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THE BILL OF RIGHTS AND THE STATES: THE REVIVAL OF STATE CONSTITUTIONS AS GUARDIANS OF INDIVIDUAL RIGHTS

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Focusing on the series of decisions he calls the most important of the Warren era, Justice Brennan traces the development of the Fourteenth Amendment as a vehicle to bind the states to the restraints of the Federal Bill of Rights. But Justice Brennan observes that the years since 1969 have seen a contraction of the scope of federal rights, often in the name of federalism. While he laments this trend, he notes with approval that state courts have stepped into the breach, often interpreting provisions in their constitutions as more protective than the analogous federal provisions. However, Justice Brennan admonishes that the strength of the federal system is its double source of protection and that federal courts must not abdicate their special responsibility to interpret and enforce the Bill of Rights and the Fourteenth Amendment.

Twenty-five years ago I had the honor to stand at this lectern and deliver one of the first James Madison lectures.[1] It is uniquely appropriate that a lecture series born out of a concern for the enhancement and appreciation of our civil liberties should bear the name of James Madison. Our constitutional structure of separated powers and limited government is known as the Madisonian system, for it was Madison who laid down its basic design in the Virginia Plan and Madison who led the congressional battle for the adoption of our national Bill of Rights.

When I spoke here in 1961, our nation stood on the threshold of great changes, in which the Supreme Court would play a major role. The Court was preparing to hand down the first in a series of decisions that were the most important of the Warren era. I reserve this characterization not for *Brown v. Board of Education*[2] or for *Baker v. Carr*,[3] although

* Associate Justice, Supreme Court of the United States. This Article was delivered as the nineteenth James Madison Lecture on Constitutional Law at New York University School of Law on November 18, 1986.

[1] Brennan, The Bill of Rights and the States, 36 N.Y.U. L. Rev. 761 (1961).

[2] 347 U.S. 483 (1954).

surely the banning of racial segregation and the recognition of the principle of one person-one vote were great triumphs for our nation and our Constitution. Instead, I believe that even more significant for the preservation and furtherance of the ideals we have fashioned for our society were the decisions binding the states to almost all of the restraints in the Bill of Rights.

The vehicle for this dramatic development was the Fourteenth Amendment. "[I]t is the amendment that has served as the legal instrument of the equalitarian revolution which has so transformed the contemporary American society,"[4] protecting each of us from the employment of governmental authority in a manner contravening our national conceptions of human dignity and liberty. This country has been transformed by the standards, promises, and power of the Fourteenth Amendment—"that the citizens of all our states are also and no less citizens of our United States, that this birthright guarantees our federal constitutional liberties against encroachment by governmental action at any level of our federal system, and that each of us is entitled to due process of law and equal protection of the laws from our state governments no less than from our national one."[5]

The passage of the Fourteenth Amendment fulfilled James Madison's vision of the structure of American federalism. During the debates over the Bill of Rights, Madison expressed serious reservations over the bills of rights then present in various state constitutions. He stated, "[S]ome states have no bills of rights, there are others provided with very defective ones, and there are others whose bills of rights are not only defective, but absolutely improper; instead of securing [rights] in the full extent which republican principles would require, they limit them too much to agree with common ideas of liberty."[6]

Madison crafted a solution to this problem and proposed it as one of the seventeen amendments to the Constitution that he originally submitted to the House. Coincidentally numbered 14, the amendment read: "No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press."[7] Because Madison thought that there was "more danger of . . . powers being abused by the State Governments than by the Government of the

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[3] 369 U.S. 186 (1962).

[4] Schwartz, The Amendment in Operation: A Historical Overview, in The Fourteenth Amendment 29, 30 (B. Schwartz ed. 1970).

[5] Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 490 (1977).

[6] 1 Annals of Cong. 439 (J. Gales ed. 1789).

[7] Id. at 435.

United States,"[8] he labeled this "the most valuable amendment in the whole list."[9] After passage in the House, however, his amendment was defeated in the Senate by the forces Madison feared most, those who wanted the states to retain their systems of established churches.[10]

Madison's fears of excessive and arbitrary state power were not widely shared at the time the Bill of Rights was adopted. Instead it was believed that personal freedom could be secured more accurately by decentralization than by express command. In other words, the states were perceived as protectors of, rather than threats to, the civil and political rights of individuals. The enactment of the Fourteenth Amendment seventy-nine years later signaled the adoption of Madison's view and banished the spectre of arbitrary state power, his lone fear for our constitutional system.

Prior to the passage of this Civil War Amendment, the Supreme Court had made it plain that the Bill of Rights was applicable only to the federal government. In 1833, in *Barron v. Baltimore*,[11] Chief Justice Marshall held that the Bill of Rights operated only against the power of the federal government and not against that of the States. The federal Constitution, he stated, "was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states."[12]

Only after the Civil War did the demand arise for the national protection of individual rights against abuses of state power. The war exposed a serious flaw in the notion that states could be trusted to nurture individual rights: the assumption of "an identity of interests between the states, as the level of government closest to the people, and the primary corpus of civil rights and liberties of the people themselves—an identity incomplete from the start and . . . impossible to maintain after the great battle over slavery had been fought."[13] In fact, the primary impetus to the adoption of the Fourteenth Amendment was the fear that the former Confederate states would deny newly freed persons the protection of life, liberty, and property formally provided by the state constitutions. But the majestic goals of the Fourteenth Amendment were framed in terms of more general application: "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

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[8] Id. at 440.

[9] Id. at 755.

[10] See generally I. Brant, James Madison, Father of The Constitution 271 (1950).

[11] 32 U.S. (7 Pet.) 243 (1833).

[12] Id. at 247.

[13] L. Tribe, American Constitutional Law § 1-3, at 5 (1978).

the equal protection of the laws."[14]

Section 5 of the new amendment further authorized Congress to enforce its requirements through appropriate legislation. Thereafter, in March 1875, Congress granted the federal courts jurisdiction "of all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States . . . ."[15] This legislation, in my view, revealed Congress's intention to leave the definition and enforcement of the protections and prohibitions of the Fourteenth Amendment to the federal judiciary. The authors of the Fourteenth Amendment, like the authors of the original Bill of Rights and the Constitution, realized that the written guarantees of liberty are "mere paper protections without an [independent] judiciary to define and enforce them."[16]

In my 1961 lecture, I detailed the historical development of the relationship between this modern Magna Carta and the protection of civil rights in the states. Initially, the Fourteenth Amendment served to protect the excesses of expanding capital and industry from even limited control by the government. The Court firmly rejected the suggestion that any of the guarantees of the Federal Bill of Rights were among the "privileges or immunities of citizens of the United States."[17] But I also observed that the Court had not "closed every door in the Fourteenth Amendment against the application of the Federal Bill of Rights to the states."[18] The Court utilized the Due Process Clause to apply certain safeguards in the first eight amendments to the states. Unfortunately, the Court expressly rejected any notion that the Fourteenth Amendment mandated the wholesale application of any of the first eight amendments to the states; instead the Court held that certain of the protections in the Bill were "of such a nature that they are included in the conception of due process of law."[19] The Court felt that it could give the Due Process Clause of the Fourteenth Amendment a meaning or content independent of the liberties secured by the Bill of Rights by picking and choosing those rights it considered "of the very essence of a scheme of ordered liberty."[20]

Pursuant to this analysis, the Court, at the time of my lecture, had held that all the protections of the First Amendment extended to restrain the unlawful exercise of state power.[21] Aside from the First Amend-

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[14] U.S. Const. amend. XIV.

[15] 18 Stat. 335 (1875).

[16] Brennan, Landmarks of Legal Liberty, in The Fourteenth Amendment 1, 4 (B. Schwartz ed. 1970).

[17] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79-81 (1873).

[18] Brennan, supra note 1, at 769.

[19] Twining v. New Jersey, 211 U.S. 78, 99 (1908).

[20] Palko v. Connecticut, 302 U.S. 319, 326 (1937).

[21] See Gitlow v. New York, 268 U.S. 652, 666 (1925).

ment, however, only three specific rights from the Federal Bill had been deemed to apply to the states when I stood before you in 1961: the Fifth Amendment's requirement that just compensation should be paid for private property taken for public use,[22] the Sixth Amendment's requirement that counsel be appointed for an accused in a capital case,[23] and the Fourth Amendment's prohibition of unreasonable searches and seizures, absent its corollary, the exclusionary rule.[24]

I left the audience with a prediction and a question. My prediction was that, having applied the guarantee against unreasonable searches and seizures to the states, the Court would soon determine that states must also exclude from their proceedings any evidence obtained by such illegal means.[25] In other words, the Court would have to impose adherence to the exclusionary rule on the states. This prediction came to pass four months after the delivery of the lecture.[26] Needless to say, I decline to spoil my perfect record by making any further predictions at this time.

The question I asked in 1961 has now been answered by the actions of the Court. I asked what James Madison would have thought of the Court's refusal to apply many of the protections and prohibitions of the Federal Bill to the states, protections such as

> the right of a person not to be twice put in jeopardy of life or limb for the same offense; not to be compelled in any criminal case to be a witness against one's self; as an accused, to enjoy the right in criminal prosecutions to a speedy and public trial by an impartial jury of twelve, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[27]

I asked whether Madison would have conceded that any of these rights were unnecessary to " 'the very essence of a scheme of ordered liberty,' " or that any were not among " 'those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' " or not among those personal immunities that are " 'so rooted in the traditions and conscience of our people as to be ranked fundamental?' "[28]

It is with deep satisfaction that I come before you tonight to answer the rhetorical question I posed twenty-five years ago. Of course, the his-

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[22] See Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

[23] See Betts v. Brady, 316 U.S. 455 (1942).

[24] See Wolf v. Colorado, 338 U.S. 25 (1949).

[25] Brennan, supra note 1, at 776.

[26] See Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[27] Brennan, supra note 1, at 777.

[28] Id. (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937); Hurtado v. California, 110 U.S. 516, 535 (1884); Snyder v. Massachusetts, 291 U.S. 97, 105 (1922)).

torical record demonstrates clearly what Madison's answer would be: he felt that it was vital to secure certain fundamental rights against state and federal governments alike. Recent history reveals that the Supreme Court finally agreed with him. In the years between 1961 and 1969, the Supreme Court interpreted the Fourteenth Amendment to nationalize civil rights, making the great guarantees of life, liberty, and property binding on all governments throughout the nation. In so doing, the Court fundamentally reshaped the law of this land.

Two questions recurred throughout this period of change. The first was whether the Bill of Rights should be selectively or fully incorporated. Although the full incorporation of the Bill of Rights into the Fourteenth Amendment has never commanded a majority of the Court, we have "looked increasingly to the Bill of Rights for guidance [so that] many of the rights guaranteed by the first eight Amendments"[29] have been deemed selectively absorbed into the Fourteenth. Second, assuming that a particular guarantee in the Federal Bill should be applied to the states, there remained the question of the scope or extent of its application. For example, for a great many years after the Fourth Amendment had been applied to the states, the Court refused to extend application of the exclusionary rule, labeling it a mere rule of evidence and not a constitutional requirement. The reversal of this decision was the forerunner of the trend toward the broad and complete nationalization of the Bill which occurred in the 1960s.

The first signal that change was in the air came in 1961 with the Court's decision in *Mapp v. Ohio*,[30] reversing *Wolf v. Colorado*[31] and applying the Fourth Amendment *and* the exclusionary rule to the states. Evidence obtained through an unconstitutional search was excluded from consideration in state court cases, as it had been for some years in federal cases. This decision was, in its time, "the Supreme Court's most ambitious effort to affect and determine the quality of state criminal justice . . . subject[ing] the state officer to a constitutional standard of performance no lower or different from that governing federal law enforcement."[32] Anthony Lewis, who covered the Court for the *New York Times*, perceptively noted that a significant corner had been turned in the relationship between the Bill of Rights and the states and speculated that other rights in the Bill, too, might be fully applied to the

[29] Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

[30] 367 U.S. 643 (1961).

[31] 338 U.S. 25 (1949).

[32] Allen, Federalism and the Fourth Amendment: A Requiem for Wolf, 1961 Sup. Ct. Rev. 1, 47.

states.[33]

Although, in retrospect, it is plain that *Mapp* was a turning point, at the time the future of the incorporation doctrine did not appear settled. The case was decided by the narrowest of margins—five to four. Opponents of the decision violently denounced it, arguing that it offended principles of federalism and symbolized the Court's determination to impose a national system of individual rights at the expense of traditional state controls.

The opinion of the court itself firmly and properly rejected this argument. A *healthy* federalism is not promoted by allowing state officers to seize evidence illegally or by permitting state courts to utilize such evidence. The Court has long recognized the paramount importance of procedural safeguards in the administration of a system of criminal laws. In our modern world, "the criminal procedure sanctioned by any of our states is a procedure sanctioned by the United States."[34] The mere invocation of the slogan "state's rights" does not authorize the judiciary to "administer a watered-down, subjective version of the individual guarantees of the Bill of Rights when state cases come before [the Court]."[35]

Between 1962 and 1969, in a flurry of activity, the Court extended nine of the specific provisions of the Federal Bill to the states; these decisions have had a profound impact on American life, deeply involving state courts in the application of rights and protections formerly perceived as creatures solely of federal courts. The Eighth Amendment's prohibition against cruel and unusual punishment was applied against the states in 1962 in the case of *Robinson v. California*.[36] Walter Robinson was arrested in Los Angeles for the "crime" of addiction to narcotics. Almost as an afterthought, Robinson's attorney argued that the narcotics addiction statute inflicted cruel and unusual punishment, first because it punished an involuntary status, and second because it required an offender to undergo a "cold turkey" withdrawal from his or her addiction. In June 1962, the Court accepted these arguments and determined that the Cruel and Unusual Punishment Clause of the Eighth Amendment applied to the states. We held that drug addiction was akin to mental illness, leprosy, or affliction with venereal disease and that, "in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth

[33] Lewis, An Old Court Dispute: Search-Seizure Edict Revives Issue of Applying Bill of Rights to States, N.Y. Times, June 21, 1961, at 21, col. 1.

[34] Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 26 (1956).

[35] Ohio ex. rel. Eaton v. Price, 364 U.S 263, 275 (1956) (Brennan, J., dissenting from the judgment of an equally divided court).

[36] 370 U.S. 660 (1962).

and Fourteenth Amendments."[37]

The opinion of the Court did not make plain whether the Court was holding that the Cruel and Unusual Punishment Clause applied to the state in exactly the same way it applied to the federal government or whether it was holding only that the Due Process Clause, as the embodiment of a more generalized notion of fairness, prohibited the punishment inflicted upon Robinson. In other words, the Court did not state clearly that the Fourteenth Amendment applied the full scope of protections embodied in the Cruel and Unusual Punishment Clause of the Eighth Amendment to the states. Subsequently, it was made clear that the clause was indeed incorporated to its full extent. The importance of this decision cannot be overestimated, for it was pursuant to this clause that the death penalty as then administered was struck down in 1972.[38]

In *Gideon v. Wainwright*,[39] the Court once again avoided a direct holding on the question of incorporation, but did deal a devastating blow to an ad hoc, fundamental fairness approach to the application of the Federal Bill. The case came to the Court by way of a hand-written petition for certiorari in which Clarence Gideon stated the question quite plainly: "It makes no difference how old I am or what color I am or what church I belong to if any . . . . The question is very simple. I requested the court to appoint me [an] attorney and the court refused."[40] Abe Fortas, who was appointed to represent Gideon before the Court, did not primarily argue that the Assistance of Counsel Clause of the Sixth Amendment applied in state criminal trials through incorporation in the Fourteenth Amendment; instead, he forcefully maintained that indigent defendants simply could not possibly receive a fair trial in serious state criminal cases unless represented by counsel. It was evident at oral argument that Fortas was willing to accept the application of the right of counsel to the states whether or not the Court accomplished this through specific incorporation of the Sixth Amendment.[41]

When the decision was handed down, the Court held that the Due Process Clause required the appointment of counsel for indigent defendants charged with serious state criminal offenses. We stated that any provision of the Federal Bill which is " 'fundamental and essential to a fair trial' "[42] is made obligatory on the states by the Fourteenth Amend-

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[37] Id. at 666 (citation omitted).

[38] Furman v. Georgia, 408 U.S. 238, 240 (1972).

[39] 372 U.S. 335 (1963).

[40] Answer to Respondent's Response to Petition for Writ of Certiorari at 2-3, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155), quoted in R. Cortner, The Supreme Court and the Second Bill of Rights 195 (1981).

[41] R. Cortner, supra note 40, at 199-200.

[42] *Gideon*, 372 U.S. at 340 (quoting Betts v. Brady, 316 U.S. 455, 465 (1942)).

ment, and that representation by counsel is one such fundamental right. Justice Harlan, however, insisted in his concurrence that *Gideon* did not mean that the right to counsel that applied to the states was identical to that guaranteed in the Sixth Amendment.[43] He rejected the idea that the Fourteenth Amendment incorporated the Sixth and found instead that the right to counsel was embraced within the Due Process Clause's conception of "fundamental fairness."[44]

Ironically, it was in *Gideon* that the opponents of incorporation were hoist on the petard of their own traditional argument that a proper consideration of the principles of federalism would block the full application of the guarantees of the Federal Bill to the states. When asked by the Attorney General of Florida to submit briefs in support of his state's position in *Gideon*, the Attorneys General of twenty-three states instead urged the Court to require appointed counsel in all cases involving indigent defendants. The states argued that the existing rule—that counsel would only be appointed when necessary due to "special circumstances"—led to friction between state and federal courts because it required a post-trial assessment of the fairness of the adversary proceeding conducted absent counsel, necessitating a "most obnoxious" federal supervision[45] of the state court's actions. Essentially, twenty-three states had requested incorporation of the right to counsel, hoping to avoid unpredictable and arbitrary intrusions of federal judicial power in state proceedings and expressing a desire for clear standards of conduct. The position of the states in *Gideon* illustrated that federalism is better served by incorporation of the guarantees of the Federal Bill than by a case-by-case assessment of the degree of protection afforded to particular rights.

The momentous consequence of this decision is that "counsel must now be provided in every courtroom of every state of this land to secure the rights of those accused of crime."[46] By this decision, the Court removed one of the most egregious examples of differential treatment for poor and rich; effective advocacy is no longer exclusively enjoyed by the wealthy criminal defendant.

In *Malloy v. Hogan*,[47] the Court finally decided a case by speaking in explicitly incorporationist terms. *Twining v. New Jersey*[48] was reversed, and the Self-Incrimination Clause of the Fifth Amendment was applied to the states. The state had insisted that only the core of the Self-Incrimination Clause, that is, the prohibition against use of physically coerced

[43] Id. at 352 (Harlan, J., concurring).
[44] Id.
[45] R. Cortner, supra note 40, at 196.
[46] Brennan, supra note 5, at 494.
[47] 378 U.S. 1 (1964).
[48] 211 U.S. 78 (1908).

confessions, applied to the states, not the full clause or all of the procedural refinements applicable in federal proceedings.

Writing for the majority, however, I stated that the Court must refuse to accord "the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by the Framers when they added the Amendment to our constitutional scheme"[49] and rejected the suggestion that a "watered-down" version of the Fifth Amendment applied in state court. In *Mapp*, *Robinson*, and *Gideon*, the Court had not proceeded explicitly on the basis of incorporation, but the Court's opinion in *Malloy* made clear that the rights and prohibitions nationalized in the past were now considered to apply to the states with full federal regalia intact.

It has been said that "the nationalization process took on an inexorable quality after the decision in *Malloy v. Hogan*."[50] The explicit articulation of the incorporation theory clarified the reasoning of the Court's earlier decisions and advanced significantly the progress toward full nationalization. Moreover, the decision to extend this particular guarantee held profound significance for the future. Eventually, "after decades of police coercion, by means ranging from torture to trickery, the privilege against self-incrimination became the basis of *Miranda v. Arizona*, requiring police in every state to give warnings to a suspect before custodial interrogation."[51]

Between 1965 and 1967, in rapid-fire succession, the Court extended to the states four of the Sixth Amendment's guarantees—the right of an accused to be confronted by the witnesses against him,[52] the right to a speedy trial,[53] the right to a trial by an impartial jury,[54] and the right to have compulsory process in order to obtain witnesses.[55] In the course of these decisions, however, it became clear that a majority of the Court was unwilling to embrace incorporation of all the amendments in the Bill of Rights. In 1968, in *Duncan v. Louisiana*,[56] the Court attempted to explain the theoretical basis for its decisions requiring the states to adhere to certain provisions of the Bill while excluding others. Applying the right to trial by jury for all serious offenses to the states, the Court reasoned that "state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the

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[49] *Malloy*, 378 U.S. at 5.

[50] R. Cortner, supra note 40, at 217.

[51] Brennan, supra note 5, at 494.

[52] See Pointer v. Texas, 380 U.S. 400 (1965).

[53] See Klopfer v. North Carolina, 386 U.S. 213 (1967).

[54] See Parker v. Gladden, 385 U.S. 363 (1966).

[55] See Washington v. Texas, 388 U.S. 14 (1967).

[56] 391 U.S. 145 (1968).

common-law system that has been developing contemporaneously in England and this country."[57] As a consequence, the Court explained that each decision to incorporate was founded on a determination of whether "a procedure is necessary to an Anglo-American regime of ordered liberty."[58]

Justice Black concurred in this decision, stating that he was willing to accept the majority's selective incorporation of rights because it limited the discretion of the Court to application of specific protections, and because it had "already worked to make most of the Bill of Rights' protections applicable to the States."[59]

Finally, on June 23, 1969, in *Benton v. Maryland*,[60] the Double Jeopardy Clause of the Fifth Amendment was applied to the states and the modern revolution was virtually complete. Only the Second and Third Amendments, the Grand Jury Clause of the Fifth Amendment, the Seventh Amendment, and the Excessive Fines and Bail Clause of the Eighth Amendment remained unincorporated, and the latter was subsequently absorbed. Although the Court had rejected Hugo Black's theory of total incorporation, it had accepted one vital element of his analysis—that once a provision of the Federal Bill was deemed incorporated, it applied identically in state and federal proceedings. To this day that remains the position of the Court.

The nationalization process stretched over a hundred years after the passage of the Fourteenth Amendment. Most fittingly, the date upon which *Benton*, the capstone of the revolution, was handed down was also the final day of Earl Warren's service on the Court. The tenure of this great Chief Justice saw the conversion of the Fourteenth Amendment into a guarantee of individual liberties equal to or more important than the original Bill of Rights.

This series of decisions transformed the basic structure of constitutional safeguards for individual political and civil liberties in the nation and profoundly altered the character of our federal system. The agenda of the national Court was radically altered by the nationalization of the first eight amendments. Only rarely in the nineteenth century did individuals challenge the exercise of federal authority. Now modern constitutional law revolves around questions of civil and political liberty. The Court's reinvigorated construction of the Fourteenth Amendment, and particularly the nationalization of the Bill of Rights through the Due Process Clause, are the primary reasons for that development.

I do not believe, however, that these revolutionary changes are due

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[57] Id. at 149 n.14.
[58] Id. at 150 n.14.
[59] Id. at 171 (Black, J., concurring).
[60] 395 U.S. 704 (1969).

solely to the triumph of the doctrine of selective incorporation. Even those Justices who resisted the sway of this theory interpreted the Due Process Clause of the Fourteenth Amendment to require progressively more stringent standards in a state criminal trial. This truth is revealed most clearly in the Court's judgment in *Gideon* which, despite the lack of consensus as to rationale, was a unanimous decision. Every member of the *Gideon* Court concurred in the holding that the Constitution required that indigent defendants receive the benefit of counsel when charged with a serious criminal offense. Some felt that the Fourteenth Amendment incorporated the Sixth Amendment's requirements and applied them to state criminal proceedings, but others simply concluded that principles of fundamental fairness mandated equal representation for rich and poor alike. By different paths, each member of the Court arrived at the same constitutional endpoint. Modern critics of incorporation who insist that the doctrine has dealt the principle of federalism a "politically violent and constitutionally suspect blow"[61] ignore this significant fact.

Most Americans have come to think of the Bill of Rights as the source of their liberties. Even in casual parlance, people speak of "taking the Fifth" or of their "First Amendment rights." In most relevant instances, Americans receive the protections they take for granted only due to their application to the states through the Due Process Clause of the Fourteenth Amendment, which has most appropriately been called "our second Bill of Rights."[62]

I would prefer to end my tale here with the legal fulfillment of the original promise of the Fourteenth Amendment. Although we have not yet achieved equal justice for all members of our society, Congress and the judiciary did much in the decade of the 1960s to close the gap between the promise and the social and political reality envisioned by the framers of the Fourteenth Amendment. But today, although unmistakable inequities should disrupt any observer's complacency, the Court is involved in a new curtailment of the Fourteenth Amendment's scope. Although this nation so reveres the civil and political rights of the individual that they are sheltered from the power of the majority, these rights are treated as inferior to the ever-increasing demands of governmental authority. Although both economic and political power are more intensely concentrated in today's urban industrialized society than ever before, threatening individual privacy and autonomy, we see an increasing tendency to insure control rather than to nurture individuality.

The issue of application of the Bill of Rights to the states involves two separate questions: whether the guarantee in question should apply

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[61] Address by Attorney General Edwin Meese, American Bar Association (July 9, 1985).

[62] R. Cortner, supra note 40, at 301.

to the states, and what its content should be when applied. For several years now, there has been an unmistakable trend in the Court to read the guarantees of individual liberty restrictively, which means that the content of the rights applied to the states is likewise diminished.

The Fourth Amendment has been most clearly targeted for attack. For many years, the rule was that a valid search warrant had to be supported by probable cause; if it was not, the fruits of the search could not be used in evidence. In 1984, in *United States v. Leon*,[63] the Court revoked this rule and determined that the products of a search based on a police officer's "reasonable" reliance on a warrant not supported by probable cause would not necessarily be suppressed.[64] I joined the dissent, in which three Justices stated that this holding—"that it is presumptively reasonable to rely on a defective warrant"[65]—is the product of "constitutional amnesia"[66] and suggested that the Court was converting the Bill of Rights "into an unenforced honor code that the police may follow at their discretion."[67]

The Court has further determined that we do not have a legitimate expectation of privacy in our bank records,[68] permitting their seizure without our consent or knowledge; that private diaries may be seized and utilized to convict a person of a crime;[69] that police searches are lawful when grounded on consent even if that consent is not a knowing or intelligent one;[70] that states may convict persons of crimes by nonunanimous juries;[71] that private shopping centers may prohibit free speech on their premises;[72] and that it is neither cruel nor unusual punishment to sentence a repeated writer of bad checks to a lifetime in prison.[73] These decisions reveal most plainly that retrenchment is following the Warren era, a time in which the Court played "the role of keeper of the nation's conscience."[74]

This trend is not visible solely in the enfeebled protection of individual rights under the Federal Bill and the Fourteenth Amendment. The venerable remedy of habeas corpus has been sharply limited in the name of federalism, the Equal Protection Clause has been denied its full reach,

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[63] 468 U.S. 897 (1984).
[64] Id. at 922-25.
[65] Id. at 972 (Stevens, J., dissenting).
[66] Id.
[67] Id. at 978.
[68] United States v. Miller, 425 U.S. 435, 443 (1976).
[69] Fisher v. United States, 425 U.S. 391, 408 (1976).
[70] United States v. Watson, 423 U.S. 411, 423-24 (1976); Schneckloth v. Bustamonte, 412 U.S. 218, 247-48 (1973).
[71] Apodaca v. Oregon, 406 U.S. 404, 410-14 (1972) (plurality opinion).
[72] Hudgens v. NLRB, 424 U.S. 507, 521 (1976).
[73] Rummel v. Estelle, 445 U.S. 263, 285 (1980).
[74] Wilkes, The New Federalism in Criminal Procedure, 62 Ky. L.J. 421, 421 (1974).

and a series of decisions shaping the doctrines of justiciability, jurisdiction, and remedy "increasingly bar the federal courthouse door in the absence of showings probably impossible to make."[75]

For a decade now, I have felt certain that the Court's contraction of federal rights and remedies on grounds of federalism should be interpreted as a plain invitation to state courts to step into the breach. In the 1960s, the "understandable enthusiasm that championed the application of the Bill of Rights to the states . . . contribute[d] to the disparagement of other rights retained by the people, namely state constitutional rights."[76] Busy interpreting the onslaught of federal constitutional rulings in state criminal cases, the state courts fell silent on the subject of their own constitutions. Now, the diminution of federal scrutiny and protection out of purported deference to the states mandates the assumption of a more responsible state court role. And state courts have taken seriously their obligation as coequal guardians of civil rights and liberties.

As is well known, federal preservation of civil liberties is a minimum, which the states may surpass so long as there is no clash with federal law. Between 1970 and 1984, state courts, increasingly reluctant to follow the federal lead, have handed down over 250 published opinions holding that the constitutional minimums set by the United States Supreme Court were insufficient to satisfy the more stringent requirements of state constitutional law.[77] When the United States Supreme Court cut back the reach of First Amendment protections, the California Supreme Court responded by interpreting its state constitution to protect freedom of speech in shopping centers and malls.[78] The Massachusetts, Pennsylvania, and Washington courts responded in kind when confronted with similar questions involving freedom of expression.[79] Under the federal Constitution, a motorist stopped by a police officer for a simple traffic violation may be subject to a full body search and a search of his vehicle.[80] Such police conduct offends state constitutional provisions

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[75] Brennan, supra note 5, at 498 (citing Rizzo v. Goode, 423 U.S. 362, 380 (1976); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-46 (1976); Warth v. Seldin, 422 U.S. 490, 508-10 (1975); O'Shea v. Littleton, 414 U.S. 448, 502-04 (1974)).

[76] Collins, Reliance on State Constitutions, in Developments in State Constitutional Law 1, 4 (B. McGraw ed. 1985).

[77] Id. at 2.

[78] Robins v. Pruneyard, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979), aff'd, 447 U.S. 74 (1980).

[79] Batchelder v. Allied Stores Int'l, Inc., 388 Mass. 83, 87-93, 445 N.E.2d 590, 593-95 (1983); Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1333-39 (Pa. 1986); Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 237-46, 635 P.2d 108, 112-17 (1981).

[80] Gustafson v. Florida, 414 U.S. 260, 266 (1973); United States v. Robinson, 414 U.S. 218, 235 (1973).

in California and Hawaii, unless the officer has articulable reasons to suspect other illegal conduct.[81] South Dakota has rejected the inventory search rule announced in *South Dakota v. Opperman*.[82] Other examples abound.[83] Truly, the state courts have responded with marvelous enthusiasm to many not-so-subtle invitations to fill the constitutional gaps left by the decisions of the Supreme Court majority.[84]

As Professor Sager has so convincingly argued,[85] the institutional position of the national Supreme Court may cause it to "underenforce" constitutional rules.[86] The national Court must remain highly sensitive to concerns of state and local autonomy, obviously less of a problem for state courts, which *are* local, accountable decisionmakers. It must further be remembered that the Federal Bill was enacted to place limits on the federal government while state bills are widely perceived as granting affirmative rights to citizens.

In addition, the Supreme Court formulates a national standard which, some suggest, must represent the common denominator to allow for diversity and local experimentation. In the Warren era, federalism was unsuccessfully invoked to support the view of the anti-incorporationists—that the rights granted in federal courts need not apply with the same breadth or scope in state courts. Dissenting Justices "extolled the virtues of allowing the States to serve as 'laboratories' " and objected to incorporation as "press[ing] the States into a procrustean federal mold."[87] Justice Harlan and others felt that the phenomenon of incorporation complicated the federal situation, creating a kind of "constitutional schizophrenia" as the Court attempted both to recognize diversity and faithfully to enforce the Bill of Rights.[88] In order to make room for

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[81] People v. Brisendine, 13 Cal. 3d 528, 551-52, 531 P.2d 1099, 1114-15, 119 Cal. Rptr. 315, 330-31 (1975); State v. Kaluna, 55 Haw. 361, 368-70, 52 P.2d 51, 58-60 (1974).

[82] Compare South Dakota v. Opperman, 428 U.S. 364 (1976) (search of car impounded for parking violation not unreasonable and therefore permissible under Fourth Amendment) with State v. Opperman, 247 N.W.2d 673 (S.D. 1976) (on remand, same search held not permissible under state constitution).

[83] See Mosk, State Constitutions After Warren: Avoiding the Potomac's Ebb and Flow, in Developments in State Constitutional Law 201, 222-35.

[84] See Brennan, supra note 5, at 503; see also cases cited in Collins, supra note 76, at 24 n.13.

[85] Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978).

[86] See id. at 1212-13; see also Utter, Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds, 63 Tex. L. Rev. 1025, 1042-45 (1985).

[87] Abrahamson, Criminal Law and State Constitutions: The Emergence of State Constitutional Law, 63 Tex. L. Rev. 1141, 1141 n.2 (1985) (quoting Crist v. Bretz, 437 U.S. 28, 39-40 (1978) (Burger, C.J., dissenting)).

[88] Williams v. Florida, 399 U.S. 78, 136 (1970) (Harlan, J., concurring in result).

such diversity, Justice Harlan felt that the Bill should not apply to the states exactly as it applied to the federal government.

As is well known, however, I believe that the Fourteenth Amendment fully applied the provisions of the Federal Bill of Rights to the states, thereby creating a federal floor of protection and that the Constitution and the Fourteenth Amendment allow diversity only *above and beyond* this federal constitutional floor. Experimentation which endangers the continued existence of our national rights and liberties cannot be permitted; a call for that brand of diversity is, in my view, antithetical to the requirements of the Fourteenth Amendment. While state experimentation may flourish in the space above this floor, we have made a national commitment to this minimum level of protection through enactment of the Fourteenth Amendment. This reconciliation of local autonomy and guaranteed individual rights is the only one consistent with our constitutional structure. And the growing dialogue between the Supreme Court and the state courts on the topic of fundamental rights enables all courts to discern more rapidly the "evolving standards of decency that mark the progress of a maturing society."[89]

This rebirth of interest in state constitutional law should be greeted with equal enthusiasm by all those who support our federal system, liberals and conservatives alike. The development and protection of individual rights pursuant to state constitutions presents no threat to enforcement of national standards; state courts may not provide a level of protection less than that offered by the federal Constitution. Nor should these developments be greeted with dismay by conservatives; the state laboratories are once again open for business.

As state courts assume a leadership role in the protection of individual rights and liberties, the true colors of purported federalists will be revealed. Recently, commentators have highlighted a substantial irony; it is observed that "the same Court that has made federalism the centerpiece of its constitutional philosophy now regularly upsets state court decisions protecting individual rights."[90] When state courts have acted to expand individual rights, the Court has shown little propensity to leap to the defense of diversity. In fact, in several cases, the Court has demonstrated a new solicitude for uniformity. The Court has reminded the residents of Florida that when their state court's decisions rest only on state constitutional grounds, citizens have the power "to amend state law to insure rational law enforcement."[91] Some state courts and commentators have taken umbrage at the suggestion that proceeding in lockstep

[89] Trop v. Dulles, 356 U.S. 86, 101 (1970).

[90] Collins, Plain Statements: The Supreme Court's New Requirement, A.B.A. J., Mar. 1984, at 92.

[91] Florida v. Casal, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring).

with the Supreme Court is the only way to avoid irrational law enforcement. As one state court judge reminded us recently, the United States Supreme Court is not "the sole repository of judicial wisdom and rationality."[92] One wonders if ringing endorsement of state independence will be transformed into assertions of the importance of federal uniformity in law enforcement.

State experimentation cannot be excoriated simply because the experiments provide more rather than less protection for civil liberties and individual rights. While the Fourteenth Amendment does not permit a state to fall below a common national standard, above this level, our federalism permits diversity. As tempting as it may be to harmonize results under state and national constitutions, our federalism permits state courts to provide greater protection to individual civil rights and liberties if they wish to do so. The Supreme Court has no conceivable justification for interfering in a case plainly decided on independent and adequate state grounds.

Finally, those who regard judicial review as inconsistent with our democratic system—a view I do not share—should find constitutional interpretation by the state judiciary far less objectionable than activist intervention by their federal counterparts. It cannot be denied that state court judges are often more immediately "subject to majoritarian pressures than federal courts, and are correspondingly less independent than their federal counterparts."[93] Federal judges are guaranteed a salary and lifetime tenure; in contrast, state judges often are elected, or, at the least, must succeed in retention elections. The relatively greater degree of political accountability of state courts militates in favor of continued absolute deference to their interpretations of their own constitutions. Moreover, state constitutions are often relatively easy to amend; in many states the process is open to citizen initiative. Prudential considerations requiring a cautious use of the power of judicial review, though not insignificant, should "weigh less heavily upon elected state judges than on tenured federal judges."[94]

Some critics fear that the Supreme Court will become increasingly hostile to state courts' protection of individual rights and will meddle in those cases, refusing to find that a decision is based on independent and adequate state grounds.[95] I am not so pessimistic. Despite the recent

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[92] State v. Jackson, 672 P.2d 255, 264 (Mont. 1983) (Shea, J., dissenting).

[93] Note, *Michigan v. Long*: Presumptive Federal Appellate Jurisdiction over State Cases Containing Ambiguous Grounds of Decision, 69 Iowa L. Rev. 1081, 1096-97 (1984)(footnote omitted).

[94] Keyser, State Constitutions and Theories of Judicial Review: Some Variations on a Theme, 63 Tex. L. Rev. 1051, 1077 (1985).

[95] See, e.g., Collins, supra note 90.

tendency of the Court to give gratuitous advice to state citizens to amend their constitutions,[96] I believe that the Court has set appropriate "ground rules"[97] for federalism with its recent decision in *Michigan v. Long*.[98] If a state court plainly states that its judgment rests on its analysis of state law, the United States Supreme Court will honor that statement and will not review the state court decision. So long as the Court adheres strictly to this rule, state courts may shield state constitutional law from federal interference and insure that its growth is not stunted by national decisionmakers. I join Justice Mosk of the California Supreme Court in his most apt observation: "I detect a phoenix-like resurrection of federalism, or, if you prefer, states' rights, evidenced by state courts' reliance upon provisions of state constitutions."[99]

This said, I must conclude on a warning note. Federal courts remain an indispensable safeguard of individual rights against governmental abuse. The revitalization of state constitutional law is no excuse for the weakening of federal protections and prohibitions. Slashing away at federal rights and remedies undermines our federal system. The strength of our system is that it "provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled."[100]

Federalism does not require that one level of government take a back seat to the other when the question involved is one of individual civil and political rights; federalism is not an excuse for one court system to abdicate responsibility to another. Indeed, federal courts have been delegated a special responsibility for the definition and enforcement of the guarantees of the Bill of Rights and the Fourteenth Amendment. Our founders and framers, and here I include the framers of the Fourteenth Amendment, took it as an article of faith that this nation prized the independence of its judiciary and that an independent judiciary could be counted upon to enforce the individual rights and liberties of our citizens against infringement by governmental power. As James Madison said, "[T]he independent tribunals of justice will consider themselves in a peculiar manner the guardian of those rights."[101]

Twenty-five years ago, when the Supreme Court finally began to seek achievement of the noble purpose of the Fourteenth Amendment, it

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[96] See Colorado v. Nunez, 465 U.S. 324, 327 (1984) (White, J., concurring); Florida v. Casal, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring).

[97] See Pollock, Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts, 63 Tex. L. Rev. 977, 993 (1985).

[98] 463 U.S. 1032 (1983).

[99] Mosk, The State Courts, in American Law: The Third Century 213, 216 (B. Schwartz ed. 1976).

[100] Brennan, supra note 5, at 503.

[101] 1 Annals of Cong. 439 (J. Gales ed. 1789).

took giant steps in the direction of equality under the law for all races and all citizens. While the full breadth and depth of the promise of the Fourteenth Amendment have not been fulfilled, the promise itself remains—a vibrant symbol of the hopes and possibilities of this nation and a forceful challenge to those who have become complacent. As a nation, we must renew our commitment to its ideal: "[J]ustice, equal and practical, for the poor, for the members of minority groups, for the criminally accused, . . . for all, in short, who do not partake of the abundance of American life."[102]

[102] Brennan, supra note 16, at 10.