process grounds.[1066] Defendants have had difficulty meeting the Court's standards: Only one challenge has been successful.[1067]

Fair Trial.—As noted, the provisions of the Bill of Rights now applicable to the states contain basic guarantees of a fair trial—right to counsel, right to speedy and public trial, right to be free from use of unlawfully seized evidence and unlawfully obtained confessions, and the like. But this does not exhaust the requirements of fairness. "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. . . . What is fair in one set of circumstances may be an act of tyranny in others."[1068] Conversely, "as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it . . . [the Court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."[1069]

For instance, bias or prejudice either inherent in the structure of the trial system or as imposed by external events will deny one's right to a fair trial. Thus, in *Tumey v. Ohio*[1070] it was held to violate due process for a judge to receive compensation out of the fines imposed on convicted defendants, and no compensation beyond his salary) "if he does not convict those who are brought before him."

[1066] The Court eschewed a *per se* exclusionary rule in due process cases at least as early as *Stovall*. 388 U.S. 293, 302 (1967). In Manson v. Brathwaite, the Court evaluated application of a *per se* rule versus the more flexible, *ad hoc* "totality of the circumstances" rule, and found the latter to be preferable in the interests of deterrence and the administration of justice. 432 U.S. 98, 111–14 (1977). The rule in due process cases differs from the *per se* exclusionary rule adopted in the *Wade-Gilbert* line of cases on denial of the right to counsel under the Sixth Amendment in post-indictment lineups. Cases refining the *Wade-Gilbert* holdings include Kirby v. Illinois, 406 U.S. 682 (1972) (right to counsel inapplicable to post-arrest police station identification made before formal initiation of criminal proceedings; due process protections remain available) and United States v. Ash, 413 U.S. 300 (1973) (right to counsel inapplicable at post-indictment display of photographs to prosecution witnesses out of defendant's presence; record insufficient to assess possible due process claim).

[1067] Foster v. California, 394 U.S. 440 (1969) (5–4) ("[T]he pretrial confrontations [between the witness and the defendant] clearly were so arranged as to make the resulting identifications virtually inevitable."). In a limited class of cases, pretrial identifications have been found to be constitutionally objectionable on a basis other than due process. *See* discussion of Assistance of Counsel under Amend. VI, "Lineups and Other Identification Situations."

[1068] Snyder v. Massachusetts, 291 U.S. 97, 116, 117 (1934). *See also* Buchalter v. New York, 319 U.S. 427, 429 (1943).

[1069] Lisenba v. California, 314 U.S. 219, 236 (1941).

[1070] 273 U.S. 510, 520 (1927). *See also* Ward v. Village of Monroeville, 409 U.S. 57 (1972). *But see* Dugan v. Ohio, 277 U.S. 61 (1928). Bias or prejudice of an appellate judge can also deprive a litigant of due process. Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813 (1986) (failure of state supreme court judge with pecuniary interest—a pending suit on an indistinguishable claim—to recuse).