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Federalism and Criminal Law -– A National Standard?

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COMMENT/Federalism and Criminal Law—A National Standard?

"... so that today the question is whether the constituent states of the system can be saved for any useful purpose and thereby saved as the vital cells that they have been of democratic sentiment, impulse and action."[1]

THE HISTORICAL DICHOTOMY of the state and the national government is currently undergoing transition. While neither the executive,[2] legislative[3] nor judicial[4] branches of the national government can be singled out as the primary catalytic agent, this redefinitional process is readily identifiable in the decisions of the Supreme Court. Indicative of the Court's "starring role" in the reexamination of the federal structure of the nation, are its activist approaches in the areas of commerce,[5] reapportionment[6] and obscenity.[7] The

[1] CORWIN, THE PASSING OF DUAL FEDERALISM, ESSAYS IN AMERICAN CONSTITUTIONAL HISTORY 164 (1964).

[2] *The State of The Union—Address By The President of The United States*, H.R. Doc. No. 1, 90th Cong., 1st Sess. 25 (1967). President Johnson noted in part that:

> Federal energy is essential. But it is not enough. Only a total working partnership among Federal, State and local governments can succeed. . . .
>
> During the past three years we have returned to the State and local governments about $40 billion in grants-in-aid. . . . With Federal assistance, State and local governments by 1970 will be spending close to $110 billion annually. These enormous sums must be used wisely, honestly and effectively.
>
> We intend to work closely with the States and the localities to do exactly that.

[3] 112 CONG. REC. 6501 (daily ed. Mar. 25, 1966) (remarks of Senator Muskie).

> Creative Federalism is not a political manuever to make the States and their localities financially dependent on the national government. On the contrary, its financial contribution is merely a response to the staggering fiscal burden under which these jurisdictions presently labor. . . .
>
> Finally, creative federalism is not concerned with the dialogue of States' rights or local rights versus centralized Federal power. This debate belongs to the past. Rather, it accepts the expanding role of State and local governments to take on greater political and administrative responsibilities as the Nation grows. At the same time, it relies on a strengthened Federal role to provide new ideas, incentives, and resources to the States and the localities to meet common goals.

[4] Murphy v. Waterfront Comm'n, 378 U.S. 52, 56 (1963). Justice Goldberg writing for the majority of the Court, saw the problem as:

> Cooperative federalism where the Federal and State governments are waging a united front against many types of criminal activity.

[5] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), posited the commerce debate as a question involving interstate as opposed to intrastate commerce. Yet, as the commerce issue continued to be clarified by the Court, it was decided that intrastate commerce, having a significant affect on interstate commerce, would also be subject to national regulation. Currin v. Wallace, 306 U.S. 1 (1939); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1953); Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35 (1966), *rehearing denied*, 384 U.S. 967 (1966).

national acceptance of the Court's intrusion in these areas, arguably the exclusive preserves of the states or the other branches of the federal govern-

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Early in the commerce debate, areas of state interests because of their relationship to problems affecting commerce, were also placed under national control. Mintz v. Baldwin, 289 U.S. 346 (1933), declared that congressional intent to supercede state regulation had to be clearly stated. Later cases were not so. Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926), found the Court overruling a New Jersey statute regarding the inspection of locomotives. Also, Terminal Ass'n. v. Trainmen, 318 U.S. 1, 8 (1943).

In Erie R.R. v. People, 233 U.S. 671 (1914), the Court held that a State law involving the allowable hours of service of railway employees, was precluded by the passage of the Federal Hours of Service Act of 1907.

Postal Tel. Cable Co. v. Warren-Goodwin Lumber Co., 251 U.S. 27 (1919), sustained federal preemption of the field of telegraphic communication.

Navigation—United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1941), held that the commerce power of the national government not only pervaded the area of waterway traffic control but also gave the national government power over watershed development, flood protection and the right to recovery of the necessary costs of these projects through the utilization of the power which was the by-product of the general use of the waters of commerce.

McDermott v. Wisconsin, 228 U.S. 115 (1913), held, on the strength of the commerce clause, that Wisconsin legislation copying the Federal Food and Drug Act of 1906, ch. 3915, § 1, 34 Stat. 768, was invalid, as rights under the federal act might be destroyed by similar state regulation.

Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 440 (1964), decided that the commerce clause reserved power over local milk markets to congressional regulations.

This collection of cases is by no means complete. Its purpose was merely to underscore the many areas of local interest which are now subject to federal control.

[6] Luther v. Borden, 48 U.S. (7 How.) 1 (1849), held that it was the job of the Congress to determine if the government of the state was of republican character. This, however, did not prevent the Court from refereeing the internecine squabbles of state executive and legislative branches of government apportionment schemes. Smiley v. Holm, 285 U.S. 355 (1932); Koening v. Flynn, 285 U.S. 375 (1932); Carroll v. Becker, 285 U.S. 380 (1932). Colegrove v. Green, 328 U.S. 549, 554 (1946), saw the Court reasserting its historical indifference to the problem of the consistency of State electoral systems, stating: "Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress." Only in Gomillion v. Lightfoot, 364 U.S. 339, 344 (1960), did the high Court intrude but then only on the grounds that the redistricting involved violated the due process clause, observing: "[The] Court has never acknowledged that the States have the power to do as they will with a municipality regardless of the consequences." Baker v. Carr, 369 U.S. 186 (1962) reversed the Court's past policy of nonintervention by qualifying the power of the Congress to review the form of state government under the guaranty clause, by subjecting state electoral districts to the test of the equal protection clause. Reynolds v. Sims, 377 U.S. 533, 568 (1963), expanded the scope of *Baker* deciding:

> . . . as a basic constitutional standard, the Equal Protection Clause requires that the seats of both houses of a bicameral legislature be apportioned on a population basis.

To counter the Court's decisions in this area, Senator Dirksen introduced, S. RES. No. 103, 89th Cong., 2d Sess. (1966). In the final voting on the resolution however, Senator Dirksen's resolution failed to pass sixty-five to thirty-eight. 112 CONG. REC. 8184 (daily ed. April 20, 1966).

[7] Roth v. United States, 354 U.S. 476, 484 (1957). In this case, Justice Brennan observed:

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

Also, Ginzburg v. United States, 383 U.S. 463 (1966).

ment, has equipped the Court with a general demeanor of self assurance and has facilitated examining areas of the law previously beyond its purview.

One of these areas is criminal law. This article will view the vitality of the nation's historic federal system of laws and law enforcement practices in light of the recent developments in criminal law and the formulation by the Court of minimal standards for certain state and federal procedures of criminal justice.[8] First we shall examine the initial efforts of the Supreme Court aimed at securing for itself the role as interpreter of the Constitution. Next, a synopsis of early cases, in which attempts were made to identify the consistency of the rights guaranteed by the Constitution as interpreted by the Court, will follow. Finally, the article will proceed along the battle lines of the debate concerning an incorporative theory of interpreting the due process clause of the fourteenth amendment and the result of that debate as seen through the developments in constitutional criminal law today.

It is the object of this article, to identify some of the significant opinions of the Court which have all but eliminated a federal theory of law enforcement at the present time. By tracing the cases which have resulted in the current concentration of near exclusive power over the administration of criminal justice by the Supreme Court, perhaps the judicial factors involved in the disintegration of the nation's historical federal structure will become clearer.

The approach of this essay, from the olympian heights of Supreme Court decisions, ought not be interpreted as a subtle indictment of the states for a lethargic response to the current debate over historical federalism.[9] Rather, this tact was adopted from a melange of practical considerations. Federal opinions were the most numerous and most conveniently available of the materials treating the area under investigation.

Mr. Chief Justice Marshall had the unenviable task of promulgating and securing the position of the Supreme Court in the affairs of the nation. *Gibbons v. Ogden,*[10] while not his first attempt, is perhaps his most significant effort in this respect. In this opinion, he laid to rest any doubts as to the demise of Jeffersonian[11] Constitutional Theory. Congress had enacted a law but it was the Court's task to determine the constitutional validity of the legislation passed. While reemphasizing the Court's interpretive function, Marshall also continued his limitation of state powers in this case as he had done in *McCulloch*[12] by first recognizing:

[8] Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Malloy v. Hogan, 378 U.S. 1 (1964); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964).

[9] Wall Street Journal, April 6, 1966, at 18. The emphasis in the article is on how difficult federal aid is to pass up.

[10] Gibbons v. Ogden, *supra* note 5.

[11] SCHLESINGER, THE AGE OF JACKSON 21-23 (1st ed. 1949) (abridged edition).

[12] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

> ... the genius and the character of the whole government seems to be, that its action is to be applied to all external concerns of the nation, and to those which reflect the State's generally; but not those within a particular state.[13]

Marshall then qualified the forgoing deference to state affairs by then recognizing that the federal government did possess the power to interfere with the internal affairs of the states "for the purpose of executing its general powers."[14] Aside from the constitutional scrutiny of the Court it thus appeared that the survival of a state's power lay solely within:

> ... the wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this as in many other instances—the sole restraints on which they have relied, to secure them from abuse. They are the restraints on which the people must often rely solely.[15]

While Marshall's opinions were geared towards establishing the role of the Court and the supremacy of the national government, the succeeding Chief Justice Taney of Maryland, stressed the arbitral function of the Court. The Court's status was akin to that of a referee of a battle between two potentates wherein:

> This Judicial power was justly regarded as indisputable not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the general government ... deciding in the peaceful forms of judicial proceeding, the angry and irritating controversies between two sovereignties, which in other countries have been determined by the arbitrament of force.[16]

Taney did not negative the Court's hard won role of constitutional interpreter but did retreat on the territory of states' rights by postulating a duality of governments. A power basis for either legislative or judicial action posited on the ambivalent foundation of "the letter and the spirit of the Constitution,"[17] was now severely constricted.

This coexistence of equal powers thesis survived until the 1930s. Then, despite the forebodings of Mr. Justice Sutherland that the problems before the Court were "all local evils over which the Federal government has no legislative control,"[18] the Court approved the Congress' reaction to the nation's economic and social disorders in *United States v. Darby*.[19] In sustaining the Court's action in this case, Mr. Justice Stone utilized Marshall's in-

[13] Gibbons v. Ogden, *supra* note 10, at 195.
[14] *Ibid.*
[15] *Id.* at 196-97.
[16] Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).
[17] McCulloch v. Maryland, *supra* note 12, at 421.
[18] Carter v. Carter Coal Co., 298 U.S. 238, 308 (1936).
[19] 312 U.S. 100 (1941).

terpretation of the necessary and proper clause in *McCulloch*[20] and Marshall's characterization of the commerce clause in *Gibbons*[21] and found the Fair Labor Standards Act of 1938,[22] constitutional. The power of the Supreme Court, enunciated in *McCulloch* and *Gibbons,* and anesthetized by Taney until the 1930s, was resurrected. The problem facing the Court, and still vexing the Court today, was to determine the occasion and manner of the exercise of this power.

In criminal law, the debate over the occasion and manner of the exercise of the power possessed by the Supreme Court, might be termed as the battle of the exclusionists[23] and the inclusionists.[24] Was it quite clear that "there is a citizenship of the United States, and a citizenship of a state . . . that it is only the former which are placed . . . under the protection of the Federal Constitution?"[25] Or was it not a fact that because of the privileges and immunities clause of the fourteenth amendment:

> A citizen of a State is now only a citizen of the United States residing in a state. The fundamental rights, privileges, and immunities . . . now belonged to him as a citizen of the United States, and are not dependent upon his citizenship of any State.[26]

The battle lines had been drawn before the passage of the fourteenth amendment by Mr. Chief Justice Marshall in *Barron v. Baltimore.*[27]

> The Constitution was ordained and established by the people of the United States for themselves, for their own government and not for the government of the individual States.[28]

To Marshall's mind:

> . . . had the framers of these amendments intended them to be limitations on the

[20] McCulloch v. Maryland, *supra* note 12.
[21] Gibbons v. Ogden, *supra* note 10.
[22] 29 U.S.C. § 201 (1964).
[23] Hurtado v. California, 110 U.S. 516 (1883); West v. Louisiana, 194 U.S. 258 (1903); Walker v. Sauvinet, 92 U.S. 90 (1875); Slaughter House Cases, 83 U.S. (13 Wall) 36 (1872).
[24] O'Neil v. Vermont, 144 U.S. 323, 361 (1891) (Justice Field).
> The privileges and immunities of the citizens of the United States are such as have their recognition in or guaranty from the Constitution of the United States.

Maxwell v. Dow, 176 U.S. 606, 617 (1899) (Justice Harlan) (dissenting opinion).
> And while those amendments originally limited only the power of the National Government in respect of the privileges and immunities specified therein, since the adoption of the Fourteenth Amendment, those privileges and immunities are, in my opinion, also guarded against infringement by the States.

Slaughter House Cases, *supra* note 23, at 122 (Justice Bradley) (dissenting opinion).
> [I]t was the intention of the people of this country in adopting that amendment [fourteenth] to provide National security against violation by the States of the fundamental rights [first eight amendments] of the citizen.

[25] Slaughter House Cases, *supra* note 23, at 74.
[26] *Ibid.*
[27] 32 U.S. (7 Peter) 243 (1833).
[28] *Id.* at 247.

> powers of state governments, they would have imitated the framers of the original Constitution, and have expressed that intention.[29]

Despite the fourteenth amendment and opinion to the contrary, *Barron's* vitality remained undiminished in the opinions of the Court concerning the constitutional issues involved in the administration of criminal justice by the states. Prohibited from implementing the first ten amendments as their guide for interpreting the fundamental "privileges and immunities" of constitutional weight, the Court set about formulating a suitable definition from precedent and personal divination. These efforts were to doom federalism.

An early attempt was optimistic regarding the fact that the identification of "what these fundamental principles are . . . would be more tedious than difficult to enumerate"[30] The method would be confined to "the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require."[31] When forced to delineate the extent of these basic rights, the following explanation was proffered:

> . . . not merely freedom from bodily restraint but also of the individual to contract to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[32]

While capturing that quality of the fourteenth amendment "so elusive of exact apprehension,"[33] the preceding incantation hardly contributed to the distillation of the nature and identity of those constitutionally fundamental rights.

Perhaps the Court's hesitancy to incorporate the first ten amendments in affecting the privileges and immunities of the fourteenth amendment, aside from the questionable, historical dictates of *Barron* and its progeny, stemmed from a distaste manifested by the Court against interfering with peculiarly parochial interest of state administration of criminal justice. While this reluctance might sacrifice individual freedoms, perhaps the Court sensed that the "powers reserved to the states and those conferred on the nation . . . to promote the general welfare, material and moral,"[34] became

[29] *Id.* at 250.
[30] Corfield v. Coryell, 6 Fed. Cas. 546 (1823).
[31] Davidson v. New Orleans, 96 U.S. 97, 104 (1878).
[32] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
[33] Twining v. New Jersey, 211 U.S. 78, 99-100 (1908).
[34] Hoke v. United States, 277 U.S. 308, 312 (1913). In sustaining the Mann Act the Court observed:

> Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction . . . but it must be kept in mind that we are one people; and the

meaningful only in the context of an actual situation. Additionally giving the factors:

> 1. law enforcement problems vary widely from State to State, as well as among different communities within the State.[35]
> 2. that the Supreme Court "so far removed from the actualities of crime prevention"[36] ought not interfere where the
> 3. problems involved "are solely exercises in balancing the freedom of the individual against the needs of law enforcement"[37] as the local authorities, being charged with the task of maintaining the security of the area, can better judge and implement the methods and remedies necessary to affect this balance, . . .[38]

arguably, any constitutional doubts concerning state criminal procedures should have been resolved in favor of the states. The dangers of this presumption of validity of state criminal law enforcement practices and the refusal to specify the consistency of personal, fundamental, constitutional rights are plain. Such an approach failed to meet the challenge which the surrender of any constitutional right entails. Given the affinity of the Court towards expanding its power base,[39] the gravity of the individual rights involved, and the inaccuracy of Justice Miller's observation in *Slaughter House* that:

> It is quite clear, then, that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other. . . .[40]

In light of national growth and concommitant interdependence of the states, sophisticated reasoning was demanded for the perpetuation of a non-incorporative standard of constitutional guarantees. The eventual failure to supply the required rationale has direct bearing on the status of historic federalism at the present time. At the very least, an opportunity had been supplied to those interests which regarded "new limitation or restriction . . . a matter of grave import, since, to that extent, it diminishes the authority of the State, so necessary to the perpetuity of our dual form of government"[41] to mold an effective standard for dual enforcement of constitutional criminal justice. But their method of formulation of this standard based on the gradual ascertainment of those fundamental rights: ". . . by the process

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powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.

[35] Cicenia v. Lagay, 357 U.S. 504, 510 (1958).

[36] Upshaw v. United States, 335 U.S. 410, 436 (1948) (Justice Reed dissent).

[37] Coakley, *Law and Police Protection: Restriction in the Law of Arrest*, 52 NW. U.L. REV. 2, 15 (1957).

[38] Upshaw v. United States, *supra* note 36, at 417.

[39] See notes 5-7 *supra*, and accompanying text.

[40] Slaughter House Cases, *supra* note 23, at 74.

[41] Twining v. New Jersey, *supra* note 33, at 92.

of inclusion and exclusion in the course of cases as they arise,"[42] made their every decisional victory pyrrhic and the vitality of their standard ephemeral. Their procrastination solidified the opposition and resulted in first encroachment, and then preemption by the federal judiciary, of areas historically the preserves of the States.

Barron's[43] theme, concretized in *Twining*,[44] found further expression in a trilogy of cases spanning the years from 1937 to 1952. First, in *Palko v. Connecticut*,[45] Mr. Justice Cardozo enunciated a test of constitutionality for criminal prosecutions by posing the historic question: "Does it violate those 'fundamental principles of liberty and justice which lie at the base of our civil and political institutions?' "[46] Mr. Justice Frankfurter further refined this pronouncement in *Adamson v. California*,[47] stating:

> Judicial review of that guarantee of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those cannons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.[48]

Finally, in *Rochin v. California*,[49] the test of criminal procedural constitutionality was confined to:

> ... respect [for] certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice."[50]

Constitutional censure, posited on rationale of incomprehensible latitude, might conceivably have resulted in a period of vigorous Supreme Court action. Yet in practice, the opposite held true.

The effect of *Palko*,[51] *Adamson*[52] and *Rochin*[53] on local law enforcement practices was nugatory. This was a period of infrequent constitutional censure of state criminal proceedings. Gross misapplications of the judicial proc-

[42] *Id.* at 100.
This Court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of decisions of cases as they arise.
[43] Barron v. Baltimore, *supra* note 27.
[44] Twining v. New Jersey, *supra* note 33.
[45] 302 U.S. 319 (1937).
[46] *Id.* at 328.
[47] 332 U.S. 46 (1947).
[48] *Id.* at 67-68 (Justice Frankfurter concurring).
[49] 342 U.S. 165 (1952).
[50] *Id.* at 173.
[51] Palko v. Connecticut, *supra* note 45.
[52] Adamson v. California, *supra* note 47.
[53] Rochin v. California, *supra* note 49.

ess were required before the Court dared intrude.[54] For the most part, "That which in one setting constitute[s] a denial of fundamental fairness, shocking to the universal sense of justice" and "in other circumstances, and in light of other considerations, fall[s] short of such denial,"[55] was left to the determination of the state tribunal. The duality of citizenship, and the accompanying diversity of protection of the individual before the courts, envisioned in *Slaughter House,* was practically speaking, realized. A catholicity of approach and of remedies in the administration of criminal justice by the states, the tatoo of criminal systems under a federal structure of law enforcement, typified the prevailing concepts of criminal jurisprudence. While this renaissance of historic federalism continued apace, in one area of the criminal law, the seeds of its future dissipation were being sown.

This area was confessions. The confession problem illustrates many of the salient factors relative to this examination of the waning vitality of the federal system. Again, the dilemmas of inclusion or exclusion of the first ten amendments, the demand for parochial security versus effectuation of individual rights protected by the national constitution, are of prime significance. But, the confession debate is by no means limited to a function of reemphasis and restatement of historical controversies. Rather, the ensuing developments in this field, brought the latent conflicts present in the administration of criminal justice by the states and the national governments to a point of confrontation and later, to a resolution ruinous to historical federalism. While the debate involving the admissibility of confessions, ultimately dispatched the Solomonic dicta of Mr. Justice Miller,[56] the *Slaughter House* opinion shaped the battle lines and outcome of this inquiry. Given the metaphysical division of citizenship contained in this opinion which necessitated a double standard of criminal justice enforced by two separate but mutually interested parties, the mode of identification of the constitutive elements of an admissible confession, was that of conflict, not cooperation. This exclusivity of approach therefore, preordained eventual resolution in the terms of victory rather than compromise. Possibly the tension caused by the confession problem, might have resulted in mutual efforts of discovery and effectuation of federal constitutional guarantees by the states and the national governments. Yet, the persistent refusal of jurist past and present, as illustrated by the confession debate, to limit the restrictions of the past to the realm of history rather than precedent, destroyed any possibility of formulating proper criminal procedure for administering constitutional criminal justice by both the state and the federal judiciaries. This

[54] Moore v. Dempsey, 261 U.S. 86 (1923); Mooney v. Holohan, 294 U.S. 103 (1935); Brown v. Mississippi, 297 U.S. 278 (1936).

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

[56] Slaughter House Cases, *supra* note 23.

obstinancy resulted in the present concentration of power over criminal justice in the national government alone and has all but demolished the function of local courts as controlling and effective administrators of criminal justice. More important, this demotion of the states of servile status in regard to the administration of criminal justice has eliminated our historically federal approach to criminal jurisprudence.

From its inception, the inquiry into the proper method of determining the admissibility of a confession, proceeded along exclusionist lines. Only in *Bram v. United States*,[57] was the question "whether a confession is incompetent" regarded as an issue "controlled by that portion of the Fifth Amendment . . . commanding no person shall be compelled to be a witness against himself."[58] Later cases ignored this precedent, concentrating rather on further elucidation of the purposes of the admissibility rule in terms as:

> . . . the aim of the rule that a confession is admissible unless voluntarily made is to exclude false evidence. Tests are involved to determine whether the inducement to speak is such that there is a fair risk that a confession is false.[59]

The effectuation of this aim was left to the individual states who possessed:

> . . . the right to prescribe the tests governing the admissibility of a confession. In various states there may be various tests. But when . . . the question is properly raised as to whether a defendant has been denied the due process of law guaranteed by the Federal Constitution, we cannot be precluded by the verdicts of a jury from determining whether the circumstances under which the confession was made were such that its admission in evidence amounts to a denial of due process.[60]

While the overtones of this type of constitutional reversal might be interpreted as the resurrection of Marshallian nationalism, the states felt secure in their belief in the continued vitality of the nation's federal approach to law enforcement. As long as the red-herring of incorporation of the first ten amendments was absent from any Supreme Court censure of state criminal procedure, little hostility greeted the opinions of the Court.

This myopic disregard of the dangers to a federal type enforcement and administration of criminal justice inherent in the "accordian-like qualities of this philosophy"[61] of implementation of the fourteenth amendment due process guarantees through "the voluntariness test" against the states, was matched by the development of the *McNabb*[62]-*Mallory*[63] rule of admissibil-

[57] 168 U.S. 532 (1897).
[58] *Id.* at 542; *But see, Developments in the Law: Confessions*, 79 HARV. L. REV. 938 (1966).
[59] Lisenba v. California, 314 U.S. 219, 236 (1941).
[60] Ward v. Texas, 316 U.S. 547, 550 (1942).
[61] Rochin v. California, *supra* note 49, at 177 (Justice Black dissent).
[62] McNabb v. United States, 318 U.S. 332 (1943).
[63] Mallory v. United States, 354 U.S. 449 (1957).

ity in the federal court system. The federal rule was a composite of the guarantees of the first ten amendments and Congressional mandate.[64] Its relevance to this study of the demise of historic federalism, lies in the constant overstatements of the Court in opinions utilizing the *McNabb-Mallory* rule to distinguish federal justice from state justice. None would deny that the interest of the two systems were alike in their beliefs that: "A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process."[65] Yet, however the ends coincided, the means remained diverse in the incrusted belief that: "This experiment [exclusionary rule] has been made in an attempt to abolish the opportunities for coercion" alone and "does not arise from Constitutional sources."[66] This polarization of enforcement techniques, based on the premise "that power over state criminal trials is not vested in this Court"[67] was rooted in the persistent view that:

> . . . review by this Court of State action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction.[68]

In the matter of confessorial admissibility therefore, the reasons behind the Court's reticence remained much the same as those controlling in search and seizure problems. Yet, while the basis was the same, the vehemence accompanying its reassertion in the area of confessions, increased. So intent was the Court on preserving the exclusivity of state and national criminal jurisprudence that the following incongruous observation was postulated:

> Consideration of large policy in making the necessary accommodations in our Federal System are wholly irrelevant to the formulation and application of proper standards for the enforcement of Federal criminal law in the Federal Courts.[69]

Historical federalism might require a diversity of procedure for continued vitality but hardly the degree of separation dictated above. Carried to a conclusion, this theory of the irrelevancy of one system of criminal justice to another, makes the *Slaughter House* division of citizenship seem timid. Rather than revitalizing a federalistic rendition of criminal justice, this irrelevancy thesis would replace federalism with a system of separate despotisms akin to those under the Articles of Confederation. The result would be

[64] *Supra* notes 62, 63.
[65] McNabb v. United States, *supra* note 62, at 343.
[66] Brown v. Allen, 344 U.S. 443, 476 (1953).
[67] Gallegos v. Nebraska, 342 U.S. 55, 64 (1951).
[68] McNabb v. United States, *supra* note 62, at 340.
[69] *Id.* at 340-41.

a censureless administration of criminal justice by both the national and state judiciaries within their own spheres.

As the Articles of Confederation had proved to be a most impractical method of governing the early colonies, so did this exclusivity theory of national and state criminal justice prove ineffective. The inadequacy of a non-incorporative mode of censure by the Supreme Court of state criminal prosecutions had proven to be of:

> . . . such uncertainty and unpredictability that it would be impossible to foretell—other than by guess work—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this ad hoc approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free.[70]

In the October term of 1961, the Supreme Court finally set about the task of substituting the dictates of the federal constitution for the individual sensitivities of the Supreme Court Justices which had served as the only governors of state criminal practices in the past.

Mapp v. Ohio[71] specifically overruled *Wolf v. Colorado,*[72] holding that the exclusionary rule announced in *Weeks v. United States,*[73] based on the dictates of the fourth amendment of the national constitution, was now effective against the states. Criminal procedure, at least in the area of search and seizure, would now have to proceed in terms of "a mutual obligation to respect the same fundamental criteria in their approaches."[74] The double standard of the past years had placed state law enforcement practices in the embarrassing posture "by admitting evidence unlawfully seized" or encouraging "disobedience to the Federal Constitution which it is bound to uphold."[75] In *Mapp,* the Court not only annihilated the factual "considerations supporting the failure of the *Wolf* Court to include the *Weeks* exclusionary rule when it recognized the enforceability of the right of privacy against the States"[76] but also defined its action as "enforceable in the same manner and the like effect as the other basic rights secured by the Due Process Clause"[77] against state encroachment. The accordion-like[78] philosophy behind efforts of defining the consistency of the fundamental rights had now made a full circle, facilitating the adoption of the approach which it so ve-

[70] Irvine v. California, 347 U.S. 128, 138 (1954).
[71] 367 U.S. 643 (1961).
[72] 338 U.S. 25 (1949).
[73] 232 U.S. 383 (1914).
[74] Mapp v. Ohio, *supra* note 71, at 658.
[75] *Id.* at 657.
[76] *Id.* at 653.
[77] *Id.* at 660.
[78] Rochin v. California, *supra* note 49, at 177 (Justice Black dissent).

hemently opposed. The difference in the utilization of that theory in *Mapp,* however, lay in the intent of the Court to confine its censure within the contour of the fourth amendment. Hopefully, the days of constitutional definition of an individual's fundamental rights on the basis of judicial sensitivities rather than the guarantees of the federal constitution were gone forever.

Mapp's relation to the question of the federal structure of the United States is critical. Basically, the importance of the decision stems from the non-preemptive tone in which the opinion was rendered. Rather than usurping the prerogatives of the individual states in the exclusion debate, the Court characterized its action as dictated by "more than half [the states] of those since passing upon it [*Weeks'* exclusionary rule] by their own legislative or judicial decision, have wholly or partly adopted or had adhered to the *Weeks* rule."[79] This plus the factor that other remedies geared to protect the individual from hostile invasions of privacy had proven futile, made *Mapp* not only logical but necessary. The aim was "Federal-State cooperation in the solution of crime under Constitutional standards . . . by recognition of their now mutual obligations to respect the same fundamental criteria in their approaches."[80] The rationale of *Mapp* was:

> . . . founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.[81]

The implementation of federal constitutional guarantees in criminal procedures initiated in *Mapp,* was amplified by the Court in *Gideon v. Wainwright.*[82] Accepting the earlier assumption in *Betts v. Brady,*[83] that the "Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right,"[84] Mr. Justice Black delivered the *coup de grace* to the "fundamental test" of the due process clause regarding counsel observing:

> . . . the Court in *Betts* was wrong, however in concluding that the Sixth Amendment guarantee of counsel is not one of these fundamental rights.[85]

The devastating simplicity of the *Gideon* opinion again emphasizes the inherent weakness of pre-*Mapp* interpretations of the requirements of the fourteenth amendment due process clause. Not only did reversal, premised on the "concept less rigid and more fluid than those envisaged in the other

[79] Mapp v. Ohio, *supra* note 71, at 651.
[80] *Id.* at 658.
[81] *Id.* at 660.
[82] 372 U.S. 335 (1963).
[83] *Supra* note 55.
[84] *Id.* at 473.
[85] Gideon v. Wainwright, *supra* note 82, at 344.

specific and particular provisions of the Bill of Rights"[86] prove ineffective to assure an individual's constitutional rights but by the facile manipulation of the mainstay of this theory's vitality, *i.e.*, the fundamental character of the right involved, any court could view the first ten amendments as:

> . . . so fundamental and essential to a fair trial and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment.[87]

Now, the presence of an individual guarantee in the first ten amendments rather than immunizing state procedure under the "fundamental right test" only emphasized that as:

> . . . this right appears in . . . our Bill of Rights [it] reflects the belief of the Framers of those liberties and safeguards that . . . [the right] was a fundamental right essential to a fair trial in a criminal prosecution.[88]

As indicated by *Gideon*, post-*Mapp* cases did not spring from an incorporative interpretation of the due process clause of the fourteenth amendment alone. Rather, the later opinions preceded the curious amalgam of two theories of constitutional due process which formerly had been mutually exclusive. On one hand, there existed the fundamental right theory of constitutional censure. Under this system of effecting due process guarantees, the constitutive states of the union were relatively free to choose the mode which their enforcement practices would pursue. Opposite, there was an incorporative theory of the due process clause of the fourteenth amendment. According to this view, state administration of criminal justice had to pass a muster of the first eight amendments of the national constitution in order to be deemed constitutionally acceptable. The synthesis of these two diverse theories as evinced by later Supreme Court decisions did not, as the proponents of the individual view points assured themselves, preserve the states as a functional unit in the administration of constitutional criminal justice. Instead, the Court adopted the rationale of both worlds of due process without the attendant restrictions of either perspective. The result was the complete obliteration of a federal structure of criminal procedures, with the Court free to roam the landscape of criminal law which it had declared now to be of limitless acreage.

The Court, intent on rejecting "the notion that the Fourteenth Amendment applies to the States only a 'watered down version of the individual guarantees of the Bill of Rights' "[89] did not, in later cases, limit itself to the text of the respective amendments in passing on the administration of criminal justice by the states. Given the prerogative of the individual states to

[86] Betts v. Brady, *supra* note 55, at 462.
[87] Malloy v. Hogan, 378 U.S. 1, 10 (1964).
[88] Pointer v. Texas, 380 U.S. 400, 404 (1965).
[89] Malloy v. Hogan, *supra* note 87, at 10-11.

"consistently with the Fourteenth Amendment, provide for differences" in criminal procedure, these differences could not "amount to a denial of Due Process or an 'invidious discrimination.' "[90] Thus, while certain amendments might now be effective against the states, the Court did not deem itself bound by them alone but continued to justify its actions on the basis of:

> . . . strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction rings the confession out of an accused against his will.[91]

From these two sources, the Court had endowed itself with a power over the administration of criminal justice approaching limitless proportions. The former minority, now the majority, goaded on by past defeats and the continued bumbling of state "kangaroo court proceedings . . . [involving] deprivation of due process of law . . . [denying] a person accused of committing a crime . . . vouchsafed basic minimal rights"[92] had finally secured the power to overturn lower federal and state court decisions based on its "vast supervisory powers"[93] alone.

The swan song of the federal structure of the nation was now completed. Every aspect of state trials, from preliminary hearing,[94] through appeal,[95] including an evaluation of the publicity[96] attendant thereon, was within the ambit of the pervasive power of the Supreme Court. In 1964, *Escobedo v. Illinois*,[97] in combining the voluntary test,[98] the supervisory power[99] of the Court, and the right of the accused to be represented by counsel,[100] underscored the peonage of the state judiciaries to the Supreme Court by creating the following rule controlling the admission of confessions:

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the policy carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth

[90] Douglas v. California, 372 U.S. 353, 356 (1963).
[91] Blackburn v. Alabama, 361 U.S. 199, 206 (1960).
[92] Rideau v. Louisiana, 373 U.S. 723, 726 (1963).
[93] Betts v. Brady, *supra* note 55, at 475 (Justice Black dissent).
[94] Pointer v. Texas, *supra* note 88.
[95] Douglas v. California, 372 U.S. 353 (1963).
[96] Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965).
[97] 378 U.S. 478 (1964).
[98] Rogers v. Richmond, 365 U.S. 534 (1961); Lynum v. Illinois, 372 U.S. 528 (1963); Haynes v. Washington, 373 U.S. 503 (1963).
[99] McNabb v. United States, *supra* note 62.
[100] Gideon v. Wainwright, *supra* note 82.

> Amendment to the Constitution as made obligatory upon the States by the Fourteenth Amendment.[101]

Escobedo was redefined in *Miranda v. Arizona*[102] in 1966. The "recurrent argument . . . that society's need for interrogation outweighs the privilege"[103] again fell before the Court's reasoning "that the Constitution has prescribed the rights of the individual when confronted with the power of the government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself."[104] The relation of this opinion to the problem of the decline of the nation's federal structure, lies in the disclaimer of Mr. Chief Justice Warren that the "Constitution . . . require[s] any specific code of procedures for protecting the privilege against self-incrimination."[105] In the tradition of Marshall, the Chief Justice noted that the Court had the power and the duty to define the basic guarantees of the constitution but left the:

> Congress and the States . . . free to develop their own safeguards . . . so long as they are fully effective as those described above in informing accused persons of the right of silence and in affording a continuous opportunity to exercise it.[106]

What at first glance appears to be an effort to restore the state courts to their previous status in criminal law, is upon further examination of attached provisos of little restitutive value. The "States are still entirely free to effectuate under their own law" standards of criminal procedure. But those standards can only be "stricter standards than those which we have laid down."[107] Additionally, the self ordained duty of the Court "as in all our cases dealing with the question whether a confession was involuntarily given, to examine the entire record and make an independent determination of the ultimate issue of voluntariness"[108] severely endangers the efficacy and finality of state criminal adjudications.

The effect of the power possessed by the Court on the federal system of law enforcement while identifiable from past deicions, is by no means a moot question. As indicated by *Schmerber v. California*,[109] it is possible that the Court may, in the future, defer to state determinations of what is constitutionally reasonable. If such is the case, the federal system of criminal law processes will not only be revitalized but will be significantly superior to the non-incorporative rationale of the past. Yet so long as the view persists that

[101] Escobedo v. Illinois, *supra* note 97, at 490.
[102] 384 U.S. 436 (1966).
[103] *Id.* at 479; citing Chambers v. Florida, 309 U.S. 227, 240-41 (1940).
[104] *Id.* at 479.
[105] *Id.* at 490.
[106] *Ibid.*
[107] Johnson v. New Jersey, 384 U.S. 719, 733 (1966).
[108] Davis v. North Carolina, 384 U.S. 737, 741-42 (1966).
[109] 384 U.S. 757 (1966).

"the concept of liberty protects those personal rights that are fundamental, and is not confined by the Bill of Rights,"[110] the Court, in applying the "penumbras, formed by the emanations from those guarantees that helped give them [the first ten amendments] life and substance,"[111] will only be limited by its own judicial fiat. The result of:

> . . . the adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts . . . which will be bad for the courts and worse for the country.[112]

[110] Griswold v. Connecticut, 381 U.S. 479, 486 (1965). (Justice Goldberg concurring).
[111] *Id.* at 484 (Justice Douglas, majority opinion).
[112] *Id.* at 521 (Justice Black dissent).