based in nothing more than the will of those with the strength to impose them on others (*Republic*, 338c-339a). Socrates counters by describing at length how a polity might seek justice through the guidance of transcendent standards of justice.

Scholars, including Edward Corwin (1965) and Charles McIlwain (1932), have traced the development of Western constitutional thought, observing the contributions of classical Greece, Roman Stoicism, medieval Christianity, England's ancient constitution, and other philosophical frameworks pre-dating the American Founding. Influential thinkers from Plato and Aristotle, to Cicero, to Aquinas, to the English jurists Henry de Bracton, John Fortescue, and Edward Coke contributed to the complex amalgam of political theories that laid the foundations of American constitutionalism. Included are the ideas that: nature serves as a standard for evaluating justice, applicable to all times and places; those standards are knowable by human beings; equality characterizes men's access to universal standards, and subjection to those standards; the legitimacy of political authority depends on conformity with universal standards of justice; political rule disregarding those standards and premised on nothing more than the will of the ruler, is arbitrary and lacks the authority of law; consent of the people is the source of sovereign authority; even rulers are bound by a fundamental law rooted in long-standing custom; and the legitimacy of governmental power, and limitations on its exercise, can be understood as arising from the social contract (see, generally, Zuckert 1994; Wiltshire

1992; Snowiss 1990; Reid 1988; Sherry 1987; Donnelly 1985; Grey 1978; Dickinson 1976; Sigmund 1971; d'Entrèves 1970; Corwin 1965 and 1948; McIlwain 1947 and 1932; Rommen 1947).

Philosophically, the justices were not writing on a blank slate. Yet the Founding represents an important chapter in the development of constitutional thought, as the Declaration places the protection of universal rights at the core of national objectives (Donnelly 2003), and the Constitution enacts a fundamental law understood as both an embodiment of higher law and a legally enforceable, positive code of law (McCloskey 2000). Thus, while philosophers had long pondered universality, the justices had no predecessors in exercising judicial review within the context of a nation officially devoted to the protection of natural rights.

The interconnection between universalistic and particularistic in American constitutional thought presents justices with difficult questions concerning judicial reliance on UR. The Court gains its authority from American sources, and its jurisdiction is circumscribed by limits of American power. More specifically, the Court gains its authority from the Constitution--a document made by and for a particular people. The Constitution's authority, in turn, is linked to enactment procedures, and the American people's continuing acceptance of the document as authoritative. At the same time, justices resolve rights controversies within the context of a national community that has declared its existence as an independent people on the basis of universal rights, and whose Founding generation embraced the notion that a basic purpose of government is to protect those rights (Grey 1975, 716; Haines 1930, ch. 3, sec. 1). To what extent may interpretation concern itself with mandates of universalistic principles? If the ultimate

standard of evaluation issues in universalistic principles, may the interpreter refer directly to those principles? Or, should rights interpreters consider themselves authorized only to consider particularistic bases of rights?

These questions confront anyone engaged in rights interpretation. The following section explains why study is warranted on how S.C. justices have addressed them.

## 2. Importance of Studying the Supreme Court's Approach to Universality as a Basis of Rights

For the reasons discussed above, questions about universalistic bases of rights within the American political system warrant investigation. To gain the fullest understanding, it would be worthwhile to examine how these questions have been addressed, not only within one branch, but in all branches of the government, as well as in the media, in electoral campaigns, and in popular culture, among other arenas relevant to the shaping of political discourse and outcomes. To be feasible, however, a single study must select a narrower focus. The judiciary makes an important target of study because of its prominent role in the interpretation of constitutional rights. When disputes over constitutional meanings find their way into litigation, the judiciary has the authority to make determinations that are binding on other political actors. The importance of studying the judiciary's role as expounder of the meaning of rights is enhanced by the fact that the judiciary has assumed greater responsibility in articulating the boundaries of constitutional rights than have other branches. While legislators and executive officials surely, at least some of the time, concern themselves with constitutional limitations, and judges surely think about policy implications, the American judiciary has assumed the predominant role with respect to detailed elaboration of the meaning of constitutional

rights, and the specific ways in which they restrain governmental action (McCloskey 2000, 7-8.).

The judiciary is also an interesting target of study, because, unlike executive and legislative officials, judges routinely provide written justifications, often detailed, for their decisions. In the American common law system, judicial reasoning about rights comprises part of the fabric of the law. The doctrine of *stare decisis* provides an institutional reason for judges to conduct ongoing discourse with past and present judges over the basis of their decisions. It is true that judges may go to great lengths to distinguish apparently applicable precedents, but this practice also entails engaging past opinions. As a consequence of the judiciary's emphasis on providing written justifications for its decisionmaking, a massive body of texts has been produced, which serves as the lifeblood of legal argumentation. The existence of comprehensive, searchable databases reflects this emphasis. Written justifications are central to the institution's operations, and to the activities of those who seek to influence it. These institutional practices allow judicial reasoning to more readily impact public understandings than it might otherwise. Given that judges are subject to the influence of developments within the legal community, and, more broadly, within American politics, the courts both reflect and help to shape American political and legal discourse (Smith 1985, 6).

Since, in the American legal system, courts at all levels of government--federal, state, and local--and at all levels of the judiciary hierarchy, are empowered to enforce individual rights, study is warranted on how the judiciary as a whole has approached questions about universalistic bases of rights. Again, feasibility demands a narrower



focus. The U.S. Supreme Court serves as an excellent focus at the outset. Sitting atop the judicial hierarchy, the Court's pronouncements are the most visible, legally and politically. Its role as supervisor of the federal judiciary makes it especially important that the justices support their actions with written explanations, which serve as guideposts for the approaches taken by lower courts. The supreme hierarchical position also makes the justices the only judicial officials with authority to overrule any previous judicial decision, including the Court's own precedents. This provides the justices with greater leeway to elaborate their legal philosophies, and to challenge those advanced by other justices. The justices, in fact, have developed a robust practice of writing substantial concurring and dissenting opinions, often explaining nuanced distinctions between their own interpretive frameworks and those employed by their colleagues, present and past (Griffin 1996, 129). The Supreme Court is also unique in the degree of control that it exercises over its docket, allowing justices to select controversies that provide the best opportunities for revisiting long-standing disputes over the basis of rights. For these reasons, the Supreme Court's jurisprudence is a suitable point of embarkation for studying the judiciary's use of UR.

B. Literature Review, and the Study's Contributions

A review of the literature reveals no publications with the same focus as this study. Many publications with a bearing on the present topic fall into two categories. One category concentrates on normative analysis of questions about rights, but does not extensively examine the Supreme Court's jurisprudence (E.g., George 1999; Dworkin 1986; Finnis 1980). Studies in a second category contain detailed discussion of the Court's jurisprudence, but do not focus on questions concerning universality and the

grounding of rights (E.g., McCloskey 2000; Currie 1990 and 1985; Urofsky 1988).

Studies in these categories differ from this project in that none extensively investigates the Court's jurisprudence to discern how the justices themselves have approached fundamental questions about universality.

To the extent that the literature discusses the Court's use of universal reasoning, it concentrates heavily on "natural law" or "natural rights" jurisprudence during the Marshall Court (E.g., Corwin 1950; Hale 1944; Grant 1931; Haines 1924) and in the economic substantive due process jurisprudence of the late nineteenth and early twentieth centuries (E.g., Eastman and Sandefur 2001; Arkes 1994; Gillman 1993; Frankfurter 1916). While the Marshall Court and the era of economic substantive due process have received the greatest attention, a number of studies have considered the role of natural law in other narrowly defined time periods, such as the Warren Court (E.g., Foley 1965), or in narrowly defined issue areas, such as freedom of speech (E.g., Carroll 1966-67). The debate between Justices Felix Frankfurter and Hugo Black over incorporation of the Bill of Rights into the Fourteenth Amendment is an example of a narrowly circumscribed judicial exchange, with a bearing on the basis of rights, that also has received attention from scholars (E.g., Simon 1989). These studies are distinct from the present study in that they focus on an aspect of the Court's jurisprudence as a discrete, confined topic.

This dissertation expands the focus from natural law within a specific issue area or time period to broader questions about the role of universality in the Court's rights reasoning. The terms "natural law" and "natural rights"<sup>5</sup> carry baggage. In the context of

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<sup>5</sup> To many philosophers and traditions, "natural law" and "natural rights" hold distinct meanings. They are used interchangeably here because the justices have not paid careful attention to the distinction. "Natural rights" is more accurate, as the justices have most commonly appealed to nature as a basis upon which

American jurisprudence, they may be associated with static property rights linked to theology and the protection of business interests, or some combination of these elements. This study is interested in universalistic rights reasoning, which need not include any of the elements listed. As noted, the role of natural law during the eras of the Marshall Court and economic due process has received substantial attention from scholars. As is well-covered in the literature, these lines of jurisprudence were abandoned by the late 1930s, when the Court generally shifted its attention away from property rights and towards other categories of rights. Universality was one element of the Court's natural law jurisprudence, but universality need not be tied to property rights. By broadening the focus, this study is able to inquire into the role of universality apart from any specific category of rights or version of natural law jurisprudence. When the Court abandoned economic due process in the late 1930s, did it abandon UR altogether? Or has UR continued to play a role in other arenas? Another reason it is best not to define the topic in terms of "natural law" is that, due largely to the noted associations, it has long been discredited. Today's justices continue to use UR, though none would purport to enforce natural law. The broadened focus allows this study to reveal similarities in the Court's use of UR in a wide range of issue areas, from the Court's earliest rights decisions to the present day. It also reveals shifts that have occurred with respect to UR's role, which helps to place contemporary debates between the justices within an historical perspective.

It was noted that one large category of works in the literature is predominantly concerned with spelling out positions on the philosophy of law. Another large category is predominantly concerned with judicial doctrine. This dissertation neither advances a

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individuals may seek to block illegitimate exercises of governmental power. The term "natural justice" appears in more Court decisions than "natural law" or "natural rights." Westlaw search, July 5, 2007.

comprehensive interpretive theory, nor concerns itself with the details of legal doctrine. Rather, it begins with questions basic to philosophy of law and investigates how the justices have approached them. To be sure, judicial opinions do not read like works of philosophy. Nevertheless, the task of adjudicating rights disputes inevitably presents the justices with basic philosophical questions, and, investigating the Court's jurisprudence over time shows that the justices have often explicitly addressed these questions in explaining their approach to reaching decisions. Directing attention to the justices' voices on these questions brings into view an understanding of the Court's rights jurisprudence as more than a conglomeration of doctrinal pronouncements. It represents an ongoing attempt to address fundamental questions about the basis of rights, a difficult challenge exacerbated by tensions within American constitutionalism. Studying how the justices have grappled with this challenge also sheds light on the nature of these tensions.

C. The Questions to Be Investigated, and the Approach to Conducting the Research

We should expect to find pervasive use of particularistic reasoning within a common law system built on respect for judicial precedents and long-standing custom. In itself, reliance on such particularistic considerations is unremarkable. The questions, here, are framed around the justices' use of UR:

- (1) Have the justices relied on UR at all? If so, has the use of UR been confined to one specific issue area or time period?
- (2) If the justices have relied on UR, what form has this taken? What kinds of universalistic standards have the justices employed? What role have they played?
- (3) If the justices have relied on UR in more than one issue area or time period, are there similarities across issue areas and/or time periods?
- (4) Are there discernible shifts over time in the nature of the Court's use of UR?

(5) Have the justices debated the use of UR in more than one issue area or time period, and, if so, are there any similarities in the nature of the debate across issue areas or time periods?

(6) The discussion above describes theoretical tensions embedded within American constitutionalism concerning the relationship between universalistic and particularistic bases of rights--to what extent are these tensions evident in the Court's jurisprudence?

(7) Does UR play a role in the contemporary Court's jurisprudence? If so, how does the Court's treatment of UR compare with earlier periods?

To investigate these questions, the study examines a set of specific issue areas.

The Court reveals its approach to universality in the context of specific controversies.

Article III, § 2 of the Constitution lists the varieties of "Cases" and "Controversies" that the federal judiciary is empowered to hear. The Court has, from the beginning, limited the scope of its power, which it has defined as extending only to the determination of "actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." It has no general, roving, "revisory" power to review governmental actions in the absence of a justiciable controversy between litigants before the court,<sup>6</sup> much less the occasion to issue free-standing philosophical statements on the basis of rights. Judges typically locate disputes within issue areas, and look first to precedents falling within those areas. To glean insights into UR's role, it is most useful to investigate within specified issue areas.

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<sup>6</sup> *Muskrat v. U.S.*, 219 U.S. 346, 361 (1911); see also *Hayburn's Case*, 2 U.S. 408 (1792).

The project covers a wide range of substantive issue areas.<sup>7</sup> Chapter Two examines the Court's Contract Clause jurisprudence, including, but not limited to, the Marshall Court. Economic due process jurisprudence of the late nineteenth and early twentieth centuries is considered in ch. 3. The discussion is placed within a broader examination of the Court's substantive due process jurisprudence, considering non-economic categories or rights as well, especially rights of expression and privacy. Chapter Four discusses procedural due process, and particularly the extent to which certain constitutional protections concerning criminal procedure apply against state governments. Although the topic is related to substantive due process in that it also arises out of the Fourteenth Amendment's Due Process Clause, the issue areas involved are distinct. For example, while substantive due process has encompassed debates over a woman's right to terminate a pregnancy, it is procedural due process that encompasses such rights as appointed counsel in a criminal case and the privilege against self-incrimination. In addition, the study considers the applicability of the Constitution in overseas U.S. territories (ch. 5), and the prohibition against cruel and unusual punishments (ch. 6).<sup>8</sup> Together, these topics encompass a wide range of intrinsically important substantive issues that range from the Court's early period to the present day.

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<sup>7</sup> The project's objectives require examination of multiple legal issues, and the topic areas have been selected to ensure the coverage of a wide range of issues and time periods. The coverage, however, for reasons of feasibility, is not exhaustive. Indeed, it is clear that UR has played a role in additional issue areas. For example, in a prominent equal protection decision invalidating a law providing for sterilization as a punishment, the Court stated: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). In another equal protection decision, regarding curfew regulations applicable to persons of Japanese ancestry, the Court stated: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943).

<sup>8</sup> Each chapter more specifically describes the specific focus of the examination within the broader topic identified. While the study is cast broadly to consider a wide range of legal topics, the chapters do not discuss every legal question that the justices have confronted within each issue area. To address the questions posed by this research, it is neither necessary nor possible to do so.

The study probes the main lines of reasoning in the development of jurisprudence within each topic considered, focusing primarily on important cases--groundbreaking cases that gained footing within the Court's jurisprudence, and cases looked to by the justices themselves as important guideposts. The final chapter (Chapter Seven) discusses conclusions and implications drawn from the research.

D. Summary of Findings and Conclusions

This research shows that UR has played an important role across a wide range of issues and time periods. One of UR's most significant roles has been to distinguish categories of rights in terms of their relative importance. Rights deemed essential to universalistic standards have received greater judicial protection. UR has often taken the form of a model of reasoning referred to here as reasoning from essential principles. This form of reasoning begins with the identification of a universalistic standard of evaluation ("USE") (such as the requirements of free government), and then identifies a category of rights whose protection is mandated by the USE (such as property rights until the late 1930s, and rights of expression since the mid-1920s). The next step in reasoning is the identification of intermediate premises ("IMPs"), representing more specific principles whose observance is essential to meaningful protection of the category of rights. During the era of economic due process, for example, the right to pursue a lawful calling was identified as an IMP essential to the protection of property rights. More recently, an individual's autonomy over decisions relating to one's intimate life has emerged as an IMP essential to the right of privacy. In addition, one of this study's unanticipated findings is that universalistic reasoning has played an important role, not only with respect to the identification of rights, but also with respect to the grounding of inherent

and inalienable governmental powers. While the topic warrants separate investigation, it is observed here that universalistic powers reasoning has been critical in certain issue areas, and has been closely related to developments in the use of UR (ch. 2, C; ch. 3, E).

The use of UR shows similarities across issue areas. First, when justices have employed USEs, they have often done so with standards combining universalistic and particularistic elements. Second, the Court's prevailing approach has been to combine UR with an approach permitting constitutional meanings to evolve. Third, in applying USEs, justices have commonly looked for guidance to practices (past or present), or other societal indicators. Fourth, the justices' disagreements over the use of UR show similar fault lines across issue areas. As noted, the Court's dominant approach has been universalistic and evolutive. From the late eighteenth century to the present day, however, a number of justices have objected to such an approach, advancing what is referred to here as the Delegative Model. While the details and contexts of the arguments naturally vary, justices from James Iredell in the late eighteenth century to Antonin Scalia today have advocated a particularistic approach to interpretation that views the Constitution as a set of specific, static commands severely constraining judicial discretion.

The research also reveals significant shifts that have occurred across issue areas concerning the use of UR. For instance, while the early Court sometimes used UR in a way that was extra-constitutional, the justices eventually shifted away from extra-constitutional reasoning, making sure to frame their UR as interpretation of constitutional provisions. Another shift concerns the manner in which the justices have incorporated practices and other societal indicators into the application of UR. Within an interpretive



approach that allows for constitutional meanings to evolve, history cannot be the only standard. What role, then, is there for past and present practices? The Court has long looked to practices as evidence bearing on a right's universal status. If observance of a right is the uniform practice in jurisdictions dedicated to free government, this may be seen as evidence that the right is indispensable to freedom. Conversely, lack of uniformity in observance of the right may count against the right's universalistic grounding. Under this approach, the ultimate evaluative standard is universalistic--the requirements of liberty, or of free government, or of justice. The reference to existing practices is not decisive, in itself, but counts as evidence helpful to determining whether the right is essential to fulfillment of the universalistic standard. More recently, the Court has incorporated practices in a different manner, referred to here as the "Emerging Trends" approach. Under this approach, dissensus does not necessarily count against a right's universal status. The direction of change may be as important as the current state of practice. A trend in state legislation may count as strong evidence in support of a right's protected status. The justices have also incorporated other indicators into this approach, including, for example, the opinions of professional associations.

These patterns and shifts in the Court's use of UR reflect tensions embedded within American constitutional thought. The context of American constitutionalism within which the justices operate suggests a set of commitments or pressures that are not easily reconciled. First, constitutional rights should have a basis that is independent of the will of the lawmaker. Important streams of thought view rights as having universal roots, grounded, not simply in the momentary preferences of a particular people, but in enduring human nature. These considerations provide the constitutional interpreter with

reasons to appeal directly to universalistic principles. At the same time, the end goal of protecting universal rights is realized within the American political system through the establishment of rule of law and branches of government with carefully delineated bounds of authority. Universalistic principles, in themselves, are vague and contested. Judicial appeals to universality may be attacked as lacking authority, and undermining of the rule of law. Under the Delegation Model that has been advanced by a number of justices, the judiciary's duty is to enforce the Constitution's specific commands. Proper judicial reasoning is particularistic, rooted in the will of the people who enacted the document, and in the traditional practices that shed light on the Framers' understandings.

The early Court employed UR that appealed directly to universalistic principles. When UR is used in a form not linked with text, however, it is the most vulnerable to charges that it is acting without authority. By folding UR under the rubric of interpreting text, justices avoid such obvious vulnerability. Framing UR as part of textual interpretation is one of the most important ways that justices have combined universalistic and particularistic bases. Constitutional provisions supply a link between judicial reasoning and the particularistic authority provided by an enacted text, as when the Court views due process as embodying the essential requirements of liberty, or the Eighth Amendment as requiring comportment with human dignity. The justices have often articulated standards of evaluation that combine universalistic and particularistic elements (referred to here as "mixed rights reasoning," or "MRR"). These MRR formulations identify a particularistic source of commitment (such as Framers' beliefs, common law, or American institutions) to universalistic principles. Thus, in following

the mandates of universalistic principles, the justices are at the same time following particularistic commitments to those principles.

The use of MRR, nevertheless, does not fully allay concerns associated with the use of UR, which has remained subject to attack. From the perspective of the Delegative Model, the Constitution's Framers have already performed all of the necessary UR. Once the document is enacted, the judiciary must be guided by its specific commands. Appeals to universalistic standards provide too much leeway for excessive judicial discretion. Today's justices remain highly cognizant of UR's vulnerability. The Emerging Trends approach can be understood as an attempt to provide insulation for the use of UR. One of the great concerns with the use of UR is that it opens the door to justices simply enforcing their own subjective will. Emerging Trends incorporates "objective" indicators into its application of USEs.

Emerging Trends, however, raises troubling implications. Responding to the reality of dramatic shifts in public morality over time, the Court has allowed for the recognition of changes in constitutional meanings. An evolutive approach raises the question of how the justices are to discern new meanings. The Court's overarching standards are universalistic, but they cannot comfortably rest their opinions on nothing more than their own free-standing UR. It was noted that the Court had earlier relied on existing practices largely by discerning whether a right was uniformly observed. The line of reasoning appeared to be that, if a practice were uniformly practiced, this provided evidence supporting a conclusion that the right was essential according to USEs. The recent Court, however, has relied, not simply on uniformity, or a lack of uniformity, but on recent legislative trends. The difficulty with this approach is that it threatens to reduce

constitutional reasoning to majoritarian nose-counting. The Court has long applied USEs in a way that incorporates reference to practices. In itself, the combination of universalistic and particularistic bases is neither remarkable nor objectionable. It is important, however, to retain an approach that retains constitutional rights as an independent constraint on lawmakers. It essential, therefore, to make clear that the overarching standard hinges on more than the recent actions of lawmakers.

## **Chapter 2**

### **The Contract Clause**

As noted, this study examines the use of UR within specific issue areas. The Contract Clause is a useful starting point, because it was the most significant constitutional provision in the early Court's rights jurisprudence. In light of the Clause's uniquely important role in this era, the analysis focuses largely, though not exclusively, on the Marshall Court's treatment of the Contract Clause, and the closely associated doctrine of vested rights. Section A discusses two of the Court's first rights decisions,<sup>9</sup> handed down before John Marshall assumed the position of Chief Justice, focusing on the nature of the UR employed by a number of the justices, and on the disagreement between some of the justices regarding the proper role of extra-constitutional, universalistic reasoning. Although they did not directly concern the Contract Clause, their inclusion provides a window into the Court's earliest period. Section B discusses the Marshall Court's use of extra-constitutional, universalistic reasoning, and generally characterizes the form of the Court's approach during that period. It also notes that the Court shifted away from extra-constitutional reasoning, without abandoning universalistic principles. Section C discusses the Court's use of universalistic reasoning in developing the concept of inherent and inalienable police powers. The concept was important in the justices' thinking as the Court addressed Contract Clause issues. The section closes with consideration of the Clause's decline. The Court's treatment of the Contract Clause is closely associated with its later handling of the Fourteenth Amendment's Due Process Clause with respect to review of economic regulations (economic due process). Thus, a number of themes central to this chapter are continued in the next.

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<sup>9</sup> *Chisolm v. Georgia*, 2 U.S. 419 (1793); and *Calder v. Bull*, 3 U.S. 386 (1798).

A. *Chisolm* and *Calder*--Early Rights Decisions Before Marshall

Prior to 1801, the Court heard only a few cases involving constitutional issues (Currie 1985, 4). During this period, a large portion of the docket concerned questions of jurisdiction (Gerber 1995, 241 n. 8), and few decisions resulted in the invalidation of legislation (Snowiss 1990, 59-60). This section considers two of the Court's earliest rights decisions--*Chisholm v. Georgia* (1793)<sup>10</sup> and *Calder v. Bull* (1798).<sup>11</sup> Examination of these cases reveals that UR, and disagreement over its use, have been with the Court since its earliest period. In *Chisolm*, the Court's first constitutional case (Gerber 1995, 1), three of the Justices--John Jay, James Wilson, and William Cushing--employed UR. In *Calder*, two Justices--Samuel Chase and Iredell--though reaching the same result, clashed over the role of UR. Moreover, the nature of the UR employed by a number of the justices in *Chisolm* and *Calder* is similar in important ways to that employed by justices throughout the Court's history, and the debate between Chase and Iredell was similar to fault lines that have persisted throughout the Court's history.

The central issue in *Chisholm* was whether the federal courts had jurisdiction to hear a claim brought by an individual from one state against another state, without the second state's consent. The issue came to the Court when Chisholm, a citizen of South Carolina, sought to recover a debt from the State of Georgia, alleging that he had never received payment for goods delivered. Georgia refused to appear, denying federal court jurisdiction. With only Iredell dissenting, Justices Wilson, Jay, Cushing, and John Blair issued opinions holding that Georgia was subject to suit under these circumstances in the

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<sup>10</sup> 2 U.S. 419.

<sup>11</sup> 3 U.S. 386. A third constitutional decision prior to the Marshall Court, *Hylton v. Ware*, 3 U.S. 199 (1796), principally concerned the questions of whether a U.S. treaty overrode an otherwise valid state law, and whether the Court could review state laws.

federal courts.<sup>12</sup> The impact of the decision was reflected in the ratification, just two years later, of the Eleventh Amendment, which provided that the federal courts did not have jurisdiction over suits by citizens of one state against another state.

In considering the opinions of Justices Wilson, Jay, and Cushing in *Chisholm*, we see illustrations of one of the most striking features of the Court's early rights jurisprudence (extending into the Marshall Court)--the reliance on extra-constitutional universalistic reasoning. Wilson examined the controversy first by "principles of general jurisprudence," and then, separately, and "chiefly" by the U.S. Constitution.<sup>13</sup> In the former section, Wilson's identified "general principles of right and equality" that applied to individuals. Wilson saw no reason why these same principles should not also be applied to states, which were artificial persons. Like a natural person, a state has rights and can acquire property. Just as an individual can enter into contracts and voluntarily assume certain duties, a state incurs legally binding obligations. In short, as a creation of men, consisting of a combination of men, a state, like an individual person, is subject to the basic principles of right, justice, and equality. According to these principles, if a state can initiate litigation, then it must also be itself subject to suit.<sup>14</sup> The greater part of Wilson's opinion was devoted to elaboration of this universalistic argument.

Like Wilson, Jay reasoned from "the obvious dictates of justice, and the purposes of society,"<sup>15</sup> which encompassed the principle that "one free citizen may sue another." Also like Wilson, Jay began with principles relevant to relationships between individual

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<sup>12</sup> Before the tenure of Chief Justice Marshall, the justices issued their opinions *seriatim*. That is, each justice issued a separate opinion, with none identified as the opinion of the Court. Marshall introduced the practice of identifying the Court's opinion. Gerber 1998.

<sup>13</sup> 2 U.S. at 453.

<sup>14</sup> 2 U.S. at 455-56.

<sup>15</sup> 2 U.S. at 472.



persons, and applied these principles to the relations between an individual and a state. Not only can one individual sue another, but an individual also can launch litigation against a large group of people, as when a citizen sues a corporation. Since a state can sue an individual, a state also must subject itself to being sued. Immunizing states from lawsuits would contradict principles of equality and sovereignty. Jay reasoned further that administering justice “without respect of persons” and “securing individual citizens as well as States, in their respective rights” forms part of “the promise which every free Government makes to every free citizen, of equal justice and protection.” In sum, Jay stated that the Court’s decision “recognizes and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man.”<sup>16</sup> Cushing also based his opinion, not only on the text of the Constitution, but also on “the reason of the thing.”<sup>17</sup> Like Wilson and Jay, Cushing insisted that states were subject to basic principles of justice, as individuals were. This point was critical for Cushing, because the “great end and object of [states] must be to secure and support the rights of individuals, or else vain is Government.”<sup>18</sup>

Wilson, Jay, and Cushing each relied on extra-constitutional and universalistic arguments. Both features are significant, but they are not co-terminous. An extra-constitutional argument need not be universalistic. One might, for example, appeal to long-standing American customs that are not understood as linked in any way to the constitutional text. What made the arguments of Wilson, Jay, and Cushing universalistic was that they reasoned from principles (such as right, justice, equality, reciprocity, and sovereignty), that did not hinge on peculiarly American preferences, traditions, or

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<sup>16</sup> 2 U.S. at 479.

<sup>17</sup> 2 U.S. at 467.

<sup>18</sup> 2 U.S. at 468.

conditions. Under the rubric of “general principles of jurisprudence,” for instance, Wilson identified principles that applied to states, as artificial persons, because they applied to natural persons. Their basis and applicability were not limited to the people or circumstances of the United States. Not all members of the *Chisolm* Court, however, agreed on the use of extra-constitutional UR. Indeed, Blair (concurring) and Iredell (dissenting) looked only to the constitutional text in their reasoning, with Blair stating flatly: “The Constitution of the United States is the only fountain from which I shall draw; the only authority to which I shall appeal.”<sup>19</sup>

In *Calder v. Bull* (1798),<sup>20</sup> the Court unanimously rejected a claim that the Connecticut legislature interfered with vested rights by altering the outcome of a probate court decision. The probate court had rejected a will as invalid, finding for Calder. After the state adopted legislation overturning the ruling, the same court held another trial, and this time found the will valid. Following affirmance by the highest state court, Calder argued before the Supreme Court that the Connecticut legislation overturning the probate court’s initial ruling amounted to an *ex post facto* law in violation of Art. I, § 10 of the Constitution. While the justices’ arguments varied, an important common determination was that the Ex Post Facto Clause applied only in the criminal context.<sup>21</sup> Since Calder’s was a civil claim, the Clause did not apply. While Chase and Iredell both rejected the Calders’ claim, they nevertheless clashed over the appropriateness of judicial reliance on extra-constitutional, universalistic principles. Chase initiated the discussion of extra-constitutional reasoning as a response to his own query of whether, absent constitutional provisions prohibiting it, a legislature can overturn any judicial decision without

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<sup>19</sup> 2 U.S. at 449.

<sup>20</sup> 3 U.S. 386.

<sup>21</sup> The interpretation has proven enduring. See, e.g., *Collins v. Youngblood*, 497 U.S. 37, 41 (1990).

restriction. Although *Calder* did not require an answer to that question (since the legislature had not asserted such authority), he used the question to argue that there were limitations on state legislatures beyond those in the constitutional text, stating:

I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State.<sup>22</sup>

Chase's discussion of the restraints on legislatures combined universalistic and particularistic elements. In referring to the social compact, Chase seemed at times to refer to the compact as a written constitution--a specific text of enacted law. At other times, he referred to the social contract as a universalistic frame providing guidance through an examination of the basic purposes of all free, republican governments. These two varieties of social contractarian reasoning were intertwined throughout the opinion. He referred to the American people as living under the laws of "governments established on express compact, and on republican principles," and stated that the "obligation of a law" in such governments "must be determined by the nature of the power, on which it is founded." That power was founded through the social compact:

The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it.

The social compact was an efficacious restraint on lawmakers:

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<sup>22</sup> *Calder*, 3 U.S. at 387-88.

An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.

The phrase “great first principles of the social compact,” however, could be referring to the terms of an enacted constitution, or to the basic requirements applicable to any society founded upon a social contractarian framework. He also stated that there were “vital principles in our free Republican governments, which determined and over-ruled an apparent and flagrant abuse of legislative power.” The acts that Chase identified as violative of these principles included:

[an act] to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established . . . A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B . . .<sup>23</sup>

The list included restraints not listed in the text of the federal Constitution, such as the prohibition on laws that take property from A and give it to B.

Chase’s opinion can be understood as combining universalistic and particularistic threads of argument. The particularistic thread was based in the will of the American people as expressed in written constitutional text, historically enacted. This line of thinking was suggested by Chase’s reference to express compacts and constitutions established by the American people. Chase’s argument was also universalistic. He identified legislative acts that were barred by the “general principles of law and reason.” His repeated references to the principles of a free, republican government suggested the ability to reason about the nature of all such governments, independently of a specific

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<sup>23</sup> 3 U.S. at 388.

constitutional text. Moreover, Chase suggested that the nature of the social contract itself was circumscribed by universalistic principles. Concerning certain forbidden acts:

It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.<sup>24</sup>

Chase, here, used reason and justice as standards for evaluating the content of the social contract, and for ruling out possible interpretations. One could use the concept of the social contract as a means of reasoning from the basic purposes of government, and the essential principles of free, republican government. From these broad standards were derived somewhat more specific limitations, such as the principle that no legislature could take property from one party and give it to another.

The universalistic and particularistic threads of Chase's argument were not inherently contradictory. Used in conjunction, one might view a constitution as representing more than a state's supreme positive law. A constitution represents the act by which the people signal their decision to enter into the social contract. Thus, it represents their collective commitment to pursue a common set of fundamental purposes, beginning with establishment of a free, republican government. The basic outlines of the social contract follow from that commitment, including certain constraints on government. Under such an understanding, the social contract supports two lines of reasoning. The first is particularistic. It looks to the written constitution as the expression of a specific people's will through enactment of a supreme positive law. The second, combining universalistic and particularistic elements, proceeds in two steps. Initially, it recognizes the constitution as an affirmation of the people's collective commitment to free, republican government (particularistic). However, having

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<sup>24</sup> 3 U.S. at 388.

recognized the people's general commitment, this line of reasoning then looks directly to concepts such as freedom and republicanism for understanding (universalistic). Chase's discussion of general constraints on legislatures was more indicative of the second line of reasoning than the first. In discussing the social contract, he did not emphasize the text of a specific enacted document. Rather, recognizing that the American people had chosen to live according to the basic ends of the social contract, he emphasized the fundamental principles that naturally followed from that foundation.

Though not referring to it explicitly, Iredell responded to the thrust of Chase's discussion, rejecting the position held by some "speculative jurists" that "natural justice" provides grounds for judicial invalidation.<sup>25</sup> In the absence of restraints imposed by the Constitution, the judiciary had no power to invalidate legislative acts. Iredell advanced two principal arguments against judicial reliance on natural justice. First, citing Blackstone for the proposition that courts were subordinate to legislative will, Iredell argued that courts lacked authority to enforce principles beyond those included in enacted laws. Second, the vague and contested principles of natural justice were, in any event, too indefinite to provide meaningful guidance: "The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject."<sup>26</sup> Reliance on natural justice would place excessive discretion in the hands of judges.<sup>27</sup>

To a degree, the disagreement between Chase and Iredell concerned judicial use of extra-constitutional reasoning. As discussed below (sec. B), the Court as a whole

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<sup>25</sup> 3 U.S. at 398.

<sup>26</sup> 3 U.S. at 399.

<sup>27</sup> Justice William Paterson also argued for exclusive reliance on text. Though believing that retroactive laws, like the one at issue in *Calder*, "neither accord with sound legislation, nor the fundamental principles of the social compact," 3 U.S. at 397, Paterson rested his opinion entirely on textual interpretation. Since, in his view, the Ex Post Facto Clause applied only in the criminal context, he could not find that the legislature violated the Constitution, and, consequently, could not find the act invalid.

shifted away from extra-constitutional reasoning. The significance of the Chase-Iredell debate, however, transcends the question of extra-constitutionality. Chase's reasoning was not only extra-constitutional, but also universalistic. We will see that reasoning used by later justices in some ways followed the basic approach Chase outlined, though framing the UR as interpretation of constitutional provisions. Likewise, Iredell's argument was similar to arguments advanced by later justices against the use of UR. Even when framed as textual interpretation, the use of UR has been attacked as lacking authority, and so vague as to allow for excessive judicial discretion. Indeed, Iredell's opinion fits within the Delegative Model ("DM"). DM stresses particularistic bases for rights. The DM advocate may believe that the Constitution is consistent with universalistic ends and values, but, from the perspective of a judge, the Constitution has authority because it is the enacted will of the people. If the Constitution was framed with universalistic ends in mind, the judge must understand these ends as lying behind the textual provisions. The judge's role is to enforce those provisions' specific commands. Direct appeal to universalistic standards, like "natural law," or "natural justice," afford the judge too much room for imposition of subjective will. To a significant degree, the fault line between Chase and Iredell in *Calder* remains with us today.

B. The Marshall Court's Use of Extra-Constitutional, Universal Reasoning

In its first few decades, the Court heard fewer rights cases than it did in later periods. The Bill of Rights provided the most extensive array of protections, but it was understood at the time as applicable only against the federal government,<sup>28</sup> and the federal government did not have the reach that it would attain later. State governments

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<sup>28</sup> *Barron v. Baltimore*, 32 U.S. 243 (1834).

were more active, but the Constitution provides few rights provisions applicable against states (Gillman 1993, 46).<sup>29</sup> American political thought during the period of the Marshall Court placed great importance on the security of property, which was viewed as vital to liberty in itself, and also as instrumentally important for pursuit of the public good (Ely 1992, 63). During the period that Marshall served as Chief Justice (1801-1835), the Court made the Contract Clause the most significant constitutional limitation on state regulations, a distinction it held for much of the nineteenth century (Ely 1992, 64, 69; Currie 1985, 128). The Clause, appearing in Article I, § 10, prohibits the states from passing any law “impairing the obligation of contracts.” In determining whether government actions violated property rights, the justices also relied on the closely related doctrine of vested rights (Corwin 1914, 247), which had roots in the common law. The doctrine held generally that legislatures could not interfere with contract or property rights already recognized by, or “vested” under, existing law. Application of the doctrine fell within the judiciary’s accepted role of safeguarding existing legal rights (Gillman 1994, 627-28), and accorded with the common law’s general disapproval of retroactive legislation (Corwin 1914, 258). The doctrine also derived from the natural rights view that, regardless of textual provisions, one of government’s primary purposes is to protect property rights, which includes safeguarding vested rights (Haines 1930, ch. 4, sec. 5).

*Fletcher v. Peck* (1810)<sup>30</sup> was the first case in which the Court employed the Contract Clause to invalidate governmental action (Currie 1985, 128; Hale 1944, “The Supreme Court and the Contract Clause II,” 629), and the first case in which the Court exercised its authority to invalidate state laws (McCloskey 2000, 33). Marshall wrote for

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<sup>29</sup> These include Article I, § 10’s provision that the states shall not “pass any Bill of Attainder [or] ex post facto Law.”

<sup>30</sup> 10 U.S. 87.



a unanimous Court (the Marshall Court's decisions on constitutional issues into the 1820s were characterized by a large degree of consensus) (Currie 1985, 127-28). The decision rendered interpretations of the Clause that proved to have lasting impact on its subsequent development. Marshall held, for example, that grants could be contracts under the Clause, and, that the Clause applied to contracts between private parties and a state. The case arose out of the Yazoo land scandal, in which the Georgia legislature, influenced by corruption, sold huge tracts of land to private companies. After the corruption became public, a later legislature rescinded the acts that had effected the sale, which raised questions about the rights of third parties who had innocently acquired the lands. Peck had conveyed property to Fletcher, who later sued to void the sale on the grounds that Peck did not have good title. The central question concerned the constitutionality of the act rescinding the initial sale, and the Court determined that later legislatures were bound by the initial sale.

While Marshall based the decision, in part, on the Contract Clause, he also supported the decision with arguments finding no clear source in the constitutional text. He drew on the doctrine of vested rights to support his argument that the acts of one legislature could not be undone by a later legislature if the effect would be to interfere with property rights already vested. In articulating grounds for the decision, he also stated "there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded,"<sup>31</sup> and that:

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they

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<sup>31</sup> 10 U.S. at 133.

to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.<sup>32</sup>

In summarizing the decision's basis, Marshall said Georgia's rescission of the sales was prohibited "either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States."<sup>33</sup> Justice Thomas Johnson wrote separately to make clear that he rested his decision entirely on extra-constitutional principles prohibiting legislative violation of vested rights:

I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.<sup>34</sup>

Johnson voted to overturn Georgia's repealing act, despite the fact that, in his view, the act did not violate the Contract Clause, or any other constitutional provision.<sup>35</sup>

Four aspects of the *Fletcher* opinions merit attention. First, Marshall (and Johnson in concurrence) appealed to universalistic bases for the decision. He did not reference uniquely American principles, but "great principles of justice, whose authority is universally acknowledged." He did not reference the contingent circumstances of the United States, but "the nature of society and of government" (see Arkes 1990, 33). Johnson appealed to "a general principle," "the reason and nature of things," and "a principle which will impose laws even on the deity." Second, Marshall's UR (and Johnson's ) was extra-constitutional (Sherry 1987, 1175-76; Smith 1985, 70). Marshall did not link UR with constitutional text, and Johnson stated expressly that his opinion did not rest on the Constitution.

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<sup>32</sup> 10 U.S. at 135.

<sup>33</sup> 10 U.S. at 139.

<sup>34</sup> 10 U.S. at 143 (Johnson, J., concurring).

<sup>35</sup> 10 U.S. at 144-45. While Johnson agreed with Marshall that a grant could be a contract under the Clause, he did not believe that the obligation of the contract continued after such a contract was executed.

Third, Marshall's UR followed a broad model of reasoning, referred to here as reasoning from essential principles ("REP") that the Court has used in other issue areas. The approach begins with an appeal to a universalistic standard of evaluation ("USE"), like Marshall's appeal to the nature of society and government. It assumes a category of rights essential to comportment with the USE (here, property rights), and identifies more specific principles or requirements (intermediate premises, or "IMPs"), whose observance is essential to meaningful protection of the category of rights at stake. Marshall's line of argument was that, if there were any constraints at all growing out of the nature of society and government, they concerned property rights, and, more specifically, prevented a legislature from seizing an individual's property without providing compensation. Discussion here of REP is not meant to suggest that Marshall, or later justices, rigorously applied the model described, or that it was always applied in precisely the same way. Rather, it indicates a general way that the justices have incorporated universalistic reasoning into their opinions. Later chapters will note examples of how REP has been used in other issue areas as well.

Fourth, Marshall's reference to "general principles which are common to our free institutions" contained an ambiguity concerning the basis of rights. Grounding rights in principles common to "our institutions" suggests particularistic reasoning, with rights gaining their force from the fact that they are followed by American institutions and are the ones Americans have chosen and followed. Grounding rights in the principles common to "free institutions" suggests universalistic reasoning, with rights gaining their force from the requirements of freedom. Marshall, however, grounded rights in principles common to "our free institutions." The reference was a form of mixed rights

reasoning (“MRR”), combining universalistic and particularistic elements. Chase’s reasoning in *Calder* was also a form of MRR. Like Chase’s opinion, Marshall’s reference can be understood as weaving together universalistic and particularistic threads of argument. The particularistic thread places weight on the fact that the American people chose to organize their political society around free institutions. Hewing to the general principles common to those institutions, then, is faithful to the expressed will of a particular people. The universalistic thread emphasizes that the concept of freedom has meaningful content, apart from the expressed will of any specific people. Once we know that a people are committed to free institutions, we can reason about certain principles that are essential to the maintenance of those institutions. Appealing to principles common to “our free institutions” is a means of strengthening the basis of those principles by weaving the particularistic and universalistic threads together. We will see that the use of MRR has been common in other areas of the Court’s rights jurisprudence.

The Marshall Court used extra-constitutional UR in other notable cases, including *Terrett v. Taylor* (1815).<sup>36</sup> Like *Fletcher*, *Terrett* concerned a state legislature’s interference with private property rights through the reversal of earlier legislation. In 1776 and 1786, the Virginia legislature had recognized and confirmed the Episcopal Church’s title to certain lands. But in 1798 and 1801, the legislature repealed the previous acts and asserted the state’s ownership in the property. As in *Fletcher*, the Court held that the state was bound by the prior legislation. The state could not constitutionally assert its rights over the property that it had previously recognized as belonging to the Church. In his opinion for the Court, Justice Joseph Story rested the decision on the principles of vested rights. Prior to the Revolution, the Church had

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<sup>36</sup> 13 U.S. 43.

acquired the lands through various statutes and the common law, and the title to the property had “indefeasibly vested in the churches.”<sup>37</sup> Story stated that the Church’s vested rights were unaffected by the events of the Revolution, according to a principle of the common law that was “equally consonant with the common sense of mankind and the maxims of eternal justice.” Moreover, even assuming that the Revolution had deprived the Church of its rights in the lands, Virginia’s subsequent legislation “vested an indefeasible and irrevocable title.” Thus, *Terrett* reaffirmed the critical holding of *Fletcher*--that a state was bound by its own grants. Story identified this as “a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property.”<sup>38</sup> The decision stood:

upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals.<sup>39</sup>

The doctrine of vested rights, then, was presented with universalistic bases, supported by the “common sense of mankind,” the “maxims of eternal justice,” “the principles of natural justice,” “a great and fundamental principle of a republican government,” and the fundamental laws of every free government.” While Story referred to “the spirit and letter of the constitution,” unlike Marshall in *Fletcher*, he did not explicitly link his discussion with the Contract Clause or any other constitutional provision.

*Wilkinson v. Leland* (1829)<sup>40</sup> stands as a later example of the Marshall Court’s reliance on extra-constitutional, universalistic reasoning. In discussing the inherent

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<sup>37</sup> 13 U.S. at 49.

<sup>38</sup> 13 U.S. at 50-51.

<sup>39</sup> 13 U.S. at 52.

<sup>40</sup> 27 U.S. 627.

protections for property rights and the restraints that confined the legislature, notwithstanding the absence of a written constitution in that state, Story wrote:

That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred.<sup>41</sup>

That the justices during this period sometimes viewed themselves as relying on extra-constitutional principles was reflected in their handling of Section 25 of the 1789 Judiciary Act, which gave the Supreme Court jurisdiction over

a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, *on the ground of their being repugnant to the constitution*, treaties or laws of the United States, and the decision is in favour of such their validity . . . (emphasis added)

The Court drew a distinction between the scope of its authority concerning cases that came to it from the highest court of a state under the authority of Section 25, and the scope of its authority in cases that came to it from lower federal courts. The distinction arose from the fact that Section 25 jurisdiction explicitly required a claim that a state act was “repugnant to the constitution.” No such limitation applied to cases that came to the Supreme Court from lower federal courts. When hearing appeals from lower federal court decisions, many justices saw themselves as free to appeal to extra-constitutional principles, whereas, in Section 25 cases, the claim had to be based in constitutional provisions (White 1988, 603, 608, 611; Siegan 1980, 92-93). Writing for the Court in

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<sup>41</sup> 27 U.S. at 657.

*Satterlee v. Mathewson* (1829),<sup>42</sup> for example, Justice Bushrod Washington explained that the Court could not, in that case, entertain the same extra-constitutional, vested rights arguments as it could in cases coming from lower federal courts, because the Court was limited to the scope of Section 25's jurisdictional grant.<sup>43</sup> The distinction regarding Section 25 represented an acknowledgement by the justices that they were, at times, relying on extra-constitutional bases of decision.

We have seen, then, that in a number of prominent cases, the early Court used UR, appealing to a variety of USEs. In *Calder*, Chase outlined an approach based on principles derived from the social contract. In other instances, justices appealed to broad principles or concepts, including justice, equality, the nature of government, and “the fundamental laws of every free government.”<sup>44</sup> These USEs were presented, generally, as supporting the essential nature of property rights, and, more specifically, as supporting IMPs, such as the doctrine of vested rights, the requirement that government provide compensation when it seized private property,<sup>45</sup> and, the prohibition on governments legislating that the property of A would be transferred to B.<sup>46</sup> Adherence to these IMPs was viewed as indispensable to the realization of the broader standards.

We have also seen, in the cases examined, that the Court's use of UR was extra-constitutional. The Court, however, eventually moved away from extra-constitutional reasoning. Notwithstanding opinions like Marshall's in *Fletcher*, and Story's as late as 1829 in *Wilkinson*, by the middle of Marshall's tenure as Chief Justice, a shift was

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<sup>42</sup> 27 U.S. 380.

<sup>43</sup> 27 U.S. at 413; *see also* *Watson v. Mercer*, 33 U.S. 88, 108-10 (1834); *Davidson v. New Orleans*, 96 U.S. 97, 105 (1877).

<sup>44</sup> *Terrett v. Taylor*, 13 U.S. 43, 52 (1815).

<sup>45</sup> *Fletcher v. Peck*, 10 U.S. 87, 135 (1810).

<sup>46</sup> *Wilkinson v. Leland*, 27 U.S. 627, 658 (1829); *Calder v. Bull*, 3 U.S. 386, 388 (1798) (Chase, J. concurring).

underway towards an approach directly linking rights reasoning to the constitutional text. In prominent cases like *Dartmouth College v. Woodward* (1819)<sup>47</sup> and *Sturges v. Crowninshield* (1819),<sup>48</sup> the Court continued to develop its Contract Clause jurisprudence (Currie 1985, 128), but, in doing so, increasingly ensured that their arguments were framed exclusively as interpretations of the text. Vested rights principles were folded into broad understandings of the Contract Clause's reach (Sherry 1987, 1170-71; Currie 1985, 15). This approach minimized jurisdictional complications associated with Section 25, and made the justices less vulnerable to attack on the grounds that they only had authority to enforce positive law (White 1988, 628).

The initial reliance on extra-constitutional reasoning, and eventual shift away from it, reflected tension embedded within the social contractarian philosophical framework that played an important role in American constitutional thought--a framework seeking to protect pre-political, universalistic rights through the application of particularistic, positivistic laws. We might think of the social contractarian framework as consisting of two principal components. One component concerns the ends for which people enter into the social contract, centering on a description of the universal rights existing in the pre-political condition. The second component concerns the mechanisms through which the people act collectively to pursue those ends, centering on the institution of government to better secure their rights. With the institution of government, individuals surrender their natural liberty, and subject themselves to regulations for the common good. In the broadest sense, the protection of pre-political, universal rights remain as a standard for evaluating the legitimacy of government. Yet,

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<sup>47</sup> 17 U.S. 518.

<sup>48</sup> 17 U.S. 122.



individuals do not retain the same degree of liberty after the institution of government. This set of ideas poses a difficult question for judges: Once the second component of the social contractarian framework is implemented--the institution of government--does any role remain for judicial reference to the first component--assertions concerning the nature of pre-political, universal rights? The second component includes the enactment of the Constitution. Put another way, in interpreting that document, is it appropriate for justices to refer directly to the universalistic principles it is aimed at realizing?

On the one hand, if one's ultimate commitment is to universal rights that exist independently of positive laws, and the positive laws are understood as instrumental to protecting those rights, one might wish to refer directly to those pre-political rights that served as the *raison d'être* of the positive laws. That is, one might wish to serve the ends directly, rather than the tools designed indirectly to implement them. On the other hand, while the institution of government is a mechanism motivated by the securing of pre-political rights, it is also a transformative event, altering the relationship between individuals and liberty. Universal rights may be said to exist independently of government, but their actual protection depends upon the establishment of government and the rule of law, which requires the concretization of governing rules. Because the content of universalistic principles is vague and contested, the institution of government requires mechanisms for arriving at collective decisions in the face of disagreements, and for resolving disputes over interpretation and application of the laws. These mechanisms include delineation of the boundaries of authority between the various branches of governmental power. One view, consistent with the Delegative Model, stresses that judicial authority emanates from particularistic sources--enacted texts and common

understandings that give the text its needed specificity. On this view, if the judge refers directly to pre-political, universalistic principles, the judge transgresses the boundaries of judicial authority. The judge would better serve the ultimate purposes of political society through careful compliance with established, governing laws.

By placing vested rights principles under the umbrella of the Contract Clause, the justices made themselves less vulnerable to the charge that they were acting outside their authority. The shift away from extra-constitutional reasoning, however, did not necessitate an abandonment of UR. The use of UR could be framed another way. Rather than referring to universalistic principles extra-constitutionally, justices could link UR with particularistic bases of rights. More specifically, they could link UR with the constitutional text, understanding specific provisions as embodying universalistic principles. This approach enabled the justices to shed an element of their opinions that made them especially open to the charge of *ultra vires* decisionmaking. It did not, however, completely insulate the use of UR from criticism. Even when not presented extra-constitutionally, UR may be subjected to the charge that its indefiniteness opens the door to the exercise of excessive judicial discretion. As discussed in the following section, the Court's 4-3 split in a landmark case in 1827 revealed a fault line around the question of extra-constitutionality. In the long run, however, while extra-constitutionality would largely be avoided, questions and disagreements over the use of UR would persist.

C. Universal Powers--the Court's Development of the Concept of Inherent and Inalienable Governmental Powers, and the Decline of the Contract Clause

*Ogden v. Saunders* (1827)<sup>49</sup> represents a landmark case in the Court's Contract Clause jurisprudence, and the first time that Marshall wrote in dissent on a constitutional

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<sup>49</sup> 25 U.S. 213.

issue. From that point on, dissensus was more prevalent (Currie 1985, 127-28). The Court had almost never rejected a claim brought under the Clause, and, in upholding New York's bankruptcy law, the *Ogden* Court laid down the significant limitation that the Clause did not apply to prospective legislation (Currie 1985, 156). The Court had held in 1819 that the retroactive application of bankruptcy laws violated the Contract Clause.<sup>50</sup> The issue in *Ogden* was whether a state could constitutionally apply a law prospectively that would provide for the discharge of debts through bankruptcy proceedings. The Court divided 4-3, with Justices Washington, Johnson, Robert Trimble, and Smith Thompson each writing separate opinions upholding the New York law's prospective application, and Marshall dissenting (joined by Justices Story and Gabriel Duvall).

A central area of disagreement between the majority and dissenting justices concerned the source of a contract's obligation. For Marshall, a contract's obligation originated independently of political society. Even absent the institution of government, individuals had both obligations and rights arising from their contractual agreements. The obligation to observe contractual agreements

is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society, but are brought into it.<sup>51</sup>

Marshall acknowledged that, through the social contract, individuals yielded a large degree of authority to the government to regulate various aspects of contractual relations. Individuals surrendered the right to self-enforcement of their contracts, and, in return, government assumed the responsibility of affording proper remedies. Thus, Marshall's

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<sup>50</sup> *Sturges v. Crowninshield*, 17 U.S. 122.

<sup>51</sup> *Ogden*, 25 U.S. at 346.

line of reasoning drew a critical distinction between the remedies for contract violations, which were the sole responsibility of government, and the obligation to fulfill a contract, which was a natural, pre-political dictate never surrendered to the government. Since New York's bankruptcy legislation, even in its prospective application, interfered with the obligation of contracts, and did not merely regulate remedies; it constituted a violation of the Contract Clause. Marshall's opinion, then, appealed to pre-political, universalistic principles as a source of limitations on the government.

For the majority, the only authoritative source of the obligation of contracts was positive law. The majority did not contest the existence of normative principles applying to contractual relations in a state of nature. However, these pre-political principles were not relevant to analysis under the Contract Clause. Thus, Washington conceded that there was a "universal law of all civilized nations, which declares that men shall perform that to which they have agreed." This universal law applied in the absence of municipal law. It governed in international affairs, or on a remote island with no semblance of organized political society. It could not, however, bind people to contracts within a political society, since it was too vague to provide sufficient guidance. Organized society required more specific regulation of contracts. Government acquired the authority to regulate from the social contract. The universal law pre-dating government was subordinated to the municipal laws of the place where a contract was executed. These municipal laws became part of the contract itself, and traveled with the parties. As part of the contract, it followed that this municipal law could not itself impair the contract.<sup>52</sup>

Washington did find that states were constrained in their regulation of contracts, due to Art. I, § 10's prohibition of *ex post facto* laws, bills of attainder, together with the

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<sup>52</sup> 25 U.S. at 258-60.

Contract Clause. The universal principle underlying these clauses was the prohibition on retroactive laws, which were “oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man.”<sup>53</sup> Since the law at issue in *Ogden* acted only prospectively, it did not run afoul of the Constitution. Washington, then, appealed to universalistic principles as an interpretation of the core principles underlying several phrases in the constitutional text, while declining to rely on pre-political principles as the source of the contract’s obligation.

Johnson also countered Marshall’s view of the relationship between pre-political, universalistic principles, and the commands of positive law. He conceded the existence of contractual rights and obligations in a state of nature, “founded solely in the principles of natural or universal law.” Nevertheless:

when men form a social compact, and organize a civil government, they necessarily surrender the regulation and control of these natural rights and obligations into the hands of the government.<sup>54</sup>

Like Washington, Johnson stressed that rights flowing from contracts may be modified by positive laws because the “rights of all must be held and enjoyed in subserviency to the good of the whole.”<sup>55</sup> The social contract fundamentally transformed the rights of contracts, because men in political society “can enter into no contract which the laws of that community forbid, and the validity and effect of their contracts is what the existing laws gives to them.”<sup>56</sup> And, like Washington, Johnson argued that contracts were implicitly subject to municipal laws:

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<sup>53</sup> 25 U.S. at 266.

<sup>54</sup> 25 U.S. at 319.

<sup>55</sup> 25 U.S. at 282.

<sup>56</sup> 25 U.S. at 284.

[T]he obligation of a contract made within a sovereign State, must be precisely that allowed by the law of the State, and none other.

. . . [S]o far as relates to private contracts between individual and individual, it is the civil obligation of contracts; that obligation which is recognised by, and results from, the law of the State in which the contract is made, which is within the meaning of the constitution. If so, it follows, that the States have, since the adoption of the constitution, the authority to prescribe and declare, by their laws, prospectively, what shall be the obligation of all contracts made within them. Such a power seems to be almost indispensable to the very existence of the States, and is necessary to the safety and welfare of the people. The whole frame and theory of the constitution seems to favour this construction.<sup>57</sup>

None of the justices in *Ogden* challenged the premises of a social contractarian philosophy, positing the existence of pre-political rights, and the establishment of a government authorized to legislate for the common good. The rift between Marshall and the majority in *Ogden* can be understood, to a significant degree, as a disagreement over how to address the tension between the two components of the social contract. For Marshall, even after the formation of government, there was a proper place in the interpretation of rights for reasoning based on pre-political rights. The majority justices, on the other hand, while not quibbling with Marshall's account of natural law, believed that it was improper to reason directly from these pre-political principles. The authority of pre-political principles was subsumed by the social contract. As Johnson put it, by entering into the social contract, individuals surrendered the regulation and control of their natural rights and obligations into the hands of government.

Johnson's opinion was especially noteworthy, because, in addition to arguing that pre-political principles were subsumed in the social contract, he used universalistic

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<sup>57</sup> 25 U.S. at 321-22.

reasoning to support the existence of governmental powers. The government's authority to regulate contractual relations, Johnson argued, "seems to be almost indispensable to the very existence of the States, and is necessary to the safety and welfare of the people." Johnson's reasoning suggested that the authority to regulate contracts arose not simply from a specific text, but from the inherent requirements of a government capable of serving the public good. While others had stressed rights that the social contract was meant to protect, Johnson sought to demonstrate that certain governmental powers followed from the nature of the social contract, and from the institution of government. As others had reasoned from rights essential to freedom, Johnson reasoned from powers essential to government capable of providing for "the safety and welfare of the people." He declined to place weight on natural, pre-political, universal rights. At the same time, however, that Johnson curtailed the judicial relevance of natural rights, he reasoned universalistically about the authority for governmental powers.

Johnson's opinion in *Ogden* is especially notable when one recalls that this was the same Justice who had written separately in *Fletcher* to emphasize that, unlike Marshall, he had rested his opinion entirely on extra-constitutional, universal principles that "impose laws even on the deity."<sup>58</sup> Johnson's evolution reflected the general shift of the justices away from reliance on extra-constitutional, universal rights, and presaged the major role to be played by universalistic, inherent and inalienable governmental powers.

The concept of inherent and inalienable governmental powers has had the broadest impact in the context of the police powers (states' general power to enact laws for the public welfare), and especially in adjudication under the Fourteenth Amendment's Due Process Clause (discussed further in ch. 3). However, the concept was initially

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<sup>58</sup> *Fletcher v. Peck*, 10 U.S. 87, 143 (1810) (Johnson, J., concurring).

articulated in the context of the Contract Clause, and has been important in its development. Although by the late nineteenth century, the Due Process Clause replaced the Contract Clause as the chief constitutional vehicle for protection of property rights, the Contract Clause remained a major focus of the Court throughout the bulk of the nineteenth century (Olken 1993, 516-17), with the Taney Court (1836-1864) wielding it more than any other constitutional provision to invalidate state legislation (Currie 1985, 210-11). An important category of cases concerned state chartering of private corporations to perform services used widely by the public, such as transportation. The recipients of charters sometimes challenged state actions on the grounds that they impaired contractual obligations that the state itself had incurred by granting the charter. By the 1830s, the Court developed an approach that afforded the states greater leeway in regulating chartered corporations, not only by allowing them to expressly reserve certain powers, but also by strictly construing provisions in the grant potentially limiting regulation ( Olken 1993, 536-37).<sup>59</sup> While this “doctrine of reserved state powers” expanded the states’ scope of regulation, it did not address situations in which states adopted regulations that did not fall under express reservations and that interfered with a chartered corporation’s activities. The question the Court faced was the extent to which the Contract Clause could prevent states from exercising their police powers.

In a series of cases beginning in the late 1870s, the Court, relying on universalistic reasoning, determined that the states could not bargain away police powers. The state’s authority to regulate for the public good was inherent and inalienable. The Court first suggested this approach<sup>60</sup> tentatively in *Boyd v. Alabama* (1876),<sup>61</sup> stating that it was “not

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<sup>59</sup> E.g., *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837).

<sup>60</sup> See *Butchers' Union v. Crescent Slaughterhouse Co.*, 11 U.S. 746, 751 (1884).



prepared to admit that it is competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to legislate for the public welfare.”<sup>62</sup> Shortly afterwards, the Court unequivocally articulated the principle of inherent and inalienable governmental powers. In *Boston Beer Co. v. Massachusetts* (1877),<sup>63</sup> as in *Boyd*, a state had issued a charter allowing a party to engage in an activity but later enacted legislation prohibiting that very activity. In 1828, Massachusetts granted the Boston Beer Co. a license to manufacture malt liquors, but, in 1869, the state legislature enacted a prohibitory liquor law. The Court unanimously rejected the claim that the prohibitory legislation violated the Contract Clause. Justice Joseph Bradley reasoned that, even though the company was incorporated for the purpose of manufacturing malt liquors, the charter did not:

exempt[] the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State.<sup>64</sup>

The Massachusetts legislature that issued the 1828 charter did not have the power to grant immunity from valid exercises of the police power by future legislatures. Banning the sale of liquors fell within the state’s police powers, and:

The legislature cannot, by any contract, divest itself of the power to provide for these objects. . . . Legislative discretion [regarding the exercise of the police powers] can no more be bargained away than the power itself.<sup>65</sup>

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<sup>61</sup> 94 U.S. 645.

<sup>62</sup> 94 U.S. at 649-50.

<sup>63</sup> 97 U.S. 25.

<sup>64</sup> 97 U.S. at 32.

<sup>65</sup> 97 U.S. at 33.

Two years later, the Court linked inalienable governmental powers with the purposes for which government was organized. In *Stone v. Mississippi* (1879),<sup>66</sup> the state granted a company the right to operate a lottery, and then banned the operation of lotteries. The Court again unanimously upheld the state's action on the grounds that the police powers were inalienable. Chief Justice Morrison R. Waite wrote:

No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.<sup>67</sup>

Evoking social contract theory, Waite explained the inalienability of the police powers as emanating from the sovereign people:

[T]he power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.'<sup>68</sup>

Since the prohibition of lotteries was within the legitimate scope of the state's police powers, any charter to conduct lotteries was issued "with the implied understanding" that

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<sup>66</sup> 101 U.S. 814.

<sup>67</sup> 101 U.S. at 819.

<sup>68</sup> 101 U.S. at 821.

the state might at a later time regulate or even ban the practice. In effect, every contract contained an implicit, unamendable provision it was subject to the state's police powers. Five years after *Stone*, in terms reminiscent of Johnson's opinion in *Ogden*, the Court tied the inalienability of governmental powers to their being "indispensable to the public welfare," and "necessary to the best interests of social organization."<sup>69</sup> The degree of consensus on these propositions was striking; the decisions in *Boyd*, *Boston Beer Co.*, and *Stone* were all issued without dissent. As Waite wrote in *Stone*: "All agree that the legislature cannot bargain away the police power of a State."<sup>70</sup>

Universalistic reasoning is more familiar with respect to the first component of the social contract--the assertion of pre-political rights. In its development of the concept of inherent and inalienable police powers, the Court used universalistic reasoning with respect to the scope of governmental powers. The justices' rooted their reasoning in the second component of the social contract--individuals' subjection to governance for the common good. The evocation of the social contract was universalistic. The justices were not referring simply to the provisions of a specific text, enacted by a particular people. They were referring to the basic purposes for which government was organized, and the essential requirements of collectively pursuing the common good. We saw above (sec. A) that, in *Calder*, Chase evoked the social contract universalistically with respect to the grounding of rights. He referred not to a particular enacted text, but to the basic purposes for which individuals surrendered liberty, and the essential requirements of freedom. As the Declaration pronounced rights could not be alienated, the Court's approach to the

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<sup>69</sup> *Butchers' Union v. Crescent Slaughterhouse Co.*, 111 U.S. 746, 751 (1884).

<sup>70</sup> 101 U.S. at 817.

Contract Clause pronounced that certain powers could not be alienated, regardless of particularistic preferences.<sup>71</sup>

The concept of inalienable governmental powers was critical to the development of the Court's Contract Clause jurisprudence, as the justices emphasized that contractual relationships were subject to the state's police powers. The following language from a 1905 decision was typical of the Court's approach:

It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power . . . is paramount to any rights under contracts between individuals.<sup>72</sup>

With the police powers taking precedence over contractual relationships, the Court's analysis largely amounted to whether the challenged state action was a valid, reasonable exercise of the state's police powers. Since this was the same approach used in challenges to economic regulations brought under the Fourteenth Amendment's Due Process Clause, the Court's approach to economic due process and Contract Clause cases converged, as reflected in the following statement from a 1914 decision:

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<sup>71</sup> The Court's use of UR with respect to governmental powers appears to be extra-constitutional in the same way that Chase's universalistic reasoning with respect to rights was extra-constitutional. Yet, as noted, the Court's universalistic reasoning with respect to powers has enjoyed a remarkable degree of consensus. A question that merits investigation is why extra-constitutionality has been more controversial in the context of rights than powers. Generally, the Court's use of universalistic reasoning about governmental powers is a relatively neglected topic. Justices have reasoned universalistically about powers since the Court's earliest cases and across a wide range of issue areas. In *Calder v. Bull* (1798), for example, Iredell, while rejecting the use of extra-constitutional, universalistic reasoning as a basis for rights, suggested that eminent domain was an inherent governmental power, one without which "the operations of Government would often be obstructed, and society itself would be endangered." 3 U.S. 386, 400. Just two years later, Paterson wrote of the governmental power of confiscation and banishment as one that "grows out of the very nature of the social compact." *Cooper v. Telfair*, 4 U.S. 14, 19 (1800). An in-depth examination of universalistic powers reasoning is warranted but beyond the scope of this project.

<sup>72</sup> *Manigault v. Springs*, 199 U.S. 473, 480.

[I]t is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.<sup>73</sup>

For this proposition, Justice Mahlon Pitney cited *Boston Beer Co.* – one of the initial Contract Clause cases articulating the concept of inalienable governmental powers – along with prominent due process opinions.<sup>74</sup> Under this approach, in the decades following the Court's articulation of the concept of inalienable governmental powers, the significance of the Contract Clause declined (Clarke 1985, 192). During this period, the Court upheld a wide range of state actions interfering with contractual obligations on the grounds that they represented valid exercises of the police powers, including, for example, regulations regarding railroad safety,<sup>75</sup> placement of billboards,<sup>76</sup> transportation of water across state lines,<sup>77</sup> and state legislation allowing a party to maintain a dam after it had privately contracted not to do so.<sup>78</sup>

The landmark case *Home Building and Loan Association v. Blaisdell* (1934)<sup>79</sup> merits attention for the majority's further elaboration of inalienable governmental powers, and disagreement over the alterability of constitutional meanings. In the midst of

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<sup>73</sup> *Atlantic Coast Line R. Co. v. City of Goldsboro*, 232 U.S. 548, 558 (1914) (upholding regulations of the speed, shifting, and other aspects of the railroads' operations); see also *Chicago & A.R. Co. v. Tranbarger*, 238 U.S. 67, 77 (1915) ("But a more satisfactory answer to the argument under the contract clause, and one which at the same time refutes the contention of plaintiff in error under the due process clause, is that the statute in question was passed under the police power of the state for the general benefit of the community at large and for the purpose of preventing unnecessary and widespread injury to property.").

<sup>74</sup> E.g., *The Slaughterhouse Cases*, 83 U.S. 361 (1872); *Munn v. Illinois*, 94 U.S. 113 (1876).

<sup>75</sup> *Atlantic Coast Line R. Co. v. City of Goldsboro*, 232 U.S. 548, 558 (1914); *Chicago & A.R. Co. v. Tranbarger*, 238 U.S. 67, 77 (1915).

<sup>76</sup> *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U.S. 269 (1919).

<sup>77</sup> *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908).

<sup>78</sup> *Manigault v. Springs*, 199 U.S. 473 (1905).

<sup>79</sup> 290 U.S. 398.

the Depression, the Minnesota legislature provided relief to homeowners by instituting a moratorium on mortgage foreclosures. Under temporary measures, the mortgagor could retain possession if reasonable rent were paid. The legislation was challenged as an impairment of the lenders' contractual rights relating to foreclosure. In a 5-4 decision, the majority upheld the legislation as a reasonable exercise of the state's police powers. In his opinion for the Court, Chief Justice Charles Hughes linked the superiority of the police powers with their being inherent to sovereignty and necessary for public order:

Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,-a government which retains adequate authority to secure the peace and good order of society.<sup>80</sup>

The state thus retained the authority to regulate for the common good, even if it “has the result of modifying or abrogating contracts already in effect.”<sup>81</sup> If a state's regulations otherwise constituted a valid exercise of power, “it is no objection that the performance of existing contracts may be frustrated.” In adjudicating Contract Clause challenges, the issue was “not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.”<sup>82</sup> Hughes cited Johnson's opinion in *Ogden*, stressing that the Constitution's prohibition of laws impairing contractual obligations must not be interpreted in a rigidly literal fashion, since: “Societies exercise a

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<sup>80</sup> 290 U.S. at 435.

<sup>81</sup> 290 U.S. at 435 (quoting *Stephenson v. Binford*, 287 U.S. 251, 276 (1932)).

<sup>82</sup> 290 U.S. at 438.

positive control as well over the inception, construction and fulfillment of contracts, as over the form and measure of the remedy to enforce them.”<sup>83</sup>

Hughes rested the decision in part on the emergency circumstances to which the Minnesota legislature was responding, but the opinion suggested great deference to legislatures even in the absence of special exigencies.<sup>84</sup> Hughes also argued that constitutional rights evolved with changing understandings about private-public relationships and the legitimacy of governmental actions. He described a “growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare.” More generally, Hughes rejected the notion that constitutional meanings are pegged to traditional understandings:

It is no answer to say that . . . what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.<sup>85</sup>

In dissent, Justice George Sutherland (joined by Justices Willis Van Devanter, James McReynolds, and Pierce Butler) challenged the majority’s assertion that

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<sup>83</sup> 290 U.S. at 429 (quoting *Ogden v. Saunders*, 25 U.S. 213, 286 (1827) (Johnson, J., concurring)).

<sup>84</sup> Although the exigencies of the Depression served as the historical backdrop for *Blaisdell*, its rationale seemed not to be limited to those extraordinary circumstances, and later events confirmed this. Ely 1992, 121. In a number of cases shortly after *Blaisdell*, e.g., *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934); *Treigle v. Acme Homestead Ass’n*, 297 U.S. 189 (1936), the Court invalidated other Depression-era state acts designed to provide relief to debtors, distinguishing *Blaisdell* on the grounds that the challenged actions could not be justified as emergency, temporary measures. See Clarke 1985, 193. Within a few years, however, the Court indicated that emergency circumstances and the limited duration of measures would not be prerequisites to constitutional interferences with contractual obligations. E.g., *Gelfert v. National City Bank of New York*, 313 U.S. 221, 235 (1941); see also *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 n. 19 (1977).

<sup>85</sup> *Home Building and Loan Association v. Blaisdell*, 290 U.S. at 442-43.

constitutional meanings evolved with changing circumstances. A constitutional provision, Sutherland argued, could not mean one thing at one time, and something contradictory at a later time.<sup>86</sup> The dictates of the Constitution did not limit government less in difficult times.<sup>87</sup> Sutherland allowed that circumstances could bring new situations within the ambit of constitutional provisions, but asserted that “their meaning is changeless; it is only their application which is extensible.”<sup>88</sup> A constitution’s purpose was to fix fundamentals of government, placing them beyond the reach of changes in public opinion. The judiciary’s role was to enforce the Constitution as written, based on the intentions and understandings of those who framed and adopted it. If circumstances made changes to the Constitution desirable, those changes could only be made by the people through the amendment procedures. There would be little point to a Constitution if its meaning fluctuated with new circumstances and trends in public opinion:<sup>89</sup> “If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned.”<sup>90</sup> Minnesota’s mortgage moratorium violated the Contract Clause, since the Clause was framed with “the studied purpose of preventing legislation designed to relieve debtors especially in time of financial distress.”<sup>91</sup>

Although the approach to the Contract Clause that Hughes described in *Blaisdell* was largely in place already, the decision crystallized and elaborated upon existing doctrine. It captured the extent to which the Clause had already declined in potency since the early nineteenth century, while furthering its demise (Clarke 1985, 192). In the early

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<sup>86</sup> 290 U.S. at 448-50.

<sup>87</sup> 290 U.S. at 449.

<sup>88</sup> 290 U.S. at 451.

<sup>89</sup> 290 U.S. at 452-53.

<sup>90</sup> 290 U.S. at 473.

<sup>91</sup> 290 U.S. at 453.



nineteenth century, the Clause “was regarded as an absolute bar to any impairment.”<sup>92</sup> While controversy might center on any number of questions relevant to whether a state’s actions impair contractual obligations, once it was determined that an impairment had occurred, it was understood that the Constitution had been violated. The approach the majority had adopted by the time of *Blaisdell* was not categorical in this way. State acts that impaired, or even completely nullified contractual obligations, could be upheld as consistent with the Clause. The analysis focused on whether the state act constituted a valid exercise of the police powers--a selection by the legislature of a reasonable means to pursue a legitimate governmental objective. Since it revolved around an analysis of valid police powers, this approach was largely indistinguishable from the Court’s method of determining whether deprivations of property occasioned by economic or business regulations violated the Due Process Clause (Hale 1944, “The Supreme Court and the Contract Clause: III,” 890). Contractual obligations, after all, represented a form of property. To the extent that Contract Clause analysis reduced to an examination of whether a deprivation of property was reasonable, some considered it to have been rendered irrelevant.<sup>93</sup> The decline of the Clause’s significance was of such magnitude that the Court did not invalidate a state law on Contract Clause grounds for a forty-year period between the late 1930s and late 1970s (Ely 1992, 144).<sup>94</sup>

After confirming the dormancy (Clarke 1985, 193-94) of the Clause in 1965,<sup>95</sup> two cases in the late 1970s, suggested a potential revival, or at least the adoption of an approach that would involve greater scrutiny of state laws interfering with contractual

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<sup>92</sup> *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n. 17 (1977).

<sup>93</sup> See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 n. 12 (1978).

<sup>94</sup> See also *United States Trust Co. v. New Jersey*, 431 U.S. 1, 60 (1977) (Brennan, J., dissenting).

<sup>95</sup> *City of El Paso v. Simmons*, 379 U.S. 497 (1965).

obligations.<sup>96</sup> Two cases in the early 1980s, however, seemed to limit their significance substantially, calling into question their lasting impact. The Court has done little since that time to clarify the law in this area, though perhaps the most telling indication is the relatively low amount of attention that the justices have paid to the Clause for more than two decades. At any rate, these more recent cases confirmed important doctrines enunciated in *Blaisdell* and earlier, including the Court's long-standing principles regarding inalienable governmental powers. Legislatures can not bargain away their police powers, and contracts are understood as incorporating existing laws regarding the interpretation and enforcement of contracts.<sup>97</sup> The "essential attributes of sovereign power" are "necessarily reserved by the States to safeguard the welfare of their citizens."<sup>98</sup> Thus, a state can not, by contract, surrender these essential attributes of sovereignty, and, can not be held to any contractual provision by which it had purported to do so.<sup>99</sup> In short, the Contract Clause does not stand in the way of the valid exercise of a state's police powers. While more recent cases introduce some uncertainty concerning the precise guidelines that would govern the Court's review of individual state acts, it remains clear that state actions might be upheld even if they interfere with obligations incurred by contract, or barred them completely.<sup>100</sup>

While detailed discussion of economic substantive due process is left for the next chapter, it is important to note here that *Blaisdell* was handed down just a few years before a series of decisions in the late 1930s<sup>101</sup> in which the Court effectively ceased

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<sup>96</sup> *Allied Structural Steel Co. v. Spannaus* 438 U.S. 234 (1978); *United States Trust Co.*, 431 U.S. 1 (1977).

<sup>97</sup> *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n. 17 (1977).

<sup>98</sup> 431 U.S. at 21.

<sup>99</sup> 431 U.S. at 23.

<sup>100</sup> *Exxon Corp. v. Eagerton*, 462 U.S. 176, 190 (1983).

<sup>101</sup> E.g., *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

reviewing economic and business regulations to determine whether they interfered with constitutionally protected property rights. In one sense, a cause of the Contract Clause's decline was the rise of economic substantive due process, which, beginning in the late nineteenth century, made the Fourteenth Amendment's Due Process Clause the chief vehicle for judicial protection of property rights.<sup>102</sup> In the long run, however, the more fundamental cause of the Contract Clause's decline was the Court's general shift away from interfering with economic and business regulations in order to protect property rights. The line of jurisprudence--economic substantive due process--that stepped over the Contract Clause in importance in the late nineteenth and early twentieth centuries, met its own demise in the late 1930s. Ultimately, the virtual abandonment of significant Contract Clause review was a result of the same factors that led to the abandonment of serious economic due process review. As discussed at length in the next chapter, the Court developed a universalistic framework revolving around an appraisal of the relative importance of distinct categories of rights. The declining significance of the Contract Clause and economic due process resulted from the Court's demotion of property rights to secondary status within its hierarchical framework. As these two areas of jurisprudence were closely related, a number of themes from this Chapter are continued in the next, including the Court's shift away from extra-constitutional reasoning, and the development of inherent and inalienable governmental powers.

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<sup>102</sup> See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978).

## **Chapter 3**

### **Substantive Due Process**

The Thirteenth, Fourteenth, and Fifteenth Amendments, ratified in the wake of the Civil War, abolished slavery and guaranteed certain rights to Americans, regardless of race. While the aftermath of the Civil War and issues of race formed the backdrop for the enactment of these Amendments, the scope of the Fourteenth Amendment's importance within American jurisprudence expanded beyond questions of racial equality. Enacted in 1868, the Fourteenth Amendment, made U.S. citizens of all "persons born or naturalized in the United States and subject to the jurisdiction thereof," independent of citizenship in any particular state. The Amendment's first section also added certain limitations on state governments, including a provision that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."<sup>103</sup> The Fourteenth Amendment's Due Process Clause makes an especially interesting target of study. (The Fifth Amendment contains a clause with nearly identical language. Except when stated otherwise, "Due Process Clause" refers to the Fourteenth Amendment.) By the late nineteenth century, the Due Process Clause took the place of the Contract Clause as the most important restriction on the states, and as the principal constitutional provision serving to protect property rights (Ely 1992, 92; Corwin 1950, 273-74).<sup>104</sup> Prior to the

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<sup>103</sup> Of the three clauses in the first section of the Amendment--the Privileges and Immunities Clause, the Due Process Clause, and the Equal Protection Clause--the last two have played roles of tremendous importance within American constitutional jurisprudence, while the first has been relegated to obscurity. The Court's decision in *The Slaughterhouse Cases*, 83 U.S. 36 (1872) dealt the Privileges and Immunities Clause a blow from which it never recovered. Although certain justices at times have advocated a broader role for the clause, e.g., *Saenz v. Roe*, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting), it has remained of relatively little consequence in the Court's jurisprudence.

<sup>104</sup> The sweeping phrases of the Due Process and Equal Protection Clauses overlap conceptually (The Equal Protection Clause provides that no state may "deny to any person within its jurisdiction the equal protection of the laws.") In the decades following the Fourteenth Amendment's ratification, it was common for litigants to advance arguments under both clauses, and for the justices to address both clauses in the same opinions. Kay 1980, 668-69; Haines 1930, ch. 7, sec. 1. The justices' approaches to the two clauses overlapped. The concept of equality was critical to the Court's due process analysis. To withstand a due process challenge, legislative classifications had to have a rational basis, and to be general in application; they could not be aimed arbitrarily at a particular class. E.g., *Lochner v. New York*, 198 U.S. 45 (1905); see Gillman 1993; Haines 1930, ch. 7, sec. 1. Contemporary jurisprudence, too, reflects the close connection

Fourteenth Amendment's enactment, the Bill of Rights had been interpreted as applying only against the federal government.<sup>105</sup> The Due Process Clause became a locus of debate over which provisions of the Bill of Rights applied against the state. Due Process jurisprudence spans a wide range of substantive areas, from economic and business regulations, in the late nineteenth and early twentieth centuries, to laws banning abortion and homosexual sodomy in the twentieth and twenty-first centuries.

The Court's due process jurisprudence encompasses two sub-topics: substantive due process (discussed in this chapter) and procedural due process (discussed in ch. 4). By prohibiting the states from depriving a person of life, liberty, or property, without due process of law, the Clause allows that a state may deprive a person of life, liberty, or property, if due process is provided. Procedural due process ("PDP") concerns, in large part, the procedures that a state must follow before it may constitutionally punish individuals by depriving them of life, liberty, or property.<sup>106</sup> It concerns, for example, the right to a jury trial, and the right to counsel. While the Clause's language is most suggestive of procedural concerns, the courts have long held that certain regulations unconstitutionally deprive individuals of life, liberty, or property, regardless of the procedures afforded. This branch has come to be known as substantive due process

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between due process and equal protection. In one recent case for example (discussed in sec. G), the majority relied on due process to strike down a Texas law that banned certain intimate sexual acts between persons of the same sex, noting that it eschewed the Equal Protection Clause for tactical reasons (invalidating the law on equal protection grounds would have made it too easy for the legislature to accomplish the same illegitimate end through crafty revision of the legislation). A concurring justice (O'Connor) however, based her opinion on the Equal Protection Clause. *Lawrence v. Texas*, 539 U.S. 558 (2003). Notwithstanding the conceptual overlap, however, the justices have developed bodies of jurisprudence with respect to the two clauses that are sufficiently distinct to allow for an examination specifically focused on due process.

<sup>105</sup> *Barron v. Baltimore*, 32 U.S. 243 (1834).

<sup>106</sup> PDP also encompasses procedures provided in the civil context; the discussion in ch. 4 concentrates principally on the criminal context.

("SDP").<sup>107</sup> Although the Fifth Amendment contains its own Due Process Clause, the Court said relatively little about due process until after the enactment of the Fourteenth Amendment,<sup>108</sup> due in part to the relatively low level of the federal government's activity in the first part of the nineteenth century. The Due Process Clause of the Fourteenth Amendment assumed a major role in the Court's jurisprudence not long after enactment, and the Fifth Amendment's Due Process Clause subsequently attained greater significance.<sup>109</sup> Chapters Three and Four contain their scope by considering cases under

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<sup>107</sup> As early as 1898, the justices recognized the distinction between the two branches of due process. In *Holden v. Hardy*, the Court differentiated between two kinds of due process claims. The first kind involved "the general system of jurisprudence," "the proper administration of justice," or "methods of trial." The second included cases "wherein the state legislature was charged with having transcended its proper police power in assuming to legislate for the health or morals of the community." 169 U.S. 366, 383-84. Similarly, in *Twining v. New Jersey* (1908), the Court distinguished between cases dealing "with the principles which must be observed in the trial of criminal and civil causes," versus cases involving "the effect of due process in restraining substantive laws." 211 U.S. 78, 110. More recently, justices have observed that, although the Clause's language suggests "that it governs only the procedures by which a State may deprive persons of liberty," at least since the late 1880s, the Clause "has been understood to contain a substantive component as well, one barring certain government actions regardless of the fairness of the procedures used to implement them." *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992); see also *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) ("Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three.").

<sup>108</sup> In *Davidson v. New Orleans* (1877), the Court acknowledged the relatively low level of attention that due process had received prior to the Fourteenth Amendment, stating: "It is not a little remarkable, that while this provision [the Due Process Clause] has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion." 96 U.S. 97, 103-04.

<sup>109</sup> At least one justice initiated the concept of SDP under the Fifth Amendment's Due Process Clause, prior to the Fourteenth Amendment's enactment. Taney's opinion in *Scott v. Sandford*, 60 U.S. 393 (1857) is often cited as the first invocation of SDP by a justice. E.g., Currie 1985, 327. In that opinion, Taney wrote: "[A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law." 60 U.S. 450. Taney had foreshadowed this use of the Clause five years earlier in his opinion for the Court in *Bloomer v. McQuewan*, 55 U.S. 539 (1852), a case concerning the constitutionality of Congress's extension of a patent, where the rights to the patent had already been sold to others. The issue before the Court was whether the rights of purchasers of patents were protected when patent periods were extended. Taney interpreted the congressional act at issue to include protection for existing rights of the purchasers, so as not to interfere with existing rights. He added that, if the act had not included provision for the protection of the rights of purchasers of patents, and interfered with those rights, then constitutional problems would be raised: "The right to construct and use these planing machines, had been purchased and paid for without any limitation as to the time for which they were to be used. They were the property of the

the Fifth Amendment's Due Process Clause only to the extent that they bear on the discussion of the Fourteenth Amendment. This chapter also contains its focus by concentrating on a few issue areas of great significance: the Court's jurisprudence in the late nineteenth and early twentieth centuries concerning economic and business regulations; and the Court's jurisprudence, beginning in roughly the 1920s, applying rights of expression and privacy against the states.

Sections A, B, and C discuss the role that UR has played in the Court's extension of due process protection to rights of property, expression, and privacy, respectively. Section D demonstrates that the Court has employed a common, universalistic framework in each of these arenas. Section E discusses the role that universalistic reasoning has played in the Court's SDP jurisprudence with respect to inherent and inalienable governmental powers. Section F examines the role of UR in the Court's development of a hierarchical approach to rights, and Section G, discusses fault lines in the contemporary Court with respect to the use of UR and the evolution of constitutional meanings.

A. Economic Due Process

1. Due Process as a Textual Vehicle for the Protection of Property Rights

It was noted in ch. 2 that a shift began, during the Marshall Court, away from appeals to extra-constitutional bases of rights. The justices had increasingly relied on the constitutional text--especially in the form of the Contract Clause--in securing property rights. As early as 1798, Iredell argued that justices had authority to interfere with

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respondents. Their only value consists in their use. And a special act of Congress, passed afterwards, depriving the appellees of the right to use them, certainly could not be regarded as due process of law." 55 U.S. at 553. *See also Hepburn v. Griswold*, 75 U.S. 603, 623-24 (1869).



legislation only when supported by constitutional text (ch. 2, A).<sup>110</sup> By the late nineteenth century, the emphasis on linking judicial reasoning to positive law had grown stronger, and extra-constitutional arguments were rare (Grey 1988, 217-18). As noted, in the decades following the enactment of the Fourteenth Amendment, the Due Process Clause largely took the place of the Contract Clause as the primary textual vehicle for the protection of property rights. In a decision handed down just five years after the Amendment's enactment, Bradley explicitly linked due process with vested rights.<sup>111</sup> A central principle of property rights understandings dating back to the Court's earliest period was that no legislature could validly declare that property properly belonging to A would be transferred to B. The justices brought this principle under the umbrella of due process protection (Bird 1913, 46). In a decision handed down less than ten years after the Amendment's enactment, the Court stated:

It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision.<sup>112</sup>

The shift away from extra-constitutionality, however, was not instantaneous. In *Loan Association v. Topeka* (1874),<sup>113</sup> the Court invalidated an act that authorized local governments to issue bonds benefiting private interests. In holding that governments

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<sup>110</sup> *Calder v. Bull*, 3 U.S. 386, 398 (1798) (Iredell, J., concurring).

<sup>111</sup> *Bartemeyer v. Iowa*, 85 U.S. 129, 136 (1873) (Bradley, J., concurring).

<sup>112</sup> *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877); see also *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 236-37 (1897) (upholding the challenged state action but indicating that the seizure of private property would violate due process absent the provision of just compensation); *Missouri Pac. Ry. Co. v. State of Nebraska*, 164 U.S. 403, 417 (1896) (invalidating an order that a railroad company grant to an association of farmers the right to build an elevator on its property).

<sup>113</sup> 87 U.S. 655.

could tax only for public purposes, the Court (in an opinion by Samuel Miller) did not rely on text, but the essential nature of free governments and the social compact:

There are limitations on . . . power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.<sup>114</sup>

These limitations included the prohibition on transferring private property from one individual to another. The reasoning was similar to extra-constitutional, universalistic reasoning employed by justices from the Court's earliest period. Miller's appeal to the "essential nature of all free governments" was reminiscent of Story's reliance, in *Terrett v. Taylor* (1815), on the "fundamental laws of every free government."<sup>115</sup> (ch. 2, B). The reasoning was universalistic, because the limitations he identified were essential, not merely to the particularistic preferences, traditions, and circumstances of the American people, but, rather, to the establishment of free government. Miller's reasoning from the social compact recalled Chase's social contractarian reasoning in *Calder v. Bull* (1798) (ch. 2, A). It was noted that Chase's social contractarian reasoning was partly universalistic, as when he stated that it was "against all reason and justice, for a people to entrust a Legislature" with certain powers, suggesting standards transcending any particular, textual manifestation of the social contract.<sup>116</sup> Miller's reference to the social compact also suggested UR. The limitations he identified were not simply part of the particular bargain into which the American people entered as evidenced by specific constitutional provisions. He argued that the social compact could not exist without these limitations. Miller's standards transcended the social compact itself. Moreover, like

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<sup>114</sup> 87 U.S. at 663.

<sup>115</sup> 13 U.S. 43, 52.

<sup>116</sup> *Calder v. Bull*, 3 U.S. 386, 388 (1798) (Chase, J., concurring).

Chase and Story, Miller reasoned from USEs to IMPs, including the principle that no government could take the property of A and transfer it to B. The Court concluded that the challenged act violated this paradigmatic principle of vested rights.

Miller might have hinted at due process by stating that only a despotic government would assert unlimited control over the “lives, liberty, and property” of its citizens, but he did not cite the Clause or any other textual provision. The sole dissenting justice, Nathan Clifford, evidently interpreted Miller’s opinion as relying on extra-constitutional reasoning, since he criticized the opinion on those grounds. Citing Iredell’s opinion in *Calder*, Clifford argued that the Constitution provided the only legitimate authority for the judicial invalidation of legislation. Justices could not invalidate state laws merely because they considered them “unwise, unjust, or inexpedient.” Absent limitations rooted in constitutional text, “the power of legislation must be considered as practically absolute, whether the law operates according to natural justice or not in any particular case.”<sup>117</sup> Limitations had to be specific. The justices could not invalidate state laws “on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution.” Judicial reliance on such limitations would “make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism.”<sup>118</sup> Where no constitutional text applied, representative government offered citizens the greatest security. The fault line between the majority and Clifford in *Loan Association* was strikingly similar to that between Chase and Iredell seventy-six years earlier in *Calder*.

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<sup>117</sup> *Loan Association v. Topeka*, 87 U.S. 655, 668 (1874) (Clifford, J., dissenting).

<sup>118</sup> 87 U.S. at 669 (Clifford, J., dissenting).

In later cases, the Court followed *Loan Association* in applying, without reference to constitutional text, the doctrine requiring public purposes for taxation.<sup>119</sup> Ultimately, however, the doctrine was brought under the aegis of the Due Process Clause.<sup>120</sup> Thus, although some early cases establishing the public purpose requirement departed from the dominant tendency, here, too, the Court eventually adopted an approach in line with the shift towards linking judicial reasoning with positive law. The arguments of Iredell and Clifford retain their force today. The distaste for extra-constitutional reasoning remains strong, and contemporary jurisprudence, too, is characterized by the inclination to ground judicial reasoning in enacted law (Sherry 1987, 117). As discussed in the sections below, even while placing basic principles of vested rights under the umbrella of due process, the Court continued to rely on UR, and often this reasoning was similar to that employed by justices during the Court's earliest period, and by Miller in *Loan Association*.

## 2. The Establishment of Economic Due Process

The pillars of the Court's economic due process ("EDP") jurisprudence were initially articulated in dissenting opinions (Brown 1927, 946). Later, a majority adopted EDP doctrines in decisions upholding challenged governmental actions, and, by the late 1890s, began using the doctrines to invalidate legislation. The sections below examine the role of UR in the development of EDP.

### a. *Slaughterhouse*, and the Separate Opinions of Field and Bradley

In the Court's first significant case interpreting the Fourteenth Amendment, the majority, in a 5-4 decision, took a restrictive view of the limitations it placed on the

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<sup>119</sup> E.g., *Cole v. La Grange*, 113 U.S. 1 (1885); *Parkersburg v. Brown*, 106 U.S. 487 (1883).

<sup>120</sup> E.g., *Green v. Frazier*, 253 U.S. 233, 238-39 (1920); *Fallbrook Irrigation District v. Bradley*, 164 U. S. 155 (1896).

states. *The Slaughterhouse Cases* (1872)<sup>121</sup> concerned a Louisiana statute that granted exclusive privileges to a specific company to operate commercial slaughterhouses in New Orleans. The act was challenged on the grounds that it created a monopoly, preventing others from engaging in a lawful occupation. Miller paid little attention to the due process challenge,<sup>122</sup> concluding that the act was a legitimate exercise of the police power. The dissenters agreed with the majority that states were entitled to engage in legitimate exercises of the state's police powers for the public health, safety, and morality,<sup>123</sup> but argued that the granting of exclusive privileges to a butchering establishment was not a valid exercise of the police powers.

In their dissenting opinions, Justices Stephen Field and Bradley began to develop an understanding of the Fourteenth Amendment as a more robust source of constraints on the states.<sup>124</sup> Rejecting the majority's position that the Fourteenth Amendment applied against the states only rights of national citizenship that were explicit or implicit in the text of the Constitution, Field (joined by Chief Justice Salmon P. Chase, and Justices Noah H. Swayne and Bradley) argued that the Fourteenth Amendment encompassed the "natural and inalienable rights which . . . of right belong to the citizens of all free governments."<sup>125</sup> For Field, the content of the rights protected by the Fourteenth

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<sup>121</sup> 83 U.S. 36.

<sup>122</sup> The act was also challenged under the Privileges and Immunities Clause. The Court placed such a restrictive interpretation on the Clause that the opinion "all but read the Privileges or Immunities Clause out of the Constitution," and "sapped [it] of any meaning." *Saenz v. Roe*, 526 U.S. 489, 521, 527 (1999) (Thomas, J., dissenting).

<sup>123</sup> As in later cases, Field and Bradley were at pains to reaffirm their acceptance of the police powers. *See, e.g., Bartemeyer v. Iowa*, 85 U.S. 129, 137-38 (1873) (Bradley, J., concurring, and Field, J., concurring).

<sup>124</sup> Field placed his reasoning principally under the Privileges and Immunities Clause, while Bradley, foreshadowing the Court's later direction, emphasized due process. Field's reasoning remains pertinent. When it became clear that a majority was more receptive to arguments advanced under due process, Field employed the same basic reasoning under that Clause.

<sup>125</sup> *Slaughterhouse Cases*, 83 U.S. 36, 96-97 (1872) (Field, J., dissenting); *see also Bartemeyer v. Iowa*, 85 U.S. 129, 140 (1873) (Field, J., concurring) ("[The Fourteenth Amendment] declared that [American

Amendment was determined by USEs--natural rights and the requirements of freedom.

The Amendment's force came in applying these rights against the states. Field linked the Amendment's protections with the Declaration:

[T]he fourteenth amendment . . . was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes.<sup>126</sup>

For Field, freedom entailed property as an essential category of rights. He cited *Corfield v. Coryell* (1823),<sup>127</sup> which had included in a list of fundamental rights “the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety.”<sup>128</sup> More specifically, he posited “the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons.”<sup>129</sup> While all pursuits or callings were subject to the police powers, the right guaranteed that “all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition.” The importance of the right was magnified because the “right of free labor [was] one of the most sacred and imprescriptible rights of man.” Indeed, the right was the “fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the

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citizens'] privileges and immunities, which embrace the fundamental rights belonging to citizens of all free governments, should not be abridged by any State”).

<sup>126</sup> *Slaughterhouse Cases*, 83 U.S. at 106 (Field, J., dissenting).

<sup>127</sup> 6 F.Cas. 546 (C.C.E.D. Pa.). The *Corfield* opinion was written by J. Washington while sitting on circuit. The case, decided forty-five years before the enactment of the Fourteenth Amendment, arose under the Privileges and Immunities Clause of Article IV, Section 2, which provides: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” Field’s understanding of the relationship between the two Privileges and Immunities Clauses was that, with respect to those privileges and immunities “which of right belong to the citizens of all free government,” the Article Four Clause provided that no state could discriminate against the citizens of another state, while the Fourteenth Amendment provided that these rights applied equally to all U.S. citizens, regardless of state citizenship.

<sup>128</sup> *Slaughterhouse Cases*, 83 U.S. at 97-101 (Field, J., dissenting).

<sup>129</sup> 83 U.S. at 97 (Field, J., dissenting).

country our government will be a republic only in name.”<sup>130</sup> From the right to pursue a lawful calling (“RTC,” for brevity), followed the prohibition on the granting of exclusive privileges, which Field found to be “opposed to the whole theory of free government.”<sup>131</sup> Field allowed for the constitutionality of monopolies in a traditionally limited set of industries where the government had issued a grant, providing exclusive privileges. However, with respect to the “ordinary trades or callings of life,” monopolies violated the “liberty of citizens to acquire property and pursue happiness.”<sup>132</sup> Field’s opinion evoked the early Court’s use of UR. His reference to the RTC as “the fundamental idea upon which our institutions rest,” recalled Marshall’s reference in *Fletcher* to “general principles which are common to our free institutions.”<sup>133</sup> This MRR formulation can be understood as drawing on the American people’s choice to live under free, republican governments, and then reasoning from the requirements of freedom and republicanism. The approach simultaneously serves universalistic dictates and the particularistic will of the American people.

Like Field, Bradley drew a link between the Declaration and Fourteenth Amendment, asserting that the Due Process Clause reflected:

the great threefold division of the rights of freemen, asserted as the rights of man. Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are the fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all; and these

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<sup>130</sup> 83 U.S. at 109-10 (Field, J., dissenting).

<sup>131</sup> 83 U.S. at 111 (Field, J., dissenting).

<sup>132</sup> 83 U.S. at 101 (Field, J., dissenting).

<sup>133</sup> *Fletcher v. Peck*, 10 U.S. 87, 139 (1810).

rights, I contend, belong to the citizens of every free government.<sup>134</sup>

Among the general categories of rights meriting protection, Bradley asserted:

[N]one is more essential and fundamental than the right to follow such profession or employment as each one may choose, subject only to uniform regulations equally applicable to all.<sup>135</sup>

For the preservation, exercise, and enjoyment of these rights the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.<sup>136</sup>

The RTC implicated both liberty and property. An individual's right to choose an occupation was a form of liberty, and the employment itself constituted property. Thus, a law blocking citizens from practicing a lawful employment of their choosing deprived them of liberty and property in violation of the Due Process Clause.<sup>137</sup>

The dissenting opinions by Field and Bradley follow the REP framework. They began with USEs--natural rights and the requirements of a free, republican government. They identified a broad category of rights--property--whose protection was essential to the USEs. IMPs, including the right to acquire and possess, followed as more specific principles essential to meaningful protection of property rights. The right to free labor also followed, since earning income through one's productive labor was the primary means of acquiring property. It further followed that individuals must have the right to

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<sup>134</sup> 83 U.S. at 116 (Bradley, J., dissenting).

<sup>135</sup> 83 U.S. at 119 (Bradley, J., dissenting).

<sup>136</sup> 83 U.S. at 116 (Bradley, J., dissenting).

<sup>137</sup> 83 U.S. at 122 (Bradley, J., dissenting).



choose and pursue a lawful employment. Since the granting of exclusive privileges for the ordinary callings interfered with that right, any act effecting such a grant was invalid. Within this framework, each link in the chain of reasoning was necessary to fulfillment of the links that were higher in the chain. Thus, breaking any link in the chain amounted to a violation of the essential requirements of freedom.

In other opinions during the 1870s and 1880s, Field and Bradley continued to develop this line of reasoning. Dissenting from an 1876 ruling upholding maximum charges for the storage of grain, for instance, Field (joined by Swayne) asserted that due process “has been supposed to secure to every individual the essential conditions for the pursuit of happiness,” and that “liberty” under the Clause meant more:

than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment.<sup>138</sup>

Writing for the Court, Chief Justice Morrison Waite maintained that maximum charges were allowable in certain industries “affected with a public interest.” Field, rejecting the conclusion that the grain storage business was affected with a public interest, saw the legislation as “subversive of the rights of private property,”<sup>139</sup> because it improperly fixed the compensation that an individual could receive for use of his property in private business.<sup>140</sup> Due process only permitted maximum charges in narrowly defined circumstances--where the government had granted rights or privileges to a party which increased the value of the grantee’s property, or bestowed an advantage to the grantee

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<sup>138</sup> *Munn v. Illinois*, 94 U.S. 113, 142.

<sup>139</sup> 94 U.S. at 136 (Field, J., dissenting).

<sup>140</sup> 94 U.S. at 138 (Field, J., dissenting).

over competitors. In any other circumstances, the setting of compensation amounted to confiscation. Field reached this conclusion by reasoning about the essential elements of rights in property. Without the owner's ability to choose how to use property, the mere title in, and possession of, property meant little.<sup>141</sup>

In an 1884 case that was an outgrowth of *Slaughterhouse*, Field and Bradley further articulated their understanding of SDP.<sup>142</sup> While *Slaughterhouse* upheld the state's grant of exclusive privileges, the legislature repealed the grant, opening up the slaughterhouse industry to competition. The Court unanimously rejected a Contract Clause challenge of the repeal.<sup>143</sup> Concurring, Field revisited his attack on the grant, stating that "certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained." Field again linked these rights to the Declaration, stressing the inalienability of the rights to life, liberty, and the pursuit of happiness, which could not "be bartered away, or given away, or taken away, except in punishment of crime." These rights necessarily included:

the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must therefore be free in this country to all alike upon the same conditions.

Citing Adam Smith's *Wealth of Nations*, Field argued that the property each person maintained in his own labor was the most sacred because it was the basis of all other

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<sup>141</sup> 94 U.S. at 142-43 (Field, J., dissenting); see also *Stone v. Wisconsin*, 94 U.S. 181, 186-87 (1876) (Field, J., dissenting).

<sup>142</sup> *Butchers' Union v. Crescent Slaughterhouse Co.*, 111 U.S. 746 (1884).

<sup>143</sup> The majority opinion in *Butchers' Union v. Crescent Slaughterhouse Co.* was discussed above (ch. 2, D) in connection with the Court's development of the concept of inalienable governmental powers.

property. Consequently, to interfere with the manner in which a person wished to labor, when such labor was not injuring another, was to violate this sacred property, and to violate the liberty both of the worker and of those who might employ him.<sup>144</sup> In his own concurrence (joined by Justices John Marshall Harlan and William Woods), Bradley also explained the right to a calling as rooted in the Declaration's inalienable rights, stating: "The right to follow any of the common occupations of life is an inalienable right, it was formulated as such under the phrase 'pursuit of happiness' in the declaration of independence."<sup>145</sup> In violation of due process, the granting of monopoly privileges with respect to an ordinary calling deprived individuals of both liberty and property.

As discussed in the next section, the approach developed by Field and Bradley was largely adopted by the Court, though initially in cases rejecting due process claims.

b. Substantive Due Process Gains Majority Acceptance

Between *Slaughterhouse* (1872) and the late 1880s, the approach developed by Field and Bradley gained the widespread acceptance of the justices (Haines 1930, ch. 6, sec. 2), although the Court had not yet invalidated state legislation on SDP grounds (Currie 1985, 365). Just a year after *Slaughterhouse*, the Court hinted that due process might impose substantive restraints.<sup>146</sup> In a series of later cases upholding state actions, majority opinions further indicated the Court's willingness to consider claims that

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<sup>144</sup> 111 U.S. at 756-57 (Field, J., concurring).

<sup>145</sup> 111 U.S. at 763 (Bradley, J., concurring).

<sup>146</sup> *Bartemeyer v. Iowa*, 85 U.S. 129 (1873); see Brown 1925-26, 946. *Bartemeyer* concerned Iowa's ban on the sale of intoxicating liquors. The owner of a liquor business claimed the act deprived him of the property he used to conduct that business. While the Court did not reach the issue (because the record did not establish that the owner was in possession of the property prior to passage of the act banning the sale of liquor), Miller noted that if ownership of the property prior to the act had been established, it would have presented a "very grave question[]" as to whether due process had been violated. 85 U.S. at 133.

regulations deprived persons of liberty or property without due process.<sup>147</sup> In an 1888 decision upholding a state ban on the sale of oleomargarine, the Court recognized the RTC, affirming that due process protected an individual's right to "enjoy[] upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property." These guarantees were "an essential part" of an individual's Fourteenth Amendment rights.<sup>148</sup> Thus, by the late 1880s, SDP had been established as a potential restriction on state legislation (Beth 1971, 178; Brown 1927, 947; Currie 1985, 376-77).

Like Field and Bradley, the Court, in prominent cases such as *Chicago, Burlington & Quincy R.R. v. Chicago* (1897),<sup>149</sup> *Allgeyer v. Louisiana* (1897),<sup>150</sup> and *Holden v. Hardy* (1898),<sup>151</sup> placed SDP within a universalistic framework. *Chicago, Burlington & Quincy R.R.* concerned a city ordinance that effected the construction of a public street across land owned by a railroad company. After a trial resulted in an award of one dollar as compensation for the property taken by the city, the company claimed a due process violation. Although the majority upheld the jury's determination, the Court determined that due process encompassed the requirement that the state provide just compensation when it took private property for public use.<sup>152</sup> The Court (Harlan) began

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<sup>147</sup> E.g., *Munn v. Illinois*, 94 U.S. 113 (1876) (regulation of charges by owners of grain elevators); *Stone v. Farmers' Loan and Trust Co.*, 116 U.S. 307 (1886) (regulation of railroad charges); *Mugler v. Kansas*, 123 U.S. 623 (1887) (law banning sale of intoxicating liquors). See discussion in Currie 1985, 373; Brown 1927, 946.

<sup>148</sup> *Powell v. Pennsylvania*, 127 U. S. 678, 684.

<sup>149</sup> 166 U.S. 226.

<sup>150</sup> 165 U.S. 578.

<sup>151</sup> 169 U.S. 366.

<sup>152</sup> The case is often cited as the first in which a specific provision of the Bill of Rights was applied against the states (the Fifth Amendment's requirement that "just compensation" be provided when private property is taken for public use). However, while *Chicago, Burlington & Quincy R.R. v. Chicago* discussed the point in greater detail, earlier cases had suggested that regulations effectively taking property without compensation would violate the Fourteenth Amendment. E.g., *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 331 (1886).

with the observation that the protection of property rights “has been regarded as a vital principle of republican institutions.” The just compensation requirement was “founded in natural equity, and is laid down as a principle of universal law,”<sup>153</sup> and “recognized by all temperate and civilized governments, from a deep and universal sense of its justice.”<sup>154</sup> Reasoning from the requirements of free government, Harlan stated that “in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.”<sup>155</sup> He quoted Marshall’s opinion in *Fletcher* (ch. 2, B) for the propositions that the nature of society and government prescribed limits to legislative power, and that, for these limits to be meaningful, they had to include the just compensation requirement.<sup>156</sup> He also quoted *Loan Association v. Topeka* (ch. 3, A(1)) for the propositions that: (1) there are certain property rights that grow out of the essential nature of free government; (2) these rights are necessary to the social compact; (3) freedom is only possible if these rights are protected; and (4) these rights include the prohibition on legislatures from taking the property of A and transferring it to B.<sup>157</sup> While the Fifth Amendment explicitly establishes the “just compensation requirement,” Harlan did not mention it. He reasoned directly from the commands of due process.<sup>158</sup>

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<sup>153</sup> *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. at 235-36.

<sup>154</sup> 166 U.S. at 238 (quoting *Gardner v. Newburgh*, 2 Johns. Ch 162).

<sup>155</sup> 166 U.S. at 236.

<sup>156</sup> 166 U.S. at 237.

<sup>157</sup> 166 U.S. at 237.

<sup>158</sup> *Chicago, Burlington & Quincy R.R. v. Chicago* is commonly cited for the proposition that the just compensation requirement applies against the states, sometimes suggesting that the decision applied the Fifth Amendment’s just compensation requirement against the states through the portal of the Fourteenth Amendment. *E.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). As noted, however, Harlan’s opinion does not rely on the Fifth Amendment.

In *Allgeyer v. Louisiana* (1897), the Court, while employing SDP for the first time to invalidate state legislation (Collins 2001, 71),<sup>159</sup> further elaborated the universalistic underpinnings of the doctrine generally, and of the “liberty of contract” (“LOK,” for brevity). Under regulations prohibiting out-of-state insurance companies from doing business within the state, Louisiana had punished an individual for writing, from within the state, a letter of notification in connection with an insurance contract to be performed outside of the state. The Court found that, in so doing, Louisiana had violated the defendant’s due process rights, because it had interfered with his LOK. The contract in question was to be performed outside of the state, and it was a valid contract where it was made, and where it was to be performed. The giving of notice was merely a collateral act pursuant to that valid out-of-state contract, and the state had no right or jurisdiction to prevent its citizen from engaging in that act.<sup>160</sup> The Court (J. Rufus Peckham) cited extensively from Bradley’s concurring opinion in *Butchers’ Union v. Crescent Slaughterhouse Co.* (1884),<sup>161</sup> accepting the propositions that: (1) the RTC was an inalienable right, essential to liberty; (2) rooted in the Declaration’s pursuit of happiness; and (3) protected by due process. Due process liberty encompassed:

the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.<sup>162</sup>

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<sup>159</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 760 (1997) (Souter, J., concurring).

<sup>160</sup> The Court distinguished an earlier case, *Hooper v. California*, 155 U.S. 648 (1895) (in which it had upheld a state’s regulations concerning the procurement of insurance), because the earlier case involved preventing an individual from procuring insurance for a citizen of the state from an out-of-state company that was not authorized to do business within the state.

<sup>161</sup> 111 U.S. 746.

<sup>162</sup> *Allgeyer v. Louisiana*, 165 U.S. 578, 589-90 (1897).

*Allgeyer* clearly established LOK, which was essential to RTC, as part of the Court's SDP jurisprudence (Haines 1924, "Judicial Review III," 18).<sup>163</sup> The decision was cited as affirmation of the RTC and LOK in some of the most important decisions of the era, including *Chicago, Burlington & Quincy R.R. v. Chicago*, *Holden v. Hardy* (1898),<sup>164</sup> and *Lochner v. New York* (1905).<sup>165</sup>

In *Holden v. Hardy* (1898), a decision upholding a maximum hours law for miners, the Court further linked SDP with UR. The Court (J. Henry Brown) wrote that there were "certain immutable principles of justice, which inhere in the very idea of free government, which no member of the Union may disregard." Due process "impl[ies] a conformity with natural and inherent principles of justice." From these USEs, Brown identified IMPs, including LOK, the just compensation requirement, and the prohibition on transferring the property of A to B.<sup>166</sup>

The act challenged in *Lochner v. New York* (1905)<sup>167</sup> included a variety of measures regarding working conditions in the baking industry, with requirements on matters ranging from plumbing and painting to the prohibition of domestic animals. The legislation also contained maximum hours provisions.<sup>168</sup> While upholding the regulations of working conditions, the Court (Peckham) invalidated the maximum hours provisions as violations of LOK. Citing *Allgeyer*, the Peckham stated that due process

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<sup>163</sup> Currie (1990, 46) has argued that "*Allgeyer* was a choice-of-law decision, not strictly speaking a substantive one." The classification, however, does not alter the significance of the case to the present discussion, which lies in the emphasis that the Court placed on the kind of right with which the state's extraterritorial act had interfered. The Court's extended discussion of the LOK was by no means confined to questions of extraterritoriality. The decision was looked to as a precedent for the LOK in prominent SDP decisions, such as *Lochner v. New York*, 198 U.S. 45 (1905). In *Lochner*, the Court cited *Allgeyer* for the proposition that: "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution." 198 U.S. at 53.

<sup>164</sup> 169 U.S. 366.

<sup>165</sup> 198 U.S. 45.

<sup>166</sup> 169 U.S. at 389-91.

<sup>167</sup> 198 U.S. 45.

<sup>168</sup> Employees could not work more than sixty hours in a week, or more than ten hours in a day.

protected an individual's "general right to make a contract in relation to his business."

Drawing on the connection between labor and property, Peckham wrote that each individual enjoyed the right "to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family[.]"<sup>169</sup>

Harlan (joined by Justices William Day and Edward White), dissented, viewing the hours provisions as a valid health-related exercise of the police powers. However, he accepted the majority's basic account of LOK, reflecting the degree of consensus that prevailed during EDP's heyday with respect to the basis of fundamental property rights. Even Justice Oliver Wendell Holmes, while not endorsing LOK in his separate *Lochner* dissent, joined some later opinions employing the LOK framework.<sup>170</sup>

Due to its high visibility, *Lochner* has become iconic of the period during which the Court wielded EDP as a significant check on social and economic legislation--roughly from the late nineteenth century to the mid-1930s. Around 1890, the number of cases reviewed on SDP grounds began increasing dramatically (Corwin 1911, 366). Over the next few decades, the justices reviewed a large number of state laws regulating aspects of business and the economy, including labor relations, the conditions of employment, and the business of public utilities (Smith 1985, 75; Haines 1930, ch. 6, sec. 3). While the Court upheld a majority of the regulations it reviewed (Currie 1990, 41; Phillips 1987, 273-74), it struck down a substantial number of state laws on SDP grounds (McCloskey 2000, 101), often as violations of RTC and LOK.<sup>171</sup> The legislation invalidated on due process grounds included, for example, maximum hour and minimum wage

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<sup>169</sup> 198 U.S. at 56.

<sup>170</sup> E.g., *Charles Wolff Packing Co. v. Court of Industrial Relations of Kansas*, 267 U.S. 552 (1925); see discussion in Phillips 1999, 449-54.

<sup>171</sup> See, e.g., *Morehead v. New York*, 298 U.S. 587 (1936); *Fairmont Creamery v. Minnesota*, 274 U.S. 1 (1927); *Coppage v. Kansas*, 236 U.S. 1 (1915).



regulations;<sup>172</sup> price regulations;<sup>173</sup> laws designed to protect union activity (such as a prohibition on firing employees on the grounds of union membership);<sup>174</sup> laws designed to protect consumers from exploitative business practices,<sup>175</sup> and inferior, fraudulent, or harmful products;<sup>176</sup> and laws restricting access to certain industries.<sup>177</sup>

Having come of age in the late nineteenth century, EDP did not survive more than a few months into President Franklin Roosevelt's second term. While there had been earlier suggestions that a majority of the justices might be inclined to effect a fundamental shift in the Court's approach to the review of economic and business regulations,<sup>178</sup> *West Coast Hotel Co. v. Parrish* (1937)<sup>179</sup> marked a turning point from which there would be no return (Gillman 1993, 191-92). In that case, and from that time on, the Court did not seriously review economic and business regulations to determine whether they comported with due process. The Court's stance towards such regulations was so deferential that it amounted to an abandonment of EDP. However, as discussed below (secs. B and C), even before EDP's demise, the Court began using SDP to protect other categories of rights, including expression and privacy. Underlying this fundamental shift was a reappraisal of the categories of rights that were essential to free government. During the era of EDP, property rights were essential to free government. IMPs, such as the RTC and LOK, had followed from the imperatives of protecting property rights. With respect to the chain of logic in the Court's REP framework, the critical shift occasioning the collapse of EDP occurred between the USE and the identification of the

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<sup>172</sup> E.g., *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

<sup>173</sup> E.g., *Williams v. Standard Oil*, 278 U.S. 235 (1929).

<sup>174</sup> E.g., *Adair v. U.S.*, 208 U.S. 161 (1908).

<sup>175</sup> E.g., *Adams v. Tanner*, 244 U.S. 590 (1917).

<sup>176</sup> E.g., *Weaver v. Palmer Bros.*, 270 U.S. 402 (1926).

<sup>177</sup> E.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

<sup>178</sup> E.g., *Nebbia v. New York*, 291 U.S. 502 (1934).

<sup>179</sup> 300 U.S. 379.

essential categories of rights. During the bulk of the EDP era, a majority of the justices had taken for granted that property rights were essential to liberty. The post-EDP-era majority rejected that appraisal, cutting off EDP at the root. If property rights as a whole were not essential to freedom, then there was no place for reasoning about which subsidiary rights were, in turn, essential to their protection.

B. Substantive Due Process as a Basis for the Protection for Rights of Expression

Even before the Court jettisoned EDP, it had already begun identifying other categories of rights that were essential to free government. During the EDP era, the justices had drawn RTC and LOK out of the broad language of the Due Process Clause, especially the words “liberty,” and “property.” A natural question was what other rights could be drawn out of the Clause. With respect to the federal government, which was subject to the Bill of Rights, the Constitution provided more textual guidance as to which categories of rights merited protection. As against the federal government, there could be no question that the Constitution protected certain rights of expression. The First Amendment states: “Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble[.]” Since the Amendment did not apply against states, however, the question arose whether rights of expression applied against state governments as part of due process liberty.

As early as 1907, Harlan foreshadowed the Court’s recognition that due process liberty encompassed expression. In *Patterson v. Colorado*, the Court upheld a contempt order punishing published criticism of a state supreme court. While the majority declined to address the issue, Harlan argued that due process protected the freedoms of speech and press, because they:

constitute essential parts of every man's liberty. . . It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the nation or by the states, which does not embrace the right to enjoy free speech and the right to have a free press.<sup>180</sup>

Eighteen years later, in *Gitlow v. New York* (1925), while upholding a criminal anarchy conviction, the Court stated: “For present purposes we may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and ‘liberties’ protected by the due process clause.”<sup>181</sup> Another six years later, in a decision invalidating the state’s use of a libel law to enjoin the publication of a newspaper, based largely on its criticism of a local chief of police, the Court could say it was “no longer open to doubt” that due process protected speech and press, as it was “impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property.”<sup>182</sup> In *Grosjean v. American Press Co.* (1936), too, the Court invalidated state action on free press grounds--a tax on the revenue received by newspapers and other publications. The challenged tax presented:

a question of the utmost gravity and importance; for, if well made, it goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests.<sup>183</sup>

In *Schneider v. New Jersey* (1939), which invalidated a city ordinance limiting the distribution of handbills, the Court wrote that the freedom of speech and press “reflects

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<sup>180</sup> 205 U.S. 454, 465.

<sup>181</sup> 268 U.S. 652, 666.

<sup>182</sup> *Near v. Minnesota*, 283 U.S. 697, 707 (1931).

<sup>183</sup> 297 U.S. 233, 243.

the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men.”<sup>184</sup>

In *De Jonge v. Oregon* (1937),<sup>185</sup> the justices extended due process to include the right of peaceable assembly, a right that was “equally fundamental” to those of speech and press, implied by the “very idea of a government, republican in form,” and one that could not “be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions-principles which the Fourteenth Amendment embodies in the general terms of its due process clause.”<sup>186</sup> In *De Jonge*, the Court overturned a conviction for criminal syndicalism that was based on the defendant’s participation in a meeting of the Communist Party. While C.J. Hughes allowed that states could constitutionally block speech and assembly that amounted to an incitement to violence or crime, he concluded that “peaceable assembly for lawful discussion cannot be made a crime.” The decision followed from the vital importance of assembly, which was based on the essential conditions of constitutional government:

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.<sup>187</sup>

It was foundational to republican governments that they respond to the people’s will and allow for peaceful change. Since responsiveness required open political discussion,

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<sup>184</sup> 308 U.S. 147, 161.

<sup>185</sup> 299 U.S. 353.

<sup>186</sup> 299 U.S. at 364.

<sup>187</sup> 299 U.S. at 365.

citizens must be allowed to assemble for political discussion. In *Thornhill v. Alabama* (1940),<sup>188</sup> in which the Court overturned a picketing conviction as violative of the defendant's freedoms of speech and press, the Court reasoned:

The safeguarding of these rights [speech and press] to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government.<sup>189</sup>

The Court (J. Frank Murphy) again rooted speech and press in the essential requirements of free government, and reasoned to correlative principles through an analysis of those requirements, emphasizing, for example, the importance of allowing opportunities for public education, the dissemination of ideas, and the public discussion and contestation of ideas, especially those relating to matters of public concern. By examining the nature of the expression that had been curtailed in the case before the Court, Murphy reasoned to the principle more specifically applicable:

Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.<sup>190</sup>

By the late 1950s, the justices also extended due process to include the freedom of association, which, unlike the freedoms of speech, press, and assembly, is not enumerated in the First Amendment. In *NAACP v. Alabama* (1958),<sup>191</sup> the Court unanimously reversed an order of civil contempt that had been issued against the NAACP for its

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<sup>188</sup> 310 U.S. 88.

<sup>189</sup> 310 U.S. at 95.

<sup>190</sup> 310 U.S. at 103; *see also Jones v. Opelika*, 316 U.S. 584, 594 (1942) ("If all expression of religion or opinion . . . were subject to the discretion of authority, our unfettered dynamic thoughts or moral impulses might be made only colorless and sterile ideas. To give them life and force, the Constitution protects their use. ").

<sup>191</sup> 357 U.S. 449.

failure to comply with a state order to produce the names of its members. The second Justice John Marshall Harlan<sup>192</sup> reasoned that, like speech, press, and assembly, the freedom to associate in groups was an indispensable liberty. Citing *De Jonge* for the “close nexus between the freedoms of speech and assembly,” Harlan asserted that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,” and the “freedom to engage in association for the advancement of beliefs and ideas” was “an inseparable aspect of the ‘liberty’ assured by the Due Process Clause[.]”<sup>193</sup> Harlan reasoned from the indispensability of association to privacy, stating that “[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.” In light of the negative consequences suffered from past publicity of individuals’ membership, the compelled disclosure was “likely to affect adversely the ability of [the group’s] members to pursue their collective effort to foster beliefs which they . . . have the right to advocate.”<sup>194</sup> In a case raising similar issues, *Bates v. Little Rock* (1960),<sup>195</sup> the Court unanimously reversed convictions for failure to comply with a city ordinance requiring the production of NAACP membership lists. The Court again viewed association as an outgrowth of essential rights of expression. Like speech and press, assembly “was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry--a government dedicated to the establishment of justice and the preservation of liberty.”

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<sup>192</sup> The first Justice John Marshall Harlan served on the U.S. Supreme Court from 1877-1911. His grandson, John Marshall Harlan II, served on the Court from 1955-1971.

<sup>193</sup> 357 U.S. at 460.

<sup>194</sup> 357 U.S. at 462-63.

<sup>195</sup> 361 U.S. 516.

The reasoning that the Court used to extend due process protection to rights of expression fell within a similar, universalistic framework to the one the Court had used to extend due process protection to certain property rights in its EDP jurisprudence. Beginning with USEs, the justices appealed to the fundamental requirements of liberty in an organized, democratic society, and of free republican government, emphasizing the importance of allowing for peaceful political change. As in other time periods and issue areas, the Court also employed MRR, appealing to standards combining universalistic and particularistic elements, such as the Framers' beliefs concerning the requirements of freedom.<sup>196</sup> The shift from EDP concerned the category of rights that was inseparable from universalistic standards. Rather than the acquisition and use of property, here it was the ability to openly discuss matters of public concern that was deemed indispensable to the kind of society to which the American people were committed. Speech and press, and later assembly and association as well, were brought under due process protection as rights fundamental to liberty.<sup>197</sup>

#### C. Substantive Due Process as a Basis of Protection for the Right of Privacy

Two years before the Court applied speech and press against the states via due process,<sup>198</sup> it handed down a decision planting the seeds of the right to privacy. In *Meyer v. Nebraska* (1923),<sup>199</sup> the Court (McReynolds) overturned the conviction of a teacher for instructing a ten-year-old child in the German language. The teacher had violated a state law that, in the name of fostering civic development, prohibited teachers from offering

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<sup>196</sup> *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939).

<sup>197</sup> The Court has also found religious freedoms applicable against the states via due process. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Everson v. Board of Education*, 330 U.S. 1, 15 (1947). The topic is omitted only for reasons of space.

<sup>198</sup> *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>199</sup> 262 U.S. 390.

foreign-language instruction to children who had not yet passed the eight grade. EDP still thrived, but the challenged act did not seem at its heart to concern property rights. While the act did implicate speech,<sup>200</sup> the Court did not approach the controversy from that vantage point either. Instead, the Court advanced a broader understanding of due process liberty, encompassing “those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” This MRR formulation appealed to rights recognized as universalistic by a particular body of law. Through this lens, McReynolds identified a range of due process protections, including “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, [and] to worship God according to the dictates of his own conscience.” McReynolds’s approach reflected the commonality in the roots of EDP and other branches of the Court’s SDP jurisprudence. The list began with RTC and LOK, while citing major cases from the Court’s EDP jurisprudence, such as *Lochner* and *Allgeyer*. The reference to the right “to acquire useful knowledge” suggested rights of expression, soon to be brought within due process. McReynolds also opened due process to new terrain by including the rights “to marry, [and] establish a home and bring up children.”<sup>201</sup>

Two years later, the Court laid further groundwork for expansion of due process liberty in a similar direction. In *Pierce v. Society of Sisters* (1925),<sup>202</sup> the Court invalidated an Oregon statute that effectively banned private schools, by requiring public

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<sup>200</sup> See *Poe v. Ullman*, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting) (“Today [*Meyer*] would probably have gone by reference to the concepts of freedom of expression and conscience assured against state action by the Fourteenth Amendment, concepts that are derived from the explicit guarantees of the First Amendment against federal encroachment upon freedom of speech and belief.”).

<sup>201</sup> *Meyer*, 262 U.S. at 399.

<sup>202</sup> 268 U.S. 510.



school attendance for all children between the ages of eight and sixteen. The Court stated that due process encompassed:

the liberty of parents and guardians to direct the upbringing and education of children under their control. . .

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>203</sup>

*Meyer* and *Pierce* did not use the word “privacy.” The central theme concerned parental direction of education, but the implications reached further. In an important sense, the decisions were precursors to *Griswold* (1965),<sup>204</sup> *Roe* (1973),<sup>205</sup> *Casey* (1992),<sup>206</sup> *Lawrence* (2003),<sup>207</sup> and other cases in which the Court has developed the right of personal autonomy in decisions pertaining to intimate relationships. *Meyer* and *Pierce* signified a willingness to identify broad categories of rights, other than property rights or rights enumerated in the Bill of Rights, for inclusion in due process. Justice William Douglas, who wrote the Court’s opinion in *Griswold*, began articulating his understanding of privacy in earlier dissenting opinions. Dissenting from a decision upholding the playing of transit radio programs in streetcars and buses,<sup>208</sup> he stated that due process liberty must include “privacy . . . if it is to be a repository of freedom. The

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<sup>203</sup> 268 U.S. at 534-35.

<sup>204</sup> *Griswold v. Connecticut*, 381 U.S. 479.

<sup>205</sup> *Roe v. Wade*, 410 U.S. 113.

<sup>206</sup> *Planned Parenthood v. Casey*, 505 U.S. 833.

<sup>207</sup> *Lawrence v. Texas*, 539 U.S. 558.

<sup>208</sup> *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952).

right to be let alone is indeed the beginning of all freedom.” Privacy was closely interconnected with fundamental principles embedded within the First Amendment:

Freedom of religion and freedom of speech guaranteed by the First Amendment give more than the privilege to worship, to write, to speak as one chooses; they give freedom not to do nor to act as the government chooses. The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. To think as one chooses, to believe what one wishes are important aspects of the constitutional right to be let alone.<sup>209</sup>

Privacy was also intertwined with personal autonomy, as it:

should include the right to pick and choose from competing entertainments, competing propaganda, competing political philosophies. If people are let alone in those choices, the right of privacy will pay dividends in character and integrity. The strength of our system is in the dignity, the resourcefulness, and the independence of our people. Our confidence is in their ability as individuals to make the wisest choice. That system cannot flourish if regimentation takes hold. The right of privacy, today violated, is a powerful deterrent to any one who would control men's minds.

Douglas began with the premise that liberty was impossible without privacy. He reasoned about the nature of this right, and what was essential to its protection. Having fleshed out the kinds of limitations that must be imposed on government to secure privacy, Douglas moved to a more specific conclusion: “If liberty is to flourish, government should never be allowed to force people to listen to any radio program.”<sup>210</sup>

Douglas further developed privacy dissenting from the dismissal of a married

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<sup>209</sup> 343 U.S. at 467-68 (Douglas, J., dissenting).

<sup>210</sup> 343 U.S. at 469 (Douglas, J., dissenting). Originating in the District of Columbia, the case was governed by the Fifth Amendment, but is included here because Douglas considered the reasoning applicable to the Fourteenth. See *Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting).

couple's challenge to a prohibition on the use of contraceptives.<sup>211</sup> Indicating he would have invalidated the law, Douglas stated: "'Liberty' is a conception that sometimes gains content from the emanations of other specific guarantees or from experience with the requirements of a free society."<sup>212</sup> Although Douglas believed that due process made the first Eight Amendments applicable against the states, he directly appealed to privacy as a necessary component of liberty, "implicit in a free society."<sup>213</sup> The law violated privacy, because enforcement would have entailed invasions of the "innermost sanctum of the home," and an "inquiry into the relations between man and wife." The right of privacy, Douglas said, was "not drawn from the blue. It emanates from the totality of the constitutional scheme under which we live." That constitutional scheme was to be contrasted with totalitarianism, which places all subcommunities under state control. A system that prohibits the peacetime quartering of soldiers surely will not permit police investigation of marital relations.<sup>214</sup> Douglas's contrast of the American constitutionalism with totalitarianism suggested the ability to reason from the broad decision the American people made about the kind of society in which they wanted to live. Americans chose to live in a free society, rather than in a totalitarian one. Certain principles followed from that choice, including the right of privacy.

In a separate dissent, Harlan also based his opinion on privacy. The law was "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life."<sup>215</sup> Citing Chase's opinion in *Calder*, Harlan argued that due process liberty protected rights that were fundamental, and belonged to

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<sup>211</sup> *Poe v. Ullman*, 367 U.S. 497 (1961).

<sup>212</sup> 367 U.S. at 517 (Douglas, J., dissenting).

<sup>213</sup> 367 U.S. at 521 (Douglas, J., dissenting).

<sup>214</sup> 367 U.S. at 519-22 (Douglas, J., dissenting).

<sup>215</sup> 367 U.S. at 539 (Harlan, J., dissenting).

the citizens of all free governments. The right to be let alone in one's home was a core element of the privacy "basic to a free society." The home was vitally important because it served as the "seat of family life." Within that family life, it was "difficult to imagine what is more private or more intimate than a husband and wife's marital relations." The Connecticut law violated privacy because it authorized "the intrusion of the whole machinery of the criminal law into the very heart of marital privacy, requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy."<sup>216</sup>

The Court reached the merits of Connecticut's birth control law in *Griswold v. Connecticut* (1965).<sup>217</sup> With Douglas now announcing the Court's opinion, he again argued that the marital relationship was a critical component of privacy, though he treated the right as emanating from specific provisions of the Bill of Rights. The justices, Douglas contended, had to recognize certain non-explicit, penumbral rights whose protection was required to ensure adequate protection of explicit guarantees. At the same time, Douglas suggested a basis for privacy, and the marital relation it protected, extending beyond the Bill of Rights, as he asserted that privacy was:

older than the Bill of Rights-older than our political parties,  
older than our school system. Marriage is a coming  
together for better or for worse, hopefully enduring, and  
intimate to the degree of being sacred.<sup>218</sup>

In a concurring opinion (joined by Chief Justice Earl Warren and Justice William Brennan), Justice Arthur Goldberg, who rejected Douglas's view that due process applied the first Eight Amendments against the states, argued from the concept of liberty, which encompassed "personal rights that are fundamental," and was not confined to enumerated

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<sup>216</sup> 367 U.S. at 550-53 (Harlan, J., dissenting).

<sup>217</sup> 381 U.S. 479.

<sup>218</sup> 381 U.S. at 486.

rights. For overarching standards, Goldberg appealed to MRR formulations originated in the Court’s PDP jurisprudence. The justices “must look to the ‘traditions and (collective) conscience of our people’ to determine whether a principle is ‘so rooted (there) . . . as to be ranked as fundamental,’”<sup>219</sup> and to whether the right comprises one of those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”<sup>220</sup> Goldberg also followed Douglas in deriving the content of liberty from specific textual provisions, “experience with the requirements of a free society,” and “the totality of the constitutional scheme under which we live.”<sup>221</sup> Citing *Meyer*, *Pierce*, and Harlan’s *Poe* dissent, Goldberg renewed the argument that the home and the marital relation were central to privacy. Reminiscent of reliance by earlier justices on the “spirit of the constitution,”<sup>222</sup> Goldberg appealed to the “entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees,” which, he said, “demonstrate[d] that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.” The argument was buttressed by reference to the Ninth Amendment, which Goldberg saw as the Framers’ confirmation that not all rights deserving of constitutional protection were enumerated. Moreover, as Douglas had highlighted the importance of the marital relationship by pointing to the ancient roots of the sacred marital relationship, Goldberg emphasized the importance of the family relationship, which was “as old and as fundamental as our entire civilization.”<sup>223</sup> Also concurring, Harlan, also drew privacy out of due process liberty. Quoting another landmark case from the Court’s PDP

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<sup>219</sup> 381 U.S. at 493 (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

<sup>220</sup> 381 U.S. at 493 (Goldberg, J., concurring) (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)).

<sup>221</sup> 381 U.S. at 493-94 (quoting *Poe v. Ullman*, 367 U.S. 497, 517, 521 (1961) (Douglas, J., dissenting)).

<sup>222</sup> *Terrett v. Taylor*, 13 U.S. 43, 52 (1815).

<sup>223</sup> *Griswold*, 381 U.S. at 495-96 (Goldberg, J., concurring).

jurisprudence, Harlan found that privacy was encompassed by the “basic values ‘implicit in the concept of ordered liberty.’”<sup>224</sup>

Given the differences in the opinions, *Griswold* left unclear whether privacy was based directly in due process liberty, or in emanations from Bill of Rights guarantees. *Roe v. Wade* (1973)<sup>225</sup> clarified that privacy was rooted in due process liberty. The Due Process Clause’s “guarantee of personal privacy” embraced “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty.’” Citing *Meyer*, *Pierce*, and *Griswold*, the Court (J. Harry Blackmun) stated that privacy reached “activities relating to marriage, procreation,” “contraception,” “family relationships,” “and child rearing and education.”<sup>226</sup> Blackmun concluded that the “right of personal privacy includes the abortion decision,” stressing various kinds of harm that could result to women denied that choice.<sup>227</sup> Though the right was not absolute, and *Roe*, and later decisions, grappled with the kinds of legislative restrictions that might be consistent with privacy,<sup>228</sup> *Roe* established the important principle that due process encompassed a woman’s right to terminate a pregnancy.

A common thread running through *Roe*, and precedents upon which it rested, was the vital importance of protecting the home and marital relationship. Indeed, these may be viewed as IMPs within the Court’s REP approach to privacy. Without abandoning these IMPs, however, the Court’s privacy jurisprudence has increasingly stressed the importance of autonomy, which has emerged as an additional IMP, whose protection is

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<sup>224</sup> 381 U.S. at 500 (Harlan, J., concurring) (*quoting Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Also concurring, Justice Byron R. White, largely following Harlan, found privacy in due process liberty.

<sup>225</sup> 410 U.S. 113.

<sup>226</sup> 410 U.S. at 152-53.

<sup>227</sup> 410 U.S. at 154.

<sup>228</sup> *E.g.*, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

essential to privacy. Even in *Roe*, the right at stake was not limited to the marital context, and Blackmun referred to the protected freedom in *Roe* as the “abortion decision.” In reaffirming the core holding of *Roe* in *Planned Parenthood v. Casey* (1992), the opinion of the Court (by Justices Sandra Day O’Connor, Anthony M. Kennedy and David H. Souter) stated that the “Constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood.”<sup>229</sup> Highlighting elements from earlier cases sounding the theme of an individual’s decisionmaking, the opinion more fully articulated an understanding of privacy built on the notion that there were decisions, touching certain aspects of personal life and fundamental beliefs, that should be left up to the individual’s conscience:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. Our precedents have respected the private realm of family life which the state cannot enter. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.<sup>230</sup>

The opinion placed this understanding of the connection between autonomy, dignity, and personhood at the center of their approach to privacy:

At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. . . The destiny of the woman must be shaped to a large extent on her own

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<sup>229</sup> 505 U.S. 833, 849.

<sup>230</sup> *Roe*, 410 U.S. at 851.

conception of her spiritual imperatives and her place in society.<sup>231</sup>

The rights at stake in *Griswold*, and later decisions extending rights relating to the use of contraceptives, had been protected because they “involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it.”<sup>232</sup>

The emphasis on autonomy was further developed in cases not involving procreation, such as *Bowers v. Hardwick* (1986), in which the majority upheld a Georgia statute criminalizing acts of sodomy. In dissent (joined by Justices Thurgood Marshall, John Stevens, and Brennan), Blackmun stressed the importance to privacy of an individual’s autonomy over certain personal spheres of decisionmaking. If the right to privacy “means anything,” it must encompass an individuals’ “choices about the most intimate aspects of their lives[.]”<sup>233</sup> Blackmun perceived two categories of privacy cases. One recognized “a privacy interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged.” The other category, at stake in *Roe* and *Pierce*, “recognized a privacy interest with reference to certain *decisions* that are properly for the individual to make.” *Bowers* “implicates both the decisional and the spatial aspects of the right to privacy.”<sup>234</sup> The spatial aspects were implicated because the defendant had been charged with conduct in the home.<sup>235</sup> The decisional aspects were implicated because privacy was built on more than home and family. It protected autonomy over certain decisions, “because they form so central a

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<sup>231</sup> 410 U.S. at 851-52; see also *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (“Our cases have long recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government.”).

<sup>232</sup> 410 U.S. at 853.

<sup>233</sup> 478 U.S. 186, 199-200 (Blackmun, J., dissenting).

<sup>234</sup> 478 U.S. at 203-04 (Blackmun, J., dissenting).

<sup>235</sup> After a preliminary hearing, the prosecutor dropped the charges, but the defendant challenged the constitutionality of the statute regardless, because he was a sexually active homosexual, and the law, therefore, represented an ongoing threat to his liberty.



part of an individual's life. '[T]he concept of privacy embodies the moral fact that a person belongs to himself and not others nor to society as a whole.'"<sup>236</sup> Blackmun viewed privacy precedents as based on a similar understanding--the abortion decision was protected because "parenthood alters so dramatically an individual's self-definition." The freedom interfered with in *Bowers* fell within due process liberty, because of sexual intimacy's critical role in an individual's life:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds. . . . The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.<sup>237</sup>

When the Court overturned *Bowers* in *Lawrence v. Texas* (2003),<sup>238</sup> the majority largely employed the understanding of privacy that Blackmun articulated in *Bowers*. Unlike *Bowers*, the law at issue in *Lawrence* criminalized certain sexual acts only when engaged in by persons of the same sex, but this difference did not alter the Court's approach. Kennedy's opinion for the Court asserted that liberty "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." While privacy traditionally protected the home, there were "other spheres of our lives and existence, outside the home, where the State should not be a dominant presence." Evoking Blackmun's distinction in *Bowers*, Kennedy wrote that the law involved "liberty

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<sup>236</sup> 478 U.S. at 204 (Blackmun, J., dissenting) (*quoting Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 777 n. 5 (1986) (Stevens, J., concurring)).

<sup>237</sup> 478 U.S. at 205-06 (Blackmun, J., dissenting).

<sup>238</sup> 539 U.S. 558.

of the person both in its spatial and in its more transcendent dimensions.”<sup>239</sup>

Summarizing privacy’s roots, Kennedy characterized *Roe* as recognizing “the right of a woman to make certain fundamental decisions affecting her destiny.”<sup>240</sup> *Lawrence* did not only concern the right to engage in specified acts. It interfered with decisions of fundamental importance, and with an individual’s control over the most personal relationships. The law “touch[ed] upon the most private human conduct, sexual behavior, and in the most private of places, the home.” It interfered with a personal relationship that individuals were entitled to choose for themselves:

[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.<sup>241</sup>

From these general principles, Kennedy reached more specific conclusions:

The State cannot demean their [two mutually consenting adults choosing to engage in acts of sexual intimacy] existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.<sup>242</sup>

The extension of due process protection to privacy rights has not gone uncontested, and privacy remains a controversial area of jurisprudence.<sup>243</sup> Some objections to the development of privacy are discussed in sec. G, which focuses especially on the disagreement in *Lawrence* over the use of practices, and other societal

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<sup>239</sup> 539 U.S. at 562. As in *Bowers*, charges in *Lawrence* arose out of conduct in the defendant’s home.

<sup>240</sup> 539 U.S. at 565.

<sup>241</sup> 539 U.S. at 567.

<sup>242</sup> 539 U.S. at 578.

<sup>243</sup> See, e.g., *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007).

indicators, in conjunction with UR. The following section reenforces a point already suggested--that the Court employed a common framework in extending due process protection to rights of property, expression, and privacy.

D.     The Common Substantive Due Process Framework Protecting Rights of Property, Expression, and Privacy

Notwithstanding obvious differences in the issue areas involved, the Court employed a similar overarching framework in extending due process protection to rights of property, expression, and privacy. Each category of rights was considered indispensable to the Due Process Clause's concept of liberty. Certain core principles were essential to meaningful protection of that category of rights. More specific applications followed from these general principles. In the area of EDP, the justices reasoned from the sanctity of property to the principle that an individual had a sacred right to the fruits of labor. The RTC and LOK followed. With respect to expression, the freedoms of speech, press, assembly, and association were found indispensable to liberty. In a free, constitutional democracy, the system of government must allow for peaceful change based on the will of the people, which requires open discussion about politics. From these essential principles, the justices could conclude, for example, that a law making it a crime simply to assemble for the purpose of discussing politics was not consistent with free government.<sup>244</sup> The right to privacy, similarly, was born of the justices' determination that certain principles were essential to the liberty, centering largely on the home and the family. The justices extended their understanding of privacy to include a related core principle--that individuals must be allowed autonomy within the

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<sup>244</sup> *De Jonge v. Oregon*, 299 U.S. 353 (1937).

sphere of decisions pertaining to highly personal matters, such as the choice of an intimate, sexual partner.

That the justices employed a similar approach across wide-ranging substantive areas is highlighted by opinions in which the justices discussed different categories of rights within the same framework. In his dissenting opinion in *Gilbert v. Minnesota* (1920),<sup>245</sup> for example, Justice Louis Brandeis compared the importance of property and expression. While the majority upheld Gilbert's conviction for protesting the draft, Brandeis, though resting his opinion on federalism grounds, took the occasion to articulate his views on the categories of rights protected by due process. Noting that due process had been interpreted to encompass the RTC and LOK, Brandeis had "difficulty in believing" that it did not also include "liberty to teach, either in the privacy of the home or publicly, the doctrine of pacifism . . . I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property."<sup>246</sup> By 1931, when *Near v. Minnesota* was handed down, the Court had included rights of expression in due process. The Court spoke of speech and press in the same breath as LOK, noting that all of these rights were protected as "indispensable requirements of the liberty assured" by due process.<sup>247</sup> In *Grosjean v. American Press Co.* (1936),<sup>248</sup> the Court (Sutherland) described an approach spanning across property and expression, as well as PDP, based on the identification of rights fundamental to liberty. Sutherland noted that, in the field of PDP, the search for fundamental rights had resulted in the finding that due process encompassed the right of an accused to the assistance of counsel

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<sup>245</sup> 254 U.S. 325.

<sup>246</sup> 254 U.S. at 343 (Brandeis, J., dissenting).

<sup>247</sup> 283 U.S. 697, 707-08.

<sup>248</sup> 297 U.S. 233.

in a criminal trial.<sup>249</sup> Speech and press, he observed, were “of the same fundamental character.” Turning from PDP to EDP, Sutherland further supported the inclusion of speech and press within due process by citing *Allgeyer’s* affirmance that “‘liberty’ . . . embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well.”<sup>250</sup>

The commonality of the underlying framework was also reflected in a prominent EDP case the following year--*New State Ice Co. v. Liebmann* (1932),<sup>251</sup> in which the Court struck down an Oklahoma law allowing entrants into the business of supplying ice only where the need for an additional supply of the product could be demonstrated. In finding that the law violated RTC, the Court stated:

The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments. This principle has been applied by this court in many cases.<sup>252</sup>

In support of that proposition, the Court cited, not only other cases involving EDP, but also cases involving the newly recognized due process rights of expression<sup>253</sup> and privacy.<sup>254</sup> The Court noted that, in *Near*:

the theory of experimentation in censorship was not permitted to interfere with the fundamental doctrine of the freedom of the press. The opportunity to apply one's labor and skill in an ordinary occupation with proper regard for all reasonable regulations is no less entitled to protection.<sup>255</sup>

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<sup>249</sup> *Powell v. Alabama*, 287 U.S. 45 (1932). The case is discussed further in ch. 4, C.

<sup>250</sup> *Grosjean*, 297 U.S. at 244.

<sup>251</sup> 285 U.S. 262.

<sup>252</sup> 285 U.S. at 280.

<sup>253</sup> *Near v. Minnesota*, 283 U.S. 697 (1931); *Stromberg v. California*, 283 U.S. 359 (1931).

<sup>254</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>255</sup> 285 U.S. at 280.

In *Gilbert v. Minnesota* (1920)<sup>256</sup> Brandeis had argued that, if liberty included property rights, then it must also include expression. Here, Sutherland argued in reverse.

During the 1920s and 1930s, then, while EDP still thrived, the justices began employing a similar universalistic framework to identify other categories of rights deserving of due process protection. Of course, while the identification of the rights to be protected is a critical element of the Court's jurisprudence, it is only a part. Rights claims arise as challenges to exercises of governmental powers. Rights are not absolute, and find themselves in collision with powers. The following section (like ch. 2, C) discusses the Court's universalistic reasoning with respect to governmental powers.

E. Universal Reasoning about Inherent, Inalienable Governmental Powers

Chapter Two (sec. C) discussed the concept of inherent, inalienable governmental powers that played an important role in the Court's Contract Clause jurisprudence. Universalistic reasoning with respect to governmental powers has also been important to the Court's SDP jurisprudence. While the justices had recognized the police powers before the Fourteenth Amendment,<sup>257</sup> and spoken of them as inherent to sovereignty,<sup>258</sup> the Amendment gave the Court far more opportunities for the review of state actions. In developing their due process jurisprudence, the justices framed the issue as whether challenged state actions constituted legitimate exercises of police powers. Thus, the scope of police powers became a major topic of consideration. While the justices often disagreed in reviewing specific exercises of police powers, they unanimously recognized,

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<sup>256</sup> 254 U.S. 325.

<sup>257</sup> *E.g.*, *Mayor of New York v. Miln*, 36 U.S. 102, 138 (1937) (“[I]t is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends[.]”).

<sup>258</sup> *E.g.*, *License Cases*, 46 U.S. 504, 583 (1847) (“[T]he police powers . . . are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions.”).

from their earliest due process decisions, that police powers were based in universalistic sources. In *Slaughterhouse*, the first case in which the Court considered the Amendment, Miller wrote that upon the police power:

depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. 'It extends,' says another eminent judge, 'to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; . . . and persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.'<sup>259</sup>

Miller's account of police powers stressed their indispensability, not to a particular community, but to the "security of social order," and to the most elemental aspects of the public welfare. Without them, the citizen's health, comfort, property, and life could not be secured. That individual safety and welfare depended upon subjection to regulation for their common good was suggestive of the universalistic aspects of social contract theory. Miller was not citing the provisions of specific enacted text, but reasoning from the nature of society and government. The dissenters did not question these propositions.

Four years later, the Court referred to police powers as the "powers of government inherent in every sovereignty," finding their roots in social contract:

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and

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<sup>259</sup> *Slaughterhouse Cases*, 83 U.S. 36, 62 (1872).

each citizen with the whole people, that all shall be governed by certain laws for the common good.’ . .

[This] authorize[s] the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim sic utere tuo ut alienum non laedas. From this source come the police powers . . . Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good.<sup>260</sup>

By viewing police powers as emanating from the concept of a social contract and the “very essence of government,” the Court grounded powers universalistically. The precise scope of the police powers was open to controversy, but not their origin and indispensability. In *Jacobson v. Massachusetts* (1905),<sup>261</sup> the Court upheld a law requiring adults to undergo smallpox vaccinations, stressing that due process liberty:

does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. . .

Powers were rooted in the requirements of a society’s survival:

Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an

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<sup>260</sup> *Munn v. Illinois*, 94 U.S. 113, 124-25 (1876); see also *Holden v. Hardy*, 169 U.S. 366, 391 (“This right of contract. . . is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers [and] this power is inherent in all governments.”).

<sup>261</sup> 197 U.S. 11.



epidemic of disease which threatens the safety of its members.<sup>262</sup>

By the late 1880s, the Court also adopted, in its due process jurisprudence, the understanding, initially articulated in the context of the Contract Clause, that police powers were inalienable. Regardless of what the legislature, or even the people themselves wanted, the powers could not be bargained away.<sup>263</sup> The inalienability of the powers was closely related with their universalistic bases. If the powers were indispensable for the protection of life and property, and if the purpose of the social contract was to authorize them, then it followed that they could not be forfeited.

F. The Development of a Hierarchical Approach to Rights

The justices during the EDP era acknowledged the tension between rights and powers, which were both grounded universalistically. In *Lochner*, for example, since due process protected LOK, and this liberty was subject to police powers, the Court was faced with the question of “which of two powers or rights shall prevail,-the power of the state to legislate or the right of the individual to liberty of person and freedom of contract.”<sup>264</sup> In *Jacobson*, the Court stated that protected liberty was “only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is . . . liberty regulated by law.”<sup>265</sup> Noting certain rights that all individuals enjoyed in a free, constitutional government, the Court stated:

[I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to

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<sup>262</sup> 197 U.S. at 26-27.

<sup>263</sup> *Holden v. Hardy*, 169 U.S. 366, 392 (1898); *Powell v. Pennsylvania*, 127 U. S. 678, 683 (1888); *Mugler v. Kansas*, 123 U.S. 623, 669-70 (1887).

<sup>264</sup> *Lochner v. New York*, 198 U.S. 45, 57 (1905).

<sup>265</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905).

be enforced by reasonable regulations, as the safety of the general public may demand.<sup>266</sup>

Liberty could not be understood in isolation. All people were entitled to liberty, but in a free government, people subjected themselves to regulation to secure that liberty. The implications of that subjection were far-reaching. Individuals could even be conscripted and compelled “to risk the chance of being shot down” in the protection of the security of all.<sup>267</sup> As the Court stated in *Nebbia*, rights and powers were not only “equally fundamental,”<sup>268</sup> but also “always in collision,” since any exercise of private right had some effect on the public interest, and regulations imposed some restraint on liberty.<sup>269</sup>

If rights are subject to exercises of the police powers enacted by legislatures, then how do rights act as constraints on legislatures? How can the Court recognize the legislature’s authority to regulate for the common good, while still retaining meaningful constraints on legislative power? As early as the 1880s, the justices employed an approach to due process framed around consideration of the end that a challenged regulation was aimed at furthering, and the means through which the regulation sought to further that end.<sup>270</sup> The ends-means test was stated a number of ways, but the general formula required that, to survive due process review, the challenged law had to be aimed at a legitimate end, and the means adopted had to be reasonably related to that end.<sup>271</sup> In

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<sup>266</sup> 197 U.S. at 29.

<sup>267</sup> 197 U.S. at 29.

<sup>268</sup> *Nebbia v. New York*, 291 U.S. 502, 523 (1934).

<sup>269</sup> 291 U.S. at 524-25.

<sup>270</sup> In *Mugler v. Kansas*, 123 U.S. 623, 661 (1887), for instance, the Court stated that if a law purportedly “enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects,” it must be invalidated.

<sup>271</sup> See, e.g., *Nebbia v. New York*, 291 U.S. 502, 537 (1934) (“If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio.”); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (“The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.”);

itself, the articulated standard was lenient, requiring simply that a regulation have some relation to some legitimate purpose. Due process review, nevertheless, operated as a meaningful constraint due to a set of traditional understandings about the scope of the police powers. For example, regulations could not favor one class over another. Thus, regulations could not be aimed at leveling the playing field between employers and employees on the assumption that employers enjoyed superior bargaining power.<sup>272</sup> In addition, price and wage regulations were distinguished from other kinds of regulations. They could only be imposed in certain businesses “affected with a public interest.”<sup>273</sup>

The Court, however, ultimately discarded these traditional understandings. We saw earlier (ch. 2, C) that, in its Contract Clause jurisprudence, the Court adopted an evolutive approach to constitutional meanings. It did so, as well, with respect to due process. In a prominent case upholding a maximum hours law for miners, for example, the Court stated that “the law is, to a certain extent, a progressive science.”<sup>274</sup> “[W]hile the cardinal principles of justice are immutable,” Brown wrote, “the methods by which justice is administered are subject to constant fluctuation.”<sup>275</sup> The alterability of constitutional meanings had to be recognized, because public understandings about rights and the law shifted. Brown pointed to examples of changes in public understandings

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*Lochner v. New York*, 198 U.S. 45, 57-58 (1905) (“The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor..”).

<sup>272</sup> E.g., *Lochner v. New York*, 198 U.S. 45 (1905); see Gillman 1993.

<sup>273</sup> E.g., *Munn v. Illinois*, 94 U.S. 113, 126 (1876). In upholding the challenged price regulation, the majority did not hold that all industries were subject to price regulations. Rather, the majority held that the grain storage industry was “affected with a public interest,” and, thus, in a special category. The dissenting justices argued that the majority’s definition of “affected with a public interest” was so broad that it effectively subjected all industries to price regulations. See also *Budd v. New York*, 143 U.S. 517 (1892); *Tyson and Bro. United Theater Ticket Offices v. Banton*, 273 U. S. 418 (1927).

<sup>274</sup> *Holden v. Hardy*, 169 U.S. 366, 385 (1898).

<sup>275</sup> 169 U.S. at 387.

relating to rights. Even before the Constitution's enactment, the severity of the common law was mitigated, especially in the criminal realm, and the list of crimes punishable by death was substantially restricted. Significant changes in the nineteenth century included the abolition of imprisonment for debt, and an expanded scope of economic independence of married women. Linking the evolution of SDP and PDP, Brown also noted shifts in the realm of criminal procedure, such as the adoption of rules permitting parties to testify as witnesses, and the abolition by many states of the requirement that indictments be handed down by grand juries. It was the nature of law to evolve. In light of the changes that had already occurred, it was "impossible to suppose that they will not continue' as the law was "forced to adapt itself to new conditions of society . . . as they arise."<sup>276</sup> Based on the relatively recent public recognition that certain classes of persons, especially those engaged in dangerous jobs, required special legal protections, the Court upheld Utah's maximum hours provisions for coal mine workers.<sup>277</sup> While contemporary observers might associate evolving constitutional meanings with the expansion of rights, during the EDP era, it facilitated the expansion of governmental powers.

Armed with an evolutive conception of constitutional meanings, a majority ultimately discarded the traditional understandings and distinctions that had given EDP bite. The Court, for example, permitted legislatures to enact regulations with an eye towards rectifying the unequal bargaining power inherent in many industries between

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<sup>276</sup> 169 U.S. at 388.

<sup>277</sup> Recognition of the need to allow for the evolution of constitutional meanings during the *Lochner* era was not limited to cases upholding government regulations. In *Adkins v. Children's Hospital* (1923), for example, in which a conservative majority struck down a D.C. minimum wage law applicable only to women, Sutherland wrote: "The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good, and the line beyond which the power of interference may not be pressed is neither definite nor unalterable, but may be made to move, within limits not well defined, with changing need and circumstance. Any attempt to fix a rigid boundary would be unwise as well as futile." 261 U.S. 525, 561.

employers and employees.<sup>278</sup> The Court also abandoned the notion that price and wage regulations could only be imposed upon businesses “affected with a public interest.” Such regulations no longer stood as a distinct category.<sup>279</sup> At the same time, the Court adopted a broad understanding of the public interest, and granted great deference to legislatures in determining the means of pursuing it.<sup>280</sup>

In the absence of traditional understandings that had given it force, EDP review no longer amounted to meaningful review. By the late 1930s, EDP was abandoned. The Court allowed EDP to collapse, because a majority of the justices no longer viewed property rights as special, as essential to liberty. Hints of the impending demotion of property rights were apparent before the late 1930s. In his dissenting opinion in *Adkins* (1923), Holmes captured the spirit of the coming shift when he wrote of the LOK:

Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts.<sup>281</sup>

LOK was built on the notion that certain property rights were essentially important to liberty. If, as Holmes suggested, there was nothing special about the freedom of contract, and property rights more generally, then the foundation of EDP would be undercut. In a

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<sup>278</sup> See, e.g., *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

<sup>279</sup> See, e.g., *Nebbia v. New York*, 291 U.S. 502 (1934). In upholding price regulations applicable to the milk industry, the majority stated the decision hinged neither on price regulations constituting a distinct category of regulation, nor on the industry being “affected with a public interest.” Rather: “It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. . . [T]here can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.” 291 U.S. at 537.

<sup>280</sup> See, e.g., *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

<sup>281</sup> *Adkins v. Children's Hospital*, 261 U.S. 525, 568 (1923) (Holmes, J. dissenting).

1934 case rejecting the traditional treatment of price controls as a distinct category of regulations, the majority similarly undermined the notion that freedom of contract or other property rights were sacred, or deserved special protection:

[I]f, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property.<sup>282</sup>

In the 1937 case that delivered EDP its coup de grace (Sanders 2005, 473), the Court stated:

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. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily 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.<sup>283</sup>

If the Court had adopted the same approach for all categories of rights, no meaningful SDP review would have remained. If the standard of review requires merely that legislation have some relation to the public interest, and the determination of the public interest, and how to pursue it, are left almost entirely to the legislature's discretion, almost any act will survive review. EDP review had been made meaningful by a set of traditional understandings that the justices no longer considered binding. Thus, the

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<sup>282</sup> *Nebbia v. New York*, 291 U.S. 502, 531-32 (1934).

<sup>283</sup> *West Coast Hotel v. Parrish*, 300 U.S. 379, 391.

combination of evolutive interpretation and the deferential standard of review led to EDP's demise. The Court, however, did not apply the same approach to all categories of rights. The evolutive approach had allowed for the demotion of property rights. It also allowed for the ascension of other categories of rights to elevated status. Sections B and C, above, discussed the expansion of SDP to include expression and privacy. The remainder of this section discusses the Court's use of universalistic reasoning to provide meaningful protection of these categories of rights by linking their elevated status with a more stringent form of ends-means testing.

In 1938, one year after abandoning EDP, the Court foreshadowed development of a hierarchical approach. In *U.S. v. Carolene Products Co.*, the Court applied the deferential rational relation test in upholding the challenged business regulation, but suggested that it might examine legislation more carefully when certain rights were affected, including expression.<sup>284</sup> One year later, the Court indicated that legislation interfering with expression might not be justified simply by any legitimate purpose:

Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.<sup>285</sup>

The prevention of litter was a legitimate public purpose, but insufficient to justify a prohibition on the distribution of handbills, because the law interfered with rights of special status. Similarly, in *Thomas v. Collins* (1945), overturning a contempt order that imposed punishment for soliciting members for labor unions, the Court stated:

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<sup>284</sup> 304 U.S. 144, 152 n. 4.

<sup>285</sup> *Schneider v. State*, 308 U.S. 147, 161 (1939). In concurring and dissenting opinions, Holmes and Brandeis had earlier begun developing stricter review for acts interfering with fundamental rights of expression. *E.g.*, *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring); *Abrams v. U.S.*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice.<sup>286</sup>

The Court's more stringent form of review has crystallized into "strict scrutiny." To survive strict scrutiny, the challenged governmental action must serve a "compelling governmental purpose."<sup>287</sup> It must also be narrowly tailored to achieving that purpose, meaning that it must seek to minimize the degree of interference with specially protected rights.<sup>288</sup> The Court continues to apply strict scrutiny in its adjudication of speech, press, assembly, religion, and association (Galloway 1988, 453 n. 16).

With respect to the right of privacy, too, a majority of the justices have applied a heightened level of scrutiny based on the fundamental nature of the right.<sup>289</sup> *Meyer* and *Pierce*, which planted seeds of privacy's development, hinted at strict scrutiny by noting an absence of emergency or extraordinary circumstances to justify the interference with

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<sup>286</sup> 323 U.S. 516, 529-30; *see also West Virginia State Board of Education v. Barnette* 319 U.S. 624, 639 (1943).

<sup>287</sup> *See, e.g., Bates v. Little Rock*, 361 U.S. 516, 524 (1960) ("Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.").

<sup>288</sup> *See e.g., Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222 (1989); *Saia v. New York*, 334 U.S. 558, 560-62 (1948).

<sup>289</sup> The Court has employed strict scrutiny outside of the due process context, as in claims under the Equal Protection Clause involving regulations that classify on the basis of race. *E.g., Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). The Court has also at times employed standards of review that fall between the rational relation and strict scrutiny tests. The contemporary approach to adjudicating equal protection claims involving gender classifications, for example, permits such classifications when the state offers an "exceedingly persuasive" justification, demonstrating that the challenged classification "serves important governmental objectives" and is "substantially related to the achievement of those objectives." *U.S. v. Virginia*, 518 U.S. 515, 524 (1996).



fundamental rights.<sup>290</sup> Later cases applied strict scrutiny when challenged acts infringed privacy. In *Roe*, for example, the Court stated:

Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

In the recent abortion cases . . . courts have recognized these principles.<sup>291</sup>

While strict scrutiny test did not fully take form until after EDP's collapse, some justices had suggested elements of the approach in their EDP jurisprudence. In prominent cases, such as *Adkins v. Children's Hospital* (1923),<sup>292</sup> *Charles Wolff Packing v. Court of Industrial Relations of Kansas* (1923),<sup>293</sup> *Tyson and Bro. United Theater Ticket Offices v. Banton* (1927),<sup>294</sup> and *Morehead v. New York ex rel. Tipaldo* (1936),<sup>295</sup> for example, majorities emphasized the importance of the right at stake, and linked the

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<sup>290</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923).

<sup>291</sup> *Roe v. Wade*, 410 U.S. 113, 155-56 (1973); see also *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977); *Griswold v. Connecticut*, 381 U.S. 479, 496-98 (Goldberg, J., concurring); *Griswold v. Connecticut*, 381 U.S. 479, 502-03 (White, J., concurring); *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting). Cases since *Roe*, beginning with *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992), have complicated analysis of abortion cases by introducing the notion that certain state regulations may be constitutional even though they have the "incidental effect of making it more difficult or more expensive to procure an abortion," as long as they do not "impose[] an undue burden on a woman's ability to make th[e] decision" of whether to have an abortion. A majority recently upheld the Partial-Birth Abortion Ban Act of 2003, which banned the use of a specific method of abortion in its later stages, on the grounds that it did not impose an undue burden on a woman's right to make the decision of whether to continue her pregnancy. *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007). The important point, for present purposes, is that, since *Roe*, the justices have never retreated from the position, originating in the fundamental importance of a woman's right to choose, that: "Before viability, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy." *Carhart*, 127 S.Ct. at 1627. *Casey*'s "undue burden" standard applies only to regulations that do not prevent a woman from making the decision. The Court has never said that anything less than a compelling governmental purpose could justify a state in banning all abortions before viability. Indeed, the *Carhart* standard could be interpreted as stricter than strict scrutiny. While the Court often states that rights are not absolute, the abortion line of cases suggests that states may never ban abortions before viability.

<sup>292</sup> 261 U.S. 525, 546.

<sup>293</sup> 262 U.S. 522, 534.

<sup>294</sup> 273 U. S. 418, 429.

<sup>295</sup> 298 U.S. 587, 610-11.

fundamental nature of these rights with an approach to adjudication that placed a heavy burden on the state to demonstrate exceptional circumstances justifying the infringement of such rights. The failure of strict scrutiny to gain traction in the Court's EDP jurisprudence was a result of a majority of the justices ultimately determining that property rights were not as fundamental or essential as were other categories of rights. At the same time, the application of strict scrutiny in the areas of expression and privacy was a result of the Court's determination that these rights were fundamental and essential.<sup>296</sup>

The development of a hierarchical approach to rights, together with the demotion of property, and ascension of other rights categories, represented fundamental change in constitutional meanings, as the Court recognized within a short period after EDP's demise.<sup>297</sup> As the next section observes, the use of an evolutive approach, which has been critical to the Court's jurisprudence, has been contested and remains controversial in the contemporary Court's SDP jurisprudence. Focusing largely on a recent landmark case concerning privacy rights, the section discusses the majority's use of an evolutive, universalistic approach, and the dissenters' advocacy of a tradition-based approach. The disagreement is especially significant in light of difficulties raised by the majority's use of practices, and other societal indicators, as part of its evolutive analysis.

G. *Lawrence v. Texas* (2003) and the Debate over Emerging Rights

*Lawrence v. Texas* (2003)<sup>298</sup> serves as a useful focus, because it captures critical fault lines in the contemporary Court concerning approaches that allow for the evolution

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<sup>296</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.").

<sup>297</sup> E.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624. (1943).

<sup>298</sup> 539 U.S. 558.

of constitutional meanings (“ECM,” for brevity). The case involved a challenge to a state law prohibiting certain sexual acts between persons of the same sex. The majority (Kennedy) found that an individual’s choice of partner in an intimate, sexual relationship fell within the liberty protected by due process, and that the Texas statute violated that liberty. He could not plausibly have rooted the decision in traditional understandings. Rather, Kennedy argued that the meanings of constitutional rights evolve:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>299</sup>

The approach emphasized that the Fourteenth Amendment’s reference to “liberty” was intentionally vague. The general concept “endures,” but successive generations may, and should, apply the concept differently “in their own search for greater freedom.”

Kennedy’s reasoning evoked earlier uses of ECM. It was noted (sec. F), for example, that the Court used an ECM approach in *Holden v. Hardy* (1898).<sup>300</sup> Brown argued that, in interpreting the Constitution, justices had to acknowledge shifts in public understandings about rights and the law. In *Lawrence*, Kennedy, too, stressed that fundamental beliefs vary from one generation to the next. He also followed key elements of an approach outlined by the second Harlan in his *Poe* dissent, which was largely adopted by justices in other prominent cases. Harlan wrote that justices should approach:

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<sup>299</sup> 539 U.S. at 578-79.

<sup>300</sup> 169 U.S. 366.

the text which is the only commission for our power not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government.<sup>301</sup>

Since neither text, nor history leading up to the Constitution's ratification provided clear answers, justices confronted the challenge of "giving meaning" to constitutional rights.<sup>302</sup> This entailed examining a "particular provision's larger context," including its "history and purposes[.]"<sup>303</sup> Analysis could not be limited to the literal meaning of the text, but had to also draw on "the rational purposes, historical roots, and subsequent developments of the relevant provisions."<sup>304</sup> Harlan cited *Weems v. U.S.* (1910), a seminal Eighth Amendment case (discussed in ch. 6) for the proposition that, "a principle, to be vital, must be capable of wider application than the mischief which gave it birth."<sup>305</sup> With respect to the ban on the use of contraceptives challenged in *Poe*, Harlan found that it violated a principle embedded within liberty--"privacy against arbitrary official intrusion." This principle could not be limited to the traditional emphasis on protection against physical invasions; it was better understood to protect, not the home as a physical location, but the home as the "seat of family life," of individual lives whose privacy was fundamental, and worthy of protection.<sup>306</sup> Although the specific right at stake in *Poe* had not previously been recognized, Harlan employed an interpretive approach that allowed the meaning of constitutional provisions to evolve, as they brought within their protection rights falling within a principle embodied by the text.

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<sup>301</sup> *Poe v. Ullman*, 367 U.S. 497, 540 (1961) (Harlan, J., dissenting).

<sup>302</sup> 367 U.S. at 540 (Harlan, J., dissenting)

<sup>303</sup> 367 U.S. at 542-43 (Harlan, J., dissenting).

<sup>304</sup> 367 U.S. at 549 (Harlan, J., dissenting).

<sup>305</sup> 367 U.S. at 551 (Harlan, J., dissenting) (*quoting Weems v. U.S.*, 217 U.S. 349, 373 (1910)).

<sup>306</sup> 367 U.S. at 551.

Dissenting in *Michael H. v. Gerald D.* (1989), another case examining the scope of due process privacy, Brennan (joined by Marshall and Blackmun), like Harlan in *Poe*, and Kennedy in *Lawrence*, stressed that the Due Process Clause contained “broad and majestic terms.” Liberty was “among the ‘[g]reat [constitutional] concepts ... purposely left to gather meaning from experience.... [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.’”<sup>307</sup> O’Connor, Kennedy, and Souter employed the essence of Harlan’s approach in *Casey*. In their opinion delivering the Court’s opinion, they endorsed Brennan’s ECM approach from *Michael H.* Due process embodied the broad principle that there was “a realm of personal liberty which the government may not enter.” “Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment,” the justices said, “marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.”<sup>308</sup> The opinion quoted extensively from Harlan’s dissenting opinion in *Poe*, noting that the Court in *Griswold* had adopted Harlan’s understanding of constitutional rights as evolving.

It was noted (sec. C) that *Lawrence* continued the Court’s universalistic approach to SDP, drawing out the meaning of privacy as an essential component of liberty. The majority’s approach, then, was both universalistic and evolutive. The use of an evolutive, universalistic approach raises difficult questions. On what basis may justices determine how the meaning of rights changes? If constitutional meanings are not bound by history, then it follows that history alone cannot determine how meanings change. If the justices rely on their own universalistic reasoning alone, they are subject to the familiar

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<sup>307</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 138 (1989) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972), quoting *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 646 (1949)).

<sup>308</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992).

objections regarding the exercise of excessive judicial discretion. In *Lawrence*, Kennedy sought guidance from practices, which, in itself was not remarkable.<sup>309</sup> The intriguing aspect of Kennedy's opinion was the assertion:

[W]e think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.<sup>310</sup>

Kennedy supported his assertion of an emerging awareness with references to three kinds of sources. First, he cited the opinion of an association of legal experts. The American Law Institute's Model Penal Code of 1955 recommended against laws criminalizing consensual sexual acts conducted in private. Second, Kennedy cited international sources. In England, a committee advising Parliament in 1957 recommended the abolition of laws criminalizing sexual acts between persons of the same sex, and Parliament substantially acted upon the recommendations. Additionally, in the early 1980s, the European Court of Human Rights invalidated a law of Northern Ireland prohibiting sexual acts between persons of the same sex. Third, Kennedy considered American state practices. Of the twenty-five states that had criminalized acts of sodomy, by the time of the *Lawrence* decision, only thirteen had continued to do so, and only four of these continued to enforce those laws against homosexuals.

Dissenting in *Lawrence*, Scalia (joined by C.J. Justice William H. Rehnquist and J. Clarence Thomas), rejected Kennedy's use of ECM, and his conception of an "emerging awareness." Scalia argued that, under the Court's SDP jurisprudence, a critical question was whether to apply strict scrutiny. Strict scrutiny applied only when

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<sup>309</sup> Like citation of precedent within a common law system, judicial reliance on longstanding, or existing practices is common and expected. Turner 2004, 1-2.

<sup>310</sup> *Lawrence v. Texas*, 539 U.S. 558, 571-72 (2003).

the challenged act implicated fundamental rights. Rights qualified as fundamental only if they were not only implicit in the concept of ordered liberty, but also “deeply rooted in this Nation's history and tradition.”<sup>311</sup> For Scalia, historical pedigree was an indispensable requirement. Kennedy’s description of an “emerging awareness” was beside the point. By definition, an emerging awareness was not “deeply rooted in this Nation's history and tradition.” Recent state actions could not birth new rights. Kennedy’s international sources were doubly irrelevant. Not only were they recent, but they were non-American. Proper fundamental rights analysis looked only to “*this Nation’s history and tradition.*”<sup>312</sup> The Court “should not impose foreign moods, fads, or fashions on Americans.”<sup>313</sup> With no fundamental right at stake, Scalia would have found that the Texas law satisfied the deferential rational relation test.<sup>314</sup>

The use of ECM has long been controversial. In the *West Coast Hotel* decision that signaled EDP’s demise, the majority recognized significant evolution in constitutional understandings due, in part, to changed economic circumstances. Opposing the majority’s use of ECM, the four-person minority argued that “the meaning of the Constitution does not change with the ebb and flow of economic events”<sup>315</sup> and protested that: “The judicial function is that of interpretation; it does not include the

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<sup>311</sup> 539 U.S. at 593 (Scalia, J., dissenting).

<sup>312</sup> 539 U.S. at 598 (Scalia, J., dissenting).

<sup>313</sup> 539 U.S. at 598 (*quoting Foster v. Florida*, 537 U.S. 990 n. 123 (2002) (Thomas, J., concurring in denial of certiorari)).

<sup>314</sup> Scalia noted that the majority also seemed to apply the rational relation test, giving rise to confusion over the Court’s approach, since Kennedy’s discussion of the liberty interests at stake suggested that the majority would consider the Texas law with heightened scrutiny. Unlike the majority, Scalia would have found the rational relation test satisfied, since the Texas law expressed moral disapproval of certain forms of sexual behavior. 539 U.S. at 599 (Scalia, J., dissenting). Kennedy, in contrast, noting that the Texas statute did not involve minors, public conduct, prostitution, or situations of coercion, concluded that the law “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” 539 U.S. at 578.

<sup>315</sup> *West Coast Hotel v. Parrish*, 300 U.S. 379, 402 (1937) (Sutherland, J., dissenting).

power of amendment under the guise of interpretation.”<sup>316</sup> In one of the Court’s most important decisions expanding privacy, *Griswold v. Connecticut* (1965),<sup>317</sup> Black (joined by J. Potter Stewart) protested the majority’s ECM:

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat oldfashioned I must add it is good enough for me.<sup>318</sup>

Similarly, in his dissenting opinion in *Roe*, Rehnquist objected to the majority’s deviation from historical rights understandings, stressing that “[t]here apparently was no question concerning the validity of [statutes prohibiting abortions] when the Fourteenth Amendment was adopted.”<sup>319</sup>

ECM lies at the heart of conceptual difficulties concerning the use of UR. On the one hand, the argument for ECM is powerful. The Constitution is meant to endure indefinitely and contains extremely broad terms, such as due process “liberty.” American history demonstrates that economic and social conditions change dramatically, as do basic tenets of public philosophy. The formal amendment procedures are unwieldy and may be inadequate for addressing changes relevant to constitutional meanings.<sup>320</sup> The

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<sup>316</sup> 300 U.S. at 404 (1937) (Sutherland, J., dissenting).

<sup>317</sup> 381 U.S. 479.

<sup>318</sup> 381 U.S. at 522 (Black, J., dissenting).

<sup>319</sup> *Roe v. Wade*, 410 U.S. 113, 177 (1973) (Rehnquist, J., dissenting).

<sup>320</sup> Since the Bill of Rights there have been at most seventeen amendments. (Doubt is cast over the validity of the Twenty-Seventh Amendment, limiting Congress’s ability to raise its own compensation, due to the long period of time that elapsed between its introduction and ratification.)



ECM used by Brown, the second Harlan, Kennedy, and other justices, provides a combination of fixedness and alterability that accommodates the use of UR. The reasoning is framed as textual interpretation, not as extra-constitutional reasoning. Kennedy in *Lawrence* was interpreting due process liberty. A distinction is drawn between the fixedness of the broad principles embodied in the text, and evolving understandings about their meaning within an ever-changing societal context. In recognizing changes in constitutional meanings, the justices may reason about what is most essential to the protection of the core concepts and principles woven into the Constitution's fabric.

The use of ECM, however, is also subject to criticism, and raises difficult questions. One of the purposes of a written constitution is to fix certain understandings, in order to restrain future lawmakers. If only extremely broad concepts are fixed, the nature of the remaining restraints is not clear. Even if the justices do not purport to engage in extra-constitutional reasoning, the use of ECM opens justices to similar objections. The broad concepts that the justices update with universalistic reasoning are vague and contested, and, some argue, leave justices with sizeable discretion.

The difficulties raised by the use of ECM are highlighted when we consider the sources for discerning changed meanings. As noted, if the justices rely exclusively on UR, they are subject to charges of exercising unfettered discretion,<sup>321</sup> but to which other

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<sup>321</sup> The justices have recognized concerns over the excessiveness of their own discretion since their earliest constitutional cases, e.g., *Calder v. Bull*, 3 U.S. 386, 398-99 (1798) (Iredell, J.), and it remains a major concern today. In the *Bowers* majority opinion that *Lawrence* overturned, for example, White wrote: "Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986). See also *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n. 6 (1989); *Roe v. Wade*, 410 U.S. 113, 173-74 (1973) (Rehnquist, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 513 (1965) (Black, J., dissenting) ("I do not believe that we are

sources may they refer? Reliance on legislative trends may offer the appearance of greater objectivity, as one may count the number of states that have adopted this or that rule. But the Constitution is supposed to restrain legislatures. If legislative trends, in themselves, are self-justifying, then the Constitution ceases to act as an effective constraint on legislative actions.

Kennedy's discussion of an "emerging awareness" referred to the actions of American state legislatures, foreign legislative and adjudicative bodies, and professional organizations, but did not explain why these sources were relevant to discerning changes in constitutional meanings. Universalistic reasoning about the requirements of liberty was central to the decision. The reference to apparently objective sources may be seen as providing insulation from criticism that the justices' opinions are overly subjective. Without an explanation of the relevance of these sources, however, there is a risk of undermining the Constitution as a restraint on lawmakers that is independent of the lawmakers' will (discussed further in ch. 7, F).

We will see in the following chapters that the tensions discussed here, and the difficulties associated with ECM, also emerge in other areas of the Court's jurisprudence.

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granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of 'civilized standards of conduct.' Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them. The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination—a power which was specifically denied to federal courts by the convention that framed the Constitution.”); *Loan Association v. Topeka*, 87 U.S. 655, 669 (1874) (Clifford, J., dissenting) (“Courts cannot nullify an act of the State legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism.”). In cases in which the Court has invalidated laws on SDP grounds, majority justices have often been at pains to make reassurances that the justices were not simply exercising unrestrained discretion. See, e.g., *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977); *Griswold v. Connecticut*, 381 U.S. 479, 493-94 (1965) (Goldberg, J., concurring).

## **Chapter 4**

### **Procedural Due Process**

Though procedural and substantive due process are based in the same constitutional provision, the Court's jurisprudence in these two areas covers very different issue areas. Within the Court's PDP jurisprudence, this chapter focuses especially on questions concerning the applicability against the states of certain rights of criminal procedure, such as the right to a jury trial, and the right to counsel. As noted, the Bill of Rights was long understood as applicable only against the federal government. With the enactment of the Fourteenth Amendment, litigants argued that specific Bill of Rights provisions applied against states through that Amendment.<sup>322</sup> Litigants also sometimes challenged state actions on the strength of the Fourteenth Amendment's Due Process Clause alone. The Court's treatment of due process challenges to state criminal procedures may be divided into three time periods. Section A discusses the late nineteenth century to the early 1930s, a period during which the Court did not invalidate state criminal procedures on due process grounds, but developed an evolutive, universalistic approach that it would later use (as discussed in sec. B) to examine, and sometimes invalidate state procedures, on a case-by-case basis. Section C discusses the "selective incorporation" approach, which the Court adopted in 1961.

A. Early Procedural Due Process--the Use of a Universal, Evolutive Approach, While Rejecting Challenges to State Procedures

Although the chapter focuses on the Fourteenth Amendment, it is useful to begin with the tradition-based "settled usages" approach that the Court adopted in its first major decision addressing due process, though the case was decided under the Fifth Amendment. At issue in *Murray's Lessee v. Hoboken Land & Improvement Co.*

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<sup>322</sup> As with substantive due process, early on, both the Privileges and Immunities and Due Process Clauses were commonly appealed to as vehicles for the application of the Bill of Rights against the states, but, in the long run, only the due process argument remained important.

(1855)<sup>323</sup> was the federal government's use of a summary procedure (without a judicial hearing), to recover from a customs collector who allegedly owed money to the United States. The collector objected that his due process rights were violated because he was not afforded the usual procedural protections of a judicial hearing. Since the government indisputably acted in accordance with procedures established by congressional legislation, the justices were faced with the question of whether the procedure provided by Congress satisfied the requirements of due process. First, the Court definitively answered a threshold question. Due process acted as a restraint on the legislature. It did not require merely that the executive and judicial branches comply with applicable law. This threshold determination confronted the justices with the challenge of identifying standards for distinguishing valid from invalid procedures. On what grounds was the Court to determine whether procedures enacted by Congress satisfied due process?

The Court turned to history for guidance. If a procedure had roots in English common law, and had been maintained in this country since colonial times, then it satisfied due process:

[W]e must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.<sup>324</sup>

The Court upheld the summary procedures that had been applied against the collector, because there was a history, dating back to before independence, of using summary procedures for the collection of debts from receivers of the revenues. Under this “settled

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<sup>323</sup> 59 U.S. 272.

<sup>324</sup> 59 U.S. at 277.

usages” test, historical pedigree was sufficient for constitutionality, though the decision did not say whether it was also necessary.

The Court rebuffed the earliest due process challenges brought under the Fourteenth Amendment, whether or not based on specific provisions of the Bill of Rights.<sup>325</sup> While these early cases did not describe in detail the Court’s approach, the justices clearly did not adopt purely historical standards. Instead, the Court suggested that due process entailed certain essential requirements. *Kennard v. Louisiana* (1875),<sup>326</sup> for example, concerned a challenge to the state procedures by which a judge was removed from office. In holding the procedures adequate, the Court observed that the removed judge “not only had the right to be heard, but he was in fact heard, both in the court in which the proceedings were originally instituted, and, upon his appeal, in the highest court of the State.”<sup>327</sup> Rather than examining whether the challenged procedures had a basis in longstanding practices, the Court emphasized that the procedures provided certain elements which, the opinion implied, were critical to due process.

Two years later, in rejecting procedural and other challenges to a tax assessment on real property, a unanimous Court (Miller), citing *Kennard* stated:

[I]t is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.<sup>328</sup>

The language suggested a “fair trial” as a guiding principle in assessing due process. In a more specific examination of the challenged procedures, Miller observed that, before the

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<sup>325</sup> E.g., *Hurtado v. California*, 110 U.S. 516 (1884); *Davidson v. New Orleans*, 96 U.S. 97 (1877); *Kennard v. Louisiana*, 92 U.S. 480 (1875); *Walker v. Sauvinet*, 92 U.S. 90 (1875).

<sup>326</sup> 92 U.S. 480.

<sup>327</sup> 92 U.S. at 483.

<sup>328</sup> *Davidson v. New Orleans*, 96 U.S. 97, 105 (1877).

assessment could be made final, owners were afforded personal service of notice, an opportunity to object, and a full and fair hearing. “If this be not due process of law,” Miller wrote, “then the words can have no definite meaning as used in the Constitution.”<sup>329</sup> As in *Kennard*, the decision did not rest on an historical inquiry. Rather, the Court implied that certain requirements, such as notice, and an opportunity to be heard, were essential to due process.

*Kennard* and *Davidson* suggested that history might not be the only standard. In *Hurtado* (1884),<sup>330</sup> the Court explicitly adopted an evolutive approach to PDP. The case concerned a right set forth in the Bill of Rights--the Fifth Amendment’s grand jury requirement: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .” The defendant was convicted of murder, after being charged by information, without a grand jury. By dispensing with the grand jury, the state departed from a procedure with deep historical roots in American law. The Court (J. Stanley Matthews) stated that due process allowed for the development of new procedures. The settled usages test from *Murray’s Lessee* meant only that historical pedigree validated a procedure. It did not mean that only procedures with historical pedigree qualified as due process:

[T]o hold that [a longstanding history] is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.<sup>331</sup>

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<sup>329</sup> 96 U.S. at 105-06.

<sup>330</sup> 110 U.S. 516.

<sup>331</sup> 110 U.S. at 529.

It “would be all the more singular and surprising” to allow only traditional procedures “in this quick and active age,” when one considered “the progressive development of legal ideas and institutions in England,” and how much understandings about rights had evolved since the Magna Carta.<sup>332</sup> Procedures considered acceptable in twelfth-century England would be considered barbaric today. The ordeal of water, if failed, led to the loss of the defendant’s right hand and foot, followed by exile. Those who passed were exiled regardless. Grand juries at one time did not hear witnesses, but made charges on reputation and general suspicion. Given the extent of change in beliefs:

it is better not to go too far back into antiquity for the best securities for our ‘ancient liberties.’ It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.<sup>333</sup>

The Constitution “was made for an undefined and expanding future.” Constitutional meanings must not be too rigidly tied to American traditions, because, while it was true that the Constitution “was ordained . . . by descendants of Englishmen, who inherited the traditions of the English law and history,” the Constitution was made “for a people gathered, and to be gathered, from many nations and of many tongues.” Matthews seemed to equate due process of law with justice:

[W]hile we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that Code which survived the

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<sup>332</sup> 110 U.S. at 529.

<sup>333</sup> 110 U.S. at 530.



Roman empire as the foundation of modern civilization in Europe.

He referred to the Magna Carta as a “broad charter of public right and law,” and implied that the Constitution should be viewed that way, open to “the best ideas of all systems and of every age.” The common law drew:

its inspiration from every fountain of justice, [and] we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not useful forms.<sup>334</sup>

*Hurtado*’s implications were more far-reaching than it acknowledged. In *Hurtado* itself, ECM was used to allow a procedure despite its lack of historical pedigree. The reasoning, however, equally supported the use of ECM to adopt new restrictions on legislatures. Matthews’s historical examples of shifts in legal understandings included changes in the direction of expanded rights. The discussion laid the groundwork for acceptance of the notion that even procedures that once had the status of “settled usages” might later be invalidated as inconsistent with fundamental rights and the basic requirements of due process.<sup>335</sup>

ECM throws off the yoke of history. But which standards take its place? In *Hurtado*, Matthews turned to a variety of USEs. He quoted *Loan Association v. Topeka* (1874) (ch. 3, A(1)) for the proposition that there were “rights in every free government beyond the control of the state. . . A government which recognized no such rights . . . is after all but a despotism.”<sup>336</sup> Any procedure that “preserves these principles of liberty

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<sup>334</sup> 110 U.S. at 530-31.

<sup>335</sup> In the area of SDP, too, ECM was initially used to loosen traditional restrictions on government. *E.g.*, *Holden v. Hardy*, 169 U.S. 366 (1898).

<sup>336</sup> *Hurtado*, 110 U.S. at 536-37 (quoting *Loan Association v. Topeka*, 87 U.S. 655, 662 (1874)).

and justice, must be held to be due process of law.”<sup>337</sup> Due process served as a bulwark “against any arbitrary legislation,” and guaranteed, “not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.”<sup>338</sup> Asserting an MRR formulation that has been widely used, Matthews stated that due process required states to operate “within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”

From these USEs, Matthews derived IMPs. Conformity with the requirements of law included that, to be valid, legislation had to be general, and “not a special rule for a particular person or a particular case.” A valid law “hears before it condemns, . . . proceeds upon inquiry, and renders judgment only after trial.”<sup>339</sup> Matthews also echoed IMPs the Court had applied in its SDP<sup>340</sup> and Contract Clause jurisprudence,<sup>341</sup> stating that the requirements of law also prohibited “acts of confiscation,” and “acts directly transferring one man's estate to another.”<sup>342</sup> Applying these principles, the Court upheld the defendant’s conviction, concluding that charging the defendant by information did not violate his fundamental rights.

In the decades following *Hurtado*, a majority continued to apply the basic elements of the approach that it outlined, including the determination that legislatures were not bound by historical practices, and the reliance on USEs to determine which departures from historical practices satisfied the requirements of due process. In *Brown v. New Jersey* (1899), for example, citing *Hurtado*, the Court (J. David Brewer)

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<sup>337</sup> 110 U.S. at 537.

<sup>338</sup> 110 U.S. at 532.

<sup>339</sup> 110 U.S. at 535.

<sup>340</sup> E.g., *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877); *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 236-37 (1897).

<sup>341</sup> E.g., *Fletcher v. Peck*, 10 U.S. 87, 135 (1810).

<sup>342</sup> *Hurtado v. California*, 110 U.S. 516, 536 (1884).

confirmed that a state was “not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law,” and that it “may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary.”<sup>343</sup> The defendant challenged the “struck jury” procedures (regarding the number of peremptory challenges allowed to the prosecution and defense), which the state followed in his murder trial. While the Court conceded that these struck jury procedures had not historically been used in murder trials, traditional practice was not decisive. Instead, the Court held that states could depart from the common law, as long as “no fundamental right of the defendant is trespassed upon.”<sup>344</sup> The inquiry was not simply whether the challenged procedure had a historical pedigree, but whether it was “fair and reasonable,” and consistent with “principles of liberty and justice.” Within this frame of inquiry, however, the Court did not ignore history. Observing that the common law had deemed the struck jury acceptable for lesser offenses, Brewer reasoned that it “could hardly be deemed essentially bad when applied to other offenses.”<sup>345</sup> In determining the procedure’s fairness, Brewer extracted its core purpose, which was to select an impartial jury. Since the procedures afforded the defendant a reasonable opportunity to discern the potential jurors’ qualifications, and to guard against the inclusion of jurors with biases, he could not object that the impaneling was unfair.

In *West v. Louisiana* (1904),<sup>346</sup> too, the Court confronted a challenge to the state’s departure from common law. The defendant argued that the admission of a deposition at

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<sup>343</sup> 175 U.S. 172, 175.

<sup>344</sup> 175 U.S. at 175; *see also Maxwell v. Dow*, 176 U.S. 581, 605 (1900) (allowing an eight-member jury in a criminal case, although it departed from the twelve-member jury traditionally used at common law, because it did not “work a denial of fundamental rights.”).

<sup>345</sup> 175 U.S. at 176.

<sup>346</sup> 194 U.S. 258.

trial violated due process.<sup>347</sup> The admission appeared not to fall within common law procedures, because depositions traditionally were considered admissible only under specified circumstances, none of which applied.<sup>348</sup> The Court held the procedure was not necessarily invalid even if it departed from common law. Citing *Hurtado*, *Brown*, and *Holden*,<sup>349</sup> the Court recognized that states were entitled to alter common law. The standard was not history, but whether procedures were reasonable under the circumstances, or deprived the defendant of a “fundamental and absolutely all-important right.” The defendant had the opportunity to cross-examine at the deposition. Common law clearly allowed admission where the witness was unavailable for certain reasons. Observing that the admission constituted only “a slight extension of the rule of the common law,” and not a change of “fundamental character,” the Court found that the deposition’s admission was not unfair, and, therefore, did not violate due process.<sup>350</sup>

*Twining v. New Jersey* (1908)<sup>351</sup> presented the question of whether the states were bound by a specific Bill of Rights protection--the Fifth Amendment’s privilege against self-incrimination: “No person . . . shall be compelled in any criminal case to be a witness against himself.” The Court did not consider the privilege’s long history of observance binding, declining to accept that “the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment.”<sup>352</sup> Again, needing a standard beyond history,

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<sup>347</sup> The Sixth Amendment guarantees the accused the right “to be confronted with the witnesses against him,” but, since the Court considered that Amendment applicable only against the federal government, the analysis was limited to whether the admission of the deposition violated the Fourteenth Amendment.

<sup>348</sup> Common law allowed admission of a deposition for a witness’s inability to testify due to death, poor health, or the defendant’s interference, but the witness in *West* had simply left the state.

<sup>349</sup> *Holden v. Hardy*, 169 U.S. 366 (1898).

<sup>350</sup> *West*, 194 U.S. at 263-64.

<sup>351</sup> 211 U.S. 78.

<sup>352</sup> 211 U.S. at 101.

the Court looked to USEs. Justice William H. Moody cited *Holden* for the proposition that: “There are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.”<sup>353</sup> In deciding whether a specific right fell within due process, the question was whether it represented:

a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?<sup>354</sup>

The Court had to determine whether the privilege against self-incrimination was “an immutable principle of justice which is the inalienable possession of every citizen of a free government.”<sup>355</sup> Employing an MRR formulation from *Hurtado*, Moody stated that, in exercising their “inherent and reserved powers,”--i.e., the police powers--the states were free to adopt a diversity of practices, provided that those powers were “exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”<sup>356</sup> Having set forth USEs, Moody identified as IMPs the requirements that trials be conducted by a court with jurisdiction, that affected parties be afforded notice of the proceedings, and an opportunity to be heard, and that courts act “not arbitrarily, but in conformity with a general law, upon evidence.”<sup>357</sup> Highlighting the interrelation between PDP and SDP jurisprudence, Moody also referred to the “inviolability of private property.”<sup>358</sup>

Though history was not the ultimate standard, the Court did refer to history in applying USEs to the question of whether states were bound by the privilege. In

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<sup>353</sup> 211 U.S. at 102 (*quoting Holden v. Hardy*, 169 U.S. 366, 389 (1898)).

<sup>354</sup> 211 U.S. at 106.

<sup>355</sup> 211 U.S. at 113; *see also Turpin v. Lemon*, 187 U.S. 51 (1902). In *Turpin*, the Court stated that, in evaluating West Virginia’s procedures for selling property upon the owner’s failure to pay taxes, it was necessary to consider whether the procedures were “in conformity with natural justice.” 187 U.S. at 57.

<sup>356</sup> 211 U.S. at 102.

<sup>357</sup> 211 U.S. at 111.

<sup>358</sup> 211 U.S. at 113.

conducting its historical analysis, the Court combined universalistic and particularistic elements, by drawing a distinction between rights that were merely “secured by specific constitutional safeguards,” and those that enjoyed “a sanctity above and before constitutions themselves.”<sup>359</sup> The fact that a practice had been followed historically was not, in itself, decisive. A practice followed only because it was thought “just and useful,” or had been “proved by experience to be expedient” did not carry much weight. What did carry weight was a practice that had been maintained specifically because it was believed to be required by universalistic principles. Moody asked whether the practice had been upheld because it was considered to be an “unchangeable principle of universal justice,” or one “ranked among the fundamental and inalienable rights of mankind,” or one without which freedom, liberty, and justice could not exist.<sup>360</sup> Inclusion in the Constitution, alone, did not answer the question of whether a practice had been thought required by universalistic standards. In *Twining*, the defendant was seeking the protection of a right explicitly protected by the Bill of Rights, but the Court concluded that it was not protected by due process. Moody’s historical examination covered: (1) pre-Constitutional America; (2) “the great instruments in which we are accustomed to look for the declaration of the fundamental rights”;<sup>361</sup> and (3) the practices of the individual states. He also looked beyond American law, observing that:

The wisdom of the [privilege against self-incrimination] has never been universally assented to since the days of Bentham, many doubt it to-day . . . It has no place in the jurisprudence of civilized and free countries outside the domain of the common law . . .<sup>362</sup>

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<sup>359</sup> 211 U.S. at 113.

<sup>360</sup> 211 U.S. at 107, 113.

<sup>361</sup> 211 U.S. at 107.

<sup>362</sup> 211 U.S. at 113.

The absence of uniformity, and the presence of doubt, were counted against the privilege's status as a fundamental right. In sum, Moody found that the weight of evidence indicated that the privilege had not been widely understood as embodying a fundamental principle that was indispensable to the protection of liberty.

At the time *Twining* was handed down, the Court had yet to invalidate a state criminal procedure under the Fourteenth Amendment (Roche 1964, 129), having rejected arguments that due process encompassed the right to a jury trial in a civil case,<sup>363</sup> the right to a twelve-member jury trial in a criminal case,<sup>364</sup> and the right in criminal cases to be charged by the presentment or indictment of a grand jury.<sup>365</sup> Through these decisions, however, the Court developed an approach that left the door open for later Courts to find state procedures violated due process. Within the REP framework, the initial inquiry was whether challenged procedures accorded with USEs, such as the fundamental requirements of a free government, and the indispensable elements of liberty and justice. From these USEs, the justices identified IMPs, such as the requirements that: laws act in a general, and not arbitrary manner; criminal defendants be given notice and an opportunity to be heard; verdicts be rendered only after trial. More specific applications of these principles were worked out on a case-by-case basis. Though the overarching standard was universalistic, the justices did refer to history, though its precise role was not always clear. In a number of cases, including *Hurtado*, *Brown*, and *West*, the Court emphasized that a challenged procedure was only a minor extension of a procedure approved at common law. *Twining* looked to history for guidance as to whether the right in question was fundamental.

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<sup>363</sup> *Walker v. Sauvinet*, 92 U.S. 90 (1875).

<sup>364</sup> *Maxwell v. Dow*, 176 U.S. 581 (1900).

<sup>365</sup> *Hurtado v. California*, 110 U.S. 516 (1884).

Although the cases described showed a remarkable degree of consensus (in each of them, either the Court was unanimous or Harlan was the lone dissenter), Harlan emerged during this period as an important critic of the Court's evolutive, universalistic approach. Like Iredell (ch. 2, A), Harlan's approach was consistent with the Delegative Model, with its emphasis on constitutional text and tradition. Unlike the majority, Harlan viewed history as decisive. In *Hurtado*,<sup>366</sup> for example, Harlan considered the grand jury requirement binding on the states. He opposed the majority's approach, which allowed modifications to historical practices if the justices found them to be consistent with fundamental principles. In *Maxwell v. Dow* (1900), the majority held that a state's use of an eight-member criminal jury did not violate due process (even though the Sixth Amendment was understood as guaranteeing a twelve-member jury in the federal context). In dissent, Harlan renewed his argument against ECM, endorsing the settled usages test from *Murray's Lessee*. For Harlan, the test meant, not only that procedures with historical pedigree were valid, but also that procedures lacking it were invalid. He rejected the majority's distinction in *Twining* between rights merely secured by the Constitution, and principles believed so fundamental that they did not depend on constitutional enactment for their existence. For Harlan, inclusion in the Constitution was the critical indication of a right's importance. Constitutional rights represented:

guaranties of life and liberty that English-speaking people have for centuries regarded as vital to personal security, and which the men of the revolutionary period universally claimed as the birthright of freemen.<sup>367</sup>

Harlan did not view any of the Bill of Rights protections as rules merely thought expedient. To the contrary: "To say of any people that they do not enjoy those privileges

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<sup>366</sup> *Hurtado v. California*, 110 U.S. 516 (1884) (discussed above).

<sup>367</sup> *Maxwell v. Dow*, 176 U.S. 581, 617 (1900) (Harlan, J., dissenting).



and immunities [protected in the Bill of Rights] is to say that they do not enjoy real freedom.”<sup>368</sup> Allowing departures from these protections, as they were understood by the Founding generation, would be to allow for the dilution of precious rights. In a similar vein, in support of his position in his *Twining* dissent that the Fourteenth Amendment encompassed the privilege against self-incrimination, Harlan stated:

[W]hen the present government of the United States was established it was the belief of all liberty-loving men in America that real, genuine freedom could not exist in any country that recognized the power of government to compel persons accused of crime to be witnesses against themselves. And it is not too much to say that the wise men who laid the foundations of our constitutional government would have stood aghast at the suggestion that immunity from self-incrimination was not among the essential, fundamental principles of English law.<sup>369</sup>

Although the Court had not yet employed it, Harlan anticipated and rejected the concept of selective incorporation, by which the justices might decide that some Bill of Rights provisions merited Fourteenth Amendment protection while others did not.<sup>370</sup> The Constitution protected the right to a criminal jury trial, and that right had been historically understood as guaranteeing a twelve-member jury. If the American people wanted to alter that requirement, they could do so by amending the Constitution. The justices had no authority to alter the Constitution’s meaning, or to selectively enforce its mandates.

Harlan, then, favored an approach to due process that was markedly distinct from that of the majority. It would be an over-simplification, however, to suggest that Harlan looked to history while the majority looked to universalistic principles. The two were necessarily interconnected. Disagreement concerned the nature of the interconnection.

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<sup>368</sup> 176 U.S. at 615 (Harlan, J., dissenting).

<sup>369</sup> *Twining v. New Jersey*, 211 U.S. 78, 118 (1908) (Harlan, J., dissenting).

<sup>370</sup> 176 U.S. at 616-17 (Harlan, J., dissenting).

The majority constructed its framework around USEs, and viewed history as a useful starting point in conducting their fundamentally universalistic inquiry. The historical analysis was not, in itself, determinative. In one case, the justices might find the traditional common law rules indispensable, while in another they might allow modifications. In making such distinctions, the majority justices referred to standards transcending the practices that happened to be in force at a particular time in a particular place. In contrast, Harlan saw the Constitution as an unalterable guide to due process. All Bill of Rights protections applied against the states. Harlan was wedded to the decisions about rights that the Framers had made by including them in the Constitution. At the same time, Harlan emphasized that the Framers considered these rights as essential to liberty. For Harlan, the best way to pursue law in conformity with USEs was through history--through strict adherence to the Framers' directives.

B. The Court Employs the Universal, Evolutive Framework to Invalidate State Procedures, on a Case-by Case Basis

*Powell v. Alabama* (1932)<sup>371</sup> was the first case in which the Court used its fundamental rights framework to invalidate state procedures. In that case, a number of defendants, young black males, challenged their rape convictions (a capital crime) on the grounds that they had been denied the right to a counsel. The facts of the case were egregious. They were tried within a community so intensely hostile to them, for racial reasons, that they frequently had to be accompanied by military guard. The colloquy between the trial judge and the appointed counsel suggested an appallingly casual attitude towards ensuring that the defendants received adequate assistance. The issue before the Court was the trial judge's handling of the defendants' access to legal advice. The Court

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<sup>371</sup> 287 U.S. 45.

employed the REP framework described in the previous section, which included the identification of notice and a hearing as IMPs. The question could be framed, then, as whether the right to acquire counsel was essential to the right to a hearing. The Court (Sutherland) found that it was: “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”<sup>372</sup> Even the most educated defendants required legal advice at every step of the proceedings. Without advice, even defendants with a strong defense would be in danger of conviction. The danger would be greater for defendants, like those in *Powell*, who were not highly educated. Therefore, it would be a denial of due process to arbitrarily deny a defendant the opportunity to retain counsel. Considering the facts of the case (including the defendants’ youth and lack of education, the hostile community in which they found themselves, and the difficulty of communication with their friends and families), Sutherland concluded that the trial judge’s management of the trial violated due process. He went further. Under the circumstances, the defendants’ need for counsel was so pressing that the judge’s failure to ensure the appointment of effective counsel also violated due process. In a capital case, where the defendants were uneducated and in dire need of legal assistance, a right to appointed counsel followed as “a logical corollary from the constitutional right to be heard by counsel.”<sup>373</sup> The opinion stressed the facts of the case, and did not state that due process required the appointment of counsel in every criminal case in which defendants were unable to retain counsel for themselves.

Sutherland also briefly considered practices, historical and contemporary. First, under the settled usages test, Sutherland observed that there was no longstanding history

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<sup>372</sup> 287 U.S. at 68-69.

<sup>373</sup> 287 U.S. at 72.

of denying defendants the right to counsel. To the contrary, American law had always afforded defendants the right to aid of counsel. The right, therefore, could not be denied on historical grounds. With respect to contemporary practice, Sutherland also observed that the federal government, as well as all of the states, required a trial judge in cases involving serious crimes to appoint counsel where the defendant could not retain counsel. “A rule adopted with such unanimous accord reflects, if it does not establish,” said Sutherland, “the inherent right to have counsel appointed at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right.”<sup>374</sup> Like earlier opinions, the analysis combined UR with analysis of historical and present practices. Uniformity of practice was cited as evidence supporting the right’s universalistic status.

While *Powell* might be considered to have left some ambiguity concerning the extent to which its holding hinged on the circumstances (Smith 1985, 77; Easterbrook 1982, 106), the opinion strongly suggested its conclusion was dependent on the facts. Indeed, for nearly the next three decades, a majority of the Court employed an approach that employed USEs on a case-by-case approach, emphasizing the importance of circumstances. Due process did not guarantee a list of accepted procedures, but treatment in conformity with USEs. The Court used a variety of formulations in articulating the universalistic standards by which cases were to be adjudged. Each individual was entitled to “fundamental justice,” and rights “basic to our free society.”<sup>375</sup> A principle of due process was binding on states if it expressed an “immutable principle of justice,”<sup>376</sup>

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<sup>374</sup> 287 U.S. at 73.

<sup>375</sup> *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

<sup>376</sup> *Snyder v. Massachusetts*, 291 U.S. 97, 108 (1934).

or was “dictated by natural, inherent, and fundamental principles of fairness.”<sup>377</sup> When a defendant challenged the manner in which a trial was conducted, the question was whether the “trial is offensive to the common and fundamental ideas of fairness and right.”<sup>378</sup> The justices asked whether the state procedures employed were “repugnant to the conscience of mankind,”<sup>379</sup> or to “the universal sense of justice.”<sup>380</sup> If a party protested the failure of the state to provide a given procedural right, the justices inquired whether, if the procedure were abolished, liberty or a fair and enlightened system of justice would still be possible.<sup>381</sup> As in other time periods and issue areas, the Court also employed MRR formulations, such as whether a challenged state procedure “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,”<sup>382</sup> or whether the procedure at issue violated those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”<sup>383</sup> One of the most commonly used formulations was first articulated in *Palko v. Connecticut* (1937), in which the Court inquired whether the asserted right was “implicit in the concept of ordered liberty.”<sup>384</sup> In his opinion for the Court in *Palko*, Justice Benjamin Cardozo perhaps best captured the universalistic spirit of the Court’s approach, stating it was “dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.”<sup>385</sup> Cardozo indicated that the same universalistic framework applied in SDP and PDP cases. The Court’s decision to apply the freedoms of

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<sup>377</sup> *Betts v. Brady*, 316 U.S. 455, 464 (1942).

<sup>378</sup> 316 U.S. at 473.

<sup>379</sup> *Palko v. Connecticut*, 302 U.S. 319, 323 (1937); *see also Rochin v. CA*, 342 U.S. 165, 172 (1952).

<sup>380</sup> *Betts*, 316 U.S. at 472.

<sup>381</sup> *Palko*, 302 U.S. at 325-26 (1937); *Snyder v. Massachusetts*, 291 U.S. 97, 110 (1934).

<sup>382</sup> *Snyders*, 291 U.S. at 105.

<sup>383</sup> *Brown v. Mississippi*, 297 U.S. 278 (1936) (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)).

<sup>384</sup> *Palko*, 302 U.S. at 325 (1937).

<sup>385</sup> 302 U.S. at 326.

speech and press against the states through the Fourteenth Amendment was a result of the same overarching analysis as its decision to require the assistance of counsel in *Powell*--the rights at stake were essential to liberty.<sup>386</sup>

The case-by-case approach enabled the Court to avoid issuing rigid rules. In evaluating due process challenges, the justices were guided, not by whether a specific rule was technically violated, but, rather, by whether, in the totality of the circumstances, the process provided was fair and just. Due process, a majority of the justices maintained, “conveys neither formal nor fixed nor narrow requirements.”<sup>387</sup> It was critical to avoid “the tyranny of labels,” which was “a fertile source of perversion in constitutional theory.”<sup>388</sup> Compliance with a given rule might be necessary to justice on one set of facts, but unnecessary on another. Rules adopted “under the pressure” of “particular situations” might prompt the framing of a rules that would turn out to be irrelevant to justice in different situations. As Cardozo wrote:

Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute, concept. It is fairness with reference to particular conditions or particular results. . What is fair in one set of circumstances may be an act of tyranny in others.<sup>389</sup>

*Snyder v. Massachusetts* (1939), *Betts v. Brady* (1942), and *Palko* are good examples of the Court’s universalistic, case-by-case approach during this period. In *Snyder*, the trial judge had denied the defendant’s request to be present while the jury was taken to a viewing of the crime scene. The Court declined to hold that due process always entitled a defendant to be present during a viewing. Instead, the Court examined

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<sup>386</sup> 302 U.S. at 324-25.

<sup>387</sup> *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

<sup>388</sup> *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934).

<sup>389</sup> 291 U.S. at 116-17.

the circumstances, noting that the defendant's counsel had been permitted to attend the viewing, and that the defendant disputed neither the location shown to the jurors, nor anything stated to jurors. The critical requirement was that the defendant be ensured an opportunity to defend. The defendant had failed to show how his absence from the viewing impeded that opportunity, or led to injustice.<sup>390</sup> Under the specific circumstances, the defendant's inability to attend the viewing did not deprive him of a fundamentally fair trial, though the Court did not rule out the possibility that, under different circumstances, a defendant's inability to attend a viewing would violate due process.

Similarly, in *Betts*,<sup>391</sup> the Court focused on the overall fairness and justice of the trial. Like *Powell*, *Betts* concerned the right to appointed counsel. The defendant, indicted for robbery and unable financially to hire his own counsel, requested the appointment of counsel. The trial judge denied the request, since the applicable law provided for the appointment of counsel only in rape and murder cases, leaving the defendant to handle his own defense at trial. The Court held that due process did not invariably require the appointment of counsel for indigent defendants. The trial was relatively uncomplicated (turning on the veracity of witnesses supporting an alibi), and the defendant demonstrated familiarity with criminal procedure and facility in conducting the defense. Under the circumstances, the denial of appointed counsel did not result in a fundamentally unfair trial. The different outcomes in *Powell* and *Betts* turned on the different circumstances of the two cases.

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<sup>390</sup> See also *Adamson v. California*, 332 U.S. 46, 54 (1947) ("For a state to require testimony from an accused is not necessarily a breach of a state's obligation to give a fair trial. Therefore, we must examine the effect of the California law applied in this trial to see whether the comment on failure to testify violates the protection against state action that the due process clause does grant to an accused.").

<sup>391</sup> 316 U.S. 455.

*Palko* also involved a due process challenge based on a Bill of Rights provision--the Fifth Amendment's double jeopardy prohibition.<sup>392</sup> The defendant had been convicted of second-degree murder in the first trial. A second trial was conducted, however, after the government successfully appealed from the verdict, as authorized by a Connecticut statute permitting the government to take appeals in criminal cases. In the second trial, the defendant was convicted of first-degree murder. In the federal context, the Court previously had held that defendants could not be tried a second time on the government's motion. The Court, however, declined to apply the federal rule. The state was not using multiple prosecutions to harass the defendant. Since the defendant could have appealed, the state was merely asserting a "reciprocal privilege," and attempting to achieve an error-free trial. Accordingly, Cardozo found: "There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before."<sup>393</sup>

Within the Court's universalistic framework, IMPs operated as more specific expressions of USEs, viewed as lying at the heart of what fundamental fairness required. They included a competent court with jurisdiction, notice, and an opportunity to be heard. If they were violated, so, too, was the Constitution. In *Powell*, for example, the defendants were effectively deprived of their right to be heard. Consequently, their right to due process was violated. By contrast, in *Snyder*, since the defendant's inability to attend the viewing did not deprive him of his opportunity to be heard, no due process violation occurred. As Cardozo explained in *Snyder*, certain privileges, such as the right to be heard in one's defense, are "so obviously fundamental" that they can not constitutionally be disregarded. A defendant who has been deprived of this right "has

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<sup>392</sup> "No person shall . . . be subject for the same offence to be put in jeopardy of life or limb . . ."

<sup>393</sup> *Palko*, 302 U.S. at 328.



lost something indispensable,” independent of any analysis of its effect on the result.<sup>394</sup>

The “harmless error” approach did not extend to these essential elements of due process:

The law . . . is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof.<sup>395</sup>

As in the period before *Powell*, the Court continued to recognize ECM. Since it was “of the very nature of a free society to advance in its standards of what is deemed reasonable and right,” due process had to be viewed as a “living principle, and its meaning could not be confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.”<sup>396</sup> And, as in the earlier period, the Court, at the same time, found a role for historical analysis. In line with the spirit of *Murray’s Lessee*, and with the Court’s use of common law in cases like *Brown* (1899) and *West v. Louisiana* (1904), the justices seemed to view longstanding practice as strong, though not dispositive, support for the validity of a given procedure. In *Snyder*, for example, in discussing the trial court’s facilitation of an out-of-court viewing of evidence by the jury, Cardozo noted that this was a practice with a long history, and one adopted almost uniformly by the states.<sup>397</sup>

The justices also seemed to view a lack of uniformity in historical and contemporary practice as evidence against a procedure being binding upon the states. That reasonable people could disagree over a procedure suggested it was not essential to

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<sup>394</sup> *Snyder*, 291 U.S. at 116.

<sup>395</sup> 291 U.S. at 122.

<sup>396</sup> *Wolf*, 338 U.S. at 27.

<sup>397</sup> *Snyder*, 291 U.S. at 110-11.

fairness and justice. In *Wolf v. Colorado* (1949),<sup>398</sup> for example, the Court considered whether due process required states to apply the exclusionary rule (preventing admission at trial of evidence obtained in violation of the Fourth Amendment). The Court had held thirty-five years earlier that the rule applied in federal court.<sup>399</sup> In *Wolf*, the Court held that a principle “basic to a free society” lay at “the core of the Fourth Amendment”--“the security of one's privacy against arbitrary intrusion by the police.” Employing the prevailing universalistic framework, the Court found that this principle was applicable against the states, not because it was part of the Fourth Amendment, but because it was “implicit in the concept of ordered liberty.”<sup>400</sup> Nevertheless, the Court (Frankfurter) held the rule did not bind states. Frankfurter pointed to the lack of uniformity among the states with respect to enforcement of the exclusionary rule. Before *Weeks*, only one of twenty-seven states had applied the exclusionary rule, and even after *Weeks*, a substantial majority still rejected it (by a count of 31-16). The important point for the majority was not that there was a trend towards greater enforcement of the rule, but that significant disagreement remained. Frankfurter did not limit his survey of practices to the United States. He noted that, since *Weeks*, a number of jurisdictions within the United Kingdom had rejected the rule. Finding that “most of the English-speaking world” did not consider the exclusionary rule as essential to the protection of the right against arbitrary police intrusion, Frankfurter wrote, “we must hesitate to treat this remedy as an essential ingredient of the right.”<sup>401</sup> The possibility, and reality, of disagreement among

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<sup>398</sup> 338 U.S. 25.

<sup>399</sup> *Weeks v. U.S.*, 232 U.S. 383 (1914).

<sup>400</sup> *Wolf*, 338 U.S. at 27.

<sup>401</sup> 338 U.S. at 29. In dissent, Murphy (joined by Rutledge), objected that he could not “believe that we should decide due process questions by simply taking a poll of the rules in various jurisdictions, even if we follow the Palko ‘test.’” 338 U.S. at 46.

reasonable people militated against a finding that the rule rose to the level of a fundamental right:

As a matter of inherent reason, one would suppose this to be an issue to which men with complete devotion to the protection of the right of privacy might give different answers.<sup>402</sup>

In *Betts v. Brady* (1942),<sup>403</sup> too, the Court (J. Owen Roberts) looked to history and practice as aids in applying USEs:

Is the furnishing of counsel in all cases whatever dictated by natural, inherent, and fundamental principles of fairness? The answer to the question may be found in the common understanding of those who have lived under the Anglo-American system of law.<sup>404</sup>

In examining whether the right to appointed counsel “expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the states by the Fourteenth Amendment,” the Court found “relevant data” in the “constitutional and statutory provisions subsisting in the colonies and the states prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the states to the present date.” These sources, Roberts said, were the “most authoritative . . . for ascertaining the considered judgment of the citizens of the states upon the question.”<sup>405</sup> Roberts’s examination of the sources did not show a uniform view in favor of providing counsel to all indigent defendants. At common law, for example, the right to counsel had required only recognition of the defendant’s own counsel, not the appointment of counsel, and the original state constitutions reflected a good deal of diversity on the question. In conducting the

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<sup>402</sup> 338 U.S. at 28-29.

<sup>403</sup> 316 U.S. 455.

<sup>404</sup> 316 U.S. at 464.

<sup>405</sup> 316 U.S. at 465.

historical analysis, Roberts employed a distinction similar to Moody's in *Twining*. The relevant inquiry was not how widely the right to counsel was afforded, but how widely it was considered essential to fairness. Since the justices were probing the essential nature of a right, the most pertinent evidence was found in practices adhered to out of a belief that they were mandated by the basic requirements of justice. Thus, Roberts, noted that, while some of the original states provided counsel, a number did so by statute, rather than by constitutional provisions. Similarly, a substantial number of states at the time of the *Betts* decision provided counsel, but, again, many did so by way of statutory provisions, rather than through constitutional guarantees. From his historical investigation, Roberts concluded that:

in the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy. In the light of this evidence we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the states, whatever may be their own views, to furnish counsel in every such case.<sup>406</sup>

The absence of a consensus on the notion that appointed counsel was a fundamental right supported the Court's finding that the right was not required by due process.

Even dissenting opinions of the justices themselves could be cited as evidence for the possibility of reasonable disagreement as to the essential nature of a right. In a 1904 case, *Kepner v. U.S.*,<sup>407</sup> the Court had held that the Fifth Amendment's double jeopardy provision was violated, not only when the state brought a new and independent second case against a defendant for the same alleged crime, but also when the state brought a

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<sup>406</sup> 316 U.S. at 465.

<sup>407</sup> 195 U.S. 100.

retrial of the same case upon its own motion. In *Palko*, interpreting the Fourteenth Amendment, the Court declined to apply the *Kepner* rule against the states. In support of the Court's holding, Cardozo pointed to the dissenting opinion in *Kepner*, endorsed by three justices, as evidence that "right-minded men could reasonably believe" that by arguing for a state's authority to retry a defendant on the prosecution's motion, "they were not favoring a practice repugnant to the conscience of mankind."<sup>408</sup>

While many justices viewed disagreement over the essential nature of a right as evidence against a right's fundamental status, it did not necessarily follow that widespread observance of a right brought it within due process. In *Adamson v. California* (1947),<sup>409</sup> the defendant challenged the state law that allowed the prosecution to use his failure to testify against him at trial. The Court (J. Stanley Reed) conceded that the general rule among the states was to prohibit comment by the prosecution on the failure of a defendant to testify, but, nevertheless, concluded that states were free to depart from that practice. The decision ultimately did not turn on the prevalence of the practice, but on the majority's own reasoning about the nature of the right. Although California was one of only a few states that permitted comment on a defendant's failure to testify, it did so within narrow confines. The state's policy did not provide for any presumptions as to facts or guilt based on the failure to testify, but simply allowed the jury to draw inferences from undisputed facts. The policy did not deprive the defendant of an essential element of due process, such as the right to be heard. If a defendant chose not to contradict inculpatory evidence, it was fair and reasonable for the prosecution to incorporate this fact into its case. Thus, while the justices looked to history and practice

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<sup>408</sup> *Palko*, 302 U.S. at 323.

<sup>409</sup> 332 U.S. 46.

as evidence bearing on whether a right was fundamental, USEs were the Court's touchstone, not the accounting of practices in itself.

Since the due process framework was built around USEs, and the avoidance of rigid rules, the Court, during this period, declined to treat specific Bill of Rights provisions as binding on the states.<sup>410</sup> There might be rights included within due process that were also included in the Bill of Rights, but inclusion in the Bill of Rights was neither sufficient nor necessary for Fourteenth Amendment protection. Moreover, even if the Court did uphold a right that also happened to be included within the Bill of Rights, it did not apply the right as a rigid rule, but, rather, evaluated each claim on case by case basis. Thus, in *Powell*, the Court found that the defendant's right to the assistance of counsel required the trial judge to appoint counsel, but, on different facts in *Betts*, found that the appointment of counsel was unnecessary. While many due process challenges suggested associations with Bill of Rights provisions, the Court at times addressed claims that did not fall as easily into an analysis drawing on analogies to explicitly protected constitutional rights.<sup>411</sup> The significant point here, however, is that whether a due process claim could be framed in terms of any specific Bill of Rights protections was, strictly speaking, irrelevant. The approach, not surprisingly, led to substantial differences between the rights available in the federal and state contexts.

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<sup>410</sup> In *Adamson v. California*, 332 U.S. 46 (1947), for example, the Court confirmed its holding in *Twining v. New Jersey*, 211 U.S. 78 (1908), that the Fourteenth Amendment did not make binding on the states the Fifth Amendment's privilege against self-incrimination. When, in *Brown v. Mississippi*, 297 U.S. 278, 286 (1936), the Court overturned a murder conviction based on a confession coerced from the defendant by violence, it made clear the decision did not rest on the Fifth Amendment, but on the Court's case-specific finding that the brutality visited upon the defendant rendered the trial a "mere pretense."

<sup>411</sup> In *Rochin v. CA*, 342 U.S. 165, 172 (1952), for example, the Court considered a challenge to a conviction for drug possession based on two capsules that the police had ordered to be removed by hospital personnel from the defendant's stomach. The Court overturned the conviction, not because any Bill of Rights protections were implicated, but because the defendant was treated in a way that "shocks the conscience," and was "bound to offend even hardened sensibilities."

While it was not until *Mapp v. Ohio* (1961)<sup>412</sup> that a majority adopted selective incorporation, a number of justices advocated a different approach well before that time. Black was one of the most important critics of the Court's case-by-case, universalistic approach. As noted (ch. 3, G), Black opposed ECM. Indeed, like the first Harlan, Black also advocated a version of the Delegative Model. He argued that the Fourteenth Amendment made the entire Bill of Rights applicable against the states, and that the scope of due process was limited to the contents of the Bill of Rights. Black's position did not rest on his own analysis of what was essential to freedom or implicit in the concept of ordered liberty. Rather, it rested on his view of the intent of the Fourteenth Amendment's Framers.<sup>413</sup> The Court's approach assumed the justices were:

endowed by the Constitution with boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental principles of liberty and justice.'<sup>414</sup>

Citing Iredell's opinion in *Calder*,<sup>415</sup> Black argued that the majority's approach suffered from a fatal defect--natural law provided no authority upon which the justices were entitled to act.<sup>416</sup> Within the American constitutional system, the government was "one of limited powers," and the Court's authority was derived from, and circumscribed by, the Constitution.<sup>417</sup> Nothing in the document bestowed upon the Court the authority to strike down governmental acts deemed unreasonable.<sup>418</sup> The lack of authority was related to another problem in the Court's natural law approach--its indeterminacy.

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<sup>412</sup> 367 U.S. 643.

<sup>413</sup> *Adamson v. California*, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting).

<sup>414</sup> 332 U.S. at 69 (Black, J., dissenting).

<sup>415</sup> 332 U.S. at 91 n. 18 (1947) (Black, J., dissenting).

<sup>416</sup> 332 U.S. at 70 (Black, J., dissenting).

<sup>417</sup> *In re Winship*, 397 U.S. 358, 383 (1970) (Black, J., dissenting).

<sup>418</sup> *Rochin v. CA*, 342 U.S. 165, 176 (1952) (Black, J., dissenting).

Without direction from the text, natural law was “entirely too speculative.”<sup>419</sup> As an evaluative standard, asking whether a right was among the “immutable and fundamental principles of justices” provided inadequate guidance. Black’s argument was highly evocative of Iredell, who had criticized the use of “natural justice” by “speculative jurists.”<sup>420</sup>

For Black, the indeterminacy of natural law was associated with the exercise of excessive judicial discretion. While there was always a risk that judicial interpretations would inappropriately contract or expand the text’s original purposes, the natural law approach exacerbated the risk. Excessive judicial discretion threatened the rule of law in a democratic society in which the “Constitution entrusts” the role of policymaking “to the legislative representatives of the people.” Under the Court’s approach, judges were free to “roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies.”<sup>421</sup> Rather than serving as a proper means of enforcing constitutional mandates, the natural law formula was itself a violation of the Constitution “in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power.”<sup>422</sup> Black observed, too, that the risk of improper interpretation ran in both directions. The justices might enforce limitations on legislatures where none existed, and also might fail to enforce clearly established limitations. Thus, Black objected that the

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<sup>419</sup> *Adamson v. California*, 332 U.S. 46, 90 (1947) (Black, J., dissenting).

<sup>420</sup> *Calder v. Bull*, 3 U.S. 386, 398 (1798).

<sup>421</sup> *Adamson*, 332 U.S. at 92 (Black, J., dissenting).

<sup>422</sup> 332 U.S. at 95 (1947) (Black, J., dissenting).



Court had nullified Bill of Rights protections, and, at the same time, expressed concerns over the Court's meddling in "the future economic affairs of this country."<sup>423</sup>

Black's approach enabled justices to proceed "within clearly marked constitutional boundaries [and] seek to execute policies written into the Constitution."<sup>424</sup>

In contrast, the Court's evolutive approach reflected the majority's impression of the Bill of Rights as an "outworn 18th Century strait jacket" some of whose provisions amounted to "outdated abstractions." Black acknowledged that the Bill of Rights was "designed to meet ancient evils," but argued that the basic problems it addressed were "the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many." In Black's judgment:

the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes.<sup>425</sup>

Viewing text as the critical standard, Black rejected the notion that the judges should recognize changes in constitutional meanings. The proper means of changing the Constitution was through amendments enacted by the people, not by judicial fiat.

"[F]aithful adherence to the specific guarantees in the Bill of Rights," Black asserted, "insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards" endorsed by a majority of the justices.<sup>426</sup>

Black's arguments were striking similar to Harlan's. Both were ultimately interested in universalistic ends (protecting against the "human evils that have emerged . .

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<sup>423</sup> *Rochin v. CA*, 342 U.S. 165, 177 (1952) (Black, J., dissenting).

<sup>424</sup> *Adamson v. California*, 332 U.S. 46, 91-92 (1947) (Black, J., dissenting).

<sup>425</sup> 332 U.S. at 89 (1947).

<sup>426</sup> *Rochin*, 342 U.S. at 175 (Black, J., dissenting).

. wherever excessive power is sought”), but believed that justices best furthered them through particularistic means (strict enforcement of enacted law). By eschewing appeals to open-ended universalistic standards, Black’s method promised to limit judicial discretion. A consequence of Black’s approach (which Black did not regret) was that it closed off possibilities for recognizing limitations on government that enjoyed widespread acceptance though not mentioned in the text,<sup>427</sup> or for recognizing changes in constitutional meanings based on evolving public morality.

Some of Black’s colleagues agreed with one element of his position (application of the entire Bill of Rights against states) while disagreeing with another (limitation of due process to Bill of Rights protections). In *Adamson*, for example, Murphy (joined by J. Wiley Rutledge) wrote that, while in “substantial agreement” with Black, he did not agree that the scope of the Fourteenth Amendment’s protections was:

entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.<sup>428</sup>

Douglas, too, while joining in Black’s *Adamson* dissent, elsewhere made clear that he endorsed a “total incorporation plus” approach--due process included the entire Bill of Rights, but was not limited to it.<sup>429</sup> The distinction between “total incorporation” and “total incorporation plus” sometimes implied different results. In *In Re Winship*

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<sup>427</sup> See, e.g., *In re Winship*, 397 U.S. 358 (1970) (holding that due process mandated the “beyond a reasonable doubt” burden of proof in criminal cases).

<sup>428</sup> *Adamson*, 332 U.S. at 124 (Murphy, J., dissenting).

<sup>429</sup> See, e.g., *Poe v. Ullman*, 367 U.S. 497, 516 (1961) (Douglas, J., dissenting) (“Though I believe that ‘due process’ as used in the Fourteenth Amendment includes all of the first eight Amendments, I do not think it is restricted and confined to them.”).

(1970),<sup>430</sup> for example, Douglas joined the majority's holding that due process encompassed the right to be convicted only upon a verdict issued in accordance with the "beyond a reasonable doubt" burden of proof. In dissent, Black rejected the right's constitutional status, arguing that it had no basis in the text.

The fault line in the Court during this period is reflected in the persistent debate between Black and Frankfurter, a forceful opponent of Black's total incorporation position, and powerful advocate of both UR and ECM. Since Black viewed the entire Bill of Rights as binding on the states, he did not distinguish the provisions in terms of importance. In contrast, Frankfurter distinguished between Bill of Rights provisions that were "enduring reflections of experience with human nature," and those that merely "express the restricted views of Eighteenth-Century England regarding the best methods for the ascertainment of facts."<sup>431</sup> The Fifth Amendment's privilege against self-incrimination, for example, "was written into the Federal Bill of Rights . . . [f]or historical reasons." Judges should not be "imprisoned in what are merely legal forms even though they have the sanction of the Eighteenth Century." Allowing the states leeway was critical to honoring the requirements of federalism. If the Court adopted Black's approach, the result would be to "tear up by the roots much of the fabric of law in the several States, and would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom." At the same time, the Bill of Rights did not exhaust the scope of due process. To limit due process to the Bill of Rights

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<sup>430</sup> 397 U.S. 358.

<sup>431</sup> *Adamson*, 332 U.S. at 63 (1947) (Frankfurter, J., concurring).

would be to “assume that no other abuses would reveal themselves in the course of time than those which had become manifest in 1791.”<sup>432</sup>

Frankfurter also rejected selective incorporation, the approach later adopted by the Court, under which the justices would select a subset of Bill of Rights provisions for inclusion in due process. Total incorporation, while not the correct approach, at least had the virtue of limiting judicial discretion. Selective incorporation was incoherent. If the justices were going to select a subset of Bill of Rights provisions, then what was the relevance of whether a given right appeared in the first Eight Amendments? The justices would need an independent standard to distinguish between Bill of Rights provisions. The Court’s universalistic, evolutive approach properly recognized that the scope of due process could not be captured by a static list of rules. It allowed for an expansive understanding of fundamental justice.

Black had derisively referred to the Court’s approach as a “natural law theory” that afforded justices excessive discretion. Frankfurter countered that the Court’s approach did not “imply that the judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment.”<sup>433</sup> “Even though the concept of due process of law is not final and fixed,” Frankfurter argued, in interpreting due process, the judges were constrained by limits “derived from considerations that are fused in the whole nature of our judicial process.” These constraints were “deeply rooted in reason and in the compelling traditions of the legal profession.” Judges were not to draw on their “merely personal and private notions,” but,

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<sup>432</sup> 332 U.S. at 66-67 (1947) (Frankfurter, J., concurring).

<sup>433</sup> *Adamson*, 332 U.S. at 67-68 (Frankfurter, J., concurring).

rather, to engage in a “disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims.”<sup>434</sup> To be sure, it was imperative that, in doing so, the justices employed “the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared,” but fulfillment of the judicial role always imposed these responsibilities. Moreover, while Frankfurter’s approach did not view history in itself as determinative, it did find meaningful guidance in judicial precedent and in the “heritage of the past, with its great lessons of how liberties are won and how they are lost.”<sup>435</sup> Against the charges of excessive judicial discretion, Frankfurter argued that the Court’s approach provided surer guidance than selective incorporation:

In the history of thought ‘natural law’ has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth.<sup>436</sup>

As discussed in the following section, the approach that the Court adopted in the 1960s, and that still reigns, was neither Black’s total incorporation, nor the *Palko/Twining* approach defended by Frankfurter, but selective incorporation. Frankfurter retired shortly after selective incorporation’s ascendance, but other justices, including the second Harlan, mounted similar objections.

### C. The Ascendance of Selective Incorporation

Frankfurter had maintained that those who argued for the incorporation of Bill of Rights provisions really were seeking selective incorporation, since they surely would not

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<sup>434</sup> *Rochin*, 342 U.S. at 170-72.

<sup>435</sup> *Adamson*, 332 U.S. at 65-66 (Frankfurter, J., concurring).

<sup>436</sup> 332 U.S. at 65 (1947) (Frankfurter, J., concurring).

impose on the states the Fifth Amendment's grand jury requirement or the Seventh Amendment's civil jury trial requirements on the states.<sup>437</sup> In the early 1960s, beginning with *Mapp v. Ohio* (1961),<sup>438</sup> a majority of the Court explicitly adopted selective incorporation. The approach retained similarities with the *Palko/Twining* approach that had reigned in the previous decades. It did not assume that due process encompassed the entire Bill of Rights. This meant that the approach required some evaluative standard, outside the Bill of Rights, as a basis for selection. The framework that the Court used retained a universalistic element. In determining whether a provision applied against states, the justices inquired whether the right was one "fundamental and essential to a fair trial,"<sup>439</sup> or whether the due process challenge involved a fundamental right that was "essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."<sup>440</sup> In *Gideon v. Wainwright* (1963), the Court overturned *Betts v. Brady* (1942), but stated that it was employing a similar overarching standard of evaluation. In the *Gideon* Court's view, the *Betts* majority had properly inquired whether the right of an indigent criminal defendant to appointed counsel was "fundamental and essential to a fair trial." (The *Gideon* Court, however, considered the role that counsel plays in criminal defense generally, and decided that a fair trial could not be assured without ensuring that an indigent defendant would have the benefit of counsel.)

In significant ways, however, selective incorporation departed from *Palko/Twining*. Under selective incorporation, the justices placed more weight on whether a specific protection was included within the Bill of Rights. To be sure,

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<sup>437</sup> The assessment proved accurate; these two provisions have never been applied against the states.

<sup>438</sup> 367 U.S. 643.

<sup>439</sup> *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (quoting *Betts v. Brady*, 316 U.S. 455, 465 (1942)).

<sup>440</sup> *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968); see also *Pointer v. Texas*, 380 U.S. 400, 403 (1965); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

inclusion in the Bill of Rights was not necessarily irrelevant in the earlier cases. But the significance of inclusion in the Bill of Rights was diminished by the distinction between constitutional provisions that were viewed merely as historical preferences, and those that expressed enduring, universalistic truths.<sup>441</sup> In the era of selective incorporation, the Court “increasingly looked to the specific guarantees of the Bill of Rights to determine whether a state criminal trial was conducted with due process of law.”<sup>442</sup> Under selective incorporation, by 1969, the Court had “incorporated” through the Fourteenth Amendment almost the entire Bill of Rights. The Fifth Amendment’s grand jury requirement remains the only rule of criminal procedure in the first Eight Amendments not incorporated (Katner 2005, 398 n. 2).<sup>443</sup> In practice, selective incorporation placed so much weight on inclusion in the Bill of Rights that it amounted to a heavy presumption.

The difference between *Palko/Twining* and selective incorporation, however, runs deeper. Making a list of incorporated provisions only has meaning under selective incorporation. Under *Palko/Twining*, even if a right were potentially fundamental to a fair trial, it might not be under the circumstances. As discussed, in *Powell*, the right to appointed counsel was indispensable, but not in *Betts*. The unit of analysis was the fairness of a specific trial. By contrast, under selective incorporation, the unit of analysis

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<sup>441</sup> E.g., *Betts v. Brady*, 316 U.S. 455, 465 (1942); *Adamson v. California*, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring).

<sup>442</sup> *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (quoting *Washington v. Texas*, 388 U.S. 14, 18, (1967)); see also *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968)).

<sup>443</sup> *Duncan*, 391 U.S. at 148. In the area of SDP, the Court has also incorporated most of the other Bill of Rights provisions, including the entire First Amendment, the Fifth Amendment’s “just compensation” requirement, and the Eighth Amendment’s prohibition of “cruel and unusual punishments. Apart from the grand jury indictment, already mentioned, the only other Bill of Rights provisions that do not clearly apply against the states are the Second Amendment’s right to bear arms, the Third Amendment’s guarantee against the peacetime quartering of soldiers, the Seventh Amendment’s right to a civil jury trial, and the Eighth Amendment’s prohibition on excessive bail or fines. See Konvitz 2001 14, 157.

was a Bill of Rights provision.<sup>444</sup> The question was not whether the right, as applied in the specific case, but as a rule, was essential to fairness.<sup>445</sup> Selective incorporation represented a shift from a case-by-case to a rule-based approach.<sup>446</sup>

The significance of this shift was heightened by another element of selective incorporation (referred to here as “unitary” application). Once the Court incorporated a Bill of Rights provision, it also applied against the states all of the Court’s previous rulings interpreting that provision in the federal context.<sup>447</sup> By applying its existing (and continually developing) federal jurisprudence in the state context, the Court was determining that, with respect to incorporated provisions, all levels of government within the United States would be subject to the same Bill of Rights protections. The implications of the unitary approach were visible in *Mapp*.<sup>448</sup> As discussed (sec. B) in *Wolf v. Colorado* (1949), the Court had held that the core principle of the Fourth Amendment--“the security of one’s privacy against arbitrary intrusion by the police”--fell within due process.<sup>449</sup> Under *Palko/Twining*, however, this did not mean that the Fourth Amendment was incorporated, or that states were bound by the Court’s decisions

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<sup>444</sup> The unit of analysis was a specific provision, not the entire Amendment. The Sixth Amendment’s right to counsel (e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963)) was considered separately, for example, from that same Amendment’s right to confront witnesses (e.g., *Pointer v. Texas*, 380 U.S. 400 (1965)).

<sup>445</sup> *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (“Our recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of ‘fundamental fairness.’”).

<sup>446</sup> The discussion has focused on Bill of Rights protections. Of course, if a claim could not be framed as falling within any specific Bill of Rights provision, then the Court could not approach view a Bill of Rights provision as the unit of analysis. The Court never adopted Black’s view that due process was limited to the Bill of Rights. Thus, a rights claim not comfortably fall within the Bill of Rights would not be excluded from due process solely on those grounds. The Court would still ask whether the right was fundamental or essential to a fair trial, and was still inclined to adopt a rule-based approach. In *In re Winship*, 397 U.S. 358 (1970), for example, the Court held that states were required to employ “beyond a reasonable doubt” as a standard of guilt, although the analysis was not framed under any specific provision of the Bill of Rights.

<sup>447</sup> See, e.g., *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (“Once it is decided that a particular Bill of Rights guarantee is [incorporated], the same constitutional standards apply against both the State and Federal Governments.”).

<sup>448</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>449</sup> 338 U.S. 25, 27-28 (1949).



interpreting the Amendment in the federal context. The exclusionary rule applied against the federal government, but not against states. Selective incorporation's unitary approach eliminated the possibility of this kind of differential application. Once the Amendment was incorporated, the rule came with it. The Court refused to apply a "watered-down" version of the Bill of Rights against the states. "It would be incongruous," the Court said, "to have different standards determine the validity of a claim . . . depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must [apply] in either a federal or state proceeding is justified."<sup>450</sup>

By the late 1960s, selective incorporation entailed an additional modification of *Palko/Twining*. The universalistic frame of inquiry under *Palko/Twining* asked whether one could imagine any system dedicated to freedom, liberty, and justice, that did not protect the right at issue. The majority in the 1960s expressed dissatisfaction with that framing of the question. Due process challenges did not occur in a vacuum. They occurred within a state's existing legal system. Any number of familiar American procedures might not be indispensable to justice in the abstract. One might be able to conjure a differently organized system that safeguarded liberty without the procedures. Yet, within an Anglo-American regime of ordered liberty, constructed upon common-law assumptions and practices, the procedures might, nevertheless, be essential to liberty. As Justice Byron White observed, "state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country." It was "easy to imagine," for example, a "criminal process which was fair and equitable" that did not provide the right to a jury trial. Such a process "would make use of

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<sup>450</sup> *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964).

alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems.” But no American states had constructed such a process. Within the American context in which the states operated, then, the right to a jury trial (along with the exclusionary rule, the privilege against self-incrimination, and other incorporated protections), was essential to liberty, and, consequently, binding upon the states. The inquiry under selective incorporation was, not whether the right at issue was “fundamental to fairness in every criminal system that might be imagined,” but whether it was “fundamental in the context of the criminal processes maintained by the American States,”<sup>451</sup> or “fundamental to the American scheme of justice.”<sup>452</sup>

The Court’s adoption of selective incorporation was not unanimous. The second Harlan emerged as one of its important critics. He engaged Black’s total incorporation position on its own terms, rejecting Black’s assertion that the Fourteenth Amendment’s Framers had intended to make the entire Bill of Rights applicable against the states. In Harlan’s view, the authors of the Fourteenth Amendment:

did not suppose that the Nation would always be limited to mid-19th century conceptions of ‘liberty’ and ‘due process of law’ but that the increasing experience and evolving conscience of the American people would add new ‘intermediate premises.’<sup>453</sup>

Echoing Frankfurter, Harlan charged that selective incorporation was incoherent. Total incorporation at least had the virtue of internal consistency; it was based in the intent of the Fourteenth Amendment’s Framers. Selective incorporation purported to be based on whether a specific rights provision was essential to liberty within the American scheme

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<sup>451</sup> *Duncan v. Louisiana*, 391 U.S. 145, 150 n. 14 (1968).

<sup>452</sup> 391 U.S. at 149 (1968); *see also Benton v. Maryland*, 395 U.S. 784, 794 (1969); *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

<sup>453</sup> *Duncan*, 391 U.S. at 174-75 (Harlan, J., dissenting).

of justice. The Court did not follow through on that approach, however. Under the Court's unitary doctrine, the Court applied against the states all interpretations of the Bill of Rights from the federal context. But the justices did not seek to establish that each of the federal interpretations was fundamental to the American scheme of justice.<sup>454</sup>

Dissenting in *Duncan v. Louisiana* (1968), in which the Court held that the Sixth Amendment's guarantee of a criminal jury trial applied against the states on the same terms as it did in the federal context, Harlan protested:

The requirement of trial by jury in federal criminal cases has given rise to numerous subsidiary questions respecting the exact scope and content of the right. It surely cannot be that every answer the Court has given, or will give, to such a question is attributable to the Founders; or even that every rule announced carries equal conviction of this Court; still less can it be that every such subprinciple is equally fundamental to ordered liberty.<sup>455</sup>

Harlan also criticized the Court for offering no principled rationale for the unitary approach, and for failing to respect imperatives of federalism. The Court had asserted in conclusory fashion that it would be "incongruous" to have different standards in state and federal courts. The charge of incongruity missed the point. There was not supposed to be congruity between the federal and state governments,<sup>456</sup> which were subject to different constitutional commands. With respect to the federal government, a specific Bill of Rights provision represented a "particular command, having its setting in a pre-existing legal context on which both interpreting decisions and enabling statutes must at least build."<sup>457</sup> Against the states, the Court applied, not the "specific substantive

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<sup>454</sup> *Duncan*, 391 U.S. at 179-82 (Harlan, J., dissenting); see also *Malloy v. Hogan*, 378 U.S. 1, 27 (1964) (Harlan, J., dissenting).

<sup>455</sup> *Duncan*, 391 U.S. at 181 (Harlan, J., dissenting).

<sup>456</sup> *Malloy*, 378 U.S. at 27-28 (Harlan, J., dissenting).

<sup>457</sup> *Mapp v. Ohio*, 367 U.S. 643, 679 (1961) (Harlan, J., dissenting).

commands” of the Bill of Rights, but “the flexible contours” of due process, in which the Court’s scope of review is “restricted to a determination of whether the prosecution was Constitutionally fair.”<sup>458</sup> The incongruity built into the system reflected the “frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions.”<sup>459</sup> Respect for federalism required, not only appreciation of the differences between the state and national governments, but also “due recognition of constitutional tolerance for state experimentation and disparity.”<sup>460</sup> The result of the unitary policy was “compelled uniformity . . . achieved either by encroachment on the States’ sovereign powers or by dilution in federal law enforcement of the specific protections found in the Bill of Rights.”<sup>461</sup>

Harlan, like Frankfurter, advocated the evolutive, universalistic approach that the Court had employed in cases like *Hurtado*,<sup>462</sup> *Holden*,<sup>463</sup> and *Palko*.<sup>464</sup> Harlan’s use of a different approach than the majority did not always lead him to a different result,<sup>465</sup> but often it did.<sup>466</sup> The significance of Harlan’s ECM can be seen, for example, in his dissent from the Court’s incorporation of the Sixth Amendment’s right to a criminal jury trial. Harlan argued that, originally, jury trial was a bulwark against a “tyrannous judiciary,” but that purpose had lost its relevance, since Americans “no longer live in a medieval or

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<sup>458</sup> 367 U.S. at 682-83 (1961) (Harlan, J., dissenting).

<sup>459</sup> *Gideon*, 372 U.S. at 352 (Harlan, J., concurring).

<sup>460</sup> *Duncan*, 391 U.S. at 176 (Harlan, J., dissenting).

<sup>461</sup> *Malloy*, 378 U.S. at 16-17 (Harlan, J., dissenting).

<sup>462</sup> *Hurtado v. California*, 110 U.S. 516 (1884).

<sup>463</sup> *Holden v. Hardy*, 169 U.S. 366 (1898).

<sup>464</sup> *Palko v. Connecticut*, 302 U.S. 319 (1937).

<sup>465</sup> Harlan, for example, concurred in the majority’s holding that due process required the appointment of counsel for indigent criminal defendants, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and a defendant’s opportunity to confront witnesses. *Pointer v. Texas*, 380 U.S. 400 (1965).

<sup>466</sup> He dissented, for example, from the Court’s decisions incorporating the exclusionary rule, *Mapp v. Ohio*, 367 U.S. 643 (1961), and the right to a criminal jury trial. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

colonial society. Judges enforce laws enacted by democratic decision, not by regal fiat. They are elected by the people or appointed by the people's elected officials, and are responsible not to a distant monarch alone but to reviewing courts, including this one.”<sup>467</sup> Harlan did not ignore history, but its role was subordinate to USEs. The inclusion of a protection in the Bill of Rights, while not decisive, might serve as evidence of which rights had traditionally been considered to be of fundamental importance,<sup>468</sup> and “of the content Americans find in the term ‘liberty’ and of American standards of fundamental fairness.”<sup>469</sup>

By the time Black retired in 1971, he had seen his total incorporation approach nearly adopted in practice, though not in theory. While continuing to advocate total incorporation, he was willing to support selective incorporation, expressing his satisfaction at seeing so many Bill of Rights protections come within the scope of due process. He also continued to express disagreement with the approach advocated by Harlan, which, in Black’s characterization, treated due process as:

prescribing no specific and clearly ascertainable constitutional command that judges must obey in interpreting the Constitution, but rather as leaving judges free to decide at any particular time whether a particular rule or judicial formulation embodies an ‘immutable principl(e) of free government’ or is ‘implicit in the concept of ordered liberty,’ or whether certain conduct ‘shocks the judge's conscience’ or runs counter to some other similar, undefined and undefinable standard.

In Harlan’s hands, Black charged, due process was “a phrase with no permanent meaning, but one which is found to shift from time to time in accordance with judges’ predilections and understandings of what is best for the country.” Interpreting due

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<sup>467</sup> *Duncan v. Louisiana*, 391 U.S. 187 (1968) (Harlan, J., dissenting).

<sup>468</sup> *Malloy v. Hogan*, 378 U.S. 1, 22 (1964) (Harlan, J., dissenting).

<sup>469</sup> *Duncan v. Louisiana*, 391 U.S. 180 (1968) (Harlan, J., dissenting).

process via an evaluation of “fundamental fairness,” or similarly vague standards “depends entirely on the particular judge’s idea of ethics and morals instead of requiring him to depend on the boundaries fixed by the written words of the Constitution.” Black could not accept that the Constitution granted such “unconfined power,” given that its fundamental purpose was “to limit governmental power.”<sup>470</sup> Black’s position was the reverse of Harlan’s. Black believed that the Fourteenth Amendment included the entire Bill of Rights, and nothing more, while Harlan believed that it did not include the entire Bill of Rights, but reached beyond the lines demarcated by the first Eight Amendments. Black worried about the implications of both of these differences between the two jurists. On the one hand, under Harlan’s approach, citizens of the states would not enjoy the vital protections of the Bill of Rights. Harlan’s appeal for state diversity and experimentation did not move Black, who rejected the notion that the states should be free to experiment with the Bill of Rights. At the same time, Black worried that Harlan’s approach gave judges too much room for interfering with state policies based on their own personal preferences. Harlan’s approach was self-contradictory. On the one hand, it espoused providing the states with great leeway to pursue their own diverse policies, but, at the same time, afforded judges nearly limitless power to strike down state policies of which they did not approve.<sup>471</sup>

Notwithstanding the protests of Harlan and, at various times, a number of other justices,<sup>472</sup> however, the Court has never retreated from the unitary approach. By

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<sup>470</sup> *Duncan*, 391 U.S. at 168-69 (1968) (Black, J., concurring).

<sup>471</sup> *Duncan*, 391 U.S. at 170-71 (1968) (Black, J., concurring).

<sup>472</sup> For example, Frankfurter and Whittaker joined Harlan’s dissent in *Mapp*, Clark joined his dissent in *Malloy*, and Stewart joined his concurrence in *Pointer*. See also *Apodaca v. Oregon*, 406 U.S. 404 (1972) (Powell, J., concurring); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Fortas, J., concurring).

1969,<sup>473</sup> with the exception of the grand jury requirement, all of the criminal procedure provisions in the Bill of Rights had been incorporated through selective incorporation, and, since that time, the Court has made no changes to the overall list of which provisions are included in due process (Wildenthal 2000, 1055). It appears now to be well-settled law that the criminal procedure protections in the Bill of Rights, once incorporated, apply to the federal and state governments on the same terms (Dripps 2005, 130).

As in other areas, the Court has struggled in its PDP jurisprudence with the proper relationship between universalistic and particularistic bases. The *Murray's Lessee* settled usages test relied heavily on history, but the Court soon made clear that history alone would not be decisive. Public attitudes about law and rights had changed in the past and were sure to do so in the future. The adoption of ECM recognized that constitutional meanings had to be allowed to adapt to these changes. Yet, surely not all departures from historical rights understandings can be approved, or else the Constitution would cease to be any restraint at all. But if history is not determinative, then on what basis may the Court decide which innovations are valid and which are not? The majority, as in other areas discussed, developed an approach that was both evolutive and universalistic. The Court's framework was built around USEs, such as the requirements of liberty, fairness, and justice. The *Palko/Twining* approach enabled the justices to evaluate procedures on a case-by-case basis for their compliance with USEs. The combination of broad, universalistic standards, and a case-by-case approach allowed for a substantial amount of diversity of requirements depending on the specific context and circumstances; federal and state cases could be treated differently.

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<sup>473</sup> *Benton v. Maryland*, 395 U.S. 784 (1969).

As we also have seen in other areas, however, the use of an evolutive, universalistic approach was not unanimous. It was attacked by some justices as too indefinite, and, therefore, allowing for the exercise of excessive judicial discretion. Black and the first Harlan, for example, both advanced versions of the Delegative Model, arguing that the best way to pursue the Framers' universalistic ends was through faithfulness to the particularistic commands of text and history.

The selective incorporation approach adopted by the Court in the 1960s in some ways addresses the concerns of *Palko/Twining's* critics. The presumption in favor of incorporating Bill of Rights provisions places more weight on text, and the unitary doctrine reduces the room for variation and diversity by opting for uniform applications between federal and state governments. Overall, the approach appears to rely more heavily on particularistic commands, and to reduce the scope for judicial discretion. It does not, however, turn itself over entirely to particularistic bases. It is not the total incorporation that Black and the first Harlan advocated. At bottom, selective incorporation remains guided by universalistic standards, reflecting the critical importance of ECM and its close connection with UR. The justices have needed to retain the flexibility to depart from history at times, as in their refusal to apply the grand jury requirement against the states. Once room is allowed for departure from history, some other touchstone is required. Selective incorporation continues to look to universalistic standards to make distinctions between rights that have strong support from particularistic sources. As noted, in the late 1960s, the Court announced that it would inquire whether procedures were indispensable to the American scheme of justice. This



inquiry modified, but did not repudiate, reliance on universalistic standards. The shift placed a greater emphasis on context in evaluating the essential nature of rights.

The next chapter examines how the Court has addressed questions concerning the applicability of constitutional protections in overseas territories. While very different in the scope of its practical consequences, the questions were conceptually similar to the PDP issues discussed in this chapter. The justices had to decide to what extent the Bill of Rights applied in a context other than the one for which it was originally written. As we will see, the Court's response was complicated by similar tensions, and similar fault lines emerged between the justices in confronting them.

## **Chapter 5**

### **The Constitution's Applicability in Overseas U.S. Territories**

In 1898, through the treaty ending the Spanish-American War, the United States acquired territories in the Pacific Ocean and Caribbean Sea, including Puerto Rico and the Philippines (Carter 2001, 317). The acquisitions raised the issue of the extent to which the residents of these territories enjoyed constitutional protections (Roche 1963-64, 134). The constitutional provision granting Congress authority over the territories (Art, IV, § 3) states:

The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Neither Article IV, nor any other provision, addresses the Constitution's applicability.<sup>474</sup>

A. The *Insular Cases*

The Court confronted the Constitution's applicability in the newly acquired overseas territories in a series of cases from the early 1900s through the early 1920s.

*Downes v. Bidwell* (1901)<sup>475</sup> was among the earliest and most significant<sup>476</sup> of these *Insular Cases*, as they have come to be known.<sup>477</sup> The issue in *Downes* was the

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<sup>474</sup> The question of the Constitution's applicability in the territories is part of a broader set of questions concerning the scope of the Constitution's applicability. Applicability is clearest with respect to U.S. citizens residing in one of the states. Neuman 1991, 915. On the other end of the spectrum lies non-citizens outside of the United States, where appeals to the Constitution's protections would be weakest, and the Bill of Rights would ordinarily not apply. Soltero 2001, 26-27. The Court has confronted a wide range of issues where, for various reasons, the scope of applicability was at issue. Examples include non-citizens residing within the United States (*E.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)); Native Americans born members of tribes recognized by the U.S. Government (*E.g.*, *Elk v. Wilkins*, 112 U.S. 94 (1884)); and non-military dependents of members of the U.S. military, accused of committing crimes in foreign countries (*E.g.*, *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956)). A growing debate concerns applicability to non-citizens residing in foreign countries who are affected by actions of the U.S. Government. Neuman 1991, 911. While there is overlap in the problems raised by these questions, this chapter focuses specifically on the issue of the applicability within overseas U.S. territories.

<sup>475</sup> 182 U.S. 244.

<sup>476</sup> See *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 600 n. 30 (1976).

<sup>477</sup> The decisions commonly counted among the *Insular Cases* include: *Dooley v. U.S.*, 182 U.S. 222 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Hawaii v.*

constitutionality of tariffs that Congress had imposed on oranges imported from Puerto Rico. The tariffs were challenged on the grounds that they violated Art. 1, § 8 of the Constitution, which provides that “all duties, imposts, and excises shall be uniform throughout the United States.” A 5-4 majority held that, although Puerto Rico was not a foreign country,<sup>478</sup> it also was not a part of the United States for purposes of Art. 1, § 8, and, consequently, the tariff was not unconstitutional. While the immediate issue in *Downes* concerned the tariff, the justices treated the case as raising the broader question of the Constitution’s applicability within the newly acquired territories.

The Court had ruled on the applicability of certain constitutional rights within territories that were destined to become states. In some of these decisions, the Court had indicated that Bill of Rights protections applied. The force of these decisions, however, was unclear. Congressional legislation typically had provided explicitly for the applicability of certain constitutional rights, or of the entire Constitution. As a result, when an opinion stated that a constitutional right applied in a territory, it was not clear whether the right would have applied in the absence of congressional legislation to that effect. In *Webster v. Reid* (1850),<sup>479</sup> for example, the Court invalidated legislation adopted by the territory of Iowa eliminating jury trials for certain civil actions. In doing so, the Court referred both to the Seventh Amendment (which guarantees jury trials for suits where the amount in controversy exceeds twenty dollars), and to congressional legislation that provided for jury trials in the territory. Almost fifty years later, and four

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*Mankichi*, 190 U.S. 197 (1903); *Dorr v. U.S.*, 195 U.S. 138 (1904); *Rasmussen v. U.S.*, 197 U.S. 516 (1905); *Dowdell v. U.S.*, 221 U.S. 325 (1911); *Ocampo v. U.S.*, 234 U.S. 91 (1914); *Balzac v. U.S.*, 258 U.S. 298 (1922).

<sup>478</sup> In *De Lima v. Bidwell* (1901),<sup>478</sup> the Court had held that, due to the peace treaty with Spain, Puerto Rico could not be considered a foreign country for purposes of a tariff; that is, the United States could not collect customs duties on merchandise arriving from Puerto Rico, as it could with respect to foreign countries.

<sup>479</sup> 52 U.S. 437.

years before the first of the *Insular Cases*, in *Amer. Pub. Co. v. Fisher* (1897), the Court acknowledged that the ambiguity in *Webster* pervaded the Court’s jurisprudence on the subject.<sup>480</sup> In *Amer. Pub. Co.*, the Court overturned a law in the Utah territory allowing for non-unanimous decisions in jury trials. The Court, as in *Webster*, referred to the Seventh Amendment, in addition to the organic act that had explicitly made the Constitution applicable in the territory, and subsequent legislation providing for the right of trial by jury in common law suits. Thus, the ambiguity remained. Other decisions spoke of Congress as being bound by the First<sup>481</sup> and Eighth<sup>482</sup> Amendments in its governance of the Utah territory, but the import of these opinions, too, was muddled by organic acts explicitly extending the Constitution’s protection. Nevertheless, language in some of the pre-*Insular Cases* decisions strongly suggested that constitutional protections applied regardless of congressional legislation. In *Thompson v. Utah* (1898),<sup>483</sup> for example, the Court considered it “no longer an open question” that “the provisions of the constitution of the United States relating to the right of trial by jury in suits at common law apply to the territories of the United States,” and stated: “It is equally beyond question that the provisions of the national constitution relating to trials by jury for crimes and to criminal prosecutions apply to the territories of the United States.”<sup>484</sup>

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<sup>480</sup> 166 U.S. 464, 466 (“[T]he invalidity may have been adjudged by reason of the conflict with congressional legislation.”).

<sup>481</sup> *Reynolds v. U.S.*, 98 U.S. 145 (1878).

<sup>482</sup> *Wilkerson v. Utah*, 99 U.S. 130 (1878).

<sup>483</sup> 170 U.S. 343. In *Thompson*, the defendant had been tried by the state of Utah for a crime that the defendant had allegedly committed in Utah before it became a state. The Court held that the state of Utah had violated the prohibition on ex post facto laws (Art. 1, § 10) when it provided a criminal jury of only eight members (which the Court viewed as contradicting the Sixth Amendment’s right to a criminal jury trial), since the defendant had been entitled to a twelve-member jury under the Sixth Amendment’s guarantee of a criminal jury trial, while Utah was still a territory. See also *Murphy v. Ramsey*, 114 U. S. 15, 44 (1885) (“The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty, which restrain all the agencies of government.”).

<sup>484</sup> 170 U.S. at 347.

In the absence of congressional legislation making the Constitution applicable in Puerto Rico, the *Downes* Court confronted the question of whether the Constitution applied *ex proprio vigore* (of its own force) in the territories. The justices' multiple opinions presented contrasting approaches. (In addition to Brown's opinion announcing the judgment of the Court, White issued a concurring opinion, and C.J. Melvill Fuller and Harlan issued dissenting opinions). Brown asserted that, generally speaking, the Constitution did not apply *ex proprio vigore*.<sup>485</sup> The Constitution's applicability fell within congressional discretion. His interpretation of the relevant law was that Congress had not intended to extend the Constitution's reach to Puerto Rico.

Brown stressed the differences that might exist between Americans and the people living in overseas territories. A territory might be populated by "alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought,"<sup>486</sup> and residents of the territory might be "foreign . . . to our habits, traditions, and modes of life."<sup>487</sup> In addition, conditions in a newly acquired territory might entail "differences of soil, climate, and production."<sup>488</sup> As a result of these differences, "the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible,"<sup>489</sup> and the consequences of trying immediately to impose the Constitution's limitations might be "extremely serious."<sup>490</sup> If the Court held the Constitution automatically applicable, it might have been "fatal to the development of . . . the

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<sup>485</sup> Brown denied that the earlier decisions established the Constitution's applicability in the territories. In his view, they rested on the existence of legislation explicitly extending the Constitution. Even if language in some of the earlier opinions suggested that the Constitution applied in the territories *ex proprio vigore*, this was merely dicta. 182 U.S. at 258-59.

<sup>486</sup> 182 U.S. at 287.

<sup>487</sup> 182 U.S. at 279-80.

<sup>488</sup> 182 U.S. at 282.

<sup>489</sup> 182 U.S. at 287.

<sup>490</sup> 182 U.S. at 289.

American empire,”<sup>491</sup> as Congress would likely have considered further annexations infeasible. On the other hand, if leeway were afforded in the short term, then, in the long run, “ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended”.<sup>492</sup>

Brown’s opinion, however, also indicated, drawing on UR, that elements of the Constitution might apply of their own force (though this portion of the opinion was hedged with tentative language).<sup>493</sup> He noted, for example, a distinction between “natural rights enforced in the Constitution by prohibitions against interference with them,” on the one hand, and “artificial or remedial rights which are peculiar to our own system of jurisprudence,” on the other. The former rights were “indispensable to a free government,” and included the freedoms of religion, speech, and press; due process of law and access to courts of justice; equal protection of the laws; and “immunities from unreasonable searches and seizures, as well as cruel and unusual punishments.” Artificial or remedial rights, on the other hand, included “the rights to citizenship, to suffrage . . . and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the states to be unnecessary to the proper protection of individuals.” Brown again referenced natural or inherent principles in stating:

There are certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests.<sup>494</sup>

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<sup>491</sup> 182 U.S. at 286.

<sup>492</sup> 182 U.S. at 287.

<sup>493</sup> Brown explicitly stated that the Court was leaving open the extent to which the Bill of Rights might apply in the territories *ex proprio vigore*.

<sup>494</sup> 182 U.S. at 180.

Brown's discussion of Taney's opinion in *Scott v. Sandford* (1857)<sup>495</sup> also suggested that Congress was bound by the requirements of due process in governing the territories. In *Scott*, Taney had argued that, since slaves were property, Congress could not constitutionally prohibit settlers from bringing their slaves into the territories. While noting that historical events since *Scott* had undermined its precedential import, Brown professed agreement with Taney on one point. If, as Taney believed, slaves were property, Taney would have been correct in concluding that Congress could not constitutionally have prevented people from bringing slaves into the territories, for:

If the assumption be true that slaves are indistinguishable from other property, the inference from the *Dred Scott Case* is irresistible that Congress had no power to prohibit their introduction into a territory. It would scarcely be insisted that Congress could with one hand invite settlers to locate in the territories of the United States, and with the other deny them the right to take their property and belongings with them. The two are so inseparable from each other that one could scarcely be granted and the other withheld without an exercise of arbitrary power inconsistent with the underlying principles of a free government. It might indeed be claimed with great plausibility that such a law would amount to a deprivation of property within the 14th Amendment.<sup>496</sup>

Brown also appeared to be referring to the automatic application of due process requirements when he stated that, even before Congress determined whether the Constitution applied in a territory:

it does not follow that in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of

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<sup>495</sup> 60 U.S. 393.

<sup>496</sup> *Downes*, 182 U.S. at 274-75.



the Constitution to be protected in life, liberty, and property.<sup>497</sup>

White's concurring opinion (joined by Justices Joseph McKenna and George Shiras) advocated an approach based on a distinction between incorporated and unincorporated territories.<sup>498</sup> Under White's theory of incorporation, the extent of constitutional applicability in a territory hinged on the nature of its legal relationship with the United States. If the territory was "incorporated" as an integral part of the United States, then the entire Constitution applied *ex proprio vigore*. If the territory was "unincorporated,"--that is, if it were "foreign to the United States in a domestic sense," or "merely appurtenant [to the United States] as a possession"--then the entire Constitution did not apply *ex proprio vigore*. A territory's incorporation was within congressional discretion. The Court's role was to discern congressional intent, as expressed through the treaty by which the United States acquired the territory, or subsequent legislation. White found Congress did not intend to incorporate Puerto Rico.<sup>499</sup>

White's approach was substantially distinct from Brown's in that it would apply the entire Constitution *ex proprio vigore* to an incorporated territory. The approach White advocated for unincorporated territories, however, shared similarities with the approach Brown's articulated for all territories. In support of his argument that the Constitution did not automatically apply in unincorporated territories, White, like Brown, pointed to the diversity of conditions that might make application of the Constitution impractical.

The people of a newly acquired territory might be "utterly unfit for American citizenship

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<sup>497</sup> 182 U.S. at 283. Almost ninety years later, the Court cited Brown's opinion for the proposition that due process was binding in the territories regardless of congressional legislation. See *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 600 (1976).

<sup>498</sup> Justice Horace Gray provided the fifth vote for upholding the tariffs at issue in *Downes*; in his concurring opinion, he stressed that the question of the Constitution's applicability in the territories was political in nature, and ought to be left to the political branches of the government.

<sup>499</sup> 182 U.S. at 341-42 (White, J., concurring).

and totally incapable of bearing their proportionate burden of the national expense.”<sup>500</sup>

The argument brought to mind Brown’s concern over the impracticality of applying the Constitution in places populated with “alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought.”<sup>501</sup>

Also, like Brown, White suggested, employing UR, that Congress might be subject to certain restrictions regardless of congressional legislation. There might be “inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended,” and “restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.”<sup>502</sup> White further stated that Congress could not “destroy the liberties of the people of Porto Rico by exercising in their regard powers against freedom and justice which the Constitution has absolutely denied.”<sup>503</sup>

Fuller’s dissenting opinion (joined by Brewer, Peckham, and Harlan) adopted the position that the entire Constitution applied in the territories *ex proprio vigore*. Rejecting White’s theory of incorporation, Fuller argued that the Constitution applied anywhere that the United States exercised sovereignty. He interpreted *Webster v. Reid*,<sup>504</sup> *Thompson v. Utah*,<sup>505</sup> and other precedents as supporting this position, and found unacceptable the notion that “if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period.” While a

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<sup>500</sup> 182 U.S. at 307-11 (White, J., concurring).

<sup>501</sup> 182 U.S. at 287 (White, J., concurring).

<sup>502</sup> 182 U.S. at 291 (White, J. concurring).

<sup>503</sup> 182 U.S. at 298 (White, J. concurring).

<sup>504</sup> 52 U.S. 437.

<sup>505</sup> 170 U.S. 343.

number of justices, at different times, have advocated full constitutional applicability in the territories, including four concurring justices in an opinion almost eighty years later,<sup>506</sup> the position has never gained a majority (Carter 2001, 319).

Harlan wrote a separate dissent, more fully articulating the reasoning behind his position. In explaining why he believed that the Constitution applied everywhere the United States exercised sovereignty, Harlan focused principally, not on precedent, text, or practical consequences, but, rather, on the basic kind of government to which the American people were devoted. He approached the Constitution, not simply as a conglomeration of specific provisions, but as the manifestation of the American people's fundamental commitments, finding guidance in the document's "spirit and genius."<sup>507</sup> As noted, Brown and White referred to natural rights. Harlan did not reject their existence, but disagreed over the relationship between natural rights and the Constitution. The Framers, having seen the colonists' suffering at the hands of the Crown, wished to construct a governmental system that would protect "the privileges that inhere in liberty," and "the inherent rights of freemen." But the Framers had not been willing to entrust the protection of natural principles of justice to such vague notions. They believed that "the only safe guaranty against governmental oppression was to withhold or restrict the power to oppress," and this was accomplished through the enactment of a written constitution as the supreme law of the land:

The glory of our American system is that it was created by a written constitution which protects the people against the exercise of arbitrary, unlimited power, and the limits of which instrument may not be passed by the government it

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<sup>506</sup> Brennan's concurring opinion in *Torres v. Com. of Puerto Rico*, 442 U.S. 465 (1979) (joined by Stewart, Marshall, and Blackmun), appeared to endorse full application of the Constitution in the territories.

<sup>507</sup> 182 U.S. 380 (Harlan, J., dissenting).

created, or by any branch of it, or even by the people who ordained it, except by amendment or change of its provisions.

Harlan contrasted American government with systems of government “unrestrained by written constitutions,” which he characterized as “[m]onarchical and despotic.” Citing *Marbury v. Madison*,<sup>508</sup> Harlan renewed Marshall’s argument that the purpose of a written constitution was to maintain a government with limited powers, and that this purpose would be nullified if constitutional limitations were not enforced. Therefore, Harlan argued, “No higher duty rests upon this court than to exert its full authority to prevent all violation of the principles of the Constitution.”

For Harlan, then, the commitment of the American people to a written constitution represented a basic choice to live within a governmental system restrained by a fundamental law, not one subject to the oppressions occasioned by the exercise of arbitrary power. The Court’s notion that, with respect to certain places under U.S. sovereignty, Congress could ignore constitutional limitations, was “wholly inconsistent” with the kind of government to which the American people were committed. Withholding constitutional protections from the Puerto Rican people would undermine the basic philosophy of American constitutionalism. It would be “an evil day for American liberty,” Harlan wrote, “if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence.”<sup>509</sup> For similar reasons, Harlan also could not accept Brown’s argument that differences in “religion, customs, laws, methods of taxation, and modes of thought” required flexibility with respect to the Constitution’s applicability. The American people had made the

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<sup>508</sup> 5 U.S. 137, 176 (1803).

<sup>509</sup> 182 U.S. at 380-82 (Harlan, J., dissenting).

Constitution the supreme law of the land “at all times,” and it became applicable immediately upon the acquisition of new territory:

The Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States, and its full operation cannot be stayed by any branch of the government in order to meet what some may suppose to be extraordinary emergencies.

The document was “not to be obeyed or disobeyed as the circumstances of a particular crisis in our history may suggest the one or the other course to be pursued.”

Constitutional provisions could not be “ignored under special or embarrassing circumstances.” In short, for Harlan, the “meaning of the Constitution” could not “depend upon accidental circumstances.”<sup>510</sup>

The same justices lined up in the majority and dissent in *Hawaii v. Mankichi* (1903),<sup>511</sup> the next major case after *Downes* addressing the applicability of constitutional rights in overseas territories. The issue differed from *Downes* in two important ways. First, the Newlands resolution--the 1898 joint resolution of Congress annexing Hawaii and making it a U.S. territory--provided that existing laws in the Hawaiian islands would remain in force, so long as they were not “contrary to the Constitution of the United States.” Second, the governmental action challenged in *Mankichi* involved Bill of Rights protections--the Fifth Amendment’s grand jury requirement, and the Sixth Amendment’s right to a criminal jury trial. By an act of Congress in June 1900, Hawaii was formally incorporated into the United States, and provisions were made for the use of grand and petit juries, requiring unanimous verdicts for conviction. However, between annexation

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<sup>510</sup> 182 U.S. at 384-85 (Harlan, J., dissenting).

<sup>511</sup> 190 U.S. 197.

in 1898 and incorporation in 1900, the defendant had been charged without a grand jury, and convicted of manslaughter by a 9-3 jury verdict.

Brown, who again wrote the Court's opinion, applied the same approach he did in *Downes*, viewing the case as turning on congressional intent. The relevant legislation provided that existing Hawaiian legislation was invalid if "contrary to the Constitution of the United States." If that language were interpreted literally, Brown conceded, the defendant's conviction would be invalid, since the procedures afforded the defendant were in violation of the Fifth and Sixth Amendments.<sup>512</sup> Brown concluded, however, that, in adopting the Newlands Resolution, Congress had not intended to immediately abolish all criminal procedures in effect within Hawaii. In discerning congressional intent, Brown hit many of the same notes that he had in *Downes*, notwithstanding the distinct legal context in Hawaii occasioned by the Newlands Resolution. He stressed the impracticality of imposing the full panoply of constitutional protections in a place where they would be "unfamiliar to a large number of their inhabitants, and for which no previous preparation had been made." The inability of the new U.S. territory to comply immediately with all of the Constitution's protections would lead to "disastrous" consequences if the Court were to interpret the Newlands Resolution literally. Congress must not have intended to interfere with the existing criminal procedures in Hawaii, where to do so would threaten peace and order.

Brown also evoked portions of his *Downes* opinion in stating that only the constitutional rights "fundamental in their nature" took immediate effect. Under this standard, "most, if not all, the privileges and immunities contained in the Bill of Rights of

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<sup>512</sup> 190 U.S. at 212. At the time, the Sixth Amendment was understood as requiring unanimous verdicts for criminal convictions.

the Constitution were intended to apply from the moment of annexation,” including, for example the “just compensation” requirement and the due process of law. But the rights at stake in *Mankichi* were not fundamental. They concerned “merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being.”<sup>513</sup>

Concurring, White (joined only by McKenna) continued to employ his theory of incorporation. Concluding that Hawaii was unincorporated during the period between annexation and formal incorporation, he believed that the only applicable limitations during that period were the “fundamental provisions of the Constitution.”<sup>514</sup> The Newlands Resolution simply confirmed that the territory could not violate fundamental constitutional provisions. The pivotal question, then, was whether the Fifth Amendment grand jury requirement and the Sixth Amendment right to a criminal jury trial were fundamental. Here, White cited opinions from the Court’s PDP jurisprudence. During this same time period (as discussed in ch. 4, B) the Court held that only fundamental rights, indispensable to a free government, fell within due process. White cited *Hurtado* (1884),<sup>515</sup> which held due process did not include the grand jury requirement, and *Maxwell v. Dow* (1900),<sup>516</sup> which held that due process did not include the right to a criminal jury trial. Based on these and other precedents, White considered it “not an

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<sup>513</sup> 190 U.S. at 217.

<sup>514</sup> 190 U.S. at 221 (White, J., concurring).

<sup>515</sup> *Hurtado v. California*, 110 U.S. 516.

<sup>516</sup> 176 U.S. 581.

open question that the provisions of the Constitution as to grand and petit juries were not applicable” in Hawaii while it remained an unincorporated territory.<sup>517</sup>

In dissent, Fuller (joined again by Harlan, Brewer, and Peckham) rejected the majority’s interpretation of the Newlands Resolution, arguing that its plain meaning was to extend the entire Constitution. More fundamentally, Fuller reiterated that the entire Constitution applied of its own force. He added that, even employing the majority’s standard, the grand jury requirement and right to a jury trial qualified as fundamental.

Harlan’s dissent again asserted that the Constitution “speak[s] with commanding authority to all who exercise power under its sanction.” Congress was, at all times and in all places, subject to constitutional restrictions, since it “came into existence, and exists, only by virtue of the Constitution.”<sup>518</sup> Applicability in the territories followed from the American people’s choice to live under a system that subjected government to the restrictions of a written charter. The majority’s view placed Congress above the Constitution, and made the will of Congress the supreme law with respect to certain jurisdictions. It “assumes the possession by Congress of power quite as omnipotent as that possessed by the English Parliament,” and allows for the “exercise of absolute, arbitrary legislative power.”<sup>519</sup> Adopting the majority’s approach would indicate that:

this country had left the old ways of the fathers, as defined by a written constitution, and entered upon a new way, in following which the American people will lose sight of, or become indifferent to, principles which had been supposed to be essential to real liberty.<sup>520</sup>

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<sup>517</sup> *Hawaii v. Mankichi*, 190 U.S. 197, 220 (1903).

<sup>518</sup> 190 U.S. at 236 (Harlan, J., dissenting).

<sup>519</sup> 190 U.S. at 236 (Harlan, J., dissenting).

<sup>520</sup> 190 U.S. at 239-40 (Harlan, J., dissenting).



Indicating his opposition to the majority's use of ECM and UR, as he had in PDP opinions (ch. 4, B.),<sup>521</sup> Harlan rejected the notion that it was the judiciary's role to adapt the Constitution's meaning to the "apparent necessities of the hour, or the apparent majority of the people, at a particular time,"<sup>522</sup> or to determine which of the Constitution's provisions applied due to their fundamental nature.<sup>523</sup>

The year following *Mankichi*, for the first time,<sup>524</sup> the majority adopted White's doctrine of incorporation. *Dorr v. U.S.* (1904)<sup>525</sup> presented the Court with another opportunity to consider the applicability of the right to a criminal jury trial in one of the newly acquired overseas territories--the Philippines. The defendant had been charged with criminal libel under territorial law, which made no provisions for jury trials. The Court (Day ) found that the Philippines was an unincorporated territory. Consequently, only fundamental constitutional rights applied of their own force, and the right to a criminal jury trial did not qualify as a fundamental right. Day renewed arguments made by majority justices in previous *Insular Cases* to support the proposition that the entire Constitution could not be made applicable in unincorporated territories. Again, a central theme was the potential differences between the American people and the "the needs or capacities of the people" in overseas territories. The United States might acquire territories where the local residents were "savages," and where "a system of trial [was] unknown to them and unsuited to their needs." It might, therefore, be impossible to "carry[] into practice" the jury trial requirement. Under such circumstances, attempting

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<sup>521</sup> E.g., *Twining v. New Jersey*, 211 U.S. 78 (1908); *Maxwell v. Dow*, 176 U.S. 581 (1900); *Hurtado v. California*, 110 U.S. 516 (1884).

<sup>522</sup> *Mankichi*, 190 U.S. at 241 (Harlan, J., dissenting).

<sup>523</sup> 190 U.S. at 246-47 (Harlan, J., dissenting).

<sup>524</sup> See *Torres v. Com. of Puerto Rico*, 442 U.S. 465, 469 (1979); Carter 2001, 319.

<sup>525</sup> 195 U.S. 138.

to immediately impose all of the Constitution’s requirements might “work injustice and provoke disturbance rather than to aid the orderly administration of justice.”<sup>526</sup>

At the same time, Day endorsed the fundamental rights approach to identifying the constitutional limitations that applied *ex proprio vigore*. Day noted that Brown and White had indicated support for the approach in *Downes*, and approvingly cited the Court’s statement in *The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. U.S.* (1890) that:

Doubtless congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the constitution from which congress derives all its powers, than by any express and direct application of its provisions.<sup>527</sup>

Day further cited the Court’s finding in *Mankichi* that, while many of the Bill of Rights provisions might well apply of their own force in the territories, this could not be said of the right to a criminal jury trial, which was not “fundamental in [its] nature,” but, rather, “concern[ed] merely a method of procedure” that had been found to be locally useful.<sup>528</sup>

The Court’s approach to determining the Constitution’s applicability in unincorporated territories was similar to its due process framework. In both areas, the inquiry focused on whether the right at issue was essential to freedom. The Court asked whether fairness, liberty, and justice could be secured without affording the right in question. In *Dorr*, White considered the Spanish civil law system used in the Philippines, and concluded that, even without the right to a criminal jury trial, it was possible that “a

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<sup>526</sup> 195 U.S. at 148.

<sup>527</sup> 195 U.S. at 146 (quoting *The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 43-44 (1890)).

<sup>528</sup> 195 U.S. at 144-45 (quoting *Mankichi*, 190 U.S. at 217-18).

method of fair and orderly trial prevails.”<sup>529</sup> It “cannot be successfully maintained,” Day wrote, that the system in force in the Philippines:

does not give an adequate and efficient method of protecting the rights of the accused as well as executing the criminal law by judicial proceedings which give full opportunity to be heard by competent tribunals before judgment can be pronounced.<sup>530</sup>

Day, here, was guided by IMPs the Court had identified in its PDP jurisprudence--a court with jurisdiction, and the opportunity to be heard in one’s own defense. The legal system in the Philippines preserved these elements which were indispensable to justice. By contrast, the right to a jury trial was inessential, and could be eliminated without violating the defendant’s fundamental rights.

Harlan’s dissent in *Dorr* also reflected the tight connection between the *Insular Cases* and the Court’s PDP jurisprudence.<sup>531</sup> Noting that he had already set forth his views on grand and petit juries, he cited, not only his opinions from the *Insular Cases*, but also his dissenting opinions in *Hurtado* and *Maxwell*. In *Mankichi*, White had relied on the majority opinions in the same two cases to support his view that the rights to grand and petit juries were not fundamental. Thus, the axes of disagreement in the Court’s PDP jurisprudence also appeared in the *Insular Cases*. In both contexts, a majority held that only fundamental rights applied, over Harlan’s protest that the entire Constitution applied with full and equal force in all U.S. jurisdictions.

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<sup>529</sup> *Dorr v. U.S.*, 195 U.S. 138, 148 (1904).

<sup>530</sup> 195 U.S. at 146.

<sup>531</sup> Harlan was the lone dissenter in *Dorr*. The other dissenters in *Downes* and *Mankichi* had not changed their views, but, in *Dorr*, considered themselves bound by the Court’s ruling in *Mankichi*.

The Court's adoption of White's incorporation approach was confirmed in later decisions. In *Rasmussen v. U.S.* (1905),<sup>532</sup> for instance, the Court held that the Sixth Amendment's right to a jury trial applied in Alaska, because the territory was incorporated.<sup>533</sup> In *Balzac v. U.S.* (1922),<sup>534</sup> the Court unanimously reaffirmed the doctrine of incorporation. The Sixth and Seventh Amendment provisions relating to jury trials did not apply in Puerto Rico, an unincorporated territory, because they did not qualify as fundamental rights.<sup>535</sup> In his opinion for the Court, Chief Justice William Taft echoed a familiar theme in stressing that the "jury system needs citizens trained to the exercise of the responsibilities of jurors," and could not easily be implemented where the citizens were not so trained. Since Puerto Rico remained an unincorporated territory, Congress was within its authority to conclude that

a people like the Filipinos, or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when.<sup>536</sup>

At the same time, confirming earlier suggestions, the Court included the due process of law among those fundamental constitutional limitations that applied *ex proprio vigore*.<sup>537</sup>

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<sup>532</sup> 197 U.S. 516.

<sup>533</sup> On that basis, the Court invalidated a law for the territory of Alaska that provided for juries of only six members in jury trials involving misdemeanors, since the Sixth Amendment was understood as guaranteeing juries of twelve members. Brown concurred, basing his decision on an interpretation of the governing treaty, and renewing his opposition to White's approach. As *Rasmussen* and later cases made clear, White had won the battle over the framework of analysis in determining the territorial scope of the Constitution's applicability. Harlan concurred, reiterating his disapproval of the Court's approach.

<sup>534</sup> 258 U.S. 298.

<sup>535</sup> See also *Ocampo v. U.S.*, 234 U.S. 91 (1914) (Fifth Amendment grand jury requirement did not apply in the Philippines, since it was an unincorporated territory, and the requirement was not fundamental).

<sup>536</sup> *Balzac v. U.S.*, 258 U.S. 298 (310) (1922).

<sup>537</sup> 258 U.S. at 312-13 ("The guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in the Philippines and Porto Rico.").

B. Post-*Insular* Cases

Since *Balzac*, the Court has been relatively inactive in its jurisprudence concerning the scope of the Constitution's applicability in unincorporated territories.<sup>538</sup> The doctrine of incorporation has not been overturned, though some justices have expressed dissatisfaction with it (Carter 2001, 320). In one of the most important decisions since the *Insular Cases*, *Torres v. Com. of Puerto Rico* (1979),<sup>539</sup> the Court unanimously held that the Fourth Amendment's immunity from unreasonable searches and seizures applied in Puerto Rico (still deemed an unincorporated territory). The decision invalidated legislation enacted by the Commonwealth of Puerto Rico in 1975, which authorized searches by the police of the luggage of any person entering the Commonwealth from the United States. In his opinion for the Court, Chief Justice Warren Burger approvingly described the doctrine of incorporation. Like majority justices in the *Insular Cases*, Burger expressed concern that immediate imposition of the entire Constitution in all territories "would create such severe practical difficulties under certain circumstances as to prohibit the United States from exercising its constitutional power to occupy and acquire new lands," and that the attempt to impose the entire Constitution might lead to injustice.<sup>540</sup> At the same time, Burger acknowledged that the Court had held some constitutional provisions applicable of their own force, including freedom of speech and due process.<sup>541</sup>

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<sup>538</sup> This relative inactivity may be due, in part, to the extension, through congressional legislation, of certain constitutional protections in unincorporated territories, such as Puerto Rico. Soltero 2001, 28.

<sup>539</sup> 442 U.S. 465.

<sup>540</sup> 442 U.S. at 469.

<sup>541</sup> See also *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 599-600 (1976); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668-69 n. 5 (1974). In these cases, the Court made clear that due process applied, but found it unnecessary to determine whether it applied via the Due Process Clause of the Fifth Amendment, or the Due Process or Equal Protection Clauses of the Fourteenth Amendment.

Burger's analysis in *Torres* stressed the relevant circumstances in Puerto Rico. He inquired whether the imposition of the Fourth Amendment immunity would likely lead to the compromise of national interests or security, or to unfairness. In conducting that inquiry, Burger looked to insights that could be gleaned from Puerto Rico's experience to date, and placed great weight on congressional legislation, stating:

Both Congress' implicit determinations in this respect and long experience establish that the Fourth Amendment's restrictions on searches and seizures may be applied to Puerto Rico without danger to national interests or risk of unfairness.<sup>542</sup>

Burger noted that, between 1917 and 1952, Congress had extended “equivalent personal rights” in Puerto Rico, and that Puerto Rico itself had chosen to include the language of the Fourth Amendment in its own constitution.

While concurring in the result, Brennan (joined by Stewart, Marshall, and Blackmun), rejected Burger's approach. He appeared to endorse the approach advocated by Harlan--that the entire Constitution applied of its own force in all territories. Brennan considered the *Insular Cases* as valid, at best, “in the particular historical context in which they were decided.” He also quoted a 1957 opinion which had stated, with respect to the *Insular Cases*, that:

[N]either the cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.<sup>543</sup>

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<sup>542</sup> *Torres v. Com. of Puerto Rico*, 442 U.S. 465, 470 (1979).

<sup>543</sup> *Torres*, 442 U.S. at 476 (Brennan, J., concurring) (quoting *Reid v. Covert*, 354 U.S. 1, 14 (1957)).

Marshall later characterized Brennan's concurring opinion in *Torres* as expressing "the view that all provisions of the Bill of Rights apply to Puerto Rico."<sup>544</sup>

Brennan's concurring opinion in *Torres* indicated that, while the Court has retained the same basic approach since the *Insular Cases*, the justices have continued to disagree over the applicability of the Constitution in the territories. Indeed, in the 1957 decision that Brennan cited in *Torres*--*Reid v. Covert*--a plurality of four justices seemed to express dissatisfaction with the *Insular Cases*. *Reid* itself did not concern the applicability of the Constitution in the territories. At issue was the availability of certain constitutional protections to dependents of American military personnel, who were tried overseas by U.S. military courts for offenses allegedly committed in locations outside the United States. The Court held that the right to a jury trial was applicable under these circumstances. For present purposes, the relevant aspect of the case was that, in his plurality opinion announcing the judgment of the Court, Black (joined by Warren, Brennan, and Douglas) criticized the approach the Court employed in the *Insular Cases*. Black saw the issue in *Reid* as part of a broader question concerning the applicability of the Constitution when the U.S. Government "acts outside the continental United States." Regarding the fundamental rights approach articulated in the *Insular Cases*, Black wrote:

we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.<sup>545</sup>

Given the differences in the issues involved, however, it was not necessary for the Court to overrule the *Insular Cases* to reach the decision in *Reid*. Rather, Black argued that the

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<sup>544</sup> *Harris v. Rosario*, 446 U.S. 651, 653-54 (1980).

<sup>545</sup> *Reid v. Covert*, 354 U.S. 1, 8 (1957).

*Insular Cases* could be distinguished, since, unlike *Reid*, which concerned the subjection of American civilians to military jurisdiction, the *Insular Cases* “involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions.”<sup>546</sup> Strong dissatisfaction with the doctrine of incorporation was also expressed by Justice Marshall in his dissenting opinion in *Harris v. Rosario* (1980).<sup>547</sup> There, Marshall asserted that “the present validity of [the *Insular Cases*] is questionable.”

Notwithstanding expressions by certain justices at various times of dissatisfaction with the *Insular Cases*, a majority of the justices has never indicated that the *Insular Cases* and their doctrine of incorporation have been rejected. Indeed, in *Verdugo-Urquidez v. U.S.* (1990),<sup>548</sup> which, like *Reid*, did not itself involve the territories, a majority of the Court made clear that the *Insular Cases* were still good law. The issue before the Court was whether the protection of the Fourth Amendment was available to a Mexican citizen whose home in Mexico had been searched by Mexican police in cooperation with United States D.E.A. agents. In his opinion for the Court, holding that the Fourth Amendment did not apply in those circumstances, Rehnquist cited the *Insular Cases* broadly for the proposition that “not every constitutional provision applies to governmental activity even where the United States has sovereign power.” Removing any doubt of the majority’s view of the continued validity of the *Insular Cases*, he wrote that “it is not open to us in light of the *Insular Cases* to endorse the view that every constitutional provision applies wherever the United States Government exercises its

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<sup>546</sup> *Reid*, 354 U.S. at 14.

<sup>547</sup> 446 U.S. 651, 653.

<sup>548</sup> 494 U.S. 259.



power.”<sup>549</sup> Citing a range of *Insular Cases*, Rehnquist summarized the extant doctrines they had established, referring to an unincorporated territory as “one not clearly destined for statehood,” and reaffirming (if *Torres* had introduced any doubt) that “[o]nly ‘fundamental’ constitutional rights are guaranteed to inhabitants of those territories.”<sup>550</sup>

In the Court’s due process jurisprudence, it confronted the applicability of the Bill of Rights in the states. In the *Insular Cases*, the Court confronted the applicability of the Bill of Rights in overseas territories. As in the due process context, the Court adopted a universalistic approach, inquiring into the fundamental nature of the rights in question. The approach determined that certain rights were so essential to liberty and justice that they applied of their own force. At the same time, it stressed the importance of allowing for diversity and variance based on context. In this respect, the Court’s approach struck similar notes to the ECM approach applied in the due process context. Universalistic principles set inherent limitations on government, but the justices recognized the need for flexibility arising from divergent circumstances.<sup>551</sup> As in the due process context, the universalistic framework was not unanimously approved by the justices. Indeed, the fault line between the justices in PDP largely reproduced itself in the *Insular Cases*, with a number of justices citing opinions from the due process context in their opinions in the *Insular Cases*. As in PDP, Harlan was the most forceful opponent of the Court’s universalistic approach. And, as in Harlan’s PDP dissents, he objected to distinctions

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<sup>549</sup> Kennedy echoed the theme in his concurrence: “the *Insular Cases* do stand for an important proposition, one which seems to me a wise and necessary gloss on our Constitution. The proposition is, of course, not that the Constitution ‘does not apply’ overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place.” *Verdugo-Urquidez v. United States*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

<sup>550</sup> *Verdugo-Urquidez*, 494 U.S. at 268-69.

<sup>551</sup> The *Insular Cases*, however, did involve a type of contextual variation that did not arise in the due process context, regarding characteristics of the governed.

between constitutional protections on the basis of their relative importance. For Harlan, inclusion in the Constitution was the critical consideration that should guide the justices. Harlan's judicial philosophy sought particularistic bases for judicial action. He could not accept the Constitution's partial applicability. In reasoning about the Constitution's applicability, with little text or history available for guidance, Harlan found a particularistic basis for constitutional applicability in the basic choice of the American people to live in a society governed by a written constitution. He reasoned from that expression of will; it was not consistent with the form of government selected to permit the government to exercise unrestrained power.

During the time period of the *Insular Cases*, then, the Court's jurisprudence, including axes of disagreement, were largely similar in the due process and territorial arenas. In the due process context, we saw that a majority eventually adopted an approach that placed a greater emphasis on particularistic bases. Although the Court has been less active in the territorial context, Burger's opinion in *Torres* moved in a similar direction; the heightened emphasis on political acts--congressional intent, and the intent of the people living in Puerto Rico--suggested a greater role for particularistic considerations. The opinion also reflected continuing disagreement, with the four concurring justices apparently endorsing the total incorporation approach that Harlan had advocated in the early twentieth century.

The next chapter addresses a topic in which the Court has been active in recent decades--the Eighth Amendment's Cruel and Unusual Punishments Clause. The issue as recently presented has not concerned the applicability of the Clause, but the proper approach to determining its meaning. Despite the significant difference in the nature of

the substantive topic, we will again see that the Court's jurisprudence, and disagreements between the justices, have revolved considerably around questions about the proper role of universalistic reasoning, and the closely related issue of evolving constitutional meanings.

## **Chapter 6**

### **Cruel and Unusual Punishments**

The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The Court’s jurisprudence interpreting the Cruel and Unusual Punishments Clause (“CUPC”) brings to the forefront questions raised by evolutive, universalistic approaches, with respect to the appropriate sources for guidance in discerning how rights meanings change. Section A discusses the Court’s earliest decisions on CUPC. These decisions, while not as detailed in their reasoning as later cases, suggested a role for the examination of prevalent practices, and an approach appealing to general principles, and not purely to history. Section B discusses a number of cases, beginning with *Weems v. U.S.* (1910), in which the Court adopted an evolutive, universalistic approach to CUPC. Section C focuses on decisions since *Furman v. Georgia* (1972), in which the justices have wrestled with the proper role of UR, and the relationship between practices, and other societal indicators, and changes in constitutional meanings.

A. Early Universality in Cruel and Unusual Punishments Jurisprudence

The Court’s earliest CUPC decisions, all rejecting defendants’ constitutional challenges, provide less insight into the Court’s reasoning than did *Weems* (1910) and later cases. One reason is that some of the early cases concerned challenges to state actions. The Court did not indicate until the late 1940s that the Eighth Amendment applied against the states.<sup>552</sup> Thus, the basis of some nineteenth-century decisions was ambiguous. The inapplicability of the Eighth Amendment, alone, was enough to defeat CUPC challenges to state actions. Nevertheless, the opinions at times offered insights into the justices’ understandings. *Pervear v. Massachusetts* (1866)<sup>553</sup> appears to have

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<sup>552</sup> *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

<sup>553</sup> 72 U.S. 475.

been the first case in which the Court considered a CUPC challenge.<sup>554</sup> *Pervear*, convicted of selling intoxicating liquors without a license, was sentenced to a \$50 fine, and three months' imprisonment at hard labor. The Court rejected *Pervear*'s argument that the punishment was excessive, noting that the state's approach to enforcing laws against intemperance was the "usual mode adopted in many, perhaps, all of the States."<sup>555</sup> The short opinion foreshadowed the Court's later reliance on prevailing practices.<sup>556</sup>

Twelve years later, in *Wilkerson v. Utah* (1878),<sup>557</sup> the Court again referred to prevalent practices.<sup>558</sup> The defendant, sentenced to death by shooting on a murder conviction in the Utah territory (where the Eighth Amendment applied by statute), objected to the method of execution. The Court (Clifford) indicated that CUPC banned "punishments of torture" and "unnecessary cruelty," including a number of practices that had long ago been used in England, such as beheading, quartering, public dissection, and burning alive.<sup>559</sup> (This much has never been disputed; controversy has focused on what else CUPC prohibits.) In rejecting the CUPC challenge, Clifford focused on existing practices. Execution by shooting was the common method for soldiers convicted of military offenses, and was permitted by customs of war, and the laws of other countries.

Another twelve years later, in *In re Kemmler* (1890),<sup>560</sup> the Court introduced USEs into its CUPC jurisprudence.<sup>561</sup> Like *Wilkerson*, *Kemmler* concerned a challenge to a method of execution--the recently created electric chair. The Court (Fuller) stated

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<sup>554</sup> See *Furman v. Georgia*, 408 U.S. 238, 264 (1972) (Brennan, J., concurring).

<sup>555</sup> *Pervear*, 72 U.S. at 480.

<sup>556</sup> The Court held the Amendment inapplicable to states, but explained the claim lacked merit in any event.

<sup>557</sup> 99 U.S. 130.

<sup>558</sup> See *Furman*, 408 U.S. at 276-77 (Brennan, J., concurring) (characterizing the decision as upholding the challenged practice because it was commonly employed at the time).

<sup>559</sup> *Wilkerson*, 99 U.S. at 136.

<sup>560</sup> 136 U.S. 436.

<sup>561</sup> As in *Pervear*, the Court held CUPC inapplicable to states, but also found the claim without merit.

that the death penalty was not cruel in itself. “Cruel” implied “something inhuman and barbarous--something more than the mere extinguishment of life.”<sup>562</sup> As a standard of evaluation, inhumanity is universalistic, in that it transcends the preferences or practices of a particular place and time.

In an influential<sup>563</sup> dissenting opinion in *O'Neil v. Vermont* (1892),<sup>564</sup> Field (joined by Harlan and Brewer) also employed USEs. (The majority did not reach the merits, holding CUPC inapplicable to states.) The defendant, convicted of selling intoxicating liquors, was sentenced to over \$6,000 in fines, and over fifty years' imprisonment if the fines were not timely paid. The punishment for each individual sale was light, but the defendant was sentenced cumulatively on 307 separate counts. Field argued that CUPC's was not limited to torturous punishments. A punishment, though not cruel in itself, could violate the prohibition if it was “greatly disproportioned to the offenses charged.” “The whole inhibition,” Field asserted, was “against that which is excessive.” Analogizing to punishing a person separately for each drop in a glass of liquor, Field contended that the cumulative sentence was excessive. In expressing his objections to the defendant's sentence, Field, like the Court in *Kemmler*, employed universalistic language. The sentence “was greatly beyond anything required by any humane law for the offenses.” Given the nature of offense and punishment, it was “hard to believe that any man of right feeling and heart can refrain from shuddering. . . The judgment of mankind would be that the punishment was not only an unusual, but a cruel,

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<sup>562</sup> 136 U.S. at 447.

<sup>563</sup> See, e.g., *Weems v. U.S.*, 217 U.S. 349, 371 (1910); *Furman v. Georgia*, 408 U.S. 238, 249 (1972) (Douglas, J., concurring).

<sup>564</sup> 144 U.S. 323.

one, and a cry of horror would rise from every civilized and Christian community of the country against it.”<sup>565</sup>

In showing that the sentence was inhumanely disproportionate, Field referred to existing practices. He pointed to the disparity between the defendant’s sentence and sentencing practices for other crimes, and for the same crime in other jurisdictions. The defendant’s sentence was more severe than what he would have received for burglary or highway robbery, and was six times more severe than what he would have received for manslaughter, forgery, or perjury. Moreover, Field could not find any instance in a U.S. jurisdiction of a defendant receiving as severe a sentence for the same crime.<sup>566</sup>

B. Weems (1910), Resweber (1947), and Trop (1958): Adoption of an Evolutive, Universal Approach to Cruel and Unusual Punishments

In *Weems v. U.S.* (1910),<sup>567</sup> for the first time, the Court invalidated a sentence prescribed by a legislature on CUPC grounds.<sup>568</sup> The defendant had been convicted in the Philippines (then, a U.S. territory)<sup>569</sup> under a statute criminalizing the use of false documents by government officials. The statute provided a minimum sentence of twelve years’ confinement. The form of confinement, known as *cadena temporal*, entailed the wearing of chains on the ankles and wrists, and hard and painful labor. Following the term of imprisonment, the sentence included a substantial continuing loss of civil rights, and subjection to surveillance. The minimum sentence was mandatory, even if the defendant had no intention of defrauding the government, or securing personal gain. The

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<sup>565</sup> 144 U.S. at 340 (Field, J., dissenting).

<sup>566</sup> 144 U.S. at 338-39 (Field, J., dissenting). Eleven years after *O’Neil*, the Court, while upholding the challenged sentence, seemed to leave the door open for considering proportionality in CUPC cases. *Howard v. Fleming*, 191 U.S. 126, 135-36 (1903).

<sup>567</sup> 217 U.S. 349.

<sup>568</sup> See *Furman v. Georgia*, 408 U.S. 238, 325 (1972) (Marshall, J., concurring).

<sup>569</sup> The Court considered itself to be interpreting CUPC, because the case arose under a provision of the territorial constitution of the Philippines containing similar language.



defendant in *Weems* was sentenced to fifteen years, but the Court treated the statute's twelve-year minimum as the subject of analysis. The majority's opinion (McKenna) introduced ECM into the Court's CUPC jurisprudence, using reasoning similar to reasoning the Court has used in adopting ECM in other issue areas. Constitutions, McKenna argued, were intended to endure indefinitely, and thus, must survive unforeseeable changes. If constitutional provisions were to be effective over time, their application must not be limited to evils known at the time of enactment. The Framers understood that future legislatures might abuse their power over criminal laws by devising new punishments that were cruel. CUPC was not "intended to prohibit only practices like the Stuarts', or to prevent only an exact repetition of history." More broadly, noting other parts of the Constitution whose meaning had evolved substantially (including the Fourteenth Amendment), McKenna argued that constitutional provisions had to be understood as embodying general principles, whose application evolved with changing conditions:

Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. . . [Constitutions] are not ephemeral enactments, designed to meet passing occasions. . . The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.<sup>570</sup>

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<sup>570</sup> *Weems*, 217 U.S. at 373.

CUPC “may be . . . progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.”<sup>571</sup> This oft-quoted passage linked ECM with USEs (“humane justice”). McKenna also employed universalistic language in basing the opinion on the “precept of justice that punishment for crime should be graduated and proportioned to offense.”<sup>572</sup> In considering proportionality, McKenna investigated existing practices, including laws from a variety of jurisdictions in the United States, and in the Philippines. Individuals convicted of far more serious crimes (such as conspiracy to destroy the government by force, and some degrees of homicide) received less severe sentences than the defendant in *Weems*. McKenna’s landmark opinion relied on a combination of ECM, UR, “public opinion,” and existing practices, raising difficult questions still with today’s Court concerning the proper relationship between these elements.

In dissent, White advocated a more restrictive view of CUPC, suggesting, in opposition to the Court’s ECM, that the Clause:

forbids only . . . inflicting unnecessary bodily suffering through a resort to inhuman methods for causing bodily torture, like or which are of the nature of the cruel methods of bodily torture which had been made use of prior to the Bill of Rights of 1689, and against the recurrence of which the word ‘cruel’ was used in that instrument.<sup>573</sup>

Like *Wilkerson* and *Kemmler*, *State of La. ex rel. Francis v. Resweber* (1947)<sup>574</sup> concerned the manner of execution. The defendant survived the state’s attempt to execute him due to the electric chair’s malfunction, and objected to re-scheduling of the execution on CUPC grounds. The Court, 5-4, upheld the re-scheduling. In his opinion

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<sup>571</sup> 217 U.S. at 378.

<sup>572</sup> 217 U.S. at 367.

<sup>573</sup> 217 U.S. at 409 (White, J., dissenting).

<sup>574</sup> 329 U.S. 459.

for a four-person plurality, Reed (joined by C.J. Frederick Vinson, and Justices Robert Jackson and Black), who assumed without deciding the Eighth Amendment's applicability, wrote: "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence."<sup>575</sup> The MRR phrase "traditional humanity" blended the universalistic standard of humanity with that standard's historical role within a particular system of law. For the plurality, the accidental nature of the chair's malfunction was critical. The state had not intended to cause unnecessary pain.

In his concurring opinion, providing the majority's fifth vote, Frankfurter did not assume the Eighth Amendment's applicability. He applied the same universalistic, evolutive approach that he applied to claims brought under the Fourteenth Amendment's Due Process Clause (ch. 4, C). He could not find that re-scheduling the execution was "repugnant to the conscience of mankind,"<sup>576</sup> nor that it offended "a principle of justice "rooted in the traditions and conscience of our people."<sup>577</sup> Dissenting, Justice Harold Burton (joined by Murphy, Rutledge, and Douglas) also employed a universalistic formulation, maintaining that CUPC was violated by methods of execution that "shock[] the most fundamental instincts of civilized man."<sup>578</sup> He would have remanded the case to the state courts. More information was needed, such as the extent of the defendant's suffering during the attempted execution.

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<sup>575</sup> 329 U.S. at 463.

<sup>576</sup> 329 U.S. at 470 (Frankfurter, J., concurring) (*quoting Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

<sup>577</sup> 329 U.S. at 471 (Frankfurter, J., concurring) (*quoting Palko v. Connecticut*, 302 U.S. 319, 323 (1937)).

<sup>578</sup> 329 U.S. at 473 (Burton, J., dissenting).

In *Trop v. Dulles* (1958),<sup>579</sup> the justices offered the most in-depth consideration of CUPC since *Weems*, reaffirming and elaborating on tenets of McKenna's opinion, including the reliance on UR, ECM, and existing practices. Trop, a native-born American citizen convicted by a court-martial of wartime desertion while serving in French Morocco during the Second World War, was deprived of citizenship as part of his sentence. The Court, 5-4, invalidated the sentence. Warren wrote the opinion for a four-person plurality (joined by Justices Charles Whittaker, Black, and Douglas), with Brennan providing the fifth vote on non-CUPC grounds.<sup>580</sup> Introducing a USE that has remained part of the Court's jurisprudence, he stated: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."<sup>581</sup> The Amendment imposed a "basic prohibition against inhuman treatment,"<sup>582</sup> and mandated that the state's "power to punish . . . [must] be exercised within the limits of civilized standards."

Citing *Weems*, Warren also confirmed CUPC's evolutive nature, noting that its words "are not precise," and that "their scope is not static." In *Weems*, McKenna had written that the Amendment's meaning "may be . . . progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."<sup>583</sup> Warren wrote that the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>584</sup> Like McKenna's language, Warren's oft-quoted reference to "evolving standards of decency" indicated a link between USEs, ECM, and public attitudes. Also like McKenna, Warren

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<sup>579</sup> 356 U.S. 86.

<sup>580</sup> Brennan concluded that the statute providing the punishment at issue in *Trop* fell outside of Congress's legislative powers.

<sup>581</sup> 356 U.S. at 100.

<sup>582</sup> 356 U.S. at 101 n. 32.

<sup>583</sup> 217 U.S. at 378.

<sup>584</sup> *Trop*, 356 U.S. at 100-01.

examined existing practices in a variety of jurisdictions. He noted that the sentence entailed the possibility of banishment, which was a “fate universally decried by civilized people.” Statelessness was “a condition deplored in the international community of democracies,” and there was “virtual unanimity” among the “civilized nations of the world” that a condition of statelessness should not be imposed as punishment. He cited a United Nations study showing that, of the eighty-four countries surveyed, only two prescribed denationalization as a punishment for desertion. He conceded that several countries imposed expatriation where their nationals had engaged in conduct in derogation of native allegiance, but stressed that even these statutes generally limited their applicability to naturalized citizens.<sup>585</sup> The sentence subjected Trop “to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment,”<sup>586</sup> and was “offensive to cardinal principles for which the Constitution stands.” The conclusion did not follow only from investigation of international practices. Warren also conducted his own consideration of the nature of the punishment itself. The punishment was cruel because it amounted to a “total destruction of the individual’s status in organized society,” and, thus, left an individual with no rights, and utterly at the mercy of the governing authorities of whatever place in which he happened to find himself. This condition, which subjected “the individual to a fate of ever-increasing fear and distress,” was “a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.”<sup>587</sup>

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<sup>585</sup> 356 U.S. at 102-03.

<sup>586</sup> 356 U.S. at 99.

<sup>587</sup> 356 U.S. at 101-02.

The dissenters accepted the principal tenets of Warren’s approach,<sup>588</sup> including reliance on USEs and international practices. Frankfurter (joined by Justices Tom Clark, Burton, and Harlan) spoke of CUPC as embodying “enlightened concepts of humane justice,”<sup>589</sup> and cited U.N. documents in considering the practices of “civilized nations.”<sup>590</sup> The dissenters, however, reached a different result based on, among other things,<sup>591</sup> a different interpretation of the evidence of international practices.<sup>592</sup>

C. Furman (1972) to the Present

In recent decades, the justices have clashed repeatedly over the use of UR, ECM, and the proper role of various societal indicators in discerning changes in CUPC’s application. Many of the clashes have occurred in cases concerning the constitutionality of the death penalty. As discussed below, in *Furman v. Georgia* (1972), the Court invalidated death penalty statutes based on their arbitrary application, leaving open the opportunity for states to enact new legislation seeking to address the justices’ concerns. Within four years, the Court ruled on two different types of responses to *Furman*. The Court upheld Georgia’s legislation providing greater guidance to those authorized to make the sentencing decision, and invalidated North Carolina’s mandatory death penalty statute. The Court has not wavered from the determination that the death penalty is not inherently violative of CUPC. It has, however, considered many challenges based on the death penalty’s disproportionality as punishment for certain crimes, and its

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<sup>588</sup> See *Furman v. Georgia*, 408 U.S. 238, 327 (1972) (Marshall, J., concurring) (noting that the dissenters adopted the same basic analytical approach as the plurality).

<sup>589</sup> 356 U.S. at 127 (Frankfurter, J., dissenting).

<sup>590</sup> 356 U.S. at 126 (Frankfurter, J., dissenting).

<sup>591</sup> Frankfurter also argued that the deprivation of Trop’s citizenship was not punishment for Eighth Amendment purposes.

<sup>592</sup> The plurality and dissenting opinions both noted laws in a number of countries imposing loss of citizenship on naturalized citizens as punishment for certain crimes. The plurality minimized the relevance of these laws, because their application was limited to naturalized citizens, while the dissenters saw these laws as supporting the view that the deprivation of citizenship was an acceptable form of punishment.

inappropriateness as a punishment for certain defendants. For example, the Court initially approved the death penalty for juveniles under the age of sixteen, and for the mentally retarded, but, in recent years, reversed both of these holdings. These decisions have been closely contested, often issued with multiple concurring and dissenting opinions. (All five majority justices in *Furman*, for example, issued separate opinions.)

Notwithstanding the complexity occasioned by shifting majorities and multiple opinions, central themes and axes of disagreement have emerged. ECM has been critical to the debate. Since the death penalty has a long history of acceptance, the Court's repeated examination of its constitutionality has raised questions about the importance of history. Moreover, in recent years, the Court has twice reversed holdings based on intervening shifts in public attitudes and practices. In these cases, a fault line has crystallized between two competing approaches to CUPC. The prevailing approach is unabashedly universalistic and evolutive. The current majority argues that, in applying CUPC, the justices should look for guidance to contemporary societal values ("CSV"). In assessing CSV, they look to a wide range of sources, including, not only state legislation, but also international practices, and the opinions of professional associations. For the majority, however, the CSV analysis is not, in itself, decisive. The justices must also conduct their own independent assessment of the challenged punishment to determine its comportment with USEs. A substantial minority of justices opposing this approach, has recently questioned the use of ECM. Even accepting ECM, however, and the concept that CUPC's application may change with evolving standards of decency, the current minority objects to the majority's engaging in their own independent assessment. Unlike the majority, which appeals to USEs, the minority, like other Delegative Model

approaches we have seen, emphasizes the importance of particularistic sources for judicial decisionmaking. On this view, there are only two available bases upon which the justices may invalidate legislation on CUPC grounds: (1) CUPC's original meaning; or (2) CSV, as evidenced principally by legislative practices, and, to some degree as well, the behavior of juries. This section discusses major cases in recent decades highlighting development of the majority's approach, and the continuing axis of disagreement.

While *Furman v. Georgia* (1972)<sup>593</sup> invalidated the challenged Georgia and Texas statutes, only two justices (Brennan and Marshall) held that the death penalty was inherently unconstitutional. Three justices (Douglas, White, and Stewart) held that the death penalty was unconstitutional as applied. Brennan explained his approach to CUPC in considerable detail. His universalistic, evolutive framework considered four criteria. The first, the organizing principle, was the universalistic concept of human dignity. "The primary principle," Brennan wrote, "which I believe supplies the essential predicate for the application of the others, is that a punishment must not by its severity be degrading to human dignity."<sup>594</sup> The purpose of the framework's other elements was "simply to provide means by which a court can determine whether a challenged punishment comports with human dignity."<sup>595</sup> "At bottom," the Clause:

prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity.<sup>596</sup> (269).

Punishments that inflicted severe suffering were forbidden because:

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<sup>593</sup> 408 U.S. 238.

<sup>594</sup> 408 U.S. at 281 (Brennan, J., concurring).

<sup>595</sup> 408 U.S. at 282 (Brennan, J., concurring).

<sup>596</sup> 408 U.S. at 269 (Brennan, J., concurring).



they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.

The infliction of an extremely severe punishment . . . may reflect the attitude that the person punished is not entitled to recognition as a fellow human being.<sup>597</sup>

Brennan considered the death penalty inherently and “uniquely degrading to human dignity,” since it involved “by its very nature, a denial of the executed person's humanity,” and excluded him from the “human family.”<sup>598</sup>

The analysis, however, did not end there. Due to capital punishment's “longstanding usage and acceptance in this country,” Brennan did not think himself justified in invalidating it on the first criterion alone. Brennan's unusually detailed opinion provides an excellent illustration of the tension between universalistic and particularistic bases of rights. Based on his own UR, Brennan considered the death penalty unconstitutional. Despite the fact that he framed his entire inquiry around USEs, however, he did not consider himself justified in ruling on universalistic bases alone. While retaining USEs as guiding principles, he thought it necessary to incorporate particularistic bases into the analysis. Just how universalistic and particularistic bases are to interact, however, poses a difficult challenge. Brennan's second criterion was CSV. A constitutional punishment could not be unacceptable to contemporary society. Public attitudes were evidence bearing on whether a punishment respected dignity. “[R]ejection by society” was a “strong indication that a severe punishment does not comport with

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<sup>597</sup> 408 U.S. at 272-73 (Brennan, J., concurring).

<sup>598</sup> 408 U.S. at 290-91 (Brennan, J., concurring).

human dignity.”<sup>599</sup> Thus, Brennan relied on particularistic sources as evidence bearing on an ultimately universalistic determination, as justices have done in other issue areas (as when the Court viewed uniformity of practice as evidence of a criminal procedural right’s universalistic status (ch. 4, B)).

One of the persistent objections to UR has been the opportunity it presents for excessive judicial discretion, and the imposition of a judge’s subjective will. Brennan was keenly aware of this difficulty associated with his use of UR, even when combined with an assessment of societal values. He observed that the “danger of subjective judgment is acute” when judges assess public attitudes, or apply open-ended standards, such as whether a punishment is “repugnant to the conscience of mankind.”<sup>600</sup> To minimize the danger, it was critical for judges to rely on objective factors, such as “the history of a challenged punishment,” and “society’s practices with respect to its use.”<sup>601</sup> Brennan concluded that capital punishment had “been almost totally rejected by contemporary society.”<sup>602</sup> “At the very least,” Brennan had to “conclude that contemporary society views this punishment with substantial doubt.”<sup>603</sup> The persuasive evidence included: state legislation, showing that a number of states had abolished the death penalty, while others had limited its use; low rates of imposition of the death penalty by juries; and a substantial incidence of governors commuting death sentences. For Brennan, measurements of the actual imposition of the death penalty were more revealing of societal acceptance than legislative authorization. It was true that state

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<sup>599</sup> 408 U.S. at 277 (Brennan, J., concurring).

<sup>600</sup> 408 U.S. at 278 n. 21 (Brennan, J., concurring) (*quoting State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 470 (1947) (Frankfurter, J., concurring)).

<sup>601</sup> 408 U.S. at 279 (Brennan, J., concurring).

<sup>602</sup> 408 U.S. at 295 (Brennan, J., concurring).

<sup>603</sup> 408 U.S. at 300 (Brennan, J., concurring).

legislation, referenda, and public opinion polls indicated substantial approval of authorization of the death penalty. However, in practice, society's unease was reflected in the infrequency with which the death penalty was imposed in practice:

The objective indicator of society's view of an unusually severe punishment is what society does with it, and today society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute.

The rarity of the death penalty's imposition was also closely related to another of Brennan's criteria--arbitrariness. The state "must not arbitrarily inflict a severe punishment[,] because . . . the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others."<sup>604</sup> Out of the total number of possible death sentences, the actual number was so small that it "smacks of little more than a lottery system."<sup>605</sup> The final criterion in Brennan's framework was a form of ends-means testing traceable to *Weems*. A punishment could not be "excessive in view of the purposes for which it is inflicted." CUPC would be violated if there was "a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted." If this were the case, the unnecessarily severe punishment would amount to the "pointless infliction of suffering."<sup>606</sup> This criterion also cut against the death penalty's constitutionality, because the purposes commonly urged in the death penalty's defense--deterrence and retribution--were not served by its imposition. Since all four criteria cut against constitutionality, Brennan concluded that the death penalty did not comport with human dignity.

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<sup>604</sup> 408 U.S. at 274 (Brennan, J., concurring).

<sup>605</sup> 408 U.S. at 293 (Brennan, J., concurring).

<sup>606</sup> 408 U.S. at 279 (Brennan, J., concurring).

Marshall's framework was also universalistic and evolutive. He set forth a number of bases upon which punishments could violate CUPC. First, the Clause prohibited "punishments that inherently involve so much physical pain and suffering that civilized people cannot tolerate them," such as the rack or thumbscrew. This inquiry was independent of "public sentiment . . . in a particular case or at any one moment in history."<sup>607</sup> An additional basis concerned public attitudes. Independent of other criteria, a punishment violated the Clause "if citizens found it to be morally unacceptable,"<sup>608</sup> or if "it shocks the conscience and sense of justice of the people." The determining factor was not actual public feelings, but "whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable."<sup>609</sup> Thus, an examination of existing legislation was not determinative. Few people paid attention to the issue. An informed public might feel differently. Marshall was insisting, not on rationality, but, on knowledge:

This is not to suggest that with respect to this test of unconstitutionality people are required to act rationally; they are not. With respect to this judgment, a violation of the Eighth Amendment is totally dependent on the predictable subjective, emotional reactions of informed citizens.<sup>610</sup>

Notwithstanding evidence of public acceptance of capital punishment, Marshall believed the death penalty violated the Clause, because an informed public would not accept it:

Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of

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<sup>607</sup> 408 U.S. at 330 (Marshall, J., concurring).

<sup>608</sup> 408 U.S. at 360 (Marshall, J., concurring).

<sup>609</sup> 408 U.S. at 361 (Marshall, J., concurring).

<sup>610</sup> 408 U.S. at 362 (Marshall, J., concurring).

justice. For this reason alone capital punishment cannot stand.<sup>611</sup>

In separate, concurring opinions, White, Stewart, and Douglas each focused on the infrequency with which capital punishment was inflicted. White argued that capital punishment could not serve any of its purposes when inflicted so rarely. Its use amounted to “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.”<sup>612</sup> Stewart focused largely on the arbitrariness with which the death penalty was imposed, asserting that the Amendment could not tolerate a punishment “so wantonly and so freakishly imposed.”<sup>613</sup> Douglas found the principle of equal protection (protecting unpopular minorities from biased enforcement of the laws), implicit in the Amendment, and that this principle was violated by the arbitrary way in which the death penalty was imposed.

Given the long history of capital punishment in the United States, its invalidation implicated ECM. Dissenting, Burger (joined by Justices Lewis Powell, Blackmun, and Rehnquist) did not challenge ECM or its link with public morality:

[T]he Eighth Amendment prohibition cannot fairly be limited to those punishments thought excessively cruel and barbarous at the time of the adoption of the Eighth Amendment. A punishment is inordinately cruel, in the sense we must deal with it in these cases, chiefly as perceived by the society so characterizing it. The standard

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<sup>611</sup> 408 U.S. at 369 (Marshall, J., concurring). Like Brennan, Marshall’s framework also included ends-means testing. A punishment violated the Eighth Amendment if it imposed “excessive or unnecessary penalties,” and “serves no valid legislative purpose.” 408 U.S. at 331 (Marshall, J., concurring). This element of Marshall’s analysis required consideration of “whether less severe penalties would satisfy the legitimate legislative wants as well as capital punishment.” 408 U.S. at 342 (Marshall, J., concurring). Considering six purposes offered to justify capital punishment (retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy), Marshall found that all of them were either illegitimate purposes, or were not actually served by the imposition of the death penalty. Marshall conceded that his analysis of whether a punishment was excessive and unnecessary could be framed in such a way that it was barely distinguishable from the strict scrutiny test. 408 U.S. 238, 359 n. 41. (Marshall, J., concurring).

<sup>612</sup> 408 U.S. at 312 (White, J., concurring).

<sup>613</sup> 408 U.S. at 309-10 (Stewart, J., concurring).

of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.<sup>614</sup>

The Amendment forbade “the imposition of punishments that are so cruel and inhumane as to violate society's standards of civilized conduct.”<sup>615</sup> The dissenters, however, advocated a different approach to assessing public attitudes. Burger stressed the overriding importance of legislation. In a democratic society, the legislatures, not courts, were “constituted to respond to the will and consequently the moral values of the people.” Thus, “the legislative judgment is presumed to embody the basic standards of decency prevailing in the society. This presumption can only be negated by unambiguous and compelling evidence of legislative default.”<sup>616</sup> Reliance on legislative judgments minimized the danger of subjective judicial decisionmaking.

[W]here as here, the language of the applicable provision provides great leeway and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great. It is too easy to propound our subjective standards of wise policy under the rubric of more or less universally held standards of decency.<sup>617</sup>

The fact that Congress, the District of Columbia, and forty states had authorized the death penalty constituted overwhelming evidence that it comported with contemporary standards. It was not “a punishment such as burning at the stake that everyone would ineffably find to be repugnant to all civilized standards. Nor is it a punishment so roundly condemned that only a few aberrant legislatures have retained it on the statute

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<sup>614</sup> 408 U.S. at 382 (Burger, C.J., dissenting).

<sup>615</sup> 408 U.S. at 397 (Burger, C.J., dissenting).

<sup>616</sup> 408 U.S. at 384 (Burger, C.J., dissenting).

<sup>617</sup> 408 U.S. at 385 (Burger, C.J., dissenting).

books.”<sup>618</sup> Without conceding their relevance, the dissenters also cited public opinion polls for the limited purpose of noting that “the reported results have shown nothing approximating the universal condemnation of capital punishment that might lead us to suspect that the legislatures in general have lost touch with current social values.” The dissenters also opposed the ends-means testing employed by some of the majority justices. The argument that capital punishment was unnecessary to achieving legislative goals was a policy, not a judicial, argument. The Amendment “does not prohibit all punishments the States are unable to prove necessary to deter or control crime.”<sup>619</sup>

In *Furman*, then, there was agreement on two propositions: (1) the meaning of CUPC could evolve; and (2) CSV was relevant to how it evolved. An important disagreement, however, concerned the measurement of CSV. No justices denied the relevance of legislation, but the dissenters looked to it as the chief factor. The combination of ECM and heavy reliance on legislation is troublesome, if constitutional rights are supposed to act as independent restraints on lawmakers. Legislation is the product of lawmakers. It should be constrained by CUPC. If an approach recognizes that the meaning of CUPC evolves, and looks to the actions of legislatures as key determinants of how it evolves, then the approach risks failing to provide a check on lawmakers. It should be recognized, however, that, in *Furman*, Burger essentially used an accounting of legislation as a rebuttal to the charge that the death penalty was inconsistent with contemporary values. He did not use recent shifts in legislation to justify changes in meaning.

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<sup>618</sup> 408 U.S. at 431 (Powell, C.J., dissenting, joined by the other three dissenting justices).

<sup>619</sup> 408 U.S. at 397 (Burger, C.J., dissenting).

Keying on the *Furman* opinions that stressed the arbitrariness of the death penalty's imposition, many states amended their death penalty statutes. In *Gregg v. Georgia* (1976),<sup>620</sup> the Court upheld, 7-2, Georgia's response to *Furman*. (Since Georgia's approach included innovations that other state legislatures had implemented, the decision's implications reached beyond a single state.) Georgia's legislation provided for a bifurcated trial. If the first part of the trial resulted in a guilty verdict, then a sentencing trial was conducted. Before the death penalty could be considered, the trier of fact had to find unanimously, and beyond a reasonable doubt, that at least one aggravating circumstance (of ten listed by the statute) applied to the defendant's crime. If an aggravating circumstance was established, the trier of fact had to decide whether to impose the death penalty, taking into account mitigating and other aggravating circumstances. The legislation also provided procedures for review on appeal, including completion by the trial judge of a questionnaire addressing matters relating to the possibility of arbitrariness, disproportionality, racial prejudice, or error concerning guilt.

In their opinion announcing the judgment of the Court, Stewart, Powell, and Stevens began by explaining why capital punishment was not *per se* unconstitutional. A punishment could violate CUPC either because it was unacceptable to CSV, or because, independent of public attitudes, it transgressed universalistic standards. Like other justices, Stewart, Powell and Stevens stressed the dangers of excessive judicial discretion. Judges had to resist the temptation to impose their own subjective preferences. Therefore, it was critical that judges look to "objective indicia that reflect the public attitude toward a given sanction."<sup>621</sup> Like the *Furman* dissenters, they emphasized that

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<sup>620</sup> 428 U.S. 153.

<sup>621</sup> 428 U.S. at 173.



courts were “not designed to be a good reflex of a democratic society.”<sup>622</sup> A punishment selected by the people’s democratic representatives came before the Court with a strong presumption of validity. This was especially true, because “the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards.”<sup>623</sup> State legislation enacted after *Furman* negated the argument that the death penalty was unacceptable according to societal standards. Congress and at least thirty-five states had reacted to *Furman* by enacting new legislation that included the death penalty as a sentence for some crimes, while trying to address the constitutional concerns expressed by some of the justices. The relative infrequency with which juries imposed the death penalty did not necessarily reflect categorical disapproval of capital punishment, but, rather, suggested that many believed the penalty should be reserved for egregious cases.

Stewart, Powell, and Stevens addressed the troublesome implications of relying too heavily on legislative practices in constitutional interpretation. They indicated that CSV, with its heavy reliance on legislation, did not, alone, determine constitutionality. Since the Amendment protected the governed from legislative abuses, legislation could not be the sole determinant of the constitutionality of the punishments adopted by legislatures.<sup>624</sup> As a basis for evaluating legislation that was independent of legislation, the justices looked to USEs. They accepted Warren’s pronouncement in *Trop* that CUPC’s basic concept was that punishments must respect human dignity. With human dignity as the overarching standard, they articulated more specific principles that followed, analogous to the role that IMPs have played in other issue areas. To withstand

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<sup>622</sup> 428 U.S. at 174.

<sup>623</sup> 428 U.S. at 175.

<sup>624</sup> 428 U.S. at 174 n. 19.

scrutiny, a punishment could neither “involve the unnecessary and wanton infliction of pain,” nor “be grossly out of proportion to the severity of the crime.”<sup>625</sup> A punishment would not be invalidated on the grounds that a less severe penalty would adequately serve legislative ends, but a punishment could not “be so totally without penological justification that it results in the gratuitous infliction of suffering.”<sup>626</sup> Applying these criteria to the death penalty, Stewart, Powell, and Stevens could not find that capital punishment was, in all cases, unconstitutional. They also found the statute adequately addressed *Furman*’s with arbitrary sentencing procedures.<sup>627</sup>

In *Woodson v. North Carolina* (1976),<sup>628</sup> the Court considered a different response to *Furman*. North Carolina made capital punishment mandatory for first-degree murder. The Court invalidated the legislation, 5-4. As in *Gregg*, Stewart, Powell, and Stevens issued the opinion announcing the judgment of the Court. Their examination of CSV focused on the acceptability of mandatory death penalty statutes. While some states had imposed mandatory death penalties earlier in American history, by 1963, no states continued that practice. Prior to *Furman*, “the practice of sentencing to death all persons convicted of a particular offense ha[d] been rejected as unduly harsh and unworkably rigid.”<sup>629</sup> In the four years between *Furman* and *Gregg*, ten states enacted mandatory death penalty statutes. The enactment of these statutes, however, did not reflect a change in public attitudes. Rather, they reflected confusion in interpreting *Furman*. Public

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<sup>625</sup> 428 U.S. at 173.

<sup>626</sup> 428 U.S. at 182-83.

<sup>627</sup> Burger and Rehnquist joined White’s concurrence, and Blackmun concurred without comment. Brennan and Marshall dissented, renewing their arguments that the death penalty was always unconstitutional.

<sup>628</sup> 428 U.S. 280.

<sup>629</sup> 428 U.S. at 293.

opinion polls, and jurors' reluctance to impose death further demonstrated Americans' disapproval of mandatory statutes.

In dissent, Rehnquist challenged ECM. It was "by no means clear" that CUPC "was not limited to those punishments deemed cruel and unusual at the time of the adoption of the Bill of Rights." Thus, "evolving standards of decency" made for a "somewhat shaky point of departure."<sup>630</sup> Even accepting ECM *arguendo*, however, Rehnquist interpreted the evidence of CSV differently. He placed greater weight on the fact that ten states that had adopted mandatory death penalty statutes since *Furman*, showing that they preferred mandatory statutes to abolishing the death penalty.

*Gregg* established that the death penalty could comply with CUPC, if implemented according to procedures adequately channeling sentencing discretion. The Court has never wavered from position that the death penalty is not *per se* unconstitutional. Since *Gregg*, however, the Court has considered claims that the death penalty could not constitutionally be imposed on certain categories of crime, or on certain classes of persons. In *Coker v. Georgia* (1977),<sup>631</sup> the Court held that the death penalty was an excessive punishment for the crime of raping an adult woman. Announcing the Court's judgment, White (joined by Stewart, Blackmun, and Stevens) stated that a punishment violated the Amendment, not only if it was barbaric, but also if it was "'excessive' in relation to the crime committed." Citing *Gregg*, White stated that a punishment was excessive if it:

(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering;

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<sup>630</sup> 428 U.S. at 308 (Rehnquist, J., dissenting).

<sup>631</sup> 433 U.S. 584.

or (2) is grossly out of proportion to the severity of the crime.

CSV was an element of the disproportionality analysis. The specific question was the public acceptability of the death penalty as punishment for raping an adult.

Concerning state legislation, White found, while the “current judgment . . . is not wholly unanimous, . . . it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.”<sup>632</sup> In the fifty years before *Coker*, it had never been the case that a majority of the states authorized the death penalty in cases of rape. When *Furman* was handed down, sixteen states had such statutes.

*Furman* invalidated all death penalties in force at the time, and only three states reinstated the death penalty as a punishment for the rape of an adult. With respect to jury verdicts, White noted, between 1973 and 1977, Georgia juries imposed the death penalty in less than 10% of the cases in which it was available as a punishment for rape. White also referred to international practices. Noting that the Court in *Trop* discussed the “climate of international opinion” with respect to the punishment at issue, White considered it “not irrelevant” that, according to a 1965 survey, only three of sixty countries surveyed employed the death penalty in rape cases.<sup>633</sup> Like Stewart, Powell, and Stevens in *Gregg*, White indicated that the CSV analysis did not “wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” Nevertheless, the evidence concerning “the legislative rejection of

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<sup>632</sup> 433 U.S. at 596.

<sup>633</sup> 433 U.S. at 596 n. 10.

capital punishment,” served to “strongly confirm[] [the Court’s] own judgment” that capital punishment was excessive for rape of an adult.<sup>634</sup>

White’s reliance on state legislation was curious. He stated that it “obviously weighs very heavily” against constitutionality. Yet, by his own account, just five years before the decision, sixteen states had legislation similar to the statute at issue. We have seen various ways of relying on evidence of practices. We saw, for example, in the Court’s PDP jurisprudence that the Court sometimes pointed to uniformity of practice as evidence of a rights’ universalistic status. The reasoning appeared to be that a right’s universal observance was evidence of its indispensability to cherished ends. Conversely, lack of uniformity was evidence that reasonable people, committed to the same cherished ends, could disagree, and, consequently, that the right in question lacked universalistic status. White, however, was not using legislation in this manner. He was counting legislation very heavily against constitutionality when the evidence suggested a large degree of dissensus. The difference in the use of legislation is not merely one of degree. It raises questions about what the relationship is between evidence of existing legislative practices and the Court’s determination. If an issue is closely contested, then how does a snapshot of a temporary “lead” for one position over another inform constitutional analysis? Similar questions were raised by Kennedy’s use of state legislation in *Lawrence v. Texas* (ch. 3, G). Importantly, White in *Coker*, (like Kennedy in *Lawrence*) indicated that he was not relying exclusively on state legislation, but was bringing his own judgment to bear on the question. Nevertheless, White’s statement of heavy reliance on legislation brings to the fore questions about its role.

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<sup>634</sup> 433 U.S. at 597.

In dissent, Burger (joined by Rehnquist) challenged White's CSV analysis. He placed greater weight on the fact that, before *Furman*, sixteen states authorized the death penalty for rape of an adult. The fact that *Furman* had invalidated those laws, and that, in responding to the legal confusion caused by that case, only three states had re-enacted such laws, was less relevant. Moreover, even if only three states favored the death penalty as a punishment for rape of an adult, that would contradict a finding of the punishment's unacceptability. The mere fact that a minority of the states favored a certain punishment did not, in itself, establish its incompatibility with public morality.<sup>635</sup>

Like *Coker, Enmund. v. Florida* (1982)<sup>636</sup> concerned a challenge to the use of the death penalty as punishment for a certain category of crime. The Court (White) held, 5-4, that death was an unconstitutionally disproportionate punishment for robbery, where the defendant did not intend or commit homicide ("non-homicide robbery"). White again focused on existing legislation. Of the thirty-six states that authorized the death penalty, only a "small minority" of eight provided the death penalty for non-homicide robbery. In another nine states, the sentencing body could impose the death penalty, depending on its appraisal of the aggravating and mitigating circumstances. Even if one counted all seventeen states as authorizing the death penalty for non-homicide robbery, White noted, this amounted only about a third of the states. Moreover, of the eight states that enacted new death penalty statutes in the previous four years, none had provided the death penalty for non-homicide robbery. Though the states were not unanimous, and the CSV evidence was less strong than in *Coker*, the evidence concerning state legislation

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<sup>635</sup> Brennan and Marshall each issued concurring opinions, and Powell concurred in the judgment, but wrote separately to indicate that he would have held the punishment disproportionate on the facts in *Coker*, but would not have held that the death penalty was always, and under all circumstances, a disproportionate punishment for the crime of raping an adult.

<sup>636</sup> 458 U.S. 782.

“nevertheless weighs on the side of rejecting capital punishment for the crime at issue.”<sup>637</sup> Citing *Coker* for the proposition that the “climate of international opinion” was “not irrelevant,”<sup>638</sup> White also noted that the doctrine of felony murder had been abolished in England and India, restricted in Canada and other Commonwealth countries, and was not used in continental Europe.

In addition to the CSV analysis, the majority also engaged in its own proportionality analysis, insisting that it was “for [the Court] ultimately to judge” the punishment’s constitutionality. The majority’s own analysis led to the same conclusion. Robbery was not “so grievous an affront to humanity that the only adequate response may be the penalty of death.”<sup>639</sup> The difference in the seriousness of crimes between robbery and murder was substantial. Citing *Gregg*, White considered whether imposing the death penalty for Enmund’s crime furthered either of capital punishment’s two major purposes: deterrence and retribution. Neither of these purposes was served since Enmund’s crimes lacked the intent to kill. Without making a contribution to these purposes, the death penalty was pointless infliction of suffering.

In dissent, O’Connor (joined by Burger, Rehnquist and Powell), disputed the majority’s analysis of state legislation. More inclined to take sentencing provisions into account, O’Connor counted twenty-three states where existing laws authorized the death penalty for non-homicide robbery. Thus, nearly half of the states, and nearly two-thirds of the states with death penalties, had legislation similar to that challenged in *Enmund*. Rather than weighing heavily in favor of invalidation, the evidence of state legislation demonstrated that the evolving standards of decency “still embrace capital punishment

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<sup>637</sup> 458 U.S. at 793.

<sup>638</sup> 458 U.S. at 796 (*quoting Coker v. Georgia*, 433 U.S. 584, 596 n. 10 (1977)).

<sup>639</sup> 458 U.S. at 782 (*quoting Gregg v. Georgia*, 428 U.S. 153, 184 (1976)).

for this crime.”<sup>640</sup> O’Connor also objected to the majority’s arguments based on the punishment’s failure to serve capital punishment’s major purposes. This was not legitimate judicial inquiry. The ends and effectiveness of the law were better left to legislative judgment.

The Court has also heard claims that the death penalty could not constitutionally be imposed on certain classes of defendants. In *Thompson v. Oklahoma* (1988),<sup>641</sup> the Court held, 5-3, that death could not be imposed on a person who was under the age of sixteen years old at the time of the offense. Announcing the judgment of the Court,<sup>642</sup> Stevens (joined by Brennan, Marshall, and Blackmun), argued that the CSV evidence led to the “unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community.”<sup>643</sup> Fourteen states had no death penalty. Of the states with a death penalty, eighteen had minimum ages of at least sixteen years, and nineteen states did not establish a minimum age. Stevens also pointed to evidence from other countries. The opposition in the United States to the execution of juveniles was consistent with the views of “other nations that share our Anglo-American heritage, and . . . the leading members of the Western European community.”<sup>644</sup> The United Kingdom and New Zealand, which retained the death penalty for some crimes, did not allow the execution of juveniles. The death penalty was abolished in West Germany, France, Portugal, The Netherlands, all of the

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<sup>640</sup> 458 U.S. at 823 (O’Connor, J., dissenting).

<sup>641</sup> 487 U.S. 815.

<sup>642</sup> Concurring, O’Connor supported the result on narrower grounds. While she considered it “very likely” that a national consensus existed against the execution of fifteen-year-olds, she declined to adopt that as the basis of the ruling. Instead, she argued that, in light of the strong evidence of a national consensus, a state’s legislation would have to make a “clear statement” that the death penalty was authorized for juveniles under sixteen. In the absence of such a clear statement, O’Connor refused to interpret the relevant legislation as authorizing the death penalty in the case before the Court.

<sup>643</sup> 487 U.S. at 832.

<sup>644</sup> 487 U.S. at 830.



Scandinavian countries, Australia (except for the State of New South Wales), and the Soviet Union. In another set of countries, including Canada, Italy, Spain, and Switzerland, the execution of juveniles was permitted only for exceptional crimes such as treason. Stevens also found the evidence concerning jury verdicts persuasive, as it had been forty years since the last time a jury imposed death on a defendant under sixteen. In addition, Stevens referred to “the views of respected professional organizations.”<sup>645</sup> The American Bar Association and American Law Institute opposed execution of juveniles.

As the Court had done in earlier cases, following CSV analysis, Stevens indicated that the Court must reach its own independent judgment. He inquired whether the imposition of the death penalty for juveniles under sixteen “measurably contributes” to the major purposes of capital punishment. Focusing on psychological differences between adults and persons under sixteen, he concluded that retaining the death penalty for juveniles under sixteen served the goals of neither deterrence nor retribution.

In dissent, Scalia (joined by Rehnquist and White) interpreted state legislation differently. The critical fact was that almost 40% of the states, including a majority of death penalty states, allowed the imposition of the death penalty in cases where juveniles were tried as adults, which could include persons under the age of sixteen. Moreover, even with respect to the states that had rejected execution of juveniles, it had not been established that the reason for this was a societal belief in the moral unacceptability of executing juveniles. The rejection could have reflected a general decline in support for capital punishment, and a belief that the execution of juveniles should be rare. Scalia also argued that the practices of other countries were irrelevant. The proper inquiry concerned attitudes within the United States. That 40% of American states did not rule

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<sup>645</sup> 487 U.S. at 830.

out the challenged punishment showed that there was no national consensus against it. The practice, accordingly, was constitutional, “even if that position contradicts the uniform view of the rest of the world. We must never forget that it is a Constitution for the United States of America that we are expounding.”<sup>646</sup>

Scalia also challenged the notion that the Court should form its own independent judgment of the appropriateness of the challenged punishment. There were only two bases upon which a punishment could violate CUPC: the original understanding of the Clause, and the evolving standards of decency of American society. Stevens did not address original understanding, and the portion of his opinion extending beyond American attitudes exceeded the bounds of legitimate inquiry, opening the door to the justices’ reaching decisions based on their own personal consciences.

While *Thompson* that death could not be imposed on persons under sixteen, *Stanford v. Kentucky* (1989)<sup>647</sup> upheld death for persons sixteen or older. In his opinion for a four-person plurality, Scalia (joined by Rehnquist, Kennedy and White) accepted the premise that application of the Amendment could change with evolving standards of decency. Again, however, he stressed that the relevant standards were those of “modern American society,” and not those of the justices, or places outside the United States. Legislation provided the most significant evidence of American standards of decency. Of the 37 death penalty states, 22 allowed execution of sixteen-year-olds, and 25 allowed execution of seventeen-year-olds. This data did “not establish the degree of national consensus that the Court has previously thought sufficient to label a particular

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<sup>646</sup> 487 U.S. at 868 n. 4 (Scalia, J., dissenting).

<sup>647</sup> 492 U.S. 361.

punishment cruel and unusual”<sup>648</sup> In *Coker*, for example, Georgia had been the only jurisdiction that imposed the death penalty for the rape of an adult (under the majority’s count, which was based on *Furman*’s mass invalidation of legislation). In *Enmund*, only eight jurisdictions had authorized the same kind of punishment challenged in that case. Scalia limited CSV investigation to legislation and evidence of sentences actually imposed, refusing to consider public opinion polls or the positions adopted by professional associations:

We decline the invitation to rest constitutional law upon such uncertain foundations. A revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved.<sup>649</sup>

Having concluded CSV analysis, Scalia considered the Court’s role fulfilled. He rejected the notion that the Court should bring its own independent judgment to bear on the decency, or moral acceptability, of the challenged punishment:

[O]ur job is to identify the “evolving standards of decency”; to determine, not what they should be, but what they are. . . [W]e emphatically reject [the] suggestion that the issues in this case permit us to apply our own informed judgment . . . regarding the desirability of permitting the death penalty for crimes by 16- and 17-year-olds.<sup>650</sup>

To enforce the justices’ own views, as the dissenters advocated, would be “to replace judges of the law with a committee of philosopher-kings.”<sup>651</sup>

In some ways, Scalia’s approach was similar to Delegative Model approaches we have seen employed by other justices, including Black and the first Harlan. Scalia

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<sup>648</sup> 492 U.S. at 371.

<sup>649</sup> 492 U.S. at 377.

<sup>650</sup> 492 U.S. at 378.

<sup>651</sup> 492 U.S. at 379.

emphasized particularistic bases--original understandings and American legislation.

Scalia departed, however, in a significant respect from the approach advocated by Black

and Harlan. We have seen that a pillar of the Delegative Model is opposition to ECM.

Here, however, Scalia accepted ECM with respect to CUPC. The approach was troubling

for similar reasons noted with respect to White's in *Coker*. He accepted that the meaning

of CUPC could change based on CSV and relied on legislation as the critical determinant

of CSV. Scalia's approach was more troubling than White's, though, because Scalia did

not allow for an independent judicial analysis apart from the CSV investigation.

In dissent, Brennan (joined by Marshall, Blackmun, and Stevens) interpreted the

CSV evidence differently than Scalia. Believing that non-death-penalty states should be

included, Brennan counted 27 states that did not allow the execution of juveniles under

eighteen, a figure he thought cut in the direction of invalidity. Moreover, while Brennan

agreed that CSV analysis should begin with legislation and juries, his analysis did not end

there: "The views of organizations with expertise in relevant fields and the choices of

governments elsewhere in the world also merit our attention as indicators whether a

punishment is acceptable in a civilized society."<sup>652</sup> Thus, Brennan noted that a number of

professional organizations, including the American Bar Association, the American Law

Institute, and the National Council of Juvenile and Family Court Judges, opposed the

execution of juveniles. Brennan also considered foreign practices. Over 50 countries,

including almost all of Western Europe, had either abolished the death penalty entirely,

or had limited it to exceptional crimes such as treason. In 27 other countries, the death

penalty had not been formally abolished, but was never used in practice. Out of the

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<sup>652</sup> 492 U.S. at 379 (Brennan, J., dissenting).

countries that retained the death penalty, a majority (65) did not allow the imposition of death on juveniles. Sixty-one countries retaining the death penalty did not exempt juveniles, but some of these countries had ratified international treaties prohibiting execution of juveniles. Three treaties ratified or signed by the United States prohibited execution of juveniles, and, according to Amnesty International, since 1979, worldwide, only eight persons under the age of eighteen had been executed. Based on this evidence, Brennan concluded that: “Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved.”<sup>653</sup>

Brennan again defended the view that justices should conduct their own analysis of a challenged punishment’s moral acceptability. CUPC mandated that punishments accord with human dignity. Justices had the responsibility to address that question. This analysis inquired whether the punishment was “wholly disproportionate to the blameworthiness of the offender,”<sup>654</sup> and “whether the sentence makes a measurable contribution to acceptable goals of punishment,”<sup>655</sup> particularly the goals of deterrence and retribution. Emphasizing psychological differences between juveniles and adults relating especially to the moral culpability of, and responsibility for, ones’ actions, the dissenters concluded that execution of juveniles violated CUPC. The plurality’s refusal to conduct an independent evaluation of the challenged punishment amounted to an abdication of institutional responsibility. The Constitution imposed constraints on legislatures, and it was the judiciary’s responsibility to enforce those constraints. An approach to constitutional interpretation could not serve to constrain legislatures while placing as much as weigh as did the plurality on an accounting of existing legislation:

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<sup>653</sup> 492 U.S. at 390 (Brennan, J., dissenting).

<sup>654</sup> 492 U.S. at 393 (Brennan, J., dissenting).

<sup>655</sup> 492 U.S. at 403 (Brennan, J., dissenting).

The promise of the Bill of Rights goes unfulfilled when we leave constitutional doctrine to be formulated by the acts of those institutions which the Constitution is supposed to limit, as is the case under Justice Scalia's positivist approach to the definition of citizens' rights. This Court abandons its proven and proper role in our constitutional system when it hands back to the very majorities the Framers distrusted the power to define the precise scope of protection afforded by the Bill of Rights, rather than bringing its own judgment to bear on that question, after complete analysis.<sup>656</sup>

While providing the majority with its fifth vote, O'Connor did not fully join Scalia's opinion. She agreed with the dissent concerning the Court's responsibility to bring its own judgment to bear on the punishment's acceptability.

The Court has also confronted the constitutionality of executing persons who are mentally retarded. In *Penry v. Lynaugh* (1989),<sup>657</sup> the Court upheld the practice, but reversed itself in *Atkins v. Virginia* (2002).<sup>658</sup> The case brings to the forefront questions about ECM, because the Court's reversal was based on intervening changes in public attitudes and practices. At the time of *Penry*, only two states had legislation prohibiting the execution of mentally retarded persons. Even adding the fourteen non-death-penalty states, this had not established that the challenged punishment was inconsistent with evolving standards of decency. The Court's (Stevens) approach in *Atkins* was similar to the approach advocated by the four dissenters and O'Connor in *Stanford*. First, in the CSV analysis, Stevens observed that eighteen states barred the execution of the mentally retarded, sixteen more than at the time of *Penry*. Since twelve states had no death penalty, this meant a total of 30 states did not sanction the execution of the mentally retarded. It was not simply the number of states that was significant, but "the consistency

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<sup>656</sup> 492 U.S. at 392 (Brennan, J., dissenting).

<sup>657</sup> 492 U.S. 302.

<sup>658</sup> 536 U.S. 304.

of the direction of change.”<sup>659</sup> No state that prohibited the execution of the mentally retarded had removed the prohibition.

Like the *Stanford*, dissenters, the *Atkins* majority considered indicators of societal standards beyond the actions of legislatures and juries. Noting the opposition, on the part of a wide range of professional and religious organizations, to the execution of the mentally retarded, the majority concluded that the “legislative judgment reflects a much broader social and professional consensus.” Polling data indicated “a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong.” The majority also considered indicators of societal standards beyond American borders, finding that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”<sup>660</sup> The international sources were not dispositive, but “their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.” The majority also followed the dissenters and O’Connor in *Stanford* in bringing their own judgment to bear on the acceptability of the challenged punishment. Focusing on the lessened personal culpability of the mentally retarded, Stevens concluded that imposing the death penalty on the mentally retarded was excessive.

Stevens’ opinion in *Atkins* bears substantial similarities to Kennedy’s majority opinion in *Lawrence*.<sup>661</sup> The opinion engaged in UR, allowed for ECM, and looked to a variety of societal indicators in determining changes in constitutional meanings. State

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<sup>659</sup> 536 U.S. at 315.

<sup>660</sup> 536 U.S. at 316 n. 21.

<sup>661</sup> *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

legislation was one of the most important societal indicators, and recent changes in legislation were considered the most telling. Stevens's analysis, with its emphasis on the direction of change, is similar to Kennedy's recognition of an "emerging awareness."<sup>662</sup> Uniformity, or near uniformity of practice was not needed for state practices to support the existence of a right. Even in the midst of obvious continuing dissensus on an issue, a discernible trend towards the observance of a right could provide substantial support. As in *Lawrence*, the *Atkins* majority looked to societal indicators beyond legislation, and beyond American borders. Moreover, in both cases the Court did not rely on the investigation of societal indicators alone. The majorities also engaged in their own analysis, drawing on universalistic standards--the implications of liberty in *Lawrence*, and the requirements of human dignity in *Atkins*. As in privacy cases the Court has reasoned from autonomy as an IMP expressing a critical bridge principle between USEs and application, so in the CUPC context the Court has viewed dignity as requiring that the death penalty measurably contribute to its purported goals of retribution or deterrence, else it amount to nothing more than the pointless infliction of suffering.<sup>663</sup>

Rehnquist, Scalia and Thomas dissented, with all three joining the opinions written by Rehnquist and Scalia. The total of eighteen states prohibiting the execution of the mentally retarded (less than half of the states with a death penalty), did not establish a national consensus against the practice. The data did not show anything close to the consensus shown in previous cases where the Court had invalidated punishments. Moreover, many of the states with legislation prohibiting the execution of the mentally

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<sup>662</sup> 539 U.S. at 572.

<sup>663</sup> *Atkins*, 536 U.S. at 319.



retarded had adopted that legislation recently,<sup>664</sup> suggesting public attitudes were fluid.

The *Atkins* dissenters reiterated other positions from the *Stanford* dissent, including opposition to reliance on CSV indicators beyond legislation and juries, and opposition to independent judicial evaluation of the challenged punishment's moral acceptability.

The justices had no authority to impose their own feelings and intuitions. Only actions of legislatures and juries could be considered, because only this type of investigation could:

be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.<sup>665</sup>

Of the majority opinion, Scalia wrote: "Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members."<sup>666</sup>

Just as *Atkins* overturned a thirteen-year-old decision, *Roper v. Simmons* (2005)<sup>667</sup> overturned the *Stanford* decision issued sixteen years earlier. *Roper* held, 5-4, that execution of persons under eighteen violated CUPC. The majority employed a similar analytical framework to the one employed by the majority in *Atkins*. In his opinion for the Court, Kennedy stated that the Court's review of Eighth Amendment challenges began with "objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question." The analysis of objective indicia of consensus provided the justices with "essential instruction.." The Court then had to determine whether, in the Court's own judgment, the death penalty was an

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<sup>664</sup> All of the states had adopted it within the fourteen years preceding *Atkins*, and over half had adopted it in the preceding eight years.

<sup>665</sup> 536 U.S. at 324 (Rehnquist, C.J., dissenting).

<sup>666</sup> 536 U.S. at 324 (Scalia, J., dissenting).

<sup>667</sup> 543 U.S. 551.

unconstitutionally disproportionate punishment when imposed on juveniles.<sup>668</sup> In the CSV analysis, Kennedy noted that the objective indicia of consensus had changed in the sixteen years between *Stanford* and *Roper*. The raw numbers with respect to legislation were comparable to those in *Atkins*. By the time *Roper* was decided, eighteen states barred the execution of juveniles. It was also important, Kennedy argued, to include the twelve states with no death penalty. Together, a total of 30 states did not provide for the execution of juveniles. While acknowledging that the case for a national consensus was somewhat stronger in *Atkins*,<sup>669</sup> Kennedy argued that the evidence nevertheless supported a finding that societal standards were no longer consistent with the execution of minors.

Kennedy also engaged in an examination of the sentences in foreign countries. Between 1990 and the decision in *Roper*, only seven countries other than the United States had executed minors, and all of them had subsequently abolished or disavowed the practice. Kennedy accorded particular weight to the experience of the United Kingdom, due to the “historic ties between our countries and in light of the Eighth Amendment’s own origins.”<sup>670</sup> Decades before abolishing the death penalty entirely, the United Kingdom had abolished the death penalty for juveniles. In addition, a number of international human rights treaties banned the execution of minors, including the U.N. Convention on the Rights of the Child. The United States was one of only two countries that had not ratified the Convention. In short, Kennedy wrote, “the United States now

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<sup>668</sup> 543 U.S. at 574.

<sup>669</sup> Kennedy conceded, for example, that the pace of the legislative trend against the execution of juveniles was slower than the pace of the legislative trend against the execution of the mentally retarded, for example. Between *Penry* and *Atkins*, sixteen additional states had adopted legislation banning the execution of the mentally retarded, while, between *Stanford* and *Roper*, four states had adopted legislation banning the execution of minors (and the judiciary of another state had banned the practice).

<sup>670</sup> 543 U.S. at 577. The Eighth Amendment is widely considered to have roots in the English Bill of Rights of 1689.

stands alone in a world that has turned its face against the juvenile death penalty.”<sup>671</sup>

Although the “opinion of the world community” was “not controlling,” it did provide instruction and “respected and significant confirmation for our own conclusions”<sup>672</sup> The Court’s determination that the death penalty was a disproportionate punishment for minors found “confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”<sup>673</sup> In defense of his reliance on international sources, Kennedy wrote that the American Constitution:

sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.<sup>674</sup>

Again, the majority also conducted its own independent analysis, concluding that the imposition of the death penalty on minors was excessive. Due to the diminished culpability of minors for their crimes, growing out of psychological differences between juveniles and adults, such as lower levels of maturity and greater vulnerability to peer pressure, retaining capital punishment for minors did not serve deterrence or retribution.

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<sup>671</sup> 543 U.S. at 577.

<sup>672</sup> 543 U.S. at 578.

<sup>673</sup> 543 U.S. at 575.

<sup>674</sup> 543 U.S. at 578.

In dissent, Scalia, joined by Rehnquist and Thomas (as in *Atkins*) argued that non-death-penalty states should not be included in the count of states opposing the execution of minors, because the constitutionality of the death penalty in general was not before the Court, and the count of non-death-penalty states shed no light on attitudes specifically towards the execution of minors. Among the death penalty states, only 47% had prohibited the execution of minors. “Words have no meaning,” Scalia wrote, “if the views of less than 50% of death penalty States can constitute a national consensus.” Previous cases, Scalia asserted, had “required overwhelming opposition to a challenged practice, generally over a long period of time,” and no evidence of such opposition was present in *Roper*.<sup>675</sup>

Scalia also elaborated on arguments he had made in other cases against reliance on international sources in interpreting the Eighth Amendment. Kennedy referred to two international agreements with provisions banning the execution of minors. In one (U.N. Convention on the Rights of the Child), the United States was one of only two countries that had not ratified the agreement. In the other (International Covenant on Civil and Political Rights) the United States had ratified the agreement with an express reservation opting out of the provision banning the execution of minors. International treaties were irrelevant to the extent that they concerned actions and attitudes outside the United States. To the extent that they reflected U.S. attitudes, however, if anything, they undermined the majority’s argument, since they underscored the lack of an American consensus against the execution of juveniles. Scalia argued that the majority’s “basic premise . . . that American law should conform to the laws of the rest of the world ought to be rejected out

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<sup>675</sup> 543 U.S. at 609 (Scalia, J., dissenting).

of hand.”<sup>676</sup> He added that the Court was inconsistent in the weight it accorded to international legal practices. The Court had evidently not placed much weight on international practices in numerous other areas of constitutional law. Scalia contended, for example, that the rest of the world had universally rejected the strict application of the exclusionary rule enforced in the United States, that most other countries committed to religious neutrality did not insist on the same degree of separation of church and states as the United States, and that the United States was one of only six countries in the world that allowed abortion on demand up to the point of viability. In response to Kennedy’s assertion that the affirmation of certain rights by other countries could underscore America’s commitment to constitutional rights, Scalia argued that the majority was using foreign law, not to underscore established principles of American constitutional law, but to set them aside.

We have seen that, in *Stanford* and other cases, Scalia and other justices had advocated a different approach to Eighth Amendment analysis than the one taken by the majority in *Roper*. It generally appeared, however, that Scalia had agreed with other justices on at least one point--that the application of the Eighth Amendment could change with evolving standards of decency. In *Roper*, however, Scalia appeared to challenge even this premise. He stated, for example, that the Court had “wrongly, long rejected a purely originalist approach” to the Eighth Amendment.<sup>677</sup> “In a system based upon constitutional and statutory text, democratically adopted,” Scalia wrote:

the concept of ‘law’ ordinarily signifies that particular words have a fixed meaning. Such law does not change, and this Court’s pronouncement of it therefore remains authoritative until (confessing our prior error) we overrule.

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<sup>676</sup> 543 U.S. at 624 (Scalia, J., dissenting).

<sup>677</sup> 543 U.S. at 626 (Scalia, J., dissenting).

The Court has purported to make of the Eighth Amendment, however, a mirror of the passing and changing sentiment of American society regarding penology.<sup>678</sup>

Scalia also rejected O'Connor's assertion that there was something special about the Eighth Amendment, in its drawing meaning from evolving societal standards. He noted that there was nothing in the Eighth Amendment's language to indicate such a special character. In any event, Scalia said, citing *Lawrence* and *Casey*, the Court had also taken an evolutive approach in other areas of constitutional jurisprudence.<sup>679</sup> While Scalia disapproved of ECM, given the approach that had long been adopted by a majority of the Court--tying changes in meaning to evolving standards of society--it was imperative that the justices limit their analysis to discerning changes in societal standards through an examination of American practices. Any departure from that analysis would put the judges in the position of prescribing new standards, rather than "identify[ing] a moral consensus of the American people." Scalia asked rhetorically: "By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?"<sup>680</sup>

O'Connor cast the fourth dissenting vote, but wrote separately, because she disagreed with elements of Scalia's opinion. She agreed with the majority on ECM, and the Court's responsibility to conduct an independent analysis. She also took the opportunity to argue for the relevance of international practices:

Obviously, American law is distinctive in many respects, not least where the specific provisions of our Constitution and the history of its exposition so dictate. . . But this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary,

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<sup>678</sup> 543 U.S. at 629 (Scalia, J., dissenting).

<sup>679</sup> 543 U.S. at 627 n. 9 (Scalia, J., dissenting).

<sup>680</sup> 543 U.S. at 616. (Scalia, J., dissenting).

we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement-expressed in international law or in the domestic laws of individual countries-that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.<sup>681</sup>

Stevens (joined by Ginsburg), apparently prompted by Scalia's questioning of ECM, wrote separately to reaffirm that the meaning of the Eighth Amendment changed with evolving standards of decency, stating that the Court's position that "our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text."<sup>682</sup>

Relatively early in its CUPC jurisprudence, the Court adopted an evolutive approach that appealed to USEs. Its early decisions also relied on prevalent practices as a source of guidance. While many of the decisions in recent decades have been complicated by the issuance of multiple opinions, a fault line has emerged centering on the use of UR and ECM. While the prevailing approach is evolutive and universalistic, a number of justices, most notably Scalia, have presented opposing views. The opposition to the prevailing approach has not been consistent in its view of ECM. In many of the Court's decisions since *Furman* (1972), the use of ECM had gone uncontested. In *Roper* and other decisions, however, Scalia, with others, has objected to ECM. With opposition to ECM, the approach advocated by Scalia falls within the Delegative Model that Black,

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<sup>681</sup> 543 U.S. at 604-05 (O'Connor, J., dissenting). O'Connor disagreed, however, with both the majority's CSV and independent analyses. Not seeing enough change in state legislation since *Stanford* to warrant a different conclusion concerning the national consensus, O'Connor believed that the decision turned on the Court's own independent judgment. In opposition to the majority, she did not agree that, as an absolute rule, the execution of a juvenile was an excessive punishment.

<sup>682</sup> 543 U.S. at 587 (Stevens, J., concurring).

the first Harlan, and other justices have employed. It looks to particularistic bases for rights interpretation, especially history and legislation, stressing the need to confine judicial discretion.

Since the currently prevailing approach incorporates CSV into its discernment of changes in constitutional meanings, the use of practices and other societal indicators takes on significance in the Court's jurisprudence. The Court's CSV analysis looks to a variety of indicators, including state legislation, international practice, and the views of professional associations. The Court's approach to CSV analysis raises questions. In decisions like *Atkins* and *Roper*, the Court has found support for the invalidity of punishments from state legislation, even in the face of considerable dissensus among state practices. It has placed special weight on trends. In itself, separated from other elements of the Court's approach, the use of legislative trends as a basis for rights interpretation has troubling implications. If mere trends justify newly popular policies, then the notion of constitutional rights as an independent restraint on lawmakers is undermined. The Court's use of a similar approach, recognizing an "emerging awareness" in *Lawrence* raises the question of whether the approach is one that the Court will use widely across various issue areas. It is not clear that there is anything about the Eighth Amendment that separates it from other constitutional rights provisions. While the term "unusual" in the Clause might be thought to provide textual direction to rely on changing practices, the Court's jurisprudence does not appear to have hinged on this term.<sup>683</sup>

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<sup>683</sup> See *Furman v. Georgia*, 408 U.S. 238, 276 n. 20 (1972) (Brennan, J., concurring) ("It is fair to conclude from these statements that '(w)hether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear.' *Trop v. Dulles*, 356 U.S., at 100 n. 32. The question, in any event, is of minor significance; this Court has never attempted to explicate the meaning of the Clause simply by parsing its words.").



The prevailing approach, however, does not rest only on the CSV analysis. The framework's overarching standard is universalistic--the requirements of human dignity. More specifically, dignity is considered to require that punishments not be disproportionate to the crime, and that they measurably contribute to the penological goals of retribution or deterrence, lest they amount merely to the pointless infliction of suffering. Thus, the Court conducts its own universalistic inquiry. The relationship between the universalistic inquiry and CSV analysis is not entirely clear. The combination, however, reflects the complex relationship between universalistic and particularistic bases we have seen in other issue areas. Universalistic standards play a critical role in providing independent basis for constraining lawmakers, but also raise concerns about excessive judicial discretion. CSV analysis, with its emphasis on quantifiable indicators perhaps diminishes the perception that justices are relying on nothing more than their subjective preferences. Moreover, with history's role undercut by the Court's recognition of ECM, the importance placed on state legislative practices provides a link between rights interpretation and the indicators reflecting the American people's preferences and attitudes.

## **Chapter 7**

### **Conclusions**

The previous chapters indicate that UR has played an important role in the Court's jurisprudence from the earliest rights decisions (e.g. *Calder* (1798), *Fletcher* (1810)) to the present day (e.g. *Lawrence* (2003), *Roper* (2005)), across a wide range of substantive issue areas, including the Contract Clause, substantive due process, procedural due process, the applicability of the Constitution in overseas territories, and the prohibition on "cruel and unusual punishments." It also shows significant connections in the use of UR across areas and time periods. The depth of these connections suggests that use of UR can best be understood when studied, not in the context of isolated issue areas or time periods, but as a fundamental question confronting the Court whenever it adjudicates rights disputes. This chapter discusses the Court's use of UR with an emphasis on the characteristics, similarities, disagreements, and shifts that transcend the boundaries separating one issue from another.

Section A discusses major roles UR has played in the Court's jurisprudence, including assessment of rights' relative importance. Section B discusses the common combination of universalistic and particularistic elements in the Court's reasoning, and the shift away from extra-constitutional reasoning. Section C discusses the significance in the justices' common linkage of universalistic and evolutive reasoning. Evolutive approaches raise questions about discernment of changes in meaning. Section D discusses ways the justices have used practices and other societal indicators in determining how meanings change. While universalistic, evolutive approaches have predominated, some justices have objected. Section E describes the competing Delegative Model a number of justices have advocated. Section F concludes with a

discussion of the Court's use of UR, and debate over its use, as a reflection of tensions in American constitutionalism.

A. Universal Reasoning's Major Roles in the Court's Jurisprudence

One of the major ways the justices have used UR is in assessing the relative importance of categories of rights. Contemporary constitutional rights jurisprudence is built around a hierarchical approach to rights categories. Rights deemed of special importance receive substantially greater judicial protection than ordinary rights. UR has played a critical role in the development of the hierarchical approach. Earlier in the Court's history, property rights were considered essential to liberty, and received the Court's highest attention. By the late 1930s, the Court no longer considered property rights as deserving of the highest status within the constellation of protected rights. Other rights, including expression and privacy, however, were considered indispensable to free government. These rights were elevated to the highest status, and continue to receive the highest level of judicial protection.

The justices have also used UR in addressing questions about which rights apply in certain contexts. The Due Process Clause confronted the justices with questions about which rights applied against states. In making those determinations, the justices did not adopt constitutional text as the sole determinant. They did not determine that all Bill of Rights protections applied against states, solely on that basis. Instead, they inquired into whether rights enjoyed universalistic status. Their inquiries were centered around USEs, such as whether specific rights were indispensable to free, republican, government. The Court was also confronted with questions about which rights applied in the context of overseas territories. Here, too, the Court looked to USEs.

The REP framework describes a general approach that the justices have commonly used. Among the most pervasive USEs has been the requirements of liberty, or free government (used with respect to the Contract Clause and doctrine of vested rights,<sup>684</sup> economic due process,<sup>685</sup> expression,<sup>686</sup> privacy,<sup>687</sup> PDP,<sup>688</sup> and the applicability of the Constitution in overseas territories).<sup>689</sup> A right, or category of rights is identified as essential to the USE, such as property rights during the EDP era, or rights of expression by the 1930s. The next step in the chain of reasoning is the articulation of IMPs, which represent principles, rights, or requirements that follow from the USEs. During the EDP era, IMPs included the right to a calling, from which the justices reasoned to the liberty of contract. With respect to privacy, the protection of the home and marital relationship have long been IMPs, with the concept of autonomy emerging more recently. In the context of procedural due process, IMPs have included notice and the opportunity to be heard in one's own defense. IMPs are used as the basis for reasoning to more specific applications. Within the REP framework, the protection of each link is essential to the chain. If an IMP is violated, then the USE is violated. In *Lochner*, the maximum hours law was inconsistent with the requirements of liberty (USE), because it violated the liberty of contract (IMP).

The study shows that the justices have also used universalistic reasoning to elevate the importance of certain governmental powers. In its Contract Clause jurisprudence, the Court developed the concept of inherent and inalienable governmental

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<sup>684</sup> E.g., *Terrett v. Taylor*, 13 U.S. 43, 52 (1815).

<sup>685</sup> E.g., *Holden v. Hardy*, 169 U.S. 366, 389 (1898).

<sup>686</sup> E.g., *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939).

<sup>687</sup> E.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 851-52 (1992).

<sup>688</sup> E.g., *Twining v. New Jersey*, 211 U.S. 78, 106 (1908).

<sup>689</sup> E.g., *Downes v. Bidwell*, 182 U.S. 244, 282-83 (1901).

powers (ch. 2, C). The police powers were rooted in the basic purposes of government, the inherent attributes of sovereignty, and the indispensable requirements for the collective pursuit of the public welfare. The universality of the police powers actually operated as a restraint on legislatures. Regardless of popular or legislative will, the powers could not be bargained away. The Court also applied the concept in the realm of due process (ch. 3, E). The Court's use of universalistic reasoning with respect to rights and powers was interrelated. By the late 1930s, the Court's approach had become so deferential to legislatures that it ceased to act as a significant check. The development of a hierarchical approach to rights adjudication preserved a meaningful role for constitutional rights protections with respect to the categories of rights deemed most essential to liberty and justice.

B. Mixed Reasoning and the Shift Away from Extra-Constitutional Reasoning

In their use of UR, the justices have commonly combined universalistic and particularistic elements in articulating standards of evaluation. Indeed, in considering different interpretive approaches, the question is not so much whether reasoning should be universalistic or particularistic, but how the two forms of reasoning should be connected. In the Court's earliest period, combined standards sometimes included elements that were extra-constitutional. In *Calder* (ch. 2, A), for example, Chase employed a form of reasoning based on the social contract. One element stressed that the people made collective commitments, while another stressed the universalistic content of these commitments. The reasoning was extra-constitutional to the extent that, in discussing constitutions, Chase often seemed to be referring to principles inherent to the very concept of a social contract, rather than to a specific enactment. In the Court's first

major Contract Clause decision, *Fletcher v. Peck* (1810), in addition to textual arguments, Marshall employed MRR and extra-constitutional reasoning. The MRR formulation rested the decision on “general principles which are common to our free institutions.”<sup>690</sup> The particularistic element found authority in the principles because the American people chose them, while the universalistic thread found authority in their comportment with mandates of freedom. Marshall also argued extra-constitutionally, suggesting rights could be rooted in “certain great principles of justice, whose authority is universally acknowledged,”<sup>691</sup> and in the “nature of society and of government.”<sup>692</sup> Other decisions during this period also combined textual and extra-constitutional arguments.

As we saw (ch. 2, B; ch. 3, A(1)), the Court shifted away from extra-constitutional reasoning, increasingly hewing to an approach that framed UR as interpretation of constitutional provisions. The shift away from extra-constitutional reasoning and the common use of MRR, reflect that American constitutional thought provides reasons for justices to cite both universalistic and particularistic bases. A basic purpose of government is to protect universalistically grounded rights, and universalistic standards provide a basis of rights reasoning that is independent of lawmakers. At the same time, realization of universal rights in practice entails the rule of law, and the allocation of limited authority to distinct branches of government. Reliance on UR subjects justices to charges that they are operating outside of their institutional authority, and, thus, undermining, rather than serving, government’s basic purposes. The extra-constitutionality of the early Court’s use of UR made it more vulnerable to charges that it was operating outside its authority.

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<sup>690</sup> *Fletcher v. Peck*, 10 U.S. 87, 139 (1810).

<sup>691</sup> 10 U.S. at 133.

<sup>692</sup> 10 U.S. at 135.

Shifting away from extra-constitutional reasoning, nevertheless, does not eliminate all concerns associated with the use of UR. Universalistic principles, however framed, are typically vague and contested. Justices employing UR have often been charged with merely enforcing their own subjective will. MRR formulations have provided a means of enabling the justices to engage in UR, while extending a link between USEs and particularistic authority.<sup>693</sup> One element of the mixed formula recognizes a particularistic commitment. The source of the commitment may be cited as the Framers, the common law, American institutions, or the Constitution. A second element identifies the universalistic standard or principles to which the commitment has been made. Thus, in following the mandates of universalistic principles, the justices are at the same time following particularistic commitments to those principles. Framing UR as textual interpretation is itself a form of MRR. The constitutional provision serves as the source of commitment to USEs, as when justices view due process as embodying requirements of liberty, or the Eighth Amendment as requiring respect for human dignity.

Even the interweaving of universalistic and particularistic elements, however, does not fully insulate the use of UR from attack. As discussed below, use of UR has remained subject to criticism (sec. E), and the Court's reliance on certain societal indicators in connection with UR reflects concerns over containing judicial discretion (secs. D, F).

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<sup>693</sup> Examples include the seminal SDP/privacy case, *Meyer v. Nebraska* (1923), in which the Court referred to the "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." 262 U.S. 399. In the landmark SDP/expression case, *Schneider v. New Jersey* (1939), the Court referred to the freedom of speech and press as reflecting "the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men." 308 U.S. 147, 161. In the seminal PDP case, *Hurtado v. California* (1884), the Court stated that due process required states to operate "within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." 110 U.S. 516, 535. This MRR formulation has been used extensively in the Court's PDP jurisprudence, and at times in the area of SDP as well. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 493 (Goldberg, J. concurring).



### C. The Connection Between Universal and Evolutive Reasoning

This research also shows that the Court has commonly combined UR with an approach allowing for the evolution of constitutional meanings. Arguments for ECM have been closely associated with UR, and critical to its developing use. Justifications of ECM have recognized that public morality changes.<sup>694</sup> Since the Constitution is meant to be enduring, it must be able to accommodate such changes. The Framers could not possibly have anticipated all ways in which power might be abused. The Constitution, therefore, cannot be understood as an exhaustive list of specific limitations on government. Instead, constitutional provisions must be viewed as embodying general principles. The argument is often advanced that the Framers themselves understood the Constitution in this manner. At a broad level, the principles embedded within the Constitution remain constant. It is in this sense that an ECM approach may still provide a form of fixedness. The application of principles, however, must be allowed to adapt to new conditions, the education of experience, and evolving public understandings of law and rights. Under this approach, ECM and UR are closely linked, because the general principles embedded within the Constitution are understood in universalistic terms. The justices may reason from USEs, while allowing specific understandings about rights to evolve. The spirit of the approach was captured by Brown's statement in *Holden* (1898) that, while "the cardinal principles of justice are immutable, . . . the methods by which justice is administered are subject to constant fluctuation."<sup>695</sup> More recently, in extending due process protection to privacy rights, such as a woman's choice to terminate pregnancy, and the right to choose one's intimate sexual partners, the Court has spoken of

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<sup>694</sup> This does not mean, of course, that the use of ECM can solve deep-seated societal rifts. See Graber 2006, 4.

<sup>695</sup> *Holden v. Hardy*, 169 U.S. 366, 387 (1898).

the Constitution as a basic charter embodying broad principles, articulated in deliberately vague terms, allowing successive generations to give different meanings to those terms.<sup>696</sup> The Due Process Clause embodies the concept of liberty. The justices have not approached the interpretation of due process liberty as they would a “tax statute.”<sup>697</sup> Rather, they have inquired into the basic requirements of liberty.

ECM is critical to the Court’s jurisprudence in two sense. First, as we have seen, the Court’s acceptance of changing constitutional meanings has played an important role in a wide range of issue areas.<sup>698</sup> ECM is also important conceptually to the Court’s rights reasoning. The use of ECM brings tensions between universalistic and particularistic bases of rights to the fore. Under the Delegative Model (discussed further in sec. D), the role of particularistic sources in constitutional interpretation is stressed. Judicial authority is rooted in the will of the people, as reflected in text and tradition. Practices--past and present--are relevant because they provide the best evidence of the particularistic bases of rights. Many constitutional provisions are vague, but the Framers’ intentions can be illuminated by reference to the practices they took for granted, or considered consistent with the text. The logic of the DM is disrupted by the adoption of ECM. Under the DM, history provides the necessary specificity to make the Constitution a meaningful constraint on lawmakers, and to simultaneously provide a meaningful constraint on the judiciary’s own discretion and power. ECM declares history non-

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<sup>696</sup> E.g., *Lawrence v. Texas*, 539 U.S. 558, 564 (2003); see also *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 442-43 (1934); *Weems v. United States*, 217 U.S. 349, 373 (1910). *Hurtado v. California*, 110 U.S. 516, 529-30 (1884).

<sup>697</sup> *Poe v. Ullman*, 367 U.S. 497, 540 (1961) (Harlan, J., dissenting).

<sup>698</sup> Chapter Three, for example, discussed the importance of ECM to the Court’s demotion of property rights, and elevation of other categories of rights, including privacy. In the area of PDP, we saw that the Court did not hold all procedures with historical pedigree binding on the states, but allowed them to adopt new procedures provided they comported with USEs (ch. 4). With respect to CUPC, too, we have seen that the justices have not viewed the Clause’s scope as confined to the punishments already known, and rejected, at the time of the Founding (ch. 6).

binding. Even if an ECM approach retains a role for history, once history is no longer viewed as determinative, another standard must be introduced. Without some other standard, it would not be possible to distinguish between different historical practices, in order to determine which were binding, and which allowed for deviation.

The adoption of ECM, then, naturally raises the question of which standards the justices will use to determine when, and how, constitutional meanings may be allowed to change. As we have seen, the predominant approach has been for the justices to look to USEs. As we have also seen, the use of UR raises difficulties concerning the possibilities for excessive judicial discretion. The justices have not relied on UR in isolation, but, have often incorporated into their analysis consideration of history, current practices, or other indicators. The following section discusses different ways in which the justices have done this.

D. The Use of History in Conjunction with Universal Reasoning

Reliance on history and precedent are basic elements of the American common law system. In itself, it is unremarkable. This study has shown that the justices have not relied exclusively on history and precedent. Rather, they have often employed a universalistic, evolutive approach that is not bound by history. The use of UR, however, has not taken the form of free-standing universalistic musings. The justices have typically combined UR with references to particularistic considerations, such as practices--past or present. What, then, is the relationship between practices and UR?

One approach to incorporating practices into a fundamentally universalistic framework has been to examine practices in jurisdictions that are dedicated to the same USEs the justices are employing. If one is interested in determining whether a right is

essential to free, republican government, then one may wish to investigate the extent of the right's observance within free, republican societies. Uniform observance might count as evidence of its indispensability.<sup>699</sup> Conversely, a lack of consensus might count as evidence against the right's indispensable nature.<sup>700</sup> On this approach, the ultimate standard remains universalistic, yet existing practices serve as evidence for or against a right's universal status. Reliance on practices may also place importance on the beliefs of those who have adopted the practices. This approach stresses that it is not simply the fact of a practice that is relevant, but the beliefs supporting the practice. The investigation should focus on how often the right has been observed specifically because it was believed to enjoy universalistic status.<sup>701</sup> Again, the governing standard remains universalistic, and the practices examined function as evidence bearing on the determination. While other variations are possible, the important point, here, is that in the approaches described, practices may be relied upon while it is also clear that the governing standard is universalistic. Practices play the role of evidentiary support. Their role is not authoritative. That is, the justices are not bound by the practices they observe. The justices retain the authority to make the determination based on USEs. Given the nature of their role, there is no reason why the practices of other countries might not be examined as well. On this view, the relevance of state practices is not based on the state legislatures' authority, but on their expression, or reflection, of beliefs about rights' universalistic status. American jurisdictions may be of the greatest interest, but practices in other jurisdictions may be relevant too.<sup>702</sup>

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<sup>699</sup> *E.g.*, *Powell v. Alabama*, 287 U.S. 45, 73 (1932).

<sup>700</sup> *Wolf v. Colorado*, 338 U.S. 25, 29 (1949).

<sup>701</sup> *See, e.g.*, *Betts v. Brady*, 316 U.S. 455 (1942).

<sup>702</sup> *See, e.g.*, *Trop v. Dulles*, 356 U.S. 86 (1958); *Twining v. New Jersey*, 211 U.S. 78 (1908).

As we have seen (chs. 3, G; 6, C), in recent decades, the Court has at times appeared used practices in a manner that differs substantially from previous uses. In cases such as *Roper* (2005) and *Lawrence* (2003), the Court has found support for rights in trends towards certain practices. In addition to legislation, the approach has also looked to other societal indicators, such as the opinions of professional associations. The implications of this approach, and concerns it raises, are discussed below (sec. F).

E. Disagreements over Universal Reasoning, and the Delegative Model

The discussion in this chapter thus far has focused on dominant approaches. While the use of UR has been common, however, this research also shows that the use of UR has been a subject of disagreement between the justices since the earliest rights decisions and across a wide range of issue areas. Moreover, fault lines between justices have been similar across time periods and issue areas as well. While justices' opinions naturally express views somewhat differently, it is useful to recognize, broadly, two opposing types of approaches. The first is the universalistic, evolutive approach that has predominated. The second is an approach referred to here as the Delegative Model. The DM stresses reliance on particularistic bases of rights as a basis for judicial decision. This does not mean that the DM advocate is not committed to universal rights. The DM advocate might believe that the constitutional system is worthwhile because it is designed to protect universal rights. Indeed, the DM advocate may accept the outlines of social contract theory. The first part of social contract theory asserts the existence of universal rights, and their protection as government's *raison d'être*. But the second part of social contract theory describes individuals' subjection to government for the common good. Institution of government requires enactment of positive laws, particularistic in character.

From the perspective of DM, judicial authority, like the authority of other public officials, is carefully circumscribed by positive laws. Justices fulfill their role through strict compliance with the positive laws and the boundaries of their institutional authority. This places a premium on particularistic sources for rights interpretation--the mandates of the supreme positive law. Constitutional text is the starting point, and reference to traditional understandings, which shed light on the understandings of those who framed and enacted the text, can help to provide the requisite specificity. The critical particularistic source is the will of the people, which must not be superseded by the will of the judge. The DM, therefore, is greatly concerned with minimizing room for the exercise of the subjective will of the judge at the expense of constitutional mandates.

From the perspective of DM, judicial reference to universalistic standards is unwarranted. The Constitution itself may embody universalistic principles, but the text, then, already incorporates the relevant universalistic reasoning.<sup>703</sup> The judge need not inject them. The DM advocate is suspicious of UR, because it leaves too much room for the judge to impose personal preference.<sup>704</sup> ECM is anathema to the DM framework. It is the fixedness of original constitutional meanings that provide the essential to link to the will of the people, and at the same time, limits judicial will. Prominent DM advocates, like Scalia, Black, and the first Harlan, therefore, have rejected ECM.<sup>705</sup>

Although proponents of DM have generally not commanded a majority, and do not today, the arguments remain important. The advocacy of DM, even from a minority

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<sup>703</sup> See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 380-82 (1901) (Harlan, J. dissenting).

<sup>704</sup> E.g., *Adamson v. California*, 332 U.S. 46, 69-72 (1947) (Black, J., dissenting); *Calder v. Bull*, 3 U.S. 386, 398-99 (1798) (Iredell, J., dissenting).

<sup>705</sup> E.g., *Roper v. Simmons*, 543 U.S. 551, 629 (2005) (Scalia, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting); *Downes*, 182 U.S. at 380-82 (Harlan, J. dissenting).

position, highlight difficulties with evolutive, universalistic positions, putting pressure on those who continue to employ them. The perception of excessive judicial discretion is a persistent concern for justices, and the articulation of DM positions brings even greater attention to these concerns.

F.     The Court's Jurisprudence as a Reflection of  
       Basic Tensions Regarding Bases of Rights

Basic tensions complicate any attempt to articulate an approach to the basis of rights that can simultaneously: (1) maintain constitutional rights as an independent check on lawmakers; (2) allow for ECM; and (3) protect judges from charges of taking advantage of excessive discretion to impose subjective will. As we have seen, the Court's dominant approach allows for ECM, and it is likely to continue to do so. Ironically, ECM has been well-entrenched for so long that it carries the force of tradition. Indeed, ECM's long reign would make it more difficult for DM advocates to overthrow it. At the center of the DM is the link between particularistic bases and judicial authority. The link is maintained through reliance on original meanings, aided by reference to traditional understandings, with judicial precedents and common law often playing a role in drawing these connections. Even if a majority of justices wanted to discard ECM and install the DM, this would be complicated by the absence of a body of jurisprudence built on the DM maintaining the link between text and interpretation. The development of judicial precedent built on the ECM has created its own traditions. The DM is strongest when it can view text, tradition and precedent (and underlying universal rights) as pulling in the same direction. ECM's long reign has upset this congruity.

ECM requires an approach to discerning how meanings change. As we have seen, the dominant approach has looked to USEs. Reliance on USEs is critical to

maintaining constitutional rights as an independent constraint on lawmakers. It was noted earlier (ch. 1, A(1)) that, at the time of the Founding, different bases of rights were often asserted as if they were interchangeable. The different bases were seen as supporting the same substantive outcomes. As noted, however, different bases of rights are potentially in tension. As long as universalistic principles, popular sovereignty, and tradition are seen as pointing towards the same outcomes, the tension may remain latent. One may maintain as a set of beliefs that the constitutional text, at once, embodies the proper universalistic ends for government of society, and reflects the will of the people. If, as well, traditionally accepted understandings are understood as reflecting the will of those who framed and enacted the supreme positive law, the tension remains only potential. Indeed, this describes the heart of the DM, which explains why a justice, such as the first Harlan, could believe that he served universalistic ends best through strict enforcement of text and tradition. ECM disrupts this harmony. This is not meant to be an argument against ECM. In fact, advocates of ECM may, and have, also laid claim to acting consistently with the Framers' intentions. One may plausibly argue that the Framers intentionally wrote vague rights provisions with the intention that interpretations be allowed to evolve with changes in societal conditions and public morality. The literature is also thick, of course, with arguments that seeking to act in accordance with the Framers' intentions is misguided in any event. It is not necessary here to enter that debate. The important point about the DM, for present purposes, is that it represents an account of the basis of rights that a number of justices have found persuasive, and have employed in a way believed to properly constrain judicial discretion through reliance on particularistic bases of rights. The way that the DM promises to accomplish this is to



suppress or overcome potential tension between bases of rights. The adoption of ECM is incompatible, because it brings to the surface tensions between bases of rights.

Regardless of the Framers' intentions, once ECM is adopted, text, tradition, and universalistic principles can no longer work in lockstep. The adoption of ECM means that history is not dispositive. Some other standard, then, must be adopted. That a rights interpretation reflects understandings dating back to the Founding is no longer a decisive argument. How, then, is one to distinguish between the traditional understandings that are to be maintained and those that are to be discarded?

Popular will, alone, is a problematic basis for rights, without a fixed set of understandings linking it to universalistic principles. Once that link is broken, adherence to popular will as a basis of rights threatens to sanction any acts adopted by a momentary majority. Acts of democratic lawmakers become self-justifying, and are no longer constrained by an independent sources. The DM advocate argues that the judge need not directly reference universalistic principles. All of the necessary universalistic reasoning is already captured by particularistic sources. The ECM undermines that argument. With ECM entrenched, in order to maintain constitutional rights as an independent check, the justice is moved to reason directly from universalistic standards.

As a form of discourse, UR provides a rare forum within the branches of government for sustained debate over the roots and nature of our most fundamental rights. Even at a highly general level, such debate is healthy within a political system that places importance on the protection of fundamental rights. We have seen that one of UR's principal roles within the Court's jurisprudence has concerned the relative importance of rights. The shift from property rights to other categories of rights was an

event of tremendous importance. Thinking of this shift in terms of the categories of rights that are the most essential to free government is a useful frame.

Indeed, the REP provides a useful framework for reasoning about rights. At the highest level of generality, one may consider USEs. To what kind of society are we committed? To be sure, framed in this manner, the question is extremely general. The justices have not tended to engage debate at this level of generality, but, rather, to appeal to a variety of USEs, including free government, liberty, and justice. Nevertheless, discussion at this level of generality might be useful in prompting us to consider which concepts or principles we consider most fundamental to our polity. In extending due process protection to rights of expression beginning in the 1920s and 1930s, the justices often spoke of the requirements of a society committed to allowing for peaceful change of public officials and policies. The difference in emphasis may be slight, and operating at a level of extreme breadth, but still useful in terms of placing discussion within a conceptual frame that can guide the development of more specific principles.

REP also provides a way of thinking about the link between universalistic and particularistic bases of rights. We saw that Chase, in *Calder*, spoke of the social contract in a way that intertwined universalistic and particularistic bases. The American people entered into a social contract, but the social contract could be thought of as embodying principles at a high level of generality. We have also seen that justices have more recently spoken of the Constitution as a basic charter of society containing general rights language by design, to allow for different generations to give the terms meaning. The more recent approach avoids extra-constitutionality. It frames the inquiry as interpretation of specific constitutional language. We still may inquire into the essential

requirements of liberty. Our collective commitment to the Constitution provides a particularistic grounding for the universalistic inquiry into the requirements of liberty. We may view ourselves as part of a society that is collectively committed to a set of general principles, and we may, as a people, debate the more specific implications of those commitments. The universalistic framing of the inquiry conceptually provides a point of reference standing outside the processes of majoritarian lawmaking. Relatedly, while it would require separate treatment to address the question in appropriate depth, the universalistic frame also resonates with the reasons that many people believe they have certain rights, especially within a society so diverse in terms of national background. The violation that one feels in the face of government policies believed to transgress fundamental rights is not rooted only in American traditions or the force of popular preferences. It is often rooted in an individual's personhood. It is for this reason that people may feel their rights claim is strongly justified even if there is no longstanding American tradition of recognizing the right, or even if it does not enjoy majority support.

The REP framework also provides a useful frame for discourse at the slightly less general levels of analysis. Thus, we may inquire into the categories of rights that are essential to liberty (or other USEs), and into the IMPs that are essential to the meaningful protection of these rights. The Court's jurisprudence on privacy serves as a good example. Initially, the identification of privacy as a right provided a distinct category of rights that had not previously been recognized. Therefore, it provided a frame for thinking about whether, and why, certain governmental acts might violate the requirements of liberty. Initially, the justices' emphasis was on the subordinate requirements of protecting the sanctity of the home and marital relations. Later cases,

however, brought to light that these IMPs did not capture what was ultimately at stake. After all, as later holdings confirmed, the rights really at stake in *Griswold* and *Roe* did not hinge on marriage, or acts taken specifically in the home. The Court's more recent development of autonomy as a framing concept is useful. What was really at stake in *Lawrence* was individuals' ability to make decisions concerning their choice of intimate partners without interference from the state. This better captures what is really at stake in many privacy cases, and provides a conceptual jumping off point for considering which other rights might fall within the scope of privacy. Is there a concept of privacy that is essential to liberty? If so, does it entail autonomy? And which kinds of decisions fall within its protection. To consider this line of analysis useful, one need not believe that answer to these questions follow logically like geometrical proofs, nor that their articulation will prompt consensus. It is enough that they provide a useful frame for identifying why we believe we have the rights we do, and may help to pinpoint the level of analysis at which disagreement emerges.

Once ECM is accepted, it is clear (if it was not considered so regardless) that rights interpretation cannot simply be a matter of consulting text and traditional understandings, perhaps ascertainable by reference to common law or other relatively "objective" sources. If rights interpretation is going to turn on UR, it is better that it be well-articulated. This allows the justices, majority and minority, to better engage each other on its use. It provides better guidance to lower courts, and affords them a better opportunity to contribute to the crafting and application of UR arguments. It allows litigants the opportunity to address the matters considered important to the justices. In addition, it allows actors outside the court system to engage the debate. First, political

actors with a direct influence over judicial affairs, such as U.S. Senators involved in confirmation proceedings, may have a better opportunity to participate in UR discourse if it is made explicit by the justices. More broadly, discourse over the grounding and nature of fundamental rights should not be limited to the courts. Fuller articulation of UR provides better opportunities for the Court's opinions to interact with discourse outside the courts.

Within the American political system, the judiciary is especially well-positioned to engage in universalistic rights discourse. As noted (ch. 1, A(2)), the practices of offering detailed explanations for decisions, and regularly engaging earlier opinions, provide a good institutional environment for the development of arguments concerning the grounding of fundamental rights. Whatever might be considered a desirable division of labor between branches in principle, existing institutional practices leave the judiciary better equipped to sustain such debate. This is especially so since the justices operate in a forum within which the reasoning of their opinions is treated by much of the legal community as part of the law itself, and not merely rhetorical commentary. It should also be noted that the suggestion that the use of UR by the justices is a salutary practice does not require denial of the significant role that the individual judges' personal political preferences surely play in the formation of judicial policies. Whatever the precise nature of the interplay between personal attitudes and the writing of opinions, the justices' articulation of judicial philosophies can play an important role in shaping discourse, especially within the various layers of the judiciary itself.

It was noted (sec. D) that in some recent cases the Court has used an Emerging Trends approach. The significance of these cases does not lie in Emerging Trends having

gained dominance among today's justices; such a claim would be premature. The approach has not been fully articulated, and is contested. But the approach, as discussed earlier, appears to be distinct in important ways from earlier approaches. The interest of Emerging Trends lies in its capturing of the tension between universalistic and particularistic bases of rights as it confronts today's justices. The discussion above can help us to understand how the approach reflects basic tensions concerning bases of rights. The Court's approach is clearly evolutive, and appeals to USEs. At the same time, the justices are acutely aware of concerns over the judicial discretion arising from the use of UR. This places a premium on incorporating into the analysis factors that have the appearance of objectivity. The justices have appealed to range of factors, including state legislative practices, international practices, and the views of professional associations. The majority has combined ECM with an emphasis on an "objective" appraisal of societal values to create an approach that places weight on emerging trends with respect to rights understandings.

The Emerging Trends approach has potentially troubling implications. On the one hand, we have seen that the adoption of ECM has been largely motivated by a recognition of dramatic shifts in public morality. The argument is compelling that constitutional law must adapt in the face of long-term, fundamental shifts in public morality, such as the extension of basic human rights to women and blacks, and the recognition in the wake of the Industrial Revolution that laws must be allowed to protect the weak against those with the greatest economic resources. A distinction, however, must be drawn between these kinds of deep-seated shifts and relatively specific, short-term swings in policy preferences. Where the line is to be drawn is not obvious, but it is

worth observing the dangers of ignoring the line completely. Some of the Court's recent opinions give the impression less of recognizing fundamental transformations than of taking a snapshot of preferences. In many of the Court's CUPC cases, the justices have engaged in highly detailed debates about the proper way to calculate the number of states favoring a certain policy. There is nothing inherently special about CUPC as a constitutional provision, and *Lawrence* suggests the justices' willingness to extend a similar approach in other issue contexts. Placing great weight on the recent actions of state lawmakers comes dangerously close to simply ratifying the actions or attitudes of a temporary majority. It is true that in these cases the Court has also engaged in UR. The justices have long interwoven universalistic and particularistic bases, and there are good reasons for them to look for ways to do this. The critical point, however, is that, for universalistic principles to continue to play their role in maintaining constitutional rights as an independent check, it must remain clear that the ultimate governing standards are universalistic. When particularistic bases are employed, then, their role should be explained.

Another troubling aspect of the Court's Emerging Trends approach is that the justices have often counted legislative practices, without establishing that the adoption of the practices was based on fundamental shifts in public morality, as opposed to mere policy preferences. The justices also have not fully explained the relevance of the opinions of professional associations and international practices. The point, here, is not that there is anything inherently objectionable about these sources, or that good explanations for their relevance might not exist, but that, without an articulated link between these sources and UR, there is a risk of confusion as to the ultimate grounds of

decision. That a factor can be easily counted or listed in an opinion does not, in itself, help us to understand the basis of decision.

The use of a range of societal indicators is likely to remain at the forefront of controversy over the Court's approach to rights adjudication, as the present majority seeks to cite evidence that can help reduce the impression that their opinions are based on whim. Scalia is likely to remain an outspoken critic of the majority approach. Scalia has at times opposed ECM, and at other times accepted ECM as a premise, while stressing the importance of legislative practices as the key factor in determining how meanings change. The combination of ECM and emphasis on legislative practices is the most troubling approach, because, as other justices have noted, it abdicates the Court's responsibility of maintaining constitutional rights as a meaningful independent check.

This study began with questions about the Supreme Court's approach to the basis of rights. The results show that studying the Court's jurisprudence with an eye towards the interconnection between universalistic and particularistic bases of rights helps us to understand ongoing developments and axes of disagreement within the Court's jurisprudence. Public law literature has long recognized the role of natural law in certain discrete issue areas and time periods. The use of natural law during, for example, the Marshall Court and the era of economic due process, is an important part of the Court's jurisprudence. There is much more to be learned, however, by expanding the focus from "natural law" to questions, more broadly, about the basis of rights and the role of universality.

Viewing the Court's jurisprudence through this prism opens up avenues to important lines of further research. First, while this study expands upon existing



literature by examining universality across time and issue areas, it would certainly be useful to incorporate additional issue areas into the research. Since each issue area has its own historical context, this would allow us to better determine the extent to which use of UR is shaped by factors unique to specific topics. Beyond that, we may ask questions about the influences on UR, and its impact on policies. We may also, of course, ask questions about the use of UR in contexts beyond the Supreme Court, including, not only other actors in American politics, but also in other countries and in international bodies. Framing the investigation around a broader question may entail some limitations for a single study, but has important advantages in helping to understand issues that cut across legal topics. This study shows that it is fruitful to view constitutional law through the prism of basic questions about the grounding and nature of our most cherished rights.

## LIST OF ABBREVIATIONS

CUPC	Cruel and Unusual Punishments Clause
CSV	contemporary societal values
DM	Delegative Model
ECM	evolving constitutional meanings
EDP	economic due process
IMP	intermediate premise
LOK	liberty of contract
MRR	mixed rights reasoning
PDP	procedural due process
REP	reasoning from essential principles
RTC	right to pursue a lawful calling
SDP	substantive due process
UR	universalistic reasoning
USE	universalistic standard of evaluation

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