A THIRD PARALLEL PRIMROSE PATH: THE SUPREME COURT'S REPEATED, UNEXPLAINED, AND STILL GROWING REGULATION OF STATE COURTS' CRIMINAL APPEALS

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I. Introduction

The United States Supreme Court got away with this twice before, and now is doing it again. First, in *Chapman v. California*[1] and later decisions explaining *Chapman*, the Court regulated the proceedings of state appellate courts in criminal cases, by requiring such courts to replace their own less rigorous standards of harmlessness of federal constitutional error with the "harmless beyond a reasonable doubt" test.[2] Then in *Griffith v. Kentucky*[3] and subsequent decisions explaining *Griffith*, the Court regulated state appellate courts further, by requiring them to apply in criminal cases the Supreme Court's current view on the retroactivity of new federal constitutional rules.[4]

The Court imposed both of these requirements while writing repeatedly that states need not provide criminal appeals at all,[5] yet the Court made no attempt in either the *Chapman* or the *Griffith* line of cases to specify what provision of the Constitution authorizes it so to regulate criminal appeals in states that do choose to allow them, much less to explain why the Court so interpreted the unidentified provision.[6] Despite the Court's silence on these fundamental questions, in each instance state appellate courts followed the Court down the two primrose paths, applying first *Chapman* and then *Griffith*, each for many years, before the Court even

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[1] 386 U.S. 18 (1967).

[2] *See infra* Part V.A.2.a.

[3] 479 U.S. 314 (1987).

[4] *See infra* Part V.A.2.b.

[5] *See infra* Part V.A.1.

[6] *See infra* Part V.A.2.a-b.

wrote explicitly that federal law required state courts to apply the new prescriptions.[7] Very few state courts or commentators questioned these developments.[8]

Now the Court is at it again, apparently repeating the process to regulate yet a third crucial aspect of state criminal appeals, again without identifying the purported source of its power to do so. In a series of recent decisions, the United States Supreme Court has prescribed and applied new requirements of de novo appellate review of lower courts' decisions of mixed questions of federal constitutional law and fact in criminal cases.[9] In so doing, the Court has written nothing about the possible legal sources of these new requirements and thus about whether they govern state appellate courts at all, and very little about other issues concerning the scope of applicability of the new requirements.[10] The answers to such questions are important not only theoretically but also practically, because recent changes in the law of federal habeas corpus have left direct review in state appellate courts as the only form of review with procedural and remedial law favorable to the great majority of criminal defendants in this country.[11]

These recent Supreme Court decisions concerning de novo review bear with them, of course, the implicit threat that decisions of any courts that ignore these vague new dictates, or that apply them more narrowly than the Court later deems correct, will be vacated or reversed. As a result, many state appellate courts have been following the Court down this third primrose

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[7] *See infra* Part V.A.2.a-b.

[8] *See infra* Part V.A.2.a-b.

[9] *See infra* Parts II.B., III.A-D.

[10] *See infra* Parts II.B., III.A-D.

[11] *See infra* Part VI.

path, resolving any doubts that may have occurred to them by following the new precedents, and by extending their scope of application far beyond any specific requirements the Supreme Court has yet announced.[12] Meanwhile, scholars have provided very little commentary on the most difficult issues raised by these developments.[13]

This Article describes flaws in the Court's recent decisions and in many state appellate courts' responses, identifies the practical significance of these events, and considers possible explanations for these confusing and unsettling developments. In the course of exploring these current issues, the Article addresses specifically the similar flaws in the Court's previous creation of its *Chapman* and *Griffith* doctrines and in state courts' responses to those prior developments. Finally, the Article proposes improvements in the decisions or at least in the opinions of the Supreme Court, and in state courts' and legislatures' responsive practices. My proposed improvements are designed to prevent the United States Supreme Court from continuing to remake appellate practice in state criminal cases without having even to attempt an explanation and justification of the legal basis for its program of supposed reform.

II. Overview

A. Basic Ideas of Standards of Review

The outcome of one court's review of the decision of another court often depends heavily, of course, on the standard of review.[14] A great many state and federal criminal convictions are

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[12] *See infra* Part IV.

[13] *See infra* notes 15, 47 and accompanying text.

[14] *See* STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 1.02, at 1-20 (1992) (quoting with approval litigator Barry Sullivan's advice in an American Bar Association publication that "a thoughtful consideration of the appropriate standard of review will often determine the outcome of an appeal"); STEVEN WISOTSKY, PROFESSIONAL JUDGMENT ON APPEAL § 8.01, at 160 (2002) (referring to a standard of review's

reviewed on appeal in this country, especially in felony cases that are tried on their merits and that result in prison sentences, in which the stakes are highest for defendants and for protection of society.[15] As a result, standards of appellate review in criminal cases have important consequences for persons accused of crime and for the effectiveness of criminal law enforcement.

Federal and state law in the United States is universal that on appeal decisions of questions of pure law are reviewed de novo,[16] and decisions of questions of pure fact, often called "historical" fact, are almost always reviewed with considerable deference to the decision of the court being reviewed.[17] However, applications of law to historical facts, often called decisions of mixed law and fact,[18] have been reviewed on appeal under a variety of standards in

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"powerful influence on the outcome of appeals").

[15]"About 70,000 criminal appeals are pending at any given time." Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 388 n.13 (2002). "[I]n some jurisdictions, as many as 90% of the defendants who were convicted after trial and sentenced to prison will appeal their convictions." WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.3(s), at 24-25 (3d ed. 2000).

[16]"Questions of law are reviewed *de novo." See* WISOTSKY, *supra* note 14, § 8.03, at 162. *See also* RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT § 5.11, at 73 (1992) (writing that "pure questions of law" are subject to "plenary" or "*de novo*" review); MARSHALL HOUTS ET AL., ART OF ADVOCACY APPEALS § 6.03[6], p. 6-11 (2002) (stating that "[q]uestions of law will be reviewed *de novo* . . . .").

[17]*See* APPELLATE PRACTICE MANUAL 23 (American Bar Assn. Section of Litigation, Priscilla Anne Schwab ed., 1992) (stating that most federal appellate courts apply the clearly-erroneous standard when reviewing district courts' fact-findings); HOUTS ET AL., supra note 16, § 6.03[4], at. 6-8 (stating that "[i]n an appeal from a bench trial, the trial court's findings of fact will not be set aside on appeal unless it is found to be clearly erroneous"). *See generally* Pierce v. Underwood, 487 U.S. 552, 558 (1988) (statement by Court that judges' decisions of questions of law are traditionally reviewed de novo, and their decisions of questions of fact for clear error). Some commentators have expressed the view that in practice the clear-error standard often is equivalent to the very deferential abuse-of-discretion standard. *See, e.g.*, WISOTSKY, *supra* note 14, § 8.03, at 163 (2002). Currently the Supreme Court seems to agree. *See* Ornelas v. United States, 517 U.S. 690, 694 n.3 (1996).

[18]Applications of law to historical facts have also been called "ultimate facts." Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 1002 (1986).

American criminal cases.[19]

In case some readers of this article are unfamiliar with these three categories of questions -- law, fact, and mixed -- here is an example in which distinguishing among them is relatively easy. "How clearly must a suspect request the presence of counsel to trigger the requirement of *Edwards v. Arizona*[20] that law enforcement agents immediately cease questioning him?" is a question of pure law, the answer to which is a general standard expressed independently of the facts of any particular case.[21] The answer (a statement of pure law) happens to be, according to the opinion for the Court in *Davis v. United States*,[22] that the suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[23] "What did the suspect in the *Davis* case say to the agents questioning him?" is a question of pure fact, the answer to which is independent of any legal rule or principle.[24] The answer (a statement of pure fact) happens to be

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[19]"Where the issue on appeal is a mixed question, the deference accorded to the trial court's determination is not always easy to ascertain." HOUTS ET AL., *supra* note 16, § 6.04[3], p. 6-15. "Because mixed questions are impossible to classify by logic alone, there is room for reasoned argument and disagreement." WISOTSKY, *supra* note 14, § 8.04, at 169. *See also* DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 30.2, at 520 (4th ed. 2000) (stating that ". . . courts have struggled with the standard for reviewing" decisions of mixed questions).

The same is true of mixed questions in civil cases. "[T]he division of power [between trial and appellate courts] over mixed questions has been neither simple nor consistent . . . ." Louis, *supra* note 18, at 1003. *See also* Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235 (1991).

[20]451 U.S. 477 (1981).

[21]"Declarations of law are fact-free general principles that are applicable to all, or at least to many, disputes and not simply to the one sub judice." Louis, *supra* note 18, at 993 n.3, citing H. HART & A. SACKS, THE LEGAL PROCESS 374 (tent. ed. 1958).

[22]512 U.S. 452 (1994).

[23]*Id*. at 459.

[24]Examples of historical facts are "who did what, when, where, how, why, or with what intent." Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985).

"maybe I should talk to a lawyer."[25] "Was Davis's utterance sufficiently clear to trigger the *Edwards* requirement?" is a mixed question of law and fact, calling for application of the proposition of pure law to the proposition of pure fact.[26] The answer to this mixed question happens to be, again according to the opinion for the Court in *Davis*, "no."[27]

Standards for reviewing decisions of mixed questions long have included, at the most deferential extreme, review of trial courts' decisions for abuse or "manifest abuse" of discretion;[28] at the opposite extreme, review with no deference, often called "independent" review or review de novo;[29] and between these extremes review for "clear error" or under comparable words or

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[25]512 U.S. at 462.

[26]The identification or assignment of some questions among the three categories of law, fact, and mixed questions is debatable. "[L]aw and fact . . . are points of rest on a continuum of experience." Monaghan, *supra* note 24, at 233-34 & n.16. It is beyond the scope of this Article to attempt improvement in the definitions of these categories of questions.

Although some legal scholars have asserted that there is "no essential difference" between questions of pure law and of pure fact, at least in terms of ontology and epistemology, *see, e.g.*, Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 Nw. U. L. Rev. 1769, 1770-71 (2003), this Article refers to those categories of questions and to the third category mixing them in the manner lawyers and judges long have used them and still continue to use them. At least some of those scholars seem to share my view that, whatever ontology and epistemology may tell us, the practical questions in our legal system are "who should decide [each question and] under what standard." *Id*. at 1771.

[27]Specifically, the Supreme Court wrote that "the courts below found that petitioner's remark . . . '[m]aybe I should talk to a lawyer' . . . was not a request for counsel, and we see no reason to disturb that conclusion." 512 U.S. at 462. The legal standard articulated in *Davis* requires courts to consider not only the content of the suspect's utterances, but also the circumstances under which they were made. *Id*. at 459. In Davis's case, those circumstances included the agents' having advised Davis that he was a suspect in the crime, the length of the interview before Davis mentioned talking to a lawyer, the agents' responses to that mention, Davis's subsequent conduct during the interview, and perhaps other circumstances. *Id*. at 454-62. The courts' consideration of these circumstances along with the content of Davis's remark about a lawyer does not make this example of the distinctions among purely legal, purely factual, and mixed questions less clear, however, because each of the additional circumstances can also be described as a purely factual answer to a question such as "what did the agents say to Davis?" and "how long did the interview last before Davis mentioned a lawyer?"

[28]See, e.g., State v. Ramstad, 87 N.W.2d 736, 737, 741 (N.D. 1958) (affirming decision as to sufficiency of foundation of proffered evidence, under "manifest abuse of discretion" standard).

[29]*See, e.g.*, State ex rel. Creagan v. Rigg, 97 N.W.2d 276, 277-79 (Minn. 1959) (affirming on de novo review lower court's conclusion that relator had intelligently waived counsel).

phrases conveying requirements of one moderate degree or another of deference.[30]

B. Recent Supreme Court Decisions Concerning De Novo Review

State courts' choices of standards for reviewing decisions of mixed questions of law and fact in criminal appeals have been changing lately under the influence of recent United States Supreme Court decisions. The Court has long adopted standards of review to be applied by federal courts in reviewing decisions of various mixed questions, in civil as well as in criminal cases.[31] State courts long have consulted the Supreme Court's precedents, sometimes even following them, when similarly adopting standards for state courts' appellate review.[32]

In the last several years, though, the United States Supreme Court has been especially active in addressing standards of appellate review of trial courts' decisions in criminal cases. There have been ample opportunities, since for many mixed questions of federal constitutional law and fact the Court previously had left not only state but even federal appellate courts free to

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[30] *See, e.g.*, State v. Maxwell, 430 S.W.2d 152, 154-55 (Mo. 1968) (affirming decision that defendant received adequate assistance of counsel as not clearly erroneous and explaining "[c]learly, this is not a de novo review"). "The usual formulation is that '[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Louis, *supra* note 18, at 993 n.53 (quoting United States v. United States Gypsum co., 333 U.S. 364, 395 (1948)). Some courts have used the phrase "manifestly erroneous" and have described it as a "deferential standard of review." *See, e.g.*, People v. Sorenson, 752 N.E.2d 1078, 1083 (Ill. 2001).

[31] *See, e.g.*, Townsend v. Sain, 372 U.S. 293, 318 (1963) (stating that, when a state conviction is challenged on the theory that a confession admitted in evidence at the trial was involuntary, a federal habeas judge's "duty to apply the applicable federal law to the state court findings independently . . . was settled in" the fragmented opinions in *Brown v. Allen*, 344 U.S. 443 (1953)); Norris v. Alabama, 294 U.S. 587, 589-96 (1935) (reviewing independently and reversing state court decision " that no impermissible racial exclusion from state juries had been proved").

[32] *See, e.g.*, Commonwealth v. Wilborne, 415 N.E.2d 192, 199 (Mass. 1981) (reviewing voluntariness of defendant's confession independently on direct appeal and, in support of this standard of review, citing only a state decision quoting from two Supreme Court decisions including *Brown v. Allen*, the holding of which on the standard of review is summarized in the immediately preceding footnote in this Article); Donovan Contracting of St. Cloud, Inc., v. Minnesota Dept. of Transportation, 469 N.W.2d 718, 719-20 (Minn. 1991), *and* Heath v. County of Aiken, 394 S.E.2d 709, 711 (S.C. 1990) (both following *Pierce v. Underwood*, 487 U.S. 552 (1988), in choosing standard of review under state statutes similar to federal statute addressed in *Pierce*).

disagree with one another about standards of review, and considerable disagreement has indeed occurred.[33] Such disagreement has been invited by the Court's acknowledgment that "when . . . the trial court determination is one for which neither a clear statutory prescription nor a historical tradition exists, it is uncommonly difficult to derive from the pattern of appellate review of other questions an analytical framework that will yield the correct answer" as to the standard of review.[34] Indeed, such disagreement has been almost inevitable, since the Court has expressly refused even to "attempt to discern or to create a comprehensive test" for selecting standards of appellate review.[35]

To be specific about the United States Supreme Court's recent decisions addressed in this Article, the Court beginning in 1996 handed down a series of four decisions purporting to clarify the scope of review of certain issues of mixed federal constitutional law and fact that arise in criminal appeals. In some of these four cases the Court replaced a mere assumption about a particular standard of appellate review with a holding,[36] and in the first of the four the Court

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[33] *See, e.g.*, United States v. Mask, 330 F.3d 330, 335 n.7 (5th Cir. 2003) (citing authorities illustrating circuit split on standard of appellate review of decision whether Fourth Amendment seizure occurred); *compare* United States v. Johnson, 256 F.3d 895, 901, 913 (9th Cir. 2001) (en banc) (opinion for majority of judges, stating that under *Ornelas* federal court of appeals must review de novo decision whether property was within home's curtilage, and citing authorities illustrating circuit split on the issue), *with id*. at 919 (opinion for Tashima, J., disagreeing that *Ornelas* requires court of appeals to discontinue review of curtilage decisions only for clear error). See generally 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.7 (2004) (collecting many conflicting federal and state decisions about standards of review of decisions of various Fourth Amendment questions of mixed law and fact).

Not only has disagreement been common, choices have seldom been explained. "[T]he choice between discretion and law is made ad hoc for every type of mixed question, ordinarily without explanation . . . ." Louis, *supra* note 18, at 1038.

[34] Pierce v. Underwood, 487 U.S. 552, 558 (1988).

[35] *See, e.g., id*. at 559 (stating that "no more today than in the past shall we attempt" such discernment or creation).

[36] *See infra* text accompanying note 91.

resolved a split among lower federal courts about a standard of review.[37]

The series of recent rulings began with *Ornelas v. United States*,[38] in which the Court resolved a split among the courts of appeals for various federal circuits. It held that an appellate court should[39] review de novo both a trial court's decision that the circumstances faced by police officers in a particular case had given them reasonable suspicion justifying their stopping and questioning persons suspected of crime, and the trial court's decision that the developing circumstances had later given the officers probable cause to perform a search without a warrant.[40] Since the federal court of appeals in this case had shown deference to the federal district court's decisions of these Fourth Amendment issues, the Supreme Court remanded the case to the court of appeals for its de novo review of these determinations.[41]

Six years later, in 2002, the Court in *United States v. Arvizu*[42] applied *Ornelas*, with the Supreme Court itself engaging in de novo application of the requirement of reasonable suspicion

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[37]Similar observations can be made about civil cases. For example, in Cooper Industries, Inc., v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001), the Court granted certiorari "to resolve confusion among the Courts of Appeals" on the standard for reviewing the constitutionality of awards of punitive damages, and prescribed the de novo standard. *Id*. at 431.

[38]517 U.S. 690 (1996).

[39]The text of this Article here uses the word "should" advisedly, for reasons explained below. *See infra* text accompanying notes 74,75.

[40]517 U.S. at 699. It is not surprising that a circuit split had arisen over the standard of review of decisions of these mixed questions, since the Court had reviewed such decisions on many occasions, sometimes affirming trial courts' decisions of these questions and sometimes reversing them, without expressly identifying the standard or standards of review the Court was using. *See, e.g.*, Alabama v. White, 496 U.S. 325 (1990) (on direct review reversing state appellate court's reversal of judgment of conviction, on ground that in Court's view officer had possessed reasonable suspicion and that trial court therefore had correctly denied motion to suppress, without expressly specifying Court's standard of review).

[41]517 U.S. at 700.

[42]534 U.S. 266 (2002).

for an investigative stop of a suspect to the circumstances under which the stop had occurred. The Court held that the federal court of appeals, in rejecting the federal district court's determination that reasonable suspicion had existed and in therefore reversing the judgment of conviction entered on the defendant's conditional guilty plea, had erroneously examined some of these circumstances in isolation from the others and had thereby understated the level of suspicion these circumstances had justified.[43] Conducting its own, independent application of the legal standard to all the relevant facts, the Supreme Court then concluded that the district court had correctly determined that the agent had possessed reasonable suspicion justifying the stop.[44] The Court therefore reversed the judgment of the court of appeals.

During the six years between the Court's *Ornelas* prescription of de novo appellate review of these two kinds of Fourth Amendment determinations and its own *Arvizu* exercise of such review, the Court relied on *Ornelas* to extend this prescription to two other issues of mixed law and fact that arise in criminal cases. First the Court's 1998 decision in *United States v. Bajakajian*[45] relied on *Ornelas*, in holding that it is appropriate[46] for a federal appellate court to review de novo a federal district court's decision that a particular forfeiture violates the Excessive

[43] *Id*. at 274-76.

[44] *Id*. at 277-78.

[45] 524 U.S. 321 (1988).

[46] The text of this Article here uses the word "appropriate" advisedly, as it used the word "should" above in describing the *Ornelas* decision, *supra* text accompanying note 39, for reasons explained below. *See infra* note 84 and accompanying text.

Fines Clause of the Eighth Amendment.[47] Applying the legal standard de novo to the facts of the case, the Court held that forfeiture of currency in the amount sought by the United States would be excessive and thus unconstitutional.[48]

Then in 1999 a plurality of Supreme Court justices in *Lilly v. Virginia*,[49] relying on *Ornelas*, expressed their view that the prescription of de novo appellate review should be extended from the Fourth and Eighth Amendment contexts described above to the Sixth Amendment issue whether a hearsay statement has sufficient indicia of trustworthiness to be admissible against a criminal defendant under the Confrontation Clause.[50] Reviewing an affirmed judgment of conviction and sentence on *certiorari* to the Virginia Supreme Court, this plurality of justices engaged in their own independent application of the legal standard to the facts of the case, and concluded that the state courts had violated the Sixth Amendment by admitting the challenged evidence.[51]

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[47] 524 U.S. at 336.

[48] *Id*. at 337.

[49] 527 U.S. 116 (1999).

[50] *Id*. at 136-37.

[51] *Id*. at 137-39. The question of how trustworthy a particular statement is under the circumstances has since become less important than it appeared when the Court decided *Lilly*. In 2004 the Court held in *Crawford v. Washington*, 124 S.Ct. 1354 (2004), that introduction against a criminal defendant of what it called "testimonial evidence," a category it postponed defining, violates the Sixth Amendment Confrontation Clause in the absence of an opportunity for cross-examination, regardless of how reliable the circumstances indicate the evidence is.

Though *Crawford* reduced the importance of that more substantive question of procedure (reliability of a statement) addressed in *Lilly*, the contrasting discussions in *Lilly* of the more procedural issue of procedure (the standard of appellate review of decisions as to Sixth Amendment reliability) are likely to remain almost as important as when they were written, for two reasons. First, when the Court finally tells us what "testimonial evidence" consists of, we may well learn that the Sixth Amendment admissibility of at least some kinds of evidence outside that category still depends on its indicia of reliability, and courts then will read the *Lilly* opinions when choosing a standard of appellate review of such reliability rulings. Second, some courts have already relied on *Lilly* in choosing de novo review of decisions of Sixth Amendment mixed questions other than reliability, such as (1) a decision that the prosecution's unsuccessful efforts to procure the attendance of a witness at trial were insufficient to warrant the

Unfortunately, the Supreme Court and particular justices wrote opinions in these four cases, described and evaluated in some detail below,[52] that at best left crucial questions unanswered and at worst were so cursory as to be little more than fiats. This misfortune has been compounded by the similarly deficient opinions of a number of state appellate courts, some of which are also described below, that subsequently have relied on one or more of these Supreme Court decisions in deciding quite a wide variety of matters.[53]

C. State Courts' Responses to Recent Supreme Court Decisions

Deficiencies in the opinions in these four Supreme Court cases have led state appellate courts to create a large body of questionable case law having significant consequences for persons charged with crimes and for public efforts to control crime. Neither the Supreme Court nor any of these state courts has yet given adequate consideration to all of the legal issues raised by the Court's new precedents. Due to the inadequacies of these Supreme Court and state opinions, the doctrine calling for de novo appellate review of decisions of mixed constitutional questions in criminal cases is being applied with breadth that is remarkable in at least four

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conclusion that the witness was "unavailable" for purposes of the Confrontation right, *see, e.g.*, People v. Cromer, 15 P.3d 243, 244, 247-50 (Cal. 2001), and (2) a decision that limiting a defendant's cross-examination of a prosecution witness did not violate the Sixth Amendment, *see, e.g.*, People v. Grimes, No. 240010, 2003 WL 21995214 (Mich. App. Aug. 21, 2003); People v. Bunton, No. 236335, 2003 WL 21508500 (Mich. App. July 1, 2003).

[52] *See infra* Parts III.A-D.

[53] *See infra* Part IV. Many opinions of federal courts of appeals are subject to similar criticisms. *See, e.g.*, United States v. Paradis, 351 F.3d 21, 24, 27-35 (1st Cir. 2003) (citing only *Ornelas* as support for its review of "the ultimate Fourth Amendment conclusions de novo"; reviewing in that fashion district court's decisions of mixed questions of reasonable expectations of privacy, propriety of purported protective sweep of premises, and attenuation of taint of Fourth Amendment violation; and reversing some of those decisions on Government's interlocutory appeal); United States v. Ball, 90 F.3d 260, 262 (8th Cir. 1996) (extending the rule of *Ornelas* from the mixed questions of probable cause and reasonable suspicion it expressly encompassed to the separate Fourth Amendment mixed question of exigent circumstances, rulings on which the court said it previously had reviewed only for clear error, without explanation except to say that *Ornelas* "instructs us" to do so). However, such federal appellate decisions are beyond the scope of this article, which focuses entirely on the consequences of this line of Supreme Court decisions for criminal prosecutions in state courts.

respects, all four of which are at least somewhat debatable, and some of which are probably unsound in whole or part. For the reader's convenience in distinguishing among these four points, just below a number introducing each and a key word or phrase in each appear in bold type.

First, some state appellate courts are assuming themselves bound to follow this doctrine of de novo appellate review, even though the Supreme Court has not yet stated expressly, nor otherwise eliminated substantial doubt, that in whole or part it is a constitutional doctrine and thus binding not only on federal reviewing courts but on **state appellate courts** as well.[54] **Second**, many state appellate courts are assuming that this doctrine applies to **every federal mixed question** of constitutional law and fact arising in criminal cases.[55] **Third**, some state appellate courts are assuming that these United State Supreme Court precedents govern the standard of review by state appellate courts of lower courts' decisions of issues of mixed **state law** and fact.[56] **Fourth** and finally, some state appellate courts are assuming that this doctrine governs their review even of trial courts' decisions that have favored criminal **defendants**.[57]

The state courts have made only few and inadequate attempts to explain their decisions on these points. In addition, so far there has been little scholarly commentary on any of these matters, and apparently none on some of the most important issues.[58]

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[54] *See infra* Part IV.A.

[55] *See infra* Part IV.B.

[56] *See infra* Part IV.C.

[57] *See infra* Part IV.D.

[58] *See, e.g.*, Craig Bradley, *The Middle Class Fourth Amendment*, 6 BUFF. CRIM. L. REV. 1123-24, 1131-34 & n.36, & 1149-50 (2003) (stating author's purpose as identifying the theme of the Supreme Court's decisions since

D. This Article's Treatment of the Subject

This Article begins to fill the need for such commentary. It first identifies deficiencies in the recent United States Supreme Court opinions prescribing de novo appellate review, deficiencies which invited these problems in the state courts.[59] The Article then describes and evaluates decisions of state appellate courts illustrating the resulting uncertainty and confusion concerning standards of appellate review of decisions of mixed questions of federal

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1995 on constitutional criminal procedure, discussing *Arvizu* and citing *Ornelas*, and raising the possibility of a pattern favoring either the defense or the prosecution, but not mentioning the issue of the Court's power to require use of de novo review in favor of appellants (most of whom in criminal cases are defendants) nor even addressing the scope and consequences of this new requirement); Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and* Arvizu, 47 Vill. L. Rev. 851, 895 (2002) (discussing application of *Ornelas* and *Arvizu* to state cases at length, and urging that reform should begin with "challenging *Ornelas* and *Arvizu*," without ever mentioning the issue of the power of the Court to require de novo appellate review in state courts); Roger W. Kirst, *Appellate Court Answers to the Confrontation Questions in* Lilly v. Virginia, 53 Syracuse L. Rev. 87, 92, 147-48 (2003) (undertaking to "examine the questions raised in *Lilly* and the answers that can be found in the first round of appellate cases after *Lilly*," analyzing numerous state appellate applications of *Lilly*, and describing extensive reliance by state courts on *Lilly* when using de novo review of such rulings, but failing to address or even identify the issue of the power of the Supreme Court to regulate state courts' standard of review of applications of *Lilly*); Jennifer Christianson, *The Future Implications of* Lilly v. Virginia, 55 U. Miami L. Rev. 891, 901-03, 905-08, 910-14, 917-23, 927-28 (2001) (mentioning the disagreement among the *Lilly* justices on the standard of appellate review, and analyzing state appellate applications of *Lilly* at length, but omitting to mention the issue of the Court's power to require state courts to conduct independent review); Jeffrey M. Grybowski, Note, *The Appellate Role in Ensuring Justice in Fourth Amendment Controversies*: Ornelas v. United States, 75 N.C. L. Rev. 1819 (1997) (discussing *Ornelas* at length, without addressing legal source of the requirement of de novo review).

One of the better commentaries on the recent Supreme Court decisions is in 5 LAFAVE, *supra* note 33, § 11.7. Professor LaFave addresses some of issues addressed in this Article. He also cites some noteworthy state-court decisions discussed herein, including *Guzman*, *see infra* text accompanying notes 176, 177, 178, 179, 180, 181, 182, 183, and *Brockman*, *see infra* text accompanying notes 164, 165, 166, 167,168. *See* 5 LAFAVE, supra note 33, n.92.7. However, understandably in a treatise on the Fourth Amendment, his focus is limited to the context of that amendment. Also, he does not question the source of the Supreme Court's power to impose any requirement of de novo review on state courts, and he treats summarily the issue of whether the *Ornelas* prescription of de novo review is, as he puts it, "constitutionally grounded," not even addressing the question of whether that prescription is an interpretation of the Fourth Amendment or of the Due Process Clause, or an example of constitutional common law. *Compare id*. nn.92.6 & 92.7 (relying only on *Bose Corporation* as authority for statement that "[t]he Supreme Court's rulings on standards of appellate review are sometimes constitutionally grounded and thus applicable to the states . . .," and immediately concluding that". . . the analysis [in *Ornelas*] certainly suggests that this is the case as to the *Ornelas* holding"), *with infra* note 120 (summarizing other commentators' discussions of scope of holding in *Bose Corporation*).

[59] *See infra* Part III.

constitutional law and fact.[60] Then the Article offers a tentative analysis of possible bases for a Supreme Court mandate that state courts use de novo review, especially the Due Process Clause. This analysis includes recapitulations of others' criticisms of the Court's related regulations of state-court appeals in its cases that imposed a right to counsel and a specified test of harmlessness, and the author's original criticism of the Court's requirement that state appellate courts apply a prescribed test of retroactivity.[61] Then the Article considers to what kinds of mixed questions the requirement of de novo review may apply.[62] Next, the Article addresses the practical significance of these doctrinal problems.[63]

Finally, the Article concludes with suggestions of ways in which the United States Supreme Court in the future could avoid inviting such problems, and state appellate courts could avoid compounding them.[64] In brief summary, each time the Supreme Court announces a rule affecting state appellate practices, it should explain specifically and thoroughly why it has the authority to do so. The Court also should be explicit and specific about the content and scope of applicability of each prescription of a standard of appellate review or other rule of appellate procedure it chooses to announce. In addition, however well or badly the Court conforms to that expectation, state courts should make their own decisions about standards of review thoughtfully and independently, within whatever latitude the Supreme Court has not expressly taken from

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[60] *See infra* Part IV.

[61] *See infra* Part V.A.

[62] *See infra* Part V.B.

[63] *See infra* Part VI.

[64] *See infra* Part VII.

them. Neither the Supreme Court nor many state courts are performing nearly at these standards. Doing so could have significant benefits for constitutional doctrine and enormous consequences for the outcomes of criminal proceedings.

III. Recent Supreme Court Decisions Concerning Standards of Review

A. *Ornelas v. United States*

The first of these four recent decisions of the United States Supreme Court contained the most extensive and authoritative explanation of the doctrine it announced. In resolving a circuit split over the standard of appellate review, the Court in *Ornelas v. United States*[65] provided two reasons for de novo review of trial courts' determinations that officers had the reasonable suspicion and probable cause the Fourth Amendment requires at specified stages of warrantless investigative conduct.

First, the Court explained, appellate courts performing de novo review can create more detailed and more consistent law concerning the content of these two standards; deferential review would be less informative to lower courts and, perhaps more important, to police officers and their trainers and supervisors.[66] Second, a de novo standard for reviewing on appeal police officers' decisions about probable cause for warrantless searches provides a sharp contrast with the extremely deferential standard by which first trial courts and then appellate courts are allowed

[65] 517 U.S. 690 (1996).

[66] *Id*. at 697-98. At least one authority has divided what I summarize as the first of these two reasons into three, creating a total of four. *See* 5 LAFAVE, *supra* note 33, § 11.7 at __ (identifying the *Ornelas* Court's four reasons as (1) contribution to a unitary system of law, (2) appellate control and clarification of legal principles, (3) unification of precedent and guidance of law enforcement officers, and (4) preserving officers' incentive to seek warrants). Another division of the Court's analysis, this one into three reasons, appears in a judicial opinion. *See* United States v. Erving L., 147 F.3d 1240, 1246 (10th Cir. 1998).

to review the decisions of magistrates issuing search warrants that probable cause exists.[67] This contrast, the Court reasoned in *Ornelas*, desirably reinforces the incentives provided by other law[68] for an officer in doubt concerning probable cause to seek a magistrate's approval, before invading a person's interests in liberty, privacy or property by conducting a search or seizure.[69]

These reasons are at least plausible, though there is some room to doubt each of them, as did Justice Scalia, dissenting alone in *Ornelas*. The first reason can be discounted with the observation that the meanings of the reasonable-suspicion and probable-cause tests are susceptible only to so much detailed and consistent development.[70] The second reason can be discounted by questioning the incremental incentive to seek a warrant when a police officer already knows that other aspects of Fourth Amendment law provide huge incentives to seek warrants whenever possible.[71]

Evaluating these competing arguments is not part of the function of this Article, however. Instead, I wish to point out the Supreme Court's failure to identify the legal source of its prescription of the de novo standard of review, and its failure to define clearly that standard's content and the scope of its applicability, and I also wish to address the consequences and implications of these failures.

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[67] 517 U.S. at 699.

[68] *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984) (creating exception to Fourth Amendment exclusionary rule for evidence seized under invalid warrant, when police in reasonable good faith rely on warrant).

[69] 517 U.S. at 699.

[70] *Id*. at 701-04 (Scalia, J. dissenting).

[71] *Id*. at 704-05 (Scalia, J. dissenting). Justice Scalia also faulted the majority for internal inconsistency, since its de novo standard of appellate review incorporated some deference to decisions both of police officers in the field and of trial courts. *Id*. at 705 (Scalia, J. dissenting). None of Justice Scalia's three criticisms of the majority's decision is essential to the arguments made in this Article.

With regard to the source of this legal requirement, one first observes that *Ornelas* was a federal prosecution. Consequently, it is conceivable that the Court in deciding this case deemed the scope of appellate review to be dictated either by federal constitutional law or by other federal law, such as the Supreme Court's so-called "supervisory power" or "supervisory authority" to prescribe rules of procedure to govern the lower federal courts.[72] The Court in *Ornelas* failed expressly to disclose from which legal source this new doctrine arose, despite the Court's history of clarity in identifying the legal sources of certain standards of procedure the Court had prescribed in some of its previous decisions.[73]

Attempts to parse the Court's language concerning the legal basis of the rule are complicated a bit by the bizarre fact that the Court, after expressing the reasons for de novo review described above, decided in this regard only that "*as a general matter* determinations of reasonable suspicion and probable cause [for seizures and searches without warrants] *should* be reviewed de novo on appeal."[74] "Should," not must? "As a general matter," not always? Such a qualified and precatory designation of a procedure to be followed by appellate courts is surprising enough if based only on the Supreme Court's supervisory power and if thus directed only to lower federal courts; it would seem astonishing if based on the United States Constitution and thus directed also to every state appellate court in the country.

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[72] *See generally* 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.6(i) (2d ed. 1999) (describing genesis, development, and current status of supervisory authority).

[73] An example of a clear disclosure of the Court's view that a new rule was an interpretation of a specific constitutional provision, though with an inadequate rationale for that interpretation, was *Ashe v. Swenson*, 397 U.S. 436 (1970) (holding that collateral estoppel is part of a state-court defendant's protection under the Fifth Amendment Double Jeopardy Clause, as incorporated in the Fourteenth Amendment). A comparable example of the Court's clarity in resting a decision expressly on its supervisory power is *McNabb v. United States*, 318 U.S. 332 (1943).

[74] 517 U.S. at 699 (emphasis added).

The Court's use of these soft phrases on this occasion may have been careless or calculated vagueness, rather than a signal that the specification of de novo review of decisions of these Fourth Amendment questions is to be optional or subject to exceptions, in view of the disposition of *Ornelas*. The Court vacated the judgments and "remanded the case to the Court of Appeals to review de novo the District Court's determinations that the officer had reasonable suspicion and probable cause in this case,"[75] making the mandatory nature of the new requirement of de novo review rather clear, at least for that lower federal court under the particular circumstances of that case.

Moreover, the rest of the Court's opinion arguably lends itself to the conclusion that the Court viewed its prescription of this standard for appellate review as dictated by the United States Constitution and as mandatory. Both of the Court's reasons for the prescription are based on constitutionally grounded policies.

That is, first, the Fourth Amendment requirements of reasonable suspicion and probable cause apply nationwide, and will to a greater degree mean the same thing throughout the country if given relatively detailed and consistent interpretations and applications. This will enable police officers everywhere to know better the rules governing warrantless searches and seizures, so individuals' constitutional rights should be more consistently respected. Likewise, adding de novo appellate review of trial courts' decisions that police officers had Fourth Amendment justifications for their warrantless activities, on top of the existing legal incentives for officers' obtaining warrants and otherwise complying with constitutional requirements, serves the policies on which this constitutional protection is grounded. Thus, despite the qualified and tentative

[75] *Id*. at 700.

terms in which the Court stated the new rule, arguably both of the stated rationales for the rule tend to support the conclusion that this is a mandatory rule of constitutional law.

Turning from the question of the legal source of the *Ornelas* doctrine to that of the scope of its applicability, the rationales tending to indicate that de novo review of decisions of these Fourth Amendment mixed questions is constitutionally required by policies rooted in that amendment also tend to limit the scope of the requirement to the Fourth Amendment context. However, parts of the Court's explanation of one of those rationales suggest that this doctrine may extend to mixed questions of law and fact arising under other constitutional amendments.

For example, the Court described "reasonable suspicion" and "probable cause" as "commonsense, nontechnical conceptions that deal with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"[76] The Court explained that "as such, the standards are 'not readily, or even usefully, reduced to a neat set of legal rules.'"[77] In these respects the Court contrasted these Fourth Amendment standards with what the Court had in *Illinois v. Gates*[78] called the "finely-tuned standards" of proof beyond a reasonable doubt or by a preponderance of evidence.[79] It described reasonable suspicion and probable cause as "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed."[80] These explanations are also arguably applicable to

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[76] *Id*. at 695.

[77] *Id*. at 695-96.

[78] 462 U.S. 213 (1983).

[79] *Id*. at 235.

[80] 517 U.S. at 696.

various other federal constitutional concepts and standards, so could later be viewed as supporting expansion of de novo appellate review beyond the Fourth Amendment context to other mixed questions of federal constitutional law and fact with similar characteristics. For these reasons, the scope of this *Ornelas* holding, like its source, appeared debatable when the decision was handed down.

B. *United States v. Bajakajian*

Chronologically, the second of these four decisions of the Supreme Court was *United States v. Bajakajian*.[81] The court in this case relied on *Ornelas* to extend the requirement of de novo appellate review to the issue of a forfeiture's excessiveness under the Eighth Amendment, and then conducted such review for itself. However, this decision shed virtually no light on the legal source of the prescription of this standard of appellate review, and contained no explicit discussion of the scope of its applicability.

The Court addressed the scope of appellate review only in a footnote. Even there, in rejecting the defendant-respondent's call for use of the abuse-of-discretion standard, the Court wrote only that "the question whether a fine [to which the Court held this forfeiture equivalent] is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context de novo review of that question is appropriate," citing *Ornelas* with only the introductory signal "see."[82] Only five justices joined the opinion for the Court, but the four dissenters expressed no disagreement with the majority's choice of the standard of

[81] 524 U.S. 321 (1998).

[82] 524 U.S. at 336 n.10.

appellate review.[83]

Again the Court chose not to state expressly the source of this rule of appellate procedure. This case, like *Ornelas*, had begun in federal court, so again the decision as to the scope of appellate review could have been based either on the supervisory power or on the Constitution. And again the Court may have sowed a seed of doubt that de novo review was constitutionally required by using a weak word in writing that de novo review is "appropriate," instead of a clearly mandatory word like "necessary" or "required," much as it had done by writing in *Ornelas* that courts "should" employ de novo appellate review.[84]

As for the scope of applicability of the prescription of this standard of review, its extension from the Fourth Amendment to the Eighth Amendment context tells us only that the *Ornelas* rationales specific to the former amendment have not deterred the Court from relying on *Ornelas* in the context of another constitutional amendment. The Court's cursory explanation in *Bajakajian* for this reliance left one uncertain about possible further extensions of the prescription of de novo review.

C. *Lilly v. Virginia*

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[83] *Id*. at 344-56 (Kennedy, J., dissenting).

[84] The Court later interpreted *Bajakajian*, in *Cooper Industries, Inc., v. Leatherman Tool Group, Inc*., 532 U.S. 424, 435 (2001), as noting that the courts of appeals "must" review proportionality determinations de novo. The very next paragraph of the Court's opinion in *Cooper Industries*, however, summarized the *Ornelas* holding as being that trial judges' determinations of reasonable suspicion and probable cause "should" be reviewed de novo on appeal. *Id*. at 436. The *Cooper Industries* Court provided no reason either for shifting from the precatory word "appropriate" to the mandatory word "must" concerning *Bajakajian*, nor for persisting in using the precatory work "should" concerning *Ornelas*, and gave the impression of inattention to such distinctions when it linked the two paragraphs with the word "likewise." *Id*. Further evidence of the *Cooper Industries* Court's inattention to the matter is the fact that the Court in *Cooper Industries* twice described its holding in that case as being that courts of appeals "should" use de novo review when passing on the constitutionality of punitive damages awards, *id*. at 436, 443, but at another point wrote that "the constitutional issue merits *de novo* review," id. at 431, and clearly meant to create a mandate since it remanded the case to the court of appeals for its determination of the constitutionality of the award "under the proper standard." *Id*. at 431.

Of the four recent Supreme Court decisions this Article primarily addresses the third, *Lilly v. Virginia*,[85] probably is hardest to decipher in the respect considered in this Article. This difficulty arises in part from the fact that there was no opinion for the Court concerning the standard of appellate review of resolutions of the particular mixed question of Sixth Amendment law and fact on which the decision seemed to depend.[86]

That need not have been an insuperable obstacle to understanding the *Lilly* Court's treatment of the scope of appellate review. After all, careful analysis of several dissonant opinions by various justices in a case without an opinion for the Court can on occasion produce a firm conclusion about the view of a majority of the justices on a particular issue.[87] Nevertheless, an attempt to make sense of the several *Lilly* opinions on this subject is further impeded by the ways in which the various opinions were written. That is most regrettable, because the genesis of *Lilly* made it a particularly apt vehicle for clarifying the basis and scope of the expanding requirement of de novo appellate review.

In contrast with the other three recent Supreme Court cases under discussion, *Lilly* arose

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[85] 527 U.S. 116 (1999).

[86] *Id*. at 135-37 (Part V of opinion of Justice Stevens, joined by Justices Souter, Ginsburg and Breyer). In my text I write only that the decision "seemed" to depend on resolution of that mixed question, because in the fragmented opinions in *Lilly* only four justices joined part V of the plurality's opinion, the part in which the plurality addressed the Sixth Amendment question whether the extrajudicial statements had sufficient circumstantial guarantees of trustworthiness. Justices Scalia and Thomas wrote opinions, both concurring in part and concurring in the judgment, in which for different reasons neither deemed it necessary to address that question. *Id*. at 143-44. For himself and two other justices, Chief Justice Rehnquist wrote an opinion concurring in the judgment, disagreeing that appellate courts should independently review a trial court's decision that guarantees of trustworthiness meet Sixth Amendment standards, and favoring a remand for deferential review of that decision by the state appellate court. *Id*. at 144-49.

[87] *See, e.g.*, 1 LAFAVE, *supra* note 72, § 2.10(e), at __ (analyzing various opinions in *Teague v. Lane*, 489 U.S. 288 (1989), in which there was no opinion for the Court on the issue of retroactivity, and concluding that ". . . seven justices expressed agreement with the view that, subject to certain exceptions, a new ruling should not be applied on a habeas review of a conviction that had been final at the date of that new ruling").

from a proceeding begun in a state court, rather than a federal forum. The Court disposed of the case when it reviewed on *certiorari* to the Virginia Supreme Court the latter court's affirmance on direct review of a judgment of conviction and sentence entered by a Virginia trial court. The state-court genesis of the case might have made it an occasion for announcing a federal constitutional right of defendants to de novo appellate review at least of decisions of this issue of mixed Sixth Amendment law and fact, and perhaps of other federal constitutional mixed questions, if that were the Court's view.

However, a majority of the Court were able to agree only on a description of the facts and procedural history of the case, on the existence of jurisdiction in the U.S. Supreme Court, on the conclusion that admission of the challenged evidence violated the Sixth Amendment Confrontation Clause, and on the desirability of remanding the case to the state courts for a determination of whether the error was harmless. Concerning the issue addressed in this Article, the required standard of appellate review of mixed questions of federal constitutional law, there was considerable disagreement and even more ambiguity of expression.

The four-justice plurality cited the *Ornelas* decision concerning de novo appellate review of Fourth Amendment decisions about reasonable suspicion and probable cause for warrantless police investigative activity,[88] and wrote in favor of extending that doctrine to the context of the Sixth Amendment.[89] The plurality opined that "courts should independently review" the adequacy of indicia of trustworthiness of hearsay statements in applying the Sixth Amendment's

[88]527 U.S. at 136.

[89]*Id*. at 137.

Confrontation Clause.[90]

The plurality did provide some explanation for this conclusion. These justices wrote that the Court's prior Sixth Amendment opinions had "assumed, as with other fact-intensive, mixed questions of constitutional law, that '[i]ndependent review is . . . necessary . . . to maintain control of, and to clarify, the legal principles' governing the factual circumstances necessary to satisfy the protections of the Bill of Rights."[91] In support of that statement, the plurality merely cited and quoted *Ornelas*, with no introductory signal and with only the bare parenthetical summary of its "holding that appellate courts should review reasonable suspicion and probable-cause determinations *de novo*."[92]

These justices then further explained that Sixth Amendment trustworthiness of a hearsay statement does not depend on the hearsay declarant's in-court demeanor, to judge which a trial court would be better situated than an appellate court, or on "any other factor uniquely suited to the province of trial courts."[93] Based on that analysis, the plurality concluded that "when deciding whether the admission of a declarant's out-of-court statements violates the Confrontation Clause, courts should independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the Clause."[94]

What are the legal basis, content, and scope of application of this pronouncement? With

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[90] *Id.*

[91] *Id.* at 136.

[92] *Id.*

[93] *Id.* at 137.

[94] *Id.*

regard to its legal basis, the plurality provided no explicit identification of the source of the Court's power to prescribe such a standard of appellate review. Part of the plurality's rationale, the relative unimportance for applications of this Sixth Amendment doctrine of witness demeanor or other factors uniquely suited for trial courts, was not specific to constitutional policies. However, another part of the rationale, the necessity of independent appellate review to clarify and control protections found in the Bill of Rights, was rooted in the Constitution.

For another clue to the legal source of this position, the plurality in this case used the soft word "should,"[95] much as the Court had done in both *Ornelas* and *Bajakajian*. This was even more surprising when the Court reviewed the state-court conviction in *Lilly* than when it reviewed those two federal judgments. "Should" is not the mandatory kind of word one expects to find, when reading an opinion supporting the U.S. Supreme Court's reversal of a judgment of a state supreme court.

One therefore could read this soft word to mean that this designation of de novo review is just advice and, since the Supreme Court does not sit to advise state courts, the designation is addressed (in this opinion about review of a state case!) only to the Court itself and perhaps to other federal appellate courts. On this interpretation of the language, though state trial courts *must* comply with the Sixth Amendment when ruling on the admissibility of evidence, the Unites States Supreme Court and other *federal* appellate courts merely *should* employ de novo review, and *state* appellate courts are perfectly free to chose any standard of appellate review of these questions.

However, the plurality thrice wrote about the need for appellate "courts" in general to

[95] *Id.*

conduct independent review, never expressly modifying this word to cover just federal courts.[96] Thus the plurality implicitly declined to tell the reader whether the prescription applies only to *federal* reviewing courts such as the Supreme Court. The plurality almost seemed to invite readers to interpret the prescription as applicable to all appellate courts, including those created by and operating within state governments, but if so it chose not to make this explicit.

It is difficult to reconcile these conflicting signals about the legal basis on which the plurality sought to rest its prescription of de novo review. One recalls that in *Ornelas* the nature of the Court's remand, instructing the lower appellate court to conduct de novo review, probably converted the precatory "should" to a command, if only a command covering a single case and addressed to a single lower federal court.[97] This may also have increased the likelihood that a constitutional requirement of de novo review, not a supervisory rule, was being announced; a precatory doctrine of appellate procedure created under the Court's supervisory power would have seemed more plausible than a precatory doctrine deemed to flow from the Constitution.

No such clue appears in the *Lilly* remand, however, because of the contrasting ways in which the Court remands cases to federal and to state appellate courts. The Court remanded *Ornelas* to a federal court of appeals, so was entitled to and did give that court specific instructions. In contrast, the Court's custom is to remand cases to state courts with the more open-ended phrase, "for further proceedings not inconsistent with this opinion."[98] Since *Lilly*

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[96] *Id*. at 136-37.

[97] *See supra* text accompanying note 75.

[98] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 660 (1961). See generally Note, *Individualized Criminal Justice in the Supreme Court: A Study of Dispositional Decision Making*, 81 HARV. L. REV. 1260, 1277 (1968) (stating that ". . . the Court has traditionally left the state free to complete the adjudicatory process in any manner 'not inconsistent' with its opinion").

had come to the Supreme Court from a *state* appellate court, and since there was only an incomplete opinion for a majority of the Court, in this instance the Court merely reversed and remanded to the Virginia Supreme Court "for further proceedings,"[99] without even a direction that the state court avoid inconsistency with whatever views one might attribute to five or more justices of the Supreme Court after reading their fragmented opinions. Thus, after reading the terms of this remand and the various opinions addressing the standard of review, the state supreme court was left to wonder whether in future cases it and other state appellate courts "should" (or even must) conduct de novo review of decisions of this Sixth Amendment mixed question, or whether only *federal* reviewing courts "should" (or must) do so.

In any event, the *Lilly* plurality saw no need for the state supreme court, on remand from the United States Supreme Court, to conduct further de novo review of the trial court's decision of the Sixth Amendment mixed question presented in that case. These four justices rejected the view of the posture of the case held by the three justices concurring in the judgment, the view that the mixed question was not properly before the United States Supreme Court since the state supreme court had not applied the Sixth Amendment test to the facts of the case.[100] The plurality decided instead that the Virginia Supreme Court's thorough application of a substantially identical test of state law to the same facts was an adequate substitute for application of the Sixth Amendment, permitting the United States Supreme Court itself to review de novo the state appellate court's previous de novo decision of the cognate question.[101] This the plurality then

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[99] 527 U.S. at 140.

[100] *See id*. at 148-49 (opinion of Rehnquist, C.J., concurring in judgment).

[101] *Id*. at 135 n.6.

proceeded to do, concluding that the trial and appellate courts had erred.[102] Only a decision about harmlessness of the error remained to be made by the state court on remand.

On this view of the case, it was not necessary for the plurality to decide whether the Constitution had required the Virginia Supreme Court to review the state trial court's decision de novo. In sum, the legal basis for the prescription of this standard of appellate review remained quite unclear after *Lilly*.

Chief Justice Rehnquist wrote an opinion concurring in the judgment, for himself and two other justices. As I wrote above, they thought the issue of the scope of appellate review was not presented since, on their view of the record, the state trial and appellate courts had not applied that Sixth Amendment test to the facts of the case.[103] Nevertheless, they expressly disagreed with the plurality's conclusion "that appellate courts should independently review the government's proffered guarantees of trustworthiness" under Sixth Amendment law.[104]

They explained that they considered deference to trial courts' decisions of this mixed question more appropriate because, on this mixed question of law and fact, "the mix weighs heavily on the 'fact' side."[105] They further explained: "We have said that 'deferential review of mixed questions of law and fact is warranted when it appears that the district court is better positioned' than the appellate court to decide the issue in question or that probing appellate

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[102] *Id*. at 137-39.

[103] *Id*. at 148-49.

[104] *Id*. at 144 (opinion of Rehnquist, C.J., concurring in judgment).

[105] *Id*. at 148.

scrutiny will not contribute to the clarity of legal doctrine."[106] In the view of these justices, under those criteria trial courts' decisions of this particular Sixth Amendment question should be reviewed with deference.

With four justices calling for de novo appellate review of decisions of this Sixth Amendment issue and three for deference to trial courts, one turns to the separate opinions of Justices Scalia and Thomas, each concurring in part and concurring in the judgment, for signs that a majority conclusion was reached on this issue. Scalia did not address the standard of review, apparently because he deemed introduction of the evidence in this case a "paradigmatic" and "clear" Sixth Amendment violation,[107] the standard of appellate review of which was therefore inconsequential. However, he had dissented in *Ornelas*, writing that it was "unwise to require courts of appeals to undertake the searching inquiry" that de novo review requires into the Fourth Amendment questions there presented.[108] It seems somewhat unlikely, therefore, that he would have approved of the *Lilly* plurality's extension of that precedent to the Sixth Amendment context.[109]

Justice Thomas's separate opinion in *Lilly*, like Scalia's, did not address the standard of appellate review, since he expressed disagreement with the plurality's broad interpretation of the Sixth Amendment and also agreed with the dissent's view that the state courts had not applied the

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[106]*Id*. at 149 (quoting the Court's opinion in *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991)).

[107]*Id*. at 143.

[108]517 U.S. at 700.

[109]In *Bajakajian*, Scalia had joined a dissent not addressing the standard of appellate review. 524 U.S. at 344-56 (Kennedy, J., dissenting).

constitutional standard to the facts of the case.[110] However, Thomas had joined the Court's opinion in *Ornelas*,[111] and he had written for the Court when in *Bajakajian* it had extended de novo review from the Fourth Amendment context to that of the Eighth Amendment.[112] Thus there is at least a good chance that he would have approved the *Lilly* plurality's view that this standard of appellate review should be further extended to the context of the Sixth Amendment.

Even after these attempts to understand the various *Lilly* opinions and the Court's opinions in the previous two cases under discussion, it seems unclear whether the plurality's prescription of de novo review would be a requirement of federal constitutional law, or a doctrine governing only review conducted by *federal* courts of decisions made by other federal and by state courts. Turning from that issue of the legal source of this prescription to the issue of its content, here, as I wrote above,[113] precatory language was not converted into a command by a remand for another appellate court's de novo review, so it is conceivable that the Lilly plurality considers such review merely something an appellate court, in the language of the *Ornelas* Court, "should" do "as a general matter."

Finally, as for the scope of applicability the *Lilly* plurality would assign to the prescription, the author of the opinion wrote that independent review is necessary of "fact-intensive, mixed questions of constitutional law."[114] The plurality quoted *Ornelas* as to the

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[110]527 U.S. at 143-44.

[111]517 U.S. at 690.

[112]524 U.S. at 324.

[113]*See supra* text accompanying notes 98, 99.

[114]527 U.S. at 136.

contribution such review can make to appellate courts' clarity and control of federal constitutional protections, and relied on the unimportance for application of this Sixth Amendment test of a person's "in-court demeanor . . . or any other factor uniquely suited to the province of trial courts."[115] These explanations, combined with those provided by the Court in *Ornelas*, tend to support expansion of the prescription of de novo beyond the specific mixed questions presented in *Ornelas, Bajakajian* and *Lilly* to various other constitutional issues, though not necessarily to every mixed question of federal constitutional law that arises in criminal cases.

D. *United States v. Arvizu*

The Court's decision in *United States v. Arvizu*,[116] the most recent of these four Supreme Court cases, added little if anything to one's knowledge of the source or scope of the prescription of de novo appellate review. In *Arvizu*, which like *Ornelas* was a federal prosecution, the Court merely adhered to and applied for itself the *Ornelas* requirement of de novo appellate review of a trial court's finding of reasonable suspicion for a warrantless stop of a suspect.[117]

E. Context of Supreme Court's Opacity on This Subject

The Court's consistent failure in the four cases just described to be explicit about the legal source of the requirement of de novo review is especially noteworthy for two reasons. First, twelve years before the Court in its 1996 *Ornelas* decision launched this program of changing or clarifying standards for reviewing decisions of mixed questions of federal constitutional law and

[115] *Id*. at 137.

[116] 534 U.S. 266 (2002).

[117] *Id*. at 275-78.

fact in criminal cases, the Court in *Bose Corporation v. Consumers Union of United States, Inc.*,[118] had mandated de novo review of decisions of the mixed question of actual malice in civil cases governed by the First Amendment doctrine of *New York Times v. Sullivan*,[119] and in *Bose Corporation* the Court had been explicit that the Constitution was the source of the mandated standard of review.[120] The Court showed in *Bose Corporation* that of course it is capable of adverting to and resolving at least in general terms the issue of the source of such a rule of appellate procedure.

Second, by the time various justices in *Lilly* disagreed with one another about a new requirement of de novo review in criminal cases, reported decisions in various states had made it clear that state appellate courts disagreed among themselves as to whether the *Ornelas* requirement of de novo review was a constitutional ruling applicable to state appellate courts, or only an exercise of the Supreme Court's supervisory power over lower federal courts.[121] Thus the Court had shown that it knew how to be explicit on this subject, and various state courts had shown that explicit communication was needed. Under these circumstances, the Court's persistent silence in these four criminal cases as to the legal source of the requirements of de

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[118]466 U.S. 485 (1984).

[119]376 U.S. 254 (1964).

[120]The Court in *Bose Corp*. did not attempt to identify the constitutional source of its own power to constitutionalize such a rule of appellate procedure, nor even to define the scope of the rule. *See, e.g.*, Allen & Pardo, *supra* note 26, at 1787 (stating that in *Bose Corp*. "the Court did not explain why the 'importance' [of the constitutional issue before it] does not extend to all constitutional issues"); Monaghan, supra note 24, at 230-39 (interpreting the *Bose Corp*. Court's rationale for independent review as based entirely on the First Amendment, but not easily confined to that context). Still, the Court did in *Bose Corp*. what it failed to do in each of the four decisions on which this Article mainly focuses; it identified the mandate of de novo review as a constitutional requirement.

[121]*See infra* Part IV.A.

novo review appears quite remarkable.

IV. State Appellate Courts' Responses to Recent Precedents

A. Decisions to Follow the Supreme Court

Of the four categories of questionable applications, summarized above,[122] that state appellate courts have made of the recent Supreme Court precedents on de novo review, the state courts' decisions that they are bound by these precedents present probably the most analytically difficult issue. It certainly is also the most fundamental of the four issues, for the following reason.

Suppose that we had an authoritative and thorough explanation, for example, that state courts indeed are bound to employ de novo appellate review, that this requirement is an interpretation of the Fourteenth Amendment's Due Process Clause, and that a set of rather specifically stated reasons support this interpretation of due process. This explanation probably would shed much light on each of the other three issues, (1) which mixed questions of federal constitutional law and fact are covered by this requirement of de novo review and which are not, (2) whether due process similarly requires de novo review of some or all kinds of decisions of mixed state law and fact, and (3) whether due process requires that prosecutors too get the benefit of de novo appellate review.

Because of the difficulty and fundamental nature of the issue of the legal basis for the Supreme Court's requiring de novo review by state appellate courts, this Article will devote disproportionate space here to description of state courts' various treatments of this issue, and

[122] *See supra* Part II.C.

below to analysis of this issue,[123] and less space to each of the other three questionable state-court applications of the Supreme Court's recent precedents.

Already, many state appellate courts have undertaken de novo review of lower courts' decisions of various mixed questions of federal constitutional law and fact in reliance on one or more of the Supreme Court precedents discussed above. When so doing, a number of state courts have indicated at least fairly clearly that they consider themselves bound by federal law to do so, though without questioning the source of the Supreme Court's power so to bind state courts. Some others have simply followed these precedents without indicating whether they deem the precedents binding or only persuasive authority. Just a few state courts or judges have expressed doubts as to whether state appellate courts must follow the Supreme Court concerning de novo review. Each of these three alternative treatments of the matter is discussed in turn just below.

1. State Courts Deeming These Precedents Binding

Courts of about ten states have indicated rather clearly that they consider themselves obligated under federal law to use this standard of review. For example, in *State v. Campbell*[124] the Rhode Island Supreme Court affirmed a trial court's conclusion that the defendant's statements to police were voluntary and thus admissible in evidence consistently with the Fifth Amendment, writing that "[o]ur prior cases followed a standard of review on mixed questions of law and fact that has now been declared erroneous in *Ornelas*."[125] Those prior cases had

[123] *See infra* Part V.A.

[124] 691 A.2d 564 (R.I. 1997).

[125] *Id*. at 569.

reviewed decisions concerning voluntariness under the "deferential"[126] standard that the trial court's conclusion as to voluntariness must be "clearly erroneous."[127] However, in *Campbell* the court quoted the *Ornelas* Court's rationales that appellate courts should curb inconsistent decisions of trial judges and should control and clarify legal principles, and wrote that "[t]his Court will review *de novo* . . . mixed questions of law and fact insofar as those issues impact on constitutional matters, pursuant to *Ornelas*."[128]

Another state court considering itself bound to follow *Ornelas* on the standard of appellate review is the Maryland Court of Special Appeals. In *Jones v. State*[129] the court decided two probable-cause issues de novo with this explanation of its lack of deference to the trial court (and to the police officer who had initially determined that probable cause existed):

> *Ornelas* modifies this State's existing law in a very subtle, yet important, manner. . . .
>
> . . . [Under prior state law], . . . when reviewing an officer's "on the street" determination of probable cause, an appellate court's task [was] to decide whether the officer had a substantial basis for concluding that probable cause existed. . . . *Ornelas* . . . holds that a reviewing court does not extend this sort of deference to the officer, but *must* make its own *de novo* determination of whether probable cause existed in light of the not clearly erroneous first-level findings of fact and assessments of credibility.[130]

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[126]State v. Hightower, 661 A.2d 948, 961 (R.I. 1995) (using "deferential" standard of review in affirming trial judge's conclusion that statements were voluntary).

[127]State v. Garcia, 643 A.2d 180, 188-89 (R.I. 1994) (reciting the "clearly erroneous" standard, affirming conclusion that statement was voluntary, and writing that "[n]othing in our review of the record indicates that the trial justice's ruling was clearly wrong").

[128]691 A.2d at 569. Remarkably, the Rhode Island Supreme Court later went on to extend the requirement of de novo appellate review to decisions of mixed questions of federal and state constitutional law and fact arising in civil actions, simply quoting from *Campbell*'s reliance on *Ornelas*. *See* Foley v. Osborne Court Condominium, 724 A.2d 436, 439 (R.I. 1999).

[129]681 A.2d 1190 (Md. Ct. Spec. App. 1996).

[130]*Id*. at 1195 (emphasis added).

The Nebraska Supreme Court showed almost as clearly that it deems itself bound by the *Ornelas* prescription of de novo review, by writing in *State v. Konfrst* :[131]

> In light of the U.S. Supreme Court's decision in *Ornelas* . . ., the traditional clearly erroneous standard of review of a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search is no longer applicable. The clearly erroneous standard has now been supplanted by a two-stage standard in which the ultimate determinations of reasonable suspicion and probable cause are reviewed de novo . . . .[132]

South Dakota provides another example. That state's supreme court in *State v. Hirning*[133] simply cited *Ornelas* and wrote that "[t]oday we modify our standard for reviewing decisions on warrantless searches and seizures. Our past standard -- abuse of discretion -- conflicts with the current Fourth Amendment analysis employed by the United States Supreme Court."[134]

A final example I shall describe in this text, of a court of yet another state indicating rather clearly that it considers itself bound by a Supreme Court precedent to review a trial court's decision of a mixed question of federal constitutional law and fact de novo, is the Indiana Court of Appeals' decision of *D.D. v. State*.[135] Less than six weeks after the Supreme Court had decided *Ornelas*, the majority of the *D.D.* court, reversing a trial court's denial of a motion to suppress evidence found during a warrantless search, began by reciting the boilerplate description of the standard of review it had used previously in such cases: "The trial court has

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[131]556 N.W.2d 250 (1996).

[132]Id. at 253-54, 258. The court used precisely the quoted language both in the syllabus by the court on pages 253-54 and in the body of its opinion on page 258.

[133]592 N.W.2d 600 (S.D. 1999).

[134]*Id*. at 603.

[135]668 N.E.2d 1250 (Ind. Ct. App. 1996).

broad discretion in ruling on the admissibility of evidence, and we will not disturb its decision absent a showing of an abuse of that discretion."[136] After describing the circumstances under which the search had occurred and concluding that the searching officer had lacked probable cause, however, the majority then wrote:

> Contrary to the dissent's assertion, we need not defer . . . to the trial court's conclusion that Officer Green possessed probable cause. In *Ornelas v. United States* . . . the Supreme Court recently held . . . that determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal. . . . The Court reasoned that de novo appellate review "tends to unify precedent and will come closer to providing law enforcement officers with a defined 'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified . . . .'" . . . Under our de novo standard of review, we conclude that Officer Green lacked probable cause . . . .[137]

The dissenting judge's assertion with which the majority disagreed was that in *Ornelas* "the Court has mandated a standard of de novo review which appears to be slightly deferential in nature."[138] The *D.D.* majority's disagreement rather clearly extended only to the dissenter's notion that some deference was due, not also to the dissenter's view that under *Ornelas* use of de novo review was a "mandate" governing state appellate courts.

In addition to the states whose courts made the decisions described just above, courts of Connecticut,[139] Illinois,[140] Michigan,[141] Ohio,[142] and Texas[143] have rather clearly treated the

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[136] *Id*. at 1252. The court discussed in detail three of its prior decisions reviewing trial court conclusions as to probable cause that had arisen in the same context as in the *D.D.* case. In all three the court had similarly written of the trial court's "broad discretion," and in none had the appellate court referred to independent or de-novo appellate review. *See id*. at 1252-53 and the Indiana Court of Appeals' *Walker, Bratcher*, and *C.D.T.* decisions cited therein.

[137] *Id*. at 1254 (quoting New York v. Belton, 453 U.S. 454, 458 (1981)).

[138] *Id*. at 1255 (Baker, J., dissenting).

[139] *See, e.g.*, State v. Merriam, 826 A.2d 1021, 1040 n.27 (Conn. 2003) (stating that in *Lilly* the Supreme Court "instructed that, 'when deciding whether the admission of a declarant's out-of-court statements violates the Confrontation Clause, [appellate] courts should independently review whether the government's proffered guarantees

recent Supreme Court precedents on de novo appellate review as binding on state courts.

The state with perhaps the most puzzling treatment of the possibly binding effect on the proceedings of state appellate courts of the Supreme Court's rulings concerning de novo review is

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of trustworthiness satisfy the demands of the Clause,'" and then conducting "an independent review" of this Sixth Amendment question "in accordance with *Lilly*") (brackets and bracketed word added by Connecticut Supreme Court).

[140]*See, e.g.*, People v. Sorenson, 752 N.E.2d 1078, 1083 (Ill. 2001) (stating that traditionally the court had used the "deferential" standard of "manifestly erroneous" to review ultimate rulings on motions to suppress evidence, but that "most recently . . . this court has applied the de novo standard to the ultimate ruling on a motion to suppress, relying on . . . *Ornelas*," and proceeding to conduct de novo review of issues of reasonable suspicion for and the scope of a *Terry* frisk).

[141]*See* People v. Goforth, 564 N.W.2d 526, 528-29 & n.4, 531 (Mich. Ct. App. 1997) (rejecting on de novo review trial court's conclusion that police officer had lacked reasonable belief that defendant's mother had authority to consent to search of defendant's room, therefore reversing suppression of seized evidence and dismissal of charge, and citing *Ornelas* as the sole direct support for court's statement that "all mixed questions . . . must be reviewed de novo"). Immediately after citing *Ornelas*, the court wrote "see also *People v. Nelson"*). In *Nelson*, the Michigan Supreme Court had rejected a trial court's conclusion that police had lacked reasonable suspicion, explaining only that "application of constitutional standards by the trial court [to uncontested facts] is not entitled to the same deference as factual findings," without rejecting the possibility that some lesser but still significant degree of deference is appropriate. 505 N.W.2d 266, 269 n.7 (1993). Apparently, deference was sometimes afforded in Michigan appellate courts prior to the *Goforth* decision. *See, e.g.*, People v. Muro, 496 N.W.2d 401, 403 (Mich. Ct. App. 1993) (reversing suppression of evidence as "clearly erroneous" per appellate court's conclusion that police officer had reasonable suspicion, without expressly rejecting trial court's underlying findings of historical fact).

[142]*See* State v. Russell, 713 N.E.2d 56 (Ohio Ct. App. 1998). In *Russell* a panel of the Ohio Court of Appeals, reviewing de novo whether exigent circumstances justified peace officers' warrantless entry into and search of a home, wrote: "Our inquiry on appeal was recently enunciated by the United States Supreme Court in *Ornelas v. United States* . . .. An appellate court *must* review the trial court's findings of historical fact only for clear error, giving due weight to inferences drawn from those facts by the trial court. The trial court's legal conclusions, however, are afforded no deference, but are reviewed de novo." *Id*. at 57 (emphasis added).

Prior to the Supreme Court's *Ornelas* decision, Ohio appellate courts appear to have used various standards of appellate review of decisions of mixed questions of Fourth Amendment law and fact. *E.g., compare* State v. Retherford, 639 N.E.2d 498, 502-10 (Ohio Ct. App. 1994) (concluding on independent review that defendant was seized, that reasonable suspicion was absent, and that seizure tainted consent to search, and therefore reversing conviction), *with* State v. Hickson, 590 N.E.2d 779, 780 (Ohio Ct. App. 1990) (per curiam) (holding that trial court's determination that consent to search was involuntary was not clearly erroneous, and therefore affirming conviction), *and* State v. Hassey, 459 N.E.2d 573, 581 (Ohio Ct. App. 1983) (holding that trial court's finding that defendant consented to search was not clearly erroneous, and therefore affirming conviction).

[143]A unanimous panel of the Texas Court of Appeals, in One Car, 1996 Dodge X-Cab Truck White in Color 5YC-T17 VIN 3B7HC13Z5TG163723, v. State, 122 S.W.3d 422 (Tex. Ct. App. 2003), cited *Bajakajian* for the proposition that "[i]n determining whether the fine is excessive, . . . the [Texas] court of appeals *de novo* on appeal, must consider proportionality," and then went on to hold that the forfeiture before the Texas appellate court was "grossly disproportional to the offense under *Bajakajian*" and to remand with an order for return of the truck to its owners. *Id*. at 425, 428.

California. Before a United States Supreme Court plurality in *Lilly v. Virginia* prescribed independent review of decisions as to Sixth Amendment reliability of hearsay statements, a unanimous panel of the Second District of the California Court of Appeal had decided in *People v. Greenberger*[144] that such decisions were reviewed only for abuse of discretion. Panels of other districts of the same court followed the *Greenberger* ruling on this point in unreported opinions.[145]

The first California appellate ruling citing *Lilly* concerning any standard of review was the state supreme court's decision in *People v. Cromer*.[146] The court relied on *Ornelas* and *Lilly* in holding that appellate courts must use independent or de novo review of a decision that the prosecution's unsuccessful efforts to procure the attendance of a witness at trial were insufficient to warrant the conclusion that the witness was "unavailable" for purposes of the confrontation right.[147] The court did not expressly state whether it deemed itself bound to follow these Supreme Court precedents, much less did it try to identify the source of the Court's possible authority so to bind a state court. Neither did the court mention the standard of review of decisions of the analogous mixed question of Sixth Amendment reliability of hearsay, nor cite the *Greenberger* precedent for review of decisions of that question only for abuse of discretion.

After the state supreme court in *Cromer* had adopted de novo review of decisions of the Sixth Amendment mixed question of "unavailability" that it had addressed, various panels of the

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[144]68 Cal. Rptr. 2d 61 (Cal. Ct. App. 1997).

[145]*See, e.g.*, People v. Sanns, No. E028389, 2002 WL 226378, at *2 (Cal. Ct. App., 4th Dist., Feb. 14, 2002); People v. Ton, No. H021375, 2002 WL 77796, at *7 (Cal. Ct. App., 6th Dist., Jan. 18, 2002).

[146]15 P.3d 243 (Cal. 2001).

[147]*Id*. at 246-50.

California Court of Appeal used the same standard to review decisions of Sixth Amendment trustworthiness, the very issue addressed in *Lilly*. They simply wrote that "[w]e independently review a trial court's determination that the statements bore sufficient indicia of reliability"[148] or made similar pronouncements, relying on *Lilly* and sometimes on *Cromer*.[149]

Occasionally such writings were somewhat equivocal. For example, a court of appeal panel wrote that "[i]n the opinion of at least a plurality of the United States Supreme Court, appellate courts should independently review whether the government's proffered guarantees of the trustworthiness of a hearsay statement satisfy the confrontation clause," and then went on to review a trial court's decision that a statement was sufficiently trustworthy only for abuse of discretion and to add that it would have reached the same conclusion de novo.[150]

Eventually, in June of 2003, four years after *Lilly* and more than two years after *Cromer*, a panel of the California Court of Appeal took explicit notice of the confusion. The panel wrote in *People v. Schmaus*[151] that ". . . *Lilly* . . . does cast doubt on the continuing validity of aspects of *People v. Greenberger* . . .," including its ruling that decisions on Sixth Amendment trustworthiness are reviewed only for abuse of discretion.[152] Two months later, though, the state supreme court decided *People v. Brown*[153] in a manner and with a result later described well by

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[148]People v. Roberto V., 113 Cal. Rptr. 2d 804, 822 (Cal. Ct. App. 2001).

[149]*See, e.g.*, People v. Tatum, 133 Cal. Rptr. 2d 267, 273 (Cal. Ct. App. 2003); People v. Eccleston, 107 Cal. Rptr. 2d 440, 447 (Cal. Ct. App. 2001).

[150]People v. Wheeler, 129 Cal. Rptr. 2d 916, 922 (2003).

[151]135 Cal. Rptr. 2d 521, 528-29 (Cal. Ct. App. 2003).

[152]*Id*. at 528-29.

[153]73 P.3d 1137, 1155-56 (Cal. 2003).

an obviously puzzled panel of the state court of appeal.

> *Lilly* has been said . . . to cast doubt on . . . [the] *Greenberger* [holding] . . . that we should review a ruling for abuse of discretion . . . . The latest word from our state high court [in *Brown*], however, casts doubt on those doubts, for it reviewed a statutory trustworthiness finding "for abuse of discretion" . . . and then, finding no abuse, concluded as to residual trustworthiness under *Lilly*, "Because we have . . . concluded that the evidence of [the] out-of-court statements bore sufficient guarantees of trustworthiness, we find no confrontation clause violation occurred when the trial court admitted the statements into evidence" . . . .[154]

Despite all the inconsistency and confusion on display in these numerous California cases, not a single one of the dozens of appellate jurists who sat on them ever mentioned in any opinion the issue of whether and why the United States Supreme Court might have constitutional authority to require state appellate courts to use de novo review in appeals the Constitution does not mandate at all. When nothing clearer than doubts about doubts -- doubts squared -- is generated among appellate judges of a large and influential state by the United States Supreme Court's failure to articulate the constitutional basis of a new line of decisions requiring de novo appellate review, one can hardly deny that we need clearer and more specific opinions from the Court on this subject.

2. Courts Following But Expressing No Opinion

In a few other states, appellate courts have employed de novo appellate review and have cited *Ornelas* or another of these cases as authority for doing so, but have failed to explain whether they view the Supreme Court precedents as binding or only persuasive authority. For example, in *James v. Commonwealth*[155] the Virginia Court of Appeals reviewed de novo a trial

[154]People v. Conwell, Nos. A097011, A101881, & A101927, 2004 WL 505240, at *34 (Cal. Ct. App. March 16, 2004).

[155]473 S.E.2d 90 (Va. Ct. App. 1996) (affirming trial court's decision that reasonable suspicion permitting pat-down search existed).

court's conclusion that a police officer's pat-down search of a suspect had been based on reasonable suspicion, explaining its adoption of this standard of appellate review only in the following words:

> It is well established in Virginia that, on review of a trial court's denial of a motion to suppress, the appellate courts of this Commonwealth view the evidence in the light most favorable to the trial court's determination. . . . In light of *Ornelas v. United States*, . . . it appears that in certain cases a deferential standard of review may no longer be appropriate.[156]

Courts have similarly applied de novo review in reliance on one or another case in this line of Supreme Court precedents, without specifying whether they viewed them as binding or only persuasive, at least in Arizona,[157] Kentucky,[158] and Minnesota.[159]

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[156] *Id.* at 91.

[157] *See* State v. Bronson, 63 P.3d 1058 (Ariz. Ct. App. 2003). There a three-judge panel using de novo review concluded that extrajudicial statements evidence of which had been admitted at a trial lacked sufficient indicia of reliability to satisfy Confrontation Clause standards, and therefore reversed the conviction. Concerning its choice of de novo review, the court wrote only that "Confrontation Clause violations are reviewed *de novo*," providing no explanation, and citing *Lilly* and no other authority. *Id*. at 1061. The en banc state supreme court later the same year did likewise in State v. Prasertphong, 75 P.3d 675 (Ariz. 2003). There the court on de novo review agreed with the trial court's conclusion that certain extrajudicial statements bore sufficient indicia of reliability to satisfy Confrontation Clause standards, and therefore affirmed the convictions. Concerning its choice of de novo review, the en banc court wrote only that "review of a trial court's determination of a Confrontation Clause violation is *de novo*," and cited only the *Lilly* plurality. *Id*. at 685. My March 26, 2004, search of the Westlaw AZ-CS database for all previous Arizona reported decisions containing both of the phrases "Confrontation Clause" and "indicia of reliability" yielded none prior to *Bronson* in which an Arizona court had specified the standard of appellate review of decisions of this mixed question. See, e.g., State v. Bass, 12 P.3d 796, 800, 805-07 (Ariz. 2000) (en banc) (concluding without apparent deference to trial court that extrajudicial statements were insufficiently reliable to satisfy Sixth Amendment standards, and reversing convictions, without specifying standard of appellate review for this mixed question).

[158] *Compare* Richardson v. Commonwealth, 975 S.W.2d 932 (Ky. Ct. App. 1998) (concluding on de novo review that "the trial court was correct in finding . . . probable cause . . ." for warrantless search, explaining use of de novo review by writing that in *Ornelas* the Supreme Court had "enunciated a new standard of appellate court review of a trial court's suppression rulings on investigative stops and warrantless searches," and citing only *Ornelas*, an appellate court decision in a federal prosecution, and "*cf. Clark v. Commonwealth*, Ky. App., 868 S.W.2d 101 (1993)" (in which the court had reversed denial of suppression for clear error)), *with* Hamilton v. Commonwealth, 580 S.W.2d 208 (Ky. 1979) (affirming ruling on voluntariness of confession using clear-error standard).

[159] *See* State v. Rewitzer, 617 N.W.2d 407, 412-15 (Minn. 2000) (holding that fines and surcharges violated Excessive Fines Clause of Eighth Amendment, relying extensively on *Bajakajian* in reaching that conclusion, and citing in support of de novo resolution of Eighth Amendment issue only two prior decisions of Minnesota Supreme

3. Courts and Judges Doubting They Are Bound

In the state cases described above, none of the courts that seemed silently to assume they were bound by federal law to use de novo review, nor even those that made this view explicit, tried to give any reasons why these Supreme Court pronouncements on standards of appellate review might govern state courts. However, my research has identified just a few cases in which state appellate courts or individual judges thereof have expressly questioned whether these mandates of de novo review bind state courts.

One such case was the Washington Court of Appeals' 1996 decision in *State v. Jackson*.[160] Rejecting appellate challenges to a trial court's denial of motions to suppress evidence, and therefore affirming two defendants' convictions, that court applied a "substantial evidence" test in reviewing the mixed questions of law and fact whether and when a FedEx package was "seized" within the meaning of the Fourth Amendment.[161] The court distinguished those issues from the probable-cause and reasonable-suspicion issues addressed in *Ornelas*, and went on to say that on the facts before it the court would reach the same result on the seizure

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Court neither of which addressed standard of review of decisions of Eighth Amendment mixed questions).

Instead of the silence or elliptical statements provided by the Virginia, Arizona, Kentucky and Minnesota courts as to the binding or persuasive character of the Supreme Court's precedents on de novo review, the Florida Supreme Court provided ambiguity. The court wrote plenty in *Connor v. State*, 803 So.2d 598 (Fla. 2001), about why it was clearly adopting the de novo standard for review of decisions of questions of mixed federal constitutional law and fact, but the opinion contains conflicting signals as to whether the court considers the Supreme Court precedents binding. *See, e.g., id*. at 605 & 608 (twice referring to "policy reasons" in the Court's *Ornelas* opinion); *id*. at 606 & 608 (describing the Court's conclusion in *Ornelas* "that an appellate court has an independent obligation" to use de novo review, and holding that ". . . appellate courts must independently review mixed questions" under the Fourth and Fifth Amendments).

[160]918 P.2d 945 (Wash. Ct. App. 1996).

[161]*Id*. at 951 n.26.

issue using de novo review as it actually reached using "substantial evidence" review.[162] The court added, though, that "*Ornelas* was a federal supervisory case, as opposed to a constitutional case."[163] Unfortunately, the court provided no analysis or authority purporting to support that characterization of *Ornelas*.

Despite this lack of support, later in *State v. Brockman*[164] the Supreme Court of South Carolina relied on *Jackson* in reaching the conclusion that "*Ornelas* was merely a supervisory opinion crafted out of . . . [the Supreme] Court's policy concerns."[165] The court consequently examined yet another Fourth Amendment mixed issue of law and fact not de novo but only to determine whether "there is any evidence to support the ruling."[166] Applying this deferential standard of appellate review, the court upheld the trial court's ruling that police officers' involvement in a mother's search of her son's property had been so slight that the search had constituted private rather than state action.[167] To its credit, the *Brockman* court did offer one concise if questionable reason for its conclusion that the*Ornelas* doctrine of de novo review is not a federal constitutional requirement. In the court's view, "there is nothing in the language of

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[162]*Id*.

[163]*Id*.

[164]528 S.E.2d 661 (2000).

[165]*Id*. at 664-65. A March 26, 2004, review of every case and secondary authority listed in Westlaw's KeyCite service as having cited *Jackson* revealed that *Brockman* was the only court or commentator included in Westlaw's databases to have cited *Jackson* concerning the standard of appellate review of decisions of mixed questions. Professor LaFave's treatise on the Fourth Amendment does, however, cite *Brockman*. *See* LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.7 at __ n.92.7 (2004).

[166]*Id*. at 666.

[167]*Id*. at 666-67.

Ornelas suggesting that the Fourth Amendment mandates *de novo* review . . . ."[168]

At least one state court has treated *Ornelas* as only persuasive authority on standards of appellate review while following rather than departing from the precedent. The Supreme Court of Illinois in the case of *In re G.O.*[169] abrogated its traditional "manifestly erroneous" standard for reviewing the voluntariness of a defendant's statement to police, despite the court's renewed approval of that standard only four years earlier.[170] The court cited *Ornelas*, as well as a Seventh Circuit decision extending the *Ornelas* standard of appellate review from the two Fourth Amendment mixed questions the Supreme Court had there addressed to the Fifth Amendment voluntariness question, agreed that the extension was sound for "the federal appellate courts and the Supreme Court,"[171] and then went on to address the different question "whether we should adopt the same standard."[172] Summarizing "the principles relied on in *Ornelas*"[173] and citing precedents on the meaning of the Fifth Amendment requirement of voluntariness,[174] the court decided "that the same principles apply to our review of the voluntariness of a confession . . .," and that consequently "we will review *de novo* the ultimate question of whether the confession

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[168] *Id*. at 664.

[169] 727 N.E.2d 1003 (2000).

[170] *Id*. at 1008-10.

[171] *Id*. at 1010.

[172] *Id*.

[173] *Id*.

[174] *Id*. at 1009-13.

was voluntary."[175]

The fullest judicial discussion I have found of the legal basis of the *Ornelas* doctrine is in the concurring and dissenting opinion of Judge Meyers in the Texas Court of Criminal Appeals case of *Guzman v. State*.[176] The trial court had denied the defendant's motion to suppress evidence seized from his person incident to his arrest. The Texas Court of Appeals had reversed the resulting conviction, concluding on de novo review that probable cause for the arrest had been absent. The majority of the Court of Criminal Appeals reversed the lower appellate court, concluding on its own de novo review that probable cause had existed.

Explaining its choice of the de novo standard of appellate review, the majority wrote that "[t]he amount of deference a reviewing court affords to a trial court's ruling on a 'mixed question of law and fact' (such as the issue of probable cause) often is determined by which judicial actor is in a better position to decide the issue,"[177] citing the United States Supreme Court's 1985 decision in *Miller v. Fenton*[178] concerning the standard by which federal habeas courts formerly reviewed decisions that confessions were voluntary. According to the *Guzman* majority, "the trial judge is not in an appreciably better position than the reviewing court" to decide whether an

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[175]*Id*. The court's analysis was unsound in one respect. The court wrote that "this court has followed *Ornelas*. . . . Thus this court has already found *persuasive* the principles relied on in *Ornelas*." *Id*. (emphasis added). However, the court cited in support of these statements solely a case in which the court had followed *Ornelas* only for its interpretation of Fourth Amendment restrictions on police conduct, which state courts clearly are bound to follow, and not for its choice of a standard of appellate review, which state courts arguably are not bound to follow. Thus, the court overstated the significance of its having followed *Ornelas* in the prior decision. Regardless of this error, however, the court in the *G.O*. decision itself clearly made a choice to adopt the de novo standard of appellate review by relying on *Ornelas* as persuasive, not binding, authority.

[176]955 S.W.2d 85, 92-96 (1997) (en banc).

[177]*Id*. at 87.

[178]474 U.S. 104.

officer had probable cause to seize a suspect.[179]

Having provided that policy-based reason for choosing de novo review, the majority wrote:

> In a recent decision, the United States Supreme Court held that . . . determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. *Ornelas v. United States* . . . . The Court stated, "the legal rules for probable cause and reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify the legal principles."[180]

With this description of *Ornelas*'s holding and this quotation of part of its rationale, the *Guzman* majority simply announced that its de novo review of the matter led it to reverse the Court of Appeals and to affirm the judgment of the trial court. The majority did not specifically address the issue of whether the *Ornelas* requirement of de novo review binds state appellate courts.

Judge Meyers addressed that issue in some detail, but failed to elicit a response from the majority.[181] Judge Meyers wrote:

> The Court points to *Ornelas* . . . in support of adopting *de novo* review, but offers no discussion as to why that opinion is binding on state court appellate review. . . . [T]he holding in *Ornelas* does not appear to emanate from the United States Constitution, but, rather, from practical considerations . . . . There is no indication in *Ornelas* that *de novo* appellate review is a constitutional rule, applicable on direct appeal of state convictions in those appellate courts. *Compare Bose Corporation v. Consumers Union of United States, Inc.* . . . (declaring that independent appellate review of trial court's finding of "actual malice" in cases governed by *New York Times Co. v. Sullivan* . . . "is a rule of federal

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[179] 955 S.W.2d at 87.

[180] *Id*.

[181] The majority did, however, respond to a somewhat related point Judge Meyers made, concerning the role of the Texas Court of Appeals as a "discretionary review court." *Compare id*. at 88 n.3 (majority's contention that de novo review by Court of Criminal Appeals of trial court's and appellate court's conflicting conclusions is a proper form of review) *with id*. at 95 n.4 (Judge Meyers' contention that Court of Criminal Appeals should instead vacate the judgment in such a case and remand for the appellate court "to properly apply the proper test").

constitutional law").[182]

It is regrettable that the *Guzman* majority did not respond to this pointed call for an explanation of the majority's reliance on *Ornelas*. Its failure to do so seems to have caused some subsequent uncertainty concerning standards of appellate review to be used in Texas courts. After the en banc Court of Criminal Appeals handed down the *Guzman* decision, the same en banc court, citing *Ornelas* as well as *Miller v. Fenton*, expressly declined to decide whether in the light of those federal precedents Texas appellate courts would review trial courts' determinations of the voluntariness of confessions deferentially or de novo.[183]

4. Summary of State Courts' Responses

To sum up these usually opaque and occasionally conflicting decisions, many state appellate courts have followed the United States Supreme Court down the primrose path toward de novo review, citing *Ornelas* and the Court's other decisions. On the whole these state courts have provided inadequate consideration of the possible federal constitutional basis for a requirement of de novo review. Most courts have remained silent on this issue, and the few that have addressed it have not provided full analysis or use of authorities.[184]

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[182]*Id*. at 93 n.3.

[183]Henderson v. State, 962 S.W.2d 544, 564 (1997), *cert. denied*, 525 U.S. 978 (1998) (affirming judgment and holding that affirmance would result under any arguably applicable standard of appellate review).

[184]The Supreme Court has caused comparable uncertainty in decisions of state courts in civil cases, by similarly failing to specify whether the de novo standard of review the Court prescribed in *Cooper Industries, Inc., v. Leatherman Tool Group*, Inc., 532 U.S. 424 (2001), is dictated by the Constitution, and by failing to specify the scope of applicability of the prescription. *See, e.g.*, Aken v. Plains Elec. Generation & Transmission Coop., Inc., 49 P.3d 662, 668-69 (N.M. 2002) (considering possibility that Supreme Court decided *Cooper Industries* under its supervisory power over lower federal courts, and concluding that the requirement of de novo review is a constitutional mandate). *See generally* Lisa M. White, Comment, *A Wrong Turn on the Road to Tort Reform: The Supreme Court's Adoption of De Novo Review in Cooper Industries v. Leatherman Tool Group, Inc.*, 68 BROOK. L. REV. 885, 923 n.289 (2003) (noting that "[a]lthough the Supreme Court handed down its opinion in *Cooper Industries* less than two years ago, there is already widespread confusion among state courts concerning the

B. Extensions to Other Federal Mixed Questions

After this lengthy discussion of state courts' decisions concerning the most fundamental and important issue raised by the recent Supreme Court decisions on de novo review, we can briefly consider the other three questionable applications state courts have made of these cases. The first of these concerns the question of which federal constitutional mixed questions are subject to de novo review, and which are not.

Many of the state appellate courts citing *Ornelas* and the other recent Supreme Court precedents for adoption of de novo review have gone beyond following the Court down this primrose path, they have sprinted ahead of the Court. That is, the decisions of many state appellate courts relying on these cases have extended de novo review to numerous mixed questions of federal constitutional law and fact other than the four that the Court has recently addressed: Fourth Amendment reasonable suspicion and probable cause, Eighth Amendment excessiveness of fines, and Sixth Amendment trustworthiness of hearsay.[185]

A noteworthy example is the decisions of the appellate courts of Nebraska. I quoted

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implementation of de novo review," and citing numerous decisions of state courts).

[185]State-court decisions such as those to be described in the text are arguably sound extensions of the Supreme Court's precedents to additional mixed questions to which the Court itself eventually may extend its prescription of de novo review. Such cases should be contrasted with state-court decisions that conflict with other Supreme Court precedents and that therefore must be considered simple blunders.

For example, in State v. Hulbert, No. 02-3202-CR, 2003 WL 21788560, at *2-3 (Wis. Ct. App. Aug. 5, 2003), the court relied on *Ornelas* in reviewing a trial court's conclusion that a court commissioner had correctly found probable cause when issuing a search warrant, and thus in reviewing the trial court's consequent denial of a motion to suppress evidence found when the warrant was executed. However, other Supreme Court cases such as Illinois v. Gates, 462 U.S. 213 (1983), have held that a court hearing a motion to suppress evidence seized under a warrant needs decide only that the issuing magistrate had a substantial basis for finding probable cause. The *Hulbert* court neither cited such cases, nor claimed to be requiring more searching review of the magistrate's decision as a matter of state law, nor offered any other explanation for extending *Ornelas* so far as to bring it into apparent conflict with the doctrine of cases like *Gates*.

above[186] language of the Nebraska Supreme Court in *State v. Konfrst*[187] making it quite clear that the court considered itself bound to follow *Ornelas* concerning the standard of appellate review of decisions concerning probable cause and reasonable suspicion. One of the mixed questions presented in *Konfrst* was indeed probable cause, and the court used de novo review in approving the trial court's decision of that question.[188]

More remarkable is the fact that, despite its previous use of the clearly-erroneous standard when reviewing mixed questions decided in the context of motions to suppress evidence, the *Konfrst* court also reviewed de novo the trial court's decisions of three additional mixed questions of Fourth Amendment law and fact: Did the defendant have standing to challenge the search in question?[189] Did the police reasonably believe that the passenger in the defendant's car had authority to consent to its search?[190] Was that consent voluntary?[191] The court did this before the Supreme Court extended its *Ornelas* holding in *Bajakajian* or *Lilly*, yet the Nebraska court provided no explanation for its own extensions of the *Ornelas* holding. Later unreported opinions of the intermediate appellate court of Nebraska have extended de novo review to decisions of still other mixed questions, such as to the Fourth Amendment question whether a search was sufficiently contemporaneous with an arrest to be incident thereto, and beyond the

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[186] *See supra* text accompanying notes 131, 132.

[187] 556 N.W.2d 250 (1996).

[188] *Id*. at 262.

[189] *Id*. at 259.

[190] *Id*. at 259-60.

[191] *Id*. at 260-262.

Fourth Amendment to the question whether a suspect's statement was voluntary and therefore admissible under the Fifth Amendment though made after a *Miranda* violation.[192]

Similarly, various appellate courts of other states have conducted de novo review, citing one or more of these Supreme Court cases, of trial courts' decisions of the following mixed questions of Fourth Amendment law and fact, among others: whether a defendant had a reasonable expectation of privacy in a residence providing standing for him to object to its search;[193] whether a search constituted state action or private conduct;[194] whether a search occurred within the curtilage of a home;[195] whether exigent circumstances justified peace officers' warrantless entry into and search of a home;[196] whether a traffic checkpoint had a primary purpose of investigating crimes such that its detentions of persons violated the Fourth Amendment per se;[197] whether a person was seized;[198] whether a law enforcement officer acted reasonably in detaining persons under a Fourth Amendment doctrine of "community

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[192]*See, e.g.*, State v. White, No. A-98-271, 1999 WL 14505 (Neb. Ct. App. Jan. 12, 1999) (stating that ". . . an argument could be made that the *Ornelas-Thompson* standard of review is applicable to the instant case involving application of Fifth Amendment principles. However, we need not conclusively determine which standard of review to apply, because under the facts of the case at bar, the outcome would be the same under a clearly erroneous or de novo standard of review, or a combination of the two"); State v. Cervantes, No. A-96-916, 1997 WL 199078 (Neb. Ct. App. Apr. 15, 1997) (citing *Ornelas* and reviewing de novo the trial court's decisions on Fourth Amendment contemporaneity and Fifth Amendment voluntariness after *Miranda* violation).

[193]*See, e.g.*, State v. Werner, 831 A.2d 183, 200-01 (R.I. 2003) (reviewing question of standing de novo despite defendant's concession of legality of search, and concluding that defendant lacked standing).

[194]*See, e.g.*, State v. Brockman, 494 S.E.2d 440, 443, 446-49 (S.C. Ct. App. 1997).

[195]*See, e.g.*, State v. Martwick, 604 N.W.2d 552, 556-56 (Wis. 2000).

[196]*See, e.g.*, State v. DeCoteau, 592 N.W.2d 579, 584 (N.D. 1999); State v. Russell, 713 N.E.2d 56, 57 (Ohio Ct. App. 1998).

[197]*See, e.g.*, Trent v. Commonwealth, 544 S.E.2d 379, 380-81 (Va. Ct. App. 2001).

[198]*See, e.g.*, People v. Wallace, 701 N.E.2d 87, 93-94 (1998).

caretaking";[199] whether a passenger in the defendant's car could give effective consent to a search of a bag in the car;[200] whether a suspect effectively revoked his consent to his detention and frisk;[201] whether the inevitable-discovery exception to the Fourth Amendment exclusionary rule applied to the facts;[202] and whether the good-faith exception to the Fourth Amendment exclusionary rule applied to the facts.[203]

State courts have likewise relied on one or more of these Supreme Court precedents for de novo review of decisions of the following mixed questions of Fifth Amendment law, among others: whether a confession was voluntary;[204] whether a person was in custody for purposes of the *Miranda* rules;[205] whether the conduct of law enforcement officers was the functional equivalent of interrogation;[206] whether a suspect's waiver of *Miranda* rights was voluntary;[207] whether a suspect's utterances constituted an effective request for counsel under the *Miranda*

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[199] *See, e.g.*, Wright v. State, 18 S.W.3d 245, 246-47(Tex. Ct. App. 2000).

[200] *See, e.g.*, State v. Derrow, 981 S.W.2d 776, 778-779 (Tex. Ct. App. 1998).

[201] *See, e.g.*, E.B. v. State, No. 2D03-778, 2004 WL 351800, at *2 (Fla. Dist. Ct. App. 2004).

[202] *See, e.g.*, Copeland v. Commonwealth, 592 S.E.2d 391, 395, 397-98 (Va. Ct. App. 2004) (explaining only that "[w]e . . . review the ultimate question of law, the application of the inevitable discovery doctrine, *de novo*," and citing only *Trent, supra* note ... (about 4th fn. above), which in turn had relied only on *Ornelas* concerning the standard of appellate review).

[203] *See, e.g.*, Commonwealth v. Opell, 3 S.W.3d 747, 751-52 (Ky. Ct. App. 1999).

[204] *See, e.g.*, In re G.O., 727 N.E.2d 1003, 1008-10 (Ill. 2000).

[205] *See, e.g.*, State v. Burdette, 611 N.W.2d 615, 626-27 (Neb. 2000).

[206] *See, e.g.*, Watts v. Commonwealth, 562 S.E.2d 699, 702-06 (Va. Ct. App. 2002).

[207] *See, e.g.*, Cary v. Commonwealth, 579 S.E.2d 691 (Va. Ct. App. 2003) (using de novo review, citing as authority for such use *Ornelas* and a Virginia state court decision, which in turn had cited *Ornelas* and another Virginia decision, which in its turn had also cited *Ornelas*; concluding that waiver of *Miranda* rights was voluntary; and affirming conviction).

doctrine;[208] and whether a suspect who had made such a request later effectively waived the right.[209]

Similarly, state courts have relied on these Supreme Court precedents in extending de novo review at least to the mixed questions of Sixth Amendment law of whether pretrial delay denied a defendant a speedy trial,[210] and whether a defendant received ineffective assistance of counsel.[211]

State courts likewise have extended the Court's call for de novo review to various mixed questions that are based not on the specific guarantees of the Bill of Rights, but only on the free-standing Fourteenth Amendment right to due process. This has happened at least for the question whether the state's loss or destruction of potentially exculpatory evidence prejudiced the defendant,[212] and the similar question whether, in consequence of the prosecution's inadequate disclosure of evidence in its possession that was favorable to the defendant, there was a reasonable probability that the result at trial would have been different.[213] At least one state

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[208]*See, e.g.*, Ortiz v. State, 763 So.2d 540, 541 (Fla. Dist. Ct. App. 2000); State v. Page, 709 A.2d 1042, 1044-46 (R.I. 1998); Commonwealth v. Redmond, 568 S.E.2d 695, 697-700 (Va. 2002) (plurality opinion).

[209]*See, e.g.*, Cuozzo v. Commonwealth, No. 1843-98-2, 2000 WL 1145924, at *4-6 (Va. Ct. App. Aug. 15, 2000).

[210]*See, e.g.*, State v. Austin, 742 A.2d 1187, 1193-94 (R.I. 1999); State v. Flores, 951 S.W.2d 134 (Tex. Ct. App. 1997).

[211]*See, e.g.*, Stephens v. State, 748 So.2d 1028, 1031-33 (Fla. 1999); Miguel v. State, 774 A.2d 19 (R.I. 2001) (on convict's application for post-conviction relief, using de novo review, citing as authority for such use *Ornelas* and state cases all of which relied on *Ornelas*; concluding that counsel was not ineffective; and denying relief); Heath v. Vose, 747 A.2d 475, 477 (R.I. 2000).

[212]State v. Vanover, 721 A.2d 430, 432-34 (R.I. 1998).

[213]*See, e.g.*, Broccoli v. Moran, 698 A.2d 720, 725-29 (R.I. 1997); Arsola v. State, Nos. 04-96-00963-CR & 04-96-00964-CR, 1998 WL 538125, at *2 (Tex. Ct. App. Aug. 26, 1998).

appellate court has done likewise for the mixed question arising under the Equal Protection Clause of whether a criminal defendant has established a prima facie case that the prosecution has exercised a peremptory challenge of a prospective trial juror on the basis of the juror's race.[214]

C. Extensions to State-Law Mixed Questions

Also surprising is the practice of some state courts of relying on *Ornelas* and other cases in this line as authority for de novo appellate review of trial courts' decisions of mixed questions of *state* law. For example, after the Illinois Supreme Court had decided in *In re G.O.*, as described above,[215] to follow *Ornelas* as persuasive authority for the standard of review of decisions of Fourth Amendment reasonable suspicion and probable cause for police interference with liberty or property and of Fifth Amendment voluntariness of confessions, the Illinois Appellate Court in *People v. DeSantis*[216] decided several mixed questions of federal and state law in the course of reversing the trial court's suppression of evidence of the defendant's written statement to police. The court introduced its analysis of all these mixed questions with a single paragraph identifying what it called "the" applicable standard of appellate review,[217] in which it cited only *Ornelas* and *In re G.O.*, and it appeared to decide the state-law as well as some of the federal-law mixed questions without deference to the conclusions of the trial court.[218] Florida[219]

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[214]State v. Dockery, No. C-000316, 2002 WL 63437, at *2 & n.1 (Ohio Ct. App. Jan. 18, 2002).

[215]*See supra* text accompanying note 169, 170, 171, 172, 173, 174, 175.

[216]745 N.E.2d 1 (Ill. App. Ct. 2001), *overruled on other grounds by* People v. Johnson, 803 N.E.2d 442 (Ill. 2003).

[217]*Id*. at 7.

[218]*Id*. at 10 (holding that "the defendant's state due process rights were not violated"). Another panel of the

and North Carolina[220] courts have made similar decisions.

D. Extensions to Appeals by States

A final and rather surprising practice of some state courts is their reliance on these Supreme Court cases as authority for de novo appellate review producing appellate decisions in favor of the *state*. One example is the Illinois decision in *DeSantis*, described just above, but there have been a number of others, including some by courts apparently considering themselves required to follow *Ornelas* or another of these Supreme Court precedents.

In this manner a panel of the Court of Special Appeals of Maryland relied on *Ornelas* and gave the prosecution on its appeal the benefit of de novo review, thus reversing a ruling that a search was not validly incident to an arrest.[221] Appellate courts in at least the states of Florida, Michigan, Ohio, Rhode Island, and South Dakota have likewise reversed judgments favoring defendants, by giving prosecutors the advantage of de novo review in reliance on one or another of these recent Supreme Court decisions, after appellate courts in these states had indicated in

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same court made an analogous decision in *People v. Cox*, 739 N.E.2d 1066 (App. Ct. Ill. 2000). In *Cox*, the appellate court reviewed a trial court's ruling that a police officer had had "no reasonable basis" for walking a drug-sniffing dog around the defendant's car, relied on *Ornelas* for the proposition that ". . . we conduct *de novo* review of a trial court's determination of reasonable suspicion . . . ," *id*. at 1068, and ultimately concluded that, though this conduct did not violate the Fourth Amendment, *id*. at 1070, it did violate the state constitution because ". . . the officer lacked reasonable suspicion sufficient to call the canine unit." *Id*. at 1071.

[219]*See* Connor v. State, 803 So.2d 598, 608 (Fla. 2001) (adopting de novo standard of appellate review for decisions of Fourth and Fifth Amendment questions "and, by extension, article I, section 9 of the Florida Constitution").

[220]*See* State v. Fowler, 548 S.E.2d 684, 696-97 (N.C. 2001) (concluding that admission against the defendant of hearsay statements violated neither the Sixth Amendment nor the "similar right" provided by the state constitution, this provision of which the court had "generally construed . . . consistent with the federal provision," stating that in accordance with *Lilly* the court had "conducted a full and independent review" of the statements' trustworthiness, and showing no apparent deference to conclusions of the trial court as to trustworthiness).

[221]State v. Fernon, 754 A.2d 463, 464-65, 476 (Md. Ct. Spec. App. 2000). *See also supra* text accompanying notes 129, 130.

other cases that at least arguably they considered themselves bound to follow the Court's decisions on this subject.[222] In none of these opinions did the state court attempt to explain why the prosecution should benefit from de novo review or, more specifically, why Supreme Court rulings that the state court viewed as mandates for de novo review by state appellate courts should operate in favor of prosecutors.

V. This Article's Analysis of the Legal Issues

A. Legal Basis of Requiring State-Court De Novo Appellate Review

In the discussion above of these four recent Supreme Court cases, we saw that the Court provided no explicit statement of the legal basis of the prescription of de novo review, and that apparent clues to its basis seem inconsistent. One must look beyond those cases to other legal authorities, and attempt to determine whether the Supreme Court can require that state criminal defendants receive de novo appellate review of decisions of all, or even of some, mixed questions of federal constitutional law and fact.

Among legal academics, a teacher of Constitutional Law and Federal Courts would seem best qualified to answer this question, largely because the answer may lie at least in part in Article III, for reasons discussed below.[223] Even apart from any Article III issues, the most likely basis for any such constitutional right appears to be the Fourteenth Amendment Due Process Clause, for reasons also stated below.[224] Of course, the Due Process Clause covers civil as well

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[222] *See* State v. Mike, No. 3D02-2211, 2004 WL 298697, at *1 (Fla. Dist. Ct. App. 2004); People v. Goforth, 564 N.W.2d 526, 528-29 & n.4 (Mich. Ct. App. 1997); State v. Wortham, 761 N.E.2d 1151, 1153 (Ohio Ct. App. 2001); State v. Briggs, 756 A.2d 731, 736 (R.I. 2000); State v. Hodges, 631 N.W.2d 206, 209 (S.D. 2001). *See also supra* text accompanying notes 124, 125, 126, 127, 128, 133, 134, 141, 159.

[223] *See infra* Parts V.A., VII.

[224] *See infra* Parts V.A., VII.

as criminal proceedings, so a Constitutional Law scholar might be best equipped to address this issue. Still, I should be able as a Criminal Procedure teacher to contribute something to the due-process part of the analysis.

Nevertheless, I shall approach it only tentatively. I assume that Supreme Court justices take great interest in applying the existing test for identifying due process requirements -- which I show below involves weighing and combining several vague, subjective, incommensurable, and competing factors -- to decide that due process does require one specific procedure but does not require another. The justices must find that process fascinating and worthy of much time and effort. That is because they have votes. I obviously do not, and must balance the time and effort involved against the likely benefits. I have done so and, unlike many law professors before me who have indeed published lengthy due-process analyses of particular issues only to see the Supreme Court apparently ignore them,[225] in this Article I shall forgo a comprehensive application of current due process doctrine to the questions of whether the Supreme Court can require states to provide direct review of their criminal or civil judgments or both and, even if the Court cannot go that far, whether the Court nevertheless can require use of particular procedures in appeals that states choose to permit, in particular, use of de novo review of some classes of decisions. One does not need a vote, in order to draw attention to a series of recent rulings in which voting is about all the Court has done. I shall go beyond drawing attention, and address the merits of the due-process issue, but not nearly exhaustively.

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[225] *See, e.g.*, Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993) (64 printed pages and 349 footnotes not cited by Supreme Court); Leonard N. Sosnov, Due Process Limits on Sentencing Power: A Critique of Pennsylvania's Imposition of a Recidivist Mandatory Sentence Without a Prior Conviction, 32 DUQ. L. REV. 461 (1994) (62 printed pages and 357 footnotes not cited by Supreme Court).

For those reasons, the following analysis should be viewed as only a tentative first attempt at finding answers, or even just at raising some of the right questions. This attempt seems well worthwhile, if only because so far scholars of Constitutional Law or Federal Courts (or other subjects) have almost wholly failed to raise hard questions about the specific constitutional basis of the Supreme Court's currently expanding demands for de novo review.

The existence of a constitutional right to de novo review in state criminal appeals appears debatable. Legal scholars have recognized that the standard for reviewing decisions even of mixed questions of federal constitutional law and fact "is generally a question of policy."[226] Even after the Supreme Court in *Bose Corporation* had decided that the Constitution requires that decisions of a particular First Amendment mixed question be reviewed independently,[227] Professor Monaghan examined the subject thoroughly in 1985 and concluded that, though ". . . appellate courts often exercise independent judgment with respect to constitutional law application," he saw "no persuasive case for converting this competence into a duty."[228] However, the next year Professor Louis, in a leading analysis of standards of review, took seriously both the possibility that the Constitution requires de novo review of decisions of some mixed questions, and the converse possibility that requiring such review of decisions of some mixed questions is itself "potentially unconstitutional."[229]

1. Lack of Federal Constitutional Right to Review

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[226]Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 904 (1998).

[227]*See supra* text accompanying notes 118, 119, 120.

[228]Monaghan, *supra* note 24, at 264.

[229]Louis, *supra* note 18, at 1031-32.

To evaluate these competing possibilities, one should begin with the following observation. The Supreme Court has never clearly recognized a constitutional right to direct appeals in criminal cases, or a constitutional right to launch collateral attacks on the criminal judgments of state courts.[230] On the contrary, the Court has stated expressly and repeatedly that at least in ordinary cases no such rights exist.[231]

The apparent lack of a generally applicable federal constitutional right to obtain direct or collateral state-court review of decisions in criminal cases requires one to distinguish two

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[230]"[T]he Constitution apparently does not require the states to afford a right to appellate review of a criminal conviction." LAFAVE ET AL., *supra* note 15, § 18.5(c), at __. The same appears to be true for civil litigation. *See* Monaghan, *supra* note 24, at 246 (restating "the general rule that there is no constitutional right to appellate review in any case"). In contrast with this lack of a constitutional requirement of appellate or collateral review by one court of the decision of another judge, the Court has held that the Due Process Clause of the Fourteenth Amendment does require judicial review of the sizes of jury awards of punitive damages, and has reserved what it called "the more difficult question of what standard of review is constitutionally required." Honda Motor Co., Ltd., v. Oberg, 512 U.S. 415, 432 and n.10 (1994).

Some federal courts have interpreted the Supreme Court's opinion in *Stone v. Powell*, 428 U.S. 465 (1976), as requiring in some kinds of cases "at least the availability of meaningful appellate review by a higher court," *see, e.g.*, O'Berry v. Wainwright, 546 F.2d 1204, 1213 (5th Cir.), *cert. denied*, 433 U.S. 911 (1977), as a component of the "opportunity for full and fair litigation of a Fourth Amendment claim" on which under *Stone* a bar to federal habeas review of such a claim depends, Stone v. Powell, 428 U.S. 465, 482 (1976). *Accord* Agee v. White, 809 F.2d 1487, 1490 (11th Cir. 1987). This has little if any relevance, however, to the question whether there is a constitutional right to appellate review of criminal convictions or sentences.

[231]"There is, of course, no constitutional right to an appeal . . . ." Jones v. Barnes, 463 U.S. 745, 751 (1983). "Following dictum written over a century ago, the Supreme Court has consistently maintained that the due process guaranteed to the accused by the Constitution does not include access to appellate review of criminal convictions." LAFAVE, supra note 15, § 27.1(a), at 1255. The Court wrote in *Ross v. Moffitt*, 417 U.S. 600, 611 (1974), that "it is clear that the State need not provide any appeal at all," and quoted that language with approval in *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987). In the latter case the Court also wrote that states have no obligation to permit collateral attacks on criminal convictions. *Id*. at 557. *Accord*, United States v. MacCollom, 426 U.S. 317, 323 (1976) (holding that due process does not require that petitioner for collateral review of conviction have broader access to free trial transcript than federal statute provided, and stating that "[t]he Due Process Clause of the Fifth Amendment does not establish any right to an appeal, . . . and certainly does not establish any right to collaterally attack a final judgment of conviction").

Some scholars have urged the recognition or creation of such constitutional rights. See, e.g., Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 U.C.L.A. L. REV. 503, 544, 572-73 (1992) (calling the argument for a constitutional right to a criminal appeal "compelling," favoring what he calls "the Fairness Model" of appellate review, and observing with approval that sometimes the Supreme Court, following the rationale of that model, "has overridden established historical practice to institute rules of constitutional criminal procedure unknown both to common law and to early American practice"). Attempting to resolve the merits of such arguments is beyond the scope of this Article.

different questions about the power of the Supreme Court. A claim that the Supreme Court has power to prescribe standards for direct or collateral review in *state courts* of decisions previously made in state criminal cases would be one matter, currently an apparently debatable matter. A quite different matter is the Court's well established power to prescribe such standards for review in *federal courts* either of decisions made by federal courts during federal prosecutions, or of decisions made by state courts during state prosecutions.

Power to perform the latter function, that of prescribing standards and procedures for direct and collateral review by *federal courts* of decisions in federal and state criminal cases, is solidly settled. Congress long ago created appellate rights in federal criminal cases,[232] authorized collateral attacks in federal district courts on federal criminal judgments,[233] gave federal district courts power to grant the writ of habeas corpus to state prisoners,[234] and gave federal courts of appeals jurisdiction both to review decisions in collateral attacks on federal criminal judgments and to review decisions in federal habeas cases involving state prisoners.[235] It has long been established that the Supreme Court has considerable supervisory power to regulate the manner in which inferior federal courts exercise the jurisdiction given them by Congress.[236] It is at least equally well settled that Congress has considerable power to prescribe procedures to be followed

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[232]*See* LA FAVE ET AL., *supra* note 15, § 27.2(a), at 1256 (stating that Congress gave federal circuit courts authority to review federal criminal convictions in 1879).

[233]*See* 28 U.S.C.A. § 2255(2004) (citing original enactment in 1948).

[234]*See* LA FAVE ET AL., supra note 15, § 28.2(b), at 1294-95 (describing Habeas Corpus Act of 1867 and successor statutes).

[235]See 28 U.S.C. § 1291 (2000).

[236]*See* source cited *supra* note 72.

by federal courts, and both the Court and Congress have exercised these powers on occasions too numerous and too obvious to bear discussion here.[237] Federal legislative and judicial powers to prescribe federal courts' standards of review, and otherwise to regulate procedures used in federal reviewing courts, seem to flow from the federal powers to provide for such review in the first place.

Similarly, it is not surprising that the Supreme Court has claimed the power to require that state as well as federal courts in civil and criminal trials follow specified procedures that the Court deems essential to the fairness of those trials, since the Constitution not only provides a specific right to a trial in a criminal case[238] but also and more generally requires due process, ordinarily including a trial, when one is deprived in any judicial proceeding of life, liberty or property.[239] The constitutional right to a trial serves as a predicate for the Court to require, for example, that guilt be proved in a criminal trial beyond a reasonable doubt,[240] and that in civil trials grounds for termination of parental rights[241] and actual malice in First Amendment cases[242] both be proved by clear and convincing evidence.

In each of the above examples, a requirement of federal law that a trial or appeal occur at

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[237]*See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (describing and evaluating history of Congress's and Supreme Court's exercises of these powers).

[238]U.S. CONST. amend. VI.

[239]*See* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 17.9, at __ (2004).

[240]*See* In re Winship, 397 U.S. 358 (1970).

[241]*See* Santosky v. Kramer, 455 U.S. 745 (1982).

[242]*See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29,30 (1971); New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964).

all serves as a predicate for imposing in the name of federal law particular procedural requirements for the manner in which the required trial or appeal must be conducted.[243] By analogy to those examples, a federal constitutional requirement that all state appellate courts review decisions of certain mixed questions of federal constitutional law and fact according to a specified standard or standards of review would seem plausible, *if* the requirement were an appendage on a federal constitutional right to obtain direct review of decisions made in state criminal cases.

However, since it appears that, at least in ordinary cases and at least for the time being, federal law does not require states to provide the parties to criminal cases any access to direct review, it might seem surprising if the Supreme Court held that certain federally mandated procedures had to be followed if and when states chose to authorize such review.

Indeed, the Court has sometimes rejected criminal defendants' or prisoners' claims to be accorded certain desired procedures for appellate or collateral review of their cases, and in so doing has occasionally relied on the apparent lack of a federal constitutional right to review of decisions in criminal cases. Thus, in the old case usually cited as the first to reject a constitutional right to appeal a criminal judgment, *McKane v. Durston*,[244] the Court relied on the lack of any federal constitutional right to appeal in upholding a state's denial of bail pending appeal.[245] The Court explained that "the right of appeal may be accorded by the state to the

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[243]There have been other examples of the Supreme Court piggy-backing one federal constitutional right on another. *See, e.g.*, Pennsylvania v. Finley, 481 U.S. 551, 554 (1987) (explaining that "[t]he holding in [*Anders v. California*, 386 U.S. 738 (1967), that appointed appellate counsel who deems the case wholly frivolous must follow specified procedures] . . . was based on the underlying constitutional right to appointed counsel . . .").

[244]153 U.S. 684 (1894).

[245]*Id*. at 687-88.

accused upon such terms as in its wisdom may be [deemed] proper," and that "whether an appeal should be allowed, and, if so, under what circumstances, or on what conditions, are matters for each state to determine for itself."[246]

Much more recently, the Court in *Ross v. Moffitt*[247] rejected the claim that a defendant has a federal constitutional right to appointed counsel on discretionary direct appeal of a criminal judgment, relying in part on the lack of a federal constitutional right to appeal at all.[248] Even more recently and using a similar analysis, the Court in *Pennsylvania v. Finley*[249] held that there is no federal constitutional right to appointment of counsel to represent a petitioner for collateral relief from a criminal judgment, in part because there is no constitutional right to file such petition at all.[250]

2. Relevance of *Chapman* and *Griffith*

However, despite these repeated refusals to impose procedural requirements on review

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[246]*Id*.

[247]417 U.S. 600 (1974).

[248]*Id*. at 610-11.

[249]481 U.S. 551, 557 (1987).

[250]*Id*. at 555-57. Eminent legal scholars have made arguments along similar lines. For example, Professor Monaghan has written that it is "troublesome" to attempt to locate the *Bose Corporation* duty of independent review in the First Amendment "given the general rule that there is no constitutional right to appellate review in any civil case." Monaghan, *supra* note 24, at 246. Also, addressing the question of retroactivity of new constitutional law, Professors Fallon and Meltzer wrote, in an article published in 1991, that "[t]he Supreme Court's restriction of federal habeas corpus review in cases involving new law raises no question of withdrawal of constitutionally required remedies," since "[h]istory marks federal habeas corpus as constitutionally gratuitous as a means of postconviction review." Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1813 (1991). If a state's allowing criminal defendants to take direct appeals is likewise "constitutionally gratuitous," then perhaps it similarly follows that at least some particular procedures desired by state-court defendants (such as application of new law, de novo review of application of law to facts, and use of a harmless-error standard favorable to defendants) in appeals that states choose to allow are not or should not be constitutionally required. *But see infra* note 297 (citing scholarly writings assuming that *Griffith* governs state appellate courts or ignoring this issue).

proceedings that the states could withhold entirely, the Court did impose both the *Chapman* harmless-error test and the *Griffith* retroactivity rule on state appellate courts. It is remarkable how nearly contemporaneous were the Court's 1974 *Ross* and 1987 *Finley* refusals to regulate review proceedings on the ground that states need not provide them at all, on the one hand, with its 1967 *Chapman* ruling and the 1987 *Griffith* decision, since both *Chapman* and *Griffith* do nevertheless regulate such optional review proceedings. Even more remarkable is the clearly inadequate manner in which the Court announced and explained the *Chapman* and *Griffith* decisions. It is important now to evaluate in depth the Court's explanations of those two decisions, since the Court's manner of announcing the line of recent decisions on de novo review that began with *Ornelas* is quite analogous.

The *Griffith* issue, of whether a claim that a trial court erred is governed by old or new law, is analytically prior to the *Chapman* issue of whether any such error was harmless. In this Article, however, I shall discuss harmlessness first, since the Court mandated use of the "harmless beyond a reasonable doubt" standard in 1967, another twenty years passed before the Court in 1987 required retroactive application of new rules on direct review, and almost another ten years elapsed before the Court launched its current project of requiring de novo appellate review. Analysis of the 1967 and 1987 developments in chronological sequence reveals much about the Court's track record of governance of state appellate procedure, and suggests that the Court's recent decisions about de novo review may well be further steps designed to lead state appellate courts down a third primrose path parallel to the previous two.

a. *Chapman v. California*

The Supreme Court in *Chapman v. California*[251] dictated use by appellate courts of an extremely onerous test of the harmlessness of federal constitutional error. *Chapman* held that an appellate court is required to reverse a criminal judgment on account of such an error unless the error was harmless "beyond a reasonable doubt."[252] Later the Court even identified a few kinds of constitutional error that must be deemed or conclusively presumed never to be harmless.[253]

In *Chapman*, by the time the case reached the United States Supreme Court, the California Supreme Court had already determined that the criminal defendants' federal constitutional rights had been violated during their trials. However, the state supreme court had applied the California Constitution's provision forbidding reversal of a judgment unless "the error complained of has resulted in a miscarriage of justice,"[254] and had concluded under that standard that the error had been harmless.

The United States Supreme Court in turn held (insofar as is relevant to this Article) (1) that "federal law" of an unspecified kind governs the question whether a particular federal constitutional error was harmless,[255] (2) that under this federal law the question is whether the error was "harmless beyond a reasonable doubt,"[256] and (3) that on the Court's own application of

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[251]386 U.S. 18 (1967).

[252]*Id*. at 24.

[253]*See, e.g.*, Sullivan v. Louisiana, 508 U.S. 275 (1993) (holding that instruction overstating degree of doubt jury can have when rendering guilty verdict cannot be harmless).

[254]386 U.S. at 20.

[255]*Id*. at 20-21.

[256]*Id*. at 24.

this standard to the record the error in this case was not harmless.[257] The Court therefore reversed and remanded the case, explaining that "[p]etitioners are entitled to a trial free from [federal constitutional error]"[258] and thus doubtless expecting a state-court retrial unless the charges were dropped or dismissed.

The Court's conclusion that federal law governs its own review of the harmlessness of a federal constitutional error in a state's judicial proceeding is not very surprising. But what is the source of this federal law? As Justice White wrote, dissenting in *Brecht v. Abrahamson*[259] over a quarter-century after *Chapman*, the Court in *Chapman* "never expressly identified the source" of the rule it created, as being either the Constitution or another source of federal law.[260]

The Court in *Chapman* did not even state expressly whether federal law required use of this standard of harmlessness only by the Supreme Court itself (and presumably by lower federal appellate courts), or also by state appellate courts. Justice Harlan in dissent was perfectly explicit in giving the latter interpretation to the Court's opinion,[261] and in sharply questioning the Court's power to impose the *Chapman* doctrine on state courts.

> I would hold that a state appellate court's reasonable application of a constitutionally proper state harmless-error rule to sustain a state conviction constitutes an independent and adequate state ground of judgment. . . .
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> . . .

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[257] *Id*. at 24-26.

[258] *Id*. at 26.

[259] 507 U.S. 619 (1993).

[260] *Id.* at 645 (White, J., dissenting).

[261] Justice Harlan wrote that "[t[he Court imposes [the *Chapman* standard of harmlessness] . . . on state appellate courts . . . ." 386 U.S. at 46 (Harlan, J., dissenting).

> I regard the Court's assumption of what amounts to a general supervisory power over the trial of federal constitutional issues in state courts as a startling constitutional development that is wholly out of keeping with our federal system and completely unsupported by the Fourteenth Amendment where the source of such a power must be found. . . .
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> . . .
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> Even assuming that the Court has the power to fashion remedies and procedures binding on state courts for the protection of particular constitutional rights, I could not agree that a general harmless-error rule falls into that category.[262]

Remarkably, the Court did not even mention any of this very pointed language concerning whether the *Chapman* holding governs state appellate courts' decisions, and concerning what law might empower the Court so to regulate state courts' proceedings, so of course the Court did not respond to Justice Harlan's views on their merits.

The alternatives of course depended upon whether this harmlessness standard came (1) from some unspecified part of the Constitution that applies to state courts, such as the Due Process Clause of the Fourteenth Amendment, (2) from some power of the Court to create sub-constitutional federal law binding state courts, or instead (3) from the Court's power to regulate its own and lower federal courts' procedures. With no more guidance than the Court's passing reference to "the absence of appropriate congressional action" concerning a test for harmlessness of error,[263] which could have implied that the Constitution did not dictate the *Chapman* standard (since at least ordinarily congressional acts cannot trump constitutional requirements), state courts and commentators reading the opinion were left to speculate about the source of this new test of harmlessness and about the scope of its applicability.

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[262] *Id*. at 46-48 (Harlan, J., dissenting).

About three weeks after handing down its *Chapman* decision, the Court granted certiorari and summarily vacated about a score of California appellate decisions "for further consideration in the light of" *Chapman*.[264] However, these actions provided only a weak indication that *Chapman* governed state appellate courts, since these actions could have been designed only to require the state courts to address issues the Court itself had not clearly resolved in *Chapman*, especially whether *Chapman* governed state appellate courts and, if so, on what constitutional basis.

Nevertheless, many state appellate courts jumped to the conclusion that they were required to employ the *Chapman* test of harmlessness of federal constitutional errors. For example, in other cases that later came before the California Supreme Court, whose own judgment the United States Supreme Court had reversed in *Chapman*, that state court promptly interpreted the new test as binding on state appellate courts, without explaining why or even considering the alternative interpretations of *Chapman*.[265] Appellate courts in other states did likewise,[266] even though doing so often required their rejecting the less strict rules of

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[263]*Id*. at 21 (opinion of the Court).

[264]*See, e.g*., Wheaton v. California, 386 U.S. 267 (1967). These actions are listed in Westlaw's KeyCite pages for *Chapman*.

[265]*See, e.g*., People v. Modesto, 427 P.2d 788, 799 (Cal. 1967) (en banc) (holding that state supreme court "must" determine claimed harmlessness of federal constitutional error "in accordance with the *Chapman* test," because the *Chapman* rule "requires us" to do so, and thus applying that test in affirming conviction).

[266]*See, e.g*., Raphael v. State, 994 P.2d 1004, 1013 n.40 (Alaska 2000) (applying *Chapman* standard to reverse conviction, and explaining that in 1977 the court had replaced its previously applicable "affect a substantial right" standard "in accord with . . . *Chapman*"); State v. Smith, 242 A.2d 49, 52-53 (N.J. App. Div. 1968) (applying *Chapman* standard without considering its alternative possible sources, holding that error was not harmless under that standard, and reversing convictions); Commonwealth v. Pearson, 233 A.2d 552, 554 (Pa. 1967) (applying *Chapman* standard without considering its alternative possible sources, holding that error was not harmless under that standard, reversing convictions, and explaining that "as we read *Chapman*" the prosecution "must now demonstrate" to the state appellate court that the *Chapman* test is met).

harmlessness of error they previously had used.[267]

For many years, commentators too paid little attention to the questions of the *Chapman* rule's source and scope.[268] More than twenty-five years after the Supreme Court decided *Chapman*, the eminent legal scholar Daniel Meltzer still considered "the source of the rule" announced in Chapman to be mysterious enough to warrant his writing an article attempting to solve the puzzle.[269] Professor Meltzer's effort was necessary, in his view, because "[t]he *Chapman* opinion was cryptic . . ." as to the source of the law it created, and "[f]or the most part, the Court and commentators have passed by this question entirely."[270]

Eventually, twenty-six years after deciding *Chapman*, the Court did write expressly that state appellate courts were obliged to use this test of harmlessness.[271] This necessarily implied that the obligation either was found in the Constitution or was created under some unspecified and not-yet-explained power of the Supreme Court to create sub-constitutional federal law binding the states.

Even today, though, more than thirty-five years after *Chapman*, the Court has never even tried to identify which provision of the Constitution is the source of the obligation, much less to

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[267] *See* Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 22 n.89 (1994).

[268] "Justice Harlan's dissent did not generate much debate in subsequent years about the legal basis for the Chapman rule." *Id*. at 2.

[269] *Id*.

[270] *Id*. at 2-3.

[271] *See* Brecht v. Abrahamson, 507 U.S. 619, 636 (1993) (stating that one reason for adopting a narrower standard of harmlessness of federal constitutional errors for federal courts' habeas review of state criminal judgments than for federal courts' direct review is that "*Chapman* requires state courts to engage in on direct review" consideration of such errors under the *Chapman* harmless-error standard).

persuade readers that the obligation really is found there. Neither has the Court attempted to identify any source of power in the Court to impose the *Chapman* doctrine on state courts as a sub-constitutional requirement of federal law.

Professor Meltzer's careful analysis of the possible bases of the doctrine led him to conclude that each presents a "profound conceptual difficulty"[272] or more flatly "fails to sustain the argument"[273] and "cannot account for *Chapman*."[274] He ultimately concluded that the theory of "constitutional common law" is "the best explanation for the *Chapman* rule."[275] However, his conclusion appeared to rest in significant part on his assumption -- reflecting perhaps undeserved faith in the Court -- that the Court could not have exceeded its powers when it established that rule. He wrote that, since there is "no firm basis for understanding the *Chapman* decision as a constitutional mandate, . . . understanding *Chapman* instead as constitutional common law seems to me the only plausible alternative."[276] I, in contrast, consider it also plausible that the Court in *Chapman* and in other cases discussed in this Article exceeded the powers conferred on it by the

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[272]Meltzer, *supra* note 267, at 2 (referring to the theory that *Chapman* rests squarely on the Constitution).

[273]*Id*. at 15 (referring to the theory that the *Chapman* rule is "required by due process or by fundamental presuppositions about judicial review" because appellate courts with jurisdiction are "obliged to apply the Constitution").

[274]*Id*. at 23 (referring to the theory that the *Chapman* rule is necessary "to protect the Supreme Court's appellate jurisdiction"). *See also id*. at 14 (concluding that "harmless error rules do not run afoul of the Equal Protection Clause"), 15 (concluding that "a state harmless error rule does not fall within the doctrine that proscribes unconstitutional conditions"), 19 (concluding that the *Chapman* rule cannot rest on FED. R. CRIM. P. 52(a)), 21 (concluding that "difficulties stand in the way of resting *Chapman* on [28 U.S.C.] § 2111"), and 26 (concluding that "*Chapman* is hard to understand as a rule of constitutionally mandated remediation"). In an earlier article, Professor Meltzer had noted that another possible explanation for the Court's decision in *Chapman* is "that the Supreme Court was simply confused." Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 279 n.166 (1988).

[275]Meltzer, *supra* note 267, at 26.

[276]*Id*.

Constitution.

Despite the failure of the Court to explain the source of *Chapman* at all, and despite the weaknesses of others' explanations, today state appellate courts and scholars seem uniformly to accept this obligation as part of federal constitutional law. The Court appears to have accomplished in the *Chapman* line of cases the imposition of a federal constitutional requirement on state appellate courts by stealth.[277]

b. *Griffith v. Kentucky*

Twenty years after the Court in 1967 had in this manner begun the process by which state appellate courts implemented the Court's view of harmlessness of errors, the Court in 1987 handed down its decision in *Griffith v. Kentucky*,[278] which would come to require state appellate courts to follow the Court's current doctrine concerning retroactive application of new rules of federal constitutional criminal procedure announced after occurrence of the events they are deemed to regulate. The Court's method in announcing *Griffith*, and the responses of state courts and commentators, were on this occasion very similar to what had already happened concerning *Chapman* and would later happen in the *Ornelas* line of cases.

The Court held in *Griffith* that "a new [federal constitutional] rule for the conduct of

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[277]In case the word "stealth" strikes one as harsh, I remind the reader that equally strong or stronger language is not unusual in legal scholarship. *See, e.g.*, John Gava, *Another Blast from the Past or Why the Left Should Embrace Strict Legalism: A Reply to Frank Carrigan*, 27 MELB. U. L. REV. 186, 194 (2003) (referring to judges' "constitutional amendment by stealth"); Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421 (1980); Lino A. Graglia, *Constitutional Law: A Ruse for Government By an Intellectual Elite*, 14 Ga. St. U. L. Rev. 767, 773 (1998) (referring in heading to "The Fraud of Constitutional 'Interpretation'"); Sylvia A. Law, *Physician-Assisted Death: An Essay on Constitutional Rights and Remedies*, 55 MD. L. REV. 292, 325 (1996) (referring in heading to "The Stealth Destruction of Constitutional Liberty"); Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution*," 76 N.Y.U. L. REV. 1456, 1500 (2001) (stating that "[i]nterpreting the Constitution solely with regard to the intent of 'dead men' was a fraudulent method of constitutional interpretation . . . .").

[278]479 U.S. 314 (1987).

criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . . ."[279] This holding, as the Court announced it in the quoted language, expressly applied to *state* as well as to federal *cases*. The Court also wrote expressly elsewhere in the opinion that retroactivity was required for a new rule announced while the case in question was "pending on direct *state* or federal *review* or not yet final."[280]

However, those two utterances, even the references to state proceedings that I have italicized above and below to highlight the point to be made in this paragraph, did not necessarily resolve a further issue. Even given that the *Griffith* retroactivity doctrine governs *state* as well as federal *cases*, and given also that the Court's criterion for application of the *Griffith* doctrine turns on whether the litigation in question was final or instead was still pending on direct *review* in a *state* or federal court when the new constitutional rule was announced, the question remained: Did the Court's holding require retroactive application to state cases according to the *Griffith* criterion only by the United States Supreme Court itself and by lower federal courts reviewing state convictions and sentences, or also by *state courts* reviewing their own criminal judgments on direct or on collateral review? The former version of the holding could have been an exercise of the Court's supervisory power over federal courts, since it would have governed only proceedings in federal courts. The latter would have to be an interpretation of an unspecified constitutional provision, a piece of so-called constitutional common law, or some other kind of Supreme Court governance of state courts, since it would have applied also to proceedings in state courts.

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[279] *Id*. at 328.

[280] *Id*. at 316 (italics added).

The Court used some language tending to support the former interpretation, not binding state courts. For example, the Court quoted with approval its statement in *Linkletter v. Walker*[281] that "'the Constitution neither prohibits nor requires retrospective effect' of a new constitutional rule."[282] The Court also explained its decision largely in terms of the duties and practices of "this Court"[283] under "Art[icle] III,"[284] which of course has no direct application whatever to state courts.[285] The rationale in the opinion was expressed primarily in the general and not necessarily constitutional terms of "inequity" and "the principle of treating similarly situated defendants the same,"[286] without even a mention in this connection of the Fourteenth Amendment Equal Protection Clause or Due Process Clause as conceivable sources of this doctrine of equity or equality. Also, the Court expressed its conclusion on what it saw as the most specific issue presented by the case -- "whether a different retroactivity rule should apply when a new rule is a 'clear break' with the past," an issue the Court deemed "squarely before us in the present cases"[287] -- as a conclusion that such an exception was "inappropriate."[288] Not unconstitutional; inappropriate.

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[281]381 U.S. 618, 629 (1961).

[282]479 U.S. at 320 (quoting *Linkletter*).

[283]*Id*. at 322, 326.

[284]*Id*. at 322.

[285]*See* 3 ROTUNDA & NOWAK, *supra* note 239, § 2.13, at __ ("State courts are not bound by Article III of the U.S. Constitution . . . .").

[286]479 U.S. at 323, 327.

[287]*Id*. at 326.

[288]*Id*.

However, the Court also used language one might view as tending to indicate that somehow state appellate courts were bound to follow the new rule concerning retroactivity. The Court wrote that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication,"[289] and referred to "the nature of judicial review"[290] and even "the integrity of judicial review."[291] Quite remarkably, the Court wrote that "[a]s a practical matter . . . we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final."[292] Perhaps these parts of the opinion can be interpreted as carrying the implication -- to borrow Justice Harlan's word in *Chapman*, the "startling" implication[293] -- that Article III, by giving the Court specified and limited powers to do its own business, implicitly gave it also authority to require state courts to supplement the Court's powers by implementing the Court's views, or that some other unspecified part of the Constitution requires state courts to adhere to a conception of judicial powers which includes the Court's specific view of retroactivity.

The Court in this opinion passed up many chances to clarify the matter. For example, it "instruct[ed] the lower courts to apply . . . new rule[s] retroactively to cases not yet final" without

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[289] *Id*. at 322.

[290] *Id*. at 323.

[291] *Id*.

[292] *Id*.

[293] *See supra* text accompanying note 262.

specifying whether it was so instructing lower state as well as lower federal courts.[294] Similarly, the Court used the passive voice in writing twice that a new rule "is to be applied retroactively," without saying by what courts the rule must be so applied.[295]

As it had done in the immediate aftermath of its *Chapman* decision, about six weeks after handing down *Griffith* the Court granted certiorari and summarily vacated about a dozen decisions of various state appellate courts on direct review of convictions or sentences "for further consideration in light of" *Griffith*.[296] However, again these actions provided only an ambiguous indication that *Griffith* governed state appellate courts, since these actions could have been designed only to require the state courts to address issues the Court itself had not clearly resolved in *Griffith*, especially whether *Griffith* governs state appellate courts and, if so, on what constitutional basis.

Faced with the ambiguity of *Griffith*, regrettably even the most astute commentators seemed to assume without discussion that state appellate courts were bound by the new requirement of retroactive application of new rules of federal constitutional law.[297] Likewise,

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[294] 479 U.S. at 323.

[295] *Id*. at 324, 328.

[296] *See, e.g*., Mack v. Illinois, 479 U.S. 1074 (1987). These actions are listed in Westlaw's KeyCite pages for *Griffith*.

[297] *See, e.g*., Fallon & Meltzer, *supra* note 250. Professors Fallon and Meltzer in this article addressed the issue of whether the Court has power under Article III to deny retroactive effect to its new constitutional rules, *e.g*., *id*. at 1734, and discussed at length the issue of the Court's power to compel state courts to provide remedies for constitutional violations, *id*. at 1786-96. However, they omitted to mention the distinct issue of whether the Court has power to require state appellate courts to give such rules retroactive effect, and stated that, in a hypothetical case of a state criminal conviction for failure to pay a highway use tax held unconstitutional during the pendency of the criminal appeal, "[t]he criminal conviction . . . could not stand," without specifying whether the conviction must fall in a state or only in a federal court. *Id*. at 1768.

Comments on previous Supreme Court rulings on retroactivity similarly neglected the issue. *See, e.g*., Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965) (addressing the Court's power to limit the retroactive effects of its decisions, but not its power to require

state appellate courts assumed without discussion that they were compelled to follow this new mandate.[298] Such assumptions seem, however, poor substitutes for analysis by state courts and by commentators, and no substitutes at all for explication by the Supreme Court itself of the specifics of its constitutional authority to impose such requirements on state appellate courts.

Eventually, years after it had decided *Griffith*, the Court did make it reasonably clear in *Powell v. Nevada*[299] that it considers state appellate courts bound to apply the *Griffith* holding.[300]

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state appellate courts to give retroactive effects to such decisions).

Even today, when Wayne R. LaFave, Jerold H. Israel, and Nancy J. King discuss *Griffith* in their excellent treatise, CRIMINAL PROCEDURE, they make no mention of the issue of the Court's power to impose its view of retroactivity on state appellate courts. *See* LAFAVE ET AL., *supra* note 72 §§ 2.10(a), (d) & (e). Professor LaFave's fine treatise on the Fourth Amendment discusses retroactivity and cites decades of relevant articles, but again is silent as to whether and why the Court can require state appellate courts to follow its view of retroactivity. *See* 5 LAFAVE, *supra* note 33, § 11.5. I have been unable to find a mention of this issue even in the current edition of the masterful casebook, RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (5th ed. 2003).

[298] *See, e.g.*, Taylor v. Sherrill, 802 P.2d 1058, 1062-63 (Ariz. Ct. App. 1990) (applying the then-new double-jeopardy rule of *Grady v. Corbin*, 495 U.S. 508 (1990), to a not-yet-final state conviction, on the sole basis of a citation to *Griffith*), *vacated on other grounds*, 819 P.2d 921 (Ariz. 1991) (en banc); Commonwealth v. Bembury, 548 N.E.2d 1255, 1259 & n.3 (Mass. 1990) (retroactively applying *Davis v. Alaska*, 415 U.S. 308 (1974), "under *Griffith*," to a direct appeal during the long pendency of which (as a result of the defendant's escape from custody and delay in his recapture) *Davis* had been decided); People v. Scott, 516 N.E.2d 1208, 1210 (N.Y. 1987) (retroactively applying *Batson v. Kentucky*, 476 U.S. 79 (1986), to a direct appeal during the pendency of which *Batson* had been decided, and explaining only that "[i]n *Griffith* . . . the Supreme Court declared that *Batson* applied retroactively to all pending appeals"). Only rarely did a state appellate court even make explicit its assumption that it was bound by *Griffith*. *See, e.g.*, Taylor v. State, 10 S.W.3d 673, 679 (Tex. Ct. Crim. App. 2000) (stating that "[t]he Supreme Court's retroactivity analysis for federal constitutional errors is binding upon the states when federal constitutional errors are involved," and supporting that statement only by a citation to *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991)).

As a refreshing contrast, in the context of collateral rather than direct review of criminal judgments, a panel of the Appellate Court of Illinois identified and addressed the issue of whether state courts are bound by the United States Supreme Court's pronouncements on retroactivity. That court wrote that state courts are not bound, when hearing collateral attacks based on new federal constitutional rules, to apply the Court's view of the extent and limits of retroactivity in federal habeas corpus proceedings. People v. Kizer, 741 N.E.2d 1103, 1110 (Ill. App. Ct. 2000).

[299] 511 U.S. 79 (1994).

[300] *See id.* at 84 (vacating the state supreme court's judgment on the grounds that "[t]he State . . . concedes that the Nevada Supreme Court's retroactivity analysis was incorrect" with regard to a new rule of federal constitutional law and that ". . . *Griffith* entitles [the state-court appellant] to rely on . . ." the new rule").

However, the *Powell* opinion did not even attempt to explain why.[301] Indeed, in none of the cases after *Griffith* in which the Court has discussed or applied its doctrine of mandatory direct-review retroactivity has the Court provided a specific and thorough explanation of its purported power to impose that doctrine on state appellate courts. Worse, much of what the Court actually has written tends to undermine its implicit claim to such power.

The best the Court has offered in these cases are repeated statements that its holding in *Griffith*

> . . . rested on two "basic norms of constitutional adjudication." First, we reasoned that "the nature of judicial review" strips us of the quintessentially "legislat[ive]" prerogative to make rules of law retroactive or prospective as we see fit. Second, we concluded that "selective application of new rules violates the principle of treating similarly situated [parties] the same."[302]

Individual justices from time to time have elaborated on those rationales or added to them, by expressly relying on Article III of the Constitution and by explaining that "[t]he true *traditional* view is that prospective decisionmaking is quite incompatible with the judicial power, and that

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[301]The Court has performed similarly concerning retroactivity of new constitutional rules in civil cases. *See, e.g.*, Ashland Oil, Inc., v. Caryl, 497 U.S. 916, 918 (1990) (quoting the statement in the opinion of Justice O'Connor for herself and three other justices in *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 177 (1990), that "[t]he determination whether a constitutional decision of this Court is retroactive . . . is a matter of federal law," and reversing a judgment on the ground that the state appellate court had erred in failing to apply such a Supreme Court precedent retroactively, without identifying the federal law that authorizes the Court to impose its view of retroactivity of new constitutional rulings on state appellate courts); American Trucking Assns., Inc. v. Smith, 496 U.S. 167, 177-78 (1990) (opinion of O'Connor, J.) (making the statement quoted in *Ashland Oil*, and adding that ". . . we have consistently required that state courts adhere to our retroactivity decisions," without trying to identify the source of the Court's purported power to impose this requirement on state appellate courts).

[302]Harper v. Virginia Department of Taxation, 509 U.S. 86, 95 (1993) (citations omitted). *See also* Powell v. Nevada, 511 U.S. 79, 84 (1994) (explaining *Griffith* in terms of "the nature of judicial review"); Teague v. Lane, 489 U.S. 288, 304 (1989) (explaining *Griffith* in terms of "basic norms of constitutional adjudication"). *Harper* was a civil case, but the opinion of the Court is an example of opinions in several civil and criminal cases in which the Court has drawn on principles discussed in one category of cases when considering retroactivity in the other category, and thus has explained criminal retroactivity in civil cases and vice versa. *See, e.g.*, James B. Beam Distilling Company v. Georgia, 501 U.S. 529, 540 (1991) (reasoning in a civil case that "*Griffith* cannot be confined to the criminal law"); Solem v. Stumes, 465 U.S. 638, 642 (1984) (relying, in a case reviewing a state criminal conviction on federal habeas, on a statement in the civil case of *Great Northern R. Co. v. Sunburst Oil & Refining*

courts have no authority to engage in the practice."[303] Indeed, the Court in *Griffith* itself cited Article III as a predicate for basing its holding on "basic norms of constitutional adjudication" and "the nature of judicial review."[304]

How cogent are these reasons for imposing the *Griffith* rule on state appellate courts? As for the Court's references to "treating similarly situated [parties] the same," neither the Court nor any single justice has stated that the *Griffith* requirement of retroactivity is a command of the Equal Protection Clause, which of course does in other contexts limit various actions by state courts and other state actors. Seldom has such a claim been made even in the opinions of lower federal courts[305] or of state courts,[306] or in the writings of commentators.[307] Even if some lower

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Co., 287 U.S. 358, 364 (1932), that ". . . retroactive application is not compelled, constitutionally or otherwise").

[303]Harper v. Virginia Department of Taxation, 509 U.S. 86, 106 (1993) (concurring opinion of Scalia, J.); *see* James B. Beam Distilling Company v. Georgia, 501 U.S. 529, 547 (1991) (Blackmun, J., concurring in judgment and joined by Marshall and Scalia, JJ.) (citing Article III and relying on "basic norms of constitutional adjudication" and "[t]he nature of judicial review"); *id*. at 549 (Scalia, J., concurring in judgment and joined by Marshall and Blackmun, JJ.) (writing that the reference in Article III to "[t]he judicial Power of the United States" conferred on federal courts "must be deemed to be the judicial power as understood by our common-law tradition").

[304]Griffith v. Kentucky, 479 U.S. 314, 322-23 (1987).

[305]A March 10, 2004, Westlaw search of the Allcases and Journals and Law Reviews databases for documents containing both the word "Griffith" six words or less before the word "Kentucky," and the word "Griffith" in the same paragraph as the phrase "Equal Protection," yielded 116 federal and state cases and 21 documents published in legal journals. Among those 137 documents, every one relevant to the possibility that *Griffith* is based on the Equal Protection Clause is described in this footnote and the two immediately following it.

There are three relevant decisions of lower federal courts. First, two judges of a three-judge panel in *Myers v. Ylst*, 897 F.2d 417 (9th Cir. 1990), reversed the denial of habeas relief to a state prisoner on the ground that the state supreme court had violated the Equal Protection Clause by denying him the retroactive benefit of a new rule of state law while granting such benefit to another prisoner, though the cases of both were pending on direct review when the new rule was announced, and cited *Griffith* while writing that it did not reach "the issue of whether *Griffith* applies to state court decisions promulgating new rules . . . ." *Id*. at 424. This holding and its explanation by the Ninth Circuit do not comprise an assertion that the *Griffith* holding itself is required by the Equal Protection Clause, but instead are based on unequal treatment of two prisoners both of whose cases were pending on direct review.

Second, a grant of habeas relief on Equal Protection grounds with a citation of *Griffith*, by two judges of a three-judge panel of the Eighth Circuit in *Williams v. Armontrout*, 891 F.2d 656, 658-59 & n.1 (1989), *vacated on other grounds*, 912 F.2d 924 (1990) (en banc), provides an even weaker indication that *Griffith* is an Equal Protection mandate, since those judges relied not only on the state supreme court's "selective application" of its new state-law rule but also on the judges' conclusion that that court's "only purpose has been to affirm convictions."

Third, the only other relevant decision of a lower federal court is *United States ex rel. Mahaffey v. Peters*,

court or commentator had written a plausible argument that *Griffith* is an interpretation of the Equal Protection Clause, that would be a poor substitute for a similar opinion of the Supreme Court itself. And if, as currently appears most likely, the *Griffith* holding is not mandated by Equal Protection, then presumably state appellate courts are free to decide by their own standards whether or not particular parties to litigation are similarly situated and, even if they are similarly situated, to treat them differently when the kind or degree of similarity is insufficient to require identical treatment, insofar as retroactivity is concerned.

Turning from the Court's invocations of the principle of equality, to the Court's and particular justices' references in these retroactivity cases to Article III, to the "judicial power" and

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978 F.Supp. 762 (N.D. Ill. 1997), *rev'd on other grounds*, 162 F.3d 481 (7th Cir. 1998). There the judge relied on *Griffith* in rejecting a state prisoner's claim on habeas that the state supreme court's failure to apply one of its decisions to him retroactively had violated the Equal Protection Clause. *Id*. at 777 n.18.

[306]None of the five relevant state cases yielded by the search described in the immediately preceding footnote includes a holding or statement that *Griffith* is an interpretation of the Equal Protection Clause, and some contain contrary holdings or statements. *See* Smith v. State, 598 So.2d 1063, 1066 (Fla. 1992), *receded from in* Wuornos v. State, 644 So.2d 1000, 1007 n.4 (Fla. 1994) (relying on *Griffith* to interpret state constitution's equal protection provisions to require retrospective application of new judicial rules to all non-final cases); Commonwealth v. Waters, 511 N.E.2d 356, 357 (Mass. 1987) (stating that ". . . *Griffith* . . . is not based on equal protection . . . grounds); State v. Burgess, 689 A.2d 730, 736 n.4 (N.J. App. Div. 1997) (stating that "[w]e . . . do not address the question of whether, to the extent *Griffith* rests upon an equal-protection foundation, the *Griffith* rule itself is one of constitutional magnitude requiring compliance by the states" with regard to new rules of state law); Burr v. Kulas, 532 N.W.2d 388, 391-92 (N.D. 1995) (rejecting Equal Protection Clause challenge based in part on *Griffith* to prospective application of new rule of state civil law); State v. Stilling, 770 P.2d 137, 143 (Utah 1989) (rejecting Equal Protection claim based on *Griffith*). All or most of the federal and state cases cited in this footnote and the immediately preceding one involved claims that Equal Protection was violated by failure retroactively to apply new rules of *state* rather than *federal* law, but this probably is insignificant, since of course the Equal Protection Clause limits the power of states to apply not only federal but also state law unequally.

[307]Only two published commentaries found by the search described in the footnote before last shed any light on whether *Griffith* is an interpretation of the Equal Protection Clause. *See* Robert A. Destro, *The Structure of the Religious Liberty Guarantee*, 11 J.L. & RELIGION 355, 380 n.103 (1994-95) (citing *Griffith* and stating that the view of the justices who announced the judgment of the Court in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), "has strong Article III, Supremacy Clause, Due Process and Equal Protection components"); Norman Cole Williams & Katherine M. Zehmisch, Note, *Section 27A of the Securities Exchange Act of 1934: Did Congress Grant Itself New Constitutional Powers?*, 8 ST. JOHN'S J. LEGAL COMMENT. 607, 623 (1993) (stating that ". . . the Court's decision in *Beam* was . . . based on the Constitution" and that ". . . Justice Souter's . . . reliance on the principle of 'equality' . . . suggested a constitutional analysis based on the Equal Protection Clause," and then mentioning the heavy reliance on *Griffith* in Justice Souter's opinion for the Court in *Beam*).

"the nature of judicial review," and to the distinction between judicial and legislative prerogatives, such phrases are understandable when the powers and functions of *federal* courts are under discussion. The first three articles of the United States Constitution separate the powers of the legislative, executive, and judicial branches of the federal government. Article III begins with the phrase "the judicial Power," and its use of that phrase seems to require courts to consider its meaning. Such deliberations might well produce conclusions about the extent and limits of the federal judicial power, and perhaps those conclusions might include matters of retroactivity of judicial rulings.

However, that phrase in Article III in context clearly refers *only* to the*federal* judicial power.[308] For the sake of discussion, let us suppose that implicitly, among the various components of the federal judicial power, that phrase grants to the United States Supreme Court the power to bind all the lower federal courts by this rule: Federal district courts' rulings that were correct when made will be deemed on direct review to have been incorrect because of the Supreme Court's intervening changes in the relevant law. It does not follow from that proposition that state appellate courts, when hearing appeals that the Constitution does not require to be heard at all, likewise must treat as erroneous rulings that were correct when state trial courts made them, simply because after the rulings the relevant federal constitutional law changed.

On its face, the Constitution does not speak to the nature of the judicial power of state courts in general, much less to the more specific subject of the extent and limits of the powers of state appellate courts that the Constitution does not even require states to create. Whatever the

[308]*See supra* note 285.

Constitution may or may not say implicitly about the extent and limits of the "judicial power" of state *trial* courts, it is a remarkable stretch to read it as speaking to the nature of the judicial power of state *appellate* courts. If the United States Supreme Court disagrees -- if it really construes "the judicial Power" conferred on it by Article III as including a power to require state appellate courts to review state trial courts' rulings that way -- then the Court owes us a much better explanation of why state appellate courts, which states are free to abolish, must while they do exist deem erroneous state trial court rulings that were correct when made.

The Court's sketchy and implausible explanations in *Griffith* and in the later cases on retroactivity, as to why that precedent binds state appellate courts, is slightly preferable to the Court's utter silence in *Chapman* and later harmlessness cases as to why *Chapman* binds state appellate courts, but still the Court has clearly failed to provide a specific and thorough justification for this aspect of the *Griffith* doctrine. The manner in which the Court has led state courts and commentators alike to accept the proposition that state courts must apply the Court's *Griffith* doctrine on retroactive application of new federal constitutional rules appears, here as previously with *Chapman*, remarkably stealthy and probably unsound.

To summarize my criticism of application of *Griffith* to state appellate courts, the Court's stated reasons for the *Griffith* rule have included citation of only one federal constitutional provision, Article III, which does not apply to state courts, plus citations of many of the Court's own precedents on retroactivity, which the Court and commentators have admitted have been confused, conflicting, and sometimes overruled.[309] The Court's other stated reasons for the

[309]*See, e.g.*, Harper v. Virginia Department of Taxation, 509 U.S. 86, 95 (1993) (overruling Chevron Oil Co. v. Huson, 404U.S. 97 (1971); Fallon & Meltzer, *supra* note 250, at 1736 (stating that "[e]specially in the area of criminal law and procedure, the recurrent effort to identify 'new' law with that which is made, not found, leads to unhelpful debates and conceptual confusions"); *id*. at 1744 (stating that ". . . the views of the judicial role implicit in

Griffith rule have been mere policies, principles, and equities. People often can reasonably disagree about the kinds of policies, principles, and equities the Court has discussed in its retroactivity cases, as is illustrated not only by disagreements over them among individual members of the Court, but also by changing conclusions about them reached over relatively short periods of time by the Court's majorities.

Since reasonable disagreements over these particular policies, principles, and equities are so clearly possible, the Court probably should not have imposed its current views of them upon state appellate courts. At the very least, it should not have done so without providing a specific identification of the constitutional provision authorizing the Court so to regulate state appellate procedure, and without a thorough explanation of why that constitutional provision contains this particular rule of appellate retroactivity when neither it nor any other constitutional provision contains a requirement that states provide appellate review at all. The Court owes us much more than it provided in the *Griffith* line of cases, just as in the *Chapman* line of cases.

Now that this Article has reviewed Professor Meltzer's critique of the possible bases of the Court's power to impose the *Chapman* harmlessness test on state courts, and has provided an original critique of the possible bases of the Court's power to require state appellate courts to follow the *Griffith* rule of retroactivity, it seems warranted to make another point supporting a suspicion that the Court lacks the authority it has been exercising to regulate state criminal appeals.

Failure to explain significant conduct often results from the lack of a good explanation. Every parent, spouse and employer knows this, since in those relationships, as in the relationship

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recent opinions [on retroactivity] are mixed and sometimes conflicting . . .").

the Court is obliged to maintain with the legal community, explanations are ordinarily expected and provided. The Court's complete failure to explain its supposed constitutional power to govern state criminal appeals in the *Chapman* and *Ornelas* contexts, and its transparently inadequate explanations in the *Griffith* context, all occurring consistently over a period of almost forty years, are added reasons to doubt that the Constitution authorizes the Court's regulations of state criminal appeals.

3. Due Process Argument for De Novo Review

If the Court were now to give us belated but specific and thorough explanations of its already asserted power to require state appellate courts to follow *Chapman* and *Griffith*, and perhaps also to tell us that the newer *Ornelas* line of cases binds state courts, how might it explain? There seem to be three possibilities.

First and most likely, the Court might explain that all these doctrines regulating state appellate practice are interpretations of the Due Process Clause of the Fourteenth Amendment. Second, the Court might try to base particular holdings in some of these cases on specific provisions of the Bill of Rights, claiming for example that the Fourth Amendment dictates the *Ornelas* rule of de novo review, the Eighth Amendment *Bajakajian*'s similar rule, and so on. Third, the Court might assert that the Constitution gives it power to create sub-constitutional rules of procedural and remedial law that bear certain relationships to the actual content of the Constitution, and that these doctrines are manifestations of that power.

The first of these three, the due process possibility, seems worth discussing in this Article at some length. At the opposite extreme from the Supreme Court's stealthy methods in the *Chapman* and *Griffith* lines of cases, where it created new doctrines and for years left state courts

merely to assume themselves bound to apply those doctrines, the Court often has overtly exercised enormous power by expressly imposing constitutional duties on state courts. Its broadest rationale for creating such explicit procedural obligations in state criminal cases, whether in the contexts of pretrial, trial, sentencing, appellate, or post-conviction procedure, has been that a state choosing to use (or constitutionally compelled to use) a given process must do so in a manner consistent with the federal constitutional guarantee of due process. In this manner the Court has created literally dozens of due-process protections of suspects, defendants, and convicts going beyond the specific rights enumerated in the Constitution's Bill of Rights, some appended to proceedings states constitutionally must provide in criminal cases such as trials, but others appended to procedures states constitutionally could withhold entirely.[310] Since such precedents exist, it seems quite possible that the Court would explain its various regulations of state criminal appeals as interpretations of the Due Process Clause.

The second possibility, a claim by the Court that its various regulations of state appellate practice are based on the particular Bill of Rights provisions affected by these regulations, seems unlikely. It is true, of course, that the Court has explicitly created various constitutional doctrines as purported aspects of particular provisions of the Bill of Rights. For example, in *Ashe v. Swenson*[311] the Court reversed a state conviction by expressly adding collateral estoppel to the set of rights deemed contained in the Double Jeopardy Clause, writing that collateral estoppel "is embodied in the Fifth Amendment guarantee against double jeopardy."[312] It seems conceivable,

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[310] *See* LAFAVE ET AL., *supra* note 15, § 2.7(a), at 77-80 (listing dozens of such due-process rights).

[311] 397 U.S. 436 (1970).

[312] *Id*. at 445. The Court's explanation of this conclusion was cursory at best, but at least the Court explicitly placed a state-court defendant's right to the benefit of collateral estoppel within the Fifth Amendment

therefore, that the Court might find it implicit in each of several constitutional provisions that decisions about its application must be reviewed de novo on appeal. However, the Court has already applied all three of its regulations of state appellate practice -- on retroactivity of new rules, on harmlessness of error, and on de novo review -- to various issues arising under several particular provisions of the Bill of Rights as well as under general due process principles.[313] It therefore seems that the Court would be hard-pressed to convince readers that each of those particular provisions implicitly requires, as to each of various issues arising under that provision, that appeals must be conducted in the ways the Court has specified.

That leaves the third conceivable basis for Supreme Court authority to impose procedural and remedial requirements on state criminal appeals. Some commentators have argued that the Court can regulate criminal procedure in state courts under a power to create sub-constitutional law designed to prevent or remedy constitutional violations. Such arguments have been made by certain brilliant scholars and endorsed by others, perhaps most notably in the case of Professor Monaghan's theory of "constitutional common law."[314]

However, the Court has never expressly accepted such an argument, even when it was exercising great yet long-unexplained power and therefore was under considerable pressure to do

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Double Jeopardy Clause, as deemed applied to the states by the Fourteenth Amendment. *See id.* at 445-46 & n.10.

[313]*See, e.g.*, Powell v. Nevada, 511 U.S. 79 (1994) (applying *Griffith* test to retroactivity of Fourth Amendment rule for prompt determination of probable cause to detain defendant); Arizona v. Fulminante, 499 U.S. 279 (1991) (applying *Chapman* test to harmlessness of admission of coerced confession in evidence in violation of privilege against self-incrimination); Olden v. Kentucky, 488 U.S. 227 (1988) (applying *Chapman* test to harmlessness of violation of right to confrontation). *See also supra* text Parts III.A-D. *See generally* LAFAVE, *supra* note 15, at 1284-86 (listing with citations many issues to which the Court has applied its *Chapman* test of harmlessness, and many others to which it has applied its doctrine that some kinds of errors cannot be harmless).

[314]*See* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). This very thoughtful article has been extremely influential in the legal academy. *See, e.g.*, Meltzer, *supra* note 267, at 26 (writing that constitutional common law is "the only plausible" basis of *Chapman v. California*).

so.[315] As a clear and quite recent example, the need arose in *Dickerson v. United States*[316] for the Court to explain why Congress (or, hypothetically, a state legislature) could not by statute overrule requirements that the Court first had created and applied in *Miranda v. Arizona*[317] and later had denied were personal constitutional rights.[318] Even when pressed sharply in *Dickerson*,[319] the Court rested its decision not on a claim of power to make "constitutional common law" or something like it, but on vague and conclusory assertions that *Miranda* was "a constitutional decision of this Court"[320] and established "a constitutional rule."[321] The Court's failure for decades to use the life lines scholars have offered on this conceivable aspect of its powers makes its resort to such a theory seem unlikely to occur in the context under discussion in this Article.

To summarize, the Court has never adopted commentators' theories along the lines of "constitutional common law," and the Court has applied to too many rights arising under too many constitutional provisions all three of the doctrines regulating state appellate practice that

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[315]My March 29, 2004, search of Westlaw's SCT database with the terms-and-connectors search "constitutional common law" produced six Supreme Court cases, in none of which the Court cited Professor Monaghan's article and endorsed his theory for a power of the Court to create rules supplementing constitutional interpretation.

[316]530 U.S. 428 (2000).

[317]384 U.S. 436 (1966).

[318]*See, e.g.*, Michigan v. Tucker, 417 U.S. 433, 444 (1974) (stating that the Miranda rights are "not themselves rights protected by the Constitution").

[319]530 U.S. at 444 (Scalia, J., dissenting).

[320]530 U.S. at 432.

[321]Id. at 437. *See generally* Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1032 (1999) (referring to "Chief Justice Rehnquist's embarrassing failure in *Dickerson v. United States* to acknowledge, much less

are discussed in this Article. Consequently, a unitary theory of due process seems the most plausible basis for applying to the states the Court's retroactivity, harmlessness, and de novo review doctrines concerning appellate review, and I therefore shall address at some length only that arguable basis for these requirements.

The Court's methods for identifying the demands of due process give it extremely wide latitude to reach unpredictable and debatable conclusions on a wide variety of matters. True, the Court has written that "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation,"[322] and that "expansion of those constitutional guarantees [found in the Bill of Rights] under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the constitution strikes between liberty and order."[323] However, as Professor LaFave has observed, these pious disclaimers have not prevented the Court from "imposing due process requirements invalidating practices that had been followed for many years in many states."[324]

The Court's due-process standards lend themselves to such decisions. For example, in criminal cases the Court often has written that procedural due process demands those processes that meet a general standard of "fundamental fairness."[325] Elaborating this standard in almost equally general words, the Court has written that the due-process question is whether a particular

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resolve, the *Miranda* conundrum").

[322]Dowling v. United States, 493 U.S. 342, 352 (1990).

[323]Medina v. California, 505 U.S. 437, 443 (1992).

[324]LAFAVE ET AL., *supra* note 15,§ 2.7(b), at 86.

[325]*See, e.g.*, Cooper v. Oklahoma, 517 U.S. 348, 362 (1996); Medina v. California, 505 U.S. 437, 448 (1992).

procedure being used in criminal cases "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[326] Yet another very general phrase the Court treats as instructive in this regard is that a challenged criminal procedure must not offend one of those "fundamental conceptions of justice . . . which define the community's sense of fair play and decency."[327]

When applying these extremely general standards to decide one or another particular issue of criminal procedure, the Court sometimes even relies on its interpretations not only of the constitutional text and historical practice but also of modern views regarding the issue.[328] In addition, there is wide recognition that often individual justices' decisions on how to apply the general standards of due process in resolving specific issues are, in the words of Professor LaFave, "influenced by the personal perspectives of the members of the Court,"[329] and by their "personal values and . . . subjective judgments."[330] The combination of such general, incommensurable and competing legal standards and factors, along with the subjective influences on justices' votes, has led the Court on some occasions to reach conclusions concerning procedural due process in criminal cases that have deeply divided the Court and provoked

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[326] *See, e.g.*, Cooper v. Oklahoma, 517 U.S. 348, 367 (1996); Medina v. California, 505 U.S. 437, 446 (1992).

[327] *See, e.g.*, Dowling v. United States, 493 U.S. 342, 353 (1990); United States v. Lovasco, 431 U.S. 783, 790 (1977).

[328] *See, e.g.*, Cooper v. Oklahoma, 517 U.S. 348, 356, 360, 362 (1996) (relying on "modern practice," "contemporary practice," and "contemporary procedures" as reasons to create new due process requirement); Medina v. California, 505 U.S. 437, 447 (1992) (considering "contemporary practice" in rejecting due process argument).

[329] LAFAVE ET AL., *supra* note 15, § 2.7(b), at 80.

[330] *Id*. at 85.

impassioned dissents.[331]

Among the decisions the Court has made in this manner, probably the one most relevant to the possibility that due process is the basis for *Chapman* and *Griffith*, and that it also requires de novo appellate review of decisions of mixed questions of federal constitutional law and fact, is the Court's ruling that the Due Process Clause guarantees defendant-appellants the assistance of counsel in a first appeal of right that a state chooses to permit. However, this precedent is not very instructive, except in the sense that it instructs us that the Court has given itself enormous latitude to resolve such matters in almost any manner it chooses.

The Court created this right in *Douglas v. California*[332] as an Equal Protection Clause right of indigents to have free counsel appointed for them. In *Douglas*, the Court did not even mention due process as a basis of the decision, and cited "fair procedure" only with regard to the perceived unfairness of unequal economic resources.[333] More than a decade later the Court admitted that the "precise rationale" for *Douglas* and related cases had "never been explicitly stated," attributed these decisions to the Due Process Clause as well as equal protection,[334] and enlarged the right to cover retained as well as appointed counsel.[335] In applying the general standards of due process in these cases, the Court relied on such varied, policy-based factors as

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[331]*See, e.g.*, Arizona v. Youngblood, 488 U.S. 51 (1988) (rejecting claim that police failure to preserve evidence violated due process, over vigorous dissent of three justices). "Due process doctrine subsists in confusion." Fallon, *supra* note 225, at 309.

[332]372 U.S. 353 (1963).

[333]*Id*. at 357.

[334]Ross v. Moffitt, 417 U.S. 600, 608-09 (1974).

[335]*See* Evitts v. Lucey, 469 U.S. 387 (1985).

economic and administrative costs, along with the benefit of an appellate lawyer in a proceeding that otherwise might be a "meaningless ritual."[336] The latter factor has the ring of the ultimate due-process test of "fundamental fairness." However, as Professor LaFave and his co-authors have explained, the Court treated its concern about a "meaningless ritual" first as an aspect of the equal-protection analysis and only later of the due-process analysis,[337] and ultimately the interaction the Court saw between the two constitutional clauses has been "left unclear."[338] Thus the cases establishing the due-process right to counsel on a first appeal of right provide a slim basis to predict what else the Court might require of state criminal appeals under the Due Process Clause.[339]

The Court has not yet disclosed how, if at all, its extremely malleable due-process rationale may apply to the specific issue of standards of appellate review of decisions of mixed questions of federal constitutional law and fact. The Court's pre-*Ornelas* precedents concerning such standards of review seem to convey conflicting messages. On many occasions and in a

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[336] *See* LAFAVE ET AL., *supra* note 15, § 11.1(b), at 558-59.

[337] *Id*. at 566.

[338] *Id*. at 565.

[339] In regulating review of criminal proceedings, the Court has even gone beyond procedural and remedial requirements such as the provision of counsel, the use of a specified test of harmlessness of error, or the refusal to consider the possibility that some kinds of error are harmless in particular cases. For example, in a series of cases beginning with *Blackledge v. Perry*, 417 U.S. 21 (1974), the Court has placed quite substantive federal constitutional limits on the power of a state to treat an admittedly lawful guilty plea as creating a forfeiture of the right to raise certain issues on appeal or collateral attack. *See, e.g.*, Menna v. New York, 423 U.S. 61 (1975) (per curiam) (holding that defendant's right to litigate double jeopardy claim survived valid guilty plea, despite contrary state law). *See generally* LAFAVE ET AL., *supra* note 15, § 21.6(a), at 1014-16. The Court has done so despite the state's apparent lack of an obligation either to permit guilty pleas at all, or to create vehicles for direct or collateral review. *See, e.g*., United States v. Jackson, 390 U.S. 570, 584 (1968) (quoting with approval the statement "that a criminal defendant has [no] absolute right to have his guilty plea accepted by the court" made in *Lynch v. Overholser*, 369 U.S. 705, 719 (1962)). *But see* Barry J. Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty*, 65 Alb. L. Rev. 181 (2001) (arguing that capital defendants have a due process right to plead guilty).

variety of contexts, the Court has conducted de novo review itself of such decisions, or has held that lower courts must do so, without expressly holding that this requirement governs review not only by federal courts but also by state courts, and without attempting to explain its possible authority to impose this requirement on state reviewing courts. The Court has treated in this fashion, for example, review of decisions as to the Fifth and Fourteenth Amendment voluntariness of confessions[340] and the Sixth Amendment effectiveness of counsel[341] and effectiveness of waiver of counsel.[342]

On the other hand, the Court has not uniformly prescribed or applied de novo appellate review of decisions of mixed questions of federal constitutional law and fact. Instead, sometimes the Court has shown deference to decisions of such questions by trial courts, or has respected rulings in which lower appellate courts did so.[343] For example, in *Minnesota v. Olson*[344] the Court upheld a state court's application to the facts of the case of "essentially the correct standard" for a Fourth Amendment exigency, and wrote that the Supreme Court did "not disturb the state court's judgment that these facts do not add up to exigent circumstances" excusing the

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[340]*See* Miller v. Fenton, 474 U.S. 104, 115-17 (1985). This case was decided in the context of habeas review of a state conviction, and in that context *Miller v. Fenton* is no longer good law after enactment of the AEDPA. *See infra* Part VI. However, federal and state appellate courts continue to review decisions of this mixed question de novo on direct review. *See, e.g.*, United States v. Bautista, No. 02-50664, 2004 WL 595351, at *4 (9th Cir. March 26, 2004); State v. Ramsey, No. 2002-577-CA, 2002 WL 602708, at *3 (R.I. 2004).

[341]*See* Strickland v. Washington, 466 U.S. 668, 698-99 (1984).

[342]*See* Brewer v. Williams, 430 U.S. 387, 397 n.4 (1977). Like *Miller v. Fenton*, *see supra* note 340, this case has been superseded in the habeas context by the AEDPA. However, federal and state appellate courts continue to review decisions of this mixed question de novo on direct review. *See, e.g.*, United States v. Hazelwood, 40 Fed. Appx. 347, 349 (9th Cir. 2002); State v. Coleman, 69 P.3d 1097, 1098, 1103 (Kan. 2003).

[343]"Some ultimate facts that have a constitutional nexus and that in theory could be regarded as constitutional facts are not so classified, apparently because the Supreme Court does not feel that free review of these facts is essential." Louis, *supra* note 18, at 1036.

lack of a warrant.[345] The concurring opinion in *Olson* interpreted the Court's opinion as showing deference to the lower court's decision of this mixed question,[346] and other courts have similarly interpreted it in subsequent cases.[347]

Similarly, the Supreme Court in both *Illinois v. Somerville*[348] and *Arizona v. Washington*[349] prescribed and applied a deferential standard for reviewing state trial courts' decisions that manifest necessity existed for declaration of mistrials. Whether manifest necessity exists or not is in effect a mixed question of federal constitutional law, since the Court has held that use of this standard by state courts is dictated by the Double Jeopardy Clause, and both *Somerville* and *Washington* presented the Court with Double Jeopardy claims.

Ohio v. Robinette[350] may be another example of Supreme Court approval of deference to trial courts' decisions of mixed questions of federal constitutional law and fact. On direct review

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[344]495 U.S. 91 (1990).

[345]*Id*. at 100-10.

[346]*Id*. at 102 (Kennedy, J. concurring).

[347]*See, e.g.*, United States v. MacDonald, 916 F.2d 766, 769 (2d Cir. 1990) (en banc) (describing *Olson* decision as "showing deference to the state court's 'fact-specific' finding of exigent circumstances, and therefore applying "clearly erroneous" standard in affirming trial court's finding of exigency).

[348]410 U.S. 458, 459 (1973) (holding that there was no double jeopardy because the trial court "could reasonably have concluded" that declaration of a mistrial served the ends of public justice).

[349]434 U.S. 497, 510-11 (1978) (holding that trial court's decision concerning mistrial "is entitled to special respect" when prompted by a defense lawyers's "improper and prejudicial remarks," and according "the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment") . Though the Court decided both *Somerville* and *Washington* on review of decisions of federal habeas courts rather than on direct review of decisions of state courts, that is not significant for present purposes, since the Court decided these cases during the period of time before the federal habeas statute was amended to require deference to state courts' decisions of mixed questions of federal constitutional law and fact. *See infra* textaccompanying note 397.

[350]519 U.S. 33 (1996).

the Court reversed a state appellate court's judgment, on the ground that the court had used a bright-line rule instead of considering all the circumstances to determine the Fourth Amendment voluntariness of a consent to a search. The Court quoted its previous statement in *Schneckloth v. Bustamonte*[351] that "[v]oluntariness is a question of fact,"[352] and remanded for further proceedings in which presumably the state courts would reconsider the issue of voluntariness in light of that quotation. Interpreting this language, the Fifth Circuit later wrote that "[t]he Supreme Court reiterated its deferential standard of review for Fourth Amendment voluntariness determinations in *Ohio v. Robinette*, a post-*Ornelas* decision."[353] Relying on that interpretation of *Robinette*, the Fifth Circuit affirmed a judgment of criminal conviction on the ground that the federal trial court had not clearly erred in concluding that the defendant's consent to a search was voluntary.[354]

How can one reconcile these various Supreme Court precedents, some permitting or even showing deference to decisions of certain mixed questions of federal constitutional law and fact, and others demanding de novo review of decisions of certain other mixed questions?

With broad and flexible tests for creating and reinterpreting due process requirements, with the checkered history of the Court's sometimes creating such rules and sometimes declining to do so, and specifically with the Court's practice of approving de novo review of decisions of some mixed constitutional questions and deferential review of decisions of others, the Court

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[351]412 U.S. 218 (1973).

[352]*Id*. at 248-49.

[353]United States v. Tompkins, 130 F.3d 117 (5th Cir. 1997).

[354]*Id*. at 122-23.

seems to have given itself latitude to do in the name of due process almost whatever it may please on almost any aspect of criminal procedure, particularly including standards of appellate review. It therefore is very difficult if not impossible to determine whether or not the Court already views its recent decisions about standards of appellate review of decisions of mixed questions as components of due process, or may come to call them such if and when it explicitly addresses the issue. One way the Court might take such a step is to repudiate its long history of rejecting any federal constitutional right to criminal appeals, but that option too seems virtually impossible to evaluate while the Court subscribes to its vague definition of due process.

B. Federal Mixed Questions To Be Reviewed De Novo

1. Clues in the Recent Supreme Court Decisions

Now we turn from the question of the legal source of the recently announced requirement of de novo review, to the question of its scope. The opinions in the four recent Supreme Court cases contain language one could use in arguing that the requirement of de novo appellate review is applicable to a wide range of mixed questions of federal constitutional law and fact that arise in criminal cases. For example in *Ornelas*, chronologically the first of the four cases, though the Court's opinion at some points identified the holding of the case with specific references to "the ultimate questions of reasonable suspicion and probable cause to make a warrantless search,"[355] at other points the Court used language susceptible of broader application. As I wrote above,[356] the Court described those mixed questions as "nontechnical" and "practical" conceptions that "take their substantive content from the particular contexts in which the standards are being

[355] *See, e.g.*, 517 U.S. at 691.

[356] *See supra* notes 76, 77.

assessed," that are applicable by ordinary persons, not only by "legal technicians," and that are "not reducible to legal rules." The Court contrasted such mixed questions with standards of judicial persuasion, which the Court called "finely-tuned" and seemed to consider more technical and less dependent for their meanings on the contexts of their application. Each of these two vaguely defined categories of mixed questions, the former category to be reviewed de novo and the latter apparently to be reviewed with deference, seems to have a potentially broad application to numerous mixed questions of constitutional law and fact.

As we saw above,[357] the Court's discussion of the standard of appellate review in the next of these four decisions to be handed down, *Bajakajian*, was concise to a fault. All the Court did was to identify Eighth Amendment excessiveness of a fine as a mixed question, to cite *Ornelas*, and to write that "in this context *de novo* review of that question is appropriate."[358] It may seem difficult to ascribe much significance to this cursory language, particularly in view of the Court's failure to specify what about the context of the case made de novo review more appropriate than the abuse-of-discretion alternative urged by the defendant.

However, the very fact that the Court saw no need for detailed explanation, when extending the specific holding of *Ornelas* not to yet a third Fourth-Amendment mixed question but to a question arising under another amendment entirely, is an indication that at least the five justices in the *Bajakajian* majority view the new prescription of de novo review as having obviously very broad application. This inference is especially strong, since these justices extended the *Ornelas* rule to a mixed question that is always initially decided not in the field by

[357] *See supra* Part III.B.

[358] 524 U.S. at 336 n.10.

an ordinary person like a policeman (as are the *Ornelas* questions), but in a courtroom by a legal technician in a black robe (as are the applications of burdens of persuasion that the *Ornelas* court had contrasted with the *Ornelas* questions).

On the other hand, other language in the Court's and various justices' recent opinions concerning de novo review would be useful in arguing that such review is not required for a number of mixed questions of federal constitutional law and fact that arise in criminal cases. For example, the Court's rationale in *Ornelas* included the two Fourth-Amendment-specific reasons for de novo review that were described above:[359] first, a prediction that de novo review will produce clearer and more specific development of legal guidance to law enforcement officers about the constitutional limits on their powers to infringe persons' liberty and property interests; and second, a desire to increase deterrence of violations of those limits by creating a sharp contrast between reviewing courts' deference to conclusions of magistrates issuing warrants, on the one hand, and lack of deference to trial courts' conclusions concerning the lawfulness of warrantless police activities.

The latter of these reasons has no application to constitutional provisions other than the Fourth Amendment, or even to Fourth-Amendment doctrines concerning police conduct for which obtaining a warrant is seldom or never a realistic possibility, such as the doctrine permitting police to seize unexpected but sufficiently incriminating items they plainly perceive while engaging in lawful activities.[360] Similarly, the former of these two reasons has little if any application to constitutional doctrines that govern conduct of legally trained state actors

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[359] *See supra* text accompanying notes 65, 66, 67, 68, 69.

[360] *See* Minnesota v. Dickerson, 508 U.S. 366 (1993).

performing duties not in the field but in more fully transparent and regulated situations, such as the Equal-Protection doctrine forbidding attorneys for both sides of criminal cases to exercise peremptory challenges of trial jurors on racial and certain other proscribed grounds.[361]

Above I sufficiently quoted and summarized the relevant language in each opinion in the fragmented decision of*Lilly* that bears on the breadth of applicability of the prescription of de novo review.[362] It is not necessary to repeat those details here, especially since none of that language was joined by more than four justices. It is sufficient here to summarize all that the justices have told us in the three cases of *Ornelas*, *Bajakajian* and *Lilly* -- the *Arvizu* opinion added nothing significant to the rationale -- about the scope of applicability of the new requirement of de novo review.

When majorities of the Court have provided clues concerning this, there has been conflict or at least tension among the clues. When dissenters have objected to requiring de novo review of decisions of certain mixed questions, both the majorities and the dissenters have been able to advance plausible reasons, all of indeterminate breadth, for their respective views. And the last time various justices addressed the scope of application of the new requirement, in *Lilly*, no five could agree even on a single standard, much less on reasons for its selection. Consequently, readers of these four cases cannot predict more confidently the Court's eventual decision of how broadly de novo review of decisions of mixed questions of constitutional law and fact will be required, than they can predict exactly to what legal source the Court will ascribe the doctrine and how the Court will try to convince us that the source is genuine. Indeed, prediction of the

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[361]*See* Batson v. Kentucky, 476 U.S. 79 (1986).

[362]*See supra* Part III.C.

doctrine's scope will be virtual guesswork unless and until the Court identifies and explains the doctrine's legal source.

2. Enormous Potential Scope of Application

When evaluating the arguments just above as to the scope of the mandate for de novo review, one should remember that mixed questions of federal constitutional law and fact commonly arising in criminal cases are extremely numerous and quite varied. There literally are at least scores of them. Indeed, above I cited state appellate cases considering de novo review of some twenty or thirty different mixed questions of federal constitutional law and fact.[363]

To give just a few additional examples, under the Fourth Amendment the following issues, among others, frequently arise:

Whether a defendant has made a sufficient preliminary showing that the affidavit on the basis of which a search warrant was issued contained a false statement, made by the affiant with knowledge of its falsity or with reckless disregard for its truth, to justify the hearing that *Franks v. Delaware*[364] requires in such a case.[365]

Whether an investigation of premises occurred so promptly after a fire that no warrant for entry was needed.[366]

Whether the causal relationship between a Fourth Amendment violation and evidence offered at trial was sufficiently attenuated so that the evidence is not fruit of the poisonous

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[363] *See supra* Part IV.B.

[364] 438U.S. 154 (1978).

[365] *See, e.g.*, United States v. Owens, 167 F.3d 739, 747, 747 n.4 (1st Cir. 1999) (rejecting extension of *Ornelas* to this issue, and affirming judgment on ground that ruling was not clearly erroneous).

[366] *See, e.g.*, Michigan v. Clifford, 464 U.S. 287 (1984).

tree.[367]

Likewise, the Fifth and Sixth Amendment law governing interrogations and other methods of obtaining evidence, introduction of evidence in criminal trials, and other aspects of criminal procedure commonly presents many additional issues, including the question whether a state actor "deliberately elicited" statements by an indicted defendant.[368]

Even under the Eighth Amendment numerous and varied additional issues arise, including whether bail in a particular case is excessive[369] and whether the punishment imposed in a particular case is cruel and unusual.[370]

Besides the mixed questions arising under specific provisions of the Bill of Rights, many mixed questions arise under rules of "fundamental fairness" the Court has created pursuant to the general terms of the Due Process Clauses. A single additional example of many such mixed questions is whether the circumstances of a pretrial identification of the defendant by a witness created such a risk of misidentification that introduction of the evidence at trial violates due process.[371]

This small sampling of the very many mixed questions of federal constitutional law and fact commonly arising in state criminal cases should suffice to illustrate not only the enormous number of such questions, but also their varied natures, as well as the importance of the standard

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[367] *See* LAFAVE ET AL., *supra* note 15, § 9.3(c), at 503-04.

[368] *See, e.g.*, United States v. Henry, 447 U.S. 264 (1980).

[369] *See, e.g.*, State v. Briggs, 666 N.W.2d 573, 575 (Iowa 2003) (reviewing de novo excessiveness of bail).

[370] *See, e.g.*, State v. Hurbenca, 669 N.W.2d 668, 674-75 (Neb. 2003) (independently reviewing claim that punishment was cruel and unusual).

[371] *See,e.g.*, Manson v. Braithwaite, 432 U.S. 98 (1977).

of review by which trial court's decisions of such questions will be reviewed.

3. Traditional Factors for Standards of Review

When the Supreme Court, other courts, and commentators have considered choices of standards by which decisions of particular mixed questions would be reviewed, they have relied on a wide variety of factors, including those discussed above and the following. Factors tending to support deferential review are listed first. Neither list is exhaustive.

a. A perception that "[i]ntermediate appellate courts have no special competence over most mixed questions and would not necessarily decide them better than would trial level fact finders,"[372] especially as to mixed questions decision of which "requires application of experience with human affairs."[373]

b. A perception that de novo review is "disruptive" and "time consuming"[374] or expensive.[375]

c. A concern that de novo review "might attract additional or marginal appeals"[376] or other requests for review.

d. A perception that de novo review "undermines the authority of trial

[372]Louis, *supra* note 18, at 1013-14.

[373]HOUTS ET AL., *supra* note 16, § 6.04[3], p. 6-15.

[374]Louis, *supra* note 18, at 1032.

[375]Pierce v. Underwood, 487 U.S. 552, 560 (1988) (stating that ". . . even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense . . .").

[376]Louis, *supra* note 18, at 1014.

judges."[377]

e. A perception that some mixed questions of procedural law and fact "are quite fact specific, dependent on a number of variables, or dependent on an intimate 'feel' for all the circumstances of the case that only a trial level fact finder has."[378]

f. A perception that "the fact specific opinions [rendered by courts conducting de novo review] would be readily distinguishable in subsequent cases"[379] and thus would contribute little to the development of more specific or clearer law.[380]

Factors tending to support de novo review are listed next.

a. A perception that "[a]n appellate court is . . . likely to be more expert and reliable in matters of procedure than is a single trial judge . . . ,"[381] especially as to mixed questions decision of which depends heavily on "legal principles and their underlying values."[382]

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[377]*Id*. at 1015.

[378]*Id*. at 1041. *See also* Miller v. Fenton, 474 U.S. 104, 114 (1985) (stating that sometimes the choice of a standard of review for decisions of a particular kind of mixed question "has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question").

[379]Louis, *supra* note18, at 1014.

[380]*See, e.g*., Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 at 662-63 (1971) (stating that a good reason for conferring discretion on trial judges and reviewing their decisions only for abuse of discretion is "the sheer impracticability of formulating a rule of decision for the matter in issue . . . at least, for the time being," until opinions explaining various results of deferential review "have allowed the formless problem to take shape, and the contours of a guiding principle to emerge").

[381]Louis, *supra* note 18, at 1040.

[382]HOUTS ET AL., *supra* note 16,§ 6.04[3], p. 6-15.

b. A "mistrust of local decision makers,"[383] or a perception that "local trial judges are . . . often incompetent or untrustworthy."[384]

c. A perception that, since "trial judges sit alone, . . . [w]ithout voting colleagues to provide checks and balances, even the best trial judges will sometimes make aberrational decisions . . . ."[385]

d. An opinion that "[f]or . . . mixed questions . . . determinative of constitutional rights . . . even occasional wrong results are arguably unacceptable . . . ."[386]

e. An observation that de novo review "of questions arising out of police searches, seizures, and interrogations is designed to deter illegal police conduct."[387]

4. Relevant Variations Among Mixed Questions

The numerous Fourth, Fifth, Sixth, and Eighth Amendment and Due Process Clause questions of mixed law and fact mentioned above vary among themselves in ways that appear relevant at least to some of the factors traditionally influencing choices of standards of review, and at least to some of the factors the Supreme Court has mentioned in its recent decisions on de novo review. For example, they vary in the degrees to which they (1) are sensitive to the detailed facts of particular cases and even to assessments of demeanor and of other factors in evaluation

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[383]Louis, *supra* note 18, at 1032.

[384]*Id*. at 1014. *See also id*. at 1033 (referring to de novo review as "correcting for trial level bias, interest, or relative incompetence").

[385]*Id*. at 1014.

[386]*Id*. at 1027. *Cf*. Pierce v. Underwood, 487 U.S. 552, 563 (1988) (stating that the kinds of decisions that ordinarily have substantial consequences might be expected to be reviewed more intensively than other kinds of decisons).

[387]Louis, *supra* note 18, at 1035.

of witness credibility (a factor favoring appellate deference to trial judges), (2) often require very time-consuming consideration of voluminous and complex factual information about the particular case (a factor favoring appellate deference to trial judges), (3) depend upon judges' deep knowledge of legal principles and sensitivity to their underlying values (a factor discouraging such deference), (4) involve topics on which there are risks of state court or trial court bias or hostility to federal law or risks of other shortcomings of decision-makers (a factor discouraging deference), and (5) govern doctrines designed to create positive and negative incentives for particular conduct by law enforcement officer, prosecutors, judges, and others wielding governmental power (a factor perhaps discouraging deference).

When choices of standards of review are influenced by so many competing factors, and when quite various characteristics of particular mixed questions seem relevant to application of those factors, there often is ample room for reasonable differences of opinion concerning the most suitable standard of review for a particular mixed question. For example, leading Fourth Amendment expert Professor Wayne LaFave wrote, concerning the standard of review of a decision whether police conduct constituted a seizure within the meaning of that amendment, that ". . . compelling arguments have been put forward on both sides" of the choice between clearly-erroneous and de novo review.[388]

To illustrate how such variations among the characteristics of particular mixed questions of federal constitutional law and fact could influence choices among standards of review for them, consider the last of these five examples of relevant factors, the one giving weight to likely incentives for desired conduct by police and other state actors. Many of these mixed questions

[388] 5 LAFAVE, *supra* note 33, § 11.7.

do indeed arise in proceedings in which constitutional rights are enforced by exclusion of evidence at trial or by other measures creating strong and systematic incentives, but not nearly all of them. As a result, many such mixed questions are distinguishable from the two issues addressed in *Ornelas*, both of which implicate the Fourth Amendment exclusionary rule, when one is choosing a standard of appellate review.

The Court in *Ornelas* relied on the perceived incremental deterrence of warrantless investigative conduct thought to be provided by the contrast between, on the one hand, great deference to the probable cause conclusion of a magistrate issuing a warrant and, on the other hand, de novo review of the probable cause conclusion of a police officer acting in the field without a warrant. However, this part of the *Ornelas* rationale probably has less application to review of some of the mixed questions listed above, such as whether bail is excessive or punishment cruel and unusual, whether delay in indicting or trying the defendant has been excessive, whether retained counsel has given the defendant ineffective assistance, or whether the prosecutor has exercised peremptory challenges of prospective jurors on impermissible grounds.

One obvious reply to this point is that the Court created the *Ornelas* requirement of de novo review for decisions not only about probable cause, which can justify either certain kinds of warrantless police conduct or, preferably, issuance of a warrant, but also about reasonable suspicion, questions concerning which are not presented to magistrates for prior evaluation and issuance of warrants but are made entirely by law enforcement officers in the field. Moreover, the Court then extended that requirement in *Bajakajian* to the context of a ruling about the excessiveness of a fine under the Eighth Amendment, and a plurality further extended it in *Lilly* to the Sixth Amendment question of admissibility of evidence at trial, despite the irrelevance of

incentives for seeking warrants in either of the latter two contexts. This argument makes this factor in the analysis of the *Ornelas* Court appear less than decisive.

Even when one looks only at mixed questions on the determinations of which applications of exclusionary rules or other strong and systematic legal incentives for official conduct depend, it is not clear that the Court would extend the *Ornelas* rule to all of these contexts. There are several exclusionary rules, not just one, and they have various contents and exceptions.[389] Likewise other remedial law affecting incentives perceived by various kinds of state actors varies.[390] A "one-size-fits-all" approach to standards of appellate review would be rather insensitive to these variations in the exclusionary rules and other remedies, and thus to the resulting variations in investigators', prosecutors', and judges' incentives, as well as to variations in the more substantive rules of criminal procedure enforced by the exclusionary rules.

5. Conclusion on Federal Questions Reviewed De Novo

Unfortunately, the Supreme Court in the four cases that began with *Ornelas* made no attempt to discuss the matters raised in the preceding paragraphs of this Article. When one reviews the above analysis, one is left with great uncertainty about whether this doctrine will be extended to other federal constitutional issues in the area of criminal law and procedure and, if so, to which issues and according to what test for determining the doctrine's scope. Again, knowing what constitutional provision requires de novo review and why would be, to understate

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[389]*See, e.g.*, Robert A. Harvie, *The Exclusionary Rule and the Good Faith Doctrine in the United States and Canada: A Comparison*, 14 LOY. L.A. INT'L & COMP. L.J. 779, 784 n.24 (1992) (stating that ". . . in the United States the First, Fourth, Fifth, Sixth, and Fourteenth Amendments have different exclusionary rules that reflect and protect the different values underlying each amendment").

[390]Examples are variations among standards for civil actions against municipalities for damages resulting from police conduct, and standards for disciplinary proceedings against prosecutors and judges.

the point, extremely helpful in determining the scope of the requirement.

C. De Novo Review for State-Law Mixed Questions

Of course, none of the Supreme Court's recent decisions expanding federal courts' use of de novo review in criminal cases have involved federal judicial review of decisions of mixed questions of state law and fact. If states were free to choose standards of review for all kinds of state and federal mixed questions, one would expect them ordinarily to choose the same standards for review of decisions of mixed questions of federal law and fact as of decisions of mixed questions of similar state law and fact, if only for the sake of simplicity and efficiency.

However, if it ever becomes clear that the United States Supreme Court has created new and broad mandates that state appellate courts use de novo review of decisions of some or all mixed questions of federal constitutional law and fact, then states will have newly important choices to make concerning review of decisions of mixed state-law questions, and probably will be constitutionally free to make them. Just as state constitutional law can protect the interests of criminal suspects and defendants more than does federal constitutional law, states similarly are free to adopt rules for applying state constitutional law that are either more or less favorable to suspects and defendants than the analogous rules for applying federal constitutional law. When particular state courts' or legislatures' own views concerning efficiency of judicial administration and other relevant factors lead them to confident conclusions about wise standards of review of decisions of certain mixed questions of state law and fact, they clearly can and arguably should implement their own conclusions, even if the resulting choices are different from the United States Supreme Court's choices of standards of review of decisions of similar mixed questions of federal constitutional law and fact.

D. De Novo Review Favoring the Prosecution

All of the Supreme Court's recent decisions expanding the use of de novo review have been cases in which such review would help the criminal defendant. When the state takes a direct appeal in a criminal case, though, for example an interlocutory appeal of a pretrial order suppressing crucial evidence, de novo review would improve the state's chances of overturning the defendant's victory below.

If we eventually learn that states are free to choose their own standards for review of decisions of various mixed questions, then one would expect most states to make many such standards symmetrical. Some of the policies tending to support de novo review of decisions of some mixed questions cut only one way, such as the *Ornelas* rationale that de novo review adds incentive for police to seek warrants. However, most of the relevant factors cut both ways, and symmetry in giving appellants the same level of scrutiny regardless of which side of cases they represent seems presumptively fair because evenhanded.

Thus, most states probably would adopt this symmetrical approach for most mixed questions, whether they are left unencumbered by federal constitutional dictation of standards of review, or are required to employ de novo review on some federal questions. In a sense this would benefit the state in some cases, to the crucial detriment of some defendants. Again, though, state legislatures and courts would be wise to consider the alternatives, and make whatever choices are dictated by their own views of sound policies, within whatever latitude the Supreme Court has not abolished.

VI. Practical Significance of These Doctrinal Matters

States' efforts to control crime and defendants' efforts to avoid conviction and punishment

will be greatly affected by the resolutions of the issues discussed in this Article. The main reason is that standards for state-court appellate review of decisions made by criminal trial courts determine the outcomes of many cases. If federal constitutional law dictates de novo review of many such decisions, or if state courts conduct such review merely because they suspect that they are governed by such a federal requirement, then appellants (who predominantly are defendants) will prevail much more often. If, instead, federal constitutional law leaves state appellate courts free to review all or many kinds of decisions of mixed questions in criminal cases with substantial deference to trial courts, and if states use that freedom to require or permit such appellate deference, then many more convictions and sentences will be affirmed.

There are two principal reasons for this. First, the United States Supreme Court has only enough resources to review a very tiny fraction of all the criminal cases processed by state courts,[391] even though very many of these cases involve issues of federal constitutional law.[392] Second, other federal courts, which cannot directly review state convictions and sentences, but can in habeas proceedings review state courts' decisions of federal constitutional questions, are required to do the latter in ways that are much less favorable to criminal defendants, on all three of the points the Supreme Court addressed in *Griffith*, *Chapman*, and the *Ornelas* line of cases,

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[391] "[F]or 1993, the available data suggest a nationwide criminal caseload of at least 12.5 million prosecutions, and probably exceeding 15 million prosecutions . . . . [T]he states as a group . . . are responsible for 97% of all felony prosecutions . . . . When only felony convictions are considered, the federal portion rises [from 3%] to 4% . . . ." 1 LAFAVE ET AL.., *supra* note 72, § 1.2(b) (footnotes omitted). The Supreme Court's website displayed on March 3, 2004, at http://www.supremecourtus.gov /about/ justicecaseload.pdf, an excerpt from a booklet prepared by the Court and published with funding from the Supreme Court Historical Society, which included the statement that "[t]he Court's caseload has increased steadily to a current total of more than 7,000 cases on the docket per Term."

[392] "In this century, the Court has greatly expanded the reach of the Bill of Rights and the fourteenth amendment and in the process has substantially increased the potential number of constitutional facts and cases raising constitutional fact issues on appeal." Louis, *supra* note 18, at 1037.

than if state courts reviewed those decisions de novo on direct appeals.

As I discussed above, the Supreme Court already has required state appellate courts to give defendant-appellants the benefit of *Griffith*'s doctrine on new constitutional rules and of *Chapman*'s harmless-error standard. Petitioners for federal habeas relief, in contrast, lack both benefits. If the Court is indeed now in the process of giving state-court defendant-appellants the additional benefit of de novo review, it will complete a sweep, requiring state appellate courts to treat defendant-appellants more favorably than federal habeas courts treat petitioners on all three of these crucial determinants of the success of a request for relief.

First, the constitutional doctrine applicable to a case is more likely to favor the defendant in a state appellate court than in a federal habeas court. The reason is that, as I explained above,[393] *Griffith v. Kentucky* requires defendants challenging their convictions or sentences on direct appeal in state courts to receive the benefit of new rules of federal constitutional law that favor them. In contrast, the Supreme Court has held that, perhaps with narrow exceptions, state prisoners seeking habeas relief in federal courts do not receive that benefit.[394] Although the Supreme Court in recent decades has created fewer new rules favoring defendants than it did in the heyday of the Warren Court, the Court does continue to generate new rules favoring defendants that are important enough so that direct appeal with the benefit of the *Griffith* rule

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[393] *See supra* Part V.A.2.b.

[394] *See* Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion). Though the general principle that habeas petitioners were denied the benefit of new constitutional rules began in this plurality opinion, the Court itself later adopted the *Teague* doctrine and applied it in many cases. *See* LAFAVE, *supra* note 15, § 28.6(b), at 1336. The exceptions to such denial, created in *Teague* itself, are new rules that "place certain kinds of primary, private conduct beyond the power of the criminal law-making authority" and those that mandate procedures "central to an accurate determination of innocence or guilt." *Id.* § 28.6(e), at 1338. The Supreme Court created these exceptions before Congress in 1996 enacted various new limits on opportunities for federal habeas relief. It is unclear whether the Court's exceptions to the non-retroactivity of new rules on habeas have survived the 1996 enactment. *See id.* § 28.6(g), at 1343.

often is better for defendants than federal habeas review without it.[395]

Once this choice of the applicable federal constitutional law has been made, the outcome of the appeal often turns on the standard of review by which the court decides whether error occurred below, discussed at length above, and the standard by which the harmlessness of any error is determined, also discussed at length above.[396] On both of these procedural and remedial points, just as on the choice-of-law point, the standards used in federal habeas proceedings are much less favorable to prisoners than are the standards many state appellate courts are using on direct review.

As to the procedural matter of the standard of review, a federal habeas court cannot employ de novo review to grant relief to a prisoner on the ground that the state trial or appellate court's decision of a mixed question of federal constitutional law and fact was erroneous. Instead, under a statute enacted in 1996 and commonly called the AEDPA[397] the federal court can grant relief only if the state court's decision was unreasonable.[398] The Supreme Court in *Williams v. Taylor*[399] construed that statutory provision as requiring considerable deference to the

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[395]*See, e.g.*, Sam-Miguel v. Dove, 291 F.3d 257, 260 (4th Cir. 2002) (holding that new rule created by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), does not apply retroactively on collateral review); Smith v. Moore, 137 F.3d 808, 822 (4th Cir. 1998) (reaching same conclusion concerning new rule created by *Simmons v. South Carolina*, 512 U.S. 154 (1994)).

[396]*See* WISOTSKY, *supra* note 14, § 8.01, at 160-61 (stating that in an appeal ". . . the critical questions are two: the degree of deference that the appeals court will give to the judgment or order below -- the standard of review -- in deciding whether there is error, and the question of whether such error is harmless or reversible").

[397] *See generally* LAFAVE ET AL., *supra* note 15, § 28.2(b).

[398]28 U.S.C. § 2254(d)(1) (date).

[399]529 U.S. 362 (2000).

state court's decision of the mixed question.[400]

Lower federal courts have shown such deference in denying relief in many cases,[401] even when reviewing decisions of mixed questions of federal constitutional law and fact that were based on "sparse or otherwise unsatisfactory state court discussion" or, still more remarkably, were "summary, which is to say unexplicated," and made "without any discussion."[402] Some commentators have criticized this kind of interpretation and application of the federal habeas statute[403] but, so far at least, the courts of appeals seem unanimous in employing it.[404]

On the second, remedial matter of the harmlessness of error, even if a federal habeas court does conclude that a state court's decision of a mixed question of federal constitutional law was indeed unreasonable, relief must be denied to the prisoner if the state court's error was harmless, and here too the habeas standard is unfavorable to prisoners. The federal court's test for harmlessness is not the *Chapman* "harmless beyond a reasonable doubt" test applicable on

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[400]*Id*. at 411 (opinion of O'Connor, J., concurring on behalf of a majority of justices).

[401]*See, e.g*., Benefiel v. Davis, 357 F.3d 655 (7th Cir. 2004) (holding that state court decisions of mixed questions of federal constitutional law and fact were not unreasonable); Perry v. Kemna, 356 F.3d 880 (8th Cir. 2004) (holding that state court decision of mixed question of federal constitutional law and fact was not unreasonable).

[402]Wright v. Moore, 278 F.3d 1245, 1253-54 & n.2 (11th Cir. 2002), *cert. denied*, 123 S.Ct. 1511 (2003).

[403]*See, e.g*., Brittany Glidden, *When the State Is Silent: An Analysis of AEDPA's Adjudication Requirement*, 27 N.Y.U. REV. L & SOC. CHANGE 177, 179, 204, (2001-02) (footnotes omitted) (stating that "perfunctory opinions, which deny all of a petitioner's claims in a single sentence or statement, are common in state courts" and that "many scholars believe that state courts are always subject to interests that prevent the adequate protection of federal rights," and concluding that "when ambiguity exists [as to whether a state court adjudicated a federal issue], the issue should be reviewed de novo by the federal court); Monique Anne Gaylor, Note, *Postcards from the Bench: Federal Habeas Review of Unarticulated State Court Decisions*, 31 HOFSTRA L. REV. 1263 (2003); Claudia Wilner, Note, *"We Would Not Defer to That Which Did Not Exist": AEDPA Meets the Silent State Court Opinion*, 77 N.Y.U. L. REV. 1442 (2002).

[404]*See* Wright v. Moore, 278 F.3d at 1254 & n.2 (citing cases from eight other federal circuits).

direct review, but the less rigorous test of *Brecht v. Abrahamson*[405] that the error had a substantial and injurious effect or influence in determining the outcome. This broader test of harmlessness, like the statutory requirement of deference, has led to many denials of habeas relief.[406]

The results of these federal habeas standards -- for choosing the applicable rule of federal constitutional law, for identifying error in its application to the facts, and for assessing its harmlessness -- are these: Currently criminal defendants' federal constitutional claims already must receive more favorable treatment in state appellate courts than in federal habeas courts on two of these three crucial determinants of success.[407] As to the third, decisions of mixed questions of federal constitutional law and fact currently do not receive de novo review in any state or federal court unless state appellate courts either balance the competing policies for themselves and decide, contrary to some of their recent pre-*Ornelas* precedents, that such review is wise; or interpret the unclear *Ornelas* line of cases as binding them; or take the primrose path of least resistance by simply following and attributing breadth to that line of Supreme Court cases as insurance against reversal of judgments.

VII. Improving Review Standards and How They Are Chosen

After reviewing these Supreme Court decisions concerning de novo appellate review, and observing the confusion they have produced in the state appellate courts, one must regret that the

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[405]507 U.S. 619 (1993).

[406]*See, e.g.*, Burgess v. Dretke, 350 F.3d 461, 472 (5th Cir. 2003); Lewis v. Pinchak, 348 F.3d 355, 359-60 (3d Cir. 2003).

[407]As Professors Fallon and Meltzer have written, "[t]hough they differ in history and theory, reversal of a conviction on appeal and issuance of a writ of habeas corpus have similar consequences for the prosecution and the defendant." Fallon & Meltzer, *supra* note 250, at 1813 n.455.

Court did not write its opinions more completely and clearly and thereby prevent some of these problems. This criticism is not a call for the Court to issue holdings broader than its role in our federal system dictates, nor a call for it to utter dicta unwisely. I suggest only that the Court is obligated to make clear what it is deciding and why. Most fundamentally under our Constitution it is especially important, when the source of the Court's power to create a particular rule of law is ambiguous and doubtful (as it certainly is concerning the subjects addressed in this Article), for the Court to identify, explain and support clearly and precisely the source of that power. The Court's recent prescriptions of de novo review fall far short of these expectations.

It would be easy to belittle my suggestion by saying that creation of law is harder than criticism of it, and more specifically that I underestimate the difficulty of the Court's task: deciding debatable cases while collecting majorities of at least five disparate persons to agree on reasons for those decisions. That response to this Article would sound plausible, unless one kept in mind the extent of the Court's past failures concerning the *Chapman* and *Griffith* doctrines and of its current failures concerning de novo review. Over a period of almost four decades, the Court has never even told us whether these are rules of constitutional law or so-called constitutional common law, much less which specific constitutional provisions contain these rules. After all this time, with the Court now apparently extending to yet a third context its regulation of state-court appeals that the Court continues to say are not themselves constitutionally required, the Court now more than ever owes us a clear, specific and thorough explanation of this body of law. The gravity of this problem seems obvious when one reflects that the current situation would in a sense be improved if the Court even made a conscientious attempt to explain why it cannot or will not explain its power to regulate state appellate practice.

There surely are some contexts in which, "when no satisfactory answer to a question can be found, it is discreet to ignore the question,"[408] but not in the context of such important exercises of federal judicial power at the expense of state authority.

There is another reason why specific and thorough explanation by the Court of its recent decisions concerning de novo review is especially desirable. In the eyes of some informed observers, the Court has a spotty track record of explanations of its power to create other vital doctrines in the law of crimes and criminal procedure. The detailed criticisms above of the Court's creations of the *Chapman, Griffith* and *Ornelas* doctrines do not nearly exhaust this general subject. The Court has never provided a thorough explanation of some of the most important rules it has created in the area of criminal law and procedure, or of its power to create those rules, as even some apparent fans of the results of the Court's work have written.[409]

This is not just a matter of disagreements over the meanings of the Fourteenth Amendment or of specific provisions of the Bill of Rights. As Professor Grano explained, some of the Court's lawmaking on criminal law and procedure raises the more fundamental issue of

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[408]State v. Jones, 653 A.2d 1040, 551 n.1(Md. Ct. App. 1995), *rev'd sub nom*. Jones v. State, 682 A.2d 248 (1996).

[409]A central example is the doctrine of "selective incorporation" by which the states came in the 1960's to be governed by most of the specific provisions of the Bill of Rights, many of which of course address matters of criminal procedure. As Professors LaFave, Israel and King have written, "[t]here are those who argue that the selective incorporation doctrine has no coherent constitutional rationale. . . . [T]he Supreme Court majority never responded to such criticism . . .." LAFAVE ET AL., *supra* note 15, § 2.5(b), at 66-67. Another example, having practical importance almost equal to that of the doctrine of selective incorporation, is the Court's adoption of a series of exclusionary rules as remedies for violations of various federal constitutional rights. Regardless of the relative merits of such rules as a matter of policy, the Court has never provided a specific, thorough and cogent explanation of its authority under the Constitution to impose such exclusionary rules on state courts. *See generally* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 365-66 (writing that "[e]ven from a liberal's perspective, the arguments that have been derived from the Fifth Amendment, the Fourth Amendment, and the Due Process Clause do not support more than a shadow of the present [exclusionary] rule").

"whether article III of the Constitution grants the Court authority to take such action."[410] It is beyond the scope of this Article to pick at these old sores in its text, but two footnotes here remind persons familiar with the law of criminal procedure of a few aspects of the broad context within which the Court's current project to reform state appellate practice demands justification of these purported powers of the Court.[411] Perhaps it is not too optimistic to hope that the Court

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[410]Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 101-02 (1985).

[411]An important example to add to the two just described, *supra* note 409, is what Professor Barry Latzer has called the Court's various "prophylactic, quasiconstitutional or constitutional common law determinations that are not directly construing constitutional provisions." Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 128 (1996). For example, there are the Court's sub-constitutional prophylactic rules, some of which the Court has admitted are not interpretations of provisions of the Constitution itself, but instead are laws created by the Court itself as attempts to prevent violations of constitutional provisions. *See, e.g., id*. at 125-26 (discussing *United States v. Wade*, 388 U.S. 218 (1967) (creating right to counsel for suspects in lineups)). Such prophylactic rules formerly included the rules created in *Miranda v. Arizona*, 384 U.S. 436 (1966), until the Court recently reinterpreted them as constitutional rules lacking specific location in the Constitution, *Dickerson v. United States*, 530 U.S. 428 (2000), and still include rules designed to prevent violations of due process by vindictive judges and prosecutors, *see, e.g.*, *Blackledge v. Perry*, 417 U.S. 21 (1974). As Professor Grano wrote,

> [a]lthough the Court has ignored the issue, prophylactic rules raise a question of constitutional legitimacy. When the Court holds that certain conduct violates the Constitution or that the Constitution requires a particular remedy, we may disagree strongly with the Court's interpretation of the Constitution, but we may not challenge the legitimacy of its authority. *Marbury* settled this legitimacy issue. "Mistake" remains possible, of course, because we cannot expect the Court to be infallible in exercising legitimate authority. A legitimacy issue not addressed in *Marbury* is raised, however, when the Court invalidates official conduct without finding an actual constitutional violation. The issue is whether article III of the Constitution grants the Court authority to take such action, an issue obviously more fundamental than whether the Court in a given case mistakenly has interpreted the Constitution.

Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 101-02 (1985) (footnotes omitted).

Not only has the Court on many occasions failed to identify the source of its purported power to create important rules of criminal law and procedure and to support its claim to such power, it also has shown a troubling tendency to create law under its supervisory power over lower federal courts or as federal statutory interpretations and then, using a kind of bootstrap, to rely on these precedents in elevating law that formerly bound only federal courts into constitutional commands that henceforth governed state courts as well. Thus in *Ashe v. Swenson*, 397 U.S. 436 (1970), the Court transformed the non-constitutional doctrine that federal criminal defendants get the benefit of collateral estoppel into a requirement of the Double Jeopardy clause. Later in *Crist v. Bretz*, 437 U.S. 28 (1978), the Court converted the non-constitutional rule that, for purposes of the Double Jeopardy Clause, jeopardy attaches in a federal criminal case being tried by jury when the jury is sworn, and in a federal bench trial of a criminal case when the first witness is sworn, into a federal constitutional doctrine binding the states. Still more recently, in *Jones v. United States*, 526 U.S. 227 (1999), the Court relied on the doctrine of "constitutional doubt" to interpret a federal statute as defining two offenses the elements of each of which must be proved to a jury beyond a reasonable doubt. Only a year later, the Court relied on its statutory interpretation conclusion in *Jones* as support for its decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to require states to treat as elements of offenses for

might see its recent rulings on de novo review as an opportunity to begin improving the clarity, specificity, and thoroughness of its explanations of the source and scope of its power to regulate state criminal proceedings.

This Article illustrates the undesirable consequences of the Court's failure to measure up to reasonable standards of clear, specific and thorough explanation when creating new law. It also identifies clues that might lead one to suspect that the Court, with its recent expansion of requirements of de novo review, again is creating law of indeterminate source and scope as it initially did in *Chapman* and then also in *Griffith*, and is thereby either again inducing states to change their own law as a precaution against reversal of state judgments, or again laying a stealthy predicate for the Supreme Court's own later, explicit announcement of important new doctrines of federal constitutional law -- or both. Even if the Court never follows up on its recent vague decisions concerning standards of review by converting those standards into constitutional mandates, it may accomplish much the same outcome, by creating uncertainty leading state courts to interpret the Court's decisions as either binding or very persuasive, and to attribute broad scope to the resulting doctrine. As this Article has shown, such a process is underway in many states.

Some jurists and commentators might applaud state courts' adopting de novo review, no matter for which one of the three reasons mentioned above: because the state courts' own views of competing policies dictate such review, or because they interpret the recent Supreme Court

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purposes of trial facts that the state legislature had deemed sentencing criteria. The scope and consequences of these new *Apprendi* requirements are still the subject of great uncertainty and confusion. *See, e.g*., State v. Wheeler, 34 P.3d 799 (Wash. 2001) (en banc) (court dividing over interpretation and application of *Apprendi*). The current uncertainty and confusion about the Supreme Court's new requirements of de novo appellate review may be another example of new doctrine being launched as apparent interpretation of the duties only of federal courts, and then sailing into port as constitutional commands.

decisions as binding on the states, or because they simply fear the latter may be true. An expert might favor de novo review of decisions of mixed questions of federal constitutional law and fact fervently, and care less about how such review comes to be required.

For example, some justices of the United States Supreme Court[412] and some commentators[413] appear dissatisfied with the AEDPA's new requirement that federal habeas courts conduct only deferential review of state courts' decisions of mixed questions of federal constitutional law and fact. Others have criticized the decision of the Supreme Court majority in *Brecht v. Abrahamson* that in federal habeas review of state convictions harmlessness is

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[412]For example, when the Court interpreted the AEDPA provision as requiring such deference, 28 U.S.C. § 2254(d)(1), Justice Stevens wrote a separate opinion urging an interpretation calling for less deference than that adopted by other justices. *Compare* Williams v. Taylor, 529 U.S. 362, 375-99 (2000) (opinion of Stevens, J.), *with id.* at 399-416 (opinion of O'Connor, J.) *and id.* at 416-19 (opinion of Rehnquist, C.J.). In a subsequent case, Justice Stevens dissented from the Court's holding that a state court had not unreasonably applied the relevant constitutional precedent, without citing § 2254(d)(1) or explaining why he ignored it. Bell v. Cone, 535 U.S. 685, 694 n.2 (2002) (Rehnquist, C.J., for the Court) (pointing out that "Justice STEVENS' dissent does not cite this statutory provision governing respondent's ability to obtain federal habeas relief, much less explain how his claim meets its standards"); *id*. at 702-19 (Stevens, J., dissenting) (concluding that Sixth Amendment right to effective assistance of counsel was violated, without showing deference to contrary conclusion of state courts). It may not be a mere coincidence that in each of the four Supreme Court decisions this Article addresses, Justice Stevens wrote or joined opinions favoring de novo review. *See* United States v. Arvizu, 534 U.S. 266, 273-78 (2002) (unanimous, including Stevens, J., applying de novo review); Lilly v. Virginia, 527 U.S. 116, 120, 135-39 (1999) (Stevens, J., for the plurality with Souter, Ginsburg, and Breyer) (urging and applying de novo review); United States v. Bajakajian, 524 U.S. 321, 336-37 & n.10 (1998) (Thomas, J., for five justices including Stevens, J., adopting and applying de novo review); Ornelas v. United States, 517 U.S. 690, 697-700 (1996) (Rehnquist, C.J., for eight justices including Stevens, J., adopting de novo review). Perhaps Justice Stevens, disappointed in the currently narrow standard of federal habeas review, views de novo review by state appellate courts as at least a partial substitute for the formerly more independent review by federal habeas courts.

[413]*See, e.g.*, Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947, 1033 (2000) (writing that ". . . it seems wrong to require federal courts to stand idly by when a state court interprets or applies such fundamental constitutional rights in an incorrect, but not unreasonable, manner"); Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised By State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 336-37 (writing that ". . . the new reasonableness standard for mixed law-fact questions is unlikely to generate a workable or principled body of law" and that ". . . reasonableness review of mixed law-fact questions is likely to contribute significantly to the density and intricacy of the already dense and intricate habeas forum"). An article written before the AEDPA was enacted, and before the Court decided *Ornelas*, anticipated the current situation and supported de novo appellate review by state appellate courts because of limitations on federal habeas relief. *See* Chris Hutton, *The "New" Federal Habeas: Implications for State Standards of Review*, 40 S.D. L. REV. 442 (1995).

determined by a test less favorable to prisoners than the formerly applied *Chapman* test of harmlessness beyond a reasonable doubt.[414] Such critics of the current law of federal habeas corpus might welcome state courts' de novo review of decisions of mixed questions of federal constitutional law and fact, as a replacement for the more generous but now superseded federal habeas law they preferred, without caring much about whether de novo state-court review results from the Supreme Court's possibly exceeding any powers it may have to regulate state judicial proceedings, or from state courts' unwillingness to risk reversals in the face of unclear federal law, or from state courts' well-considered exercises of lawmaking power resting only in their own hands. To me, though, the Supreme Court's providing clear explanations of why it has constitutional power to regulate the proceedings of state appellate courts, and of why the Constitution requires the specific regulations the Court adopts, is much more important under our Constitution than the particular outcomes reached when competing policies are weighed to select standards of appellate review of specific mixed questions.

I therefore would consider it regrettable if state courts were to continue assuming that United States Supreme Court pronouncements having undefined legal sources and indeterminate scopes should be given their most powerful possible interpretation and application by the state courts themselves. It would be better if state courts, and state legislatures making and revising statutes governing state judicial procedures, would use whatever freedom the High Court has not specifically withdrawn from them. They should form their own conclusions about the wisdom of

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[414] *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 644-47 (1993) (White, J., dissenting and joined by Blackman and Souter, JJ.) (writing that the Court's majority's conclusion is "untenable" and "inexplicable" and produces "illogically disparate treatment"); Bennett L. Gershman, *The Gate Is Open But the Door Is Locked -- Habeas Corpus and Harmless Error*, 51 WASH. & LEE L. REV. 115, 116, 133 (1994) (writing that "*Brecht* is a paradigm of the Rehnquist Court's result-oriented approach to habeas corpus and harmless error," and calling the decision "confusing," "unprincipled," and "illogical and perverse").

employing particular standards of review of decisions of particular mixed questions of federal constitutional law and fact. They should adopt and apply such rules, performing their own functions to the best of their abilities, unless and until the day comes when the United States Supreme Court begins more often to perform its functions at an adequate level and to explain with adequate thoroughness and clarity what it is doing to standards of appellate review and why. The primrose path now lying before state courts leads to an important shift in power from state authorities to federal, and specifically to the Supreme Court. That is not a destination to be approached carelessly.

VIII. Conclusion

By handing down a series of recent decisions calling for de novo appellate review of mixed questions arising under three different provisions of the Bill of Rights, perhaps implying but not expressly stating that state courts are bound by the decisions and without defining the scope or even the constitutional source of the new doctrine, the Supreme Court has created considerable uncertainty. Many state courts have responded by beginning to use such de novo review, and by extending its use far beyond anything the Court's decisions specifically address. Prior to this Article commentators have almost entirely ignored the most fundamental issues raised by the recent decisions.

This Article has reminded readers that Professor Meltzer described similar treatment by the Court in the *Chapman* case of another aspect of state appellate practice, harmlessness of error. The Article also has identified yet another similar performance by the Court, this aspect of which was not previously criticized in case law or published scholarship, when in the *Griffith* line of cases the Court required state appellate courts to follow the Supreme Court's view on

retroactivity of new federal constitutional rules. On both of those previous occasions, the Court began by letting state courts assume themselves bound to follow the Court's precedents, and only many years later confirmed that assumption. However, in neither of those prior instances has the Court ever adequately explained its power so to regulate state criminal appeals, or even identified the specific source of that supposed power.

This Article calls upon the Supreme Court to clarify these matters, especially to clarify the recent prescriptions of de novo review that the Court has not yet even expressly said are applicable to state courts. Unless and until it does so, the Article also suggests that state courts and legislatures seriously consider interpreting the recent decisions on de novo review as not binding state courts, or as regulating review only of the mixed questions so far specified by the Court. The Article also has raised and addressed, without attempting thoroughly to resolve, the question whether the Court in the current instance and in the two previous ones has exceeded its powers.

When Professor Meltzer addressed the question of the Court's power to impose the *Chapman* harmlessness test on state appellate courts, he found every rationale for such power unconvincing, and deemed the idea of "constitutional common law" the only plausible basis for the decision. However, the Court has never written that it considers "constitutional common law" even plausible. The very fact that the Court has failed for decades to specify the source of the power it has exercised over three aspects of state criminal appellate practice should leave readers of its opinions with grave doubt that the Constitution really gives the Court that power, and with a thirst for an explanation by the Supreme Court itself.