

The Utah Supreme Court and the Rule of Law: *Phillips* and the Bill of Rights in Utah

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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.

Article VI, Clause 2
United States Constitution

The Utah Supreme Court in *State v. Phillips*¹ denied the applicability of the freedom of speech provisions of the first amendment (and by dicta any other provision of the Bill of Rights) as a protection of individual rights against state governments by way of the due process clause of the fourteenth amendment. In so doing, the Utah Supreme Court defied² or demonstrated ignorance of³ over half a century of

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1. 540 P.2d 936 (Utah 1975). The five members of the Utah Supreme Court divided in two, three, and ultimately four directions in reaching the result in *Phillips*. The "majority" opinion originally carried three members of the court, with Justice Ellett in agreement with both the rationale and the result of the main opinion but also writing a separate concurring opinion commenting upon the validity of the fourteenth amendment. Two members joined in a dissenting opinion. Chief Justice Henriod was then listed as "concurring" in the majority opinion in the official opinion (locally termed the "green sheets") issued by the court. See UTAH CONST. art. 8, § 25. This three-member position supporting both the rationale and the holding of the majority opinion remained intact through the later publication of the advance sheets of *Phillips*, with Chief Justice Henriod still "concurring" in the majority opinion and Justice Ellett concurring in the rationale and the result, but also filing a separate concurring opinion. ("I concur with the main opinion, but wish to comment on some statements in the dissenting opinion . . .") After issuance of the official opinion (the "green sheets") and the publication of the advance sheets, however, Chief Justice Henriod changed his position as recorded in the bound volume of the West Reporter to "concurring in the result." The status of *Phillips* as precedent is therefore of dubious worth, with the Utah court divided 2-2 on the rationale and the result announced in the "majority" opinion, with one member concurring "in the result."

2. After asserting that the first amendment and the other amendments comprising the Bill of Rights are "simply, solely, expressly and utterly, nothing more and nothing less than a limitation upon the Congress of the United States and the powers of the federal government," the Utah court noted:

The foregoing is said in awareness of the proliferations that have occurred on the First Ten Amendments, and particularly by the use of the Fourteenth Amendment, to extend and engraft upon the sovereign states, limitations intended only for the federal government.

Id. at 938. *But see* note 3 *infra*.

3. The court's assertion of its awareness of "the proliferations that have occurred

United States Supreme Court case law holding to the contrary.⁴ It is late in the day of our country's constitutional history to be forced to review the debate over and the objectives of the supremacy clause of our Constitution by which its provisions were declared to be the "supreme Law of the Land," state judges, state laws, and state constitutions to the contrary notwithstanding.⁵ It is only slightly less antiquarian to remember in print that the scope of judicial review⁶ extends to state executive, legislative, and judicial acts;⁷ that the substantive and procedural provisions of the first amendment have been consistently held, since *Gitlow v. New York*⁸ in 1925, to apply against the states by way of the due process clause of the fourteenth amendment;⁹ that with two relatively minor exceptions,¹⁰ virtually every other procedural protection afforded the individual against the federal government by virtue of the Bill of Rights has now been guaranteed the individual against state government via the due process clause of the fourteenth amendment;¹¹ and that the United States Supreme Court has announced in many decisions a particular body of law which is binding upon the states when the issue is raised of the constitutionality of state legislation defining the parame-

on the First Ten Amendments" included only old cases denying the applicability of the first ten amendments to the states. 540 P.2d at 938 n.2. To support its assertion that "the United States Supreme Court has itself previously held that the Fourteenth Amendment does not make the First Ten Amendments applicable to the states," the Utah Supreme Court cited *Twining v. New Jersey*, 211 U.S. 78 (1908), which was overruled by the United States Supreme Court in *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). See *Duncan v. Louisiana*, 391 U.S. 145, 163 (1968) (Black & Douglas, JJ., concurring) (arguing that on the issue of incorporation *Palko v. Connecticut*, 302 U.S. 319, 326 (1937), "must be read as overruling *Twining*"). As authority, the Utah Supreme Court also cited *Presser v. Illinois*, 116 U.S. 252 (1886), and *Walker v. Sauvinet*, 92 U.S. 90 (1875). 540 P.2d at 938 n.2.

4. None of the United States Supreme Court cases by which all major liberties of the Bill of Rights were held inviolate from state infringement through the due process clause of the fourteenth amendment from *Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech) to *Mapp v. Ohio*, 367 U.S. 643 (1961) (unreasonable searches and seizures), and from *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against self-incrimination) to *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to jury trial), were cited by the Utah Supreme Court in its *Phillips* decision.

5. U.S. CONST. art. VI, cl. 2.

6. *Marbury v. Madison*, 5 U.S. 87, 1 Cranch 137 (1803).

7. E.g., *Cohens v. Virginia*, 19 U.S. 120, 6 Wheat. 264 (1821); *McCulloch v. Maryland*, 17 U.S. 159, 4 Wheat. 316 (1819); *Martin v. Hunter's Lessee*, 14 U.S. 141, 1 Wheat. 304 (1816).

8. 268 U.S. 652 (1925).

9. E.g., *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943). See Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 747-49 (1965).

10. The two exceptions are the seventh amendment right to a jury trial in civil cases where the amount in controversy exceeds twenty dollars, *Minneapolis & St. L.R.R. v. Bombolis*, 241 U.S. 211 (1916), and the fifth amendment right to a grand jury indictment, *Hurtado v. California*, 110 U.S. 516 (1884).

11. See notes 85-102 *infra* and accompanying text.

ters of legally acceptable expression.¹² Such a review of these basic constitutional principles nevertheless is made necessary by *State v. Phillips*. (Of course, the political wisdom of this trend toward the nationalization of due process in the area of state criminal procedure may be questioned, and the Constitution provides means by which such United States Supreme Court case law may be modified or even reversed. There exist techniques or methods by which change or modification in constitutional rules and the penumbra of constitutional common law emanating therefrom may be altered.¹³ The *Phillips* decision is not the way.)

In *Phillips*, the Utah Supreme Court upheld the convictions of three employees of the Adult Book and Cinema Store in Ogden who had been found guilty of distributing pornographic materials in violation of the Utah pornography statute.¹³ In rejecting the defendants' claim that the Utah statute violated their constitutionally protected freedom of speech, the court held that the first amendment prohibition against federal infringement of freedom of speech is not binding against the states by way of the due process clause of the fourteenth amendment:

[T]his provision [the first amendment] is simply, solely, expressly and utterly, nothing more and nothing less than a limitation upon the Congress of the United States and the powers of the federal government.

This is made abundantly clear by the other amendments adopted at the same time.

. . . .
The reasonable and judicious approach to the application of these amendment [sic] [the Bill of Rights] requires that they be considered together, and in the light of the background and purposes for which they were adopted, and this applies with equal force and appropriateness to the Fourteenth Amendment, which has been used to distort and nullify, in some measure, the purposes of the First Ten Amendments. . . .

The foregoing is said in awareness of the proliferations that have occurred on the First Ten Amendments, and particularly by the use of the Fourteenth Amendment, to extend and engraft upon the sovereign states, limitations intended only for the federal government.¹⁴

After finding that the first amendment afforded no protection against state infringement of free speech, the Utah court did not feel

12. *Miller v. California*, 413 U.S. 15, 24 (1973); *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966); *Roth v. United States*, 354 U.S. 476, 489 (1957). For an analysis of the developments in the constitutional standard for state regulation of obscenity from *Roth* to *Miller* see Note, *Obscenity*, 87 HARV. L. REV. 160 (1973). The Court recently reaffirmed the *Miller* standard in *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974).

13. See, e.g., H. WECHSLER, *THE NATIONALIZATION OF CIVIL LIBERTIES AND CIVIL RIGHTS* 18-19 (1970); Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

14. Ch. 196, § 76-10-1204, [1973] Utah Laws 679.

obliged to analyze the defendants' claim under the first amendment as demanded by *Miller v. California*,¹⁵ wherein the United States Supreme Court established a constitutional standard for the state regulation of obscenity. It simply held that the Utah statute did not violate the free expression provision of the Utah Constitution,¹⁶ thus placing itself in disobedience to over fifty years of case law of the United States Supreme Court declaring that the limitations upon federal procedural conduct in criminal trials established by the first amendment in particular, and later the Bill of Rights generally, was made applicable to the states through the due process clause of the fourteenth amendment. This refusal to honor Supreme Court decisions from *Roth v. United States*¹⁷ to *Miller* and beyond, when the Court, acting in its capacity as ultimate arbiter of federal constitutional issues, established a constitutional standard for state regulation of obscenity, places the Utah Supreme Court in violation of the supremacy clause in article VI, providing that the United States Constitution and other federal law is the "supreme Law of the Land."

Justice Ellett, in his concurring opinion, again¹⁹ noted his belief that the fourteenth amendment is itself a nullity, being illegally ratified and adopted, and is therefore not capable of being the vehicle by which any provisions of the Bill of Rights are made applicable to the states. Furthermore, in Justice Ellett's view, the fourteenth amendment due process clause required only that the states provide a procedurally fair system, which he felt the state had satisfied in *Phillips*:

The dissenting opinion asserts that "The Fourteenth Amendment is a part of the Constitution of the United States." While this same assertion

15. 540 P.2d at 938. See note 3 *supra*.

16. 413 U.S. 15 (1973).

17. UTAH CONST. art. I, § 1.

18. 354 U.S. 476 (1957).

19. Justice Ellett thoroughly explained his theory that the fourteenth amendment is a nullity in *Dyett v. Turner*, 20 Utah 2d 403, 439 P.2d 266 (1968). In *Dyett*, the Utah Supreme Court rejected a habeas corpus petition and held that the defendant had "knowingly and intelligently" waived the right to assistance of counsel, which was a right protected under the sixth amendment of the United States Constitution. Justice Ellett challenged the validity of the fourteenth amendment on the following grounds: (1) that the congressional resolution proposing the fourteenth amendment was not properly adopted by two-thirds of the full membership of Congress due to certain irregularities in seating southern senators and representatives, and (2) that the fourteenth amendment was not constitutionally ratified by three-fourths of the states, since many of the southern states ratified the fourteenth amendment "under the duress of military occupation," (*Id.* at 412, 439 P.2d at 273) and some of those states which had ratified the fourteenth amendment subsequently retracted their ratification.

Dyett was the first in a line of decisions by Justice Ellett asserting that the fourteenth amendment was invalidly adopted and ratified. *E.g.*, *Buhler v. Stone*, 533 P.2d 292, 295 (Utah 1975) (Ellett, J., dissenting) ("I do not think the Fourteenth Amendment to the Federal Constitution gives any rights to anybody."); *State v. Richards*, 26 Utah 2d 318, 322, 489 P.2d 422, 425 (1971) (Ellett, J., concurring).

has been made by the United States Supreme Court, that court has never *held* that the amendment was legally adopted. I cannot believe that any court, in full possession of its faculties, could honestly hold that the amendment was properly approved and adopted.

But even if it be assumed that Congress, by joint resolution, could compel the then Secretary of State to declare that the amendment had been approved by three fourths of the states of the Union, still there is no question in this case of lack of due process of law. The defendants were tried in a court of competent jurisdiction under rules of state law which applied to all alike. They were given notice of the charge against them and had a fair trial wherein they were afforded the rights to counsel, to be confronted by the witnesses, to testify and to give evidence in their own behalf.²⁰

Whatever the historical merit of the conspiracy theory of the fourteenth amendment,²¹ the time has long since passed that such a theory can be seriously entertained for purposes of declaring invalid²² a cornerstone of a century's constitutional law, especially by a state court.²³ In some circumstances it is proper to thunder from the bench at judicial trends with which one disagrees,²⁴ and this may be done by an inferior

20. 540 P.2d at 941-42 (emphasis in original).

21. Justice Ellett cited the following articles in support of his theory: McElwee, *The 14th Amendment to the Constitution of the United States and the Threat that it Poses to Our Democratic Government*, 11 S. CAR. L.Q. 484 (1959); Suthon, *The Dubious Origin of the Fourteenth Amendment*, 28 TUL. L. REV. 22 (1953). But see note 22 *infra*.

The mixed motivations of the proponents of the fourteenth amendment are analyzed in Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938).

22. In *Coleman v. Miller*, 307 U.S. 433 (1939), the Court reviewed the action of the Kansas Legislature in ratifying a proposed child labor amendment to the United States Constitution. On the basis of a thorough analysis of the ratification of the fourteenth amendment, including the disputed ratifications and withdrawals of three states as well as Seward's proclamation of valid adoption of the amendment, the Court held that the issue of state ratification of a constitutional amendment was not justiciable on the following grounds:

We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

Id. at 450. Thus Justice Ellett's challenge to the validity of the fourteenth amendment in *Phillips* presumes to rule on the constitutionality of the fourteenth amendment contrary to the United States Supreme Court's position in *Coleman* that the separation of powers mandates that the resolution of the valid ratification of a constitutional amendment is a political question for Congress, and is not a justiciable controversy. See *Leser v. Garnett*, 258 U.S. 130, 137 (1922) ("As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts.").

23. See notes 75-111 *infra* and accompanying text.

24. *E.g.*, *Cypert v. Washington County School Dist.*, 24 Utah 2d 419, 422, 473 P.2d 887, 890 (1970) ("Notwithstanding our emphatic disagreement with the majority in the Phoenix case, we realize that it is for the present to be recognized as the law . . .").

court toward an appellate body as well, as long as the forum recognizes that it is still bound by current and unambiguous case law of the appellate court. Arguably, Justice Ellett was within such a parameter of permissible judicial disagreement when in *Dyett v. Turner*,²⁵ he stated that:

We have spoken in the hope that the Supreme Court of the United States may retreat from some of its recent decisions affecting the rights of a sovereign state to determine for itself what is proper procedure in its own courts as it affects its own citizens. However, we realize that because of that Court's superior power, we must pay homage to it even though we disagree with it; and so we now discuss the merits of this case just the same as though the sword of Damocles did not hang over our heads.²⁶

While he demonstrated "homage" toward the United States Supreme Court in *Dyett* by recognizing the binding quality of law with which he disagreed, Justice Ellett and the Utah Supreme Court recognized no such inhibition in *Phillips* where the Utah court defied an unambiguous and controlling fifty year development of authoritative case law which holds that basic rights within the Bill of Rights, including the first amendment, are protected against state action by the due process clause of the fourteenth amendment. Similarly and consequently, Supreme Court case law defining the first and fourteenth amendments' parameters within which states may regulate speech were ignored, thereby calling into question the rule of law at the top of the Utah judicial system. The situation is made worse, in the sense that the Utah court's action was not only illegal but unnecessary, since the object of the court's opinion, the control of pornography, can be accomplished within the confines of the first and fourteenth amendments as announced by *Miller* and its progeny.²⁷

Justices Maughan and Tuckett in dissent followed the mandate of the United States Supreme Court and submitted the Utah statute in question in *Phillips* to an analysis within the context of *Miller*.²⁸

This article analyzes the proper relationship between state legislation and case law and the United States Supreme Court as mandated by the supremacy clause; the "incorporation" doctrine and the relationship between the Bill of Rights and the fourteenth amendment; the

25. 20 Utah 2d 403, 439 P.2d 266 (1968).

26. *Id.* at 414-15, 439 P.2d at 274. See note 19 *supra*.

27. See, e.g., *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Heller v. New York*, 413 U.S. 483, 494 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54, 69 (1973); *Miller v. California*, 413 U.S. 15, 24 (1973). See text accompanying notes 115-19 *infra*.

28. Justices Maughan and Tuckett would have declared the Utah pornography statute unconstitutional as being overly broad and vague in defining the proscribed conduct, since the Utah statute regulated areas of expression which were protected by the first amendment from infringement by the states through the due process clause of the fourteenth amendment, as the United States Supreme Court held in *Miller*. See 540 P.2d at 946-47.

current status of pornography law after *Miller*; and concludes with a view of the nature of judicial professionalism, procedural justice, and the "rule of law."

I. THE SUPREME COURT OF UTAH, THE SUPREME COURT OF THE UNITED STATES, AND THE SUPREMACY CLAUSE

I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.

Oliver Wendell Holmes, Jr.²⁹

When the Utah Supreme Court refused to follow the case law pronounced by the Supreme Court of the United States regarding the "incorporation" of seminal first amendment prohibitions against federal violation of rights of expression, religion, assembly, and petition into the due process clause of the fourteenth amendment as a barrier against state violation of these rights, and failed to honor Supreme Court case law regarding the definition of obscenity in cases from *Roth* to *Miller* and beyond, it violated the supremacy clause of the Constitution. To do so two hundred years after the foundation of the Republic raises the question whether the Utah court feels itself bound by the rule of law. Shortly after the drafting of the Constitution, Judge Spencer Roane of Virginia and Chief Justice John Marshall debated in grand manner the issue of the degree to which state tribunals were bound to follow the decisions of the United States Supreme Court on matters of federal and constitutional law.³⁰ Marshall won that debate, by position if not by persuasion, and the Civil War cemented that conclusion. The time and the manner in which the Utah court reopens that debate takes us in descent from the excitement of high politics, when such questions of federalism were truly open,³¹ to an intransigence marked by reaction and

29. O.W. HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 295-96 (1920).

30. See, e.g., *Cohens v. Virginia*, 19 U.S. 120, 6 Wheat. 264 (1821); *McCulloch v. Maryland*, 17 U.S. 159, 4 Wheat. 316 (1819); *Martin v. Hunter's Lessee*, 14 U.S. 141, 1 Wheat. 304 (1816); *Marbury v. Madison*, 5 U.S. 87, 1 Cranch 137 (1803); G. GUNTHER, JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 1-21 (1969); Gunther, *John Marshall, "A Friend of the Constitution": In Defense and Elaboration of McCulloch v. Maryland*, 21 STAN. L. REV. 449 (1969). For modern affirmation of this constitutional debate see *Cooper v. Aaron*, 358 U.S. 1, 4 (1958); *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859); cf. *Williams v. Bruffy*, 102 U.S. 248, 252-53 (1880).

31. Serious debates over the nature of the federal union continued after the classic exchanges between John Marshall, Spencer Roane, and Thomas Jefferson, but took on the more ominous overtones of the sectional conflict which led ultimately to the Civil War. The major spokesmen and antagonists in this later dialogue were President Andrew Jackson and John C. Calhoun, the proponent of nullification and interposition. These two theories were defined by Calhoun:

disregard of the rule of law.³²

The supremacy clause was the culmination of one of the most deli-

Nullification—as declaring null an unconstitutional act of the General Government, as far as the state is concerned. Interposition—as throwing the shield of protection between the citizens of a State and the encroachments of the General Government.

D. TIPTON, *NULLIFICATION AND INTERPOSITION IN AMERICAN POLITICAL THOUGHT* 7 (1969). The issues raised by nullification and interposition, *i.e.*, “the nature of the union, and . . . the proper relationship between the rule of a majority and the rights of a minority,” are vital to our federal constitutional system and have persisted from Calhoun’s time to the present. *Id.* at 15.

The nullification controversy flared in South Carolina in 1832 when the South Carolina Legislature drafted the Ordinance of Nullification to oppose the Tariff Act of July 14, 1832 passed by Congress. South Carolina passed legislation to prohibit the payment of duties or to recover those duties already paid by seizing the personal effects of any federal authority who failed to return the duties paid. Further, appeals to the United States Supreme Court were blocked by penalties to be imposed on any clerk of a court who allowed papers to be filed obstructing the enforcement of the Act. South Carolina provided for military defense in the event federal authorities offered resistance or coerced the state into obeying the congressional enactment. President Jackson delivered the following proclamation to South Carolina:

I consider, then, the power to annul a law of the United States, assumed by one State, incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed.

Id. at 38. While the confrontation between South Carolina and the federal government was eventually resolved by South Carolina’s rescission of the Ordinance of Nullification, the debate over the precise nature of the federal union, with federal and state sovereignties, has continued.

For an excellent analysis of the early debate over the specific nature of the American federal system see *id.* at 6-14.

The United States Supreme Court raised the fundamental objections to the interposition of a state opposing an act of the federal government in the early decision of *United States v. Peters*, 9 U.S. 65, 5 Cranch 115 (1809). In *Peters*, Chief Justice Marshall rejected Pennsylvania’s legislation effectively depriving the federal district court of admiralty jurisdiction over a vessel captured by a vessel owned by the State of Pennsylvania, and stated:

If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves.

Id. at 77, 5 Cranch at 136. Interposition can be accomplished judicially as well as legislatively when the state courts resist the rule of law established by the federal government operating within its proper constitutional parameters. See D. TIPTON, *supra*, at 34-42.

32. The rhetoric offered by the Utah court in the place of the legal analysis appropriate in such cases where constitutional interpretation is at issue is illustrated by the following example:

We feel like galley slaves chained to our oars by a power from which we cannot free ourselves, but like slaves of old we think we must cry out when we can see the boat

cate and critically important compromises made in the great constitu-

heading into the maelstrom directly ahead of us; and by doing so, we hope the master of the craft will heed the call and avert the dangers which confront us all. But by raising our voices in protest we, like the galley slaves of old, expect to be lashed for doing so. . . . We shall not complain if those who berate us belong to that small group who refuse to take an oath that they will not overthrow this government by force. When we bare our legal backs to receive the verbal lashes, we will try to be brave; and should the great court of these United States decide that in our thinking we have committed error, then we shall indeed feel honored, for we will then be placed on an equal footing with all those great justices who at this late date are also said to have been in error for so many years.

Dyett v. Turner, 20 Utah 2d 403, 405-06, 439 P.2d 266, 268 (1968).

The most recent example of the Utah Supreme Court's failure to analyze properly federal constitutional issues inherent in state legislation arose in *Turner v. Department of Employment Security*, 531 P.2d 870 (Utah 1975), *vacated per curiam*, 44 U.S.L.W. 3295 (U.S. Nov. 17, 1975), where the Utah Supreme Court analyzed the issue before the court as follows:

Should a man be unable to work because he was pregnant, the statute would apply to him equally as it does to her. What she should do is to work for the repeal of the biological law of nature. She should get it amended so that men shared equally with women in bearing children. If she could prevail upon the Great Creator to so order things, she would be guilty of violating the equal protection of the law unless she saw to it that man could also share in the thrill and glory of Motherhood.

531 P.2d at 871. The United States Supreme Court reversed the state court and struck down the Utah statute which denied unemployment benefits to an expectant mother during the last three months of pregnancy and for the first six weeks after birth. For Justice Ellett's reaction to the United States Supreme Court's opinion, see *Salt Lake Tribune*, Nov. 18, 1975, § 1, at 8, col. 1, accusing the Supreme Court of "entering into affairs that are not its business." *Id.* col. 2.

The Utah Supreme Court in *Manning v. Sevier County*, 30 Utah 2d 305, 517 P.2d 549 (1973), held that the establishment and free exercise clauses of the first amendment were "made applicable to State action by the Fourteenth Amendment," and construed the state statute in light of appropriate United States Supreme Court precedent. *Id.* at 308-09 & n.1, 517 P.2d at 551 & n.1. The Utah Supreme Court made no mention of this precedent in considering the incorporation doctrine in *Phillips*.

The role of the jurist in honoring and protecting the principles of procedural justice extend beyond legal interpretation per se to being the living embodiment of fairness and objectivity, in judicious and compassionate demeanor as well as in judicial action. Canon Three of the *Code of Judicial Conduct* requires:

- (1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.
- (2) A judge should maintain order and decorum in proceedings before him.
- (3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

ABA CODE OF JUDICIAL CONDUCT No. 3(A).

In *In re Rome*, 542 P.2d 676 (Kan. 1975), the Supreme Court of Kansas censured a municipal court judge under Canon 3(A)(3) for a memorandum opinion issued by the judge in a prostitution prosecution which was phrased in a poetic form that "allegedly [held] out a litigant to public ridicule or scorn." *Id.* at 684. The poetic memorandum opinion contained the following objectionable passages:

On January 30th, 1974,
This lass agreed to work as a whore.

tional convention in Philadelphia. The founding fathers feared a vast centralization of power in the federal government, as noted by the Utah

Her great mistake, as was to unfold,
 Was the enticing of a cop named Harold.
 Unknown to _____, this officer, surnamed Harris,
 Was duty-bent on _____'s lot to embarrass.
 At the Brass Rail they met,
 And for twenty dollars the trick was all set.
 In separate cars they did pursue,
 To the sensuous apartment of _____.
 Bound for her bed she spared not a minute,
 Followed by Harris with his heart not in it!
 As she prepared to repose there in her bay,
 She was arrested by Harris, to her great dismay!

Id. at 680. Of the judge's responsibility to be "patient, dignified, and courteous to litigants," the court stated:

Judges simply should not "wisecrack" at the expense of anyone connected with a judicial proceeding who is not in a position to reply. . . . Nor should a judge do anything to exalt himself above anyone appearing as a litigant before him. Because of his unusual role a judge should be objective in his task and mindful that the damaging effect of his improprieties may be out of proportion to their actual seriousness. He is expected to act in a manner inspiring confidence that even-handed treatment is afforded to everyone coming into contact with the judicial system.

Id. at 685.

Compare the requirements of Canon Three with the following excerpts from opinions of the Utah Supreme Court, which indicate the treatment that some litigants and others have received in some cases from the state's highest court. In *Christensen v. Christensen*, 18 Utah 2d 315, 422 P.2d 534 (1967), the court affirmed the distribution of marital assets as decided by the trial court in a divorce action, and described the facts as follows:

The dove of peace dropped the olive branch soon after the honeymoon, during which the bride paid her own expenses,—a new concept perhaps born of the new insistence that women must be paid the same salaries as their darlings. Mr. C. hit Mrs. C. over the head with a large package of kitchen cleaner called Babo,—hardly an appropriate instrumentality to cleanse a soiled marital wardrobe.

Id. at 317, 422 P.2d at 535.

Continuing in the same vein, the court justified the distribution of marital assets on several factors, including the fact that Mrs. C. "did not know that she would have to forego the government payment which was created by a previous husband, when she sought the arms of her lover, without knowing of his propensity for laying on the head of a female, not hands, but Babo cans." *Id.* at 319, 422 P.2d at 536.

In *Sorensen v. Sorensen*, 18 Utah 2d 102, 417 P.2d 118 (1966), the court upheld an award of child custody to a young father with the following comments made at the expense of the litigants before the court:

The litigants, a couple of kids, 19 and 17, did what comes naturally, and were married two months after a son Troy fell, an unwilling participant in this lawsuit,—to be but a bouncing ball for a couple of either conceptionists or misconceptionists.

. . . .

Mother says father was a cad, an opinion that apparently she did not subscribe to a few months before. Father says mother was a no good, an opinion that he did not share during his God-given biological urge.

. . . .

. . . She picks out all of the evidence in her favor, but neglects to point out

court,³³ but it was not that fear that had driven them to Philadelphia in frustration. Rather, it was the condition of virtual powerlessness of the national government under the Articles of Confederation which led them to understand that while absolute power may corrupt absolutely, something approaching absolute impotence may have the same effect. The Constitution represented a masterful combination of compromises and insights into the nature of man, providing power, yet harnessing it; separating power horizontally between branches of a federal government ideally in tension with each other, though colleagues in governance; dividing power both vertically and horizontally between the states and the federal government, each being coordinate in certain spheres of governance, yet lodging truly national power in the federal government; and finally and most relevant to *Phillips*, protecting certain rights of individual human beings against the powers of *any* level of government, federal or state. While a fuller realization of the accomplishments reflected within the Constitution had to await the Civil War and subsequent constitutional amendments, the seeds were there.³⁴ One of the final acts of the Philadelphia Convention was to decide how this careful blend of apportioned power reflected in the Constitution was to be preserved against either disintegration or undue centralization. How could the necessary supremacy of the Constitution and federal law be assured without usurping the powers of the states? Should the Constitution create a full-blown system of federal courts beneath the Supreme Court to protect the national interest? Could state courts uniformly interpret the great charter?

One of the critical compromises at Philadelphia was the decision reflected in article III, section 1 of the Constitution to leave the question of the creation of a federal judiciary below the Supreme Court to Congress. The central importance of a supremacy clause thereby became even more apparent. Madison noted in *The Federalist* that the failure to design a government in which the Constitution and national law were supreme over state law would create

a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster in which the head was under the direction of the members.³⁵

some of the evidence in favor of Huckleberry Finn. On appeal we review the record in favor of Huckleberry.

Id. at 103-04, 417 P.2d at 119.

33. 540 P.2d at 939.

34. Crosskey has argued that the Bill of Rights was intended from the beginning as a limitation on state action, with the exception of the first and seventh amendments which by their terms speak of Congress and courts of the United States. See II W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1056-82 (1953); U.S. CONST. art. I, § 10, cl. 1. See note 66 *infra*.

35. THE FEDERALIST NO. 44, at 147 (Great Books ed. 1952) (J. Madison).

Similarly, Hamilton argued in favor of state judiciaries being subordinate to the Supreme Court in interpreting constitutional issues:

Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.³⁶

Justice Joseph Story also supported the supremacy of the Constitution and national law, stating that the "propriety" of the supremacy clause arose "from the very nature of the Constitution," and that

[i]f [the Constitution] was to establish a national government, that government ought, to the extent of its powers and rights, to be supreme. It would be a perfect solecism to affirm that a national government should exist with certain powers, and yet that in the exercise of those powers it should not be supreme.³⁷

Finally, Madison clearly expressed his overriding concern that states should not be empowered to render impotent the rights of the people recognized by the Constitution and by federal law:

The necessity of some constitutional and effective provision guarding the Constn. & laws of the Union, agst. violations of them by the laws of the States, was felt and taken for granted by all from the commencement, to the conclusion of the work performed by the Convention. Every vote in the Journal involving the opinion, proves a unanimity among the Deputations on this point. A voluntary & unvaried concurrence of so many, (then 13 with a prospect of continued increase), distinct & independent authorities, in expounding & acting on a rule of Conduct, which must be the same for all, or in force in none, was a calculation, forbidden by a knowledge of human nature, and especially so by the experience of the Confederacy, the defects of which were to be supplied by the Convention.³⁸

Article III, section 2 of the Constitution defines the scope of the federal judicial power, providing that it "shall extend to all Cases, in Law and Equity, arising under this Constitution."³⁹ Further, the Supreme Court "shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make."⁴⁰ Section 25 of the Judiciary Act of 1789⁴¹ interpreted this constitutional section to provide for review over state court decisions upholding the validity of state legislation which is allegedly repugnant to the Constitution.⁴² On the basis of these constitutional mandates and historical

36. *Id.* No. 80, at 235 (A. Hamilton).

37. II J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 579 (1873).

38. III M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 527 (1911).

39. U.S. CONST. art. III, § 2, cl. 1.

40. *Id.* cl. 2.

41. Ch. 20, § 25, 1 Stat. 85-87. See 28 U.S.C. § 1257 (1970).

42. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 3-5 (1959).

directives, state courts interpreting such legislation are bound by the constitutional precedent established by the United States Supreme Court in construing specific constitutional provisions. It may be that there are discrete textual mandates in the Constitution granting a final and nonreviewable lawmaking power to another branch of government,⁴³ but no such issue is raised by *Phillips*.

Beginning primarily⁴⁴ with the United States Supreme Court decision of *Marbury v. Madison*,⁴⁵ the principle that our courts may, in a justiciable framework, review the lawmaking acts of other branches of government and of inferior courts, and declare such acts void if they violate the Constitution has become firmly established within the matrix of our constitutional fabric. Powerful arguments were raised against this notion,⁴⁶ but it prevailed and came to represent a bulwark of republican government,⁴⁷ a protection for minorities against an undisciplined

43. See Firmage & Mangrum, *Removal of the President: Resignation and the Procedural Law of Impeachment*, 1974 DUKE L.J. 1023, 1078-85 (the constitutional mandate to the Senate to try impeachments).

44. Prior to *Marbury*, state courts and the framers of the Constitution relied upon the doctrine of judicial review to hold that the judicial power, under a constitutional system, implicitly authorized the courts to review legislation and to declare it invalid when such legislation conflicted with the fundamental law of the nation. See, e.g., *Rutgers v. Waddington* (N.Y.C. Mayor's Ct. 1784), in SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 302 (R. Morris ed. 1935); *Den ex dem. Bayard v. Singleton*, 1 Martin 42 (N.C. 1787); *Cases of the Judges*, 8 Va. (4 Call.) 135 (1788); *Commonwealth v. Caton*, 8 Va. (4 Call.) 5 (1782). These early state court decisions are described and analyzed in 1 J. GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 125-41 (1971). Notions of judicial review were prevalent prior to and during the Constitutional Convention, in part in relation to the proposed Council of Revision which combined members of the Executive and the Judiciary in vetoing legislation. See, e.g., 5 J. ELLIOT, *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 151 (1937) (reported by James Madison); I M. FARRAND, *supra* note 38, at 96-101; III *id.* at 133. For notions of judicial review outside the Constitutional Convention see THE FEDERALIST No. 78, at 229-33 (Great Books ed. 1952) (A. Hamilton); *id.* No. 82, at 243.

45. 5 U.S. 87, 1 Cranch 137 (1803).

46. Judge Spencer Roane of Virginia, for example, a leading states' rights advocate, stated:

The Constitution of the United States was formed by the sanction of the states, given by each in its sovereign capacity. It adds to the stability and dignity, as well as to the authority of the Constitution, that it rests on this legitimate and solid foundation. The states then being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity, that there can be no tribunal above their authority, to decide in the last resort, whether the compact made by them violated; and consequently that as the parties to it, they must themselves decide in the last resort, such questions as may be of sufficient magnitude to require their interposition.

G. GUNTHER, *supra* note 30, at 61-62. See *Madison's Observations on Jefferson's Draft of a Constitution for Virginia*, in 6 THE PAPERS OF THOMAS JEFFERSON 315 (J. Boyd ed. 1952), wherein Madison stated that allowing courts to invalidate legislation would make "the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper."

47. The doctrine of judicial review under the American constitutional system has

majoritarianism which could otherwise obliterate constitutional protections and prerogatives.⁴⁸ Since *Martin v. Hunter's Lessee*⁴⁹ and *Cohens v. Virginia*,⁵⁰ there is no question that the Supreme Court's power of judicial review extends to review of state court decisions and state legislation. Neither is there any ambiguity regarding the binding nature for the state court of Supreme Court pronouncements interpreting the Constitution. Chief Justice Joseph Story, delivering the opinion of the Court in *Martin v. Hunter's Lessee*, observed:

It is a mistake, that the constitution was not designed to operate upon states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states; in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of state sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted, that the constitution does not act upon the states. The language of the constitution is also imperative upon the states, as to the performance of many duties. It is imperative upon the state legislatures, to make laws prescribing the time, places and manner of holding elections for senators and representatives, and for electors of president and vice-president. And in these, as well as some other cases, congress have a right to revise, amend or supersede the laws which may be passed by state legislatures. When, therefore, the states are stripped of some of the highest attributes of sovereignty, and

become a model for the development of some foreign constitutional systems of government. See, e.g., Cappelletti & Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207 (1966); Cole, *Three Constitutional Courts: A Comparison*, 53 AM. POL. SCI. REV. 963 (1959).

48. E.g., C. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* 93 (1962) (based on an analysis of Madison's notes on the Convention, Beard concluded that the members of the Convention sought "to set up a system of government that would be stable and efficient, safe-guarded on one hand against the possibilities of despotism and on the other against the onslaught of majorities."); R. BERGER, *CONGRESS V. THE SUPREME COURT* 16-21 (1969). Madison, in the Constitutional Convention, supported the Council of Revision proposal to combine the Judiciary and the Executive in a review function over legislation "for the safety of a minority in Danger of oppression from an unjust and interested majority." I M. FARRAND, *supra* note 38, at 108.

49. 14 U.S. 121, 1 Wheat. 304 (1816).

50. 19 U.S. 120, 6 Wheat. 264 (1821). In *Cohens v. Virginia*, the Court reviewed an alleged conflict between a Virginia criminal statute and a federal statute and held that while there was no conflict, the Court had the authority and the constitutional duty to review state court decisions bearing on federal constitutional issues, since the "states are constituent parts of the United States; they are members of one great empire—for some purposes sovereign, for some purposes subordinate." *Id.* at 185, 6 Wheat. at 414.

In *Martin v. Hunter's Lessee*, the Court rejected Judge Spencer Roane's assertion that the United States Supreme Court did not have appellate jurisdiction over a Virginia Supreme Court decision affecting the title to Virginia property which was also claimed by a British citizen under a federal treaty. Of a state judge's "judicial duties," the Court stated that state judges "were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States—the supreme law of the land." 14 U.S. at 157, 1 Wheat. at 340-41.

the same are given to the United States; when the legislatures of the states are, in some respects, under the control of congress, and in every case are, under the constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument, that the appellate power over the decisions of state courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.⁵¹

In a lawmaking statement which applies with equal force to state court judges today, as it did to Spencer Roane and the Virginia court in 1816, Story ruled:

Nor can such a right [judicial review] be deemed to impair the independence of state judges. It is assuming the very ground in controversy, to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience, by the letter of the constitution; and if they should unintentionally transcend their authority, or misconstrue the constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordinate departments of state sovereignty.

. . . .

It has been further argued against the existence of this appellate power, that it would form a novelty in our judicial institutions. This is certainly a mistake. In the articles of confederation, an instrument framed with infinitely more deference to state rights and state jealousies, a power was given to congress to establish "courts for revising and determining, finally, appeals in all cases of captures." It is remarkable, that no power was given to entertain original jurisdiction in such cases; and consequently, the appellate power (although not so expressed in terms) was altogether to be exercised in revising the decisions of state tribunals. This was, undoubtedly, so far a surrender of state sovereignty; but it never was supposed to be a power fraught with public danger, or destructive of the independence of state judges. On the contrary, it was supposed to be a power indispensable to the public safety, inasmuch as our national rights might otherwise be compromised, and our national peace be endangered.⁵²

In *Cohens v. Virginia* the Great Chief Justice also spoke the language of nationalism over parochial factionalism:

That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are

51. *Id.* at 158-59, 1 Wheat. at 343-44.

52. *Id.* at 159, 1 Wheat. at 344-45.

one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character, they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a state, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States; they are members of one great empire—for some purposes sovereign, for some purposes subordinate.⁵³

For Marshall and Story, as for Madison, Morris, and those who dominated the Philadelphia Convention and shaped our country's institutions directly thereafter, ultimate sovereignty lay not with the states, but with the people.⁵⁴ After Roger Taney succeeded Marshall, however, a moderating trend occurred away from the more extremely nationalistic opinions of the Marshall Court.⁵⁵ But the necessity of obedience by

53. 19 U.S. at 185, 6 Wheat. at 413-14.

54. *E.g.*, I M. FARRAND, *supra* note 38, at 123 (remarks of Mr. Madison); II *id.* at 92-93 (remarks of Gouverneur Morris); G. GUNTHER, *supra* note 30, at 85-86 (Chief Justice John Marshall) ("The confederation was a mere alliance offensive and defensive, and purports to be, what it was intended to be,—the act of sovereign states. The constitution is a government acting on the people, and purports to be, what it was intended to be,—the act of the people.").

55. In *Charles River Bridge v. Warren Bridge*, 36 U.S. 341, 11 Pet. 420 (1837), Chief Justice Taney, writing for the Court, strictly construed a public contract granting the privilege to build a bridge and collect tolls and held that the contract did not preclude the state from authorizing a competing bridge. Expressing a concern for local and state interests, Taney stated:

We cannot deal thus with the rights reserved to the states; and by legal intendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well being and prosperity.

Id. at 434, 11 Pet. at 552. In noting the trend of the Taney Court, which began in the *Charles River Bridge* case, one commentator stated:

The work of the 1837 term thus marked the beginning of a new order. The transition was not a sharp one, and those who saw it as such were mistaken. In spite of the radical doctrines sponsored by some Jacksonians of the time, the Court was careful to adhere to traditional patterns. In the *Bridge Case*, for example, there was no challenge to the status of the charter of a private corporation as a contract. The holding of the Marshall Court in the *Dartmouth College Case* stood firm. The same was true of the other highly controversial cases of this term. The change was limited, sometimes almost infinitesimal, and yet it was there. There was a greater tendency to look to items of local welfare and to emphasize the rights of the states, a greater concern with living democracy in a rapidly changing society. The tendency was to manifest itself further in succeeding terms in other kinds of cases.

5 C. SWISHER, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836-64*, at 97-98 (1974). *See generally id.* at 99-204, 396-422, 457-83.

state institutions to the constitutional interpretations of the United States Supreme Court remained undiminished. In *Ableman v. Booth*,⁵⁶ Chief Justice Taney, speaking for the Court, rebuked the Wisconsin Supreme Court for denying the validity of an act of Congress and disregarding a writ of error that had issued from the United States Supreme Court. In *Ableman*, a defendant who had been convicted in the state court sought a writ of habeas corpus from the federal district court. Upon the federal district court's grant of habeas corpus, the state court refused to recognize the authority of that federal court ultimately to dispose of the case on federal constitutional grounds. Thereafter, the prosecution appealed to the United States Supreme Court which issued a writ of error to the Wisconsin Supreme Court. That court refused to recognize the United States Supreme Court's authority under the Judiciary Act to review the state court's decision since, in the Wisconsin Supreme Court's opinion, that state court decision was "final." In response to the Wisconsin court's contention, Chief Justice Taney reiterated the views that Marshall had previously expressed:

[I]t is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; to make the Constitution and laws of the United States uniform, and the same in every State; and to guard against evils which would inevitably arise from conflicting opinions between the courts of a State and of the United States, if there was no common arbiter authorized to decide between them.⁵⁷

No state representative or institution may be allowed to block the enjoyment of rights secured the citizens of every state by the Constitution. This is as true of one who would block entrance through a schoolhouse door as it is of those who would deny the protections of the first and fourteenth amendments to the citizens of the State of Utah. This point was reiterated by the United States Supreme Court in *Cooper v. Aaron*,⁵⁸ wherein the Court was confronted with the argument by the Governor and Legislature of Arkansas that they were not bound to obey the orders of the federal district court in fashioning a desegregation plan for Little Rock schools as required under the earlier decision in *Brown v. Board of Education*.⁵⁹ The Court in *Cooper* responded to this resistance to the United States Constitution as interpreted by the United States Supreme Court in the following language:

Article VI of the Constitution makes the Constitution the "supreme law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and para-

56. 62 U.S. (21 How.) 506 (1858).

57. *Id.* at 518-19.

58. 358 U.S. 1 (1958).

59. 347 U.S. 483 (1954).

mount law of the nation," declared in the notable case of *Marbury v. Madison* . . . that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, "to support this Constitution." Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' "anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State"

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.⁶⁰

Thus, as shown by the cases from *Marbury* to *Cooper*, the United States Supreme Court must be recognized as the ultimate arbiter of federal constitutional issues that are presented before state courts, and those courts are bound by the decisions of the United States Supreme Court.

II. THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS

It is one of the first principles of my life, and one that I have cultivated from my childhood, having been taught it by my father, to allow every one the liberty of conscience. I am the greatest advocate of the Constitution of the United States there is on the earth. In my feelings I am always ready to die for the protection of the weak and oppressed in their just rights. The only fault I find with the Constitution is, it is not broad enough to cover the whole ground.

Although it provides that all men shall enjoy religious freedom, yet it does not provide the manner by which that freedom can be preserved, nor for the punishment of Government officers who refuse to protect the people in their religious rights, or punish these mobs, states, or communities who interfere with the rights of the people on account of their religion. Its sentiments are good, but it provides no means of enforcing them. It has but this one fault. Under its provision, a man or a people who are able to protect themselves can get along well enough; but those who have the misfortune to be weak or unpopular are left to the merciless rage of popular fury.

Joseph Smith, Nauvoo, 1843⁶¹

60. 358 U.S. at 18.

61. VI J. SMITH, HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 56-57 (2d ed. B. Roberts 1950).

Like many other local incidents, persecutions of Mormons in Missouri and in Illinois, sanctioned on occasion by state governments and with mobs often led by state or local officials, were immune from federal interdiction to protect the Mormons in the enjoyment of their first amendment rights of freedom of religion, speech, and assembly. When Joseph Smith, the Mormon leader, appealed for help to President Martin Van Buren, the latter responded with the statement, “[y]our cause is just but I can do nothing for you.”⁶² Whatever Van Buren’s motive,⁶³ this result was mandated by *Barron v. Baltimore*,⁶⁴ the first case which presented the Supreme Court with the opportunity to determine the scope of the prohibitions against governmental action provided by the Bill of Rights. In *Barron*, the petitioner sued the city for diverting streams in such a manner that his wharf in Baltimore harbor was without value. He claimed that the city had violated the fifth amendment prohibition against taking private property for public use “without just compensation.” Barron argued that the fifth amendment, “being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States,”⁶⁵ but Marshall held that the Bill of Rights spoke only to the national government and did not limit state action.⁶⁶

Following the Civil War, the thirteenth amendment, while legitimating the Emancipation Proclamation, did not provide an unambiguous authorization⁶⁷ for federal legislation designed to insure civil rights for former slaves still trammelled by the “black codes” of several southern states.⁶⁸ The fourteenth amendment, ratified in 1868, was designed in part at least to validate the Civil Rights Act of 1866, which was similarly passed to destroy the “black codes.” Two of the three major provisions⁶⁹ of the fourteenth amendment—the “due process” and

62. *Id.* at 57.

63. 2 B. ROBERTS, A COMPREHENSIVE HISTORY OF THE CHURCH 30 & n.17 (1930) (suggesting pre-election year political motives for this statement).

64. 32 U.S. 153, 7 Pet. 243 (1833).

65. *Id.* at 156, 7 Pet. at 247.

66. *Id.* at 159, 7 Pet. at 250-51. As Justice Crockett noted in *Phillips*, the first amendment expressly restrains “Congress.” The seventh amendment is addressed to “any Court of the United States.” All of the other amendments comprising the Bill of Rights speak only in general terms. Therefore, prior to the fourteenth amendment, the literal language of those two amendments arguably was merely a restraint upon federal action, while the more general terms of the other amendments were arguably intended to restrain state action as well. See II W. CROSSKEY, *supra* note 34, at 1056-66.

67. While the thirteenth amendment included an implementing clause and Congress acted thereunder in 1866, it was seriously questioned whether the terms of the amendment were sufficiently broad to authorize the sweeping provisions of the Civil Rights Act of 1866. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 427-37 (1968).

68. For a description of “black codes” and their impact see VI C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88, at 110-17, 1178-79, 1226-28 (1971).

69. U.S. CONST. amend. XIV, § 1 provides:

“equal protection” clauses—have provided the nexus for the constitutional protection of individuals against state government intrusion throughout the course of the development of constitutional law in this century. With the exception of the grand jury indictment requirement of the fifth amendment and the civil offenses jury trial provision of the seventh amendment, virtually every specific procedural guarantee of the Bill of Rights, together with every substantive and procedural guarantee of the first amendment, has now been held applicable to the states by way of the due process clause of the fourteenth amendment, just as they are applied directly to the federal government. That is the status of the law as announced by our nation’s highest tribunal. The clarity, specificity, notoriety, and longevity of this condition is what makes the *Phillips* decision a lawless act.

The law, however, was not always so. The *Slaughter-House Cases*⁷⁰ limited so strictly one of the three major provisions of the fourteenth amendment—the “privileges and immunities” clause—that while it might have more naturally provided the vehicle to accomplish what was done more awkwardly through the due process clause,⁷¹ and while it may yet provide a bulwark against intrusive and arbitrary government,⁷² it is today virtually a dead letter.⁷³ Other cases followed *Barron* in similar fashion, strictly construing the provisions of the fourteenth amendment.⁷⁴

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

70. 83 U.S. (16 Wall.) 36 (1872). In the *Slaughter-House Cases*, the Court upheld a Louisiana statute granting an exclusive right to a state corporation to operate certain livestock facilities which shut down competing butchers, and rejected a broad interpretation of the privileges and immunities clause, which may have protected the independent butchers.

71. Some commentators have argued that the historical intent of the privileges and immunities clause was to incorporate the Bill of Rights. *E.g.*, Levy, *Introduction to C. FAIRMAN & S. MORRISON, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY* at XIII-XIV (1970); Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U.L. REV. 740, 752 (1974).

72. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round At Last"?*, 1972 WASH. U.L.Q. 405, 419-20 concludes:

With government in control of so many essentials of our life, where in the Constitution can we turn for haven against the impositions of 1984? . . .

. . . .
 . . . [I]f the legislative and executive discretion is to be limited by the Constitution on such matters as public education, public welfare, and public housing; police, fire, and sanitation; ecology; and, to repeat, most importantly, with reference to the right of privacy, I expect it will come as an attempt to define the privileges or immunities of American citizenship.

73. See, *e.g.*, *Madden v. Kentucky*, 309 U.S. 83, 90-93 (1940); *McElvaine v. Brush*, 142 U.S. 155, 158-59 (1891); *In re Kemmler*, 136 U.S. 436, 446-48 (1890).

74. In *Davidson v. New Orleans*, 96 U.S. 97 (1877), the Court strictly construed “due process” in the fourteenth amendment as applied to an assessment on real property by a

But with *Twining v. New Jersey*,⁷⁵ while rejecting the view that the fifth amendment privilege against self-incrimination was “incorporated” into the fourteenth through its due process clause, the Court by dicta began⁷⁶ the creation of a naturalist or “fundamental law” formula which provided a means by which, through judicial inclusion and exclusion, procedural protections mostly⁷⁷ found within the Bill of Rights and considered to be integral to procedural and substantive justice, were held to be applicable to the states.

The first freedom of the Bill of Rights to be considered protected against state violation by virtue of the due process clause of the fourteenth amendment was—most appropriate to the present consideration of *Phillips* and consistent with thoughts expressed as early as the first Congress⁷⁸—the free speech clause of the first amendment. In *Gitlow v.*

state statute for drainage of swamps and held that such an assessment did not deprive a property owner of his property without due process of law. While the Court strictly construed the meaning of “due process of law,” it nevertheless recognized, in dictum, that a more expansive definition could gradually develop:

[T]here is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the *gradual process of judicial inclusion and exclusion*, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.

Id. at 104 (emphasis added).

75. 211 U.S. 78 (1908).

76. Justice Harlan, in dissent in *Hurtado v. California*, 110 U.S. 516 (1884), planted the seed for the future development of a naturalist interpretation of “due process of law” when he stated that this constitutional term embodied “fundamental principles of liberty and justice,” which may be applicable to the states under the fourteenth amendment. *Id.* at 558 (Harlan, J., dissenting).

The naturalist approach to defining the due process clause of the fourteenth amendment was again recognized by the Court in *Twining* when it stated:

[The defendants] appeal to another clause of the Fourteenth Amendment, and insist that the self-incrimination, which they allege the instruction to the jury compelled, was a denial of due process of law. This contention requires separate consideration, for it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. . . . If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.

211 U.S. at 99.

77. The naturalist formula may protect some procedural rights in the due process clause which are not specifically included within the Bill of Rights. In *In re Winship*, 397 U.S. 358 (1970), the Court held that proof beyond a reasonable doubt was among the “essentials of due process and fair treatment” protected by the due process clause and must therefore be the standard of proof in a juvenile, adjudicatory proceeding. *Id.* at 359, 364. See *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965) (recognizing that penumbral rights emanating from the specific guarantees of the Bill of Rights may be protected under the due process clause).

78. In considering a proposed amendment to the Constitution which essentially embodied the guarantees of what ultimately became the first amendment, Madison “conceived” of this amendment as “the most valuable amendment in the whole list.” 1 ANNALS

New York,⁷⁹ where the defendant had been convicted of violating a New York statute which prohibited the advocacy of criminal anarchy, the Court rejected on the merits the defendant's position that the statute violated his first amendment freedom of speech, but conceded that this liberty was protected against state intrusion by the due process clause of the fourteenth amendment. The Court said:

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and “liberties” protected by the due process clause of the Fourteenth Amendment from impairment by the States.⁸⁰

Since *Gitlow*, the Court's technique of “selective incorporation” has reached the point where every significant protection afforded the individual by the first amendment against the federal government has been extended through the due process clause of the fourteenth amendment against impairment by the states.⁸¹ Furthermore, the same exacting standards imposed by the Bill of Rights upon the federal government are laid against state action by the due process clause, “jot-for-jot and case-for-case,”⁸² “bag and baggage,”⁸³ without any loss of integrity.⁸⁴

Today, the due process clause of the fourteenth amendment forbids

of CONG. 784 (1789). Madison thought that the protections of the first amendment should be imposed upon the states as well as upon the federal government:

If there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments. He thought that if they provided against the one, it was as necessary to provide against the other, and was satisfied that it would be equally grateful to the people.

Id.

79. 268 U.S. 652 (1925).

80. *Id.* at 666.

81. See notes 85-102 *infra* and accompanying text.

82. *Duncan v. Louisiana*, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting).

83. *Id.* at 213 (Fortas, J., concurring).

84. The provisions of the Bill of Rights which are incorporated through the due process clause of the fourteenth amendment apply against the states to the same extent and in the same manner that they apply to the federal government. In *Malloy v. Hogan*, 378 U.S. 1 (1964), the Court held that “the Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment's privilege against self-incrimination, and that *under the applicable federal standard*, the [state court] erred in holding that the privilege was not properly invoked.” *Id.* at 3 (emphasis added). The Court further explained:

The State urges, however, that the availability of the federal privilege to a witness in a state inquiry is to be determined according to a less stringent standard than is applicable in a federal proceeding. We disagree. We have held that the guarantees of the First Amendment . . . the prohibition of unreasonable searches and seizures of the Fourth Amendment . . . and the right to counsel guaranteed by the Sixth Amendment . . . are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment. . . . The Court thus has rejected the notion that the

a state from taking an individual's property for public use without just compensation;⁸⁵ it protects an individual's freedom of speech,⁸⁶ free exercise of religion,⁸⁷ assembly,⁸⁸ the press,⁸⁹ petition,⁹⁰ and his right to be free from a state establishment of religion;⁹¹ it assures his freedom from unlawful search and seizure,⁹² from being placed in double jeopardy,⁹³ and from self-incrimination;⁹⁴ it guarantees a speedy⁹⁵ and public⁹⁶ criminal trial by an impartial⁹⁷ jury⁹⁸ after notification of charges;⁹⁹ it ensures the right to counsel¹⁰⁰ and compulsory process for obtaining witnesses;¹⁰¹ and it prohibits cruel and unusual punishment.¹⁰²

If the Utah court had recognized and honored the law of the Constitution that they are under oath to sustain, as represented by the long line of cases herein analyzed holding the essential procedural protections of the Bill of Rights inviolate also from state infringement by way of the due process clause of the fourteenth amendment, but criticized the means by which some of those provisions have been "selectively

Fourteenth Amendment applies to the States only a "watered-down, subjective version of the individual guarantees of the Bill of Rights"

Id. at 10-11.

In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court held: "Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—*were they to be tried in a federal court*—would come within the Sixth Amendment's guarantee." *Id.* at 149 (emphasis added).

In *Benton v. Maryland*, 395 U.S. 784 (1969), the Court held that the fifth amendment double jeopardy protection was incorporated against the states to protect individual constitutional guarantees, and stated that "[o]nce it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' . . . the same constitutional standards apply against both the State and Federal Governments." *Id.* at 795.

85. *E.g.*, *Chicago, B.&Q.R.R. v. Chicago*, 166 U.S. 226 (1897).

86. *E.g.*, *Fiske v. Kansas*, 274 U.S. 380 (1927); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

87. *E.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

88. *E.g.*, *DeJonge v. Oregon*, 299 U.S. 353 (1937).

89. *E.g.*, *Near v. Minnesota*, 283 U.S. 697, 707 (1931).

90. *E.g.*, *Bridges v. California*, 314 U.S. 252, 265 (1941) (dictum).

91. *E.g.*, *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

92. *E.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961), *overruling* *Wolf v. Colorado*, 338 U.S. 25 (1949).

93. *E.g.*, *Benton v. Maryland*, 395 U.S. 784 (1969), *overruling* *Palko v. Connecticut*, 302 U.S. 319 (1937).

94. *Malloy v. Hogan*, 378 U.S. 1 (1964), *overruling* *Twining v. New Jersey*, 211 U.S. 78 (1908).

95. *E.g.*, *Klopfert v. North Carolina*, 386 U.S. 213, 222 (1967).

96. *E.g.*, *In re Oliver*, 333 U.S. 257, 273 (1948).

97. *E.g.*, *Turner v. Louisiana*, 379 U.S. 466 (1965).

98. *E.g.*, *Duncan v. Louisiana*, 391 U.S. 145 (1968).

99. *E.g.*, *In re Oliver*, 333 U.S. 257 (1948).

100. *E.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

101. *E.g.*, *Washington v. Texas*, 388 U.S. 14 (1967).

102. *E.g.*, *Robinson v. California*, 370 U.S. 660 (1962).

incorporated" into the due process clause, it conceivably could have made a contribution to the issue of incorporation. The consequences of "means," here as in so many areas of the law, are enormous. The realization of proper means, as opposed to a total preoccupation with substantive ends, is after all at the center of the concept of due process or procedural justice.

Over the years of debate regarding the procedural content of the due process clause of the fourteenth amendment and its relationship to the Bill of Rights, two analytical approaches have been fashioned. One approach, characterized by a naturalistic impulse and associated with Justices Cardozo, Frankfurter, Harlan, and now Powell, directs attention toward the "fundamental," "basic," and innately moral content of the right in question.¹⁰³ The second more characteristically positivist

103. While the Court in *Twining v. New Jersey*, 211 U.S. 78 (1908), rejected a particular incorporationist argument (which rejection was later overruled in *Malloy v. Hogan*, 378 U.S. 1 (1964)), it created the beginning of a formula which was ultimately to provide the vehicle by which many of the freedoms and liberties of the Bill of Rights were to be accorded citizens against the states. See the dictum of the *Twining* Court, *supra* note 76.

Mr. Justice Cardozo provided the core concept by which values that were considered to be fundamental to procedural justice were to be evaluated with respect to their inclusion within the idea of due process. In *Palko v. Connecticut*, 302 U.S. 319 (1937), the defendant urged the Court to reverse a state criminal conviction which allegedly violated the double jeopardy provision of the fifth amendment, in that a state statute had allowed the prosecution to appeal the decision, and retry the case if the appeal was upheld. After the state court reversed the defendant's second degree murder conviction, he was retried and convicted of first degree murder and sentenced to death. While the Court rejected the "incorporation" of double jeopardy through the due process clause (later overruled in *Benton v. Maryland*, 395 U.S. 784 (1969)), Cardozo stated that:

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress . . . or the like freedom of the press . . . or the free exercise of religion . . . or the right of peaceable assembly, without which speech would be unduly trammelled . . . or the right of one accused of crime to the benefit of counsel In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

302 U.S. at 324-25.

Justice Frankfurter continued this approach in his concurring opinion in *Adamson v. California*, 332 U.S. 46 (1927):

approach is dominantly associated with Justice Hugo Black and, with important differences, Justices Douglas, Brennan, Marshall, and Gold-

A construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights would, as has been noted, tear up by the roots much of the fabric of law in the several States, and would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom. . . . Such a view not only disregards the historic meaning of "due process." It leads inevitably to a warped construction of specific provisions of the Bill of Rights to bring within their scope conduct clearly condemned by due process but not easily fitting into the pigeon-holes of the specific provisions. It seems pretty late in the day to suggest that a phrase so laden with historic meaning should be given an improvised content consisting of some but not all of the provisions of the first eight Amendments, selected on an undefined basis, with improvisation of content for the provisions so selected.

And so, when, as in a case like the present, a conviction in a State court is here for review under a claim that a right protected by the Due Process Clause of the Fourteenth Amendment has been denied, the issue is not whether an infraction of one of the specific provisions of the first eight Amendments is disclosed by the record. The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him. Judicial review of that guaranty 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 canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment.

Id. at 67-68 (Frankfurter, J., concurring).

In *Rochin v. California*, 342 U.S. 165 (1952), three state policemen broke into petitioner's room, "jumped upon him" in an attempt to force out of his mouth or stomach two capsules they had seen him take during their forced entry, and took him to a hospital where, against his will, he was given an emetic solution through a tube into his stomach. The petitioner vomited out the pills which were found to contain morphine, and they were entered as evidence which ultimately led to his conviction at state trial. The Supreme Court reversed the state conviction. In speaking for the Court, Justice Frankfurter sustained and elaborated upon Cardozo's "concept of ordered liberty":

However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." . . . These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental" . . . or are "implicit in the concept of ordered liberty. . . ."

. . . .
. . . This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding

berg. Justice Black, for example, joined by Justice Douglas, presented in dissent in *Adamson v. California*¹⁰⁴ a lengthy appendix arguing that the intent of the framers of the fourteenth amendment was to incorpo-

by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and screw to permit of constitutional differentiation.

Id. at 169, 172.

Justice Harlan's position, following in the tradition of Cardozo and Frankfurter, can be seen from his concurring opinion in *Williams v. Florida*, 399 U.S. 78 (1970), wherein the Court held that the sixth amendment right to jury trial did not mandate a twelve man jury:

These decisions demonstrate that the difference between a "due process" approach, that considers each particular case on its own bottom to see whether the right alleged is one "implicit in the concept of ordered liberty" . . . and "selective incorporation" is not an abstract one whereby different verbal formulae achieve the same results. The internal logic of the selective incorporation doctrine cannot be respected if the Court is both committed to interpreting faithfully the meaning of the federal Bill of Rights and recognizing the governmental diversity that exists in this country. The "backlash" in *Williams* exposes the malaise, for there the Court dilutes a federal guarantee in order to reconcile the logic of "incorporation," the "jot-for-jot and case-for-case" application of the federal right to the States, with the reality of federalism. Can one doubt that had Congress tried to undermine the common-law right to trial by jury before *Duncan* came on the books the history today recited would have barred such action? Can we expect repeat performances when this Court is called upon to give definition and meaning to other federal guarantees that have been "incorporated"?

Id. at 129-30 (Harlan, J., concurring).

Justice Powell would seem to have taken the mantle from Justice Harlan as can be seen in his decisive concurring opinion in *Apodaca v. Oregon*, 406 U.S. 404 (1972), wherein the Court held that a state jury verdict need not be unanimous to satisfy the requirements of the sixth amendment right to jury trial as incorporated through the fourteenth amendment due process clause. Justice Powell disagreed with the majority's major premise that "the concept of jury trial, as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept required in federal courts by the Sixth Amendment." *Id.* at 369 (Powell, J., concurring). Justice Powell framed the issue before the Court as follows:

The question, therefore, that should be addressed in this case is whether unanimity is in fact so fundamental to the essentials of jury trial that this particular requirement of the Sixth Amendment is necessarily binding on the States under the Due Process Clause of the Fourteenth Amendment. An affirmative answer . . . would give unwarranted and unwise scope to the incorporation doctrine as it applies to the due process right of state criminal defendants to trial by jury.

Id. at 373. While Justice Powell would require unanimity in federal court proceedings, the states should be left free "to experiment with adjudicatory processes different from the federal model." *Id.* at 375. What is required of state criminal procedure by the fourteenth amendment's due process clause is not lock-step uniformity with the federal system, but adherence to "what is fundamental in jury trial." *Id.* at 376.

104. 332 U.S. 46 (1947). In *Adamson v. California*, the Court held that the fifth amendment privilege against self-incrimination was not incorporated against the states. Mr. Justice Black, the primary supporter of total incorporation of the Bill of Rights through the fourteenth amendment, expounded his position in dissent as follows:

My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that

rate therein all of the Bill of Rights.¹⁰⁵ While no Court majority has ever accepted this position,¹⁰⁶ most Supreme Court justices have agreed that the centrality of the focus upon the provisions of the Bill of Rights should govern the content of the due process clause of the fourteenth amendment, and that fact is critical, even though the process has been that of "selective," rather than "total" incorporation. The result, whether by a naturalistic examination of "fundamental" rights or a positivistic inclusion or exclusion of specific provisions of the Bill of Rights, has been to "absorb" or "incorporate" every significant criminal procedural provision of the first eight amendments together with the

the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced.

Id. at 71-72 (Black, J., dissenting). In continuing, Justice Black noted:

I cannot consider the Bill of Rights to be an outworn 18th Century "strait jacket" as the *Twining* opinion did. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. If the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the states, or the *Twining* rule applying none of them, I would choose the *Palko* selective process. But rather than accept either of these choices, I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.

Id. at 89.

105. 332 U.S. at 92-123. For an historical rebuttal to Justice Black's position see Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949). But see Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

106.

Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court—a period of seventy years—the scope of that Amendment was passed upon by forty-three judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States.

Adamson v. California, 332 U.S. 46, 62 (1947) (Frankfurter, J., concurring).

substantive rights enumerated within the first amendment.¹⁰⁷

Nevertheless, it is suggested that these two different approaches do not necessarily lead to the same result. While subjectivity is not by any means eliminated by either approach,¹⁰⁸ the chance of reaching a proper result is at least furthered by asking the right questions and directing attention to the crucial issue.¹⁰⁹ That would seem to be done by focusing on the fundamental nature of the right in question and its relationship to procedural justice, rather than looking directly at a particular provision of the Bill of Rights for the purpose of making a mechanical decision to "exclude or include." It would seem in addition that greater latitude could be afforded to the states to experiment creatively in the realm of criminal procedure if the precise standard which the Bill of Rights imposes on the federal government were not automatically demanded of the states.¹¹⁰ It may well be that future generations will perceive "funda-

107. See notes 85-102 *supra* and accompanying text.

108. In their judicial debates, Justices Black and Frankfurter each claimed that the other's approach injected subjective moral judgments into the definition of the due process clause of the fourteenth amendment. Justice Frankfurter, in *Adamson v. California*, asserted that "the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment," 332 U.S. at 68 (Frankfurter, J., concurring), but criticized Black's incorporationist approach which "leads inevitably to a warped construction of specific provisions of the Bill of Rights to bring within their scope conduct clearly condemned by due process but not easily fitting into pigeon-holes of the specific provisions." *Id.* at 67.

Justice Black, on the other hand, in *Rochin v. California*, 342 U.S. 165 (1952), disagreed with the "nebulous standards" set by the naturalist approach to incorporation because they lacked external criteria for fixing the content of procedural due process. Black argued that

[t]here is, however, no express constitutional language granting judicial power to invalidate every state law of every kind deemed "unreasonable" or contrary to the Court's notion of civilized decencies Of even graver concern . . . is the use of the philosophy to nullify the Bill of Rights. I long ago concluded that the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights.

Id. at 176-77 (emphasis in original).

109. See Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

110. As Justice Fortas stated in *Duncan v. Louisiana*, 391 U.S. 145 (1968):

Neither logic nor history nor the intent of the draftsmen of the Fourteenth Amendment can possibly be said to require that the Sixth Amendment or its jury trial provision be applied to the States together with the total gloss that this Court's decisions have supplied. The draftsmen of the Fourteenth Amendment intended what they said, not more or less: that no State shall deprive any person of life, liberty, or property without due process of law. It is ultimately the duty of this Court to interpret, to ascribe specific meaning to this phrase. There is no reason whatever for us to conclude that, in so doing, we are bound slavishly to follow not only the Sixth Amendment but all of its bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings. To take this course, in my judgment, would be not only unnecessary but mischievous because it would inflict a serious blow upon the principle of federalism. The Due Process Clause commands us to apply its great standard to state court proceedings

mental” norms of due process that should appropriately be demanded of the states under the fourteenth amendment, but not of the federal government under the due process clause of the fifth amendment.¹¹¹

The current ambivalence between the two approaches to due process interpretation can be seen in *Duncan v. Louisiana*,¹¹² where the Court, in holding the sixth amendment right to jury trial in criminal cases applicable to state procedure by way of the due process clause of the fourteenth amendment, seemed still to employ the Cardozo-Frankfurter approach looking toward “fundamental” rights, while significantly altering the conventional terminology. Rather than examining whether a particular procedure was “implicit in the concept of ordered liberty” or required by “immutable principles of justice,” the Court inquired whether the procedure was “fundamental to the American scheme of justice”:

Earlier the Court can be seen as having asked, when inquiring into whether some particular procedural safe-guard was required of a State, if a civilized system could be imagined that would not accord the particular protection. [*Palko v. Connecticut*] . . . The recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty.¹¹³

The Court then held:

Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment’s guarantee.¹¹⁴

to assure basic fairness. It does not command us rigidly and arbitrarily to impose the exact pattern of federal proceedings upon the 50 States. On the contrary, the Constitution’s command, in my view, is that in our insistence upon state observance of due process, we should, so far as possible, allow the greatest latitude for state differences. It requires, within the limits of the lofty basic standards that it prescribes for the States as well as the Federal Government, maximum opportunity for diversity and minimal imposition of uniformity of method and detail upon the States. Our Constitution sets up a federal union, not a monolith.

Id. at 213-14 (Fortas, J., concurring).

111. See, e.g., *In re Winship*, 397 U.S. 358 (1970). In *Adamson v. California*, Justice Frankfurter was of the opinion that the due process clause of the fourteenth amendment possessed “independent potency” that “neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them.” 332 U.S. at 66.

112. 391 U.S. 145 (1968).

113. *Id.* at 149 n.14.

114. *Id.* at 149.

Whether the Court under the influence of Justice Powell will examine more acutely the fundamental nature of state criminal procedure, leaving some elasticity and creativity within the state systems, or whether the approach will be continued by which state procedure is mechanistically matched against federal procedure, may be influenced in part by state court opinions which contribute creatively to this dialogue.

III. A NOTE ON SUBSTANCE: STATE CONTROL OF PORNOGRAPHY

The purpose of this article has been to comment on the *Phillips* case as seen within the western tradition of the rule of law, here conceived to be a concept dominantly concerned with procedural means rather than substantive ends. The resolution of the *Phillips* case, therefore, is not central to our purpose. A brief view is expressed, however, simply to complete the analysis of *Phillips*.

Since the first amendment right of free speech has been considered since 1925¹¹⁵ to be absorbed within and protected by the due process clause of the fourteenth amendment, the Utah Supreme Court was obliged to consider a free speech challenge to the constitutionality of the Utah pornography statute within the confines of the recent case law of the United States Supreme Court delimiting such state legislation. That obligation was not met.

Through its holding in *Roth v. United States*¹¹⁶ that obscene material was not protected by the first and fourteenth amendments, the United States Supreme Court provided a means whereby states could pass pornography legislation without constitutional proscription. "Obscene" material was to be determined by

whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.¹¹⁷

In the course of his opinion, Justice Brennan justified the conclusion that the first amendment rights were not absolute and that obscenity or pornography was unprotected with the assertion that such material was "utterly without redeeming social importance."¹¹⁸

In *Memoirs v. Massachusetts*,¹¹⁹ however, the Court in a plurality opinion took the earlier statement made in defense of the unprotected nature of obscenity, namely that it was without redeeming social im-

115. See notes 79-80 *supra* and accompanying text.

116. 354 U.S. 476 (1957). In *Roth v. United States*, the Court upheld a federal statute that punished the mailing of "obscene" publications, and sustained the conviction of a defendant who had violated that statute.

117. *Id.* at 489.

118. *Id.* at 484.

119. 383 U.S. 413 (1966).

portance, and made it a part of the *Roth* test defining obscenity. Thus,

[u]nder this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.¹²⁰

The addition of the last qualification pronounced in *Roth* simply as a descriptive comment, placed upon the states the nearly impossible burden of proving a negative proposition. In addition, while in *Roth* the "community" by whose standards obscenity was to be determined was not defined, a national criterion soon emerged.

Subsequently, the Burger Court in *Miller v. California*¹²¹ returned to a test resembling the original *Roth* approach, scraping off the accretions of intervening cases like *Memoirs* which had rendered state legislation and prosecution of pornography difficult, if not impossible. *Miller* eliminated the "utterly without redeeming social value" test¹²² (which had not been originally suggested as a "test" in *Roth*) by restoring as critical the "taken as a whole" phraseology of *Roth*, and defined the "community" by whose standards the definition would be interpreted as being "local," presumably a state or local community standard, rather than a national one.¹²³ In providing an element of statutory specificity, the *Miller* Court established "basic guidelines" which could have been followed in *Phillips* for determining the constitutionality of the Utah pornography statute:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole lacks serious literary, artistic, political, or scientific value.¹²⁴

The Utah statute at issue in *Phillips*¹²⁵ was challenged on the basis that it was overbroad in proscribing the conduct of distributing pornographic materials and therefore failed to satisfy requirements of statutory specificity, contrary to the guidelines of *Miller*. Prior to the decision

120. *Id.* at 418.

121. 413 U.S. 15 (1973). In *Miller*, the Court vacated the conviction of the appellant who had violated a California statute prohibiting the use of the mails for the distribution of unsolicited sexually explicit material.

122. *Id.* at 24.

123. *See id.* at 30-34.

124. *Id.* at 24. For the most recent interpretation of the *Miller* standard in the United States Supreme Court see *Jenkins v. Georgia*, 418 U.S. 153 (1974).

125. Ch. 196, § 76-10-1204, [1973] Utah Laws 679. The Utah Supreme Court also relied upon the definition of "pornographic" contained in *id.* § 76-10-1203.

in *Phillips*, the Utah Legislature, recognizing that the state in its legislation, as well as in its adjudication, must abide by the constitutional limitations imposed by the due process clause of the fourteenth amendment, amended the state pornography statute to conform more closely to the *Miller* definition.¹²⁶

It is unclear whether the older state law as seen in *Phillips*, prior to its amendment specifically to accord with *Miller*, would have withstood a challenge, properly evaluated by the Utah court, using the *Miller* formula. The old statute, much more vague than its specific¹²⁷ successor, might possibly have survived, since there is case law permitting a court to read into a particular state statute, otherwise impermissibly vague or overbroad, the *Miller* specificity requirements and by such judicial interpretation avoid invalidation of the law for due process violation.¹²⁸ Regardless of how the old statute would have fared if *Phillips* had been accorded due process of law by the Utah Supreme Court, the new statute, drafted particularly to conform to *Miller* and patterned after the Oregon statute that was cited by the *Miller* Court as being substantially adequate to protect the constitutional freedom of speech,¹²⁹ is somewhat more secure from such constitutional attacks.

IV. CONCLUSION—PROCEDURAL JUSTICE AND THE RULE OF LAW

The reason why Men enter into society, is the preservation of their Property,¹³⁰ and the end why they choose and authorize a legislative, is, that there may be laws made, and Rules set as Guards and Fences to the Properties of all the Members of the Society, to limit the Power, and moderate the Dominion of every Part and Member of the Society . . .

John Locke¹³¹

The Utah Supreme Court in *Phillips* denied the defendants those

126. UTAH CODE ANN. § 76-10-1203 (Supp. 1975) defines "pornographic material or performance" as follows:

- (1) Any material or performance is pornographic if:
 - (a) The average person, applying contemporary community standards, finds that, taken as a whole, it appeals to prurient interest in sex;
 - (b) It is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sado-masochistic abuse, or excretion; and
 - (c) Taken as a whole it does not have serious literary, artistic, political or scientific value.

127. Compare ch. 196, § 76-10-1203, [1973] Utah Laws 679 with UTAH CODE ANN. § 76-10-1203 (Supp. 1975).

128. See, e.g., *United States v. 12 200-ft Reels of Super 8 MM. Film*, 413 U.S. 123, 130 n.7 (1973); *United States v. Thevis*, 484 F.2d 1149, 1154-55 (5th Cir. 1973); *Gibbs v. State*, 504 S.W.2d 719, 724-25 (Ark. 1974).

129. 413 U.S. at 24 n.6. Compare ORE. REV. STAT. § 167.060 (Supp. 1974) with UTAH CODE ANN. § 76-10-1201 (Supp. 1975).

130. Locke broadly defined "property" to include our "lives, liberties, and estates." J. LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT ch. IX, ¶ 123 (T. Cook ed. 1947).

131. *Id.* ch. XIX, ¶ 222.

rights protected by that amendment within the Bill of Rights considered by many to be "first among equals,"¹³² and did so in spite of fifty years of United States Supreme Court case law holding consistently that first amendment rights are protected against state infringement by the due process clause of the fourteenth amendment. By that holding, as well as in dictum denying the applicability of the Bill of Rights as a check upon state government, the Utah court rejected the supreme law of the land that recognizes every important criminal procedural provision of the first eight amendments as being obligatory upon the states.

Whether "substantive justice" was done, (*i.e.*, the "end" determination that the defendant in fact violated a valid criminal statute and therefore deserved punishment) is beyond the scope of this article and has accordingly been treated summarily.¹³³ Nevertheless, while resolution of the immediate question as to the constitutionality of Utah's pornography statute has been deferred to future cases by the thoroughgoing revision of the statute after the filing of but prior to the decision in *Phillips* in an attempt to comport with *Miller*, the question of substantive justice or the justness of "ends" is vital, and that fact is not likely to be lost sight of in a society possessing more homogeneity than most. On the contrary, a relatively integrated society such as that served by the Utah Supreme Court is likely to be less patient with the concept of procedural justice, or the justness of "means," often considering such to be procedural "details" manipulated by part of the legal profession in order that substantive justice may be frustrated. When a society possesses a common paradigm or world view it may not appreciate the necessities, imposed upon the broader community by the presence of groups possessing differently conceived ends based upon radically different paradigms, to retreat in many areas of governance from government-mandated ends to consensus as to means, which is often the only possible area of unanimity. But pluralism means essentially that, and the rule of law, that strange and fragile flower that blossomed only in Western European culture and which has been transplanted with indifferent success beyond, is based on that notion. With the breakdown of a simpler feudal culture with its economy and society based upon the land, with the rise of greater diversity in political and religious beliefs brought on by the Renaissance and Reformation, with the loss of secular power by the Western Church and the fragmentation of imperial governance, and with the rise of a capitalist economy and national markets, a legal system evolved that provided for a diversity of ends while maintaining some degree of consensus on means. John Locke described such a system when he wrote of the law as "Guards and Fences," separating the *meum* and the *tuum*, while leaving the selection of ends to be sought

132. See, *e.g.*, Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464, 464-81 (1956); Wechsler, *supra* note 71, at 743.

133. See notes 115-29 *supra* and accompanying text.

by such means to the individual. Procedural justice is the hallmark of an individualistic culture built up from an older more communal society that was fragmented by the revolutions of religion, nationalism, economic systems, and industrial technology.

Procedural justice is cold, "blue" in the McLuhanesque tongue; it does not possess the emotionally satisfying heat or "redness" of an end-oriented Utopia of Sir Thomas More, nor that of Augustine's City of God where men through divine vision uniformly understand objective reality and morality. Procedural justice reflects the disintegration of modern society. The writings of Freud and Marx have reflected the psychological and sociological filters which may interfere with our perception of absolutes in our present condition. While these grave deficiencies in means taken alone¹³⁴ are real, the situation cannot be overcome by a coerced uniformity upon ends. Indeed, the agreement upon political and legal means may represent the prime bulwark of civilization remaining to a society irretrievably divided as to substantive ends.

The rule of law—that concept devised to insulate a judicial system from the direct influence of politics, kin, and religion to the blessing alike of the religious or political minority and the capitalist in need of predictability in laws and government—recognized this and relegated the search for a uniformity on ends to the means of persuasion and by long-suffering, not by force or domination. The concept of due process or procedural justice is at the center of a rule of law which must allow diversity and individuality to govern the selection of ends. The rule of law—being predominantly a system of rational procedure or means—will always lack the natural support which can be generated by a passionate call for the accomplishment of a particular end of substantive justice. In an age when all societal institutions seem to be under assault, particularly those of national scope that bind us together and without which we unravel into a heterogeneous collection of special interest groups, the consensus on procedural means becomes a pearl of great price. Its preservation is essential if at least some of the effects of anomie are to be avoided.

Such a system, demanding more than an intuitive or a "common sense" or "folk wisdom" appreciation sufficient to continue the quest for the ends of substantive justice, places particularly great demands upon a professional lawyer-class to see that the integrity of the procedural system of means is preserved and defended. In contrast to the civil law

134. As stated in Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L.J. 1022, 1044 (1975):

Law reflects but in no sense determines the moral worth of a society. A reasonably just society will reflect its values in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law and the lion will lie down with the lamb. An unjust society will reflect its values in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.

tradition where the great men of the law have been legislative lawgivers or executive fathers of great code systems, the common law tradition has seen its great men of the law, appropriate to a system created by court-made law, as being those on the Bench: Coke, Mansfield, Marshall, Story, Kent, Holmes, Brandeis, Cardozo, Hughes, Frankfurter.¹³⁵ The Utah Supreme Court abandoned that tradition in *Phillips*.

135. The tribute given Mr. Justice Cardozo by another of our greatest jurists, Learned Hand, presents the ideal traits of a judge in our culture:

[T]he wise man is the detached man. By that I mean more than detached from his grosser interests—his advancement and his gain. Many of us can be that—I dare to believe that most judges can be, and are. I am thinking of something far more subtly interwoven. Our convictions, our outlook, the whole make-up of our thinking, which we cannot help bringing to the decision of every question, is the creature of our past; and into our past have been woven all sorts of frustrated ambitions with their envies, and of hopes of preferment with their corruptions, which, long since forgotten, still determine our conclusions. A wise man is one exempt from the handicap of such a past; he is a runner stripped for the race; he can weigh the conflicting factors of his problem without always finding himself in one scale or the other. Cardozo was such a man; his gentle nature had in it no acquisitiveness; he did not use himself as a measure of value; the secret of his humor—a precious gift that he did not wear upon his sleeve—lay in his ability to get outside of himself, and look back. Yet from this self-effacement came a power greater than the power of him who ruleth a city. He was wise because his spirit was uncontaminated, because he knew no violence, or hatred, or envy, or jealousy, or ill-will. I believe that it was this purity that chiefly made him the judge we so much revere; more than his learning, his acuteness, and his fabulous industry. In this America of ours where the passion for publicity is a disease, and where swarms of foolish, tawdry moths dash with rapture into its consuming fire, it was a rare good fortune that brought to such eminence a man so reserved, so unassuming, so retiring, so gracious to high and low, and so serene.

Hand, *A Tribute to Mr. Justice Cardozo*, 52 HARV. L. REV. 361, 362-63 (1939).

