U.S. Constitutional Limits on State Money-Bail Practices for Criminal Defendants

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U.S. Constitutional Limits on State Money-Bail Practices for Criminal Defendants

Money-bail systems allow criminal defendants to avoid prison while awaiting trial by posting a bond set by a fee schedule. The impact of money-bail systems on indigent criminal defendants, however, has prompted legislative interest in and legal challenges to such systems, particularly when the bail does not reflect an individual's specific circumstances, such as potential flight risk or public safety. Critics of money-bail systems assert that fee schedules unduly burden indigent defendants, while supporters argue that fee schedules provide uniformity and ensure that defendants appear at trial.

Several states and municipalities have reformed their bail systems. Voters in New Mexico approved a constitutional amendment that allows judges to deny bail to defendants considered exceptionally dangerous, but otherwise permits pretrial release of nondangerous indigent offenders who cannot make bail. Other jurisdictions have altered or eliminated their money-bail systems in recent years, including cities in Alabama, Georgia, and Maryland.

Courts have heard legal challenges regarding whether state or local money-bail systems comport with the Constitution's Due Process and Equal Protection Clauses. The Supreme Court has established that the Constitution provides certain protections to indigents during sentencing and postconviction, including ensuring that an indigent's failure to pay a fine cannot result in an automatic revocation of probation or imprisonment beyond the statutory maximum term. The Court, however, has not addressed these rights in the bail context. Applying the rational basis standard, some courts have found money-bail systems that reasonably ensure a defendant's subsequent court appearance to be constitutional. Other courts have indicated that bail systems that detain indigent criminal defendants pretrial, without considering their ability to pay, may be unconstitutional.

SUMMARY

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The right to bail in noncapital cases has firm roots in the United States, dating back to colonial times and originating in English law.[1] As the Supreme Court recognized, the "traditional right to freedom before conviction permits the unhampered preparation of a defense and prevents inflicting punishment prior to conviction."[2] But the Supreme Court has never recognized a right to bail as absolute,[3] and has held that the government may have legitimate interests in limiting the availability of bail, even for noncapital crimes, based not only on possible flight risk but also on other considerations, including the danger an arrestee poses to public safety or specific members of the community.[4] Nonetheless, the Court has also observed that pretrial detention may have negative consequences for criminal defendants, such as by impairing their ability to maintain employment and to support dependents financially.[5]

The impact of state and municipal money-bail systems on indigent criminal defendants has prompted legislative interest in, and judicial challenges to, such systems. Money-bail systems allow defendants to avoid jail while awaiting trial by posting a bond according to a fee schedule. Typically, judges do not assess a detainee's individual characteristics beyond the offense charged; instead, judges set a defendant's bail based on the criminal offense with which he is charged. Defendants who cannot pay bail may remain detained pending trial. Money-bail systems differ from the federal bail system, which gives judicial officers greater discretion over the conditions of a defendant's pretrial release.[6] Federal law also expressly provides that a "judicial officer may not impose a financial condition that results in the pretrial detention of the person."[7]

Critics of state and local money-bail systems assert, among other things, that fee schedules unduly burden indigent defendants, who face more difficulty paying bail—including relatively

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[1] *See generally* CRS Report R40221, *Bail: An Overview of Federal Criminal Law*, by Charles Doyle, at 1-6 (discussing the origins and scope of the right to bail in the United States).

[2] Stack v. Boyle, 342 U.S. 1, 3 (1951).

[3] United States v. Salerno, 481 U.S. 739, 752 (1987) (observing that the Eighth Amendment "says nothing about whether bail shall be available at all"); Carlson v. Landon, 342 U.S. 524, 545-46 (1952) ("The [Excessive Bail Clause of the] Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.").

[4] *See, e.g.*, *Salerno*, 481 U.S. at 753 (stating "a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants," but it is not the exclusive function); *id.* at 755 (holding no facial constitutional issue posed by "detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel"); Bell v. Wolfish, 441 U.S. 520, 535 (1979) (observing that litigants in pretrial detention did not "doubt that the Government has a substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences, or that confinement of such persons pending trial is a legitimate means of furthering that interest").

[5] *Id.* For additional discussion, see Barker v. Wingo, 407 U.S. 514, 532-33 (1972), which states:

> The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.

[6] 18 U.S.C. § 3142 (establishing general conditions for pretrial release or detention of a federal criminal defendant). *See generally* CRS Report R40221, *Bail: An Overview of Federal Criminal Law*, by Charles Doyle, at 6-10 (discussing options for pre-trial release).

[7] 18 U.S.C. § 3142(c)(3).

low bail fees associated with misdemeanor offenses—than nonindigent defendants accused of similar offenses.[8] Supporters, on the other hand, contend that fee schedules help guarantee a defendant's appearance in subsequent proceedings and treat defendants uniformly.[9]

In recent years, a few jurisdictions, including New Mexico,[10] Kentucky,[11] New Jersey,[12] Colorado,[13] and Maryland,[14] have considered legislative proposals or ballot initiatives to eliminate or alter their money-bail systems. Some states, including California,[15] Colorado,[16] and New Jersey,[17] altered their money-bail systems to employ more individualized risk assessment tools rather than using the nature of the offense charged.

Recently, defendants have challenged various state or municipal bail systems as inconsistent with the Constitution's Due Process and Equal Protection Clauses.[18] For example, in *Jones v. City of Clanton* (formerly *Varden v. City of Clanton*),[19] the parties settled the case by making release on an unsecured bond the norm rather than the exception. Lawsuits in a few other local jurisdictions have similarly been settled. In *Pierce v. City of Velda City*,[20] the U.S. District Court for the

[8] *See, e.g.*, *We Need More Bail Reform*, PRETRIAL SERVS. AGENCY FOR D.C., https://www.psa.gov/?q=node/390 (last accessed July 3, 2018); *The High Cost of Bail: How Maryland's Reliance on Money Bail Jails the Poor and Costs the Community Million*s, Md. Office of Pub. Def., at http://www.opd.state.md.us/Portals/0/Downloads/High%20Cost%20of%20Bail.pdf (Nov. 2016) (last accessed July 3, 2018).

[9] *See* MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM, HARV. L. SCH. CRIM. JUST. PROGRAM, *available at* http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf (discussing benefits of bail schedules) (Oct. 2016) (last accessed July 3, 2018); Reply Brief for Appellant, Walker v. City of Calhoun, No. 16-10521, 2016 WL 5368508, *1, *16-19 (11th Cir. Sept. 8, 2016).

[10] In November 2016, New Mexico voters approved a constitutional amendment that allows judges to deny bail to defendants, who appear exceptionally dangerous, and to grant pretrial release to nondangerous, indigent offenders who cannot provide bail. N.M. CONST. art. 2, § 13.

[11] KY. REV. STAT. ANN. § 431.510 (outlawing commercial bail bond industry).

[12] New Jersey's Bail Reform and Speedy Trial Act, effective January 1, 2017, largely eliminates bail for minor crimes in favor of judges using a risk assessment tool to decide whether to grant a defendant pretrial release. Located at http://www.njleg.state.nj.us/2014/Bills/PL14/31_.HTM (last accessed July 5, 2018).

[13] Colo. HB 13-1236 (2013) (amending Colo. Rev. Stat. § 16-1-104 to create new presumptions and to revise criteria and methods for setting bail). The enacted bill is available at http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont/6E02E86379A7876487257AF0007C1217?Open&file=1236_enr.pdf (last accessed Mar. 7, 2017).

[14] *See The High Cost of Bail: How Maryland's Reliance on Money Bail Jails the Poor and Costs the Community Million*s, MD. OFFICE OF PUB. DEF., at http://www.opd.state.md.us/Portals/0/Downloads/High%20Cost%20of%20Bail.pdf (Nov. 2016) (last accessed July 5, 2018); *see also* Letter from Brian E. Frosh, Md. Attorney Gen., to Hon. Alan M. Wilner, Chairman of Md. Comm. on Rules, http://www.marylandattorneygeneral.gov/News%20Documents/Rules_Committee_Letter_on_Pretrial_Release.pdf (last accessed July 5, 2018). Maryland's judiciary enacted Rule 4-216.1 to deprioritize cash bail use; to limit cash bail use to ensuring subsequent court appearances, not to address public safety; and to prevent courts from setting bail that the defendant cannot afford.

[15] On August 28, 2018, the Governor approved the California Money Bail Reform Act, which replaces California's money bail system with a risk assessment system, effective October 1, 2018. The enacted bill is available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB10 (last accessed Aug. 29, 2018).

[16] COLO. H.B. 13-1236 (2013).

[17] N.J. PL 2014, c.031 (S946 3R), Ch. 31, § 1-20.

[18] *See* Walker v. City of Calhoun, No. 4:15-CV-170-HLM, 2016 WL 361580 (N.D. Ga. Jan. 28, 2016); Jones v. City of Clanton, No. 2:15cv34–MHT, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015); Pierce v. City of Velda City, No. 4:15–cv–570–HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015).

[19] *Jones*, No. 2:15-cv-34-MHT, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015) (The plaintiff was arrested and jailed for four misdemeanor offenses but could not pay the municipality's bail schedule fee of $500 per charge.).

[20] No. 4:15-cv-570-HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015).

Eastern District of Missouri issued a declaratory judgment stating that "no person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond."[21] Subsequently, the parties entered a settlement agreement on a new bail policy.[22]

During the latter years of the Obama Administration, the Department of Justice (DOJ) submitted a statement of interest in litigation challenging the constitutionality of local bail systems.[23] The DOJ filed an amicus brief in a civil rights lawsuit challenging bail amounts based solely on the offense, calling such systems unconstitutional because of their impact upon indigent defendants.[24] As of the date of this report, it is unclear whether the DOJ and the Trump Administration will continue to take an active role in this case.

Pretrial Release and Pretrial Detention

Money-bail is only one way states and municipalities provide for pretrial release. Absent clear statutory guidance, judges enjoy broad discretion to determine appropriate conditions for releasing a criminal defendant pending trial. When considering pretrial release, judges weigh several factors such as due process, securing a defendant's subsequent court appearance, and protecting society from the defendant.[25] Judges may use various forms of pretrial release such as personal recognizance, secured or unsecured bonds, or conditional release.

Table 1. Types of Bonds Available

Type of Bond	Description
Commercial Surety	A secured bond agreement where a compensated surety (bail bondsman) guarantees a defendant's appearance for court by promising to pay a financial condition of bond if the court finds that the defendant violated any conditions of release.
Cash, Property, or Other Secured Bond	A secured bond agreement where the defendant or an authorized third party posts a percentage of or the full bail amount in cash; U.S., state, or local government bonds; or other personal property with the court. Generally, the money or personal property is returned (sometimes less an administrative fee) if the defendant complies with all conditions of release.
Unsecured Appearance Bond	An unsecured bond agreement that requires a defendant to appear for all subsequent court dates. If the defendant fails to appear, a monetary penalty is imposed. No upfront money is needed for release.

[21] *Id.* at *1.

[22] *Id.*; *see also* Snow v. Lambert, No.3:15-cv-567 (M.D. La. Sept. 3, 2015) (approving settlement prohibiting holding misdemeanor arrestees, who cannot afford a secured monetary bond, in jail).

[23] Statement of Interest of the United States, No. 2:15-cv-34 (M.D. Ala) (filed Feb. 23, 2015) ("It is the position of the United States that, as courts have long recognized, any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pre-trial release, without any regard for indigence, not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy."), *available at* https://www.justice.gov/file/340461/download (last accessed Aug. 27, 2018).

[24] Brief for United States, as Amici Curiae Supporting Plaintiff-Appellee, Walker v. City of Calhoun, 2016 WL 361580 (N.D. Ga. Jan. 28, 2016). Located at https://www.justice.gov/crt/file/887436/download. (last accessed Aug. 27, 2018).

[25] United States v. Salerno, 481 U.S. 739 (1987).

Type of Bond	Description
Conditional Release	Nonmonetary conditions, which may include pretrial supervision or enrollment in a treatment program. No upfront money is needed for release.
Personal Recognizance	An unsecured bond agreement that requires a defendant to promise to appear for future court dates. No upfront money is needed for release.

Source: Congressional Research Service, based upon information compiled from various sources, including law reviews and dictionaries.

Historically, judges have denied defendants bail if they pose a flight risk upon release. For example, judges generally presume defendants charged with capital crimes pose a flight risk.[26] The Supreme Court has recognized that the government may have other, constitutionally legitimate grounds for limiting pretrial release of defendants, including danger to public safety.[27]

Several state statutory and constitutional provisions deny bail to defendants arrested for capital crimes "where the proof is evident or the presumption is great,"[28] and a few also limit bail for noncapital offenses with certain characteristics.[29] Some of these latter restrictions have been challenged legally.[30] In contrast, federal law creates a rebuttable presumption that favors (but does not compel) detention of persons charged with certain offenses when a judge or magistrate determines, on the basis of clear and convincing evidence, that the defendant has a prior conviction for an offense included in one of nine categories of detention-qualifying offenses (crimes of violence, etc.), committed while the accused was free on pretrial release and for which the accused was convicted or released from prison within the last five years.[31] Federal law also establishes a second rebuttable presumption of detention in favor of pretrial detention when the judge or magistrate finds probable cause to believe that the accused has committed a 10-year

[26] Ariana Lindermayer, Note, *What the Right Hand Gives: Prohibitive Interpretations of the State Constitutional Right to Bail*, 78 FORDHAM L. REV. 267, 271-74 (2009) (discussing the basics of bail).

[27] *See* United States v. Salerno, 481 U.S. 739, 753-55 (1987).

[28] *See, e.g.*, ALA. CONST. art. 1 § 16; ARIZ. CONST. art II, § 22(A)(1); ARK. CONST. art. II, § 8 CAL.CONST. art, 1, § 12; COLO. CONST. art. II § 19; DEL. CONST. art 1, § 12; FLA. CONST. art. 1 § 14; IDAHO CONST. art. 1, § 6; Ill. CONST. art. 1, § 9;; KANS. CONST. Bill of Rights § 9; KY CONST. Bill of Rights § 16; LA. CONST. art. 1, 18; ME. CONST. art. 1, § 10; MINN. CONST. art. 1, § 7; MISS. CONST. art. Iii, 29; MO. CONST. art. 1, § 20; MONT. CONST. art. 11, § 21; NEV. CONST. art. 1, § 7; N.J. CONST. art. 1 paragraph 11; N.M. CONST. art. II, § 13; N.D. CONST. art. 1, § 11; OHIO CONST. art. 1, § 9; OKLA. CONST. art. 11, § 8; S.D. CONST. art. VI, § 8; TENN. CONST. art. 1, § 15; UTAH CONST. art. 1, § 8; VT. CONST. ch. 11, § 40; WASH. CONST. art. 1, § 20; WYO CONST. art. 1, § 14. The categorical capital offense exception has deep historical roots, see generally CRS Report R40221, *Bail: An Overview of Federal Criminal Law*, by Charles Doyle, at 1-6 (discussing origins and scope of the right to bail in the United States).

[29] *See, e.g*. ARIZ. CONST. art II, § 22 (restricting bail for aliens, who are unlawfully present in the United States, when proof is evident or the presumption is great that the alien committed a serious felony); COLO. CONST. art. II § 19 (limiting bail when a defendant is alleged to have committed a crime of violence in certain circumstances, including while previously out on bail); FLA. CONST. art. 1 § 14 (limiting bail for capital offenses and noncapital offenses subject to life imprisonment where "proof of guilt is evident or the presumption is great").

[30] *See* Lopez-Valenzuela v. Arpaio, 770 F.3d 772, (9th Cir. 2014) (en banc) (reversing three-judge appellate panel decision, 719 F.3d 1054, and holding that Arizona Constitution provision barring bail for felony arrestees, who were unlawfully present in the United States, failed to comport with substantive due process principles). The Ninth Circuit also opined in *Lopez-Valenzuela* that "[w]hether a categorical denial of bail for noncapital offenses could ever withstand heightened scrutiny is an open question." *Id*. at 785. *Cf*. United States v, Scott, 450 F.3d 863. 874 (6th Cir. 2005) (stating that no "case authorizes detaining someone in jail while awaiting trial, or the imposition of special bail conditions, based merely on the fact of arrest for a particular crime").

[31] 18 U.S.C. §§ 3142(e), (f).

controlled substance offense, federal crime of terrorism offense, or various kidnapping or sexual offenses committed against a child.[32]

Constitutional Considerations Related to Bail and Indigence

The Constitution governs pretrial detention and bail. For money-bail systems, particularly as they apply to indigent defendants, the key provisions are the Eighth Amendment's Excessive Bail Clause and the Fifth and Fourteenth Amendments' Due Process and Equal Protection Clauses.

Eighth Amendment

The Eighth Amendment of the U.S. Constitution states that "[e]xcessive bail shall not be required."[33] Bail is excessive when "set higher than an amount that is reasonably likely to ensure the defendant's presence at the trial."[34] While the Eighth Amendment expressly prohibits excessive bail, it does not establish an absolute right to bail.[35] Whether an accused has a right to bail depends on how expansively a court interprets the provision. For example, in *Stack v. Boyle*,[36] the Court declared that "this traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.... Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[37] However, in *Carlson v. Landon*,[38] decided in the same term as *Stack*, the Court stated the following:

> The bail clause was lifted, with slight changes, from the English Bill of Rights Act. In England, that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases,

[32] *Id.* § 3142. *See generally* CRS Report R40221, *Bail: An Overview of Federal Criminal Law*, by Charles Doyle, at 10 (discussing rebuttable presumption for pretrial detention).

[33] U.S. CONST. amend. VIII. The Supreme Court has not squarely held that the Excessive Bail Clause of the Eighth Amendment applies to states through incorporation via the Fourteenth Amendment, though it "has been assumed" to apply to states in certain challenges heard by the Court. Baker v. McCollan, 443 U.S. 137, 145 n.3 (1979); *see also* Schib v. Kuevel, 404 U.S. 357, 365 (1971). Several courts have expressly held that the Excessive Bail Clause applies to states, while others consider it an open question. *Compare* Sistrunk v. Lyons, 646 F.2d 64, 71 (3d Cir. 1991)(finding the Excessive Bail Clause integral to ordered liberty and binding on states through the Fourteenth Amendment); Pikinton v. Circuit Court of Howell Cty., 324 F.2d 45, 46 (8th Cir. 1963)(finding the Excessive Bail Clause applies to states through the Fourteenth Amendment); Meechaicum v. Fountain, 696 F.2d 790,791 (10th Cir. 1983)(per curiam)(same); *with* United States v. Scott, 450 F.3d 863, 866 n.5 (9th Cir. 2006)(declining to decide whether the Excessive Bail Clause applies to states through incorporation); Galen v. County of Los Angeles, 477 F.3d 652, 659 (9th Cir. 2007)(same).

[34] Stack v. Boyle, 342 U.S. 1, 3 (1951)(when the government's only justification for setting bail was preventing flight, imposing a $50,000 bail on indigent defendants, who appeared unlikely to flee before trial, was unconstitutional).

[35] *See, e.g.*, *Salerno*, 481 U.S. at 752 ("[The Excessive Bail] Clause, of course, says nothing about whether bail shall be available at all"); Carlson v. Landon, 342 U.S. 524, 545-46 (1952).

[36] 342 U.S. 1 (1951).

[37] *Id.* at 4.

[38] 342 U.S. 524, 545-46 (1952).

> bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.

Similarly, in *United States v. Salerno (Salerno*),[39] the Court found the federal Bail Reform Act[40] to be constitutionally valid under the Eighth Amendment's Excessive Bail Clause. The Bail Reform Act allowed judges to detain individuals in certain limited circumstances when the accused poses a danger to the public at large or to particular members of the public.[41] In upholding the act, the Court noted that the Excessive Bail Clause does not limit congressional considerations to question of flight.[42] In other words, the clause permits the government pursuing compelling interests such as public safety "though regulation of pre-trial release."[43]

Due Process Requirements

In addition to Eighth Amendment considerations, pretrial detention and bail must comport with due process principles. Due process requires that statutes imposing pretrial detention serve a compelling governmental interest and do not impose punishment before adjudication of guilt.[44] Moreover, governmental action that deprives an individual of life, liberty, or property must be implemented in a fair, nonarbitrary manner.[45] The U.S. Constitution's due process guarantees are contained in the Fifth Amendment[46] and the Fourteenth Amendment.[47] The Fifth Amendment applies to actions taken by the federal government, whereas the Fourteenth Amendment applies to actions taken by state governments.[48] Each clause provides that the government shall not deprive a person of "life, liberty, or property, without due process of law."[49]

[39] 481 U.S. 739 (1987).

[40] The Bail Reform Act of 1984 was enacted as chapter I of Title II (Comprehensive Crime Control Act of 1984) of P.L. 98-473, 98 Stat. 1837, 1976 (1984), 18 U.S.C. §§ 3141-3156 (1982 ed., Supp. II).

[41] 18 U.S.C. §§ 3141-3156.

[42] Id. at 754 ("Nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be excessive in light of the perceived evil....We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail").

[43] Salerno, 481 U.S. at 753.

[44] *See* Stack v. Boyle, 342 U.S. 1, 4 (1951)("[The] traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.... Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.").

[45] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see also, e.g.*, Simon v. Woodson, 454 F.2d 161, 165-66 (5th Cir. 1972)(finding that a $20,000 bail was not arbitrary because the defendant was charged with assaulting a police officer with intent to kill); U.S. ex rel. Garcia v. O'Grady, 812 F.2d 347, 352-55 (7th Cir. 1987)(ruling that $607,000 bail was not arbitrary because the defendant was charged in a drug prosecution, posed a flight risk, and allegedly earned $14 million annually from drug sales).

[46] U.S. CONST. amend. V ("No person shall ... be deprived of life, liberty, or property, without due process of law ....").

[47] *Id*. at amend. XIV, cl. 1 ("No state shall make or enforce any law... nor shall any state deprive any person, of life, liberty, or property, without due process of law....").

[48] *Id*.

[49] *Id*. at amend. XIV, cl. 1; *id.* at amend. V. cl. 1.

Due process may be procedural or substantive. Based on the principle of "fundamental fairness," procedural due process requires notice[50] and an opportunity to be heard[51] before a neutral party.[52] Substantive due process "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[53]

In *Salerno*, the Court found that the Bail Reform Act's regulatory character met substantive and procedural due process requirements.[54] Discussing substantive due process, the Court stated the following:

> Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on whether an alternative purpose to which the restriction may rationally be connected is assignable for it and whether it appears excessive in relation to the alternative purpose assigned to it. We conclude that the detention imposed by the Act falls on the regulatory side of the dichotomy. The legislative history ... indicates that Congress did not formulate the pretrial detention provisions as a punishment for dangerous individuals. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. There is no doubt that preventing danger to the community is a legitimate regulatory goal, nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve.[55]

As for procedural due process, the Court found that the act's tailored procedural safeguards satisfied the Constitution.[56]

Equal Protection Considerations

Under the Constitution's equal protection provisions,[57] courts reviewing government action that distinguishes between classes of people apply different levels of scrutiny depending on the classification used. For example, the Supreme Court has held that governmental action that categorizes people based on certain "suspect" classifications, such as race,[58] is subject to strict scrutiny, which is the most searching form of judicial review; other classifications, such as those based on age,[59] are permissible if the statute's use of such classification is rationally related to a legitimate state interest. The Supreme Court has invalidated statutes that impose jail or other adverse consequences based on a defendant's indigence,[60] but it has never held that money-bail

[50] Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985).

[51] Goldberg v. Kelly, 397 U.S. 254, 263-64 (1970).

[52] Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004).

[53] Reno v. Flores, 507 U.S. 292, 302 (1993); *see also* Washington v. Glucksberg, 521 U.S. 702, 721 (1997); United States v. Salerno, 481 U.S. 739, 749-51 (1987).

[54] Salerno, 481 U.S. 747-48 ("[Finally, we may dispose briefly of respondents' facial challenge to the procedures of the Bail Reform Act....We think [its] extensive safeguards sufficient to repeal a facial challenge.").

[55] *Id.*

[56] *Id.*

[57] The Fourteenth Amendment guarantees that "[n]o State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." The Fifth Amendment's Due Process Clause applies the same limitation to the federal government. *Salerno*, 481 U.S. at 746.

[58] McLaughlin v. Florida, 379 U.S. 184 (1964).

[59] Mass. Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (using a rational basis analysis in upholding a Massachusetts law establishing a mandatory retirement age of 50 for police officers).

[60] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 19 (1956)(invalidating a statute under equal protection principles that imposed a fee on criminal defendants, who sought to obtain a copy of the trial record, as the fee effectively denied

systems are constitutionally invalid because indigent defendants have greater difficulty paying bail than other criminal defendants. The Supreme Court, however, has considered the constitutional implications of indigence for criminal defendants in other contexts.[61]

Supreme Court Jurisprudence Regarding Indigents

In a series of cases, the Court held that imprisonment solely because of indigence constitutes invidious discrimination and is constitutionally impermissible.[62] For example, in *Bearden v. United States*,[63] the Court held that a court could not automatically revoke a defendant's probation for failing to pay a fine and make restitution unless such nonpayment was willful.[64] After the defendant pleaded guilty to burglary and theft by receiving stolen property, the court sentenced him to three years' probation, a $500 fine, and restitution of $250 to be repaid according to a four-month schedule.[65] After the defendant lost his job and could not make the payments, the court revoked his probation, sentencing him to serve the rest of his sentence.[66]

In determining the revocation's constitutionality, the Court analogized the equal protection concerns to the fundamental fairness issues of due process analysis[67] and weighed factors including the "nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose ...."[68] Acknowledging the state's interest in punishment and deterrence,[69] the Court opined that this could be achieved by extending the repayment period or by the defendant performing public service.[70] The Court held that a court

indigent criminal defendants adequate appellate review); Williams v. Illinois, 399 U.S. 235, 244 (1970)(stating "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status").

[61] *Compare* Bell v. Wolfish, 441 U.S. 520, 583 (1979)(Stevens, J., dissenting)("The fact that an individual may be unable to pay for a bail bond, however, is an insufficient reason for subjecting him to indignities that would be appropriate punishment for convicted felons."); Bandy v. United States, 81 S.Ct. 197 (1960) (Douglas, J.) (noting that requiring a substantial bond from an indigent defendant "raises considerable problems for the equal administration of the law") *with* Douglas v. People of State of Cal., 372 U.S. 353, 361–62 (1963) (Harlan, J., dissenting) ("Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent. Yet I take it that no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purchase of water from a municipal corporation, to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses.").

[62] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 19 (1956)(invalidating a statute on equal protection grounds that charged criminal defendants for a copy of the trial record, as the fee effectively denied indigent criminal defendants adequate appellate review); Williams v. Illinois, 399 U.S. 235, 244 (1970)("[T]he Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status").

[63] 461 U.S. 660 (1983).

[64] *Id.* at 672-73.

[65] *Id.* at 662.

[66] *Id.*

[67] *Id.* at 666 (describing the question presented to be "substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine").

[68] *Id.* at 666-67 (quoting Williams v. Illinois, 399 U.S. at 260).

[69] *Id.* at 672.

[70] *Id.*

must determine whether nonpayment was willful before revoking a defendant's probation.[71] As the lower court had not made such a finding, the Supreme Court held that "fundamental fairness requires that the petitioner remain on probation" and remanded the case.[72]

In other cases, the Supreme Court has not recognized indigence as a suspect class warranting strict scrutiny analysis.[73] For example, in *Maher v. Roe*,[74] the Court held the following:

> An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation falls upon those who cannot pay lead to a different conclusion. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services.[75]

Accordingly, when weighing the constitutionality of bail statutes,[76] some lower courts have used the rational basis standard to examine whether a bond requirement would rationally and reasonably ensure the defendant's appearance at trial or serve another legitimate government interest.[77]

Recent Lower Court Cases Concerning Bail and Indigents

While the Supreme Court has recognized rights for indigents in the sentencing and postconviction contexts, it has not addressed such rights in the bail context. Some courts have viewed claims of excessive bail premised solely on indigence to be uncompelling. For example, in *Katona v. City of Cheyenne*,[78] a Wyoming federal district court rejected an arrestee's assertion that $35 was excessive bail due to his indigence. Noting that excessive or denial of bail may trigger equal protection concerns, the court applied a rational basis standard of review, examining whether the bond requirement was "rationally and reasonably"[79] related to nonresidents appearing at trial.

Similarly, in *Walker v. City of Calhoun*, the U.S. Court of Appeals for the Eleventh Circuit vacated a preliminary injunction against the City of Calhoun's money-bail system for misdemeanor offenders.[80] Arrested and charged with "being a pedestrian under the influence of

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[71] *Id.*

[72] *Id.* at 674.

[73] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1972) (declining to use strict scrutiny analysis as no fundamental right was implicated or suspect class injured). Acting on behalf of students residing in poor districts, the San Antonio Independent School District challenged a funding scheme based on property taxes, arguing that wealth-based discrimination in education (a fundamental right) should be subject to strict scrutiny analysis.

[74] 432 U.S. 464 (1977).

[75] *Id.* at 470-71.

[76] *See, e.g.*, Katona v. City of Cheyenne, 686 F.Supp. 287 (D. Wyoming 1988) (finding $35 bond to be rationally and reasonably related to assuring defendant's trial appearance); Vasquez v. Cooper, 862 F. 2d 250, 253-54 (10th Cir. 1998) (distinguishing case from those where defendants' sentences exceeded the statutory maximum term).

[77] *Katona*, 686 F. Supp. at 293. *See also* United States v. Salerno, 481 U.S. 739, 747-48, 752-754 (1987) (recognizing "compelling interests" for pretrial detention such as when a defendant poses a danger to the community or to ensure "the integrity of the judicial process").

[78] 686 F.Supp. at 293.

[79] *Id.*

[80] Walker v. City of Calhoun, 901 F.3d 1245, 1268 (11th Cir. Aug. 22, 2018).

alcohol,"[81] Mr. Walker spent six nights in jail because he could not afford the $160 cash bond set by the money-bail schedule.[82] He filed a class action lawsuit alleging that the City of Calhoun violated his Fourteenth Amendment rights by jailing him and other class members "because of their inability to pay a generically set amount of money to secure release after an arrest."[83] The district court found that the bail schedule "violate[d] the Constitution insofar as it permits individuals who have sufficient resources to post a bond (or to have one posted for them) to be released immediately, while individuals who do not have those resources must wait forty-eight hours for a hearing."[84]

Appealing to the Eleventh Circuit, the city defended its bail system as constitutional because it discriminated on the seriousness of the offense rather than on wealth.[85] The city argued that the Fourteenth Amendment does not provide "an absolute entitlement to pretrial release" and that wealth-based distinctions are subject to rational basis review because wealth is not a suspect class.[86] The city asserted that its bail system met the rational basis standard because it serves the "legitimate goal of assuring the presence of a defendant at trial."[87]

The Eleventh Circuit found that the district court erred in applying heightened scrutiny to wealth-based classifications.[88] Citing the Supreme Court's *San Antonio Independent School District v. Rodriguez* decision,[89] the Eleventh Circuit noted that whether the plaintiff suffered "an absolute deprivation" or a "mere diminishment" was key because "differential treatment by wealth is impermissible only where it results in a *total* deprivation of a benefit *because* of poverty."[90] Because Mr. Walker was not totally deprived of pretrial release but had to wait 48 hours at most to "receive the same benefit as the more affluent,"[91] the Eleventh Circuit held that the "district court was wrong to apply heightened scrutiny under the Equal Protection Clause."[92]

Other courts have held that bail systems that incarcerate indigent individuals without considering their ability to pay are unconstitutional. In *Pierce v. City of Velda City*,[93] the district court issued a declaratory judgment, stating that "no person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest

[81] *Id.* at 1251.

[82] *Id.* at 1251-52. The City of Calhoun's bail schedule allowed arrestees charged with state offenses to be immediately released upon paying the bail schedule amount. Arrestees unable to make bail had a bail hearing within 48 hours. *Id.*

[83] Walker v. City of Calhoun (*Walker I*), 2016 WL 361612, *1, *3 (N.D. Ga. Jan. 28, 2016), vacated *Walker II*, 682 Fed. Appx. 721, 724 (11th Cir. Mar. 9, 2017) (finding the injunction violated Federal Rule of Civil Procedure 65(d)(1), which requires orders granting injunctions to "(A) state the reasons why it was issued, (B) state its terms specifically; and (C) describe in reasonable detail . . . the act or acts restrained or required.").

[84] Walker v. City of Calhoun (*Walker III*), 2017 WL 2794064, *1, *3 (N.D. Ga. June 16, 2017).

[85] Brief for Appellant, Walker v. City of Calhoun, 2016 WL 3344873, *1, *9 (11th Cir. June, 14, 2016).

[86] *Id.* at *9.

[87] *Id.* at *13.

[88] *Id.*

[89] 411 U.S. 1, 24 (1973) ("[The] Equal Protection Clause does not require absolute equality or precisely equal advantages.").

[90] *Walker IV* at *9.

[91] *Id.* at *10.

[92] *Id.*

[93] No. 4:15-cv-570, 2015 WL 10013006 (E.D. Mo. June 3, 2015).

because the person is too poor to post a monetary bond."[94] Ultimately, the parties resolved the case through a settlement agreement that changed the jurisdiction's bail system.[95]

Conclusion

Recognizing that "[t]here can be no equal justice where the trial a man gets depends on the amount of money he has,"[96] the Supreme Court has invalidated statutes or actions that arguably punished individuals for indigence. But the Supreme Court has generally viewed pretrial release of criminal defendants to be a regulatory, rather than a penal, matter, noting that the government may have legitimate and, in some cases, compelling interests in limiting pretrial release for certain types of defendants.[97] The Supreme Court has never squarely assessed whether applying money-bail systems to indigent criminal defendants as a class is permissible. Lower courts are split on whether money-bail systems impermissibly discriminate against indigents. Some courts have found money-bail systems to be constitutionally suspect, while others have upheld money-bail systems as rationally related to legitimate or compelling governmental interests, including providing for a defendant's subsequent court appearance.

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[94] *Id.* at *1.

[95] *See also* Snow v. Lambert, No.3:15-cv-567 (M.D. La. Sept. 3, 2015) (approving settlement barring using secured monetary bonds to hold misdemeanor arrestees, who cannot afford the bonds, in jail).

[96] Griffin v. Illinois, 351 U.S. 12, 19 (1956).

[97] *See* United States v. Salerno, 481 U.S. 739, 746-747 (1987) (distinguishing "regulatory" limits on pretrial release of criminal defendants under the Federal Bail Reform Act of 1984, including providing for a defendant's presence at trial and community safety, from punitive "penal" restrictions).