As late as 1958, Justice Harlan asserted in an opinion of the Court that a certain state practice fell afoul of the Fourteenth Amendment because "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech . . . ."[33]

But this process of "absorption" into due process, of rights that happened also to be specifically named in the Bill of Rights, came to be supplanted by a doctrine that had for a time co-existed with it: the doctrine of "selective incorporation." This doctrine holds that the Due Process Clause incorporates the text of certain of the provisions of the Bill of Rights. Thus, in *Malloy v. Hogan*,[34] Justice Brennan wrote: "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." And Justice Clark wrote: "First, this Court has decisively settled that the First Amendment's mandate that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' has been made wholly applicable to the States by the Fourteenth

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(1947) (concurring opinion). Justice Harlan followed him in this regard. *E.g.*, Benton v. Maryland, 395 U.S. 784, 801 (1969) (dissenting opinion); Williams v. Florida, 399 U.S. 78, 117 (1970) (concurring in part and dissenting in part). For early applications of the principles to void state practices, *see* Moore v. Dempsey, 261 U.S. 86 (1923); Meyer v. Nebraska, 262 U.S. 390 (1923); Tumey v. Ohio, 273 U.S. 510 (1927); Powell v. Alabama, 287 U.S. 45 (1932); Mooney v. Holohan, 294 U.S. 103 (1935); Brown v. Mississippi, 297 U.S. 278 (1936); Rochin v. California, supra.

[33] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958).

[34] 378 U.S. 1, 10 (1964) (citations omitted). In Washington v. Texas, 388 U.S. 14, 18 (1967), Chief Justice Warren for the Court said that the Court has "increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law." And, in Benton v. Maryland, 395 U.S. 784, 794 (1969), Justice Marshall for the Court wrote: "[W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment." In this process, the Court has substantially increased the burden carried by those who would defend a departure from the requirement of the Bill of Rights of showing that a procedure is fundamentally fair. That is, previously the Court had asked whether a civilized system of criminal justice could be imagined that did not accord the particular procedural safeguard. *E.g.*, Palko v. Connecticut, 302 U.S. 319, 325 (1937). The present approach is to ascertain whether a particular guarantee is fundamental in the light of the system existent in the United States; the use of this approach can make a substantial difference. Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968). *See also* Williams v. Florida, 399 U.S. 78 (1970); Apodaca v. Oregon, 406 U.S. 404 (1972); McDonald v. Chicago, 561 U.S. ___, No. 08–1521, slip op. (2010) (plurality opinion).