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CRIMINAL LAW

TOWARD THE DECENTRALIZATION OF CRIMINAL PROCEDURE: STATE CONSTITUTIONAL LAW AND SELECTIVE DISINCORPORATION

BARRY LATZER*

I. INTRODUCTION

When one surveys the growing body of criminal procedure cases in which the decision is grounded in a state constitutional provision, a rather startling trend becomes manifest.[1] It is increasingly evident that at some time during the early years of the next century virtually every significant federal constitutional criminal procedure right will have been duplicated or expanded as a matter of state law by the appellate courts of most of the states. That is, the same rights that defendants now enjoy as a result of United States Supreme Court cases construing the federal Bill of Rights, or an even broader state-law-based version of those rights, will be established in most of the states by cases construing state bills of rights.[2] Little if any thought has been

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1 I recently completed such a survey. BARRY LATZER, STATE CONSTITUTIONAL CRIMINAL LAW (1995). Criminal procedure cases are defined as cases involving a claim based upon one of the following provisions of the United States Constitution or their state constitutional equivalents: the Fourth Amendment, the Fifth Amendment Double Jeopardy or Self-Incrimination Clauses, or the Sixth Amendment.

2 Every state constitution has a bill of rights consisting of provisions that are usually textually similar to the federal Bill of Rights, but in some instances are significantly different. It is now well-established that these state provisions may be interpreted more favorably to rights-claimants than the analogous federal provisions. *See* California v. Greenwood, 486 U.S. 35, 43 (1988) ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."). It is also true, although less well-known, that the state provisions may be interpreted *less* favor-

given to the implications of this development for constitutional law in the United States, or on the relations between state courts and the United States Supreme Court.[3]

For openers, consider this question: if defendants' rights are protected by state law, why is there a need for redundant federal law?[4] Why provide federal protections where state rights exist, especially in light of the fact that the state rights are as broad or broader? This is in part, of course, a question about the Supreme Court's incorporation policy by which federal rights have been applied to the states through the Fourteenth Amendment Due Process Clause.[5] The stock answer is that together, the federal rights established through incorporation and the rights established through interpretation of state constitutions afford a double-barreled protection for individual rights in America, and we all benefit from such dual assurances.[6] Upon close examination, however, rights-redundancy has distinct disadvantages.

There can be little question that incorporation forced the states to adopt uniform procedures without regard to local needs. In the decades since the 1960s, when the Supreme Court "selectively" incor-

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ably to rights-claimants. Barry Latzer, *Four Half-Truths About State Constitutional Law*, 65 TEMP. L. REV. 1123, 1125-30 (1992).

Notwithstanding that state law may provide narrower rights than federal law, the Supremacy Clause of the United States Constitution prohibits enforcement of less-protective state law where the litigant is entitled to the broader protections of federal law. The Supremacy Clause reads as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2.

[3] Of course, constitutional law embraces much more than criminal procedure, and it would be worthwhile to explore the implications of state constitutional developments in such areas as First Amendment rights, the right to procreational autonomy and Equal Protection law. This essay is, however, limited to an examination of state constitutional criminal procedure and its consequences. Criminal procedure is probably the central issue in the majority of state constitutional cases. For a survey of state constitutional law that covers non-criminal areas, see JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES (1992).

[4] Normally perhaps, the question is turned around: why provide *state* protections where federal rights already exist? This version of the question focuses on state protections, and usually leads to a discussion of the development of state constitutional law, a development that has been amply covered in the literature. This article presents a more provocative and rarely-asked question: do we still need the *federal* part of the redundancy?

[5] The Fourteenth Amendment's Due Process Clause reads as follows: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[6] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) ("[O]ne of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens.").

porated nearly all of the criminal procedure rights in the Bill of Rights,[7] the state courts have had little choice but to give force to these federal procedures (absent broader state rights). No matter how costly, no matter how inefficient, no matter how difficult to implement, no matter how much injustice they might cause, and no matter how inappropriate to local circumstances they might be, the state courts have had to give effect to these federal procedural rights.[8] These disadvantages of incorporation were acknowledged even in the 1960s, but they were believed to be outweighed by one important value: equality. Whatever the disadvantages in stifling state uniqueness, independence, and freedom to experiment, the advantage of uniform treatment of defendants throughout the United States, at least with respect to the fundamental rights of the Bill of Rights, seemed to justify incorporation.

But let us be candid. Incorporation was also predicated upon an assumption—a very negative assumption—about the states, and especially about state courts. The assumption was that some state courts were chronically, and virtually all state courts were occasionally, backward. Without the Supreme Court to stand over them, ready to review and reverse, the state courts would fail to provide the minimal rights that all defendants were entitled to at all times. In short, incorporation was motivated by the Mississippi Problem: the assumption that the state bench was, at its worst racist and incompetent, and merely competent most of the time.

This essay contends that the Mississippi Problem is history, that

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7 Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial); Washington v. Texas, 388 U.S. 14 (1967) (right to obtain favorable witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to speedy trial); Parker v. Gladden, 385 U.S. 363 (1966) (right to impartial jury); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront adverse witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (compulsory self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Robinson v. California, 370 U.S. 360 (1962) (cruel and unusual punishments); Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment exclusionary rule).

8 Although this essay will focus on incorporated procedures that do not establish or protect fundamental rights, rulings that do safeguard fundamental rights may also require a sacrifice of local needs. The impact of *Baldwin v. New York*, 399 U.S. 117 (1970), is illustrative. *Baldwin* struck down a New York law providing trials before three-judge panels instead of jury trials for misdemeanants in New York City. The law was passed to cope with the burgeoning case load in the city, and sought to afford a more efficient trial to defendants facing relatively light penalties (under one year incarceration). Consistent with its earlier ruling in *Duncan v. Louisiana*, 391 U.S. 145 (1968) incorporating the Sixth Amendment Jury Trial Clause, the Supreme Court struck the law down, imposing upon the states the federal six-months rule (right to trial by jury where the authorized penalty is six months or more). As a result, when the case load soared in New York City, jury trials, with their many inefficiencies, became rare events, and guilty pleas became the norm. By ignoring the needs of the big city states and forcing them to establish the federal rule, the Court effectively discouraged the states from affording misdemeanants any trial at all.

the state courts are no longer rights-antediluvians, and that therefore an entire set of assumptions underlying incorporation has eroded. The proof of the change in the state courts lies in their eagerness to protect federal constitutional rights, but even more, in the development of state constitutional law. State constitutionalism has not only created rights-redundancy, it has undermined the very reasons for that redundancy. It gives the lie to the assumption that the state bench is rights-backward. Unlike federal constitutional law, which is imposed upon the state courts, state constitutional law is a matter of choice. Whereas state courts *must* enforce federal procedural rights incorporated into due process, they need not provide equivalent state constitutional rights. State constitutional rights need not be as protective as comparable federal rights,[9] and they certainly do not have to be *more* protective, as they so often are. State constitutional law epitomizes the change in the attitude and orientation of state judges. It shows that state courts are now every bit as rights-sensitive as the United States Supreme Court, if not more so.[10]

The thesis of this essay is that some of the federal-state rights redundancy is no longer justified. But contrary to those who mistrust the state courts and oppose the development of state constitutional law, this essay calls for an increased reliance upon state constitutionalism.[11] The sounder course for American constitutional develop-

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9 Neither the Fourteenth Amendment nor the Supremacy Clause require that state courts adopt federal doctrine when construing state constitutional provisions. California v. Greenwood, 486 U.S 35, 44-45 (1988) (California constitutional amendment eliminating the state exclusionary rule does not violate the Fourteenth Amendment Due Process Clause). Indeed, nothing in the United States Constitution compels any particular construction of state constitutional law, although some state courts have established, as is their prerogative, a "lockstep" policy by which they routinely reverse-incorporate federal doctrine. *E.g.*, People v. Tisler, 469 N.E.2d 147, 155-157 (Ill. 1984) (United States Supreme Court interpretations of the Fourth Amendment provide presumptively correct interpretations of the analogous Illinois search and seizure provision).

10 This may appear to contradict a position I took in earlier publications, where I pointed out that two-thirds of the state constitutional criminal cases were *not* expanding rights. *See* BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 157-71 (1991); Barry Latzer, *The Hidden Conservatism of the State Court "Revolution"* 74 JUDICATURE 190 (1991). There is no contradiction. The fact that state constitutional caselaw largely imitates Supreme Court cases does not show that the state courts are *less* rights-sensitive than the Supreme Court. Moreover, the fact that one-third of the state constitutional caselaw broadens rights suggests that the state courts are, in a significant number of cases, *more* rights-sensitive. To assert that state courts are just as conservative as the Supreme Court is obviously not the same as asserting that they are more conservative.

11 One opponent of state constitutionalism, James A. Gardner, contends that the development of state constitutional law has been inevitably marginalized by the collapse of any meaningful state identity in the United States and the consensus that fundamental values will be debated and resolved nationally. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992). I suspect that Professor Gardner would therefore consider disincorporation a dangerous anachronism. The short answer to his position

ment—startling as it may first seem—is that certain federal criminal procedures should no longer be imposed upon the state courts.

This conclusion, however, is not based solely upon the existence of the same rights in state law. In the first place, some state courts have not adopted a great many federal rights as a matter of state law. For their own reasons—perhaps ideological—some state courts have discouraged the development of state constitutionalism.[12] Moreover, it appears that no federal right has been adopted by every single state on state law grounds. Therefore, there is not, at least at the present time, complete state-federal rights redundancy. Absent incorporation, some procedures might not be imposed in some states at all.

The fact that a right is generally provided on state grounds should not, however, be the only consideration in determining whether that same right should also be provided by federal law. Whether or not federal rights ought to be imposed upon the states, and whether they ought to continue to be imposed, is a question of the meaning of Fourteenth Amendment Due Process and the authority of the Supreme Court over the states. The meaning of due process is not determined by the ubiquitousness of a procedure in state law, although that is a consideration; it is determined by the nature of the federal rights that are imposed.

Since the 1960s, the Supreme Court has selectively incorporated into due process most of the rights in the Bill of Rights.[13] Theoreti-

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is that federalism and state differences are a part of the American values consensus, and are enshrined in the United States Constitution. Consequently, despite the centralizing tendencies in recent American history, reassertions of federalism—whether through the devolution of federal functions to the states, the rise of state constitutional law, or the disincorporation of criminal procedure law—are inevitable and non-threatening.

I expect there will also be opposition to disincorporation from—ironically—some of the advocates of state constitutional development. To the extent that they have a liberal rights-expansion agenda (see Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988)), some of the champions of state constitutionalism will be very uncomfortable with proposals to remove some of the planks of the federal floor. I do not see how they will be able to reconcile in a principled way their opposition to disincorporation with support for state court independence and the development of state constitutional law. Are the state courts to be trusted to develop criminal procedure law only if that law favors defendants?

12 *See* LATZER, *supra* note 10, at 159-64 for an account of state-by-state variations in the development of state constitutional law. The most likely explanation for the failure of some states to develop state constitutional criminal procedure, and for its relatively advanced development in other states, is that state constitutional development is associated with rights-expansion. Conservative judges, who do not wish to encourage claims for broader-than-federal rights, are apt to oppose the development of state constitutional rights law. Liberal judges favor it in contemplation of the same rights-expansive outcome. State constitutional law need not, and usually does not, establish broader-than-federal rights.

13 *See* cases cited *supra* note 7.

cally, it did so because it found that these rights were "fundamental in the context of the criminal processes maintained by the American States."[14] In what may be called the post-incorporation era, the Court applied to the states various subsidiary procedural requirements derived from these fundamental rights—the so-called bag-and-baggage. Most of these procedural requirements cannot be defended as fundamental rights in and of themselves, nor are they necessarily essential to the administration of fundamental rights. Unfortunately, the Supreme Court has simply assumed that such procedures are properly a part of due process, without demonstrating that they are so. It will be argued in this article that only those procedures that are both fundamental and required by the Bill of Rights, or are at least demonstrably essential to the implementation of a fundamental right in the Bill of Rights, may be imposed upon the states. Where a procedure is none of the above it is not a proper part of due process and the Supreme Court has no authority to compel the state courts to adopt it. Where a previously incorporated procedure is challenged and it cannot be proven essential to a fundamental right it should be *disincorporated,* by which I mean that the incorporation decision should be reversed and the procedure should no longer be required by the Fourteenth Amendment Due Process Clause.

As I hope to show, at least two criminal procedural rights merit disincorporation: the Fourth Amendment exclusionary rule, and the *Miranda*[15] doctrine. Both procedures have been downgraded to prophylactic status. They offer one method of enforcing the Fourth and Fifth Amendments, respectively, but are not themselves essential to the safeguarding of these provisions. They are not fundamental to the American scheme of justice, nor are they essential to the enforcement of fundamental rights. *Mapp*[16] and *Miranda* should be reversed.

Startling as this proposal might seem at first, neither the values underlying stare decisis nor the rights of defendants would be affected as much as might be thought. Reversing *Mapp* and *Miranda* will do less than conservatives hope and liberals fear. It is not true that reversals will suddenly eliminate these exclusionary rules in state courts.[17]

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[14] Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968).

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

[16] Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating the Fourth Amendment exclusionary rule).

[17] Nor perhaps in federal courts. If *Mapp* is reversed, *Weeks v. United States,* 232 U.S. 383 (1914), will still require exclusion in federal courts where there are Fourth Amendment violations. *Miranda's* fate in federal court is less certain. Perhaps the doctrine could be enforced under the Supreme Court's supervisory power, but an act of Congress, dormant so far, provides that voluntary confessions are admissible in federal prosecutions even without *Miranda* warnings. 18 U.S.C. § 3501 (1968). *See* Davis v. United States, 512 U.S. 452

What is apt to be forgotten, if it were known, is that both the exclusionary rule and the *Miranda* doctrine are broadly established as matters of state law. To the extent that a procedure is provided in state law, its abandonment as a federal matter is less likely to undermine settled expectations. Of course, such reversals will undoubtedly touch off a great re-examination of the issues as the state courts and legislatures come to realize that they are no longer bound by *Mapp* and *Miranda.* But to the extent that stare decisis seeks to assure that settled expectations about the law are not disregarded, the widespread enforcement of *Mapp* and *Miranda* doctrines as matters of state law should quiet fears of too sudden an upheaval.[18]

In reality, for both liberals and conservatives there is uncertainty in disincorporation. No one can be sure what the state courts will do. They may continue these procedures on state grounds; they may develop alternatives. But there is one great benefit that a failure to disincorporate denies: the flexibility to tailor criminal procedure to state needs and local conditions. Without disincorporation this cannot be done except (as a practical matter) to establish more demanding procedures. Flexibility, state experimentation, and federalism are the ultimate justifications for the existence of state constitutional law and for its expansion. Centralization, uniformity/equality, and incorporation are grounded in the lingering perception that state courts are backward and need an unalterable "federal floor." Perhaps it all boils down to a question of trust. Can we now trust state tribunals to develop without the supervision of the Supreme Court a workable balance between defendant's rights and the community's need to

(1994) (declining to consider § 3501 because the Government takes no position on its applicability).

18 Measured by the stare decisis considerations set forth in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 861 (1992) (declining to overrule Roe v. Wade, 410 U.S. 113 (1973)), the arguments for reversing *Mapp* and *Miranda* are strong. These considerations are whether (1) the "rule has been found unworkable;" (2) "the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by the rule;" (3) "the law's growth in the intervening years has left [the rule] a doctrinal anachronism discounted by society;" and (4) the rule's "premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed." *Id.* at 855.

Although the workability and doctrinal vitality of *Mapp* and *Miranda* are debatable, both rules may be considered unworkable in the sense that they are now considered largely ineffectual and unnecessary in regulating police misconduct. Both have been downgraded doctrinally by the Court to mere prophylactics, and their continued application to the states is inconsistent with the fundamental rights theory of incorporation. Furthermore, the underlying factual premise of the cases—that state authorities are unable or unwilling to control the police—is no longer tenable, and, for this same reason, reversal would pose no serious damage to the stability of society or of the criminal justice system. *See infra* Part IV.

enforce the criminal law? If, as is contended here, the answer is yes, then it is time to emancipate the state courts and enable the full flowering of state constitutional law.

II. Incorporation Revisited

A. INCORPORATION'S THEORETICAL FLAW

Under the incorporation doctrine, certain rights in the Bill of Rights, originally restrictions on only the federal government, become, when "incorporated" into the Fourteenth Amendment Due Process Clause, restrictions upon the state governments as well.[19] The test for determining which rights in the Bill of Rights were to be incorporated was to ask whether the right was "fundamental in the context of the criminal processes maintained by the American States."[20] Thus, "fundamentality" is the touchstone for due process, and obsolete or unimportant portions of the Bill of Rights may not be imposed upon the states as they are not "fundamental."[21]

The fundamentality theory of incorporation presented an acute doctrinal problem for the Court in cases involving what may be called subsidiary or secondary procedural rights. While all might agree that the broad principles of the Bill of Rights ought to be nationalized, what was to be done with the narrow procedural gloss derived from these rights? In a word, was the "bag-and-baggage" also to be deemed "fundamental?"

In the 1960s, Justices John Marshall Harlan, Potter Stewart and

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[19] *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), established that the Fifth Amendment Taking Clause, and by implication the entire Bill of Rights, restricted only the federal government. The Fourteenth Amendment, by its terms, restricts the states. It declares in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

[20] Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968).

[21] The Third Amendment (restricting the quartering of soldiers) is a clear example of a right too archaic to be fundamental. The Fifth Amendment right to grand jury indictment has never been deemed fundamental, perhaps because it is considered less defendant-protective than a prosecutor's information and preliminary hearing, the charging procedure preferred by many states. The Tenth Amendment, though neither an obsolete nor unimportant part of the Bill of Rights, creates states' rights and cannot therefore intelligibly be construed as a limitation upon the states.

On rare occasions the Court determined the parameters of due process without the "fundamentality" test. *See In re* Winship, 397 U.S. 358, 359 (1970) (proof beyond a reasonable doubt is among the "essentials of due process and fair treatment" required during the adjudicatory stage of a juvenile proceeding) (citation omitted); Griswold v. Connecticut, 381 U.S. 479, 482-5 (1965) (law prohibiting the use of contraceptives violates a right to marital privacy found in the "penumbras" of the Bill of Rights applicable to the states via the Fourteenth Amendment Due Process Clause). In these cases, however, the Court was not determining whether a right in the Bill of Rights was incorporated; it was merely reaffirming that due process was not limited to the Bill of Rights.

Abe Fortas, and in the 1970s, Justices Lewis Powell, William Rehnquist and Chief Justice Warren Burger, all took the view that not every element of a selected right applies to the states to the same extent as to the federal government.[22] Justice Harlan argued forcefully that incorporationism would compel the Court either to dilute federal guarantees in order to reconcile them with state practice, or force the states to abandon perfectly fair procedures.[23] But the Court repudiated this position and held that the Bill of Rights has identical application against both the state and federal governments.[24] To hold otherwise, Justice Arthur Goldberg contended, was to establish a "watered-down, subjective version of the individual guarantees of the Bill of Rights. It would allow the States greater latitude than the Federal Government to abridge concededly fundamental liberties protected by the Constitution."[25]

Justice Harlan, later seconded by Justice Powell,[26] pointed out the contradiction: "Whereas it rejects full incorporation because of recognition that not all of the guarantees of the Bill of Rights should be deemed 'fundamental,' it at the same time ignores the possibility that not all phases of any given guaranty described in the Bill of Rights are necessarily fundamental."[27] If fundamentality is the measure of incorporation for each clause of the Bill of Rights, then should it not be the standard for incorporating the specifics of each clause? It seems illogical to say in one breath that portions of the Bill of Rights may be too insignificant to impose upon the states, and in the next that every

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22 Crist v. Bretz, 437 U.S. 28 (1978) (Powell, joined by Burger and Rehnquist, dissenting); Ballew v. Georgia, 435 U.S. 223, 246 (1978) (Powell, joined by Burger and Rehnquist, concurring); Johnson v. Louisiana, 406 U.S. 356, 375 (1972) (Powell, concurring); Duncan v. Louisiana, 391 U.S. 145, 172, 213-4 (1968) (Fortas, concurring; Harlan, joined by Stewart, dissenting); Pointer v. Texas, 380 U.S. 400, 408-9 (1965) (Harlan, concurring in the result).

23 *See, e.g.*, Harlan's concurrence in *Williams v. Florida*, 399 U.S. 117 (1970) (protesting that the Sixth Amendment requires juries of twelve, not six, as the Court allowed as a matter of due process in deference to state practice).

24 *E.g.*, Crist v. Bretz, 437 U.S. 28 (1978) (Fifth Amendment attachment of jeopardy); Apodaca v. Oregon, 406 U.S. 404 (1972) (Sixth Amendment right to trial by jury); Ker v. California, 374 U.S. 23, 33 (1963) (Fourth Amendment right prohibiting unreasonable search and seizure; the Court stated that "the standard of reasonableness is the same under the Fourth and Fourteenth Amendments.").

25 *Pointer*, 380 U.S. at 413 (1965) (Goldberg, J., concurring) (internal quotation marks and citations omitted).

26 Concurring in the jury unanimity cases, *Apodaca*, 406 U.S. 404 (1972), and *Johnson*, 406 U.S. 356 (1972), Powell argued that the issue was the "fundamentality of that element viewed in the context of the basic Anglo-American jurisprudential system common to the States. That approach to Due Process readily accounts both for the conclusion that jury trial *is* fundamental and that unanimity *is not*." *Id.* at 372 n.9 (concurring opinion) (internal citations omitted).

27 *Pointer*, 380 U.S. at 409 (Harlan, J., concurring).

gloss on an incorporated right is per se fundamental. As Louis Henkin observed: "The suggestion that protections of the Bill of Rights must in all cases be applied exactly to the states, if they be applied at all, is difficult to support as a matter of constitutional language or of the jurisprudence of the Court, or to justify on any other relevant considerations."[28] The sounder view—swept aside by the Court—is that in order for an ancillary procedure to be incorporated it should be determined to be fundamental in itself, or at least absolutely essential to the realization of some more general fundamental right.

Although it is too late to reject the every-jot-and-tittle approach to incorporating ancillary procedures, surely it remains open to *dis*incorporate those procedures that have non-fundamental, non-essential status. Whereas, per Justice Goldberg, the Court seems to have assumed that the jots and tittles are either themselves fundamental, or that they are essential to the preservation of fundamental rights, an express finding by the Court that a procedure is neither should be sufficient to reduce its status. Indeed, if a procedure is neither fundamental nor essential to the enforcement of a fundamental right, it is difficult to see the basis for its continued imposition upon the states. This point is developed in Part IV of this essay, where a standard for disincorporation is offered.

B. INCORPORATION'S ANTI-STATE ASSUMPTIONS

Before considering disincorporation, however, we must further explore the reasons for incorporation. Although rarely if ever acknowledged in Supreme Court cases, undoubtedly because of the impolitic nature of the assertion, incorporation surely rested upon a measure of disrespect for state courts. At best there are indirect allusions, such as Justice Powell's reference to the "insensitivity of some state courts to the rights of defendants"[29] in explaining why the Court incorporated the right to counsel in *Gideon v. Wainwright*.[30] Just prior to *Mapp v. Ohio*,[31] in an essay urging stepped-up application of the Bill

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[28] Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 Yale L. J. 74, 88 (1963).

[29] Argersinger v. Hamlim, 407 U.S. 25, 65 (1972) (Powell, J., concurring).

[30] One of the reasons for seeking a more definitive standard [for the appointment of counsel] in felony cases was the failure of many state courts to live up to their responsibilities in determining on a case-by-case basis whether counsel should be appointed .... But this Court should not assume that the past insensitivity of some state courts to the rights of defendants will continue. Certainly if the Court follows the course of reading rigid rules into the Constitution, so that the state courts will be unable to exercise judicial discretion within the limits of fundamental fairness, there is little reason to think that insensitivity will abate.

Id. (citation omitted). Gideon v. Wainwright, 372 U.S. 335 (1963).

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

of Rights to the states, Justice Brennan implied that the state judiciary was either unwilling or unable to cope with abuses of suspected criminals:[32] "[T]oo many state practices fall far short. Far too many cases come from the states to the Supreme Court presenting dismal pictures of official lawlessness, of illegal searches and seizures, illegal detentions attended by prolonged interrogation and coerced admissions of guilt, of the denial of counsel, and downright brutality."[33] Although Brennan's reference to "state practices" encompassed state legislative acts, it is abundantly clear that he did not think that the state judges would reform matters if left to their own devices.

Additional evidence of the Supreme Court's attitude toward the state judiciary may be inferred from the dissents in the incorporation cases—largely penned by Justices Harlan and Felix Frankfurter—which vainly defended the states and the state courts[34] against the impending federal onslaught. As Justice Harlan saw it, incorporation threatened state control over the administration of criminal justice.

> As the Court pointed out in *Abbate v. United States*, "the States under our federal system have the principal responsibility for defining and prosecuting crimes." The Court endangers this allocation of responsibility for the prevention of crime when it applies to the States doctrines developed in the context of federal law enforcement, without any attention to the special problems which the States as a group or particular States may face.[35]

Although Justice Harlan spoke of the states in general, his concerns surely extended to those state officials with the responsibility for the adjudication of criminal cases. The incorporationists, by contrast, did not see any threat to the states. "[T]o deny the States the power to impair a fundamental constitutional right is not to increase federal power," observed Justice Goldberg, "but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual."[36] This, of course, begs the question whether the procedure at issue actually safeguards a fundamental right. The better explanation for the incorporation rulings lies in the attitudes of the majority Justices toward the state bench. As a defender of incorporation suggested, "perhaps they

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[32] William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. Rev. 761, 773 (1961).

[33] *Id.* at 777-78 (citations omitted).

[34] Harlan occasionally argued that the state court handling of an issue was superior to the approach of the Supreme Court. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 33 (1964) (Harlan, J., dissenting): "The Court's reference to a federal standard is, to put it bluntly, simply an excuse for the Court to substitute its own superficial assessment of the facts and state law for the careful and better informed conclusions of the state court."

[35] *Id.* at 28 (Harlan, J., dissenting).

[36] Pointer v. Texas, 380 U.S. 400, 414 (1965) (Goldberg, J., concurring).

viewed local authorities as having forfeited any right to judicial deference by their continued failure to control lawlessness in law enforcement."[37]

More than anything the Justices said, the inherent logic of selective incorporation supports the view that it was the product of the perceived "failure of state courts to deal effectively with governmental intrusions upon the rights of the individual."[38] By contrast with the "fundamental fairness" approach to the Fourteenth Amendment, which predominated in the first half of the twentieth century, incorporation sharply circumscribed the independence of the state bench.[39] Fundamental fairness had left it largely to the states to determine criminal procedure, with the Supreme Court stepping in only in the (rare) event of a fundamentally unfair trial, or, as Justice Brennan once put it, in "only the most revolting cases."[40] Under the regime of fundamental fairness, the Supreme Court's role was essentially negative; it stood ready to reverse offenses to the conscience of mankind, but not to affirmatively impose procedures upon the states. The state courts were left to their own devices provided they did not treat defendants in a fundamentally unfair manner.

By contrast, selective incorporation imposed upon the states an entire range of procedures—nearly all of the guarantees of the Bill of Rights along with all of their subordinate procedural gloss. The unspoken assumption of incorporation was that state decisionmakers—especially the state judiciary, which bears primary responsibility for construing state bills of rights and establishing rules of criminal proce-

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[37] Jerold H. Israel, *Selective Incorporation: Revisited*, 7 GEO. L.J. 253, 317 (1982).

[38] Robert T. Sheran, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV., 789, 790-91 (1981).

[39] The "fundamental fairness" theory asked whether a procedure is an essential requisite of a fair trial, or in Justice Benjamin Cardozo's famous epigram, whether the right is "of the very essence of a scheme of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[40] Brennan, *supra* note 32, at 778. "Judicial self-restraint which defers too much to the sovereign powers of the states and reserves judicial intervention for only the most revolting cases will not serve to enhance Madison's priceless gift of 'the great rights of mankind secured under this Constitution.'"

Under the fundamental fairness regime, by mid-twentieth-century, only two criminal justice rights in the Bill of Rights were also deemed essential to due process. Wolf v. Colorado, 338 U.S. 25 (1949) (the "core" of the Fourth Amendment, but not the exclusionary rule); In re Oliver, 333 U.S. 257 (1948) (the Sixth Amendment right to a "public trial"). *Powell v. Alabama*, 287 U.S. 45 (1932) imposed a right to timely appointment of counsel in capital cases where the defendants were incapable of defending themselves, but the pre-1950 Court made clear that this right to counsel was not the same as the Sixth Amendment right. *See* Betts v. Brady, 316 U.S. 455 (1942) (indigent defendant in noncapital state trial who was not incapable of self-defense had no right to appointed counsel, whereas the same defendant in a federal trial had such a right under the Sixth Amendment), *rev'd*, Gideon v. Wainwright, 372 U.S. 335 (1963).

dure—could not be relied upon adequately to protect criminal defendants. The main concern of the Warren Court was to equalize the treatment of criminal defendants with respect to rights deemed "fundamental," and the interests of federalism were to be subordinated to this concern.[41] Thus, whereas Brandeisian state experimentation was laudable, it was not desirable when it came to procedures incorporated into due process.[42] In large measure, the Tenth Amendment, which reserves to the states authority to administer criminal justice, was forced to take a back seat to the rest of the Bill of Rights.

By its very nature, incorporation established United States Supreme Court hegemony over the state bench. As the ultimate interpreter of the federal Bill of Rights, the Supreme Court became the final authority regarding the scope and nature of its guarantees; the state courts were to be compelled to conform to national mandates established by the Supreme Court, absent more protective state procedures. In the 1960s, and for the next two decades, as criminal procedure rose to the top of the Supreme Court's agenda, the Court rendered dozens of decisions glossing the Fourth, Fifth, Sixth and Eighth Amendments. Each such decision established an imperative for state proceedings, which the state courts could enlarge, but never deny. Incorporation thus shifted the initiative for developing criminal procedure law from the state courts and state legislatures to the United States Supreme Court.

Why subordinate the state bench to the federal judiciary? The most obvious—and, I submit, the best—answer is that the Justices simply did not trust their state counterparts. They believed that the state judges either would not or could not adequately protect defendants, and that the only sure way to reverse this was for the Supreme Court itself to establish defendants' rights.

This mistrust is especially troubling in light of the tension between fundamental rights theory and the willy-nilly incorporation of secondary procedures. For if, as the next section seeks to demonstrate, the Court's assumption about the states is no longer valid, there can be little justification for continuing to impose upon them proce-

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41 "The legitimate interests of federalism were far narrower for the selective incorporation Court of the 1960's than they had been for the Courts that applied the fundamental fairness doctrine." Israel, *supra* note 37, at 315. For a review of the incorporationist Court's attitudes toward federalism, see *id.* at 314-25.

42 "While I quite agree with Mr. Justice Brandeis that '[i]t is one of the happy incidents of the federal system that [a state may] serve as a laboratory; and try novel social economic experiments,' I do not believe that this includes the power to experiment with the fundamental liberties of citizens safeguarded by the Bill of Rights." *Pointer*, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring) (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

dural requirements that are not indispensable to the protection of fundamental rights. In the next section, we examine empirical evidence that the Supreme Court's largely unspoken assumption about state judicial incompetence is obsolete.

III. State Constitutionalism and the Rights-Sensitivity of the State Courts

A. "Parity" and the Alleged Institutional Infirmity of State Courts

The rapid growth of state constitutional law provides the strongest empirical proof to date that the assumptions about state court incompetence are simply not valid. Before examining the implications of state constitutionalism, however, we briefly consider the empirical evidence developed during another controversy over state courts—the so-called "parity" debate.

The parity issue was whether the state courts were the equal of the federal in protecting federal constitutional rights, and therefore whether federal habeas corpus review should be curtailed.[43] The habeas question is now probably moot, as Congress has cast a strong vote of confidence in state courts by statutorily mandating, in federal habeas review, deference to state court legal and factual determinations.[44] But before this law was passed some interesting studies comparing state and federal courts were published, and they strongly support the premise that state courts are vigorously preserving rights.

One such study, conducted by Michael E. Solimine and James L. Walker, concluded that "the available empirical evidence confirms the sensitivity of state appellate courts to the enforcement of federal rights."[45] This study measured the upholding/denial of federal con-

[43] The commentators call this use of the term "parity in its 'strong' sense." This definition asserts "the absence of a systematic difference in outcomes whether cases are allotted to state or federal courts." Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. Rev. 609, 610 (1991). The "weak" definition of parity asks whether "a litigant will receive a constitutionally adequate hearing on a federal claim in state court." *Id.*

[44] Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132, tit. I, 110 Stat. 1214, 1264 (1996). *See* Felker v. Turpin, 116 S. Ct. 2333 (1996) (upholding portions of the Act). *See also* Stephen Labaton, *New Limits on Prisoner Appeals: Major Shift of Power From U.S. to States*, N.Y. Times, Apr. 11, 1996, at B1: "The new habeas corpus law . . . is a monumental shift of power to the state courts from the federal judiciary."

[45] Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 Hastings Const. L. Q. 213, 251 (1983) [hereinafter Solimine & Walker, *Constitutional Litigation*]. *See also* Michael E. Solimine & James L. Walker, *Rethinking Exclusive Federal Jurisdiction*, 52 U. Pitt. L. Rev. 383 (1991); Michael E. Solimine & James L. Walker, *State Court Protection of Federal Constitutional Rights*, 12 Harv. J. L. Pub. Pol'y 127 (1989). For a critique of the study, see Erwin Chemerinsky,

stitutional rights claims in state appellate courts (both intermediate courts and courts of last resort) and federal district courts between 1974 and 1980. For Fourth Amendment issues, which are of special concern to this article, the state court performance was nearly identical to the federal: 30.2% of these claims were upheld in state courts, 33.3% in federal courts.[46]

Another empirical investigation, Craig M. Bradley's study of the appellate court decisions of nine states, concluded that *Stone v. Powell*'s[47] restriction of federal habeas corpus review of state court Fourth Amendment decisions did not generally diminish state court enforcement of the Fourth Amendment.[48] Indeed, collective data from six of the states studied showed increases in support for Fourth Amendment claims after *Stone*, and in only one state was there a falling-off of support.[49]

Viewing habeas corpus from a federal court perspective, we find additional proof that state courts adequately protect rights. A study directed by Victor E. Flango of the National Center for State Courts revealed that federal habeas petitions from state prisoners (petitions that go to federal district courts after state trial and direct appeal) have extremely low success rates—under 5%.[50] With federal courts affirming the state court rulings at least 95 times out of 100, the analysts concluded that the "state courts are doing a good job in protecting federal constitutional rights."[51]

In sum, the empirical studies strongly support the contention that state courts are the equal of the federal in rights-protection. Despite the empirical evidence arrayed against them, however, some of the commentators have insisted that the *potential* for state-federal judicial disparity remains because of the institutional deficiencies of the state courts.

Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 UCLA L. REV. 233 (1988).

46 Solimine & Walker, *Constitutional Litigation*, *supra* note 45, at 243.

47 428 U.S. 465 (1976).

48 Craig M. Bradley, *Are State Courts Enforcing the Fourth Amendment? A Preliminary Study*, 77 GEO. L.J. 251, 264 (1988) (examining nearly four hundred appellate court cases from nine states on Fourth Amendment issues rendered in 1975 and 1986 in order to determine the impact of *Stone v. Powell*, 428 U.S. 465 (1976), which virtually eliminated federal habeas corpus review of state court Fourth Amendment decisions).

49 *Id.* at 263. Bradley also claimed, however, that one and possibly three states of the nine were not enforcing the Fourth Amendment. *Id.* at 286.

50 NATIONAL CENTER FOR STATE COURTS, HABEAS CORPUS IN STATE AND FEDERAL COURTS 86-88 (1994). This four-state (Alabama, California, New York, Texas) study actually found a 1% success rate. *Id.* at 62. It reported data from the Administrative Office of U.S. Courts that found a success rate of 5% in 1992. *Id.* at 88. The study found a 17% success rate for capital petitioners. *Id.* at 86.

51 *Id.* at 89.

The first of these institutional critics of the state courts was Burt Neuborne, who contended that parity is a "dangerous myth."[52] Neuborne's strongest argument, seconded by Martin H. Redish,[53] goes to the institutional infirmities of the state judiciary. They contend that, compared with federal judges, the relative precariousness of the job of state judge makes the state judiciary an uncertain defender of constitutional rights, especially in the face of unfavorable majoritarian pressures.[54] Neuborne puts the matter this way:

> Federal district judges, appointed for life and removable only by impeachment, are as insulated from majoritarian pressures as is functionally possible, precisely to insure their ability to enforce the Constitution without fear of reprisal. State trial judges, on the other hand, generally are elected for a fixed term, rendering them vulnerable to majoritarian pressure when deciding constitutional cases.[55]

We need to examine the realities, not just the formalities, of the alleged precariousness of the state judiciary. The selection and tenure of state judges varies not only from state to state, but also, within each state, from type of court to type of court.[56] Generally, state judges are subject to some sort of public approval, either through direct election, or retention election following selection by a judicial commission.[57]

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[52] Burt Neuborne, *The Myth of Parity*, 90 HARV. L.R. 1105, 1105 (1977). Neuborne compared state and federal trial courts, conceding that the parity of federal courts and state appellate courts was a "much closer" issue. *Id.* at 1118 n.51. Neuborne's contention that federal judges are more technically competent than their state counterparts is purely impressionistic, and he has recently repudiated his claim that they have a more rights-oriented "psychological set." *See* Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 798 (1995). *See also* Sandra Day O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 813 (1981), in which then-judge O'Connor defended her state judicial brethren against Neuborne's charges.

[53] Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988).

[54] I have written elsewhere about the "vulnerability" of state supreme court judges when compared with their United States Supreme Court counterparts. Barry Latzer, *California's Constitutional Counterrevolution*, *in* CONSTITUTIONAL POLITICS IN THE STATES 149 (G. Alan Tarr, ed. 1996).

[55] Neuborne, *The Myth of Parity*, *supra* note 52, at 1127-28 (footnotes omitted). Redish says much the same thing:

> Under article III, federal judges' salary and tenure are protected; . . . most state judges do not receive such protection. Instead, they must stand for election or at least seek reappointment, with all of the potential external financial and political pressures which these factors imply. Moreover, neither their salary nor their tenure is insulated from state legislative reduction. Can one realistically suggest that we can trust the independent judgment of such individuals in cases challenging the constitutionality of state action?

Redish, *supra* note 53, at 333.

[56] OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 1993, at 32-43, 48-69 (1995) [hereinafter STATE COURT ORGANIZATION].

[57] Thirty states select all or most of their judges by popular election. *Id.*

In practice, however, public input is qualified in three ways: (1) by the large number of judicial vacancies filled by appointment—even for elected positions—due to widespread early retirements; (2) by the low public interest and turnout in judicial elections; and (3) by the overwhelming number of incumbent reappointments, in part because of lack of electoral opposition.[58] By contrast, there is no direct public input into federal judicial appointments. However, federal appointments are rife with partisan politics, ideological considerations, and special interest campaigns.[59] In any event, the evidence that elected judges are less rights-sensitive than appointed judges is in conflict,[60] and it cannot be concluded with certainty that the appointment process is more conducive to independence on the part of the federal judges.

The terms of office of state judges are short when compared with their federal counterparts, who serve for life while on good behavior. Most state judges serve terms of eight years or less, more if they are on courts of last resort.[61] Once again, however, the differences may not be as great as they appear since state judges may generally succeed themselves and incumbents are almost always reelected.[62] Moreover, if a sitting judge does not intend to seek reappointment (assuming

58 HENRY R. GLICK, COURTS, POLITICS, AND JUSTICE 119, 122 (3d ed. 1993).

59 LAWRENCE BAUM, AMERICAN COURTS, PROCESS AND POLICY 112 (3d ed. 1994). "The greatest change in the criteria for selecting [federal] lower-court judges is the increasing emphasis given to policy preferences. Historically, there has been wide variation in the attention that [presidential] administrations gave to the views of their nominees. But ideological screening of candidates for [federal] judgeships has become standard practice in the past three decades."

60 A recent major study of a sample of state courts, found that the formal method of selecting state supreme court judges "significantly affect[s] judicial policy in several important areas of law." D. R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY: INNOVATION, REACTION AND APATHY 129 (1995). But others found that selection method made little difference. Bradley Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges—Reconsidered*, 6 LAW & SOC'Y REV. 579 (1972); Victor Flango & Craig Ducat, *What Differences Does Method of Selection Make: Selection Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25 (1979).

To the extent that state constitutionalism is associated with receptivity to defendants' rights, there is evidence both supporting and denying a relationship between selection method and rights policy. Among state courts that were most active in deciding cases on state constitutional grounds (prior to 1990), five out of ten had elected appellate judges. LATZER, *supra* note 10, at 162. On the other hand, three out of the four state courts that (prior to 1990) most rejected United States Supreme Court doctrines in favor of more protective state constitutional rights had appointed appellate judges. *Id.* at 164.

61 STATE COURT ORGANIZATION, *supra* note 56, at 32-43, 48-69.

62 GLICK, *supra* note 58, at 119. "Studies of individual states indicate that as many as nine out of ten judges who sought reelection ran unopposed, and only a mere handful of those with opposition were voted out of office." *Id.* Few state judges are rejected in retention elections. Susan B. Carbon, *Judicial Retention Elections: Are They Serving Their Intended Purpose?*, 64 JUDICATURE 210, 213 (1980) (from 1934 to 1980 only thirty-three judges were not retained).

that this decision was not influenced by his stance on individual rights or the reactions to it), it is not clear that the short term of office leads to less sympathy for rights-claimants. On the other hand, for jurists wishing to succeed themselves, having to stand for reelection fairly often may sensitize one to majoritarian sentiments in ways that negatively impact upon counter-majority claims.

Setting aside defeat in regular or retention elections, or non-reappointment by governors, state judges are subject to legislative impeachment or milder legislative sanction ("address"), as well as sanctions by judicial conduct commissions. By contrast, federal judges can be removed only by Congress, although federal judicial councils can impose other sanctions and recommend impeachment.[63] Legislative sanctions are relatively rare on both levels, and state judicial councils vary from state to state in their aggressiveness.[64] More importantly, sanctions are usually imposed because of corruption or malfeasance, and there is no reason to think that they are more likely to be imposed against rights-oriented jurists.

There have been, in recent years, some striking examples of state judges who were threatened with non-reelection or were actually defeated by the voters at least in part because of positions favorable to defendants' rights. Most notable of the defeats were those of three California Supreme Court justices, including Chief Justice Rose Bird, and that of Wyoming Supreme Court Justice Walter Urbigkit.[65] The Bird episode was especially stunning because non-retention was unprecedented in the history of the state, and because the reason was so clearly tied to dissatisfaction with her (and her two defeated colleagues') decisionmaking in a particular policy area, viz., criminal justice. On the one hand, Bird's widely publicized defeat could hardly fail to make an impression on other judges around the country who are subject to voter approval. On the other hand, this message is blunted because removal is so uncommon; most of the time most judges are not vulnerable. More typical were the dismal failures to unseat Oregon Supreme Court Justice Hans Linde in 1984, and Florida Supreme Court Chief Justice Ellen Barkett of the in 1992, both of whom were also opposed in part on the basis of their criminal justice

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63 The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 94 Stat. 2035, 28 U.S.C.A. §§ 1 notes, 331, 332, 372, 604 (1996), established regional judicial councils for each federal circuit. Of course, Congress could abolish the lower federal courts altogether, and can exclude certain types of cases from their jurisdiction. *See infra* note 71.

64 BAUM, *supra* note 59, at 162-64.

65 *See* Latzer, *supra* note 54, *passim* regarding Bird and her two colleagues, Associate Justices Joseph R. Grodin and Cruz Reynoso. Justice Urbigkit's defeat was reported in Andrew Blum, *Jurists, Initiatives on Ballot*, NAT'L L. J., November 16, 1992, at 1.

decisions.[66] Moreover, the Bird court was unusual in its determination to thwart the public will as expressed through state law.[67]

Overall, it must be concluded that state judges are much more exposed to majority approval/disapproval than federal judges, even though the exposure of the state bench is minimized in practice. Assuming that public accountability translates into attitudes more favorable to the government and less favorable to the individual, then on balance, at least in theory, federal courts appear to be the safer repository for individual rights. It has not been clearly demonstrated, however, that exposure to public disapproval results in less sympathy for individual rights claims. Indeed, as the development of state constitutional law demonstrates, state court performance in protecting rights has outstripped that of the Supreme Court.

Rights-protective though they may be, it must also be conceded that state constitutional law decisions are themselves vulnerable to public check in ways that federal constitutional caselaw is not. Rights grounded upon state constitutions are more easily narrowed or eliminated than rights derived from the United States Constitution because of the greater ease in amending state constitutions. Nearly all states require only a simple majority of the popular vote to approve state constitutional amendments proposed by state legislatures or state constitutional conventions, and seventeen states allow state constitutional amendment by initiative, i.e., without the prior approval of a legislature or convention.[68] Consequently, there have been a superabundance of state constitutional amendments, some of which were designed to reduce the rights of the criminally accused.[69] Notable amongst the latter were California's Proposition 8, which eliminated state constitutional exclusionary rules, and Florida's forced linkage

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66 *Id. See* Ronald K.L. Collins, *Hans Linde and His 1984 Judicial Election: The Primary*, 70 OR. L. REV. 747, 764 (1991).

67 Despite the passage of two state constitutional amendments favoring capital punishment and carefully crafted statutes to facilitate them, the California Supreme Court under Bird reviewed sixty-four capital cases and upheld the penalty in only six. Her court's prodefendant orientation in other criminal cases inspired Proposition 8, a state constitutional amendment abolishing the California exclusionary rule. Latzer, *supra* note 54, at 157-58, 164-67.

68 Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 PUBLIUS: J. FED. 153, 157 (1987). By contrast, the typical amending procedure for the United States Constitution, pursuant to Article V, requires that an amendment be proposed by two thirds of both houses of Congress followed by ratification by the legislatures of three fourths of the states. *Id.* at 154. As a result, thirty-three federal constitutional amendments have been proposed to the states in all of American history, twenty-six of which have been approved, whereas some 8,000 state constitutional amendments have been proposed, over 5,000 approved. *Id.* at 162.

69 *Id.* at 171 (citing Donald E. Wilkes, *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L. J. 223, 232-235 (1984).

amendment, limiting state constitutional search and seizure rights to those established by the United States Supreme Court for the Fourth Amendment.[70] Although federal constitutional rights are on much firmer footing because of the difficulty in amending the United States Constitution, Article III does give Congress certain rarely-used powers over the federal bench, including the power to limit the Supreme Court's appellate jurisdiction.[71]

Notwithstanding the theoretical precariousness of state court rights decisions, the fact remains, as is shown below, that the state courts have been in the last few decades as protective or more protective than the United States Supreme Court. How can we account for the anomaly that state courts are more accountable to popular majorities than federal courts, and have nevertheless been more committed to individual rights? Four reasons may explain the phenomenon. (1) The restraints on state courts are usually more hypothetical than real. Turning out state judges because of their pro-rights decisions, and amending state constitutions in ways that significantly narrow individual rights remain quite uncommon. Rose Bird is the exception that proves the rule. (2) There has been strong support among state political elites within and without the judicial branch and at least grudging mass tolerance for individual rights. This has provided a supportive legal-political atmosphere. (3) The vast number of criminal cases raising individual rights issues has led to the routinization of rights-enforcement, such as through suppression hearings, and this routinization has obfuscated the work of the courts. Along the same lines, the complexity and narrowness of the issues has also blunted what public opposition there might be to the expansion of individual rights. Granting a motion to suppress evidence may impress the legal community as an exercise in rights affirmation, but to the general public it is a scarcely noticeable technicality. (4) The "new judicial federalism," the post-1970 period of state rights expansion, has given impetus to more pro-rights rulings by the state courts, in part by making state judges the focus of attention in the legal literature.

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[70] LATZER, *supra* note 10, at 37-38.

[71] Article III gives the Supreme Court appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make," which has been construed to mean that Congress may eliminate Supreme Court appellate jurisdiction over cases dealing with certain issues. U.S. CONST., art. III, § 2. Congress tried this only once, during the Civil War period, when it eliminated jurisdiction over habeas corpus petitions. *Ex parte* McCardle, 74 U.S. 506 (1869) (upheld). Also, although Article III implies that Congress could abolish lower federal courts altogether, it may not reduce judicial salaries—even during financial exigencies as compelling as the Great Depression. O'Donoghue v. United States, 289 U.S. 516 (1933). Article III states that "[t]he Judges . . . shall, at stated Times receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST., art. III, § 1.

If, despite their relatively greater public accountability, state courts are in fact more rights-sensitive than the Supreme Court, the structural critique of state courts loses much of its potency. It is difficult to credit speculation that popular accountability leads to less rights-sensitivity in the face of so much empirical evidence to the contrary. The structural critique must therefore fall back on two arguments. The first is that the state courts differ from state-to-state, rendering nationwide generalizations suspect. State judges with greater vulnerability may still be expected to provide less hospitable forums for rights claims, notwithstanding the national picture. The second argument relies on conjecture about future developments, viz., that majoritarian pressures may someday lead to state court backsliding on rights (i.e., whatever their present rights-orientation, state court exposure to popular constraints may, in the future, cause a change in attitude).

Regarding the first point: state court proclivities to expand rights do indeed vary from state to state, although these tendencies ebb and flow over time. But the variation among the states in pro-defendant decisions does not necessarily correlate with the vulnerability of the state judges to public accountability. For instance, three states that are very active in developing state constitutional law—Oregon, Texas and West Virginia—provide for the election of state appellate judges.[72] These states have made significant rulings expanding the rights of the criminally accused, on such matters as automobile searches,[73] *Miranda* rights[74] and the right to counsel.[75] Moreover, state judicial elections are not especially threatening; candidates often

[72] State Court Organization, *supra* note 56, at 38, 40, 42. My earlier state constitutional law study found that the courts of last resort in Oregon and West Virginia were among the top ten in rendering decisions based on state constitutional provisions. Latzer, *supra* note 10, at 162. Although Texas was not on the list, my more recent study suggests that it might well be included on an up-to-date list. *See* Latzer, *supra* note 1, *passim*. Concededly, however, making state constitutional law decisions is not synonymous with favoring defendants' rights. The Texas Court of Criminal Appeals, for example, adopted federal doctrines in over 80% of its state constitutional decisions, and federal doctrine has not been especially favorable to defendants in recent decades. Latzer, *supra* note 10, at 163-64.

[73] Autran v. State, 887 S.W.2d 31, 33 (Tex. Crim. App. 1994) (en banc) (plurality opinion) (Texas Constitution provides greater protection than Fourth Amendment in context of inventory searches of automobiles).

[74] State v. Randolph, 370 S.E.2d 741,743 (W. Va. 1988) (whether or not a suspect was advised of the charges is, contrary to federal law, a factor in determining whether he intelligently and voluntarily waived his *Miranda* rights).

[75] Brown v. Multnomah County District Court, 570 P.2d 52, 60 (Or. 1977) (en banc) (extending the right to counsel to first offense drunk driving cases even though no incarceration could be imposed).

run unopposed and almost always win.[76] The removal of Chief Justice Bird in California is atypical. Although a recent study found that appointed state judges were generally more sympathetic to criminal defendants' rights than their elected counterparts, that conclusion must be considered provisional.[77] In short, there is only weak empirical support for the assertion that some state judiciaries are structurally less hospitable to defendants' rights.

As for the second point—the backsliding argument—it is purely speculative. It is certainly true that there is considerable unpredictability regarding the role of the state courts. In 1960, who would have predicted that within two decades, the state courts would be expanding rights beyond federal boundaries, and the Supreme Court would decline to broaden those boundaries? For that matter, the role of the Supreme Court and the lower federal tribunals has hardly remained constant; compare the Court of the early 1930s with the Warren era.[78]

By the next century it is conceivable, even likely, that the posture of the state judiciary will change again, although not necessarily on the issue of defendants' rights. However, uncertainty about the future role of state courts does not justify continued Supreme Court hegemony over the state judiciary. As the Court has repeatedly acknowledged, it has no supervisory authority over the state courts.[79] Its authority is limited to interpreting the Constitution and federal law. Where the Court is properly within its authority to require a procedure as a matter of Fourteenth Amendment Due Process, the state courts are compelled by the Supremacy Clause to comply. But where the Court concedes that a procedure is not required by the Constitu-

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[76] GLICK, *supra* note 58, at 119.

[77] PINELLO, *supra* note 60, studied six states, a rather small sample. He did not separately examine states that select judges by merit plan or nonpartisan election—methods used by over one-half of the nation. Nor did he look beyond the formal judicial selection process. In many states, judges retire before the expiration of their terms and state law provides for gubernatorial appointment of their replacements. GLICK, *supra* note 58, at 118. Consequently, judges who are officially exposed to public approval through elections are insulated from it in practice. Pinello's sample of "elected" judges may actually have been appointed, and therefore, he may have been comparing apples and apples.

[78] For an overview of the Supreme Court's role over the course of American history see ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (1960).

[79] *E.g.*, Smith v. Phillips, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.") (citing Chandler v. Florida, 449 U.S. 560, 570 (1981) ("This Court has no supervisory jurisdiction over state courts, and, in reviewing a state-court judgment, we are confined to evaluating it in relation to the Federal Constitution."); Ker v. California, 374 U.S. 23, 31 (1963) ("Mapp [v. Ohio] . . . established no assumption by this Court of supervisory authority over state courts . . . and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law.").

tion, that it is no more than a judicially created remedy, and that it is not essential to the enforcement of a fundamental right, there is simply no warrant to continue to impose it upon the states. The United States Supreme Court is not the guardian of the state judiciary. It cannot legitimately mandate national procedures simply out of fear that some states might some day adopt different procedures that are less to its liking. The mere potential rights-hostility of some state courts at some time in the future is simply not a good enough reason to fasten a procedure upon all of the states. Moreover, under the proposed disincorporation standards described in Part IV of this article,[80] the Supreme Court retains authority to prod foot-dragging states into properly protecting fundamental rights. Lastly, even if disincorporation were to create a risk that the state courts will renege on their individual rights mission, that risk is far outweighed by the advantages of disincorporation. As detailed in Part V of this article, disincorporation will restore Supreme Court legitimacy, re-establish state authority in criminal justice policymaking, a traditional area of state control, permit greater state flexibility in criminal justice administration, and encourage a full flowering of state constitutionalism.[81]

To return one last time to the parity debate that launched this section, it has now become so abundantly clear that state courts are competent rights protectors that experts on federal court controls over state administration of justice through habeas corpus and § 1983 litigation are now recommending that such controls should be considerably scaled back.[82] Indeed, there is national support for this position as evidenced by the recent federal legislation curtailing federal habeas review of state court rulings.[83] As will be demonstrated in the next subsection of this article, state constitutional law offers compelling proof that rights are just as safe in the state forum.

B. STATE CONSTITUTIONAL RIGHTS: REDUNDANCY AND BEYOND

State courts have made hundreds of decisions recognizing as a matter of state law the same rights that the Supreme Court has acknowledged for the federal Constitution.[84] This says something significant about state courts because these state constitutional decisions

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80 *See infra* text accompanying notes 147-152.

81 *See infra* Part V.A.

82 Joseph L. Hoffman & Lauren K. Robel, *Federal Court Supervision of State Criminal Justice Administration*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 154 (1996) (calling for a diminished role for federal courts in state criminal cases through reform of federal habeas corpus and Section 1983 (42 U.S.C. § 1983) litigation).

83 *See supra* note 44 and accompanying text.

84 LATZER, *supra* note 1, *passim*.

were not mandatory. It is true that the Supremacy Clause requires the enforcement of federal rights where they are broader than state rights, but enforcing a more protective federal right does not establish the right as a matter of state constitutional law.[85] The Supremacy Clause does not demand the incorporation in reverse of federal rights into state constitutional law. State constitutions may be interpreted however state courts wish, even to provide less protection for defendants than the federal Constitution, in which case the state courts must give force to the broader federal guarantee. Thus, interpreting state constitutional provisions in the same way as similarly-worded federal constitutional provisions—i.e., adopting, or reverse-incorporating federal doctrines—is merely one of a range of interpretive options for the state courts.

The widespread resort to reverse-incorporation led to criticism of the state courts for "lockstepping," the seemingly unreflective copying of Supreme Court doctrines.[86] This criticism overlooks the potential impact of these rulings upon constitutional law in the United States. State reverse-incorporation decisions have created an entire corpus of rights law quite independent of federal constitutional law.[87] If suddenly, a radical United States Supreme Court were to reverse the major defendants' rights decisions of the last forty years there would be a remarkable degree of continuity in American criminal procedure law.[88] Virtually all federal constitutional doctrines have been reverse-

[85] Latzer, *supra* note 2, at 1125-30. State courts are not always aware of the distinction. There are occasional statements in state cases suggesting that state law cannot be narrower than federal. *See id.* at 1126.

[86] For a critique of state constitutional "lockstepping" see Gardner, *supra* note 11, at 791-92. Some of the criticism of "lockstepping" may be ideologically motivated, reflecting the commentator's disappointment that state constitutional law was not used to expand rights. To the contrary, however, the fact that state constitutionalism is not an unprincipled contrivance for establishing a liberal agenda adds to its legitimacy.

[87] Some of the case law is "law-ambiguous," i.e., it cannot easily be determined from the court opinion whether the decision rests on federal constitutional law, state constitutional law, or both. *See, e.g.*, State v. Detweiler, 544 N.W.2d 83 (Neb. 1996) (not clear that the court was applying the state double jeopardy clause). This makes it hard to decide whether or not a state constitutional decision has indeed been rendered. Law-ambiguity suggests indifference to the creation of an independent body of state constitutional law. However, law-ambiguity may simply be motivated by a desire to enhance state judicial power. It does so in at least three ways. First, it reduces the likelihood of United States Supreme Court review of state cases by blurring the distinction between federal and state grounds. The Court struck back (ineffectually) by establishing a presumption that independent state grounds do not exist. Michigan v. Long, 463 U.S. 1032 (1983). Secondly, law-ambiguity enables state courts to back off from troublesome rulings by claiming in subsequent cases that the state constitution was not really relied on. Third, it provides federal "cover" for controversial state court decisions; the judges can claim that they were simply extending Supreme Court principles.

[88] Some might contend that this article endorses such a radical reduction in rights protection. To the contrary, however, this article favors removing from Fourteenth

incorporated into state constitutional law, often in a sizable number of states. In addition, nearly every one of these federal doctrines has been rejected by several states in favor of broader protections grounded upon state constitutional law. In the event that Supreme Court mandates are eliminated, these rights-adopting or rights-expanding states will enforce the very same or broader rights as those heretofore guaranteed by the United States Constitution.

Concededly, not all federal doctrines have been adopted on state constitutional grounds by all states; for each federal doctrine there are some states that do no more than fulfill their obligations under the Supremacy Clause to enforce federal rights. Consequently, if certain federal due process mandates were to be eliminated there would be no protection for those rights in some states. Although the list of non-adopting states varies with the issue, there is a recurring pattern. Some states, e.g., Alabama, Georgia, and Virginia, are simply not as active as others in developing their state constitutional jurisprudence. This does not necessarily indicate rights-insensitivity, however. It must be remembered that under current federal hegemony, reverse-incorporation appears to be of no practical significance; who needs state constitutional rights where federal protections must be enforced by the states? Moreover, because state constitutional law is commonly associated with rights-expansion, and its development invites litigation pressure to broaden rights, some of the more conservative state courts may wish to signal that they approve of the status quo in criminal procedure law, or do not wish to "tilt" further in favor of defendants. What these "inactive" states will do if given greater responsibility to determine the law for themselves is not certain. Disincorporation thus creates the possibility that some states will never give force to the disincorporated right. However, disincorporation also creates the possibility that state courts will acknowledge state constitutional rights that did not previously exist in their states.

Notwithstanding the above, a remarkable number of states have established state constitutional rights that are the equivalent of or exceed federal rights.[89] To demonstrate the extent of this federal-state constitutional redundancy I have collected search and seizure decisions grounded in state constitutional law that have adopted or broadened federal constitutional requirements. The left-hand side of Table 1 below lists various law enforcement activities regulated by the Fourth

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Amendment Due Process mandates only those rights that are not fundamental to the American scheme of justice, or essential to the preservation of those rights. As will be shown, disincorporation is not likely to markedly impair defendants' rights. *See infra* Part IV.

[89] *See infra* notes 90-135 and accompanying text.

Amendment as interpreted by the United States Supreme Court. For each regulated activity Table 1 provides on the right-hand side a count of the states that have either adopted the federal requirements on the basis of independent state constitutional law or have provided a more defendant-protective state constitutional procedure.[90]

As will be seen, the level of redundancy is quite impressive; in some instances, over 70% of the states provide shadow state constitutional rights.

TABLE 1

INDEPENDENT STATE CONSTITUTIONAL RESTRICTIONS ON SELECTED LAW ENFORCEMENT ACTIVITIES THAT ARE SUBJECT TO FOURTH AMENDMENT LIMITATIONS

Activity Subject to Fourth Amendment Limitations	*Number of States Regulating on State Constitutional Basis*
1. Home entries to effect felony arrests[91]	Twenty-four[92] (48% of states)
2. Seizures of items in "plain view"[93]	Eighteen[94] (36% of states)
3. Searches pursuant to consent[95]	Twenty-three[96] (46% of states)
4. "Seizures" of the person[97]	Nineteen[98] (38% of states)
5. "Stops" and brief detentions of the person[99]	Thirty-six[100] (72% of states)
6. "Stops" of vehicles (non-roadblock)[101]	Twenty-three[102] (46% of states)
7. Protective (weapons) searches of the person[103]	Twenty-one[104] (42% of states)
8. Vehicle impoundment and inventory[105]	Nineteen[106] (38% of states)
9. Searches of persons incident to arrest[107]	Nineteen[108] (38% of states)
10. Vehicle searches incident to arrest[109]	Twenty-one[110] (42% of states)
11. Vehicle searches pursuant to the "automobile exception"[111]	Thirty-five[112] (70% of states)

[91] *See* Payton v. New York, 445 U.S. 573 (1980).

[92] *See* State v. Martin, 679 P.2d 489, 494 (Ariz. 1984) (en banc); State v. Shepherd, 798 S.W.2d 45, 49 (Ark. 1990); People v. Williams, 774 P.2d 146, 162 (Cal. 1989); People v. Drake, 785 P.2d 1257, 1262 (Colo. 1990); State v. Geisler, 610 A.2d 1225, 1230 (Conn. 1992); Mason v. State, 534 A.2d 242, 252 (Del. 1987); State v. Bradley, 679 P.2d 635, 638

[90] The coverage is limited to search and seizure cases decided through 1995; other criminal procedure issues are not included. State court decisions based on statutory construction are also omitted, even though they may provide significant rights on the basis of state law. Although the courts of a particular state may have reached the same general issue more than once, in determining the right-hand column figures, no state was counted more than once for each issue.

(Idaho 1983); People v. Foskey, 554 N.E.2d 192, 196 (Ill. 1990); State v. Holtz, 300 N.W.2d 888, 891 (Iowa 1981); State v. Ruden, 774 P.2d 972, 974 (Kan. 1989); State v. Platten, 594 P.2d 201, 202 (Kan. 1979); State v. Brown, 387 So. 2d 567, 569 (La. 1980); State v. Boilard, 488 A.2d 1380, 1383 (Me. 1985); People v. Oliver, 338 N.W.2d 167, 169 (Mich. 1983); State v. Othoudt, 482 N.W.2d 218, 221 (Minn. 1992); State v. Lohnes, 344 N.W.2d 605, 610 (Minn. 1984); State v. Dow, 844 P.2d 780, 784 (Mont. 1992); State v. Carlson, 644 P.2d 498, 502 (Mont. 1982); State v. Santana, 586 A.2d 77, 78 (N.H. 1991); State v. Houtenbrink, 539 A.2d 714, 715 (N.H. 1988); State v. Jones, 503 A.2d 802, 805 (N.H.1985); State v. Henry, 627 A.2d 125, 128 (N.J. 1993); State v. Olson, 598 P.2d 670, 671 (Or. 1979); Duquette v. Godbout, 471 A.2d 1359, 1361 (R.I. 1984); Vasquez v. State, 739 S.W.2d 37, 39 (Tex. Crim. App. 1987) (en banc); State v. Holeman, 693 P.2d 89, 91 (Wash. 1985) (en banc); State v. Schofield, 331 S.E.2d 829, 834 (W. Va. 1985); State v. Boggess, 340 N.W.2d 516, 520 (Wis. 1983); Laasch v. State, 267 N.W.2d 278, 281 (Wis. 1978); Brown v. State, 738 P.2d 1092, 1094 (Wyo. 1987); Ortega v. State, 669 P.2d 935, 940 (Wyo. 1983).

[93] *See* Horton v. California, 496 U.S. 128, 130 (1990); Arizona v. Hicks, 480 U.S. 321, 323 (1987); Coolidge v. New Hampshire, 403 U.S. 443, 445 (1971).

[94] *See* Reeves v. State, 599 P.2d 727, 733 (Alaska 1979); Stout v. State, 898 S.W.2d 457, 459 (Ark. 1995); State v. Meyer, 893 P.2d 159, 162-63 (Haw. 1995); State v. Barnett, 703 P.2d 680, 683 (Haw. 1985); State v. Stachler, 570 P.2d 1323, 1325 (Haw. 1977); People v. Mitchell, 650 N.E.2d 1014, 1016 (Ill. 1995); Clark v. State, 498 N.E.2d 918, 921 (Ind. 1986); Wilson v. State, 606 N.E.2d 1314 (Ind. Ct. App. 1993); Commonwealth v. Johnson, 777 S.W.2d 876, 877 (Ky. 1989); State v. Ellis, 657 So. 2d 341, 359 (La. Ct. App. 1995); Commonwealth v. Cefalo, 409 N.E.2d 719, 725 (Mass. 1980); State v. Hembd, 767 P.2d 864, 867 (Mont. 1989); State v. Murray, 598 A.2d 206, 207 (N.H. 1991); State v. Ball, 471 A.2d 347, 350 (N.H. 1983); State v. Bruzzese, 463 A.2d 320, 325 (N.J. 1983); State v. Peterson, 834 P.2d 488, 490 (Or. App. 1992); Sneed v. State, 423 S.W.2d 857, 860 (Tenn. 1968); Brown v. State, 657 S.W.2d 797 (Tex. Crim. App. 1983), *overruled by* Heitman v. State, 815 S.W.2d 681, 698 (Tex. Crim. App. 1991); State v. Austin, 584 P.2d 853, 855 (Utah 1978); State v. Bell, 737 P.2d 254, 256-57 (Wash. 1987); State v. Broadnax, 654 P.2d 96, 105 (Wash. 1982); State v. Guy, 492 N.W.2d 311, 313 (Wis. 1992); McDermott v. State, 870 P.2d 339, 343 (Wyo. 1994).

[95] *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[96] *See* Guidry v. State, 671 P.2d 1277, 1282 (Alaska 1983); King v. State, 557 S.W.2d 386, 388 (Ark. 1977); People v. Santistevan, 715 P.2d 792, 794 (Colo. 1986); State v. Jones, 475 A.2d 1087, 1090 (Conn. 1984); State v. Kearns, 867 P.2d 903, 906 (Haw. 1994); State v. Quino, 840 P.2d 358, 361 (Haw. 1992); State v. Post, 573 P.2d 153, 155 (Idaho 1978); Pirtle v. State, 323 N.E.2d 634, 638 (Ind. 1975); State v. Owen, 453 So. 2d 1202, 1205 (La. 1984); State v. Barlow, 320 A.2d 895, 899 (Me. 1974); Gamble v. State, 567 A.2d 95, 97 (Md. 1989); Jones v. State ex rel. Miss. Dep't of Public Safety, 607 So. 2d 23, 24 (Miss. 1991); State v. Horn, 357 N.W.2d 437, 441-42 (Neb. 1984); State v. Osborne, 402 A.2d 493, 497 (N.H. 1979); State v. Johnson, 346 A.2d 66, 67 (N.J. 1975); State v. Wright, 893 P.2d 455, 458 (N.M. Ct. App. 1994); People v. Gonzalez, 347 N.E.2d 575, 582 (N.Y. 1976); State v. Little, 154 S.E.2d 61, 65 (N.C. 1967); State v. Patterson, 642 N.E.2d 390, 392 (Ohio App. Ct. 1993); State v. Flores, 570 P.2d 965, 967 (Or. 1977) (en banc); Rice v. State, 548 S.W.2d 725, 728 (Tex. Crim. App. 1977); State v. Contrel, 886 P.2d 107, 109 (Utah Ct. App. 1994); State v. Zaccaro, 574 A.2d 1256, 1259 (Vt. 1990); State v. Rodgers, 349 N.W.2d 453, 455 (Wis. 1984).

[97] *See* California v. Hodari D., 499 U.S. 621 (1991); Michigan v. Chesternut, 486 U.S. 567 (1988); United States v. Mendenhall, 446 U.S. 544 (1980) (plurality opinion).

[98] *See* Waring v. State, 670 P.2d 357, 360 (Alaska 1983); *In re* James D. 741 P.2d 161, 165 (Cal. 1987); State v. Oquendo, 613 A.2d 1300, 1308 (Conn. 1992); Bostick v. State, 554 So. 2d 1153, 1154 (Fla. 1989), *rev'd*, Florida v. Bostick, 501 U.S. 429 (1991); State v. Kearns, 867 P.2d 903, 906 (Haw. 1994); State v. Quino, 840 P.2d 358, 361 (Haw. 1992); State v. Bainbridge, 787 P.2d 231, 234 (Idaho 1990); State v. Tucker, 626 So. 2d 707, 710 (La. 1993); Commonwealth v. Cao, 644 N.E.2d 1294, 1295 (Mass. 1995); Commonwealth v. Borges, 482 N.E.2d 314, 316 (1985); People v. Mamon, 457 N.W.2d 623 (Mich. 1990) (plurality opinion); *In re* E.D.J., 502 N.W.2d 779, 781 (Minn. 1993); State v. Twohig, 469 N.W.2d 344, 353 (Neb. 1991); State v. Cote, 530 A.2d 775, 778 (N.H. 1987); State v. Tucker, 642 A.2d 401, 404 (N.J. 1994); State v. Farmer, 424 S.E.2d 120, 130 (N.C. 1993); State v. Smith, 544 N.E.2d 239, 241 (Ohio 1989); State v. Holmes, 813 P.2d 28, 31 (Or. 1991); State v. Pully, 863 S.W.2d 29 (Tenn. 1993); Gearing v. State, 685 S.W.2d 326, 328 (Tex. Crim. App. 1985); State v. Jones, 456 S.E.2d 459, 461 (W. Va. 1995).

[99] *See* Alabama v. White, 496 U.S. 325 (1990); Terry v. Ohio, 392 U.S. 1 (1968).
[100] *See* Coleman v. State, 553 P.2d 40, 46 (Alaska 1976); State v. Ochoa, 544 P.2d 1097, 1099 (Ariz. 1976) (en banc); People v. Aldridge, 674 P.2d 240, 242 (Cal. 1984); People v. Carlson, 677 P.2d 310, 312 (Colo. 1984); State v. Lamme, 579 A.2d 484 (Conn. 1990); State v. Prouse, 382 A.2d 1359, 1362 (Del. 1978); Bostick v. State, 554 So. 2d 1153, 1155 (Fla. 1989), *rev'd*, Florida v. Bostick, 501 U.S. 429 (1991); State v. Ortiz, 683 P.2d 822, 825 (Haw. 1984); State v. Gallegos, 821 P.2d 949, 951-952 (Idaho 1992); Rutledge v. State, 426 N.E.2d 638, 642 (Ind. 1981); State v. Scott, 409 N.W.2d 465, 467 (Iowa 1987); State v. Vistuba, 840 P.2d 511, 514 (Kan. 1992); Moresi v. State, 567 So. 2d 1081, 1084 (La. 1990); State v. Griffin, 459 A.2d 1086, 1089 (Me. 1983); Commonwealth v. Lyons, 564 N.E.2d 390, 392 (Mass. 1990); People v. Faucett, 499 N.W.2d 764 (Mich. 1993); State v. McKinley, 232 N.W.2d 906 (Minn. 1975); State v. Johnson, 504 S.W.2d 23, 24 (Mo. 1974); State v. Morris, 749 P.2d 1379, 1383 (Mont. 1988); State v. Colgrove, 253 N.W.2d 20, 21 (Neb. 1977); State v. Kennison, 590 A.2d 1099, 1100 (N.H. 1991); State v. Brodeur, 493 A.2d 1134, 1137 (N.H. 1985); State v. Davis, 517 A.2d 859, 861 (N.J. 1986); State v. Reynolds, 890 P.2d 1315, 1316 (N.M. 1995); People v. Bennett, 519 N.E.2d 289, 291 (N.Y. 1987); State v. Thordarson, 440 N.W.2d 510, 512 (N.D. 1989); State v. Andrews, 565 N.E.2d 1271, 1272 (Ohio 1991); State v. Ehly, 854 P.2d 421, 428 (Or. 1993); Commonwealth v. Rodriquez, 614 A.2d 1378, 1379 (Pa. 1992) (dicta); State v. Tavarez, 572 A.2d 276, 278 (R.I. 1990); State v. Pully, 863 S.W.2d 29 (Tenn. 1993); State v. Brabson, 899 S.W.2d 741, 746 (Tex. Crim. App. 1995); State v. Siergiey, 582 A.2d 119, 120 (Vt. 1990); State v. Williams, 689 P.2d 1065, 1067 (Wash. 1984) (en banc); State v. Choat, 363 S.E.2d 493, 496 (W. Va. 1987); State v. Richardson, 456 N.W.2d 830, 833 (Wis. 1990); Goettl v. State, 842 P.2d 549, 557 (Wyo. 1992).
[101] *See* Delaware v. Prouse, 440 U.S. 648 (1979).
[102] *See* Coleman v. State, 553 P.2d 40, 46 (Alaska 1976); State v. Ochoa, 544 P.2d 1097, 1099 (Ariz. 1976) (en banc); People v. Carlson, 677 P.2d 310 (Colo. 1984) (dicta); State v. Lamme, 579 A.2d 484, 486 (Conn. 1990); State v. Prouse, 382 A.2d 1359, 1362 (Del. 1978); State v. Johnson, 561 So. 2d 1139, 1141-42 (Fla. 1990); State v. Gallegos, 821 P.2d 949, 951-52 (Idaho 1991); Rutledge v. State, 426 N.E.2d 638, 642 (Ind. 1981); State v. Scott, 409 N.W.2d 465, 467 (Iowa 1987); State v. Vistuba, 840 P.2d 511, 514 (Kan. 1992); State v. Griffin, 459 A.2d 1086, 1089 (Me. 1983); State v. McKinley, 232 N.W.2d 906, 909 (Minn. 1975); State v. Childs, 495 N.W.2d 475, 479 (Neb. 1993); State v. Brodeur, 493 A.2d 1134, 1137 (N.H. 1985); People v. Bennett, 519 N.E.2d 289, 291 (N.Y. 1987); State v. Thordarson, 440 N.W.2d 510, 512 (N.D. 1989); State v. Tavarez, 572 A.2d 276, 278 (R.I. 1990); State v. Jewett, 532 A.2d 958, 961 (Vt. 1987); State v. Kennedy, 726 P.2d 445, 447-48 (Wash. 1986) (en banc); State v. Richardson, 456 N.W.2d 830, 833 (Wis. 1990); Goettl v. State, 842 P.2d 549, 557 (Wyo. 1992).
[103] *See* Minnesota v. Dickerson, 113 S. Ct. 2130 (1993); Ybarra v. Illinois, 444 U.S. 85 (1979); Sibron v. New York, 392 U.S. 40 (1968); Terry v. Ohio, 392 U.S. 1 (1968).
[104] *See* Ozenna v. State, 619 P.2d 477, 479 (Alaska 1980); People v. Scott, 546 P.2d 327, 333 (Cal. 1976) (en banc); People v. Tate, 657 P.2d 955, 958 (Colo. 1983) (en banc); State v. Dukes, 547 A.2d 10, 14 (Conn. 1988); State v. Ortiz, 683 P.2d 822, 825 (Haw. 1984); State v. Post, 573 P.2d 153, 155 (Idaho 1978); People v. Mitchell, 650 N.E.2d 1014, 1017-20 (Ill. 1995); C.D.T. v. State, 653 N.E.2d 1041, 1044 (Ind. Ct. App. 1995); State v. Ruffin, 448 So. 2d 1274 (La. 1984) (dicta); People v. Nelson, 505 N.W.2d 266, 269 n.3 (Mich. 1993) (dicta); State v. Johnson, 504 S.W.2d 23, 26 (Mo. 1974); State v. Pellicci, 580 A.2d 710, 714 (N.H. 1990) (dicta); State v. Valentine, 636 A.2d 505, 508 (N.J. 1994); People v. Diaz, 612 N.E.2d 298, 300 (N.Y. 1993); State v. Andrews, 565 N.E.2d 1271, 1273 n.1 (Ohio 1991); State v. Bates, 747 P.2d 991, 993-94 (Or. 1987); State v. Tavarez, 572 A.2d 276, 278 (R.I. 1990); Davis v. State, 829 S.W.2d 218, 221 (Tex. Crim. App. 1992) (en banc); State v. Broadnax, 654 P.2d 96, 101 (Wash. 1982); State v. Hlavacek, 407 S.E.2d 375, 380 (W. Va. 1991); State v. Guy, 492 N.W.2d 311, 313 (Wis. 1992).
[105] *See* Florida v. Wells, 495 U.S. 1 (1990).
[106] *See* State v. Daniel, 589 P.2d 408, 416 (Alaska 1979); State v. Wells, 539 So. 2d 464, 469 (Fla. 1989); Wagner v. Commonwealth, 581 S.W.2d 352, 356 (Ky. 1979), *rev'd in part*, Estep v. Commonwealth, 663 S.W.2d 213 (Ky. 1983); State v. Sims, 426 So. 2d 148, 153 (La. 1983); Commonwealth v. Bishop, 523 N.E.2d 779, 780 (Mass. 1988); People v. Toohey, 475 N.W.2d 16, 24 (Mich. 1991); State v. Sawyer, 571 P.2d 1131, 1133 (Mont. 1977); State v. Mangold, 414 A.2d 1312, 1316 (N.J. 1980); State v. Greenwald, 858 P.2d 36, 38 (Nev. 1993); People v. Galak, 610 N.E.2d 362, 363 (N.Y. 1993); State v. Kunkel, 455 N.W.2d 208, 209 n.2 (N.D. 1990); Starks v. State, 696 P.2d 1041, 1042 (Okla. Crim. App. 1985); State v. Atkinson, 688 P.2d 832, 835 (Or. 1984); State v. Flittie, 425 N.W.2d 1, 4 (S.D. 1988); State

v. Lunsford, 655 S.W.2d 921, 924 (Tenn. 1983); Drinkard v. State, 584 S.W.2d 650, 654 (Tenn. 1979); Autran v. State, 887 S.W.2d 31, 38 (Tex. Crim. App. 1994) (plurality opinion); State v. Hygh, 711 P.2d 264, 267 (Utah 1985); State v. Williams, 689 P.2d 1065, 1070 (Wash. 1984); State v. Perry, 324 S.E.2d 354, 360 (W. Va. 1984); State v. Goff, 272 S.E.2d 457, 460 (W. Va. 1980).

[107] *See* United States v. Robinson, 414 U.S. 218 (1973).

[108] *See* Zehrung v. State, 569 P.2d 189, 199 (Alaska 1977); State v. Dukes, 547 A.2d 10, 22 (Conn. 1988); State v. Barrett, 701 P.2d 1277, 1280 (Haw. 1985); State v. Post, 573 P.2d 153, 155 (Idaho 1978); People v. Hoskins, 461 N.E.2d 941, 945 (Ill. 1984); State v. Breaux, 329 So. 2d 696, 698-700 (La. 1976); State v. Paris, 343 A.2d 588, 590 (Me. 1975); Commonwealth v. Madera, 521 N.E.2d 738, 740-41 (Mass. 1988); People v. Chapman, 387 N.W.2d 835, 838 (Mich. 1986); Shell v. State, 554 So. 2d 887 (Miss. 1989) (dicta); State v. Jellison, 769 P.2d 711, 712-13 (Mont. 1989); State v. Farnsworth, 497 A.2d 835, 839 (N.H. 1985); State v. Barton, 439 P.2d 719, 721-22 (N.M. 1968); State v. Caraher, 653 P.2d 942, 946 (Or. 1982); Rogers v. State, 774 S.W.2d 247, 264 (Tex. Crim. App. 1989) (en banc); State v. Lopes, 552 P.2d 120, 121 (Utah 1976); State v. Ringer, 674 P.2d 1240, 1242 (Wash. 1983); Roose v. State, 759 P.2d 478, 481 (Wyo. 1985).

[109] *See* New York v. Belton, 453 U.S. 454 (1981).

[110] *See* Stout v. State, 898 S.W.2d 457, 460 (Ark. 1995); People v. McMillon, 892 P.2d 879, 885 (Colo. 1995); State v. Waller, 612 A.2d 1189, 1192 (Conn. 1992); State v. Kopsa, 887 P.2d 57, 64 (Idaho Ct. App. 1994); State v. Hernandez, 410 So. 2d 1381, 1385 (La. 1982); People v. Ragland, 385 N.W.2d 772, 774 (Mich. Ct. App. 1986); State v. Greenwald, 858 P.2d 36 (Nev. 1993); State v. Sterndale, 656 A.2d 409, 411-12 (N.H. 1995); State v. Pierce, 642 A.2d 947, 959 (N.J. 1994); People v. Blasich, 541 N.E.2d 40, 43 (N.Y. 1989) (dicta); State v. Kunkel, 455 N.W.2d 208, 209 n.2 (N.D. 1990); State v. Hensel, 417 N.W.2d 849 (N.D. 1988); State v. Brown, 588 N.E.2d 113, 115 (Ohio 1992); State v. Kirsch, 686 P.2d 446, 448 (Or. Ct. App. 1984); State v. Rice, 327 N.W.2d 128, 131 (S.D. 1982); Osban v. State, 726 S.W.2d 107, 111 (Tex. Crim. App. 1986); State *ex rel.* K.K.C., 636 P.2d 1044, 1046-47 (Utah 1981); State v. Stroud, 720 P.2d 436, 440 (Wash. 1986); State v. Flint, 301 S.E.2d 765, 772 (W. Va. 1983); State v. Fry, 388 N.W.2d 565 (Wis. 1986) (construing a Wisconsin statute).

[111] *See* United States v. Ross, 456 U.S. 798 (1982); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

[112] *See* Wickliffe v. State, 527 S.W.2d 640, 641 (Ark. 1975) (dicta); People v. Edwards, 836 P.2d 468, 472 (Colo. 1992) (en banc); State v. Miller, 630 A.2d 1315, 1322 (Conn. 1993); State v. Dukes, 547 A.2d 10, 22 (Conn. 1988); Brown v. State, 653 N.E.2d 77, 79 (Ind. 1995); Murrell v. State, 421 N.E.2d 638, 640 (Ind. 1981); State v. Olsen, 293 N.W.2d 216, 219 (Iowa 1980); State *ex rel.* Love v. One 1967 Chevrolet El Camino, 799 P.2d 1043 (Kan. 1990); Estep v. Commonwealth, 663 S.W.2d 213, 215 (Ky. 1983); State v. Tatum, 466 So. 2d 29, 30-31 (La. 1985); State v. Bouchles, 457 A.2d 798, 801 (Me. 1983) (dicta); Commonwealth v. Moses, 557 N.E.2d 14, 19 (Mass. 1990); Commonwealth v. Cast, 556 N.E.2d 69, 76 (Mass. 1990); People v. Carr, 121 N.W.2d 449, 451 (Mich. 1963); Rooks v. State, 529 So. 2d 546, 551 (Miss. 1988); State v. Allen, 844 P.2d 105, 108 (Mont. 1992); State v. Vermeule, 453 N.W.2d 441, 442 (Neb. 1990); State v. Sterndale, 656 A.2d 409, 411-12 (N.H. 1995); State v. Young, 432 A.2d 874, 879 (N.J. 1981); People v. Belton, 432 N.E.2d 745, 745-46 (N.Y. 1982); State v. Isleib, 356 S.E.2d 573, 577 (N.C. 1987); State v. Kottenbroch, 319 N.W.2d 465, 469 (N.D. 1982); State v. Kessler, 373 N.E.2d 1252, 1255-56 (Ohio 1978); State v. Ratcliff, 642 N.E.2d 31, 34-35 (Ohio Ct. App. 1994); Hall v. State, 766 P.2d 1002, 1005 (Okla. Crim. App. 1988); State v. Kock, 725 P.2d 1285, 1287 (Or. 1986); State v. Brown, 721 P.2d 1357, 1360-62 (Or. 1986); Commonwealth v. Rosenfelt, 662 A.2d 1131, 1145 (Pa. Super. Ct. 1995); State v. Werner, 615 A.2d 1010, 1014 (R.I. 1992); State v. McTier, 215 S.E.2d 908, 912 (S.C. 1975); State v. Nollsch, 273 N.W.2d 732, 736 (S.D. 1978); Osban v. State, 726 S.W.2d 107, 113 (Tex. Crim. App. 1986) (en banc); State v. Larocco, 794 P.2d 460, 469 (Utah 1990); State v. Savva, 616 A.2d 774, 779-81 (Vt. 1992); State v. Patterson, 774 P.2d 10, 12 (Wash. 1989) (en banc); Jordan v. Holland, 324 S.E.2d 372, 378 (W. Va. 1984); State v. Tompkins, 423 N.W.2d 823, 832 (Wis. 1988); Hunter v. State, 704 P.2d 713, 715 (Wyo. 1985).

Table 1 above shows the growing effectiveness of state law as a sufficient protector of individual rights, and the rights-sensitivity of the state courts that have established these rights. Again, it must be pointed out that there is no federal constitutional mandate for replicating these rights in state law; neither the Constitution nor the Supreme Court require it. And yet 72% of the state constitutions have been construed as regulating such matters as investigative stops and brief detentions of the person. 70% limit vehicle searches pursuant to the so-called automobile exception doctrine. No fewer than one-third of the states have established state constitutional protections equal to or exceeding each of the remaining Fourth Amendment doctrines analyzed. Furthermore, state constitutionalism is a widespread phenomenon, not one limited to a mere handful of states. Every state except three—Alabama, Georgia, and Virginia—is represented in the above table, i.e., 47 of the 50 states have established or enlarged federal search and seizure rights on state constitutional grounds.[113]

How can it still be argued that the state courts are backwaters unreceptive to defendants' rights and in need of federal suzerainty? A good chunk of Fourth Amendment doctrine, or some more protective variant of it, is now a part of the state constitutional jurisprudence of most states. Moreover, the states have also rendered hundreds of state constitutional decisions on issues that implicate Fifth and Sixth Amendment and general due process rights.[114] Although there are more search and seizure cases than any others in the body of state constitutional criminal law, it is not likely that the states are more receptive to search and seizure rights with their costly exclusionary remedies than to other defendants' rights.[115] Therefore, a table of other criminal procedure issues would probably demonstrate that state constitutional law is fully developed in these areas as well.

The development of state constitutional law is not some transient phenomenon; it is a fixture on the American legal landscape and will be for the foreseeable future. Whatever the motivation for its creation—an assertion of independence by the state judiciary, promotion

[113] Only two states, Maryland and South Carolina, are listed just once; 45 states appear two or more times. It is interesting that Southern states are overrepresented among the jurisdictions that are inactive in developing state constitutional law. This probably reflects their conservatism. It should also be noted, however, that Texas and West Virginia, unlike their southern neighbors, are listed in the table numerous times (ten and seven, respectively).

[114] *See* LATZER, *supra* note 1, at §§ 4-8 for collection and analysis of these cases.

[115] There are more search and seizure cases undoubtedly because there are more searches and seizures than other events of constitutional significance (most of which occur in the context of a trial or some other courtroom proceeding) in the criminal justice process.

of a rights-expansive agenda, development of traditional state legal institutions, a desire to improve upon Supreme Court doctrines, or all of the above—state constitutionalism exists independent of the federal caselaw. It provides its own basis for defendants' rights, a basis created and controlled by the state courts. The very existence of this body of law is compelling proof that the state bench—on its own and without Supreme Court dictate—is sensitive to the rights of the accused.

But if more evidence were needed, the fact that state courts have established broader-than-federal rights is surely conclusive. Here we have an instance where the state bench is literally repudiating the Supreme Court in order to expand rights. What more need be said about the state courts' commitment to individual rights? So much has been written about this phenomenon that it need only be treated briefly here. Table 2 below presents the same search and seizure rights set forth in Table 1, except that the right-hand column lists only states that have established *broader* rights.

TABLE 2
STATE CONSTITUTIONAL RESTRICTIONS ON SELECTED LAW ENFORCEMENT ACTIVITIES THAT ARE BROADER THAN FOURTH AMENDMENT LIMITATIONS

Activity Subject to Fourth Amendment Limitations	*Number of States with Broader State Constitutional Limitations*
1. Home entries to effect felony arrests[116]	Zero (0% of states)
2. Seizures of items in "plain view"[117]	Seven[118] (14% of states)
3. Searches pursuant to consent[119]	Two[120] (4% of states)
4. "Seizures" of the person[121]	Four[122] (8% of states)
5. "Stops" and brief detentions of the person[123]	Three[124] (6% of states)
6. "Stops" of vehicles (non-roadblock)[125]	Zero (0% of states)
7. Protective (weapons) searches of the person[126]	One[127] (2% of states)
8. Vehicle impoundment and inventory[128]	Nine[129] (18% of states)
9. Searches of persons incident to arrest[130]	Seven[131] (14% of states)
10. Vehicle searches incident to arrest[132]	Nine[133] (18% of states)
11. Vehicle searches pursuant to the "automobile exception"[134]	Eleven[135] (22% of states)

[116] *See* Payton v. New York, 445 U.S. 573 (1980).

[117] *See* Horton v. California, 496 U.S. 128 (1990); Arizona v. Hicks, 480 U.S. 321 (1987); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[118] *See* Reeves v. State, 599 P.2d 727, 734 (Alaska 1979); State v. Stachler, 570 P.2d 1323 (Haw. 1977); State v. Murray, 598 A.2d 206, 208 (N.H. 1991); State v. Ball, 471 A.2d 347, 350-52 (N.H. 1983); State v. Bruzzese, 463 A.2d 320, 323-24 (N.J. 1983); Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991); State v. Austin, 584 P.2d 853, 855 (Utah 1978); State v. Bell, 737 P.2d 254, 256-57 (Wash. 1987).

Note that most of the above cases predate Horton v. California, 496 U.S. 128 (1990), which cut back on federal rights against plain view seizures. Many state courts have not had the opportunity to rule on the plain view issue post-*Horton*.

[119] *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[120] *See* State v. Kearns, 867 P.2d 903 (Haw. 1994) (dicta); State v. Johnson, 346 A.2d 66, 67-68 (N.J. 1975).

[121] *See* California v. Hodari D., 499 U.S. 621 (1991); Michigan v. Chesternut, 486 U.S. 567 (1988); United States v. Mendenhall, 446 U.S. 544 (1980) (plurality opinion).

[122] *See* State v. Kearns, 867 P.2d 903, 908-09 (Haw. 1994); State v. Quino, 840 P.2d 358, 363 (Haw. 1992); State v. Tucker, 626 So. 2d 707, 711-12 (La. 1993); *In re* E.D.J., 502 N.W.2d 779, 781 (Minn. 1993); State v. Tucker, 642 A.2d 401, 405 (N.J. 1994).

[123] *See* Alabama v. White, 496 U.S. 325 (1990); Terry v. Ohio, 392 U.S. 1 (1968).

[124] *See* Commonwealth v. Lyons, 564 N.E.2d 390, 391-92 (Mass. 1990); State v. Kennison, 590 A.2d 1099, 1101 (N.H. 1991); State v. Pully, 863 S.W.2d 29, 31 (Tenn. 1993).

[125] *See* Delaware v. Prouse, 440 U.S. 648 (1979).

[126] *See* Minnesota v. Dickerson, 113 S. Ct. 2130 (1993); Ybarra v. Illinois, 444 U.S. 85 (1979); Sibron v. New York, 392 U.S. 40 (1968); Terry v. Ohio, 392 U.S. 1 (1968).

[127] *See* People v. Diaz, 612 N.E.2d 298, 301 (N.Y. 1993) (rejecting "plain touch" exception to the warrant requirement).

[128] *See* Florida v. Wells, 495 U.S. 1 (1990).

[129] *See* State v. Daniel, 589 P.2d 408, 416 (Alaska 1979); Wagner v. Commonwealth, 581 S.W.2d 352, 356 (Ky. 1979), *rev'd in part*, Estep v. Commonwealth, 663 S.W.2d 213 (Ky. 1983); State v. Sims, 426 So. 2d 148, 153 (La. 1983); State v. Sawyer, 571 P.2d 1131, 1133 (Mont. 1977); State v. Mangold, 414 A.2d 1312, 1316 (N.J. 1980); State v. Lunsford, 655 S.W.2d 921, 924 (Tenn. 1983); Drinkard v. State, 584 S.W.2d 650, 652-53 (Tenn. 1979); Autran v. State, 887 S.W.2d 31, 37-38 (Tex. Crim. App. 1994) (plurality opinion); State v. Williams, 689 P.2d 1065 (Wash. 1984); State v. Perry, 324 S.E.2d 354, 357-58 (W. Va. 1984); State v. Goff, 272 S.E.2d 457, 460 (W. Va. 1980).

[130] *See* United States v. Robinson, 414 U.S. 218 (1973).

[131] *See* Zehrung v. State, 569 P.2d 189, 199 (Alaska 1977); State v. Dukes, 547 A.2d 10, 18 (Conn. 1988); State v. Barrett, 701 P.2d 1277, 1281 (Haw. 1985); Commonwealth v. Madera, 521 N.E.2d 738, 740-41 (Mass. 1988); People v. Gokey, 457 N.E.2d 723 (N.Y. 1983); State v. Caraher, 653 P.2d 942, 948 (Or. 1982); State v. Ringer, 674 P.2d 1240, 1242-47 (Wash. 1983).

[132] *See* New York v. Belton, 453 U.S. 454 (1981).

[133] *See* State v. Hernandez, 410 So. 2d 1381, 1385 (La. 1982); State v. Sterndale, 656 A.2d 409, 411-12 (N.H. 1995); State v. Pierce, 642 A.2d 947, 959-60 (N.J. 1994); People v. Blasich, 541 N.E.2d 40 (N.Y. 1989) (dicta); People v. Gokey, 457 N.E.2d 723 (N.Y. 1983); State v. Brown, 588 N.E.2d 113, 115 (Ohio 1992); State v. Kirsch, 686 P.2d 446 (Or. 1984); State v. Stroud, 720 P.2d 436, 440 (Wash. 1986).

[134] *See* United States v. Ross, 456 U.S. 798 (1982); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

[135] *See* State v. Miller, 630 A.2d 1315 (Conn. 1993); State v. Dukes, 547 A.2d 10 (Conn. 1988); State v. Ritte, 710 P.2d 1197 (Haw. 1985); Brown v. State, 653 N.E.2d 77 (Ind. 1995); State v. Greenwald, 858 P.2d 36 (Nev. 1993); State v. Sterndale, 656 A.2d 409 (N.H. 1995); State v. Young, 432 A.2d 874 (N.J. 1981); People v. Belton, 432 N.E.2d 745 (N.Y. 1982); State v. Kock, 725 P.2d 1285 (Or. 1986); State v. Brown, 721 P.2d 1357 (Or. 1986) (in banc); Commonwealth v. Rosenfelt, 662 A.2d 1131 (Pa. Super. Ct. 1995); State v. Larocco, 794 P.2d 460 (Utah 1990); State v. Savva, 616 A.2d 774 (Vt. 1992); State v. Patterson, 774 P.2d 10 (Wash. 1989) (en banc).

Although the number of states rejecting Supreme Court doctrines on state grounds is far lower than the number adopting them (compare Table 1), the repudiations are nonetheless an impressive measure of state court devotion to individual rights. For instance, roughly one-fifth of the states have established more protection against motor vehicle searches than is afforded by the United States Constitution. Nor are the rejections limited to a few "ultraliberal" state courts; nearly half of the states are represented in Table 2.[136] Furthermore, dozens of other cases provide broader state rights in search and seizure as well as all of the other areas of criminal procedure.[137]

Whatever the theoretical limitations of state courts as protectors of individual rights, the reality is that they have matched and exceeded the United States Supreme Court. This sharply undercuts the claim that the protection of defendants' rights requires the broadest possible conception of due process. To the contrary, state constitutional law suggests the need to cut back on due process except to maintain truly fundamental rights. In Part IV of this article, I will suggest a formula by which federal procedures can be disincorporated without threatening the most basic protections of the Bill of Rights.

IV. A Standard for Disincorporation

After the incorporation decisions of the 1960s, the Supreme Court, in its post-incorporation cases, simply assumed that all of its rulings construing the incorporated provisions Bill of Rights applied to the states. To assume, however, that every Bill of Rights decision is also a due process decision is error. Justice Goldberg's contention that the states must be given no latitude lest they abridge fundamental rights[138]—i.e., that due process must impose on the states the exact same rules that the Bill of Rights demands of the federal government—makes sense only if the procedure *sub judice* is itself essential to the maintenance of some incorporated right. Only then would the failure to adopt that procedure pose a threat to one of the "fundamental liberties protected by the Constitution." But if the contrary is true—if the challenged procedure is not essential to the administration of a fundamental right—then the procedure should not be imposed on the states. To impose it anyway is to undermine the Tenth

136 Some state courts are apparently more liberal (i.e., rights-protective), as is indicated by multiple appearances in Table 2. Hawaii and New Jersey top the list of states rejecting Supreme Court doctrines; each did so six times. Washington is next with five rejections.

137 *See* Latzer, *supra* note 1, *passim* for collection and analysis of cases.

138 *See supra* note 25 and accompanying text.

Amendment.[139] There is no requirement in the Constitution that the states adopt a procedure because the Supreme Court thinks that it is useful, beneficial or helpful in enforcing a right. "Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."[140] Surely, where a basic postulate of federalism is implicated—that the states may decide for themeselves the best way to conduct their business, including that paradigm of state "business," the administration of state criminal law—a much higher standard should be met. It should have to be demonstrated, not merely assumed, that the procedure is vital to the preservation of a due process right. To contend that a procedure is essential to a Bill of Rights provision—so essential that it trumps Tenth Amendment considerations—the Court should have to show, not just that it is useful, beneficial or helpful, but that it is the most efficacious way of supporting the right, or better still, that the right could not survive in its present form without the rule in question.

Each post-incorporation case should have asked whether the challenged rule was essential to the administration of a fundamental right. Having failed to ask this essentiality question, the Court proceeded to incorporate rules reflexively, undoubtedly including procedures that are not vital to the preservation of a fundamental right. Unreflective incorporation has produced a rather sizable body of law, and in the area of criminal procedure, a virtual constitutional code for the states. Perhaps it is too late to reopen so many cases; stare decisis surely frowns upon such a massive second look.[141]

There are, however, some post-incorporation cases that are especially troublesome and virtually cry out for re-examination. *Miranda v. Arizona*[142] and *Mapp v. Ohio*[143] are the most obvious examples. In the

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[139] The Tenth Amendment, in constitutional disrepute for decades, is making something of a comeback. *See* United States v. Lopez, 115 S. Ct. 1624 (1995) (federal criminal law prohibiting the possession of firearms on school grounds exceeded congressional authority under the Commerce Clause); New York v. United States, 505 U.S. 144 (1992) (federal law requiring the states to take title to radioactive waste and be liable for all damages incurred by its delayed disposal exceeded the limits of congressional power or, alternatively, violated the Tenth Amendment); Gregory v. Ashcroft, 501 U.S. 452 (1991) (federal Age Discrimination in Employment Act does not apply to state court judges). This article treats the Tenth Amendment as a shorthand for federalism, which diffuses governmental power by assigning certain authority to the states. U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

[140] Smith v. Phillips, 455 U.S. 209, 221 (1982) (reversing grant of federal habeas corpus where prosecutorial conduct did not amount to a constitutional violation). *See supra* note 79.

[141] *See supra* note 18.

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

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

offspring of these cases, the Court announced that the *Miranda* and *Mapp* rules are not mandated by the Constitution at all, that they are a mere judicial creation, a prophylaxis for administrative convenience. Unreflectively incorporating such rules is particularly difficult to justify because the constitutional warrant for the rule is lacking. The theory of incorporation was that fundamental rights in the Bill of Rights were part of due process. Giving the broadest possible scope to the Supreme Court's authority to interpret these rights, we may add to due process many subsidiary rules that may be considered essential to the preservation of a fundamental right. But surely this demands reconsideration of those rules that are, by the Court's own admission, no part of any constitutional right. Even if it is too late to question all of the numerous post-incorporation decisions, surely it remains feasible to re-examine those decisions that have been expressly uprooted from their constitutional foundations.

Over twenty years ago, Henry P. Monaghan recognized the problem of what may be called quasiconstitutional rules, and concluded that they were within the Court's authority to develop "a constitutional common law subject to amendment, modification, or even reversal by Congress."[144] Even assuming Monaghan's answer is satisfactory insofar as the Court's authority to develop civil liberties doctrine is concerned, the Fourteenth Amendment problem remains unresolved, as he apparently recognized.

> One might adopt the view of Justice Powell that all the bag and baggage of the Bill of Rights does not apply to the states, by arguing that the common law components of the right do not necessarily carry over. Whether they do or not is a separate issue in which the value of the particular common law rule must be assessed in light of possibly countervailing federalism considerations.[145]

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[144] Monaghan, *Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975). Regarding the Fourth Amendment exclusionary rule Monaghan wrote:

> While the *Mapp* majority may have held the exclusionary rule to be an indispensable remedial aspect of the fourth amendment, the Court's decisions in the last two Terms have cut the exclusionary rule entirely free from any personal right or necessary remedy approach, thereby removing the clearest authority for imposing the rule on the states.
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> As a matter of traditional constitutional theory, the significant issue is whether the Supreme Court has the authority to mandate the exclusionary rule if the rule is not a necessary corollary of a constitutional right.

Id. at 4, 6 (footnote omitted). His concern with the *Miranda* rule was similar.

> That the *Miranda* prophylactic rule approach is "better" than the burdensome task of normal case-by-case adjudication may be conceded. The question is whether the Court has the authority to require such rules of the state courts where it is unwilling to treat the prophylactic implementing rule as a necessary dimension of an underlying constitutional right.

Id. at 22 (footnote omitted).

[145] *Id.* at 40 (footnote omitted).

In the decades since Monaghan wrote, the bag-and-baggage controversy died, the post-incorporation decisions multiplied, and *Miranda* and the exclusionary rule survived in their neither-fish-nor-fowl constitutional status. Just as significantly, the states moved apace toward the development of their own constitutional criminal procedure codes, highlighting the existence of "countervailing federalism considerations." Despite the availability of this state law alternative, and the crumbling federal constitutional foundation for *Miranda* and *Mapp*, no one seems to question the status of the post-incorporation decisions.[146]

It is not too late. Without reopening the selective incorporation debate, without stripping due process of its fundamental rights content, the Court can, and should, selectively reconsider its post-incorporation decisions. What is needed is a formula that maintains as a part of due process the fundamental rights of the Bill of Rights, yet permits the states to develop their own implementation rules. The standard suggested below would leave intact the fundamental rights test for incorporation of truly basic rights. It would not, however, pretend that every rule that facilitates the administration of a basic right is also "fundamental." Nor would it abandon every rule that is not. Unlike the bag and baggage challengers, we would ask not whether the challenged rule is itself fundamental, but whether it is *essential* to the survival of a fundamental right.

Where the Supreme Court finds that a challenged procedure is not absolutely essential to maintaining a fundamental right it should disincorporate the procedure, i.e., remove it from the Due Process Clause. If, for instance, *Miranda* is challenged, the Court should engage in a disincorporation inquiry, asking whether the *Miranda* rule is essential to the preservation of the Fifth Amendment right against compulsory self-incrimination.[147] If the answer is in the negative, *Miranda* should be reversed. Would such a reversal reignite the selective

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[146] *But cf.* Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699 (1988) (arguing that the Supreme Court should disincorporate the entire self-incrimination privilege).

[147] The possibility of a full-scale challenge may not be as remote as one might think. It has been suggested that the federal statute purporting to override *Miranda*, 18 U.S.C. § 3501, could serve as a vehicle for such litigation. Paul G. Cassell & Joseph Grano, *A Federal Statute that Overrules Miranda: A New Argument for Federal Prosecutors in Confession Cases*, 2 CRIM. PRAC. L. REP. 145 (1994) (urging federal prosecutors to rely on § 3501 when seeking to admit a confession challenged on *Miranda* grounds). However, as such a suit would implicate only federal law, it is probably a better vehicle for establishing that *Miranda* is not required by the Fifth Amendment than for establishing that it should be removed from the Fourteenth. A state version of § 3501, such as exists in Arizona, would be a better basis for a disincorporation challenge. ARIZ. REV. STAT. ANN. § 13-3988 (West 1978 and Supp. 1995).

incorporation controversy and jeopardize the decision which first established that the Fifth Amendment right was a part of due process?[148] This is not likely, because the *Miranda*-disincorporating ruling need not ask whether the self-incrimination clause is fundamental; it need only ask whether *Miranda* is essential to the preservation of that clause.

Let us make clear what is *not* required by disincorporation analysis. First, as just noted, there is no need to question the incorporation of the broad general principles of the Bill of Rights itself. This analysis does not mean that we should return to the days when the Fourth Amendment, or the right against compulsory self-incrimination, or any of the other basic postulates of the Bill of Rights were considered limits on the federal government alone. Second, in reconsidering the subsidiary procedures endorsed in the post-incorporation cases, there is no need to demonstrate that the challenged procedure is itself a fundamental right in the sense of "vital to the present-day criminal justice system." This would be an unfairly difficult standard. A subsidiary procedure is not likely to have the systemic significance of the basic general rights of the Bill of Rights. If the term "fundamental" is used in disincorporation analysis, it should be used in a different sense; it should be understood to mean "essential to the administration of a fundamental right."

Let us now consider what disincorporation analysis might look like. If a hitherto incorporated procedure is challenged, the Court should first examine the relationship of the procedure in question to the basic right it is supposed to protect. This requires analysis of the meaning and purpose of the basic right. It also demands an empirical and normative assessment of the challenged procedure. Empirically, the question is: does the procedure actually promote the end sought? If the answer is "no," there is no point in continuing; why impose a procedure that does not serve its intended function? If the answer is "yes," a judgment must be made that the benefit in promoting the right outweighs the harm to Tenth Amendment values caused by forcing the states to adopt a uniform procedure. To answer this, the Court should ask whether the right could survive in its present form without the procedure in question. Alternatively, or additionally, it should determine whether the procedure is the most efficacious way of supporting the right, or if there are effective alternative enforcement mechanisms available which the states, left to their own devices,

[148] Malloy v. Hogan, 378 U.S. 1, 15-17, 26 (1964). For an argument that *Malloy* erred and that the self-incrimination clause should not have been incorporated see Dripps, *supra* note 146, at 728-29.

might develop. Relevant here is evidence that the states have developed protection for the right on the basis of independent state law.

If the Court were to signal that it is ready to disincorporate, new kinds of cases would surely seek a place on its dockets. Sensing that they might be freed from the due process yoke, states would begin to develop alternative enforcement mechanisms for criminal procedure rights. These would be challenged by defendants; ultimately, and appropriately, they would be subject to Supreme Court review. A slightly varied disincorporation analysis is appropriate in such cases. The initial question is the same: does the procedure actually promote the basic right it is supposed to protect? If so, in light of the need to protect the basic right as well as Tenth Amendment values, is the procedure sufficiently effective to obviate the need for a uniform national rule? An affirmative answer requires approval of the procedure.

Only this kind of analysis or something like it will give proper consideration and respect to the function of the states in the federal system. This is not a call for a watering down of the Bill of Rights. To the contrary, it is a reaffirmation that those rights must be nationally honored. It is a demand that the Tenth Amendment—also a pillar of the Bill of Rights—be honored too, by allowing the states more flexibility in administering those rights.

Nor would disincorporation radically restructure the role of the Supreme Court. The Court will retain its authority to broadly construe constitutional provisions, although it will have to think twice before applying every procedure to the states. Furthermore, it will remain the ultimate arbiter of the suitability of state procedures as guarantors of individual rights. Under the regime of disincorporation, the Supreme Court will stand ready to step in should a state fail in its obligations to develop a suitable apparatus to protect fundamental rights. It can use any number of potent remedies, from relief in a single case to sweeping injunctive relief aimed at an entire state.[149] However, due process should be considered satisfied where a state can demonstrate that it has a bona fide workable mechanism for enforcing federal rights. This will insure that the states meet their obligations to give force to the Bill of Rights without compelling them to adopt inflexible uniform procedures.

149 I am aware that federal injunctive relief for alleged state official misconduct is disfavored, *e.g.*, Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983) (barring injunction against chokeholds by police), but it remains available where other remedies are ineffective. Lankford v. Gelston, 364 F.2d 197, 202-03 (4th Cir. 1966) (upholding injunction against home searches by police). Why not for a state failure to develop policies to protect basic federal constitutional rights? From the standpoint of federalism it is far better for the Court to come down hard on a few states than to confine them all in a constitutional straitjacket.

As indicated earlier, there are two procedures that cry out for disincorporation analysis: the *Miranda* rule and the Fourth Amendment exclusionary rule. The Supreme Court has expressly said that neither are constitutional rights, virtually inviting questions about their legitimacy. Both have been the subject of intense attack by police, the Justice Department, various scholars and practitioners.[150] They have likewise been the subjects of intense scrutiny in the state courts.[151] *Miranda* obviously, and *Mapp* colorably, are products of the post-incorporation era.[152] Are the *Miranda* rule and the Fourth Amendment exclusionary rule essential to the maintenance of fundamental constitutional rights? If not, they should be disincorporated. We first apply disincorporation analysis to *Miranda*.

A. DISINCORPORATING *MIRANDA*

From the 1930s, when the notorious *Brown v. Mississippi*[153] case arose, to the 1960s, when *Miranda v. Arizona*[154] radically changed the law, confessions in state courts had to meet the test of "voluntariness" pursuant to the Fourteenth Amendment Due Process Clause. The privilege against self-incrimination applied to proceedings (such as trials) in which the individual was subject to legal compulsion to testify, not to police interrogation.[155] In 1964, in the face of decades of precedent to the contrary, *Malloy v. Hogan*[156] established that the Fifth Amendment Self-Incrimination Clause applied to the states, because

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150 Regarding *Miranda*, see the critique presented in and the numerous authorities cited by JOSEPH D. GRANO, CONFESSIONS, TRUTH AND THE LAW *passim* (1993). For attacks on the exclusionary rule *see, e.g.*, STEVEN R. SCHLESINGER, EXCLUSIONARY INJUSTICE (1977); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); Malcolm Richard Wilkey, *A Call for Alternatives to the Exclusionary Rule*, 62 JUDICATURE 351 (1979); Malcolm Richard Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214 (1978).

151 LATZER, *supra* note 1, at ch. 2 (analyzing state constitutional cases involving exclusionary rules).

152 *Miranda* is a typical post-incorporation ruling in that the self-incrimination clause upon which it purported to rest had already been incorporated, Malloy v. Hogan, 378 U.S. 1 (1964); there was no significant Tenth Amendment analysis; and the Court assumed that its rule was applicable to the states. *Mapp* is less obviously a post-incorporation case because the *Mapp* Court did not take the incorporation issue for granted. However, the core of the Fourth Amendment right had already been applied to the states in *Wolf v. Colorado*, 338 U.S. 25 (1949), and reconsideration of *Mapp* would not jeopardize *Wolf*.

153 Brown v. Mississippi, 297 U.S. 278 (1936) (beating and hanging a suspect to obtain a confession violates due process).

154 *Miranda*, 384 U.S. 436.

155 "Why had the privilege against self-incrimination been excluded from the stationhouse all these years? The legal reasoning was that compulsion to testify meant *legal* compulsion." YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 471 (8th ed. 1994).

156 *Malloy*, 378 U.S. at 1 (witness in state gambling inquiry had Fifth and Fourteenth Amendment right to refuse to answer questions).

"the accusatorial system has become a fundamental part of the fabric of our society."[157] *Malloy* also declared that the states were bound by the same self-incrimination standard as the federal government, and that this standard applied to confessions, not just to trials. Legal scholars—even *Miranda's* best friends—agree that the application of the Fifth Amendment to police interrogations was virtually unprecedented in the provision's history.[158]

Two years after *Malloy*, *Miranda v. Arizona*[159] was decided. There it was held that a confession obtained by state police from a suspect in custody was inadmissible even though there was no evidence of coercion, unless the prosecution proved that the police informed the suspect of his right to silence and to counsel, and that the suspect voluntarily waived these rights. "Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*."[160]

A strong argument has been made that *Miranda v. Arizona* is an illegitimate decision and should therefore be reversed because its rule is not required by the Fifth Amendment.[161] The Supreme Court itself has acknowledged that the *Miranda* rule is not a Fifth Amendment mandate, while continuing to enforce it, apparently on the assumption that the Court has the authority to enforce prophylactic rules that help prevent Fifth Amendment violations.[162] This article questions that assumption insofar as enforcement against the states is concerned. Whether or not the Court has Article III authority to enforce broad quasiconstitutional rules is a question separate from the meaning of Fourteenth Amendment Due Process.[163] No matter how broad

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157 *Id.* at 9 (internal quotation marks omitted).

158 "Whether or not this approach to police interrogation and confessions makes good sense it constitutes very questionable history—at least since *Brown v. Mississippi* (1936) .... In none of the dozens of federal *or* state confession cases decided by the Court in the 1930's, 1940's and 1950's had the privilege against self-incrimination, certainly not as it applied to judicial proceedings, been the basis for judgment (although it had occasionally been mentioned in an opinion)." KAMISAR ET AL., *supra* note 155, at 470.

159 *Miranda*, 384 U.S. 436.

160 Oregon v. Elstad, 470 U.S. 298, 307 (1985).

161 For a sustained assault on *Miranda* drawing that very conclusion, see GRANO, *supra* note 150, *passim*. For a similar view see OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 1, THE LAW OF PRE-TRIAL INTERROGATION, 1, 42 (1986), *reprinted in* 22 U. MICH. J.L. REF. 437 (1989).

162 *E.g.*, New York v. Quarles, 467 U.S. 649, 654 (1984) ("The prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.' " (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974))).

163 *See supra* notes 144-45 and accompanying text. Grano seems to argue that all prophy-

the Court's interpretational authority, there is no warrant for imposing upon the states rules that are not demanded by due process. The issue considered here is whether or not the *Miranda* rule is properly a part of due process.

This requires disincorporation analysis, which begins with an examination of the meaning and purpose of the basic right, in this case, the Fifth Amendment Self-Incrimination Clause. The analysis continues with an empirical and normative assessment of the *Miranda* rule: does it in fact promote Fifth Amendment ends, and if so, does that benefit outweigh the harm to Tenth Amendment values caused by forcing the states to adopt a uniform procedure? In balancing the Fifth Amendment benefit against the Tenth Amendment harm we ask whether the self-incrimination right could survive in its present form without a national *Miranda* rule. In addition, we inquire whether *Miranda* offers the most efficacious way of supporting the right, and whether effective alternative enforcement mechanisms are available. We also look at evidence that the states have developed protection against compulsory self-incrimination on the basis of independent state law.

The Fifth Amendment says, "nor shall [any person] be compelled in any Criminal Case to be a witness against himself."[164] Although this provision, prior to the 1960s, protected against legal compulsion to give evidence against oneself at trial, *Miranda* applied it to police interrogations. It did so out of a belief that compulsion is "inherent" in incommunicado interrogation, or at least potentially so.[165] The *Mi-*

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lactic rules, like the one created by *Miranda*, are illegitimate exercises of Supreme Court's Article III authority. (U.S. CONST. art. III §§ 1, 2 says in part: "The judicial Power of the United States shall be vested in one supreme Court. . . . The judicial Power shall extend to all cases . . . arising under this Constitution.") He defines prophylactic rules as those which "may be violated without violating the Constitution." GRANO, *supra* note 150, at 175. This has drawn the criticism that constitutional law is filled with such rules, in, e.g., First Amendment and equal protection jurisprudence, and that Grano's position threatens whole bodies of constitutional law as well as the Court's authority to make such law. David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

Recast as a due process question, the issue is not whether the Court has the authority to enforce prophylactic rules generally, but whether any given rule is enforceable against the states as a matter of due process. Thus, the question is whether a prophylactic rule is essential to the enforcement of a Bill of Rights provision. Although prophylactic rules, by definition, are not required by the Bill of Rights, and will not usually establish fundamental rights, it is conceivable that some prophylactic rules might satisfy the essentiality criterion and therefore merit incorporation into Due Process. Disincorporation thus sidesteps the question of the Court's general authority to establish prophylactic rules as a matter of constitutional interpretation. Assuming such authority, disincorporation provides a formula for determining the applicability of prophylactic rules to the states.

164 U.S. CONST. amend. V.

165 *Miranda*, 384 U.S. at 457-58. "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of per-

randa Court described the general purpose of the self-incrimination privilege in these terms:

> We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values . . . . All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will."[166]

The main concern of the provision is to protect both individual autonomy and the adversary system by preventing government from using improper means to obtain from the accused incriminating statements to be offered as evidence against him at his trial. It should be noted that there is considerable disagreement as to what constitutes "improper means" in the interrogation context sufficient to implicate the Fifth Amendment. Whereas all agree that the conditions that make a confession "involuntary" (e.g., violence or threats of violence, humiliation, protracted questioning, etc.) clearly violate the Fifth Amendment, some would go way beyond (or below) the involuntariness standard and hold that *all* custodial questioning by the police is compulsion.[167] As noted above,[168] the *Miranda* Court itself was ambivalent on the matter, suggesting sometimes that police questioning is inherently compelling, and other times that it is only potentially so. However, the post-*Miranda* Court has resolved the issue by casting the *Miranda* rule as establishing no more than a *presumption* of compulsion, thus rejecting the inherent compulsion view. "Failure to administer *Miranda* warnings creates a presumption of compulsion.

suasion described above cannot be otherwise than under compulsion to speak." *Id.* at 461. However, the *Miranda* opinion also said that the confessions actually obtained might not have been "involuntary in traditional terms," but they created a "potentiality for compulsion." *Id.* at 457.

166 *Id.* at 460 (citations omitted).

167 *Compare* Steven J. Schulhofer, *Reconsidering Miranda,* 54 U. CHI. L. REV. 435, 446 (1987) ("Custodial interrogation brings psychological pressure to bear for the purpose of overcoming the suspect's unwillingness to talk, and it is therefore inherently compelling within the meaning of the fifth amendment.") *with* GRANO, *supra* note 150, at 135 ("But to repeat, unless the Fifth Amendment is read as a prohibition on all police questioning, custodial and noncustodial, it can be read in the context of police interrogation only as providing protection against involuntariness or coercion.").

168 *See supra* note 165.

Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*."[169] Clearly, custodial interrogation cannot be both inherently compelling and voluntary within the meaning of the Fifth Amendment. Therefore, it may be concluded that the main point of the Fifth Amendment, as interpreted since the 1960s, is that self-incrimination induced by improper police tactics (and not mere custodial interrogation) does not comport with the dignity and integrity of the individual which the amendment protects.

Is there empirical proof that the *Miranda* requirements do indeed protect the individual against self-incrimination induced by improper police tactics? The empirical studies concerning *Miranda* focus on its effects on police, and only incidentally on the consequences for the Fifth Amendment rights of suspects.[170] Most of these studies conclude that the impact of *Miranda* on law enforcement itself has been minimal in that the number of confessions admitted and convictions obtained did not diminish.[171] Less is known regarding *Miranda*'s impact on defendants' rights. The studies showing minimal impact on law enforcement can be read to suggest that police are obtaining statements despite compliance with *Miranda*, but they also can be interpreted to mean that *Miranda* is ineffective at preventing improperly pressured waivers. The latter explanation supports the conclusion that *Miranda* has not protected defendants' rights. By the same token, if, as a revisionist interpretation of the *Miranda* studies suggests,[172] *Miranda* has discouraged confessions, that can also mean either that *Miranda* has reduced (or helped reduce) abusive police practices that improperly induce confessions, or, that *Miranda* has created a climate in which suspects are dissuaded from confessing even in the absence of abusive police misconduct.

Certainly one has the impression that there are far fewer police

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169 Oregon v. Elstad, 470 U.S. 298, 307 (1985).

170 See the studies cited in KAMISAR ET AL., *supra* note 155, at 599, and summarized in LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 180-81, 403-05 (1983). For an exhaustive recent reevaluation of the *Miranda* studies see Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U.L. REV. 387 (1996).

171 Practitioner surveys plus earlier empirical studies were said to serve as a "strong repudiation of the claim that law enforcement would be greatly improved if *Miranda* were repealed or overruled." SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOC'Y, AM. BAR ASS'N, CRIMINAL JUSTICE IN CRISIS 28 (1988). For a contrary view of *Miranda*'s impact on law enforcement see Cassell, *supra* note 170 at 417 (concluding that the empirical studies of *Miranda* show that police failed to obtain confessions in one out of every six cases (16%) due to *Miranda*, resulting in lost cases against 3.8% of all questioned suspects). Cassell's conclusions are challenged in Steven J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U.L. REV. 500 (1996).

172 Cassell, *supra* note 170.

abuses since the 1960s,[173] but how much of this (assuming it is true) is due to *Miranda*, and how much to improved police training, intensified media scrutiny of police, and a general societal increase in respect for individual rights that is shared by police officers, is difficult to say. The commentators are divided on the credit due *Miranda* as opposed to other factors.[174] Of course, it is possible that *Miranda*, and even the public debate surrounding *Miranda*, may have indirectly protected defendants by contributing to the changes in police training, media scrutiny, and respect for individual rights, but this effect is speculative and too indirect to credit here.

Although the empirical evidence is inconclusive as to which effect predominates, it seems fair to conclude that *Miranda* has, in different cases, underprotected, protected and overprotected defendants. It has underprotected by providing no way to detect or remedy police abuses other than the failure to comply with *Miranda*'s strictures. *Miranda* provides an exclusionary sanction for a violation of *Miranda*'s rules, but *Miranda* can do nothing to prevent police from abusing a suspect and lying about it. Indeed, police could lie about the administration of *Miranda* rights as well.[175] In some cases of course, *Miranda* has done what it was intended to do by alerting suspects directly about their rights, and it has probably contributed to the general sensitizing of police to the rights of suspects. But it has also overprotected defendants by substituting the rigid formalism of compliance with *Miranda* rules for the real Fifth Amendment question—whether the suspect was compelled to confess.

No one can deny that *Miranda*'s overprotection has resulted in the suppression of voluntary statements. To offer just one illustration, consider the aforementioned *Oregon v. Elstad.*[176] In that case, two police officers went to an eighteen-year-old suspect's home with a warrant for his arrest for burglarizing a neighboring residence. They were met by defendant's mother who led them to Elstad's bedroom, where he lay on his bed in his shorts listening to a stereo. The officers

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[173] There is some weak empirical evidence of a reduction in police abuses: the number of Supreme Court cases holding that custodial interrogations produced involuntary statements has declined. One analyst found twenty-three such reversals in the quarter century preceding *Miranda*, but only two in the same time period after *Miranda*. Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 745 (1992).

[174] *Compare* Gerald M. Caplan, *Miranda Revisited*, 93 YALE L.J. 1375, 1382-83 (1984) (*Miranda* curbed police excesses) *with* Cassell, *supra* note 170, at 473-78 (coerced confessions declined before *Miranda*). Cassell's view is supported by GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

[175] As Justice Harlan observed: "Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers." *Miranda*, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

[176] 470 U.S. 298 (1985).

asked him to dress and accompany them to the livingroom. There, one of the officers testified, he asked Elstad whether he knew why the police had come. When Elstad said that he had no idea, the officer then asked if he knew someone named Gross, the burglary victim. Elstad replied that he did and also that he heard there was a robbery at the Gross house. "And at that point," the officer testified, "I told Mr. Elstad that I felt he was involved in that, and he looked at me and stated, 'Yes, I was there.'"[177]

Elstad went on to give a warned statement at the police station, fully admitting his involvement in the crime, and the Supreme Court held that the second confession was not the tainted fruit of the improper livingroom interrogation. But the important point for our purposes is that the livingroom statement, while not in compliance with *Miranda* (because no warnings were read even though the suspect was in custody and questioned) was not a compelled statement in violation of the Fifth Amendment.[178] Whereas some in-home interrogation may be compelling,[179] surely the few questions put to young Elstad were not, unless one takes the view—rejected by the *Elstad* Court—that all custodial interrogation compels. Nevertheless, pursuant to *Miranda,* Elstad's first statement would have to be suppressed.

Even where we cannot say for sure that *Miranda* overprotects by mandating the suppression of a perfectly voluntary statement it is obvious that it diverts the judiciary from the real Fifth Amendment issue. One of the most vivid examples of *Miranda's* excessive formalism is *California v. Prysock.*[180] There, although the Supreme Court ultimately held the confession admissible, its decision did not even consider the facts that the juvenile suspect had been warned four times, that the warnings went beyond *Miranda's* requirements, that the suspect's parents were present for both the warnings and the interrogation, and that the police recorded the interview. Indeed, three Justices would have suppressed the confession anyway because the fourth *Miranda* warning was not clear enough![181]

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177 *Id.* at 301.

178 "It is also beyond dispute that respondent's earlier remark was voluntary, within the meaning of the Fifth Amendment. Neither the environment nor the manner of either 'interrogation' was coercive." *Id.* at 315.

179 *See, e.g.,* Orozco v. Texas, 394 U.S. 324 (1969) (questioning by four officers in defendant's bedroom at 4:00 a.m. created potentiality for compulsion equal to police station interrogation).

180 453 U.S. 355 (1981) (per curiam) (where juvenile was told he has "the right to have a lawyer appointed to represent you at no cost to yourself," the confession was admissible because the warnings adequately conveyed to the suspect his rights). *Prysock* was singled out, along with other examples of *Miranda's* formalism, by GRANO, *supra* note 150, at 207-15.

181 Justice Stevens, joined by Justices Brennan and Marshall, dissented on the ground

Not only can we not say how often *Miranda* overprotects defendants, or diverts the judiciary from true Fifth Amendment questions, we also cannot say how frequenly it secures Fifth Amendment rights or, for that matter, fails to protect them at all. Disincorporation analysis requires that we balance this uncertain or mixed benefit against the harm to Tenth Amendment values caused by mandating a uniform national procedure. To the extent that *Miranda* overprotects (and underprotects) it is obviously not essential to the survival of the self-incrimination right. On several occasions, including the previously discussed *Elstad* case, the Supreme Court refused to enforce *Miranda*'s exclusionary rule, apparently assuming that it was not vital to the protection of Fifth Amendment values. The Court has held that *Miranda*—as opposed to the self-incrimination right itself—was less important than protecting against perjury by defendants,[182] admitting third party testimony,[183] admitting the fruits of a voluntary confession,[184] or protecting the public safety.[185] In each of these cases there was a failure to comply with *Miranda,* and in each the Court was untroubled because the self-incrimination right was not jeopardized.

New York v. Quarles[186] is an especially good illustration of the Court finding that *Miranda*'s "prophylactic rule" was simply too costly, thus implying that *Miranda* could be relaxed without jeopardizing Fifth Amendment values. In *Quarles,* the Court refused to suppress the direct product of unwarned custodial questioning—the suspect's response—when, reduced to custody in a supermarket, he was asked the location of his gun. The Court established an exception to *Miranda* in cases of questioning for the public safety, declaring that "absent actual coercion by the officer, there is no constitutional imperative requiring exclusion of the evidence that results from police inquiry of this kind."[187] In short, an actual Fifth Amendment violation would still require suppression; a mere *Miranda* violation does not. Obviously, the *Quarles* Court thought that *Miranda* was not essential to the maintenance of Fifth Amendment values.

that the warning was ambiguous on its face because it referred to the right to have a lawyer "appointed," which could have been understood as an offer of trial counsel, not counsel at interrogation. *Prysock,* 453 U.S. at 362-66.

[182] Harris v. New York, 401 U.S. 222 (1971) (statements obtained in violation of *Miranda* may be used to impeach the defendant if he testifies).

[183] Michigan v. Tucker, 417 U.S. 433 (1974) (admitting the testimony of a witness whose identity was learned through interrogation in violation of *Miranda*).

[184] *Elstad,* 470 U.S. 298 (1985) (admitting defendant's second confession, made shortly after his initial unwarned but voluntary statement).

[185] New York v. Quarles, 467 U.S. 649 (1984) (*Miranda* rule is not applicable to answers to question in a situation posing a threat to public safety).

[186] *Id.*

[187] *Id.* at 658 n.7.

These cases indicate that the Supreme Court thinks that the modern self-incrimination right could survive without *Miranda.* Additional support for this conclusion is found in the availability of effective alternatives. First, the traditional due process/involuntary confession test remains in force, as would Supreme Court review of coerced confessions. The Fifth Amendment Self-Incrimination Clause would still be a requisite of Due Process.[188] Absent a general reversion by police departments to brutal methods of yore—highly unlikely in the face of improved police training, elevated police sensitivity, and media alertness—Supreme Court review of the most egregious cases would probably be sufficient to protect the Fifth Amendment.

But Supreme Court review would not be the only or even the principal safeguard. The state courts, with their proven vigilance for defendants' rights, would, in the event of the disincorporation of *Miranda,* be the first line of defense, and an extremely effective one. As proof, consider current state constitutional law. As matters now stand, the states, to an extent that may be surprising, have replicated *Miranda* on state constitutional grounds. In a number of instances they have exceeded *Miranda*'s requirements. None of this is demanded by due process, not even the state constitutional cloning of *Miranda* rights, as the Fourteenth Amendment demands no particular interpretation of state constitutions.[189] The state commitment to *Miranda*—and beyond—is a matter of free choice for the state courts, and a mark of their devotion to defendants' self-incrimination rights.

Under present day state constitutional law only two states deny that they have state constitutional *Miranda* rules, and one of them has, nevertheless, broadened *Miranda* rights as a matter of state common law.[190] By contrast, six states have expressly declared that the equivalent of *Miranda* has independent significance under their state constitutional self-incrimination provisions.[191] A seventh, Lousiana,

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188 Malloy v. Hogan, 378 U.S. 1 (1964).

189 Due Process makes certain rights incumbent upon the states. The Supremacy Clause prohibits the states from enforcing less-protective state law where more-protective due process rights (or other federal rights) are available. Less-protective state law may exist; it simply may not be enforced. *See supra* notes 2, 9.

190 State v. Bleyl, 435 A.2d 1349, 1357-58 (Me. 1981) ("[T]his Court has never decided that the Maine Constitution requires *Miranda* warnings to be administered to a person undergoing custodial interrogation under penalty of exclusion of the evidence if they are not." Commonwealth v. Snyder, 597 N.E.2d 1363, 1368 (Mass. 1992) ("We have not adopted *Miranda* or some similar warnings as a means of protecting State constitutional rights." Commonwealth v. Smith, 593 N.E.2d 1288, 1295 (Mass. 1992) (rejecting, as a matter of common law, the rule of Oregon v. Elstad, 470 U.S. 298 (1985)).

191 State v. Jones, 534 A.2d 1199 (Conn. 1987); Traylor v. State, 596 So. 2d 957 (Fla. 1992); State v. Santiago, 492 P.2d 657 (Haw. 1971); Abram v. State, 606 So. 2d 1015 (Miss. 1992); State v. Magee, 744 P.2d 250 (Or. 1987) (per curiam); State v. Brunelle, 534 A.2d

has even adopted a constitutional provision which explicitly provides for postarrest warnings.[192] Beyond these seven states, there are a great many states—twenty-two, to date—that have adopted or expanded on state constitutional grounds various rules established by *Miranda* or its progeny, thus implicitly signaling state constitutional approval of the *Miranda* concept.[193] Taken together, twenty-nine states—58%—provide state constitutional protections akin to that established by *Miranda*. Perhaps ironically, in light of the assaults on the federal rule, *Miranda* is alive and well in state law. Were the Supreme Court to disincorporate *Miranda* most of the states would have in place the

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198 (Vt. 1987).

192 LA. CONST. art. I, § 13 provides in part:

> When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel.

See also In re Dino, 359 So. 2d 586, 589 (La. 1978) (stating that this provision enhanced and incorporated the prophylactic rules of *Miranda*).

193 Stephan v. State, 711 P.2d 1156, 1160 (Alaska 1985) (state due process requires the recording of custodial interrogations); State v. Mauro, 766 P.2d 59, 53 (Ariz. 1988) (adopting for the state constitution a definition of interrogation similar to the federal); People v. Pettingill, 578 P.2d 108, 121 (Cal. 1978) (restricting reinterrogation under the state constitution); State v. Lowe, 616 P.2d 118, 122 (Colo. 1980) (adopting for the state constitution the federal definition of interrogation); Hammond v. State, 569 A.2d 81, 93-94 (Del. 1989) (implying that custodial interrogation requires warnings under the state constitution); People v. Perry, 590 N.E.2d 454, 455-456 (Ill. 1992) (establishing pursuant to the state constitution the doctrine of McNeil v. Wisconsin, 501 U.S. 171 (1991)); Brewer v. State, 646 N.E.2d 1382, 1385 (Ind. 1995) (adopting a higher standard of proof than federal law demands for waiver of *Miranda* rights); State v. Mease, 842 S.W.2d 98, 107 (Mo. 1992) (adopting for the state constitution the rule of Edwards v. Arizona, 451 U.S. 477 (1981)); State v. Johnson, 719 P.2d 1248, 1255 (Mont. 1986) (enlarging on state constitutional grounds the federal rule for asserting the right to counsel); Holyfield v. State, 711 P.2d 834, 841 (Nev. 1985) (adopting for the state constitution the federal definition of interrogation); State v. Cote, 493 A.2d 1170, 1182 (N.H. 1985) (error to permit police to testify to defendant's post-*Miranda* silence); State v. Martin, 686 P.2d 937, 942 (N.M. 1984) (barring impeachment by defendant's post-*Miranda* silence); People v. Cunningham, 400 N.E.2d 360, 361 (N.Y. 1980) (state constitution bars custodial defendant's waiver of right to counsel after previous assertion of right); State v. Hoyle, 382 S.E.2d 752, 754 (N.C. 1989) (barring impeachment by defendant's post-*Miranda* silence); State v. Roberts, 513 N.E.2d 720, 725 (Ohio 1987) (requiring probation officer to read warnings to in-custody probationer); Battenfield v. State, 816 P.2d 555, 561-562 (Okla. Crim. App. 1991) (implying that there is a state constitutional test for interrogation, a prerequisite for warnings); Commonwealth v. Holcomb, 498 A.2d 833, 841 (Pa. 1985) (adopting for the state constitution the federal custody standard; custody is a prerequisite for warnings); State v. Crump, 834 S.W.2d 265, 269 (Tenn. 1992) (barring reinterrogation pursuant to state constitutional standards); State v. Wood, 868 P.2d 70, 82-83 (Utah 1993) (rejecting the federal standard for custody); State v. Gutierrez, 864 P.2d 894, 900-901 (Utah Ct. App. 1993) (enlarging the federal rule respecting the assertion of *Miranda* rights); State v. Randolph, 370 S.E.2d 741, 743 (W. Va. 1988) (rejecting on state constitutional grounds the rule of Colorado v. Spring, 479 U.S. 564 (1987)); State v. Brecht, 421 N.W.2d 96, 103-104 (Wis. 1988) (barring impeachment by defendant's post-*Miranda* silence); Wells v. State, 846 P.2d 589, 594 (Wyo. 1992) (adopting for the state constitution the two-part test of Oregon v. Bradshaw, 462 U.S. 1039 (1983)).

equivalent legal guarantees. Perhaps some of these states would follow the Supreme Court's lead and eliminate *Miranda*. Others would no doubt retain their state constitutional version as is. And still others would fill the void with newly minted state *Miranda* rights. Some states may develop new approaches, such as a hybrid right, in which proof that a suspect was informed of his rights is one factor in the totality of the circumstances indicating that a confession was voluntary. Although no one can say exactly what will happen, current state constitutional law offers strong reason to trust the state courts to effectively protect against coerced confessions. Should they fail in their responsibilities, the Supreme Court will still stand ready to review.

The development of state constitutional law is a strong indicator that the decidedly mixed benefits of the federal *Miranda* rule are far outweighed by its damage to the Tenth Amendment. *Miranda* over- and underprotects self-incrimination rights, and is not essential to the preservation of the Fifth Amendment. The state courts, which have vast experience with and primary authority for criminal law enforcement, stand ready to provide effective alternatives. They have proven their commitment to preventing coerced confessions. Yet they remain bound by a rigid uniform federal rule that has outlived its usefulness. It is time for the Court to fulfill the promise it made in *Miranda* itself, to permit the states to develop alternatives for protecting the Fifth Amendment privilege, and to abjure what has become, despite that Court's promise, a "constitutional straitjacket which . . . handicap[s] sound efforts at reform."[194]

B. DISINCORPORATING *MAPP*

In 1961, *Mapp v. Ohio*[195] declared that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[196] Justice Clark's rather murky opinion for the Court[197] seemed to contend that suppression

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194 Miranda v. Arizona, 384 U.S. 436, 467 (1966).

195 367 U.S. 643 (1961).

196 *Id.* at 655.

197 At most, only a plurality of four of the *Mapp* justices endorsed a purely Fourth Amendment exclusionary rule. Justice Black provided the fifth vote in the 5-4 decision, but as his concurring opinion made clear, he did not agree that the Fourth Amendment mandated exclusion:

> I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. Reflection on the problem, however, in the light of cases coming before the Court since *Wolf*, has led me to conclude that when the Fourth Amendment's ban against unreasonable

was essential to the enforcement of the Fourth Amendment, that there was no other effective deterrent to noncompliance.[198] A second argument was that the rule was essential to judicial integrity, lest governmental institutions appear (by admitting illegally obtained evidence) to endorse constitutional violations.[199] Other contentions in *Mapp* in behalf of incorporating the exclusionary rule are subsidiary to the deterrence and integrity rationales.[200]

In the years since *Mapp* the exclusionary rule has been considera-

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> searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.

Id. at 661-62 (Black, J., concurring). Perhaps to garner Black's support, there were Fifth Amendment references in Clark's opinion, *id.* at 646, 657, but it is not clear that the Fifth Amendment was essential to the *Mapp* rule.

[198]

> Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' Elkins v. United States.

Id. at 655-56.

[199]

> There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine '(t)he criminal is to go free because the constable has blundered.' People v. Defore. In some cases this will undoubtedly be the result. But, as was said in *Elkins*, 'there is another consideration—the imperative of judicial integrity.' The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in Olmstead v. United States,: 'Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. * * * If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.'

Id. at 659 (citations omitted).

[200] Clark claimed that the Fifth Amendment Self-Incrimination Clause complemented the Fourth Amendment suppression doctrine in that both sought to protect privacy. "They express 'supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy.'" *Id.* at 657. The Court has since repudiated any notion that the Fifth Amendment protects privacy, as it only guards against compulsion of incriminating testimonial evidence. Fisher v. United States, 425 U.S. 391 (1976). More recently, the Court renounced any Fifth Amendment justification for the exclusionary rule. "The Fifth Amendment theory has not withstood critical analysis or the test of time." United States v. Leon, 468 U.S. 897, 906 (1984).

Justice Clark also contended that a uniform exclusionary rule would reduce collusive evasion of the Fourth Amendment by state and federal law enforcers—the "silver platter" problem. *Mapp*, 367 U.S. at 657-58.

A third subsidiary argument in *Mapp* was aimed at *Wolf v. Colorado*, 338 U.S. 25 (1949), which *Mapp* partially overruled. Clark contended that the increased adoption of an exclusionary rule by the states in the years since *Wolf* undermined *Wolf's* factual underpinnings, since *Wolf* relied on the paucity of such adoptions to justify its conclusion that the exclusionary rule was not a part of Due Process. *Mapp*, 367 U.S. at 650-52.

bly downgraded by the Supreme Court. The Court no longer takes the judicial integrity rationale seriously, as it considers the matter subsumed under deterrence.[201] The deterrence argument is now virtually the sole support for exclusion, which is subject to exceptions where deterrence seems unachievable.[202] More significantly, the Court now finds the exclusionary rule itself to be a mere "judicially created remedy" for Fourth Amendment violations "rather than a personal constitutional right."[203] This leaves *Mapp* ripe for disincorporation.

The first major assault on *Mapp* came from *United States v. Calandra*,[204] which held that a grand jury witness could not refuse to answer questions based on illegally obtained evidence. In denying that such questions violated *Calandra's* Fourth Amendment rights, the Court, significantly, severed the link between the acquisition of the evidence and its admission. The illegal search and seizure was a completed Fourth Amendment wrong; evidentiary use—to exclude or not—was a separate question. Admissibility was not a right, it was a matter of utility: if the benefits to the criminal justice system of admitting the evidence outweighed the benefits of suppressing it, the evidence could be used. In *Calandra's* words: "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect."[205] This view was reiterated in *Stone v. Powell*,[206] which held that state prisoners who were given "full and fair consideration" of their Fourth Amendment claims by the state courts could not renew those claims on federal habeas corpus review. This time, in "weighing the utility of the exclusionary rule against the costs of extending it to collateral review" the Court detailed the disadvantages of suppression.[207] In *United States v. Leon*,[208] the theory that the exclusionary rule was a mere remedial device, divorced from the Fourth Amendment proper, reached its apogee. *Leon* established a good

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201 That is, where suppression provides no deterrent against violation of the Fourth Amendment, admitting the evidence does not offend judicial integrity. United States v. Leon, 468 U.S. 897, 921 n.22 (1984); United States v. Janis, 428 U.S. 433, 458 n.35 (1976).

202 *Leon*, 468 U.S. at 897 (creating an exception to the exclusionary rule where officers act in reasonable reliance on a search warrant later found defective). The most recent exception was established by *Arizona v. Evans*, 115 S. Ct. 1185 (1995), where the Court declined to suppress evidence seized during a search incident to arrest of a motorist where the officer relied on what later proved to be an erroneous computer report of an outstanding arrest warrant.

203 *Leon*, 468 U.S. at 906.

204 United States v. Calandra, 414 U.S. 338 (1974).

205 *Id.* at 348.

206 Stone v. Powell, 428 U.S. 465 (1976).

207 *Id.* at 489-90.

208 *Leon*, 468 U.S. at 897.

faith exception to the rule when law enforcement agents relied on the issuance of a search warrant by a judicial officer, despite the fact that the warrant was held invalid subsequent to the search. Two of the three *Leon* dissenters rejected the Fourth Amendment theory endorsed by the Court, and in doing so, made clear just how shaky is the constitutional underpinning of the exclusionary rule.[209] Justice Brennan, writing for himself and Justice Marshall, contended that the Fourth Amendment "restrains the power of the government as a whole," and that "by admitting unlawfully seized evidence, the judiciary becomes a part of what is in fact a single governmental action prohibited by the terms of the Amendment."[210] That is, the Fourth Amendment applies not only to law enforcement agents, as the majority contended, but to the judiciary, which violates its norms by admitting illegally obtained evidence. In sum, Brennan argued that exclusion was a Fourth Amendment right. By rejecting such a proposition, the Court loosened the rule from its constitutional moorings.

The exclusionary rule is thus in much the same position as the *Miranda* doctrine: it is a mere judicial prophylactic to be applied where it is efficacious. It is, without question, no constitutional right. Some have suggested that it is therefore beyond the Supreme Court's authority to impose at all.[211] As one analyst—a friend of exclusion—asked:

> If the exclusionary rule is neither part of nor corollary to the Fourth Amendment, how does the admission at trial of evidence seized in violation of the Fourth Amendment violate the Constitution? If such admission does not violate the Constitution, then by virtue of what power does the Court strike it down?
>
> The Court has frequently linked its enforcement of the exclusionary rule in the federal courts with its supervisory authority. There is a serious question whether it is a legitimate exercise of supervisory authority to exclude relevant evidence for the purpose of creating incentives for

[209] The third dissenter, Justice Stevens, offered a different approach, one less relevant to the exclusionary rule issue. He argued that Fourth Amendment violations and admissibility are governed by a reasonableness standard. Searches based on warrants issued without probable cause were unreasonable and therefore it was contradictory for the Court to conclude that police reliance on such warrants could be reasonable. *Id.* at 960-61, 966-67. Regarding the exclusionary rule, Justice Stevens appeared to argue that it was a Fourth Amendment requirement because nothing else could effectively enforce the provision. The Fourth Amendment, he said, "requires us to pay" the price of exclusion, lest the courts countenance "a constitutional violation for which there is no remedy." *Id.* at 973 n.28, 978, 979.

[210] *Id.* at 932, 933 (Brennan, J., dissenting). For a fuller exposition of this view of the Fourth Amendment, see Thomas S. Schrock & Robert C. Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974).

[211] Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U.L. REV. 100 (1985).

executive officers with respect to matters not before the court. The supervisory authority is not, however, even a candidate in the application of the exclusionary rule to the states. "[F]ederal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."[212]

Whether or not the Court has general authority to impose exclusion as a means of enforcing the Fourth Amendment, the question of its applicability to the states raises a different issue. This is a matter of Fourteenth Amendment Due Process. If the rule cannot survive the test for disincorporation, *Mapp* should be reversed. This test requires first an examination of the meaning and purpose of the Fourth Amendment right. There follows an empirical and normative assessment of the exclusionary rule: does it in fact promote Fourth Amendment ends, and if so, does that benefit outweigh the harm to Tenth Amendment values caused by forcing the states to adopt a uniform procedure? In balancing the Fourth Amendment benefit against the Tenth Amendment harm we ask whether the Fourth Amendment as we know it could survive without *Mapp*. In addition, we inquire whether the exclusionary rule is the most efficacious way of supporting the right, and whether effective alternative enforcement mechanisms are available. We also consider the availability of independent state law protection for the privacy right.

"The purpose of the Fourth Amendment," said the Supreme Court in *Calandra*, "is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life."[213] For the most part, "governmental intrusion" is a euphemism for searches and seizures by police in the course of a criminal investigation. Some such invasions are, of course, essential if evidence of crime is to be obtained and suspects arrested. The Amendment may be said to balance the need to protect privacy and the need to enforce the criminal law by prohibiting only "unreasonable" invasions of privacy.

The exclusionary rule seeks to accomplish this end by denying illegally obtained evidence (and often the fruits derived therefrom) to the prosecution. Although suppression cannot undo the invasion of privacy, it is hoped that the impairment of the prosecution's case will serve as an object lesson to the police to comply with the Fourth

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[212] Lawrence Crocker, *Can the Exclusionary Rule Be Saved?*, 84 J. CRIM. L. & CRIMINOLOGY 310, 320 (1993) (quoting Smith v. Phillips, 455 U.S. 209, 221 (1982)). Crocker asserts that there is "implicit" in the Fourth Amendment an "enforcement principle" that supports the imposition of the exclusionary rule by federal courts. *Id.* at 327-28.

[213] *Calandra*, 414 U.S. at 354.

Amendment in future investigations. Is there empirical proof that the exclusionary rule actually protects privacy against unjustified invasion by law enforcement agents? The studies present contradictory or limited evidence. Some show that arrests and seizures of evidence went down in *Mapp*'s aftermath; others found no such effect.[214] There are also studies documenting police disrespect if not contempt for Fourth Amendment values, and there are investigations yielding the opposite conclusion.[215] A recent investigation indicates that search and seizure law has become too complex for police compliance; exclusion notwithstanding, police cannot conform to rules they do not understand.[216] If there is a consensus position, it is, perhaps, that the rule has been a spur to more widespread and improved police training, which has in turn promoted compliance in some unmeasurable but significant way. This is rather weak empirical support for exclusion, because it is the training, not the exclusion, that affords compliance. It is not likely that the professional training of American police would be substantially altered if *Mapp* were reversed.

The weak empirical support for suppression must be considered in light of the availability of alternative remedies. Recently, Akhil Reed Amar presented an impressive argument for a range of civil alternatives, including strict tort liability for police departments, a Fourth Amendment fund supported by punitive damages, class action suits, and injunctive and administrative relief.[217] These proposals have been criticized as unlikely to be enacted and ineffective if they

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214 *Compare* Bradley C. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L. J. 681 (1974) (dramatic post-*Mapp* decreases in arrests suggest greater concern about Fourth Amendment) and Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970) (the rule has little or no effect on police conduct as measured by the number of arrests or on the amount of stolen property recovered by the police).

215 *Compare* Jerome H. Skolnick, Justice Without Trial (2d ed. 1975) (police reject Fourth Amendment values, view courts as adversaries, and commonly violate search and seizure rules) and Myron W. Orfield, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. Chi. L. Rev. 1016 (1987) (police are not hostile to the rule and learn the law from their time in court); Myron W. Orfield, *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. Colo. L. Rev. 75 (1992) (the rule leads to increased police professionalism and greater observance of the Fourth Amendment).

216 William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. Mich. J.L. Reform 311 (1991) (deterrence is weak because police are unfamiliar with complex search and seizure law). Perhaps most disturbing is the conclusion of these investigators that no amount of police training will eliminate substantial numbers of mistakes about Fourth Amendment law. "It seems safe to say, however, that there is an *uneliminable* 20 to 30% margin of error among even well-trained officers as to the legality of intrusions governed by those rules." *Id.* at 345.

217 Amar, *supra* note 150.

would be.[218] Perhaps so—although it is difficult to predict what would happen were the rule eliminated, since its obligatory character discourages alternatives. It is also likely that the public debate surrounding its demise would produce some surprises.

In addition to civil remedy alternatives, the present-day exclusionary rule could be modified by good faith exceptions. Despite the discouragement of the universal federal mandate, some state legislatures have made serious attempts to alter the rule.[219] Consider, for instance, Utah's ill-fated Fourth Amendment Enforcement Act.[220] The Utah Supreme Court struck down the Act because it created an exclusionary rule narrower than that currently required by federal law.[221] Whereas the federal good faith exception applies to police conduct undertaken in reliance upon some apparent objectively reasonable authority, the Utah good faith exception would have applied to *all* searches and seizures. On its face, the Utah law called for suppression of evidence only if the Fourth Amendment violation was "substantial," and the burden of proving this, by a preponderance of the evidence, lies with the defendant. Even a substantial violation would not trigger an exclusionary remedy if the state could prove that the police acted in "good faith," which probably means that the officers believed at the time that their conduct was proper.[222] The burden of proving good faith was placed on the prosecution, so that any failure of proof militates against a finding of good faith. Finally, the trial court was obligated to explain the basis for finding good faith; a mere conclusory ruling would not suffice. By contrast, a decision that the police misconduct was insubstantial, or that the police lacked good faith, need not be justified.

This Utah scheme would not likely have eliminated suppression, nor would it have been apt to significantly reduce the judicial resources devoted to search and seizure questions. But it probably would have markedly diminished the instances in which evidence is excluded. Its premise is that enforcement of the Fourth Amendment

218 Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1 (1994).

219 Federal legislation establishing a general "good faith" exception to the exclusionary rule in federal courts cleared the House of Representatives on February 8, 1995, but never came to a vote in the Senate. EXCLUSIONARY RULE REFORM ACT OF 1995, H.R. 666, 104th Cong. (1995).

220 I am indebted to Paul Cassell of the University of Utah College of Law for reminding me about this law. The key portion of the Act was contained in UTAH CODE ANN. § 77-35-12(g) (1982), which was declared unconstitutional in *State v. Mendoza*, 748 P.2d 181 (1987).

221 *Mendoza*, 748 P.2d at 181.

222 This does not preclude the requirement of a reasonably objective basis for the subjective police belief that their action was lawful.

can be achieved with less of a cost in suppressed evidence and undermined prosecutions. Does it strike a satisfactory balance between the need to protect privacy and the need to enforce the criminal law? As it was never effectively implemented it is probably impossible to say, but it certainly was a serious, carefully-wrought attempt to grapple with the problem.

It would seem difficult to conclude that the *Mapp* rule as presently constructed is the most efficacious way of supporting the right, and that effective alternative enforcement mechanisms are unavailable. Certainly the Supreme Court has indicated by the growing number of exceptions it endorses that it does not think the rule indispensable. Despite the acknowledged violation of the Fourth Amendment, evidence is admissible, e.g., in grand jury proceedings,[223] where police acted in reasonable good faith,[224] and where the evidence is used to impeach the defendant who testifies.[225] Nor can a federal habeas corpus proceeding reverse a state Fourth Amendment ruling admitting the evidence.[226] In all of these cases the Court has stated that the remedial benefits of the rule are outweighed by criminal law enforcement interests in receiving the evidence.

This brings us to the important role of independent state law in preserving privacy rights. Largely overlooked in the debates over exclusion is the development of state constitutional exclusionary rules. As will be shown, at least 74% of the states have acknowledged a state-law-based suppression policy—a strong indicator of the commitment of the states to preserving privacy.

To understand the role of the states we must examine the status of the exclusionary rule in state law in the post-*Mapp* era. In 1960, one year prior to the imposition of the federal exclusionary rule upon the states by *Mapp v. Ohio*,[227] roughly half of the states recognized a

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223 United States v. Calandra, 414 U.S. 338 (1974) (permitting questions to grand jury witness based on illegally obtained evidence).

224 Arizona v. Evans, 115 S. Ct. 1185 (1995) (admitting illegally obtained evidence where police relied in good faith on an erroneous computer report); Illinois v. Krull, 480 U.S. 340 (1987) (admitting illegally obtained evidence where police relied in good faith on a search-authorization statute subsequently invalidated); United States v. Leon, 468 U.S. 897 (1984) (admitting illegally obtained evidence where police relied in good faith on a search warrant subsequently held invalid); Michigan v. DeFillippo, 443 U.S. 31 (1979) (admitting illegally obtained evidence where police relied in good faith on a statute subsequently invalidated).

225 United States v. Havens, 446 U.S. 620 (1980) (evidence illegally obtained may be used to impeach the defendant).

226 Stone v. Powell, 428 U.S. 465 (1976) (prohibiting exclusion on Fourth Amendment grounds by federal habeas court where state courts fairly considered the issue).

227 Mapp v. Ohio, 367 U.S. 643 (1961).

state law based exclusionary rule.[228] Some of the excluding states relied upon state statutes[229] or rules of evidence[230] rather than a state constitution. Depending on how one counts, either twenty-six or twenty-eight states had no exclusionary rule when *Mapp* was announced.[231] That situation has changed dramatically. In the post-*Mapp* era, only one state court of last resort—Maine's—has unambiguously declared that there is no state constitutional exclusionary rule.[232] One other state, California, recently adopted a state constitutional amendment abrogating that state's exclusionary rules.[233]

But since, and notwithstanding that *Mapp* forced the rule upon the states, fifteen states have acknowledged suppression rules on state constitutional grounds, contrary to their pre-*Mapp* heritage.[234] Sometimes the decisions establishing state constitutional exclusionary rules

228 The Appendix to the Opinion of the Court in *Elkins v. United States*, 364 U.S. 206, 224 (1960), indicates that twenty-four of the fifty states admitted illegally obtained evidence and twenty-six did not. However, the Appendix has been accused of "dubious accounting," and it is claimed that "a clear majority of the states (28) generally opposed the exclusionary rule before *Mapp*." Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 UTAH L. REV. 751, 793 n.272.

229 *E.g.*, TEX. CODE CRIM. P. ANN. art. 38.23 (West 1989).

230 *E.g.*, People v. Cahan, 282 P.2d 905 (1955) (adopting an exclusionary rule grounded upon judicially created rules of evidence subject to legislative revision).

231 *See supra* note 228.

232 State v. Tarantino, 587 A.2d 1095,1098 (Me. 1991); State v. Foisy, 384 A.2d 42, 44 n.2 (Me. 1978); State v. Stone, 294 A.2d 683, 693 n.15 (Me. 1972). Another conceivable interpretation of these cases is that that there exists a Maine constitutional exclusionary rule, but that it will not be applied in circumstances where the federal rule will not also be invoked. This interpretation is at odds with Maine's pre-*Mapp* jurisprudence which denied altogether the existence of a state constitutional rule. State v. Schoppe, 92 A. 867 (Me. 1915). Courts of other states have declared that they will not apply their state exclusionary rule where the federal rule does not apply. For instance, the Arizona Supreme Court stated "that the exclusionary rule to be applied as a matter of state law is no broader than the federal rule," State v. Bolt, 689 P.2d 519, 527-28 (1984). This "lockstep" statement does not suggest that Arizona has no exclusionary rule; it implies the contrary. Notwithstanding this declaration, the Arizona Supreme Court has established broader state constitutional search and seizure rights, and has excluded evidence where suppression was not required by the Fourth Amendment. *See* State v. Ault, 724 P.2d 545 (Ariz. 1986) (establishing a state constitutional home search exception to the inevitable discovery doctrine).

233 Proposition 8, adopted on June 8, 1982, added to Article I of the state constitution § 28, the "Right to Truth-in-Evidence" provision, which abrogated a defendant's right to suppress evidence on state constitutional grounds. *See* In re Lance W., 694 P.2d 744 (Cal. 1985).

234 State v. Bolt, 689 P.2d 519 (Ariz. 1984); People v. Vigil, 729 P.2d 360 (Colo. 1986); State v. Dukes, 547 A.2d 10 (Conn. 1988); State v. Johnson, 716 P.2d 1288 (Idaho 1986); State v. Culotta, 343 So. 2d 977 (La. 1976); Commonwealth v. Bishop, 523 N.E.2d 779 (Mass. 1988); State v. Ball, 471 A.2d 347 (N.H. 1983); State v. Novembrino, 519 A.2d 820 (N.J. 1987); State v. Gutierrez, 863 P.2d 1052 (N.M. 1993); People v. Johnson, 488 N.E.2d 439 (N.Y. 1985); State v. Carter, 370 S.E.2d 553 (N.C. 1988); Turner v. City of Lawton, 733 P.2d 375 (Okla. 1986); Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991); State v. Larocco, 794 P.2d 460 (Utah 1990) (plurality opinion); State v. Badger, 450 A.2d 336 (Vt. 1982).

were prompted by rulings that rejected "substantive" Fourth Amendment doctrine and provided broader state rights.[235] In such a circumstance the state suppression rule is logically compelled because the federal rule does not support exclusion. For instance, the New Hampshire Constitution was interpreted to prohibit drunk driver roadblocks that are permissible under the Fourth Amendment.[236] If evidence obtained from such a roadblock is to be suppressed, the basis for exclusion must be state law as it cannot be federal. Thus, state exclusionary rules had to be acknowledged if suppression was to be utilized to enforce broader state rights.

On other occasions, state decisions on the exclusionary rule have been prompted by a desire to repudiate the good faith exception established by *United States v. Leon*.[237] *Commonwealth v. Edmunds*[238] serves as a good example. There the Pennsylvania Supreme Court rejected the good faith doctrine for the state constitutional search and seizure provision. *Edmunds'* rejection of the doctrine perforce implies that a Pennsylvania constitutional exclusionary rule exists.

Whatever the occasion for these rulings, the significant point is that more than one-half of the relevant state courts, without Supreme Court pressure, and indeed, sometimes contrary to Supreme Court rulings, recognized a state constitutional procedural guarantee of major dimensions. That is, fifteen of the twenty-six (or twenty-eight) states without an exclusionary rule when *Mapp* was handed down have since acknowledged a state law based rule. This demonstrates that the state courts are serious about protecting defendants' Fourth Amendment rights, frequently, more determined than the United States Supreme Court itself. If, as is urged here, *Mapp* were to be reversed, these fifteen states, along with the twenty-two or more states that started excluding illegally obtained evidence prior to *Mapp*—at least 74% of all the states—would continue to exclude evidence.

If *Mapp* were abandoned, some states would no doubt reconsider

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[235] *E.g.*, State v. Tapply, 470 A.2d 900, 905 (N.H. 1984) (per curiam) (seizure of defendant, unlawful by state constitutional standards, tainted his subsequent statements); State v. Koppel, 499 A.2d 977, 983 (N.H. 1985) (drunk driver roadblock, illegal under state constitution, taints evidence found in automobile); State v. Chaisson, 486 A.2d 297, 304 (N.H. 1984) (home arrest violative of state constitution taints property seized on premises); State v. Ball, 471 A.2d 347 (N.H. 1983) (reversing trial court decision to admit evidence where seizure violated state constitutional plain view standards).

[236] *Compare* Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990) (drunk driver roadblocks do not violate the Fourth Amendment) *with* State v. Koppel, 499 A.2d 977, 983 (N.H. 1985) (drunk driver roadblock, illegal under state constitution, taints evidence found in automobile).

[237] 468 U.S. 897 (1984).

[238] 586 A.2d 887 (Pa. 1991) (rejecting on state constitutional grounds the good faith exception to the exclusionary rule established in *Leon*).

their position, and perhaps develop more effective and less costly alternatives to exclusion in the true Brandeisian laboratory tradition. Others would modify the rule, as Utah tried to do,[239] with a good faith exception. Still others would no doubt be resolute in maintaining exclusion exactly as is. Whatever course they may take, however, there is little justification for not trusting the states. The state courts and legislatures are in the best position to determine whether or not exclusion of illegally obtained evidence is the most efficacious remedy for police misconduct. The state judiciary especially has demonstrated its ability to balance the need to enforce the criminal law against the privacy rights of the individual. Should a state not meet its obligations to develop a suitable apparatus to protect substantive Fourth Amendment rights the Supreme Court will stand ready to intervene. *Wolf v. Colorado*[240] remains the law: the "core" of the Amendment is a part of Due Process, and if a state fails in its duty, the Court has authority to step in and demand action. Due process should be considered satisfied, however, where a state can demonstrate that it has a bona fide workable mechanism for enforcing the amendment.[241]

Thus, neither *Mapp* nor *Miranda* are essential to the survival of a fundamental right. And if this is true, how can they be said to be requisites of Fourteenth Amendment Due Process? Both cases should be reversed. But even if they are not overturned, the Supreme Court should signal its willingness to apply disincorporation analysis whenever there is a challenge to a quasiconstitutional rule that has been imposed upon the states. The implications of doing so extend well beyond the *Mapp* and *Miranda* rules, and the last section of this article explores those implications.

V. The Implications of Disincorporation

Aside from the obvious impact of relieving the states from having to enforce disincorporated procedures, such as the Fourth Amendment exclusionary rule or the *Miranda* rule, disincorporation will provide a number of broad benefits. After these are enumerated, I shall consider the implications of a regime of disincorporation for other

239 *See supra* notes 220-22 and accompanying text.

240 338 U.S. 25, 27 (1949).

241 Perhaps the *Mapp* exclusionary regime could be reversed in stages, with the Court announcing that whereas the Fourteenth Amendment no longer demands a uniform national rule of exclusion, it requires a workable mechanism to enforce Fourth Amendment strictures. This would give the states—especially those states that have no exclusionary rule, and therefore no remedy for Fourth Amendment violations—time to develop alternatives, with the Supreme Court standing ready to review state efforts through the appellate process. The Court could continue to apply the federal exclusionary rule to those states that have no machinery or no adequate machinery for Fourth Amendment enforcement.

requirements of due process.

A. ADVANTAGES OF DISINCORPORATION

Disincorporation will provide at least five notable benefits. First, it will strengthen the authority of the Supreme Court by limiting it to its traditional and proper role of constitutional interpretation. It will eliminate anomalous Court decisions like *Mapp* and *Miranda* that impose procedures upon the states while at the same time denying that these procedures have constitutional warrant. While the Court will retain authority to broadly construe the Constitution, it will have to justify through the application of a disincorporation analysis the imposition of quasiconstitutional procedures upon the states.

Second, disincorporation will encourage truer, perhaps even more rights-protective, interpretations of the Bill of Rights by a Supreme Court freed from the distortions of having to formulate nationwide rules. It has been observed that the Court is "hesitant to impose on a national level far-reaching constitutional rules binding on each and every state."[242] In his unsuccessful campaign against the incorporation process, Justice John Marshall Harlan frequently warned about the dilution of federal standards in order to establish them nationwide.[243] It is not too late to undo some of the damage. As the Court reduces state obligations through disincorporation it facilitates broader Bill of Rights interpretations. Shorn of the necessity of compelling the states to exclude illegally seized evidence, for example, the Court could enlarge and strengthen privacy rights. To be sure, under a disincorporation regime the states will still be obligated to enforce fundamental rights, but the means of enforcement will more often be theirs to choose. Knowing this, the Court will be under less pressure to tailor rights out of federalism concerns.

Third, disincorporation will help restore the Tenth Amendment to its proper place in the American constitutional scheme.[244] It will reestablish state authority in criminal justice, a traditional area of state control. Defining and enforcing the criminal law is a reserved power of the states, while the federal government is limited to actions within

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242 State v. Hempele, 576 A.2d 793, 800 (N.J. 1990), quoting State v. Hunt, 450 A.2d 952 (N.J. 1982) (Pashman, J., concurring). *See also* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 389 (1984) ("federalism concerns" make Supreme Court justices reluctant to apply a uniform national mandate to a diverse group of state governments).

243 *E.g.*, Benton v. Maryland, 395 U.S. 784, 808 (1969) (Harlan, J., dissenting); Duncan v. Louisiana, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting); Malloy v. Hogan, 378 U.S. 1, 14-15, 27-28 (1964) (Harlan, J., dissenting). *See supra* note 23 and accompanying text.

244 *See supra* note 139.

the scope of its delegated powers.[245] Fourteenth Amendment Due Process obligates the states to enforce fundamental rights and those procedures essential to their maintenance, but the Tenth Amendment protects each state's authority to determine for itself its substantive and procedural criminal law. There is no warrant for imposing upon the states every criminal procedure rule that five Supreme Court justices approve, without regard to the relationship of that rule to a fundamental constitutional right. By acknowledging Tenth Amendment principles, the Supreme Court reinstates a much-ignored stepchild of the Bill of Rights and furthers the trend toward returning to the states authority over matters left to them by the Constitution.

Fourth, disincorporation will encourage state experimentation in a traditional area of state control. Despite some recent encouraging news about a dip in crime rates,[246] criminal law enforcement is an area that has been marked by a distinct lack of success. Why not permit some Brandeisian activity in the one policy sphere that the states know better than anyone else?[247] Though the exercise of federal authority in criminal law enforcement has grown enormously, it still remains true that fewer than 3% of the felony prosecutions, and under 1% of the misdemeanor accusations, are processed in the federal sys-

245 United States v. Lopez, 115 S. Ct. 1624, 1631 n.3 (1995) ("Under our federal system, the "'States possess primary authority for defining and enforcing the criminal law.'" Brecht v. Abrahamson, 507 U.S. 619 (1993) (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982)); *See also* Screws v. United States, 325 U.S. 91, 109 (1945) (plurality opinion) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.").

246 FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, 1994, CRIME IN THE UNITED STATES (1995) (crime rate dropped 2% from 1993).

247 The advantages of decentralizing criminal justice policy have often been noted. Sara Sun Beale recently wrote:

> A decentralized federal system is efficient; it permits criminal justice policy to be tailored to local conditions and policy preferences; and it furthers political accountability. The variety inherent in the federal system also permits desirable experimentation. Indeed, many of the most promising current trends in criminal enforcement began at the state and local levels, including specialized drug courts, community policing, boot camps, and sentencing guidelines. . . .
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> Many efficiency concerns favor state and local rather than federal criminal enforcement. Given the vastly larger size of the state judiciary, state courts are nearly always geographically closer, and hence more convenient, for victims, witnesses, jurors, and defendants. The states, which have long had large criminal dockets, typically have developed a comprehensive range of social service and outreach programs that are lacking in the federal courts. Finally, state corrections programs also have built-in advantages over their federal counterparts. Because state corrections institutions are located closer to offenders' home communities, they facilitate contact with family and reintegration into the community. . . .

Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 993-94 (1995).

tem.[248] Federal constitutional criminal procedure is a dead weight on the states; they cannot and (at least so far) the Supreme Court will not change it. Yet even its strongest supporters must concede that the Fourth Amendment exclusionary rule, the *Miranda* doctrine, and the many subsidiary criminal procedure rules propounded by the Court are often, at best, unfortunate compromises. Present-day incorporation doctrine leaves too little room for state experimentation; if there are better ways to regulate the police than by the exclusion of competent evidence the states are nonetheless forbidden from substituting them. The states have shown both their willingness and their ability to enact criminal procedure reforms. Given the individual rights track record of the state courts in the last several decades there is little to risk and much to gain from permitting state experimentation in this area.

Fifth and finally, disincorporation will enhance the role of state law, including state constitutional law, and raise the esteem of state courts. State constitutional law serves an important function: the ordering of state governmental authority and the protection of individual rights against state governmental abuse. A hyperinflated due process jurisprudence has marginalized both the law and its primary expositors, the state courts.[249] It has compelled state courts to enforce multifarious federal procedural requirements whether or not they are essential to preserving fundamental rights. Although state constitutional law can provide rights narrower than federal guarantees, such state law is unenforceable under the command of the Supremacy Clause—even if the federal rights are not properly a part of due process. Disincorporation will free state constitutional law to develop more faithfully to state needs and state constitutional history, unencumbered by federal procedures that should no longer be imposed upon the states. Disincorporation will prompt a full flowering of state constitutional law as it assumes its proper place as the principal limit on state government. The state courts will receive enhanced respect

[248] KAMISAR ET AL., *supra* note 155, at 2. Regarding the growth of federal criminal law, Beale noted that "[b]etween 1980 and 1992, the number of criminal cases filed in the federal courts increased by 70 percent (from 27,968 to 47,472) and the number of defendants prosecuted rose 78 percent (from 38,033 to 67,632)." Beale, *supra* note 247, at 984.

[249] Gardner, *supra* note 11, at 805-10, rejected the notion that incorporation stifled the development of independent state constitutional lawmaking. As he observed, state courts could have broadened rights on state grounds prior to incorporation, or could have seized the rights-enhancing initiative once the incorporation process began. *Id.* at 807. Gardner did not consider, however, that the post-incorporation era, which continued long after the 1960s, routinely imposed on state courts an abundance of federal procedures with dubious value in preserving fundamental rights. The development of an independent state constitutional law that denies these procedural "rights" is effectively prohibited by the Supremacy Clause.

(and, of course, scrutiny) as state law gains in significance.

B. THE IMPACT OF DISINCORPORATION ON OTHER CRIMINAL PROCEDURE RULES

Perhaps one of the principal obstacles to disincorporation will be the fear of opening the floodgates to challenges to much of the constitutional criminal procedure law developed since the 1960's. Admittedly, there is some justification for this fear, as one cannot predict with perfect accuracy which procedural decisions the Court will disincorporate. Application of the disincorporation test—the essentiality of a procedure to the administration of a fundamental right—entails a certain amount of subjectivity and therefore unpredictability. However, virtually all legal doctrines have a certain unpredictable quality; prior to the 1960's, who could have predicted that due process would come to be a shorthand for virtually the entire Bill of Rights? In any event, what is to be feared from inviting disincorporation challenges? The state courts are quite adequate to the task of coping with another period of legal uncertainty, and if a rule is shown to be inessential there is no good reason for imposing it upon them.

Notwithstanding the uncertainties, there are some procedures—obviously the *Mapp* and *Miranda* rules—that are so patently removed from the core constitutional rights they are supposed to protect that they virtually invite disincorporation challenges. Other rules appear to be in the same category. A Sixth Amendment case, *United States v. Wade*,[250] comes readily to mind. In *Wade*, the Court established a right to counsel for suspects placed in a lineup, and a per se exclusionary rule for violations of this right. It is difficult to reconcile such a rule with the traditional Sixth Amendment guarantee of the assistance of counsel in providing a defense.[251] The role of the attorney at a police identification is not to provide professional assistance to an accused in an adversarial setting, but rather to observe and deter lineup irregularities.[252] It is more accurate to say that counsel's presence is in-

[250] 388 U.S. 218 (1967). In *Kirby v. Illinois*, 406 U.S. 682 (1972), the Court limited the *Wade* right to postindictment lineups, explaining that the Sixth Amendment is not applicable prior to the initiation of adversary judicial proceedings.

[251] U.S. CONST. amend. VI provides in part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

[252] In another identification context, the Supreme Court said that counsel was not needed to compensate for the lay suspect's unfamiliarity with the law or his confrontation with a professional adversary. United States v. Ash, 413 U.S. 300 (1973) (no right to counsel at postindictment photo identification proceeding). That the role of counsel at lineups is primarily as an observer was suggested by Justice Stewart, concurring in *Ash*. "The [*Wade*] Court held, therefore, that counsel was required at a lineup, primarily as an observer, to ensure that defense counsel could effectively confront the prosecution's evidence at trial. Attuned to the possibilities of suggestive influences, a lawyer could see any

tended to protect defendant's confrontation rights,[253] somewhat the way a lawyer is provided by *Miranda* for the protection of Fifth Amendment rights. Thus, *Wade* appears to have established another prophylactic rule,[254] inviting inquiry into whether it is essential to a fundamental right. A strong case has been made that the per se exclusionary aspect of *Wade* is especially ripe for reversal, since such a rule, if applied, is virtually fatal to the obtaining of a conviction, and the Court never even considered the adequacy of alternative remedies.[255] But in order to determine if the *Wade* rule is truly essential to the survival of fundamental Sixth Amendment rights the Supreme Court must consider possible alternatives. It should ask if the *Wade* rule is the most efficacious way of supporting the confrontation right, and if there are effective alternative options available to the states. The Court should not simply continue to assume that the *Wade* prophylactic is vital to the preservation of a fundamental right. Because *Wade* is a quasiconstitutional rule, the Supreme Court should have to demonstrate its essentiality through the kind of disincorporation analysis suggested in Part IV of this article.

Supreme Court decisions establishing what may be called subsidiary procedural rules for the administration of rights provide another fruitful area for disincorporation. The Bill of Rights is silent about such matters as, e.g., the burden of proving a violation, the standard applicable to that burden, whether or not a right may be waived, who must participate in the waiver, whether or not a violation can be harmless error, the standard for measuring harmless error, etc.[256] Are the rules developed by the Supreme Court on these matters essential to maintaining fundamental rights? It is probably true that the states will have to develop *some* rules along these lines in order to protect fundamental rights, but does it follow that in each instance only one uniform national rule can do the job?

Consider the issue of harmless error. In *Chapman v. California*,[257] the Supreme Court held that a federal constitutional error in a state criminal trial requires reversal unless the government can establish that the error was harmless beyond a reasonable doubt. Is this stan-

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unfairness at a lineup, question the witnesses about it at trial, and effectively reconstruct what had gone on for the benefit of the jury or trial judge." *Id.* at 324 (footnote omitted).

[253] U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

[254] However, Grano says that the Court does not seem to consider *Wade* a prophylactic rule. GRANO, *supra* note 150, at 179 n.60.

[255] Joseph D. Grano, *Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717, 791 (1974).

[256] This list is suggested by GRANO, *supra* note 150, at 192.

[257] 386 U.S. 18 (1967).

dard vital to the protection of fundamental rights? The *Chapman* majority hinted that Congress could modify the rule,[258] raising doubts about its constitutional grounding, and Justice Harlan dissented, objecting that the Court had no authority to prescribe such quasiconstitutional rules of procedure for the states.[259] More recently, one scholar concluded that the *Chapman* rule was a species of "constitutional common law."[260] But it was Justice White, dissenting in a 1993 harmless error case, *Brecht v. Abrahamson*,[261] who hit the nail on the head:

> *Chapman*, it is true, never expressly identified the source of this harmless-error standard. But, whether the standard be characterized as a "necessary rule" of federal law, . . . or criticized as a quasi-constitutional doctrine, . . . the Court clearly viewed it as essential to the safeguard of federal constitutional rights. Otherwise, there would have been no justification for imposing the rule on state courts.[262]

Precisely! Perhaps it is true, as Justice White suggested, that the *Chapman* rule is an essential safeguard, or perhaps alternative formulations, such as the one approved by the *Brecht* majority ("substantial and injurious effect or influence in determining the jury's verdict") are sufficient. But surely, especially in light of *Brecht*, it is correct to say that unless it is demonstrated that some harmless error rule is "essential to the safeguard of federal constitutional rights" there is no justification for imposing it on the state courts. It is incumbent upon a majority of the Supreme Court to provide this demonstration, or to permit the state courts develop their own harmless error rules.

A word or two on those areas of criminal procedure law that do *not* lend themselves to disincorporation challenge. There are numerous Supreme Court cases that directly construe incorporated clauses of the Fourth, Fifth, Sixth and Eighth Amendments. These decisions may be controversial, and many commentators are persuaded that they are mistaken, but that alone does not make them eligible for disincorporation. So long as the decision is a constitutional, rather

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258 *Id.* at 21.

259 *Id.* at 46 (Harlan, J., dissenting).

260 Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 5 (1994). Regarding constitutional common law, *see supra* notes 145-46 and accompanying text.

261 507 U.S. 619 (1993) (applying, in federal habeas corpus review, a harmless error standard less onerous than *Chapman*'s).

262 *Id.* at 1726 (White, J., dissenting). Justice Blackmun joined this opinion, and Justice Souter, joining in part, did not object to this portion of it. Justice O'Connor, dissenting separately, agreed with White's reading of *Chapman*: "[A]s Justice White observes . . . , one searches the majority opinion in vain for a discussion of the basis for *Chapman*'s harmless-error standard. We are left to speculate whether *Chapman* is the product of constitutional command or a judicial construct that may overprotect constitutional rights." *Id.* at 652 (O'Connor, J., dissenting).

than a quasiconstitutional ruling, it should be considered immune. This includes the many search and seizure rulings of the Court deciding, for example, whether or not an automobile search, or a stop and frisk comported with the requirements of the Fourth Amendment.[263] It encompasses too the myriad determinations that confessions were or were not compelled within the meaning of the Fifth Amendment.[264] Like them or not, these cases are determining the outer boundaries of an incorporated fundamental right. They are part of the Supreme Court's mandate to interpret the Constitution, to tell us the meaning of the Fourth and Fifth Amendments. In a wholly different category, however, are those prophylactic, quasiconstitutional or constitutional common law determinations that are not directly construing constitutional provisions. Whether or not the Court has Article III authority to impose these upon the federal government, it should have to demonstrate their essentiality to a fundamental right to justify their continued inclusion in due process.[265]

VI. CONCLUSION

The incorporation process that flowered in the 1960's was based upon an assumption that the states, including the state courts, were insufficiently protective of individual rights. Empirical studies demonstrate that this assumption is no longer valid. The state constitutional renaissance, in which the state courts established either the same or broader-than-federal rights, demolishes any lingering notions that the state bench is insensitive to rights. Now that this historical foundation for incorporation has eroded, its constitutional-theoretical foundation merits re-examination. In the post-incorporation era, the Supreme Court simply assumed that its many Bill of Rights rulings were applicable to the states through the Fourteenth Amendment. This assumption was unwarranted. Some of the Court's procedural rules—*Miranda*'s and *Mapp*'s being especially noteworthy—are not directly based on constitutional provisions. Indeed, the Court has explicitly declared that these procedures are not constitutional rights. Although some commentators questioned the Court's authority to establish quasiconstitutional rights, and others defended the development by relying on such concepts as "constitutional common law," it appears that no one has seen fit to re-examine the incorporation doctrine. But if a procedure is not demanded by the Bill of Rights, and is

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263 *E.g.*, United States v. Ross, 456 U.S. 798 (1982) ("automobile exception" search); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk).

264 *See e.g.*, Colorado v. Connelly, 479 U.S. 157 (1986) (coercive police activity is a requisite for involuntariness under the due process clause).

265 *See supra* note 161 and accompanying text.

not essential to the safeguarding of such a right then it has no place in due process. Whatever the Court's authority to broadly interpret constitutional provisions, it has no authority to impose procedures on the states that cannot be shown to be essential to a fundamental right. It is a matter of the scope of due process and the Tenth Amendment authority of the states. The Court should therefore selectively disincorporate—excise from the Fourteenth Amendment—those procedures that are not demonstrably essential to the safeguarding of fundamental rights.

Although disincorporation will seem radical at first blush, it actually offers a compromise that should be acceptable to both liberals and conservatives. For years conservatives have railed against *Mapp* and *Miranda*, while liberals defended these decisions. Disincorporation provides a solution: don't abolish the exclusionary rule and *Miranda*; but don't jam them down the throats of all fifty states either. Let the state courts decide for themselves whether or not to adopt such rules. They may well establish similar rights on independent state law grounds; to a greater extent than is generally acknowledged, they have already done so.

Likewise, rights advocates have vigorously defended broad Supreme Court authority to interpret the Bill of Rights, while skeptical opponents sounded alarms at such judicial activism. Disincorporation's answer: don't cut back on Supreme Court authority to broadly interpret the Constitution, but insist that the Court justify imposing quasiconstitutional requirements on the states.

Disincorporation poses no threat to fundamental rights or their application to the States. It demands only that we refrain from saddling the states with procedures that are not essential to such rights. It gives the state courts—now proven rights-protectors—the choice of how best to preserve fundamental rights, and invites the Supreme Court to judge if they are doing so in good faith.

Disincorporation will enable the full development of state constitutional law, as it assumes its rightful place as the primary source of state criminal defendants' rights. It will herald the true emancipation of the state bench from the Supreme Court's guardianship. And it will permit the state laboratories to test out alternative approaches to criminal procedure. Constitutional theory, the historical situation, and criminal justice policy all point to disincorporation analysis. How fitting it would be if the Supreme Court recognized this in time for the new century.