BYU Law Review

Volume 1987 | Issue 3 Article 8

9-1-1987

The Incorporation Doctrine and Procedural Due Process Under the Fourteenth Amendment: An Overview

Robert L. Cord

The Incorporation Doctrine and Procedural Due Process Under the Fourteenth Amendment: An Overview*

*Robert L. Cord***

I. INTRODUCTION

Nearly a dozen years ago, I saw the personnel of the Burger Court take a different approach than had the Warren Court to the procedural guarantees of the fourteenth amendment's Due Process Clause.[1] Heartened by this change were those who thought the Warren Court majority an extremely activist one, damaging—with little more justification than constitutional fiat—the division of power inherent in federalism by preempting much of the authority of the states to establish criminal procedures in their own judicial systems. At the time, I labeled that distinctive Burger Court approach to the fourteenth amendment's Due Process Clause "Neo-Incorporation."[2]

---

* This article was presented at the Federalist Society Symposium entitled "Federalism and Constitutional Checks and Balances: A Safeguard of Minority and Individual Rights," held November 15-16, 1986, at Northwestern School of Law.

** Distinguished Professor and Professor of Political Science, Northeastern University. B.B.A., City College of New York, 1956; M.A., Maxwell School, Syracuse University, 1958; Ph.D. 1967. Liberal Arts Fellow in Law and Political Science, Harvard Law School, 1970-1971.

I would like to acknowledge two former junior colleagues, Messrs. Michael Koonce and Michael Behn—both now graduates of the Northeastern University Law School—for their thoughtful and tenacious aid in the preparation of this article.

1. Cord, *Neo-Incorporation: The Burger Court and the Due Process Clause of the Fourteenth Amendment*, 44 FORDHAM L. REV. 215 (1975).

2. *Id.* at 239-48. The fourteenth amendment has also been a fruitful source of extra-judicial legal writing. *See generally* H. BLACK, A CONSTITUTIONAL FAITH 23-42 (1968); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 76-90 (1921); Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. LEGIS. 1 (1968); Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960); Brennan, *Extension of the Bill of Rights to the States*, 44 J. URB. L. 11 (1966); Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965); Green, *The Bill of Rights, the Fourteenth Amendment and the Su-*

"Neo-Incorporation," I explained, was an aberrant form of the Incorporation Doctrine which attacked that doctrine's fundamental principle of parallelism, the acceptance—as a basic axiom in constitutional interpretation—that the fourteenth amendment had deflected against the states, *with equal vigor*, various substantive, but mostly the procedural rights of the Bill of Rights. Subscription to this symmetry was a common characteristic of all of the "traditional" incorporationist justices who—on the Roosevelt, Vinson and Warren Courts, from *Betts v. Brady*[3] until *Mapp v. Ohio*,[4]—had sought unsuccessfully to deflect against the states through the fourteenth amendment the guarantees of most, if not all, of the first eight amendments. Not so with Neo-Incorporation. That new approach thought it unnecessary to constitutionalize the federal rules of criminal procedures pertaining to a Bill of Rights' guarantee which had been carried over into the fourteenth amendment. If a procedural right has been carried over for application in the state courts without its federal "bag and baggage," traditional incorporationists thought that process would lead to little more than having the fourteenth amendment deflect against the states what Justice Brennan once characterized as a "watered down version of the Bill of Rights."[5]

In its thrust to alter and/or undo many of the Warren Court's procedural rights ventures, the Burger Court seems to have embraced techniques, all of which—including Neo-Incorporation—are based upon a reinterpretation of past Supreme

---

preme Court, 46 MICH. L. REV. 869 (1948); Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963); Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969); Lacy, *Absorption Doctrine—The Bill of Rights and the Fourteenth Amendment: The Evolution of the Absorption Doctrine*, 23 WASH. & LEE L. REV. 37 (1966); Landynski, *Due Process and the Concept of Ordered Liberty: "A Screen of Words Expressing Will in the Service of Desire"?* 2 HOFSTRA L. REV. 1 (1974); Mendelson, *Mr. Justice Black's Fourteenth Amendment*, 53 MINN. L. REV. 711 (1969); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949); Mykkeltvedt, *Justice Black and the Intentions of the Framers of the Fourteenth Amendment's First Section: The Bill of Rights and the States*, 20 MERCER L. REV. 432 (1969): O'Brien, *Juries and Incorporation in 1971*, 1971 WASH. U.L.Q. 1; Richter, *One Hundred Years of Controversy: The Fourteenth Amendment and the Bill of Rights*, 15 LOY. L. REV. 281 (1968-1969). For a discussion of "substantive" due process, see R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Ganghi, *Separation of Church and State* (Book Review), 7 HARV. J.L. & PUB. POL'Y 581, 592-95 (1984).

3. 316 U.S. 455 (1942), *overruled in* Gideon v. Wainwright, 372 U.S. 335 (1963).

4. 367 U.S. 643 (1961).

5. Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 275 (1960) (Brennan, J., dissenting).

Court happenings. Therefore, it is most appropriate that—within the confines of this limited study—some of those happenings be examined.

In 1975, I noted Justice Black's then thirty-five-year-old observation that "[t]he scope and operation of the fourteenth amendment have been fruitful sources of controversy in our constitutional history."[6] Today, they still are. Despite significant recent Supreme Court decisions defining the Equal Protection Clause,[7] the meanings of the rights, which the Due Process Clause guarantees, are still at the center of those ongoing controversies.

Throughout the period of the Roosevelt, Vinson and Warren Courts, there were manifested two basic approaches to the relationship between the Bill of Rights and the fourteenth amendment. This was especially evident in state criminal cases involving procedural rights protected by the fourth, fifth, sixth, and eighth amendments. In 1947, speaking for the Court in *Fay v. New York*,[8] Justice Jackson succinctly delineated between them:

> The due process clause is one of comprehensive generality, and in reducing it to apply in concrete cases there are different schools of thought. One is that its content on any subject is to be determined by the content of certain relevant other Amendments in the Bill of Rights which originally imposed restraints on only the Federal Government but which the Fourteenth Amendment deflected against the states. The other theory is that the clause has an independent content apart from, and in

---

6. Chambers v. Florida, 309 U.S. 227, 235 (1940). Most of the fourteenth amendment constitutional litigation historically has involved section one of the amendment which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

7. Plyler v. Doe, 457 U.S. 202 (1982) (illegal alien children); Fullilove v. Klutznick, 448 U.S. 448 (1980) (affirmative action); Ambach v. Norwick, 441 U.S. 68 (1979) (resident aliens); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) ("reverse discrimination"); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (racial discrimination); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (suffrage); Reitman v. Mulkey, 387 U.S. 369 (1967) (housing); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax); Reynolds v. Sims, 377 U.S. 533 (1964) (representation); Brown v. Board of Educ., 349 U.S. 294 (1954) (public education).

8. 332 U.S. 261 (1947).

> addition to, any and all other Amendments. This meaning is derived from the history, evolution and present nature of our institutions and is to be spelled out from time to time in specific cases by the judiciary.[9]

Justices who embraced the first approach saw the due process clause of the fourteenth amendment as incorporating specific guarantees detailed in the first eight amendments, thus protecting them from state power. Until the emergence of the Burger Court, these justices—referred to here as "*traditional* incorporationists"—saw complete and constant identicalness between the rights in the first eight amendments and those rights from the first eight amendments which had been incorporated into the fourteenth amendment's Due Process Clause by judicial decision.[10] In cases where a Bill of Rights guarantee is involved, this parallelism has been the unchanging characteristic of the traditional incorporationist's view of due process under the fourteenth amendment.[11]

Justices embracing the other fourteenth amendment meaning of due process (referred to here as the "ordered liberty" approach) held that the Clause protected from state infringement the right to a fair trial and all other "fundamental rights" essential to the "concept of ordered liberty," irrespective of whether those rights were specified in the Bill of Rights.[12] The differences inherent in these two positions can be readily seen in the opinions in *Betts v. Brady*,[13] a 1942 state case where it was alleged that the sixth amendment right of counsel in federal criminal cases was also guaranteed in state criminal trials by the fourteenth amendment.[14]

---

9. *Id.* at 287-88.

10. "The architect of the contemporary 'incorporation' approach to the Fourteenth Amendment is, of course, Mr. Justice Black." Williams v. Florida, 399 U.S. 78, 144 (1970) (Stewart, J., concurring).

11. Benton v. Maryland, 395 U.S. 784 (1969); Klopfer v. North Carolina, 386 U.S. 213 (1967); Griffin v. California, 380 U.S. 609 (1965); Pointer v. Texas, 380 U.S. 400 (1965); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting); Betts v. Brady, 316 U.S. 455, 474 (1942) (Black, J., dissenting), *overruled in* Gideon v. Wainwright, 372 U.S. 335 (1963).

12. Palko v. Connecticut, 302 U.S. 319 (1937), *overruled in* Benton v. Maryland, 395 U.S. 784 (1969).

13. 316 U.S. 455 (1942).

14. The Supreme Court's decision in Powell v. Alabama, 287 U.S. 45 (1932), essentially held that, in light of the "circumstances" in that case, the failure of the trial court to give the defendants in a capital case reasonable time and opportunity to secure coun-

In *Betts*, the U.S. Supreme Court, embracing the "fair trial/ordered liberty" due process approach, sustained the felony conviction of an indigent who was not represented by counsel. The 6-3 opinion of the Court, written by Justice Roberts, held that:

> [t]he Sixth Amendment of the national Constitution applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth.[15]

Dissenting in *Betts*, Justice Black wrote the first modern "incorporationist" opinion:

> If this case had come to us from a federal court, it is clear we should have to reverse it, because the Sixth Amendment makes the right to counsel inviolable by the federal government. I believe that the Fourteenth Amendment made the Sixth applicable to the states.[16]

II. Ordered Liberty in Ascendance

While the substance of the "ordered liberty" fourteenth amendment due process approach can be traced to earlier decisions,[17] it was not until *Palko v. Connecticut*,[18] decided in 1937, that the United States Supreme Court attempted to comprehensively define which constitutional rights it saw that amendment's Due Process Clause protecting from infringement by the states. Justice Cardozo, writing for a unanimous Court, specifically rejected the contention that the guarantees of the Bill of Rights had, through the fourteenth amendment, become binding on the states.[19] Instead, the *Palko* Court held that the various

---

sel was a clear denial of due process under the fourteenth amendment. This decision led to claims that the right to counsel, for indigents, in all serious state criminal cases was guaranteed by the Due Process Clause.

15. 316 U.S. 455, 461-62 (1942) (footnotes omitted).

16. *Id.* at 474 (Black, J., dissenting). Justice Black's dissent was joined by Justices Douglas and Murphy.

17. Snyder v. Massachusetts, 291 U.S. 97 (1934); Moore v. Dempsey, 261 U.S. 86 (1923); Twining v. New Jersey, 211 U.S. 78 (1908).

18. 302 U.S. 319 (1937).

19. *Id.* at 323.

liberties protected by the fourteenth amendment were only those truly fundamental and therefore "implicit in the concept of ordered liberty."[20] This interpretation continued during the 1940s and 1950s as the various spokesmen for this due process approach—Justices Roberts,[21] Reed,[22] Frankfurter,[23] Jackson,[24] and Harlan[25]—authored the major Supreme Court opinions addressing the issue. While the "ordered liberty" justices viewed the constitutional rights protected from federal authority by the first eight amendments to be of value, *all constitutional rights*

---

20. *Id.* at 324-25.

21. Justice Roberts wrote the opinion of the Court in Betts v. Brady, 316 U.S. 455 (1942), a classic statement of the "ordered liberty" approach to the fourteenth amendment's Due Process Clause. At that time the "ordered liberty" majority on the Court included Chief Justice Stone and Justices Reed, Frankfurter, Jackson and Byrnes.

22. In Adamson v. California, 332 U.S. 46 (1947), Justice Reed spoke for the Court and the "ordered liberty" approach in the first case contrasting in depth that interpretation and incorporationist theory. Additionally he wrote the "ordered liberty" opinion of the Court in Gibbs v. Burke, 337 U.S. 773 (1949), and concurred in numerous anti-incorporationist opinions of the Court among which were *Betts*, 316 U.S. at 455; Fay v. New York, 332 U.S. 261 (1947); Bute v. Illinois, 333 U.S. 640 (1948); Wolf v. Colorado, 338 U.S. 25 (1949), *overruled in* Mapp v. Ohio, 367 U.S. 643 (1961); Rochin v. California, 342 U.S. 165 (1952).

23. During the 1940s and 1950s, Justice Frankfurter was one of the "ordered liberty" members of the Supreme Court who in his numerous opinions defined that approach to the fourteenth amendment's Due Process Clause. Among his "ordered liberty" opinions of the Court are: Foster v. Illinois, 332 U.S. 134 (1947); *Wolf*, 338 U.S. at 25; Bartkus v. Illinois, 359 U.S. 121 (1959); and Frank v. Maryland, 359 U.S. 360 (1959), *overruled in* Camara v. Municipal Court, 387 U.S. 523 (1967). During his tenure on the court he voted consistently for opinions which rejected the incorporation approach and supported the "ordered liberty" theory. Among those important "ordered liberty" decisions were the opinions of the Court in *Adamson*, 332 U.S. at 46; *Betts*, 316 U.S. at 455; *Bute*, 333 U.S. at 640; *Fay*, 332 U.S. at 261; *Gibbs*, 337 U.S. at 773; Malinski v. New York, 324 U.S. 401 (1945); and Cohen v. Hurley, 366 U.S. 117 (1961), *overruled in* Speack v. Klein, 385 U.S. 511 (1967).

24. Justice Jackson's commitment to the "ordered liberty" approach and the rejection of the incorporation doctrine is clearly established in his opinion for the Court in *Fay* and his concurrences in the opinions of the Court in *Adamson*, *Bute*, *Foster*, *Wolf*, and *Gibbs*.

25. Justice Harlan's subscription to the "ordered liberty" due process approach is clear in his opinions for the Court in *Cohen* and Hoag v. New Jersey, 356 U.S. 464 (1958). Justice Harlan also concurred in two strongly worded opinions of Justice Frankfurter that denounced the incorporation theory in *Bartkus* and in Knapp v. Schweitzer, 357 U.S. 371 (1958). Harlan also filed separate opinions in Lanza v. New York, 370 U.S. 139, 147 (1962); Robinson v. California, 370 U.S. 660, 678 (1962); Gideon v. Wainwright, 372 U.S. 335, 349 (1963); Ker v. California, 374 U.S. 23, 44 (1963); Malloy v. Hogan, 378 U.S. 1, 14 (1964) (dissenting); Murphy v. Waterfront Comm'n, 378 U.S. 52, 80 (1964); Aguilar v. Texas, 378 U.S. 108, 116 (1964); Jackson v. Denno, 378 U.S. 368, 427 (1964) (dissenting); Pointer v. Texas, 380 U.S. 400, 408 (1965); Griffin v. California, 380 U.S. 609, 615 (1965); Griswold v. Connecticut, 381 U.S. 479, 499 (1965); and Miranda v. Arizona, 384 U.S. 436, 504 (1966).

were not viewed by them as being of equal importance, nor were all considered to be fundamental rights essential to a nation simultaneously committed to personal liberty as well as orderly societal process.[26]

From *Palko* in 1937 until *Mapp v. Ohio*[27] in 1961, the Supreme Court's "ordered liberty" majority[28] consistently held that the fourteenth amendment's Due Process Clause had a meaning distinctly its own and was not a mere reflection of, or shorthand for, all or any specific provisions of the Bill of Rights.[29] For them, freedom of thought, of speech, and the right to a fair trial were constitutionally secured by the fourteenth amendment, not because they were reflective of part of the Bill of Rights—a matter which they thought largely irrelevant—but because the Court considered those freedoms intrinsic to a free society.[30]

Although the Court's "ordered liberty" majority held that the fourteenth amendment guaranteed a fair trial in state criminal proceedings, their concept of due process precluded them from providing an exhaustive list of procedures which, if followed, would make for a fair trial in all circumstances.[31] Even the right to counsel in felony cases, they held in 1942, was not essential to the fourteenth amendment's requirement of fair trial and due process of law:

> As we have said, the Fourteenth Amendment prohibits te conviction and incarceration of one whose trial is offensive to

---

26. Palko v. Connecticut, 302 U.S. 319, 324-26 (1937), *overruled in* Benton v. Maryland, 395 U.S. 784 (1969).

27. 367 U.S. 643 (1961).

28. The "ordered liberty" justices during this period were Justices Cardozo, Frankfurter, Roberts, Reed, Jackson, Minton, Burton, Harlan, and Chief Justices Stone and Vinson. Justice Cardozo authored the Court's opinion in *Palko*. For commitment to the "ordered liberty" approach of Justices Roberts, Reed, Frankfurter, Jackson, and Harlan, see *supra* notes 21-25. Justice Burton wrote the "ordered liberty" opinion in *Bute* and joined the "ordered liberty" opinions of the Court in *Fay*, *Adamson*, *Foster*, and *Wolf*. During his short tenure on the court, Justice Minton wrote little about the relation between the Bill of Rights and the states. His subscription to the "ordered liberty" theory is clear in his opinion of the court in Brock v. North Carolina, 344 U.S. 424 (1953), which was joined by Justices Reed, Frankfurter, Jackson, Burton, and Clark. Chief Justice Vinson's subscription to the "ordered liberty" view is clear by his concurrence in the opinion of the Court in *Adamson*, *Fay*, *Wolf*, and *Foster*. Chief Justice Stone as an associate justice joined Cardozo's "ordered liberty" opinion in *Palko* and Justice Roberts' opinion in *Betts*.

29. *Adamson*, 332 U.S. at 63-64 (Frankfurter, J., concurring).

30. *Palko*, 302 U.S. at 325-27.

31. Snyder v. Massachusetts, 291 U.S. 97, 116-17 (1934).

> the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.[32]

Instead the "ordered liberty" justices maintained that "due process" and "fair trial" were terms embodying canons of justice and fairness which reflected generative principles that had historically developed and were commonly held throughout western civilization in general, and by the English-speaking peoples in particular.[33]

Steadfastly rejecting the proposition that the procedural specifics of the Bill of Rights were the constitutional requirements for a state as well as a federal trial, the "ordered liberty" justices—before *Palko* and afterward—subscribed to a shorter list of procedures that were held intrinsic to a fair trial and thus were required by the fourteenth amendment's Due Process Clause. These ingredients included the effective right to notice of a criminal charge and adequate opportunity to defend against it,[34] the right to an impartial tribunal,[35] the right to an impartial jury neither tainted by interest[36] nor dominated by fear,[37] the right to a jury chosen by a process free of racial discrimination,[38] the right of an indigent to be represented by counsel in a capital case,[39] and the general right to any other procedural protection which the special circumstances of the case necessitated to ensure a fair trial.[40]

Viewing narrowly the Supreme Court's role in state criminal cases, the "ordered liberty" justices generally argued that the fourteenth amendment did not mandate a rigid set of procedures, making it "a destructive dogma against the States in the

---

32. *Betts*, 316 U.S. at 473.

33. Malinski v. New York, 324 U.S. 401, 413-16 (1945) (Frankfurter, J., concurring).

34. *See Snyder*, 291 U.S. at 105.

35. *See* Tumey v. Ohio, 273 U.S. 510, 531-32 (1927).

36. *See* Moore v. Dempsey, 261 U.S. 86, 89, 90 (1923).

37. *Id.*

38. *See* Norris v. Alabama, 294 U.S. 587, 589 (1935).

39. Powell v. Alabama, 287 U.S. 45 (1932).

40. *See* Palko v. Connecticut, 302 U.S. 319, 326-27 (1937), *overruled in* Benton v. Maryland, 395 U.S. 784 (1969).

administration of their systems of criminal justice."[41] While none disputed that the fourteenth amendment did encumber the states procedurally in general terms, the "ordered liberty" justices nevertheless asserted that it certainly was not intended to remove from the States their primary rule making responsibility in criminal matters.[42] By holding, however, that "[d]ue process of law requires that the proceedings shall be fair," and that fairness is a "relative, not an absolute concept,"[43] the "ordered liberty" approach raised serious problems for lower courts of either original or appellate jurisdiction. The "ordered liberty" justices nevertheless continued to define the Supreme Court's role as that of carefully giving content to the fourteenth amendment's Due Process Clause through a case-by-case analysis.[44]

An important and significant characteristic of the "ordered liberty" approach was its dynamic and open-ended concept of due process. Spokesmen for this approach, like long-time advocate Justice Frankfurter, emphasized that there could not be a final and fixed definition of due process "[r]epresenting as it does a living principle . . . not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights."[45] Believing that this "living principle" would largely be limited to the particulars of the first eight amendments, justices of the "ordered liberty" school rejected any fourteenth amendment incorporation concept.[46]

III. Traditional Incorporation

A. Justice Black and Total Incorporation

"[T]o make secure against invasion by the states the fundamental liberties and safeguards set out in the Bill of Rights" was how Justice Black characterized the "incorporationist" intentions of those in both houses of Congress who authored and

---

41. Rochin v. California, 342 U.S. 165, 168 (1952).

42. *See* Malinski v. New York, 324 U.S. 401, 412-13 (1945) (Frankfurter, J., concurring).

43. Snyder v. Massachusetts, 291 U.S. 97, 116 (1934).

44. Adamson v. California, 332 U.S. 46, 67 (1947) (Frankfurter J., concurring).

45. Wolf v. Colorado, 338 U.S. 25, 27 (1949), *overruled in* Mapp v. Ohio, 367 U.S. 643 (1961).

46. "[The] standards of justice [of English-speaking peoples] are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia." Malinski v. New York, 324 U.S. 401, 417 (1945) (Frankfurter, J., concurring).

sponsored the fourteenth amendment.[47] Maintaining that only total incorporation of the Bill of Rights was consistent with the fourteenth amendment's history,[48] Justice Black's 1942 dissent in *Betts v. Brady* launched a twenty-year struggle on the Supreme Court which would culminate in the demise of the "ordered liberty" interpretation of the fourteenth amendment Due Process Clause.

Contending that the first section of the fourteenth amendment literally embodied—or was shorthand for—the totality of the wording, content and the essential procedures to implement the specific guarantees of the first eight amendments,[49] Justice Black held that the amendment circumscribed state authority in precisely the same manner as the Bill of Rights constrained federal authority.[50] This concept of parallelism is a basic principle for all "traditional incorporationist" justices, most of whom mainly served on the Roosevelt,[51] Vinson,[52] and Warren Courts.[53]

As the initial spokesman for the new incorporationist minority on the Supreme Court in 1942,[54] Justice Black attacked the "ordered liberty" concept of due process as a "natural law" theory which, because of its case-by-case analysis, unnecessarily, unwisely, and unconstitutionally expanded the Supreme Court's power.[55] The case-by-case "ordered liberty" approach to "fair trial," he argued, hampered federalism by subjecting the States to the whim and caprice of the federal judiciary.[56] Arguing that the Supreme Court failed to provide sufficiently precise opinions

---

47. Betts v. Brady, 316 U.S. 455, 474 n.1 (1942) (Black, J., dissenting). Justice Black later undertook a detailed examination of the legislative history of the first section of the fourteenth amendment in *Adamson*.

48. The results were appended to his dissenting opinion in *Adamson*. Justice Black's historical analysis of the fourteenth amendment precipitated a wide-ranging debate in the legal periodicals. *See supra* note 2 and sources listed therein.

49. *See Adamson*, 332 U.S. at 71-72 (Black, J., dissenting).

50. *Id.* at 89-90. An essential element of all traditional incorporation theories is that the fourteenth amendment does not apply to the states merely a watered-down version of the Bill of Rights. Malloy v. Hogan, 378 U.S. 1, 10-11 (1964).

51. The traditional incorporationists on the Roosevelt Court were Justices Black, Douglas, Murphy and Rutledge.

52. The traditional incorporationist Justices on the Vinson Court were the same as those on the Roosevelt Court.

53. The traditional incorporationists on the Warren Court were Chief Justice Warren and Justices Black, Douglas, Brennan, Goldberg and Marshall.

54. This incorporationist minority included Justice Black, Douglas, and Murphy.

55. *See* Adamson v. California, 332 U.S. 46, 89-90 (1947) (Black, J., dissenting).

56. *See id.* at 82-83 (Black, J., dissenting).

detailing the fourteenth amendment's procedural requirements in criminal cases, Justice Black maintained that it was extremely difficult for the state courts to avoid reversible error for want of a "fair trial." Federalism would be better served, Justice Black held, by abandoning the "accordion-like qualities" of the ordered liberty due process approach[57] in favor of the specific guarantees of the first eight amendments. For Justice Black, incorporation of the clearer guidelines of the Bill of Rights would not only satisfy the historical intent of the fourteenth amendment's authors, it would assist the state legislatures and courts in executing their rulemaking authority over their respective criminal systems.[58]

Although Justice Black had initially led the incorporation assault on the ordered liberty due process approach,[59] his concept of total incorporation was not supported, in the last analysis, by any other incorporationist justice on the Supreme Court. *The fourteenth amendment, Justice Black contended, protected no fewer and no more rights than those specified in amendments one through eight. This close-ended concept of due process distinguished him from all other incorporationists.*[60] All justices who embraced *any open-ended fourteenth amendment concept of due process* were categorized by Justice Black as subscribing to a natural law theory[61] inconsistent with "the great design of a written Constitution."[62] Consequently, Justice Black rejected not only the "ordered liberty" approach to due process, but also any "emanation" or "penumbra" theory which held that the fourteenth amendment also protected fundamental rights other than those specifically enumerated in and incorporated from, the Bill of Rights.[63] The other incorporation-

57. Rochin v. California, 342 U.S. 165, 177 (1952) (Black, J., concurring).

58. *Id.* at 176-77 (Black, J., concurring).

59. Betts v. Brady, 316 U.S. 455, 474-80 (1942) (Black, J., dissenting).

60. *See* Griswold v. Connecticut, 381 U.S. 479, 507 (1965) (Black, J., dissenting). Justice Black's dissent is crucial to an understanding of his incorporation position. In *Griswold*, he rejected Justice Douglas' opinion of the Court and Justice Goldberg's concurring opinion because they took the position that rights not specified in the Bill of Rights, such as "marital privacy," are protected by the fourteenth amendment. No other incorporationist justice joined in Justice Black's dissent. Justice Stewart, who joined in Justice Black's dissent, later rejected the incorporation theory in Williams v. Florida, 399 U.S. 78, 143-45 (1970) (Stewart, J., concurring).

61. *See* Adamson v. California, 332 U.S. 46, 69-73 (1947) (Black, J., dissenting).

62. *Id.* at 89.

63. Compare Justice Black's dissenting opinion in *Adamson*, 332 U.S. at 69-73, with his dissent in Griswold v. Connecticut, 381 U.S. 479, 507 (1965).

ist justices on the Roosevelt, Vinson, and Warren Courts, unlike Justice Black, invariably embraced some type of open-ended concept of due process.

B. Ultra-Incorporation

Unlike Justice Black's close-ended total incorporation position, the "ultra-incorporationist" fourteenth amendment approach accepts as a *minimum guarantee* of due process, the incorporation of the entire Bill of Rights. Addtionally protected by the fourteenth amendment, the three ultra-incorporationist justices—there have been only three: Justices Murphy,[64] Rutledge,[65] and Douglas[66]—maintained that there were also other fundamental rights *not specified* in the Bill of Rights. Those non-specified fundamental rights may derive from those enumerated in the first eight amendments, or might have an independent existence unrelated to the Bill of Rights.[67]

Justice Murphy's dissent in *Adamson v. California* (1947),[68] is the earliest judicial statement of ultra-incorporation. Having previously joined Justice Black's dissent in *Betts*,[69] Justice Murphy's opinion in *Adamson* clearly distinguished his position—and Justice Rutledge's who joined him[70]—from that of Justice Black's closed-ended total incorporation approach:

> While in substantial agreement with the views of Mr. Justice Black, I have one reservation and one addition to make.
>
> I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of

---

64. The earliest judicial statement of Ultra-Incorporation is contained in Justice Murphy's dissent in *Adamson*, 332 U.S. at 123 (Murphy, J., dissenting).

65. Justice Rutledge joined Justice Murphy's Ultra-Incorporationist opinion in *Adamson*.

66. Justice Douglas' Ultra-Incorporationist principles first surfaced in Poe v. Ullman, 367 U.S. 497, 516 (1961) (Douglas, J., dissenting), and are understandable by blending his concurrence with Black's dissent in *Adamson* and his opinion in Griswold v. Connecticut, 381 U.S. 479 (1965).

67. Compare Griswold v. Connecticut 381 U.S. 479 (1965) (Douglas, J., opinion of the Court) with *Adamson*, 332 U.S. at 123 (Murphy, J., dissenting). *See also* Doe v. Bolton, 410 U.S. 179, 212 n.4 (1973) (Douglas, J., concurring).

68. 332 U.S. 46, 123 (1947) (Murphy, J., dissenting).

69. 316 U.S. 455, 474 (1942) (Black, J., dissenting), *overruled in* Gideon v. Wainwright, 372 U.S. 335 (1963).

70. *Adamson*, 332 U.S. at 123 (Murphy, J., dissenting).

> conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.[71]

Justice Douglas did not emerge as an ultra-incorporationist until the 1960s. In 1942, Justice Douglas concurred—as did Justice Murphy—in Justice Black's initial incorporationist opinion in *Betts*.[72] In *Adamson*, Justice Douglas chose to join Justice Black's narrower incorporationist dissent rather than Justice Murphy's broader one.[73] Justice Douglas's dissent in *Poe v. Ullman*[74] is the first indication that he apparently had more in common with Justices Murphy and Rutledge than with Justice Black. "Though I believe that due process as used in the Fourteenth Amendment includes all of the first eight Amendments," Douglas wrote, "*I do not think it is restricted and confined to them.*"[75]

Four years later in *Griswold v. Connecticut*,[76] Justice Douglas, speaking for the Court, embraced an "emanation" theory[77] while Justice Black, in dissent, sharply denounced the Court's open-ended flexible due process approach as a revived version of natural law.[78] Although Justice Douglas later specifically denied taking the Murphy-Rutledge incorporation approach,[79] it seems unclear on the face of his denial what he thought distinguished his view from theirs.[80]

---

71. *Id.* at 123-24. It is interesting to note that Justice Murphy alludes only to procedural rights which might be protected by the fourteenth amendment in addition to those specified in the first eight amendments. In Doe v. Bolton, 410 U.S. 179, 212 n.4 (1973), Justice Douglas claimed that Justice Murphy espoused a version of the substantive due process argument. *See* Poe v. Ullman, 367 U.S. 497, 516 n.8, 521 n.13 (1961) (Douglas, J., dissenting).

72. 316 U.S. at 474 (Black, J., dissenting).

73. 332 U.S. at 92, 123.

74. 367 U.S. 497, 509 (1961) (Douglas, J., dissenting).

75. *Id.* at 516 (emphasis added).

76. Griswold v. Connecticut, 381 U.S. 479 (1965).

77. *Id.* at 482-86.

78. *Id.* at 509-13, 518-20 (Black, J., dissenting).

79. Doe v. Bolton, 410 U.S. 179, 212 n.4 (1973) (Douglas, J., concurring). Justice Douglas' rejection of the Murphy-Rutledge approach appears to be based on the misconception that Justice Murphy's opinion in *Adamson* was equivalent to a reintroduction of a substantive due process. *Id.* Justice Douglas' characterization of the Murphy-Rutledge approach seems unjustified. *See supra* note 71.

80. Perhaps Justice Douglas saw his "emanations" and "penumbras" in *Griswold*, 381 U.S. at 474, as derived from specific rights found in the first eight amendments, whereas the fundamental rights discussed in *Adamson* by Justices Murphy and Rutledge need not be.

C. *Selective Incorporation*

The traditional incorporationist majority that emerged on the Supreme Court in the early 1960s contained several Justices who regarded the relationship between the Bill of Rights and the fourteenth amendment in a manner most aptly described as a "fundamental rights approach to selective incorporation." This view of the fourteenth amendment rests on two basic maxims: first, like the "ordered liberty" justices, the selective incorporationists see *only some* of the protections of the Bill of Rights as essential and "fundamental" to justice and a free society. Consequently, for them, *only* those fundamental rights from the first eight amendments are incorporated into the fourteenth amendment; and second, the Due Process Clause also protects other fundamental rights which may not be mentioned in the Bill of Rights.

Implicit in the first proposition is the assumption that some rights contained in the Bill of Rights are *not* incorporated into the fourteenth amendment. Implicit in the second proposition is the belief that fundamental rights and due process of law are not confined to the particulars of the Bill of Rights. Selective incorporationists consequently subscribe to a flexible due process theory, as do the ultra-incorporationist and the "ordered liberty" justices. The basic distinction between an ultra-incorporationist and a selective incorporationist seems fairly clear. The former holds that the fourteenth amendment incorporates *all* of the Bill of Rights and all other fundamental rights. The latter selectively incorporates into the fourteenth amendment *only* the fundamental rights in the Bill of Rights and supplements them with all other fundamental rights. Each of these approaches embraces an open-ended concept of due process and, as such, is irreconcilable with Justice Black's closed-ended position of "total" incorporation.

These differences notwithstanding, all of the traditional incorporationists could unite to apply to the states, through the fourteenth amendment, the full protections in the Bill of Rights deemed fundamental by the selective incorporationists.[81] Consequently, the number of selective incorporationists on the Supreme Court, and what they thought those fundamental rights were, became crucial to the principles of federalism and contin-

81. The unification of all the traditional incorporationists can be seen in cases such as *Gideon, Malloy, Griffin, Pointer,* and *Klopfer. See supra* note 11.

ued procedural diversity in state criminal cases as the Warren Court moved out of the 1950s.

D. Incorporation Triumphant

In 1961, Justice Brennan emerged as the primary spokesman for selective incorporation.[82] Having first subscribed to the principles of traditional incorporation in *Ohio* ex rel. *Eaton v. Price*,[83] Justice Brennan, in *Cohen v. Hurley*,[84] wrote a lengthy dissent reiterating his selective incorporationist position.[85] Specifically repudiating the "ordered liberty" due process approach, Justice Brennan carefully subscribed to the major "article of faith" for all traditional incorporationists: that a right "absorbed" from the Bill of Rights into the fourteenth amendment does not have diminished efficacy.[86]

Four months after *Cohen*, the fourth amendment was incorporated into the fourteenth. Justice Clark—who had expressed dissatisfaction with the Court's earlier failure to extend the exclusionary rule to the states, but who had previously shunned all incorporationist positions[87]—joined the Court's four declared incorporationists, authoring the opinion of the Court in *Mapp v. Ohio*.[88] *Mapp* not only held that the "Fourth Amendment's

---

82. *See* Cohen v. Hurley, 366 U.S. 117, 154 (1961) (Brennan, J., dissenting), *overruled in* Spevack v. Klein, 385 U.S. 511 (1967). Chief Justice Warren joined in Brennan's dissent.

83. 364 U.S. 263 (1960). In the opinion of the equally divided court, Justice Brennan proffered a novel interpretation of the Supreme Court's decision in Palko v. Connecticut, 302 U.S. 39 (1937). According to Justice Brennan, it was Justice Cardozo in *Palko* who established the principles of selective incorporation embraced there unanimously by the Supreme Court. Capitalizing on the word "absorption" (used by Cardozo in *Palko*), Brennan indicates that when specific immunities from the first eight amendments were "absorbed" by the Due Process Clause, they were incorporated and applied against the states with the same scope and force by virtue of the fourteenth amendment as they had against the federal government by virtue of the Bill of Rights. Thus, for Justice Brennan it would seem that the *Powell* case did not turn on the relationship of counsel to a fair trial in that particular chain of events. Instead, Justice Brennan would see the right to counsel generally "absorbed" by the Due Process Clause as a result of his version of the "clear implications in *Palko*." In short, Justice Brennan equates "absorption" with "selective incorporation" and claims Cardozo as an adherent of this process. This thesis is adequately answered by Justice Harlan in Malloy v. Hogan, 378 U.S. 1, 22-25 (1964) (Harlan, J., dissenting).

84. 366 U.S. 117 (1961), *overruled in* Spevack v. Klein, 385 U.S. 511 (1967).

85. *Id.* at 154, 158-59 (Brennan, J., dissenting).

86. Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 275 (1960) (Brennan, J., dissenting).

87. See Justice Clark's opinion in Irvine v. California, 347 U.S. 128, 138 (1954) (Clark, J., concurring); and Breithaupt v. Abram, 352 U.S. 432 (1957).

88. 367 U.S. 643 (1961). The four incorporationist Justices were Chief Justice War-

right of privacy [was] . . . enforceable against the States through the Due Process Clause of the Fourteenth," but that "it [was] enforceable against them by the same sanction of exclusion as is used against the Federal Government."[89] The exclusionary rule was clearly constitutionalized in *Mapp* as Justice Clark, for the Court, held that it was "an essential part of both the Fourth and Fourteenth Amendments."[90]

In 1962, Justice Frankfurter—a prolific champion of the "ordered liberty" approach for over two decades—retired. Justice Goldberg, who replaced him, provided the Warren Court with its fifth traditional incorporationist member.[91] During the years that immediately followed, this incorporationist group—joined at one time or another by other members on the Court[92]—overturned the "ordered liberty" interpretation of due process and incorporated into the fourteenth amendment the significant procedural guarantees of the Bill of Rights with all their refinements.

In 1970, looking back over the previous decade, Justice Harlan—the Court's last consistent spokesman for the "ordered liberty" approach—summarized well this due process revolution:

> The recent history of constitutional adjudication in state criminal cases is the ascendancy of the doctrine of ad hoc ("selective") incorporation, an approach that absorbs one-by-one individual guarantees of the federal Bill of Rights into the Due Process Clause of the Fourteenth Amendment, and holds them applicable to the States with all the subtleties and refinements born of history and embodied in case experience developed in the context of federal adjudication. Thus, with few exceptions the Court has "incorporated," each time over my protest, almost all the criminal protections found within the first eight Amendments to the Constitution, and made them "jot-for-jot and case-for-case" applicable to the States. The process began with Mapp v. Ohio, where the Court applied to the States the so-called exclusionary rule . . . thereby overruling *pro tanto* Wolf v. Colorado. . . . The particular course embarked upon in

---

ren, and Justices Black, Douglas, and Brennan.

89. *Id.* at 655.

90. *Id.* at 657.

91. Justice Goldberg joined the incorporationist opinion of the Court written by Justice Black in Pointer v. Texas, 380 U.S. 400 (1965). He also wrote a separate concurring opinion in *Pointer* subscribing to the selective incorporationist approach to the fourteenth amendment Due Process Clause. *Id.* at 410.

92. Examples of this are Justice Clark's vote in Mapp v. Ohio, 367 U.S. 643 (1961), and Justice Stewart's vote in Gideon v. Wainwright, 372 U.S. 335 (1963).

> *Mapp* was blindly followed to its end in Ker v. California, where the Court made federal standards of probable cause for search and seizure applicable to the States, thereby overruling the remainder of Wolf. . . . Thereafter followed Malloy v. Hogan and Griffin v. California, overruling Twinning v. New Jersey and Adamson v. California and incorporating the Fifth Amendment privilege against self-incrimination by holding that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified." . . . The year of *Griffin* [1965] also brought forth Pointer v. Texas, overruling Snyder v. Massachusetts and Stein v. New York, by holding that the Sixth Amendment's Confrontation Clause applied equally to the States and to the Federal Government. . . . In 1967 incorporation swept in the "speedy trial" guarantee of the Sixth Amendment. Klopfer v. North Carolina, and in 1968 Duncan v. Louisiana, rendered the Sixth Amendment jury trial a right secured by the Fourteenth Amendment Due Process Clause. Only last Term [in Benton v. Maryland] the Court overruled Palko v. Connecticut, and held that the "double jeopardy" protection of the Fifth Amendment was incorporated into the Fourteenth, and hence also carried to the States. . . . In combination these cases have in effect restructured the Constitution in the field of state criminal law enforcement.[93]

IV. The Emergence of Neo-Incorporation

In the late 1960s, an aberrant incorporationist approach to the fourteenth amendment emerged among the justices.[94] While all traditional incorporationists continued to embrace the principle of complete parallelism—that an incorporated right, whether procedural or substantive,[95] limits state power in exactly the same way as that particular right in the Bill of Rights limits federal power[96]—the non-traditional or "Neo-Incorporationists" did not. The erosion of this basic axiom—that the rights incorpo-

---

93. Williams v. Florida, 399 U.S. 78, 130-32 (1970) (Harlan, J., concurring) (citations omitted).

94. The Court in 1968 was comprised of Chief Justice Warren and Justices Black, Douglas, Brennan, Harlan, Stewart, White, Marshall, Fortas.

95. It has been suggested that only incorporated substantive rights be applied against the States with equal force as against the federal government. *See* Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 Yale L. J. 74, 84-88 (1963). The judicial development of the due process schools focused upon procedural due process in state criminal proceedings. Consequently, this article emphasizes this area of the debate since it tends most clearly to illuminate the philosophical differences among the various schools.

96. For this reason, federal case law relating to a particular amendment may be used when applying the amendment to the states.

rated into the fourteenth amendment retained their full vitality—heralded the rise and development of "neo-incorporation."

Neo-Incorporation embraces the terminology of traditional incorporation, but not its substance. Rejecting parallelism as did the "ordered liberty" approach,[97] the Neo-Incorporationist holds that an incorporated procedural right—admittedly from the Bill of Rights—may, under the fourteenth amendment, allow different procedures in state criminal cases than the original right requires in federal criminal prosecutions.

An early example of neo-incorporation can be found in Justice Fortas' concurring opinion in *Duncan v. Louisiana* (1968).[98] After joining the Court's opinion incorporating into the fourteenth amendment the sixth amendment's guarantee of trial by jury in all non-petty criminal prosecutions,[99] Justice Fortas expressly disagreed that "incorporation" required the states to follow "not only the sixth amendment but all of its bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings."[100] The states should have leeway to develop their own concept of trial by jury, Justice Fortas argued, as he disclaimed the notion that incorporating the Sixth Amendment's jury trial guarantee required imposition, on the states, of ancillary federal rules or "federal requirements such as unanimous verdicts or a jury of 12."[101]

At bottom, it is telling that Justice Fortas' position was similar to the "ordered liberty" approach rejected by traditional incorporationists, and precisely the opposite principle is reflected in all of the traditional incorporation approaches to the fourteenth amendment. Justice Brennan's majority opinion in *Malloy v. Hogan*,[102] incorporating the fifth amendment privilege against self-incrimination, stated this incorporation principle succinctly: "The Court . . . has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.' "[103]

The carrying over of the federal "bag and baggage" when

97. Gideon v. Wainwright, 372 U.S. 335, 352 (1963) (Harlan, J., concurring).

98. 391 U.S. 145, 211 (1968) (Fortas, J., concurring).

99. *Id.*

100. *Id.* at 213.

101. *Id.*

102. 378 U.S. 1 (1964).

103. *Id.* at 10-11. Justice Brennan was quoting his own dissent in Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 275 (1960).

incorporating a Bill of Rights guarantee into the fourteenth amendment is no small matter. The holding that the federal "exclusionary rule [was] an essential part of the Fourth and Fourteenth Amendments"[104] and therefore applicable to the States was, as even Justice Harlan acknowledged, the significant difference between *Wolf v. Colorado*[105] and *Mapp v. Ohio*.[106] With all the unnecessary language stripped away, the conveyance of the federal "bag and baggage" is largely determinative of whether incorporation of a Bill of Rights particular provides symmetrical protection through the fourteenth amendment. This requirement of constitutional symmetry had been the most distinctive consistent difference between the traditional incorporationist's due process approach and that of his "ordered liberty" brethren. It is clear not only from Justice Harlan's opinion in *Williams v. Florida*, extensively cited above, but also from his concurring opinions in *Aguilar v. Texas*[107] and *Griffin v. California*, that this difference was understood on the Court—even by the "ordered liberty" Justices.[108] In *Aguilar* and *Griffin*, Justice Harlan indicated that he would have preferred to have sustained the convictions in the state courts.[109] In both concurrences, however, Justice Harlan indicated that the Court's incorporation of the fourth amendment,[110] and the fifth amendment "in all its refinements"[111] made the standards used in federal courts applicable to the states, thereby forcing him to concur with the incorporationist majority—holding against the convictions—lest, by inversion, he participate in watering down the federal standards.[112]

Tempting though it may be, Neo-Incorporation should not be equated with the "ordered liberty" approach.[113] Characteristic of *all* incorporationists—*including* the Neo-Incorporationist—is the use of federal cases to determine the substance of amendments one, four, five, six and eight when deciding four-

104. Mapp v. Ohio, 367 U.S. 643, 657 (1961).
105. 338 U.S. 25 (1949), *overruled in* Mapp v. Ohio, 367 U.S. 643 (1961).
106. 367 U.S. 643 (1961).
107. Aguilar v. Texas, 378 U.S. 108, 116 (1964) (Harlan, J., concurring).
108. Griffin v. California, 380 U.S. 609, 615 (1965) (Harlan, J., concurring).
109. *Aguilar*, 378 U.S. at 116; *Griffin*, 380 U.S. at 615-17.
110. 378 U.S. at 116.
111. 380 U.S. at 616.
112. *Id.* at 616-17.
113. *Cf.* Williams v. Florida, 399 U.S. 78, 118 (1970) (Harlan, J., concurring).

teenth amendment cases.[114] Insisting that the fourteenth amendment has a meaning and content independent of the Bill of Rights, "ordered liberty" Justices did not use federal cases to define the guarantees of the fourteenth amendment and, conversely, fourteenth amendment state cases were not employed to determine the scope of federal constitutional rights protected by the Bill of Rights. Even Neo-Incorporationists have embraced this distinguishing characteristic of incorporation, albeit to a lesser degree.[115] Explicitly holding to some instances of symmetry between the Bill of Rights and the fourteenth amendment, Neo-Incorporationists have thereby displayed an approach to due process distinct from that of the "ordered liberty" school.

V. Incorporation and the Burger Court: Undoing the Procedure

A. Jury Trial

In *Duncan v. Louisiana*,[116] decided in 1968, Justice White's Court opinion held "that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee."[117] Despite this language of traditional incorporation, two years later in *Williams v. Florida*[118] it became clear the federal right of jury trial with all its particulars *had not* been made applicable to the states. More than the chief justiceship had changed hands when Warren Earl Burger replaced Earl Warren: there was no longer a traditional incorporationist majority on the Supreme Court.[119] It was not long before the dual procedural rights standard, characteristic of Neo-Incorporation, emerged in Supreme Court case law.[120] Speaking for the Court—this time a Court in transition—Justice White's opinion in *Williams* indicated that a "12-man panel is not a necessary

114. Davis v. Alaska, 415 U.S. 308 (1974) (Burger, C.J.); Lefkowitz v. Turley, 414 U.S. 70 (1973) (White, J.); Cady v. Dombrowski, 413 U.S. 433 (1973) (Rehnquist, J.).

115. *See, e.g.*, United States v. Calandra, 414 U.S. 338 (1974) (Powell, J.); United States v. Robinson, 414 U.S. 218 (1973) (Rehnquist, J.).

116. 391 U.S. 145 (1968).

117. *Id.* at 149.

118. 399 U.S. 78 (1970).

119. The traditional incorporationists remaining on the Court were Justices Black, Douglas, Brennan, and Marshall.

120. *See* Williams v. Florida, 399 U.S. 78 (1970); Johnson v. Louisiana, 406 U.S. 356 (1972).

ingredient of 'trial by jury,' "[121] and that a six man jury in a state criminal case did not offend that newly incorporated sixth amendment right.[122]

By 1972—with Justices Powell and Rehnquist having succeeded Justices Black and Harlan—the Burger Court was in place and the Neo-Incorporationists constituted a majority.[123] Considering the status of the "unanimity rule" in *Johnson v. Louisiana*,[124] Justice White—reflecting the asymmetry of Neo-Incorporation—spoke again about the incorporated right of a jury trial. This time, however, he spoke for a new five-man majority which included all the Nixon appointees, each of whom had apparently rejected the traditional incorporation approach of the Warren Court majority:

> In *Williams v. Florida* we had occasion to consider a related issue: whether the Sixth Amendment's right to trial by jury requires that all juries consist of 12 men. After considering the history of the 12-man requirement and the functions it performs in contemporary society, we concluded that it was not of constitutional stature. We reach the same conclusion today with regard to the requirement of unanimity.[125]

In both *Johnson*, and its companion case, *Apodaca v. Oregon*,[126] Justice Douglas dissented, joined by the other remaining traditional incorporationists, Justices Brennan and Marshall.[127]

---

121. 399 U.S. at 86. To be accurate, the *Williams* decision was not truly a Burger Court product. Of the two Nixon appointees then on the Court, only Chief Justice Burger participated in the case although Justice Blackmun had taken his seat on the Court some thirteen days before the decision was announced.

122. *Id.* In an unusual deviation from the symmetrical protection that had characterized their previous fourteenth amendment positions, Justices Douglas and Black agreed to the constitutional double standard for jury membership in federal and state trials. *Id.* at 107. Only Justice Marshall, in dissent, argued that the sixth and fourteenth amendments require a twelve person jury in criminal cases. *Id.* at 116-17 (Marshall, J., dissenting).

123. The Neo-Incorporationist majority was comprised of Chief Justice Burger and Justices White, Blackmun, Powell, and Rehnquist.

124. 406 U.S. 356 (1972).

125. *Id.* at 406 (citation omitted). When they choose to invoke parallelism, Neo-Incorporationists, like traditional incorporationists, use federal cases to determine the scope of the rights which they hold have been incorporated into the fourteenth amendment. By so doing, in some instances, the Neo-Incorporationists see the fourteenth amendment protection as identical to the Bill of Rights and that federal cases establishing the meaning of the latter could also be used to determine the meaning of the former.

126. 406 U.S. 404 (1972). Unlike *Johnson*, there was only a plurality opinion in *Apodaca*.

127. *Johnson*, 406 U.S. at 380; *Apodaca*, 406 U.S. at 414. Justice Stewart, having denounced the incorporation approach to the fourteenth amendment in Williams v. Flor-

Denouncing Neo-Incorporationist principles at work,[128] Justice Douglas spoke to the crucial difference between the two basic concepts of incorporation then on the Court:

> The result of today's decisions is anomalous: though unanimous jury decisions are not required in state trials, they are constitutionally required in federal prosecutions. How can that be possible when both decisions stem from the Sixth Amendment? We held unanimously [in *Andres v. United States*, 333 U.S. 740, 748 (1948)], in 1948 that the Bill of Rights requires a unanimous jury verdict: "Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply."[129] . . . I would construe the Sixth Amendment, when applicable to the States, precisely as I would when applied to the Federal Government.[130]

Lack of such common construction separates the traditional and Neo-Incorporationists in other procedural rights areas as well.

B. Double Jeopardy

In a per curiam opinion in 1972, the Supreme Court dismissed certiorari in *Duncan v. Tennessee*,[131] a case that raised the issue whether the fifth amendment double jeopardy restriction, incorporated in *Benton v. Maryland*,[132] prohibited a second criminal trial where the second indictment was identical in all respects to the first, except in the description of the weapon.[133] The Neo-Incorporationist majority held that the case did not present a clear double jeopardy issue because those questions were closely interrelated with Tennessee's rules of criminal pleading.[134] Again, the Court's three traditional incorporationists dissented.

Stating that federal fifth amendment standards were clear,

---

ida, 399 U.S. 78, 143 (1970) (concurring opinion), wrote a dissenting opinion in both cases, stating, as did the three traditional incorporationists, that *Duncan* incorporated the sixth amendment's right to a jury trial and that this right includes the unanimity rule. *Apodaca*, 406 U.S. at 414.

128. *Johnson*, 406 U.S. at 380.

129. *Id.* at 383.

130. *Id.* at 388 (quoting Andres v. United States, 333 U.S. 740, 748 (1948)).

131. 405 U.S. 127 (1972) (per curiam).

132. 395 U.S. 784 (1969).

133. The first trial, based on an erroneous indictment charging a pistol was used, ended in a directed jury verdict for acquittal. The second indictment, which charged that a "22 caliber rifle" was used, led to the conviction which was appealed. 405 U.S. at 128-29.

134. *Id.* at 127.

incorporated, and applicable,[135] Justice Brennan cited *Green v. United States*,[136] holding that "a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again."[137] The dissenters saw no reason why Tennessee's rules of criminal procedure preempted a fourteenth amendment right.

The so-called "single transaction" principle raised another double jeopardy issue about which traditional and neo- incorporationists differ. Since *Ashe v. Swenson*,[138] Justices Brennan, Douglas and Marshall maintained that under *Benton* all prosecutions must "join at one trial all the charges against a defendant that grow out of single criminal act, occurrence, episode, or transaction."[139] Despite the holding in *Harris v. Washington*,[140]—that "collateral estoppel in criminal trials is an integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments"[141]—Justice Rehnquist, writing for the majority in *Robinson v. Neil*,[142] implied that the "dual sovereignties" concept enunciated in *Bartkus v. Illinois*[143] was not precluded by collateral estoppel.[144] Under *Bartkus*, if a single criminal act violates both state and federal law, each sovereignty may constitutionally prosecute once. It was against these multiple prosecutions (arising out of a single transaction) that traditional incorporationists would apply *Benton*, and the single transaction test, thereby nullifying *Bartkus* and giving to the constitutional prohibitions against double jeopardy a greater restrictive effect.[145]

In 1978, the Supreme Court decided three double jeopardy

---

135. *Id.* Justice Brennan's dissent was joined by Justices Douglas and Marshall.

136. 355 U.S. 184 (1957).

137. 405 U.S. at 130-31 (quoting Green v. United States, 355 U.S. 184, 188 (1957)).

138. 397 U.S. 436 (1970).

139. *Id.* at 453-54 (Brennan, J., concurring).

140. 404 U.S. 55 (1971).

141. *Id.* at 56. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443.

142. 409 U.S. 505 (1973).

143. 359 U.S. 121 (1959).

144. 409 U.S. at 510.

145. *Id.* at 511 (Brennan, J., concurring). *See also* Wells v. Missouri, 419 U.S. 1075 (1974) (mem.) (Brennan, J., dissenting); Harris v. Washington, 404 U.S. 55, 57 (1971) (per curiam) (Brennan, J., concurring); Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Brennan, J., concurring). Justices Douglas and Marshall joined Justice Brennan in each of these opinions.

cases—*Burks v. United States*,[146] *Greene v. Massey*,[147] and *Crist v. Bretz*,[148]—that highlighted the Court's internal struggle over the essential meaning of the incorporation doctrine. In an opinion written by Chief Justice Burger, a unanimous Court in *Burks*[149] holding that a re-examination of some of its precedent cases did not properly construe the Double Jeopardy Clause,[150] decided that—irrespective of whether "a defendant has sought a new trial as one of his remedies, or even as the sole remedy[151]—the [Fifth Amendment's Double Jeopardy] Clause precludes a second trial once the reviewing court has found the evidence legally insufficient."[152]

In *Greene v. Massey*,[153] the Chief Justice, speaking now for just a seven man majority,[154] held the *Burks* rule binding in state courts inasmuch as *Benton v. Maryland*[155] made "the constitutional prohibition against double jeopardy . . . fully applicable to state criminal proceedings."[156] *Greene* essentially constitutionalized the rule in *Burks*. That decision resulted in separate opinions by Justices Powell[157] and Rehnquist.[158] Although both concurred in the disposition of the case, neither agreed with the Court's holding that the fifth amendment's double jeopardy protection had been *fully* incorporated—apparently with its baggage—into the fourteenth amendment.[159]

The Court split over the fourteenth amendment protection against double jeopardy grew wider in *Crist v. Bretz*.[160] With Chief Justice Burger joining Justices Powell and Rehnquist in dissent,[161] Justice Stewart, writing for the six man majority,[162]

---

146. 437 U.S. 1 (1978).
147. 437 U.S. 19 (1978).
148. 437 U.S. 28 (1978).
149. Only eight members of the Court took part. Justice Blackmun did not participate.
150. 437 U.S. at 12.
151. *Id.* at 17.
152. *Id.* at 17-18.
153. 437 U.S. 19 (1978).
154. Chief Justice Burger was joined by Justices Brennan, Stewart, White, Marshall, Powell, and Stevens.
155. 395 U.S. 784 (1969).
156. 437 U.S. at 24.
157. *Id.* at 27.
158. *Id.*
159. *Id.*
160. 437 U.S. 28 (1978).
161. *Id.* at 39 (Burger, C. J., dissenting); *Id.* at 40 (Powell, J., dissenting).

held unconstitutional under the fourteenth amendment, a Montana statute providing "that jeopardy does not attach until the first witness is sworn."[163] After indicating that under *Benton* the double jeopardy provision of the fifth and fourteenth amendments "must apply equally in federal and state courts,"[164] the Court explicitly held the federal rule—that jeopardy attaches when the jury is impaneled and sworn—to be "an integral part of the constitutional guarantee against double jeopardy."[165] In his dissent, Chief Justice Burger indicated that although the federal rule, as a "rule," was a reasonable one, he rejected "the Court's decision to constitutionalize" it.[166] Justices Powell and Rehnquist dissented, making the same point that the rule was "not mandated by the Constitution."[167]

In sum, while the Supreme Court—using its supervisory rulemaking authority—could unanimously agree on a particular federal rule being part of the protection against double jeopardy in federal proceedings,[168] decisions about the "bag and baggage" incorporated into the fourteenth amendment with that right fractionated the Court.

C. The Right of Confrontation

In *Schneble v. Florida*,[169] the traditional and neo- incorporationists differed about the scope of the sixth amendment's right of confrontation that was incorporated into the fourteenth amendment in *Pointer v. Texas*.[170] Following the traditional incorporation approach, Justice Marshall, and Justices Black and Douglas who joined him, thought Schneble's conviction should be reversed because the trial court had allowed into evidence at their joint trial pre-trial confessions by the two nontestifying codefendants implicating each other.[171]

---

162. Joining Justice Stewart were Justices Brennan, White, Marshall, Blackmun, and Stevens.

163. 437 U.S. at 29.

164. *Id.* at 32.

165. *Id.* at 38.

166. *Id.* at 39 (Burger, C. J., dissenting).

167. *Id.* at 40 (Powell, J., dissenting).

168. In Hudson v. Louisiana, 450 U.S. 40 (1981), the Court reaffirmed that the *Burks* double jeopardy rule was applicable to the states.

169. 405 U.S. 427 (1972).

170. 380 U.S. 400 (1965).

171. *See* 405 U.S. at 432-33 (Marshall, J., dissenting).

This, the minority argued, ran counter to the following sixth amendment standard established in *Bruton v. United States*:

> [D]espite instructions to the jury to disregard the implicating statements in determining the codefendant's guilt or innocence, admission at a joint trial of a defendant's extrajudicial confession implicating a codefendant violated the codefendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.[172]

Reflecting again the dual standard intrinsic to Neo-Incorporation, the Court's opinion by Justice Rehnquist held that the admission of such a confession in a state criminal case is harmless error when there is "independent evidence of guilt" to support a jury verdict.[173] Whether or not the Burger Court's Neo-Incorporationist majority intended "to emasculate *Bruton*," as Justice Marshall speculated,[174] the *Schneble* decision preserved *Bruton* for federal sixth amendment cases while allowing a lesser standard for confrontation cases under the fourteenth amendment.[175]

D. Discharging the Burden of Proof

Having ruled in *In re Winship* that the fourteenth amendment guarantee of due process requires that an accused shall not be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is

---

172. Roberts v. Russell, 392 U.S. 293 (1968) (per curiam). Because the Confrontation Clause had been incorporated, the Court in *Roberts* held that the standards of *Bruton* are applicable to the states.

173. *Schneble*, 405 U.S. at 431-32. Justice Rehnquist was joined by Chief Justice Burger and Justices White, Stewart, Blackmun, and Powell.

174. *Id.* at 437 (Marshall, J., dissenting).

175. In Donnelly v. DeChristoforo, 416 U.S. 637 (1974), certiorari was granted to review a conviction reversed by the United States Court of Appeals for the First Circuit based upon improper remarks made to the jury in the prosecutor's summation in a state trial. The Court's opinion by Justice Rehnquist held that in the context of the trial, the prosecutor's improper remarks did not violate DeChristoforo's due process rights because the comments were characterized in advance as opinion and not as evidence. *Id.* at 646-47. In his dissent, Justice Douglas argued that the prosecutor's statements constituted a violation of the incorporated right of confrontation because the prosecutor, though not a witness, nevertheless added to the trial record. *See id.* at 650-51. Arguing that this speculation by the prosecutor would not be admissible in a federal court, Justice Douglas cited Kercheval v. United States, 274 U.S. 220 (1927). *Donnelly*, 416 U.S. at 650. Although Justices Brennan and Marshall did not fully join in Justice Douglas' dissent, they did join in that portion of Justice Douglas' dissent which argued that the reversal of the conviction should have been sustained because the judge's instruction to the jury to disregard the prosecutor's remarks was insufficient to cure the error. *Id.* at 652.

charged,"[176] in *Cupp v. Naughten*,[177] the Supreme Court's Neo-Incorporationist majority was seen by the dissenters as weakening that protection. At issue in *Cupp* was whether the charge to the jury—that "[e]very witness is presumed to speak the truth"—"shifted the State's burden to prove guilt beyond a reasonable doubt and forced [the defendant] instead to prove his innocence."[178] Through Justice Brennan's dissent, the three traditional incorporationists said that it had, even though the trial judge had charged the jury that the defendant was entitled to a presumption of innocence, and further, that the state had to discharge the burden of proof beyond a reasonable doubt.[179] Buttressing their view that Justice Rehnquist's opinion of the Court allowed a charge to a jury in a state criminal case to stand when that same charge would not be allowable in a federal criminal case, Justice Brennan indicated that the "courts of appeals in every [federal] circuit have disapproved of presumption-of-truthfulness instructions and have often expressed their objections in terms of constitutional values."[180]

By claiming that a "presumption-of-truthfulness" charge to a jury was constitutionally infirm, the dissenters addressed a majority argument that went to the heart of much of the controversy surrounding the incorporation of procedural rights. Taking note of the fact that nine cases from various federal courts of appeals "had expressed disapproval of the presumption-of-truthfulness instruction,"[181] Justice Rehnquist indicated that those conviction reversals—in the present case—were constitutionally irrelevant: all dealt with federal, not state court proceedings.[182] Instead of reflecting any due process constitutional violation, the majority contended that in the cases cited by the dissenters, the federal circuit courts, concerned that this instruction was "confusing," or "of little positive value" to a jury, exercised their "so-called supervisory power of an appellate court to

176. *In re* Winship, 397 U.S. 358, 364 (1970).

177. 414 U.S. 141 (1973).

178. *Id.* at 142-43.

179. *Id.* at 148-49.

180. *Id.* at 151 n.2 (1973) (Brennan, J., dissenting). "Moreover," Justice Brennan wrote, "the presumption-of-truthfulness instruction itself is constitutionally defective." *Id.* at 153.

181. *Id.* at 144 n.4.

182. *Id.* at 146.

review proceedings of trial courts" and reversed judgments that they concluded were wrong.[183]

Rejecting the majority's "supervisory capacity" argument, the dissenting traditional incorporationists saw the decision in *Cupp* as requiring a more demanding burden of proof in federal courts under the fifth amendment than in state courts under the fourteenth amendment.[184] The divergent interpretations in *Cupp* would arise again as the Burger Court moved to "deconstitutionalize" more of the procedural "bag and baggage" previously understood as incorporated into the fourteenth amendment.

VI. Incorporation and The Burger Court: Undoing the Substance

The concept of federalism highlighted one of the fundamental disagreements between the "ordered liberty" and incorporationist Justices during the 1940s, 1950s, and 1960s. If federal rules implementing the procedural rights of the Bill of Rights in federal court were "constitutionalized" after incorporation, the power of the states to establish their own diverse rules of criminal procedure would be significantly reduced. In its decisions modifying or negating some of the Warren Court's procedural initiatives, and their possible future implications, the Burger Court—at least within the narrow confines of this study—appears to have used at least three basic methods, some of which intertwine. All three have implications for federalism.

Neo-Incorporation was one way to curtail the preemption of diverse state criminal procedures born out of federalism. As already indicated, this was done by holding that the concept of parallelism—intrinsic to traditional incorporation—*was not required* by incorporation. Utilizing this approach, the Supreme Court, where it chooses to do so, has preserved the diversity of state criminal procedures not previously addressed by the Warren Court.[185]

A second technique has been the reestablishment of state authority over state criminal procedures by deconstitutionaliza-

---

183. *Id. See* Murphy v. Florida, 421 U.S. 794 (1975) (Burger, C.J., concurring).

184. 414 U.S. at 154-55 (Brennan, J., dissenting).

185. Examples of this are the opinion of the Court in Williams v. Florida, 399 U.S. 78 (1970) (regarding the size of juries); and Johnson v. Louisiana, 406 U.S. 356 (1972) (on the requirement of the unanimity rule).

tion of some of the federal procedural rules which the Warren Court had already carried over to the fourteenth amendment. In reading out some of the "bag and baggage" of the Warren Court's incorporation decisions, the Burger Court—over the objections of its two remaining traditional incorporationist Justices, Brennan and Marshall—has restored some previously existent diversity between federal and state criminal procedures. As in *Cupp v. Naughten*, this approach turns on whether the present Court holds the ancillary federal rules governing an incorporated right to be of constitutional stature as did the Warren Court; or merely as ones molded by the Supreme Court, other federal appellate courts, or Congress, acting in their respective supervisory capacities over the federal court system.

Illustrative of this Burger Court approach—supportive of federalism—has been the changing status of the once fourth and fourteenth amendments' exclusionary rule. In *Wolf v. Colorado*,[186] the Supreme Court, speaking through Justice Frankfurter, held that the exclusionary rule—thirty-five years after its creation—"barred [in a federal prosecution] the use of evidence secured through an illegal search and seizure" *not* because it "derived from the explicit requirements of the Fourth Amendment," or an act of Congress, but because it was a judicially created federal evidentiary rule[187] fashioned by the Supreme Court in *Weeks v. United States*[188] as a means to protect against arbitrary intrusion by police. Although the Court in *Wolf* held that a person's privacy against arbitrary intrusion was basic to a free society, implicit in "the concept of ordered liberty" and enforceable against the states by the fourteenth amendment's Due Process Clause,[189] Justice Frankfurter's opinion sustained the admissibility in state court of evidence acquired by an unreasonable search. The Court also specifically rejected the notion that any part of the Bill of Rights, or the exclusionary rule, was incorporated into the fourteenth amendment.[190]

Wolf was reversed in *Mapp v. Ohio*,[191] when the Warren Court incorporated the fourth amendment and held the exclusionary rule of constitutional stature, "an essential part of *both*

186. 338 U.S. 25 (1949), *overruled in* Mapp v. Ohio, 367 U.S. 643 (1961).
187. 338 U.S. at 25, 28.
188. 232 U.S. 383 (1914).
189. 338 U.S. at 25, 28.
190. *Id.* at 27-28.
191. 367 U.S. 643 (1961).

the Fourth and Fourteenth Amendment."[192] Slightly over a decade later, however, in *United States v. Calandra*,[193] Justice Brennan saw that interpretation begin to unravel. "[F]or the first time," Brennan wrote in dissent, he saw a majority of the Court discounting the "vital function of the rule."[194] "[T]he Court seriously errs," he said, "in describing the exclusionary rule as merely 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect' . . . ."[195] "Rather, the exclusionary rule is . . . 'an essential part of both the Fourth and Fourteenth Amendments,' " Brennan wrote, reiterating the conclusion that the Court had reached in *Mapp*.[196]

Today, it is relatively clear that in both federal cases[197] and in state cases,[198] the exclusionary rule is no longer considered of constitutional significance by a majority of the Supreme Court.[199] The rise and fall of the exclusionary rule carries at least one clear message: What a majority of the Supreme Court can write into the Constitution, a majority of the Supreme Court can write out.

The third process used by the Burger Court to imprint procedural rights may, to some, seem antithetical to the principles of federalism. Employing the methodology of incorporation, the Burger Court seems to have moved toward a much different goal than that originally sought by incorporationists on the Roosevelt, Vinson, and Warren Courts.

Until the advent of the Burger Court, the traditional incorporationists, along with their "ordered liberty" adversaries, thought that after incorporation the stricter federal rules of criminal procedure, with their respective "bag and baggage," would be applied in state courts. The incorporationists assumed that the end of diversity in basic state criminal procedures through the fourteenth amendment would constitutionally insure fair criminal and judicial process in every state. This assumption notwithstanding, Justice Harlan—the last great "or-

192. *Id.* at 657 (emphasis added).
193. 414 U.S. 338 (1974).
194. *Id.* at 360 (Brennan, J., dissenting).
195. *Id.*
196. *Id.*
197. United States v. Leon, 468 U.S. 897 (1984).
198. Massachusetts v. Sheppard, 468 U.S. 981 (1984).
199. This majority, until 1986, consisted of Chief Justice Burger, and Justices White, Blackmun, Powell, Rehnquist and O'Connor.

dered liberty" spokesman—witnessing the triumph of the incorporation doctrine expressed concern that the symmetry it mandated would not lead to more equitable procedural guarantees in state courts but, instead, would lead to a "derogation of law enforcement standards in the federal system."[200] As a result of the Court's decision in *Williams v. Florida*,[201] Justice Harlan warned that the reasoning of incorporation in reverse, led to the conclusion "that 12-member juries are not *constitutionally* required in *federal* criminal trials either."[202] To turn a phrase, Justice Harlan was concerned that the fourteenth amendment might apply to the federal government a "watered-down version of the Bill of Rights."

> The internal logic of the selective incorporation doctrine cannot be respected if the Court is both committed to interpreting faithfully the meaning of the federal Bill of Rights and recognizing the governmental diversity that exists in this country. The "backlash" in *Williams* exposes the malaise, for there the Court dilutes a federal guarantee in order to reconcile the logic of "incorporation," the "jot-for-jot and case-for-case" application of the federal right to the States, with the reality of federalism.[203]

For a time, Neo-Incorporation made Justice Harlan's incorporation "malaise" unnecessary. The Burger Court used the language of incorporation and appeared to pay deference to stare decisis, while simultaneously eroding the substance of traditional incorporation, thereby easing the burden of the stricter federal procedural standards on the states. Nevertheless, it seems that Neo-Incorporation was not enough and Justice Harlan's concern began to appear prophetic.

Comprised of Chief Justice Burger and Justices White, Blackmun, Powell, Rehnquist, and, recently, O'Connor, the Burger Court majority defined more narrowly than did the Warren Court many of the procedural guarantees of the Bill of Rights. Also, in several instances the Burger Court majority has defined more narrowly the procedural guarantees of the Bill of Rights as they apply directly to the federal government. Since procedural holdings in fourteenth amendment state cases—by the logic of

---

200. *See* Williams v. Florida, 399 U.S. 78, 130 (1970) (Harlan, J., concurring) (citing Ker v. California, 374 U.S. 23, 45-46 (1963) (Harlan, J., concurring)).

201. 399 U.S. 78 (1970).

202. *Id.* at 118 (Harlan, J., concurring).

203. *Id.* at 129.

the incorporation doctrine—also apply to federal cases, the present Supreme Court has been able to speak to the scope of those guarantees either directly in federal cases or indirectly in state cases. Within the confines of this limited study, a few illustrations should suffice.

In *Kastigar v. United States*,[204] with Justices Brennan and Rehnquist not participating,[205] Justice Powell's opinion for the Court held that the fifth amendment privilege against self-incrimination would not be violated, and could not be invoked successfully before a federal grand jury, where the federal government, by statute, had provided immunity "coextensive with privilege."[206] Dissenting, Justice Douglas argued that the "use" immunity being provided Kastigar was not, like "transactional" immunity, co-extensive with the fifth amendment's absolute immunity—recognized in *Murphy v. Waterfront Comm'n*[207] and incorporated in *Malloy v. Hogan*[208]—because Kastigar's compelled testimony could be used against him in a state proceeding. Appealing to original intent, Justice Douglas stated that in his view "the framers put it beyond the power of Congress to *compel* anyone to confess his crimes" and refused to join what he called an "attempt [by the Court] to dilute the Self-Incrimination Clause."[209]

A year later, in *United States v. Ash*, a strongly worded dissent by the Court's remaining traditional incorporationists[210] accused the emergent Burger Court majority of diluting the Warren Court's sixth amendment right to counsel.[211] The Court's holding in *Ash*—that the sixth amendment does not require the

---

204. Kastigar v. United States, 406 U.S. 441 (1972).

205. *Id.* at 462.

206. *Id.* Chief Justice Burger and Justices Stewart, White and Blackmun joined Justice Powell's opinion of the Court.

207. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

208. 378 U.S. 1 (1964).

209. *Kastigar*, 406 U.S. at 462-67 (Douglas, J., dissenting).

210. United States v. Ash, 413 U.S. 300, 326 (1973) (Brennan, J., dissenting). Justices Douglas and Marshall joined Justice Brennan's dissent. Justice Stewart wrote a separate opinion "concurring in the judgment." *Id.* at 321.

211. In *Ash*, the Court's opinion, written by Justice Blackmun, was joined by the other three Nixon appointees—Chief Justice Burger, Justice Powell and Justice Rehnquist—and Justice White. It should be noted that since the beginning of his tenure on the Court in 1962, Justice White has been more likely to advocate a narrower reading of the procedural protections of the Bill of Rights than were most of his Warren Court brethren. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 33-34, 37-38 (1964) (dissenting opinion); Escobedo v. Illinois, 378 U.S. 478, 497-99 (1964) (dissenting opinion); Robinson v. California, 370 U.S. 660, 685-89 (1962) (dissenting opinion).

defendant's counsel be present at a pre-trial photographic display by the prosecution to determine if a witness could identify the accused[212]—was assailed by Justice Brennan as "simply another step towards the complete evisceration of the fundamental constitutional principles [involving counsel] established by this Court, only six years ago . . . ."[213]

During the Burger Court era, the Warren Court's virtual merger of the fifth amendment's privilege against self-incrimination with the sixth amendment's right to counsel—in *Miranda v. Arizona*[214]—did not fare well. Born out of a deeply divided Court,[215] the "*Miranda* warning"[216] appears to have reached its zenith in *Orozco v. Texas*,[217] decided in 1969, the final year that Earl Warren served as Chief Justice. The evolutionary change in the status of *Miranda* is attested to by the recent opinion of the Court in *Oregon v. Elstad*,[218] an opinion written by Justice O'Connor.[219] There, the Court held that *Miranda* established no rigid rule, and that a confession obtained "technically in violation of Miranda" is not necessarily inadmissible if it was volun-

---

212. 413 U.S. at 300, 321.

213. *Id.* at 326 (Brennan, J., dissenting) (footnote omitted).

214. Miranda v. Arizona, 384 U.S. 436 (1966).

215. Chief Justice Warren, joined by Justices Black, Douglas, Brennan and Fortas, wrote the opinion of the Court. Justice Clark, in a separate opinion, dissented in part, and Justice Harlan, joined by Justices Stewart and White, wrote a lengthy dissent. *Id.* at 499, 503-26. Justice White, joined by Justices Harlan and Stewart, also wrote a lengthy dissent. *Id.* at 526-45.

216. *Miranda* required "that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way, . . . [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 478-79. The Court's opinion indicated that the individual must be given the opportunity to exercise these rights throughout the interrogation. The Court held further that

> [a]fter such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at [the] trial, no evidence obtained as a result of interrogation can be used against him.

Id. at 479.

217. 394 U.S. 324 (1969). When police officers investigating a murder arrested Orozco, he admitted to owning a gun and freely gave it to them. The gun (which was later identified by ballistics as the murder weapon) was held to be inadmissible evidence because the arresting officers had failed to give Orozco the *Miranda* warning prior to his admission of the gun's ownership, and his relinquishing of it to the police. *Id.* at 325-26.

218. 470 U.S. 298 (1985).

219. Justice O'Connor's opinion was joined by Chief Justice Burger, and Justices White, Blackmun, Powell, and Rehnquist.

tary and corroborated by a later voluntary post-*Miranda* admission.[220] The Supreme Court's weakening of *Miranda*, during the last decade and a half, is reflected in Justice Brennan's *Elstad* dissent:

> The lesson of today's decision is that, at least for now, what the Court decrees are "legitimate" violations by authorities of the rights embodied in *Miranda* shall "ordinarily" go undeterred. It is but the latest of the escalating number of decisions that are making this tribunal increasingly irrelevant in the protection of individual rights. . . .[221]

In 1973 and 1974, two Burger Court decisions in federal cases—one by Justice Rehnquist[222] and the other by Justice Powell[223]—were attacked by Justices Marshall, Brennan and Douglas as weakening the protections of the fourth amendment. In *United States v. Robinson*, the Court was seen by the dissent as unreasonably broadening searches incident to arrests.[224] In *United States v. Calandra*, as discussed above, the dissent charged the majority with "downgrading [the status] of the exclusionary rule."[225]

Justice Harlan's fear that the incorporation doctrine through inversion might one day undermine his view of the guarantees of the Bill of Rights seems also to have been realized in satisfying the fourth amendment's requirement of "probable cause." In *Spinelli v. United States*,[226] Justice Harlan's Court opinion restated the two prong "probable cause" requirements which had to be satisfied before a valid warrant—based largely or solely on hearsay evidence—could be issued under the fourth amendment. First, as established in *Aguilar v. Texas*,[227] the application for the warrant had to be accompanied by enough information to support an independent finding of probable cause for the issuance by a neutral and detached magistrate; and sec-

---

220. *Id.* at 318.

221. *Id.* at 363 (Brennan, J., dissenting).

222. Justice Rehnquist wrote for the Court in United States v. Robinson, 414 U.S. 218 (1973).

223. Justice Powell wrote for the Court in United States v. Calandra, 414 U.S. 338 (1974).

224. *See Robinson*, 414 U.S. at 247 (Marshall, J., dissenting). Justices Douglas and Brennan joined Justice Marshall's dissent. *Id.* at 238.

225. *Calandra*, 414 U.S. at 356 (Brennan J., dissenting). Justices Douglas and Marshall joined Justice Brennan's dissent. *Id.* at 355.

226. 393 U.S. 410 (1969).

227. 378 U.S. 108 (1964).

ond, the police had to certify that any evidence relied on to establish probable cause comes from a person believed by them to be credible and the information obtained reliable.[228] As already noted,[229] in *Aguilar* Justice Harlan regretted the Court's imposition of the more stringent federal requirements for determining "probable cause" under the fourth amendment on state judges. However, because *Mapp* and *Ker* had incorporated the fourth amendment into the fourteenth, and the responsibility he believed he had to settled law, Justice Harlan thought failure to concur in the incorporationist opinion of the Court in *Aguilar* might lead to the relaxation of federal standards.[230] Justice Harlan's concurrence notwithstanding, the two prong test that he invoked in *Spinelli* was virtually abandoned as too rigid by the Burger Court in *Illinois v. Gates*.[231] In *Gates*, a "totality-of-the-circumstances" approach was substituted in determining "probable cause."[232]

The Burger Court's procedural rights coalition of the Chief Justice and Justices White, Blackmun, Powell, Rehnquist and O'Connor further reduced the fourth amendment strictures regarding admissibility of evidence in *United States v. Leon*[233] and *Massachusetts v. Sheppard*.[234] In both cases, the Court recognized the police as acting in good faith, attempting to comply with fourth amendment admissibility requirements, but being victimized by administrative and/or judicial misjudgment. In *Leon*, evidence obtained by the police "in reasonable, good faith reliance on a search warrant," later determined defective because it had been issued without justifiable probable cause, was not deemed inadmissible under the exclusionary rule.[235] In the opinion of the Court, Justice White held that neither the exclusionary rule nor the fourth amendment requires that the fruits of a search made without probable cause are, by that fact alone,

---

228. 393 U.S. at 412-13.

229. *See supra* notes 107-12 and accompanying text.

230. 378 U.S. at 116 (Harlan, J., concurring).

231. Illinois v. Gates, 462 U.S. 213 (1983). Justice Rehnquist's opinion of the Court was joined by Chief Justice Burger and Justices Blackmun, Powell, and O'Connor. Justice White concurred in the judgment, and Justice Stevens, joined by Justice Brennan, dissented. *Id.* at 246, 291.

232. *Id.* at 231-32 & n.7.

233. 468 U.S. 897 (1984).

234. 468 U.S. 981 (1984).

235. 468 U.S. at 905.

inadmissible.[236] Indicating that the function of the exclusionary rule was deterrence, the Court saw little utility in excluding credible evidence which had come into police hands in good faith. Advocating a case by case "social cost/benefit" analysis in future similar situations,[237] the Court concluded "that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."[238] In the companion case of *Massachusetts v. Sheppard*, Justice White, again speaking for the Court, held that physical evidence obtained by the police acting "in good faith" under what they believed was a valid search warrant—later held defective—was not inadmissible under a similar determination as in *Leon*.[239]

Assessing the impact of these and other post-Warren Court cases on fourth amendment jurisprudence, Justice Brennan, joined by Justice Marshall, summed up the result:

> Ten years ago in *United States v. Calandra*, I expressed the fear that the Court's decision "may signal that a majority of my colleagues have positioned themselves to reopen the door [to evidence secured by official lawlessness] still further and abandon altogether the exclusionary rule in search-and-seizure cases." Since then, in case after case, I have witnessed the Court's gradual but determined strangulation of the rule. It now appears that the Court's victory over the Fourth Amendment is complete.[240]

Had Justice Brennan been assessing the Burger Court's decisions in the entire area of procedural rights—not simply those of the fourth amendment—it would not have been surprising had he employed similar observations regarding many constitutional guarantees thought fundamental to the Warren Court.

VII. Conclusion

Without overtly overruling major Warren Court procedural rights precedents through the vehicles discussed herein, it appears that the Burger Court has left both a legacy of modifica-

---

236. *See id.* at 905-08.
237. *Id.* at 909.
238. *Id.* at 922.
239. Massachusetts v. Sheppard, 468 U.S. 981, 989-91 (1984).
240. *Leon*, 468 U.S. at 928-29 (Brennan, J., dissenting) (citations omitted).

tion of the incorporation doctrine and a somewhat altered concept of procedural rights under the Bill of Rights and the fourteenth amendment. With the advent of the Rehnquist Court, a new transitory process may begin. The language of incorporation and the substance of Neo-Incorporation probably will continue or might even be accelerated.

Whether other traditional incorporation decisions such as *Mapp* will covertly be overturned remains to be seen. The reversal of the substance of additional incorporated procedural rights will no doubt be sought as demands for the restoration of federalism in the governance of criminal procedures in the state court systems are pressed by a growing number of the Supreme Court's personnel.