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Rights in the Modern Era: Applying the Bill of Rights to the States

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RIGHTS IN THE MODERN ERA: APPLYING THE BILL OF RIGHTS TO THE STATES*

By Stephen J. Wermiel**

The purpose of this talk is to bridge as much of the gap as time permits between the colonial conceptions of rights and the modern view. This will be accomplished with a look back at the revolution in constitutional law that took place, not in the late 1700's, but primarily between 1925 and 1969, the period in which the Supreme Court ruled that most provisions of the Bill of Rights function as checks on the power of state governments, not merely as limits on federal authority.

The process of applying the Bill of Rights to the states is known as incorporation, a rather inelegant phrase for so lofty a constitutional venture. Of course, it had nothing at all to do with corporations. Rather, the term describes the process of incorporating the rights and liberties of the Bill of Rights into the guarantee of "due process of law" in the Fourteenth Amendment.[1]

In looking back at this constitutional revolution, we will consider how it relates to our colonial history, we will glimpse the debate that took place among legal titans like Felix Frankfurter and Hugo Black over the process of incorporation, and we will examine the very pragmatic part played in this historic development by Justice William Brennan, who retired from the Supreme Court in 1990.[2]

The aim here is not to engage in some idle exercise in obscure legal thinking. Incorporation literally changed the face of our constitutional map in concrete and substantial ways that we now take very much for granted. We are well into the second generation of Americans who probably don't even know that this debate ever took place,[3] and even those that go to law school spend only a few moments on it. Yet, although we take for granted that the Bill of Rights limits state power, to some in this country the debate is not over. In his book, *The Tempting of America*, Robert Bork appears to call the incorporation doctrine into question by suggesting that "controversy over the legitimacy of incorporation continues to this day."[4] And in 1985, then Attorney General Edwin Meese repeatedly referred in a speech to "the damage" done by incorporation, a theory that he said rests on an "intellectually shaky foundation."[5]

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[1] Amendment XIV states, in part, ". . . nor shall any State deprive any person of life, liberty or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

[2] Justice Brennan retired on July 20, 1990.

[3] A poll commissioned by the American Bar Association to mark the Bicentennial of ratification of the Bill of Rights found that 55% of those polled thought limiting abuses by the states was one of the original purposes of the Bill of Rights. N.Y. TIMES, December 15, 1991, at 33.

[4] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 94 (1990).

[5] Edwin Meese, Address at the Annual Meeting of the American Bar Association, Washington, D.C. (July 9, 1985).

Let me illustrate the effect of incorporation with a simple example, a case being decided this term[6] by the U.S. Supreme Court.[7] Public school officials in Providence, Rhode Island began a junior high school graduation ceremony in June, 1989, with a prayer, an invocation delivered by a rabbi, and concluded with a benediction by the rabbi. This offended one student and her parents who strongly believed that such prayer had no place in a public school ceremony, even one outside the classroom, and they sued the school board to prevent future repetitions of this event. The Supreme Court will decide whether a federal district court in Providence[8] and a federal appeals court in Boston[9] were right when they found that the benediction violated the First Amendment guarantee against establishment of religion,[10] what we think of as the separation of church and state. It is an interesting case and sure to be one of the more closely watched of the current Court Term.

But consider this: until 1947, the First Amendment to the Constitution would have had nothing to say about the case I just described. For the first 156 years of the Bill of Rights' existence, the First Amendment would not have been applicable because this was a dispute under state law, and the Establishment Clause and all the other provisions of the Bill of Rights applied only to claims of federal abuse of power.

There are numerous other examples, but the point is clear. Most of the well-known, 1960's Supreme Court cases: the *Miranda* warnings,[11] the exclusionary rule of illegally obtained evidence,[12] the right to appointed counsel in criminal cases if you can't afford a lawyer,[13] the prohibition of prayer in the public schools,[14] the actual malice protection for the news media in libel suits by public figures[15] — none of these cases would have had the kind of impact that they have had if their effect had been limited to federal courts, dealing only with actions of the federal government.

Now how does this relate to the colonial origins of our rights? Let us start back and work our way forward if you will indulge a quick jaunt through legal history. There were many different reasons, many of them political, for adoption of the federal Bill of Rights in 1789 and its ratification by the states 200 years ago in 1791.[16]

The framers of the Constitution who omitted a federal bill of rights were quite familiar with, indeed conscious of, the importance of rights. Most of them had grappled with state constitutions, many of which included bills of rights well before the constitutional convention was convened. While these localized protections of rights were quite imperfect, the framers by and large believed that the problems created by these shortcomings could be dealt with at the state level.

The concern of the framers, especially the Federalists who fully supported the venture, was principally with creating a central government that would work and last, not with whether that government of limited powers would engage in abuses of power. They

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[6] October term '91, which began on October 7, 1991.

[7] Lee v. Weisman, Case 90-1014.

[8] Weisman v. Lee, 728 F. Supp. 68 (D.R.I. 1990).

[9] Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990).

[10] Amendment I states, in part, "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

[11] Miranda v. Arizona, 384 U.S. 436 (1966).

[12] Mapp v. Ohio, 367 U.S. 643 (1961).

[13] Gideon v. Wainwright, 372 U.S.335 (1963).

[14] Engel v. Vitale, 370 U.S. 421 (1962); Abington School District v. Schempp, 374 U.S. 203 (1963).

[15] New York Times v. Sullivan, 376 U.S. 254 (1964).

[16] Ratification was completed on December 15, 1791, when Virginia became the 11th state to approve the Bill of Rights.

failed to anticipate the alarm over the potential abuse of power that the Antifederalists could raise. The Antifederalists, who opposed the new Constitution, worried that the new national government would encroach on the states primarily through taxes and commerce regulation, but they seized on the absence of a bill of rights as an effective political means of rallying public concern about the unbridled power of the national government. It was a very effective tool. As historian Leonard Levy has observed, George Mason's contention at the constitutional convention that a bill of rights would "'give great quiet'"[17] to the people "was unanswerable."[18]

Whatever the motivation, it is clear that when the first Congress turned its attention to a bill of rights in 1789, its primary mission was to fulfill the promise to many state ratifying conventions, a promise necessary to secure approval of the Constitution, that a bill of rights would be added in order to alleviate concerns about the power of the national government.

Despite this focus on the authority of the new government, James Madison never abandoned his somewhat unique concern that the states posed more of a threat to rights than did the national government.[19] One of the amendments he proposed declared in truly prescient fashion, "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." It was accepted by the House, and Madison said he prized it above the others,[20] but it was later killed by the Senate — we don't know why since the Senate debate was not public and the only records are personal diaries.

This proposal's specific reference to the states, and its explicit rejection, is seen as one of a number of pieces of evidence that the authors of the Bill of Rights weren't thinking of limiting state power. Indeed, that was the prevailing view at the time of most legal scholars, among them most of the members of the Supreme Court. For most of the next 75 years prior to passage of the Fourteenth Amendment, the Bill of Rights had little or no real meaning. There were few cases, if any, involving complaints of federal abuse of rights and no cases were recognized by the Supreme Court involving state abuses of rights. State laws that were struck down by the Supreme Court generally violated the commerce or contract clauses, not the Bill of Rights.

There were, of course, a few holdouts. Justice William Johnson of South Carolina, appointed in 1804 by Thomas Jefferson, implied in an 1820 decision that the protection against double jeopardy — being tried twice for the same crime[21] — applied to the states.[22] "It is a restriction which operates equally upon both governments . . ."[23] he wrote.

More significantly, an important contemporary constitutional commentator, William Rawle, a Philadelphia lawyer and former U.S. Attorney, suggested in an 1825 work, *A View of the Constitution of the United States of America*, that many of the guarantees of the Bill of Rights applied to state governments.[24] He reasoned that the First

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[17] Leonard W. Levy, *The Bill of Rights*, *in* ESSAYS ON THE MAKING OF THE CONSTITUTION 259 (Leonard W. Levy ed., 1987) (quoting a remark made by George Mason on Sept. 12, 1787).

[18] *Id.* at 276.

[19] *Id.* at 282.

[20] *Id.*

[21] Amendment V states, in part, ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

[22] Houston v. Moore, 5 Wheat. 1 (1820).

[23] *Id.* at 34.

[24] William J. Brennan Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. at 764 (1961) (discussing Rawle's view of the relationship between the Bill of Rights and the States).

Amendment expressly mentioned the powers of Congress[25] and that the Seventh Amendment civil trials provision[26] expressly mentions the federal courts. He concluded that since the other amendments lacked any such narrowing references, they were obviously intended to be more broadly construed and should be applied to the states.

Chief Justice John Marshall put the debate to rest in 1833 in his opinion in *Barron v. Baltimore*.[27] Mr. Barron was upset because the city of Baltimore diverted several streams from their normal course in the process of paving some city streets. This diversion of water had the side effect of replacing the deep water surrounding Barron's commercial wharf with deposits of sand and gravel. His lawsuit charged the city with taking his property without just compensation, a violation of the Fifth Amendment.[28] Chief Justice Marshall was to have no part of that claim, ruling that "the Fifth Amendment must be understood as restraining the power of the general government, not as applicable to the states."[29]

That essentially settled the matter of the scope of the Bill of Rights until 1866, when Congress passed the Fourteenth Amendment and opened up a whole new debate on the meaning of the Bill of Rights. Ratified by the states in 1868,[30] the first part of the Fourteenth Amendment has three important phrases, two of which are relevant to our discussion here. One phrase says that the states may not "abridge the privileges or immunities of citizens of the United States," and a second says that no state may "deprive any person of life, liberty, or property, without due process of law . . . ."[31]

Adoption of the Fourteenth Amendment launched a new debate over what the authors of the Amendment meant, but let us skip over that debate since it really didn't come to fruition for another 80 years and continue in chronological order.

Even after adoption of the Fourteenth Amendment, relatively little changed in practical terms for the Bill of Rights. If the two phrases, "privileges and immunities" and "due process" may be thought of as two avenues of implementing the Fourteenth Amendment, the Supreme Court closed down one path almost right away. In 1873, in the *Slaughter-House Cases*[32] which involved New Orleans livestock butcher houses, the Supreme Court said the phrase "privileges and immunities" had nothing to do with applying the Bill of Rights to the states. The vote was a narrow 5-4 — one vote switch might have changed the course of history.

As an intellectual matter, that decision was most unfortunate, since what evidence there is of the intent of the Fourteenth Amendment's authors suggests that they may well have envisioned the "privileges and immunities" that no state could abridge as encompassing the provisions of the Bill of Rights. Thus, the decision deprived those who would apply the Bill of Rights to limit the states of their strongest historical argument. After 1873, a series of decisions ensued taking each piece of the Bill of Rights and finding that it wasn't a privilege and immunity protected by the Fourteenth Amendment.

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[25] *See supra* note 10.

[26] Amendment VII says, in part, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

[27] 7 Pet. 243 (1823)

[28] Amendment V states, in part, ". . . nor shall private property be taken for public use, without just compensation. . . ." U.S. CONST. amend. V.

[29] *Barron*, 7 Pet. at 246.

[30] Amendment XIV was ratified by 28 states, a process that was completed on July 28, 1868.

[31] This paper does not discuss the guarantee of "equal protection of the laws," which is also included in Amendment XIV.

[32] 83 U.S. 36 (1872).

Interestingly, the *Slaughter-House Cases* decision has never really been overruled and remains on the books today as an impediment to any significant use of the privileges and immunities clause. When the debate over how to apply the Bill of Rights to the states really heated up in the 1930s and 1940s, however, some advocates seemed to jumble privileges and immunites and due process together.

Toward the end of the 19th century, a new voice emerged and launched a new debate over the application of the Bill of Rights. He was Justice John Marshall Harlan, a name perhaps best known in another context for his dissenting opinion in 1896 objecting to the "separate but equal" doctrine.[33] Beginning in 1884, Harlan argued that the Fourteenth Amendment guarantee of "due process" encompassed rights and principles embodied in the Bill of Rights. That year, the Supreme Court ruled in *Hurtado v. California*,[34] over Justice Harlan's dissent, that the requirement in the Fifth Amendment of grand jury indictments in major cases[35] did not apply to the states through the Fourteenth Amendment.

This will give you an idea of how powerful precedents have been at some times in our history: the 1884 grand jury decision, like the *Slaughter-House Cases*, has never been overruled, and the Fifth Amendment grand jury requirement remains one of the few provisions of the Bill of Rights with which the states are not required to comply.

Justice Harlan continued his efforts until he died in 1911. But he met with only one major success, an 1897 decision[36] that the Fourteenth Amendment "due process" guarantee protects the right to just compensation for a government taking of private property. It is perhaps fitting in light of comments we have heard during the past two days that this should be the first provision of the Bill of Rights applied to the states. Professor Isaac Kramnick of Cornell University has said that the liberalism of the 18th century founding fathers was really about protecting their enjoyment of their property more than it was about other liberties.[37]

There were other lesser inroads, cases like *Twining v. New Jersey*[38] in which the majority appeared to concede that some liberties might be so important as to be essential to due process, although rarely finding specific examples of such liberties.

At the turn of the century, the "due process" clause was finally to get some content, but not the kind we are talking about here. That was the beginning of the era in which the due process clause came to be seen as protecting substantive economic liberties.[39]

It wasn't until 1925 that the first real leap forward occurred. With no fanfare and little evidence of any real immediate philosophical debate, the court said that the First Amendment guarantee of free speech applies to state laws through the due process clause of the Fourteenth Amendment.[40] There was no bold pronouncement; indeed, the court simply said, "For present purposes we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgment by Congress — are among the fundamental personal rights and 'liberties' protected by the due process

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[33] *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

[34] 110 U.S. 516 (1884).

[35] Amendment V states, in part, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. CONST. amend. V.

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

[37] Professor Isaac Kramnick, Address at the annual Colonial Williamsburg History Forum (Nov. 2, 1991).

[38] 211 U.S. 78 (1908).

[39] *See, e.g.*, Lochner v. People of the State of New York, 198 U.S. 45 (1905).

[40] Gitlow v. New York, 268 U.S. 652 (1925).

clause of the Fourteenth Amendment from impairment by the states."[41] On a court with the likes of Holmes and Brandeis on it, this assumption was made by one Edward Sanford, a Harding nominee who served for only seven years after a career as a federal judge in Tennessee. And despite this pronouncement, Benjamin Gitlow's conviction by the state of New York was upheld for distributing socialist literature that advocated the overthrow of the government of the United States.

Gitlow's case was, nevertheless, a beginning. In 1927, any suggestion that this application of free speech to the states was merely an aberration was dispatched in *Fiske v. Kansas*,[42] in which the Court protected a Union organizer's right to distribute pamphlets about the Union. In 1931, the court made the free press guarantee an explicit protection against state laws in *Near v. Minnesota*;[43] in 1932, the court said in *Powell v. Alabama*,[44] one of the famous Scottsboro Boys cases, that there was a Sixth Amendment right to have a lawyer in state death penalty trials; and incorporated the First Amendment rights to peaceably assemble in *DeJonge v. Oregon*[45] in 1937, and to petition government in *Hague v. CIO*[46] in 1939.

Just how rapidly, and somewhat inexplicably, this change occurred is evidenced in the 1931 free press decision by Chief Justice Charles Evans Hughes. He said, "It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."[47] That is remarkable; six years earlier, not only was there room for doubt, it was highly unlikely.

It is ironic that after much high-level, turn-of-the-century debate among Harlan and others over whether the Fourteenth Amendment applied the Bill of Rights to the states, the justices who actually began this process appeared to come from Nike's "*just do it*" school of constitutional interpretation. They did not spend a lot of time or devote much energy to advancing logical or philosophical rationales for this process, they just did it.

That changed in 1937, when Justice Cardozo touched off a debate that was to span the next 30 years over precisely what the court was doing. Cardozo rejected any suggestion that all of the first eight amendments to the Constitution should be incorporated into the Fourteenth Amendment. Instead, in *Palko v. Connecticut*[48] he said some rights have become valid against the states because they are "implicit in the concept of ordered liberty."[49] Cardozo appeared to use privileges and immunities and due process interchangeably, saying the Fourteenth Amendment had "absorbed" some of the guarantees of the Bill of Rights because "neither liberty nor justice would exist if they were sacrificed."[50]

Soon after Cardozo's opinion, the absorption of the First Amendment was completed. The Court incorporated the Free Exercise of Religion clause[51] in 1940 in

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[41] *Id.* at 666.

[42] 274 U.S. 380 (1927).

[43] 283 U.S. 697 (1931).

[44] 287 U.S. 45 (1932).

[45] 299 U.S. 353 (1937).

[46] 307 U.S. 496 (1939).

[47] 283 U.S. at 707.

[48] 302 U.S. 319 (1937).

[49] *Id.* at 325.

[50] *Id.* at 326.

[51] Amendment I states, in part, ". . . Congress shall make no law . . . prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

Cantwell v. Connecticut[52] and the freedom from government establishment of religion in 1947 in *Everson v. Board of Education.*[53]

Perhaps the real catalyst for modern focus on this issue and for examination of the history and intent of the Fourteenth Amendment was a 1947 dissenting opinion by Justice Hugo Black in *Adamson v. California.*[54] Black, in a lengthy opinion, retraced the congressional debate over proposal of the Fourteenth Amendment and concluded that it showed beyond doubt that the Amendment's authors intended to fully incorporate the first eight amendments of the Bill of Rights into the Fourteenth Amendment. He, like Cardozo, appeared to fudge a bit on whether he was talking about privileges and immunities or due process, referring to the "privileges and protections"[55] of the Bill of Rights. He relied heavily on the views of Rep. Jonathan Bingham of Ohio, the person crediting with writing the Fourteenth Amendment, and said that Bingham was fully aware of *Barron v. Baltimore* and hoped to overturn it with the Fourteenth Amendment. "With full knowledge of the import of the *Barron* decision," Black wrote, "the framers and backers of the [Fourteen]th Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced."[56]

The first to respond, in the same opinion, was Felix Frankfurter, who in a concurring opinion said that until Black advanced his plea for total incorporation only one other justice had even considered the proposition — John Harlan, whom Frankfurter called an "eccentric exception."[57] Frankfurter said in his typically understated fashion, "Those reading the English language with the meaning which it ordinarily conveys, those conversant with the political and legal history of the concept of due process, those sensitive to the relations of the states to the central government as well as the relation of some of the provisions of the Bill of Rights to the process of justice, would hardly recognize the Fourteenth Amendment as a cover for the various explicit provisions of the first eight amendments."[58]

The Black-Frankfurter debate touched off an equally vehement debate in academic circles, pitting Professors Charles Fairman, formerly of Harvard Law School but by 1949 resident at Stanford, against William Crosskey of the University of Chicago. Fairman, in an 134-page law review article,[59] concluded that "the record of history is overwhelmingly against"[60] Black. Crosskey responded in 1954 with an 143-page law review article[61] that concluded, "To take them as binding upon both the nation and the states was, after all, merely to take the amendments as they undeniably were written." [62]

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[52] 310 U.S. 296 (1940).

[53] 330 U.S. 1 (1947).

[54] 332 U.S. 46 (1947).

[55] *Id.* at 75.

[56] *Id.* at 72.

[57] *Id.* at 62.

[58] *Id.* at 63.

[59] Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

[60] *Id.* at 139.

[61] William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

[62] *Id.* at 143.

The debate over the historical record has not abated to this day. Fairman and Crosskey have been replaced by Raoul Berger of Harvard and Michael Curtis, a North Carolina lawyer and professor at Wake Forest.[63]

But while the theoretical and historical debate continues, judicial interpretation of the Fourteenth Amendment takes a different and highly significant turn that brings our story to its last chapter.

Between Black's salvo in 1947 and 1961, there was a bit more random absorption of rights into the Fourteenth Amendment. In 1948, the Sixth Amendment right to a public trial[64] and in 1949, the Fourth Amendment protection from unreasonable searches and seizures[65] were applied to the states.[66] That is where matters rested while the court turned its attention to giving meaning to the equal protection clause in the desegregation battles of the 1950s.

But it was not the end of our story. Our story ends with the alliance of Chief Justice Earl Warren, and more importantly, his chief lieutenant, Justice William Brennan. Above all else, Brennan took a pragmatic approach to the job of a justice, believing that his role was not simply to spell out his constitutional views, but to try as hard as he could to find five votes for the proposition.

It was Brennan who set the Supreme Court on an inexorable march through the 1960s to bring most of the other pieces of the Bill of Rights — guarantees of fairness in the criminal justice system — into play as checks on state power through the Fourteenth Amendment. This was done step-by-step, case-by-case, one at a time. Justice Brennan has said[67] that the reason was simply that there weren't the votes to move faster or in larger blocks. It had to be a gradual approach to build and retain support among the Warren Court majority.

In a speech in 1961, just four months before the court started down this step-by-step path, Justice Brennan said, "The need for vigilance to prevent government from whittling away the rights of the individual was never greater. Today, as rarely before, case after case comes to the court which finds the individual battling to vindicate a claim under the Bill of Rights against the powers of government, federal and state. The Bill of Rights is the primary source of expressed information as to what is meant by constitutional liberty. The safeguards enshrined in it are deeply etched in the foundations of America's freedoms."[68]

Four months later, the Supreme Court decided the first of the cases in this 1960s juggernaut, *Mapp v. Ohio*,[69] the case that extended to the state courts the 47-year-old federal court exclusionary rule that evidence obtained in an unreasonable search or seizure can't be used in a criminal trial.

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[63] *See, e.g.*, Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981); Michael Kent Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89 (1982).

[64] Amendment VI states, in part, "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . . ." U.S. CONST. amend. VI.

[65] Amendment IV states, in part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

[66] In Re Oliver, 333 U.S. 257 (1948); Wolf v. Colorado, 338 U.S. 25 (1949).

[67] These comments were made in interviews with the author.

[68] Brennan, *supra* note 24, at 776.

[69] 367 U.S. 643 (1961).

In the next seven years, the Court applied to the states the Fifth Amendment rights to be free of compelled self-incrimination[70] in *Malloy v. Hogan*[71] and to avoid double jeopardy in *Benton v. Maryland*;[72] the Eighth Amendment right to be free from cruel and unusual punishment[73] in *Robinson v. California*;[74] and the Sixth Amendment[75] rights: to counsel in all criminal cases, not just murder trials in the famous *Gideon v. Wainwright* case;[76] to a speedy trial in *Klopfer v. North Carolina*;[77] to trial by impartial jury in criminal cases in *Duncan v. Louisiana*;[78] to confront opposing witnesses in *Pointer v. Texas*;[79] and to compulsory subpoena of favorable witnesses in *Washington v. Texas*.[80]

The provisions that were never incorporated are: the Eighth Amendment protection from excessive fines and bail;[81] the Fifth Amendment grand jury requirement and the Seventh Amendment guarantee of a jury trial in many civil cases discussed earlier; the Second Amendment right to bear arms;[82] and Third Amendment freedom from being forced to quarter soldiers in one's home without consent.[83]

It is unlikely that any of these other provisions will ever be absorbed in the Fourteenth Amendment. The last great architect of this venture, Justice Brennan, has retired and there is no impetus to go further. The last act of absorption into the Fourteenth Amendment was the double jeopardy case in 1969.[84] And as Justice Brennan noted in a 1986 speech, in which he revisited his 1961 address, that double jeopardy decision was issued on the last day of the Warren Court, the day on which Chief Justice Warren retired.

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[70] Amendment V says, in part, that no person "shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

[71] 378 U.S. 1 (1964).

[72] 395 U.S. 784 (1969).

[73] Amendment VIII says, in part, ". . . nor cruel and unusual punishments inflicted . . . ." U.S. CONST. amend. VIII.

[74] 370 U.S. 660 (1962).

[75] Amendment VI states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cayse 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." U.S. CONST. amend. VI.

[76] 372 U.S. 335 (1963).

[77] 386 U.S. 213 (1967).

[78] 391 U.S. 145 (1968).

[79] 380 U.S. 400 (1965).

[80] 388 U.S. 14 (1967).

[81] Amendment VIII states, in part, "Excessive bail shall not be required, nor excessive fines impose . . . ." U.S. CONST. amend. VIII.

[82] Amendment II states, "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." U.S. CONST. amend. II.

[83] Amendment III states, "No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

[84] *See generally* Benton v. Maryland, 395 U.S. 784 (1969).

Let me close with Justice Brennan's words in 1986, "The tenure of this great chief justice saw the conversion of the [Fourteen]th 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."[85]

[85] William J. Brennan Jr., *The Bill of Rights and the States: The Revivial of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 545 (1986).