Due Process and the Concept of Ordered Liberty: "A Screen of Words Expressing Will in the Service of Desire"?

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The question of the scope of the fourteenth amendment's due process clause has provoked one of the sharpest controversies on the Supreme Court during the past quarter century. The 1947 case of Adamson v. California, which marked the beginning of this sustained dispute, stands as a landmark in constitutional law, not because of the significance of the decision—which, after all, merely reaffirmed the much earlier decision in Twining v. New Jersey; nor the particular merit of Justice Reed's opinion for the Court—which, despite its technical excellence, was really cast from the same mold as a host of other, and more noteworthy, due process opinions; but for the high drama of its presentation of one of the great debates in the history of the Court, between two judicial giants, Justice Felix Frankfurter and Justice Hugo L. Black. The case brought to a boil a simmering dispute on the Court about the relationship of the due process clause and the federal Bill of Rights, reviving the heated debates along the same lines conducted half a century earlier between the first Justice Harlan and the rest of the Court. There were, however, important differences and consequences. While Harlan in his dissenting opinions on the subject invariably spoke only for himself, Black

* "And without reason, law is merely a screen of words expressing will in the service of desire." F. Frankfurter, The "Administrative Side" of Chief Justice Hughes, in FELIX FRANKFURTER ON THE SUPREME COURT 447 (P. Kurland, ed. 1970).

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1. 332 U.S. 46 (1947).
2. 211 U.S. 78 (1908).
had made converts, and was able to muster four votes in support of his position. Moreover, while Harlan’s role as solitary dissenter died with him—no other Justice then sitting took up his constitutional cudgels, and the issue became largely quiescent until revived again in the Adamson case—Black lived to see much of what he had advocated, in substance if not in form, become embedded in the nation’s fundamental law. In this article I propose to reexamine the Black and Frankfurter opinions in Adamson, and evaluate their significance in the light of more recent developments in constitutional law. Coming on the heels of Black’s greatest triumphs, some of these later decisions have, ironically enough, borne out Black’s intense misgiving that unless the judiciary were able to place a ceiling above, as well as a floor below due process, that concept would, in the course of time, enable the Court once again to reassert the role it had played in the period 1890-1937, as a perpetual censor of legislation disagreeable to the judicial stomach, despite the lack of concrete, applicable constitutional language.

I. First Interpretations

To give a proper perspective to the Adamson debate it is necessary to pause for a backward glance into history, and a survey of the more important antecedent due process decisions. The Bill of Rights of the United States Constitution was designed as a limitation on the federal government only; it had no application to state action. The first eight amendments, declared Chief Justice Marshall in 1833, “contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.” Historically, Marshall’s position was unassailable. The opening words of the first amendment read: “Congress shall make no law . . .” Controversy surrounding the absence of a bill of rights in the Constitution as originally drafted centered around the lack of legal safeguards against arbitrary action by the proposed national government, the more so since a number of the states had prefaced their own constitutions with elaborate bills of rights.

Following the Civil War, three amendments to the Constitution, which became known as the Civil War amendments, were proposed by Congress and ratified by the states. Though these

4. The thirteenth amendment (1865), the fourteenth amendment (1868), the fifteenth amendment (1870).
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provisions were designed primarily to protect the newly emancipated black race, some of the language used in the amendments, which were couched in broad terms, lent itself to application as general limitations on the powers of the states. The most important of these amendments was the fourteenth, which in its first section provided that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

This section, and particularly its due process clause, was eventually to provide the vehicle whereby fundamental liberties and fair trial procedures would be protected against state infringement.

The phrase “due process of law” was not new to the Constitution. The fifth amendment contains a parallel provision limiting the federal government: “nor [shall any person] be deprived of life, liberty, or property, without due process of law. . . .” The phrase first appeared in 1354 in a statute of Edward III, which provided that no person should be subjected to punishment “without being brought in answer by due process of law.”

The language is believed to be derived from, and synonymous with, King John’s promise in Chapter 39 of Magna Carta that he would not “go upon” or “send upon” any “freeman” except “by the law of the land.” Such was the interpretation placed by Coke in his Institutes—“the source from which the founders of the American Constitutional System derived their understanding of the matter.” Coke defined due process as the “due proces[s] of the common law,” that is, the rights guaranteed in Magna Carta.

Shortly before the Civil War, in the only significant decision on the meaning of the fifth amendment’s due process clause prior to the drafting of the fourteenth amendment, Justice Curtis suggested that the provision embraced “those settled usages and modes of proceeding existing in the common and statute law of

5. 28 Edw. III, c.3.
England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.”

The Slaughter-House Cases⁹ of 1873 marked the Court’s first attempt to define the fourteenth amendment. A Louisiana law had granted to a corporation a monopoly for 25 years to maintain slaughterhouses in New Orleans and adjacent territory. Here, then, was a most inappropriate setting for an initial construction of a new constitutional amendment; a hard case, Justice Holmes would have called it, for while the obvious injustice of the law was bound to arouse judicial sympathies for the appellants, it was far less obvious that the law fell under the language of the amendment. Like so many other hard cases, it made bad law.

The law was challenged in the Court as violating both the privileges and immunities and due process provisions, although since the meaning of due process was circumscribed by history, counsel naturally placed the greater emphasis on the more intriguing possibilities of the privileges and immunities clause. (It was also challenged on equal protection grounds, but that issue is not germane to our discussion.) Justice Miller, speaking for the majority in a closely divided Court, fittingly described the case as presenting the most “far-reaching and pervading” questions to have come “before this court during the official life of any of its present members.”¹⁰ Since the events surrounding adoption of the fourteenth amendment were “almost too recent to be called history,” its “one pervading purpose,” the Court was certain, was “the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”¹¹ While others, too, were, of course, entitled to share in the amendment’s protections, Miller made it plain that, beyond the area of racial equality, these would be few, since it was to the main purpose that the Court must look for guidance in construing its terms.

The opening sentence of the amendment, continued Miller as he came to the decisive contention of his opinion, had established dual national and state citizenship for all Americans, yet

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10. Id. at 67.
11. Id. at 71.
the next sentence spoke of "the privileges or immunities of citizens of the United States", which the states were forbidden to impair. The different phrasing was deliberate, indicating that federal protection had been secured by the amendment only for such privileges and immunities as were derived from national citizenship, not for such as were inherent in state citizenship. But which privileges depended for their vitality on state citizenship and were not the subject of the amendment? Unless this question were answered the inquiry would not advance very far. Having begun with a literal rendering of the amendment's language, Miller continued his interpretation with an assumption which took no account of language at all. Starting from the uncontroversial premise that, before passage of the amendment, jurisdiction over individual rights was confided to the states, Miller simply took it for granted that it was the Framers' intention to continue this state of affairs afterwards. "Was it the purpose of the fourteenth amendment . . . to transfer the security and protection of all the civil rights . . . from the States to the Federal government?" 12 Was it the intention of its Framers to make "so great a departure from the structure and spirit of our institutions" by changing "radically . . . the whole theory of the relations of the State and Federal governments" and establishing the Court as "a perpetual censor" 13 of state legislation? The answer, in the absence of a clear constitutional directive, had to be negative.

What, then, were the privileges and immunities of national citizenship which the amendment protected? Miller enumerated among others the rights to free access to seaports, to the government's protection when the citizen is in a foreign country, and to assemble and petition for redress of grievances.

The due process argument had "not been much pressed," 14 said Miller, and the case did not come under any "construction of that provision that we have ever seen . . ." 15 The fourteenth amendment therefore had no bearing on the monopoly in New Orleans.

The opinions in the case are a study in extreme contrast. If Miller's interpretation of the privileges and immunities clause was, as Fairman has said, completely "vacuous," 16 that of the

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12. Id. at 77.
13. Id. at 78.
14. Id. at 80.
15. Id. at 81.
16. Fairman, RECONSTRUCTION AND REUNION 1864-1868 in 6 HISTORY OF THE SUPREME COURT.
dissenters recognized virtually no limits on the amendment’s potential (later realized through the due process clause) in extending federal protection for such individual rights as could win the Court’s benediction.

Justice Field, dissenting together with Chief Justice Chase and Justices Bradley and Swayne, protested that even prior to adoption of the fourteenth amendment, no state, in view of the Constitution’s supremacy clause, could have undertaken to nullify a privilege of national citizenship. The majority’s interpretation therefore rendered the amendment “a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.” It was more in line with the framers’ intentions and the country’s expectations to give the amendment “a profound significance and consequence” by construing it to refer “to the natural and inalienable rights which belong to all citizens . . .”18, among which was certainly the right to follow one’s chosen occupation. Moreover, since under the similarly worded comity clause of article 4, section 2 of the Constitution, which granted to the citizens of each state “all [the] Privileges and Immunities of Citizens in the several States,” the creation of a monopoly in trades or occupations by a state exclusively in favor of its own citizens was obviously forbidden, so too under the more recent privileges and immunities clause, creation of a monopoly that favored some citizens and excluded others of the same state was equally forbidden. Field made it clear that his reference to the privileges and immunities clause as a source of power for the invalidation of such laws as this one was entirely unnecessary: “grants of exclusive privileges . . . are opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void.”19

Justice Bradley, dissenting separately, spoke of “certain fundamental rights which this right of regulation [by the state] cannot infringe. . . .[C]itizenship means something.”20 The rights safeguarded by the amendment were the selfsame rights as those which the Declaration of Independence had claimed for Americans. “Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. . . .

17. U.S. CONSTITUTION, art. 6, § 2.
19. Id. at 111.
20. Id. at 114.
This right to choose one's calling is an essential part of that liberty which it is the object of government to protect”, for without it the citizen “can not be called a freeman.”

Like Field, Bradley took as his text Justice Washington’s opinion in the old circuit case of Corfield v. Coryell. Called upon to define the comity provision in article 4, section 2, Washington declared that it referred to “those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments.” Bradley recognized that this interpretation was expansive, for the clause was usually construed “as securing only an equality of privileges with the citizens of the State in which the parties are found.” Nonetheless, said Bradley, it seemed “fairly susceptible of a broader interpretation than that which makes it a guarantee of mere equality of privileges with other citizens.” So, too, the privileges and immunities secured by the fourteenth amendment against state impairment referred to those which were fundamental in character. But, instead of defining them in terms of the rights granted by common law, as he had seemed to do at the outset of his opinion, Bradley went considerably beyond Field by adding other privileges “of the greatest consequence.” These included the rights of habeas corpus and trial by jury, free exercise of religion, free speech, press and assembly, security against unreasonable searches, “and still others” specified in the original Constitution or the Bill of Rights. Even these constituted “only a few of the personal privileges and immunities of citizens”; he left a more complete enumeration to the fullness of time and proceedings in the courts. Like Field, Bradley asserted that “even if the Constitution were silent, the fundamental privileges and immunities of citizens . . . would be no less real and no less inviolable than they now are.”

The privileges and immunities clause having been limited in scope to the point of it becoming a redundancy, litigants began to concentrate on the due process clause in their objections to economic regulation by state and local governments. In the 1878

21. Id. at 116.
23. Id. at 551.
25. Id.
26. Interestingly, in terms of the later debate over the meaning of due process, Bradley regarded that clause as “including [in its terms] almost all the rest” of the fundamental rights. Id.
27. Id. at 119.
case of Davidson v. New Orleans, 28 the claim was made that a city
had failed to provide adequate compensation for property taken
for a public purpose. Justice Miller, in his opinion for the Court,
obsverved ruefully that, while the due process provision of the
fifth amendment, which had been in the Constitution for nearly
a century, had “rarely been invoked,” 29 the newer provision af-
flecting the states, although only a few years old, had already
resulted in “the docket of this Court [becoming] crowded with
cases in which we are asked to hold that State courts and State
legislatures have deprived their own citizens of life, liberty, or
property without due process of law.” 30 Miller continued in a
sharply critical vein:

There is here abundant evidence that there exists some strange
misconception of the scope of this provision as found in the
fourteenth amendment. In fact, it would seem, from the charac-
ter of many of the cases before us, and the arguments made in
them, that the clause under consideration is looked upon as a
means of bringing to the test of the decision of this court the
abstract opinions of every unsuccessful litigant in a State court
of the justice of the decision against him, and of the merits of
the legislation on which such a decision may be founded. 31

Miller went on to point out that the just compensation clause
of the fifth amendment, though in “immediate juxtaposition” 32 to
its due process clause, had been left out of the fourteenth
amendment. This argument at face value would rule out the pro-
tection of due process for any provision separately enumerated in
the Bill of Rights; an argument along similar but more compre-
hensive lines, as we shall see, was later presented by the Court
in Hurtado v. California. 33 Thus Miller, in his opinions for the
Court in the Slaughter-House and Davidson cases, had achieved
the doubtful distinction of draining both the privileges and im-
munities and due process clauses of real vitality.

Yet Miller did not close off the possibility of a more potent
content for due process in the future, but he said that such a
development would have to await “the gradual process of judicial
inclusion and exclusion, as the cases presented for decision shall

28. 96 U.S. 97 (1878).
29. Id. at 103.
30. Id. at 104.
31. Id.
32. Id. at 105.
33. 110 U.S. 516 (1884).
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require . . .” 34 In the meantime, the requirement of due process of law would be satisfied by “a full and fair hearing in the court” 35 which the appellant admittedly had received. “If this be not due process of law, then the words can have no definite meaning as used in the Constitution.” 36

II. THE BILL OF RIGHTS UNINCORPORATED

Thus far, then, due process had not served to limit the power of government itself; the substantive power remained unimpaired so long as it was exercised in a procedurally acceptable way. But as the nineteenth century came to an end, changes in judicial thinking became evident. In a portentous statement in the Davidson case, Miller had seemed to foreshadow this development when he explained that while, in England, an act of Parliament satisfied the “law of the land” provision of Magna Carta, which was designed to guard against royal oppression, under the terms of the fourteenth amendment a state could not “make anything due process of law which, by its own legislation, it chooses to declare such”; otherwise, “the prohibition to the States is of no avail . . . where the invasion of private rights is effected under the forms of State legislation.” 37 In the late nineteenth century the rise of socialist doctrines and the growth of regulation resulted in pressures that became reflected in the attitude of the Court. The principles of Social Darwinism—that the economy ought to be ruled by an aristocracy of wealth, that poverty is inevitable and is in part the fault of the poor themselves, and that the role of the government ought to be confined to that of policeman—had been widely accepted by intellectuals as well as businessmen. 38 Even the Court accepted these ideas and grafted them on to the law. Beginning around 1890 39 and continuing over several decades of expansive development, due process became the foremost legal instrument for the protection of property rights as against governmental regulation. The formula, used to bring under federal constitutional protection rights previously within the exclusive domain of the states, varied in wording but not in meaning. The

35. Id. at 105.
36. Id. at 105-06.
37. Id. at 102.
39. The change is generally dated from the decision in Chicago, Mil. and St. P. Ry. v. Minnesota, 134 U.S. 418 (1890).
crucial term throughout was "fundamental." Thus the views of Field and Bradley, at least in the sphere of economic rights, had triumphed. If the right claimed was deemed fundamental, it was a candidate for federal protection, though what was, or was not, fundamental would be determined by the judiciary. And so it came about that a limitation on the hours of bakery workers was, according to the standards of the time, considered an infringement of a fundamental liberty, while the denial by states of rights which at the federal level were protected by the Bill of Rights, was regarded in a more favorable light, as the cases which follow demonstrate.

The first of the "Bill of Rights" due process cases is Hurtado v. California. That state had authorized indictment, not by a grand jury, but on an information filed by a prosecutor, following an examination by a magistrate who had certified to the probable guilt of the suspect. Hurtado, convicted of murder, appealed on the ground that this pre-trial procedure was repugnant to the due process clause of the fourteenth amendment, which should be construed to require indictment by grand jury in a prosecution by a state for a capital offense. The Court, in an opinion by Justice Matthews, rejected the contention, with Justice Harlan filing the first of his several lengthy, solitary, and anguished dissents in fourteenth amendment cases involving the rights of defendants.

The emphasis in both opinions is on the historical significance of the grand jury. Both judges cited an impressive array of authorities in support of their respective views, sometimes drawing different conclusions from the same authorities. Thus, Coke's statement in the Institutes that "due process of law" is synonymous with Magna Carta's "law of the land," which in turn requires "indictment or presentment of good and lawful men," formed the foundation of Harlan's argument, while Matthews confined Coke's language to "forfeitures of life and liberty at the suit of the King," but not to a prosecution initiated at the instigation, or with the approval, of the judiciary. If Coke's language were to be taken at face value, asked Matthews, why did English practice allow prosecution for misdemeanors and petty offenses, and trial following a coroner's finding, without the intervention of the grand jury?

41. 110 U.S. 516 (1884).
42. See note 7 supra.
The substance of Matthews' opinion may be stripped down to one essential proposition: that due process stresses as fundamental the substance of rights recognized at common law, not their particular forms. Since the purpose of the grand jury is to prevent the tyranny of malicious prosecution, any alternative procedure, such as that in effect in California, which is reasonably calculated to attain that end, is equally amenable to due process:

It is more consonant to the true philosophy of our historical legal institutions to say [that they are not fixed, but] that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.

The Constitution of the United States . . . was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. . . . There is nothing in Magna Charta . . . which ought to exclude the best ideas of all systems and of every age . . .

The development of the grand jury was itself testimony to the soundness of this principle: when we recall that "the primitive grand jury heard no witnesses in support of the truth of the charges to be preferred, but presented upon their own knowledge, or indicted upon common fame and general suspicion, we shall be ready to acknowledge that it is better not to go too far back into antiquity for our 'ancient liberties.' "

Justice Curtis' definition of due process, which we have previously encountered and on which Harlan in his dissent strongly relied, should not, said Matthews, be read as placing the stamp of necessity on "settled usages and modes of proceeding" at common law, but only a badge of approval:

The real syllabus of the passage . . . is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law . . . [T]o hold that such

44. Id. at 530-31.
45. Id. at 530.
46. See text at note 8 supra.
47. Hurtado v. California, 110 U.S. 516, 528-29 (1884).
a characteristic is essential to due process of law, would be to deny every quality of the law but its age and to render it incapable of progress or improvement.

Matthews regarded the due process provision as requiring a common law approach for its elucidation: “as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms.”

Matthews also attempted to score a textual point. If the grand jury is a constituent of due process of law, it should have proved unnecessary to enumerate both the due process and grand jury requirements in the fifth amendment. The enumeration of the grand jury led to the obvious inference that it is not required by due process; otherwise it would be a superfluous provision, something which the Court was forbidden to assume under the “recognized canon[s] of interpretation . . . without clear reason to the contrary. . . .” Since the due process clause of the fourteenth amendment “was used in the same sense and with no greater extent” than the fifth amendment requirement, it too, “by parity of reason,” did not embrace the grand jury.

What, then, in the Court’s view, did due process require? In a word, that the power of government must be “exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . .” In deference, however, to the principle of federalism, upon which in the final analysis the decision really rests, Matthews immediately added, “and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.”

Justice Harlan agreed that due process “does not import one thing with reference to the powers of the States, and another with reference to the powers of the general government.” But he was unimpressed with the argument that because the grand jury is separately enumerated in the fifth amendment, it is not a compo-

48. *Id.* at 531.
49. *Id.* at 534.
50. *Id.* at 535.
51. *Id.*
52. *Id.* at 541.
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nent of due process. Harlan clearly regarded the phrase “due process of law” as a summary of the other procedural provisions which were separately included. (He did not seem to quarrel with the Court’s definition of due process as an ongoing process, though he believed that the important ancient liberties, among them the grand jury, were beyond the power of the judiciary to remove from the embrace of due process.) Was not the fifth amendment’s requirement of indictment by grand jury, asked Harlan, itself proof that the latter was considered, in the Court’s definition, a “fundamental principle of liberty and justice”? If the Court’s reasoning were carried to an extreme, its logic would yield the absurd conclusion that none of the procedural guarantees of the Bill of Rights were required by due process because they were separately enumerated. In his familiar tone of incredulity, he asked: “Will it be claimed that these rights were not secured by the ‘law of the land’ or by ‘due process of law’, as declared and established at the foundation of our government? Are they to be excluded from the enumeration of the fundamental principles of liberty and justice. . .?”

Indeed, the fact that the Court, over the last half century, has included many of the Bill of Rights provisions in fourteenth amendment due process, has served to vindicate Harlan’s rhetorical answer to the charge of constitutional superfluousness.

Although Harlan did not on this occasion specifically advocate incorporation of the Bill of Rights into due process, his argument was broad enough to cover the point. For the very fact that a right is included in the Bill of Rights was for him proof that it was—and must continue to be—considered fundamental. And while Harlan did not mention first amendment rights, he did enumerate most of the other significant provisions in the Bill, as falling under the sway of due process.

It was not until sixteen years later, in the 1900 case of Maxwell v. Dow, that another full exchange of views took place between Justice Harlan and his colleagues on the due process issue. In this case a robber was convicted in Utah following his indictment by an information rather than by a grand jury, and a trial by a jury of eight rather than the common law jury of twelve implicitly required by the sixth amendment in federal trials.
Maxwell claimed (1) that indictment by information violated his privileges and immunities as secured by the fourteenth amendment, notwithstanding the *Hurtado* decision that such indictments were permitted by the due process clause; (2) that Utah's eight-person jury system failed to meet the requirements of both the due process clause and the privileges and immunities provision.

Justice Peckham's opinion for the Court rejected both contentions. With regard to the indictment procedure, the matter was foreclosed by the *Hurtado* decision; even though the opinion in that case was addressed to the due process issue, it necessarily implied that indictment by grand jury was not a privilege or immunity of national citizenship. Justice Miller's opinion in the *Slaughter-House Cases*, 55 to which Peckham made extended reference, had effectively disposed of the argument that the provisions of the Bill of Rights were, through the fourteenth amendment, guaranteed against infringement by the states.

Turning to the issue of trial by jury, Peckham denied that this was a necessary requisite of due process of law. "The right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature, and are subject to the same judgment. . . ." 56

For the first time in a fourteenth amendment case an opinion of the Court addressed itself to the intentions of the amendment's sponsors. Senator Jacob Howard's speech in the Senate disclosing an intention to subsume the Bill of Rights under the amendment's first section, which, unlike Representative Jonathan Bingham's House speeches along the same lines, had been brought to the Court's attention by counsel, received short shrift: counsel had not shown that Howard's views were shared either by other Senators and members of the House, or by the States which ratified the amendment. Therefore, continued Peckham, the matter must be "determined by the language actually therein used and not by the speeches made regarding it." 57

This time, Justice Harlan's dissent expressly called for the incorporation of the Bill of Rights in the amendment. 58 Strangely

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55. 83 U.S. (16 Wall.) 36 (1873).
57. Id. at 601.
58. Can there be significance in the fact that Harlan quoted the first eight amendments with the conspicuous exception of the seventh, which grants the right of trial by jury in civil cases? Actually Harlan's call for incorporation was first made in 1892 in O'Neil
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enough, Harlan avoided the historical thicket completely, omitting even mention of Senator Howard's speech. As if heeding Peckham's admonition that one must look to the language of the amendment, rather than its proponents' speeches, Harlan presented a deceptively simple argument: All federal rights possessed by citizens prior to the adoption of the fourteenth amendment must be considered as being among the privileges and immunities which were secured against encroachment by the states.

In a lengthy explication of the importance of trial by jury, Harlan traced the development of the right from the original guarantee in Magna Carta to its eventual transplantation to the colonies and subsequent universal embodiment in the federal and state constitutions. Even independently of the privileges and immunities clause, then, trial by jury came under the wing of due process, for it was a settled mode of proceeding at common law. Thus, in federal cases the right would have been assured by the fifth amendment's due process clause even had the specific guarantee never been written. Finally, Harlan noted the irony of the Court having rejected jury trial as a constituent element of due process of law, even as it had interpreted that guarantee to prevent the taking of private property without just compensation:

"it would seem that the protection of private property is of more consequence than the protection of the life and liberty of the citizen." 59

Interestingly, not once did the possibility that the substance of the right might be preserved in the use of a jury of less than twelve, seem to have seriously crossed Harlan's mind. He regarded old process as indispensable due process, in disregard of the fact that the common law itself, which he constantly celebrated, gradually adjusts to changing conditions.

The completely negative tone of the Court's opinion in Maxwell v. Dow had seemed to shut the door tighter than ever to the possibility of fourteenth amendment protection for the provisions of the Bill of Rights. However, in Twining v. New v. Vermont, 144 U.S. 323, a case raising, among other issues, that of cruel or unusual punishment. Both Harlan and Justice Field, in separate dissents, urged that the Bill of Rights in toto be subsumed under the fourteenth amendment. But the opinions in that case do little to elucidate the meaning of due process and do not therefore require separate discussion.

59. Chicago, B. and Q. R.R. v. Chicago, 166 U.S. 226 (1897). This ruling was of course a departure from the decision in Davidson v. New Orleans, 96 U.S. 97 (1878), for a discussion of which see text to notes 28-32 supra.

Jersey, decided in 1908, in which Justice Harlan’s final due process debate with his colleagues took place, a glimmer of forthcoming change was discernible.

Twining was convicted in state court on a charge of presenting a false document to a bank examiner who had come to inquire into the financial condition of his bank, shortly after it had closed its doors. In his charge to the jury, the judge commented adversely on Twining’s failure to take the stand and contradict the evidence against him. ("And yet he has sat here and not gone upon the stand to deny it.") In the Supreme Court, his counsel argued that the fourteenth amendment incorporated the fifth amendment’s privilege against self-incrimination, and that therefore no inference as to guilt could be drawn from the invocation of a constitutional right.

Justice Moody in his opinion for the Court, “assumed . . . for the purpose of discussion” that adverse comment was not permitted, but he refused to concede that the privilege itself was enforceable against the states. True, the exemption from testimonial compulsion was now universal in American law and considered a privilege of great value. Nevertheless, on the authority of the Slaughter-House decision, the rights guaranteed by the first eight amendments were not privileges or immunities of national citizenship. Though a right be fundamental, unless it was also an attribute of national citizenship, its protection was entrusted now, as before the adoption of the fourteenth amendment, to the states.

However, the Slaughter-House decision seemed to rest uneasily on Moody. He took note of the position of Justices Field and Harlan in favor of the incorporation of the Bill of Rights, a view which he regarded as having “weighty arguments in its favor,” and conceded the disappointment of many that the prevailing interpretation gave “much less effect to the Fourteenth Amendment than some of the public men active in framing it intended. . . .” But the heavy hand of precedent meant that the question was no longer open.

61. 211 U.S. 78 (1908).
62. Id. at 82.
63. Id. at 114. The New Jersey courts had ruled that the judge’s remarks were consistent with the privilege against self-incrimination.
64. 83 U.S. (16 Wall.) 36 (1873).
65. See note 58 supra.
67. Id. at 96.
Moody next turned to a consideration of the due process issue. A settled mode of procedure at common law was not necessarily a constituent of due process, else "the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straightjacket. . . ." Only such procedures as embodied fundamental principles qualified for due process protection, and the privilege against self-incrimination was not in this class. He looked at the matter from the perspective of history. Due process of law, according to Coke, is synonymous with the "law of the land" of Magna Carta's 39th article. Since Magna Carta provided no protection against self-incrimination, the privilege could not be regarded as part of due process of law, but was an independent guarantee, no more than "a wise and beneficent rule of evidence developed in the course of judicial decision." Only four of the thirteen states ratifying the Constitution had requested Congress to include the privilege in a national Bill of Rights, treating due process and the privilege against self-incrimination as exclusive of each other by enumerating them separately. He added, for good measure, that the privilege was not "an unchangeable principle of universal justice," since it had "no place in the jurisprudence of civilized and free countries outside the domain of the common law. . . ." Moody failed to see that if only universal principles were fundamental, the future of due process would be dim indeed.

Speaking of fundamentals, Moody cautioned against neglect of a countervailing consideration which, as in the other cases we have considered, loomed large in the decision: "in our peculiar dual form of government nothing is more fundamental than the full power of the State to order its own affairs and govern its own people, except so far as the Federal Constitution . . . has withdrawn that power."

Nevertheless, the Court for the first time conceded a possible correspondence between the due process clause and at least some provisions of the Bill of Rights: "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

68. Id. at 101.
69. See text to notes 5-7 supra.
71. Id. at 113.
72. Id. at 106.
Harlan’s hard-hitting persistence was evidently making an impression: Moody cited as authority for his dictum the very decision which Harlan had used to telling effect in *Maxwell v. Dow*\(^73\)—that due process prevented the states from taking private property without just compensation,\(^73\) just as the federal government was forbidden to do so by the fifth amendment. “If this is so,” Moody hastened to add, however, “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.”\(^76\) It is fair to note that the opinion for the just compensation case referred to did not mention the fifth amendment, but rested the decision entirely on the due process clause.

Justice Harlan regarded the privilege against self-incrimination, no less than the right to jury trial, as guaranteed by both the privileges and immunities and due process clauses. Apparently having spent himself in his previous opinions, he had little new to add. As far as due process was concerned, Harlan’s argument, if such it can be called, consisted entirely of quotations from Justice Miller’s opinion in *Davidson v. New Orleans*,\(^77\) which do not substantiate his position; indeed, they serve to refute it.

Miller had remarked that due process of law was to be found in the fifth amendment “in connection with other guarantees of personal rights of the same character,”\(^78\) and he mentioned the privilege against self-incrimination as one of these. Harlan, italicizing this passage, apparently regarded Miller’s almost casual reference to the obvious proximity of the two guarantees as indicating their constitutional affinity. Yet in that case Miller rejected the contention that the just compensation clause, which is in equally close proximity, was included in due process.

Harlan’s one positive contribution was made in his challenge to Moody’s historical exposition. Harlan passed over the early failure of the common law to provide such a right, stressing instead the widespread freedom from testimonial compulsion which existed both in English and American law at the time the Constitution was adopted and the fifth amendment written. When the

\(^{73}\) Id. at 99.

\(^{74}\) 176 U.S. 581, 614 (1900) (dissenting opinion).

\(^{75}\) Chicago, B. and Q. R.R. v. Chicago, 166 U.S. 226 (1897).

\(^{76}\) Twining v. New Jersey, 211 U.S. 78, 99 (1908).

\(^{77}\) 96 U.S. 97 (1878).

\(^{78}\) Id. at 101.
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fourteenth amendment was proposed and ratified the privilege was even more deeply embedded in judicial practice and the national consciousness. Waxing extravagant in eloquence, Harlan stated his conviction that the amendment would have been rejected by every state in the Union had it been thought that it preserved the power of the states to compel testimony. Though his opinion at this point lacks the clarity of expression which the occasion required, Harlan was apparently seeking to expose the weak link in Moody’s chain of reasoning. The Court’s original modification, in *Hurtado v. California,*9 of Justice Curtis’ due process test,”80 was made, it will be recalled, in the interest of preventing due process from becoming a static concept. Justice Moody, too, strongly emphasized his commitment to a progressive interpretation of due process. From this perspective, whether a right ought to be designated as fundamental surely should depend less on the attitude of the sixteenth or even eighteenth centuries, than on the attitude of the generation which adopted the amendment or, better yet, on public attitudes toward the privilege at the time the case was decided. Moody’s avowed philosophy of a progressive law was in the *Twining* case stultified by the application of a history which ended in the eighteenth century.

III. DUE PROCESS IN TRANSITION

In the cases we have studied, failure followed failure in attempts to apply to state process some of the guarantees of the Bill of Rights. Plainly, such an illogical state of affairs could not long continue. Property rights could not forever take precedence over the liberty of the person and the right to life itself. Justice Moody had suggested in *Twining* that some of the protections of the Bill of Rights might also serve as safeguards against state action through the medium of due process. The development of such a safeguard began to become a reality in 1925.81 “Due process,” a phrase pregnant with libertarian possibilities, was now to be a bulwark of personal rights. The protections of the first amendment were, one after another, absorbed into the due process clause of the fourteenth amendment and in this manner were applied against the states.82 In matters of criminal procedure, too,

79. 110 U.S. 516, 528-29 (1884). *See text at note 47 supra.*
80. *See text at note 8 supra.*
82. *Near v. Minnesota,* 283 U.S. 697 (1931) (freedom of press); *De Jonge v. Oregon,*
various decisions held that a defendant's right to a fair trial had been abridged in the state courts. With the decline of substantive due process as a protection for property following the reconstitution of the Supreme Court in the late 1930's, the protection of personal liberties and fair procedure was to become the main business of the Court.

The nature of the fair-trial rule is well exemplified by the 1942 decision in Betts v. Brady. Ten years earlier, in the epochal case of Powell v. Alabama, which inaugurated the Court's sustained involvement in issues of fair trial procedures in the state courts, it had overturned convictions against several indigent Negro youths who "were hurried to trial for a capital offense without effective appointment of counsel . . . and without adequate opportunity to consult even the counsel casually appointed to represent them." The Court's opinion by Justice Sutherland (in Powell) had contained ambivalent references on the indispensability of right to counsel to the fairness of a trial. On the one hand, it emphasized that "[e]ven the intelligent and educated layman . . . lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him." On the other, it stressed such factors present in the case as "the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility . . . and above all that they stood in deadly peril of their lives. . . ." The first statement seemed to grant an unqualified right; the second appeared to make the right depend on the particular circumstances of the case.

In Betts the Court accepted the second inference as the correct one. Due process, said Justice Roberts for the Court, "formulates a concept less rigid and more fluid than those envisaged in

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34. 316 U.S. 455 (1942). For an excellent criticism of the fair-trial rule in operation see Green, The Bill of Rights, the Fourteenth Amendment and the Supreme Court, 46 Mich. L. Rev. 869 (1948).
35. 287 U.S. 45 (1932).
38. Id. at 71.
other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.\textsuperscript{89} The Court had recourse to "the common understanding of those who have lived under the Anglo-American system of law"\textsuperscript{90} for elucidation of the matter. This showed, among other things, that in England those accused of felonies were denied participation of counsel, even when the defendant was able and willing to pay for it, until 1836 (a rule the Powell opinion had denounced as "outrageous"),\textsuperscript{91} and that in this country in contemporary practice only eighteen states provided counsel for indigents in all criminal cases. The evidence demonstrated that "in the great majority of the States, it has been the considered judgement . . . that appointment of counsel is not a fundamental right, essential to a fair trial."\textsuperscript{92} Roberts observed that Betts was a mature man of average intelligence. Moreover, he had had a previous encounter with the law and therefore was to some extent familiar with criminal procedure in Maryland, where he was convicted, without the assistance of counsel, on a robbery charge.

In a vigorous dissent which foreshadowed major conflict on the Court, Justice Black, joined by Justices Douglas and Murphy, stated unequivocally: "I believe that the Fourteenth Amendment made the Sixth applicable to the states."\textsuperscript{93} He added that proceedings in the Senate and House while the fourteenth amendment was being drafted showed that the purpose of its sponsors was "to make secure against invasion by the states the fundamental liberties and safeguards set out in the Bill of Rights."\textsuperscript{94}

The outcome in the Betts case was almost predictable in the light of the decision in Palko v. Connecticut,\textsuperscript{95} a 1937 case which produced a pivotal due process opinion that continued to dominate the Court's thinking on the subject into the 1960's. The Palko case therefore deserves the closest scrutiny.

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90. Id. at 464.
93. Id. at 474.
94. Id. at 474, n.1.
95. 302 U.S. 319 (1937).
A Connecticut statute permitted the state to appeal a verdict in a criminal case on grounds of legal error committed by the trial judge. Palko's first trial had resulted in a conviction of murder in the second degree and a sentence of life imprisonment. Following the state's successful appeal, he was retried, found guilty of first degree murder and given a capital sentence. The Court rejected Palko's claim that the due process clause had made obligatory on the states the fifth amendment's prohibition against placing a defendant twice in jeopardy.

In an opinion for the Court which ranged far beyond the immediate issue in the case, Justice Cardozo addressed himself to the task of making more explicit the basis for the "line of division," seemingly "wavering and broken," which the Court had for over half a century been drawing between rights it recognized as falling within the due process rubric and those to which that status was denied. He defined the "rationalizing principle" as one which took into account the question whether the rights claimed were, in the view of the justices, "of the very essence of a scheme of ordered liberty" whose denial would work "a hardship so acute and shocking that our polity will not endure it."Freedom of speech, for example, "the matrix, the indispensable condition, of nearly every other form of freedom," was, like freedom of press and free exercise of religion, sufficiently basic to be carried over into due process; these rights rested on "a different plane of social and moral values" than the privileges against double jeopardy and self-incrimination—at least in the circumstances in which the latter rights had so far been claimed.

The Court was rejecting Palko's claim of a right under due process against being placed twice in jeopardy, said Cardozo, because Connecticut sought no more than parity with the defendant in the right to continue a case "until there shall be a trial free from the corrosion of substantial legal error." A defendant was given the right to appeal errors adverse to him. "A reciprocal privilege . . . has now been granted to the state. . . . The edifice of justice stands, its symmetry, to many, greater than before." One passage in Cardozo's opinion, in which he spoke of "the privileges and immunities that have been taken over from the

96. Id. at 325.
97. Id. at 328.
98. Id. at 327.
99. Id. at 326.
100. Id. at 328.
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earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption, has given rise to the widespread misconception that Cardozo advocated what has come to be called "selective incorporation." Yet to the careful reader of his opinion it should be abundantly clear that Cardozo did not intend to suggest that an individual provision of the Bill of Rights, when absorbed by due process, must be "swallowed whole" with its accompanying bag and baggage of federal rules. Cardozo, who was noted for choosing his words carefully, emphasized the peculiar nature of the double jeopardy issue presented in the Palko case by referring to "double jeopardy in such circumstances" and to "that kind of double jeopardy." He further stressed that Connecticut was "not attempting to wear the accused out by a multitude of cases with accumulated [free of error] trials," and that even in regard to federal trials the view that the Constitution "forbade jeopardy in the same case if the new trial was at the instance of the government," was adopted only by a narrow majority of the Court in 1904, in Kepner v. United States. "Right-minded men," as the Kepner case showed, "could reasonably . . . believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case." Finally, we may point to a passage which should put to rest the idea of Cardozo's adherence to a doctrine of selective incorporation: "The decision [in Powell v. Alabama] did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing."

Why, one commentator has asked, did Cardozo "feel obliged to question the Court's 1904 pronouncement in Kepner outlawing

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101. Id. at 326.
102. This position is taken even by some well known constitutional scholars. See, e.g., H. Abraham, The Judiciary 72 (3rd ed. 1973).
104. Id. at 328 (Italics added).
105. Id.
106. Id. at 323.
107. 195 U.S. 100 (1904).
a new trial begun at the behest of the Government . . . ? Why, too . . . did he consider it essential to note that the Court was not passing on the validity of a re-trial, initiated by the state, when the previous trial had been free from error?"111 The answer should by now be obvious. Cardozo was drawing attention to the fact that the decision was limited to the type of double jeopardy involved in Palko’s case, but he would not foreclose the very real possibility that if presented with a case in which the state was indeed wearing out the defendant with a multitude of error-free trials—the classic double jeopardy situation—the Court would feel obliged to designate the defendant’s hardship as one “so acute and shocking that our polity will not endure it.”111.1 Along the same lines, he was also trying to demonstrate that not all decisions implementing provisions of the Bill of Rights were beyond challenge and as worthy of the same respect as the provisions themselves; consequently, even in regard to a right falling in the same general area, so long as they adhered to fundamentals, the states should not be burdened with procedural requirements that paralleled those imposed on the federal government by the Bill of Rights.

IV. The Great Debate: Adamson v. California

Black’s exchange with the Court in Betts v. Brady,112 in which, as we have seen, he briefly though concretely resumed Justice Harlan’s incorporationist argument after a lapse of thirty-four years, presaged a fuller exposition of his views at a later date. Meanwhile, his disenchantment with the fair-trial rule was growing, and judicial conflict was being exacerbated by such rulings as that in the coerced confessions case of Malinski v. New York.113 During the consideration of the Malinski case, according to Justice Rutledge’s biographer, Black circulated a memo to his colleagues challenging the “natural law” theory of the Palko opinion.114 The stage was now set for Adamson v. California,115 in which this increasingly tense situation finally boiled over.

The issue in Adamson was almost an exact duplicate of that in Twining v. New Jersey.116 Adamson, a convicted murderer, had

112. 316 U.S. 455 (1942).
113. 324 U.S. 401 (1945).
116. 211 U.S. 78 (1908).
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not taken the stand at his trial, and adverse comment had been made (this time by the prosecutor rather than the judge) concerning his failure to testify.

The argument of Adamson's counsel was two-pronged. To begin with, he contended that adverse comment on a defendant's failure to testify would, in a federal case, be forbidden by the fifth amendment's privilege against self-incrimination. He claimed, furthermore, that the privilege against self-incrimination, to the full extent that it applies in federal prosecutions, should be enforced against the states, either because it was incorporated in the due process clause of the fourteenth amendment or because it was an essential ingredient of a fair trial.

The Court was unable to dispose of the case by rejecting the initial contention, since five of the Justices—Black, Douglas, Murphy, and Rutledge in dissent, and Frankfurter in concurrence—went on record as believing that the fifth amendment did indeed bar adverse prosecutorial comment. Justice Reed, for the Court, therefore "assume[d], but without . . . ruling upon the issue" that were this a federal case, the Constitution would have prevented the drawing of the jury's attention to Adamson's failure to testify. But standing four-square behind the Twining decision, Reed refused to hold that the due process clause subsumed the privilege against self-incrimination, or that exercise of the privilege was necessary for a fair trial. As for the incorporation issue, the "natural and logical interpretation" of the matter in the Twining case was determinative. "Nothing has been called to our attention that either the framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution." Nor was a defendant deprived of his due process right to a fair trial when comment was made on his silence. "It seems quite natural that when a defendant has opportunity to deny or explain facts and determines not to do so," asserted Reed, "the prosecution should bring out the strength of the evidence by commenting upon defendant's failure to explain or deny it."

Justice Black based his dissenting argument for complete

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117. It may be noted that in federal court, the failure of the accused to testify in his own defense creates no presumption against him. 18 U.S.C.A. §3481.
119. Id. at 53.
120. Id. at 54.
120.1. Id. at 56.
incorporation of the Bill of Rights in the due process clause on one essential premise: that a study of the historical record "conclusively demonstrates"\textsuperscript{121} that the first section of the fourteenth amendment was designed to make the Bill of Rights obligatory on the states. The Court's consistent rulings to the contrary over many decades were, said Black, a product of inadequate historical knowledge. "This historical purpose has never received full consideration or exposition in any opinion of the Court interpreting the Amendment."\textsuperscript{121.1} It was the Court's duty, as a previous Court opinion had phrased it, "to place ourselves as nearly as possible in the condition of the men who framed that instrument."\textsuperscript{122} Viewing the amendment from this vantage point, Black was persuaded that only one conclusion was possible: "one of its principal purposes . . . [was] to change the Constitution, as construed in Barron v. Baltimore,\textsuperscript{123} . . . and make the Bill of Rights applicable to the states."\textsuperscript{124} In only one of the earlier due process cases, Maxwell v. Dow,\textsuperscript{125} were the briefs and opinions directed to an examination of historical evidence, and even then only the words of Senator Howard, not those of Representative Bingham, were brought under scrutiny. Yet, continued Black, Bingham could, "without extravagance, be called the Madison of the first section of the Fourteenth Amendment."\textsuperscript{126} In a lengthy appendix,\textsuperscript{127} Black attempted to show that Bingham had repeatedly spoken of the amendment as designed to make the Bill of Rights effective against state process.

Justice Frankfurter began his concuring opinion with an appeal to precedent, which Black, in his appeal to history, had all but tossed to the winds. The all-but-unanimous decision in Palko v. Connecticut,\textsuperscript{128} then only ten years old, for which Justice Cardozo had written one of his most celebrated opinions, had won the assent not only of such judges as Hughes, Brandeis and Stone, but also, Frankfurter could scarcely resist pointing out, of Black, then serving his first term on the Court. The Palko opinion had,

\textsuperscript{121.} Id. at 74.
\textsuperscript{121.1} Id. at 72.
\textsuperscript{122.} Id. quoting from Ex parte Bain, 121 U.S. 1, 12 (1887).
\textsuperscript{123.} 32 U.S. (7 Pet.) 242 (1833).
\textsuperscript{124.} Adamson v. California, 332 U.S. 46, 75 (1947).
\textsuperscript{125.} 176 U.S. 581 (1900).
\textsuperscript{126.} Adamson v. California, 332 U.S. 46, 74 (1947).
\textsuperscript{127.} Id. at 92-123.
\textsuperscript{128.} 302 U.S. 319 (1937). Only Justice Butler had dissented, without opinion, in Palko.
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in a dictum, rejected the privilege against self-incrimination as a constituent element of due process, citing the *Twining* decision as precedent. "Decisions of this Court," admonished Frankfurter, "do not have equal intrinsic authority." Their authority, or more accurately, their influence, depend on their ability to persuade, and measured by this standard, *Twining* stood on a high pedestal. In that case, Justice Moody had written "one of the outstanding opinions in the history of the Court," one that had enjoyed "unquestioned prestige for forty years". It should therefore not be "diluted . . . either in its judicial philosophy or in its particulars." If the theory of incorporation was, as Black believed, based on substantive historical evidence, was it possible, asked Frankfurter, that of the forty-three Justices who had, previous to the Adamson case, passed on the issue, only one—that "eccentric exception," Harlan—would have subscribed to it? These judges included not only some of the greatest figures in the history of the Court, but also "judges who were alert in safeguarding and promoting the interests of liberty and human dignity through law." Some of these judges were, moreover, "themselves witnesses of the process by which the Fourteenth Amendment became part of the Constitution" (so was Harlan, as he failed to mention), and their evaluation of the extravagant claims made for the due process clause was surely more accurate than that of judges whose vision had become distorted by the distance of three quarters of a century.

Turning to the historical evidence, Frankfurter disposed of it quickly. Even if proponents of the amendment had intended the due process clause to embrace the Bill of Rights, this fact alone could not end the historical inquiry. For the amending process requires more than a proposal by Congress; it requires also ratification by the states. Unless their design was known to their contemporaries and consciously acted upon by them during ratification, the views of such as Bingham carried little weight. "What was submitted for ratification was his proposal, not his speech." Did the states believe that by ratifying the amendment they were really imposing on themselves the restrictions of

130. Id. at 60.
131. Id. at 62.
132. Id. at 64.
132.1. Id.
the Bill of Rights? Nearly half of the states, for example, did not then require indictment by grand jury in criminal cases, and it "could hardly have occurred to these States that by ratifying the Amendment they uprooted their established methods for prosecuting crime and fastened upon themselves a new prosecutorial system." Frankfurter did not explain why this idea could hardly have occurred to them. Presumably he meant to say that if such was the general understanding, it is not a little surprising that, once the amendment was ratified, those states did not move to bring their constitutional processes into alignment with the requirements of the Bill of Rights.

While Black's evidence for incorporation of the Bill of Rights was exclusively historical, Frankfurter's rebuttal also introduced a textual consideration. His starting point, and the matter on which the issue really hinged, was the relationship of the two similarly worded due process clauses. If fourteenth amendment due process was intended to have the same meaning as fifth amendment due process—and "[i]t ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth"—its scope could not be determined by reference to the specific provisions of the Bill of Rights. Surely fifth amendment due process did not embrace the more specific provisions of the Bill of Rights, else it was a redundancy, merely stating in shorthand form what had comprehensively been spelled out by the other provisions in the first eight amendments. It may be noted that many of the situations arising in the states for which litigants claimed protection of fourteenth amendment due process, would not, were these federal cases, have involved the fifth amendment due process clause, since the Bill of Rights is admirably explicit in most of its provisions: such matters as right to counsel, the privilege against self-incrimination, and the protection of double jeopardy are separately enumerated. Thus, with the exception of the discredited *Dred Scott* case, the Court, prior to 1868, had never made any extravagant claims for the fifth amendment due process clause. In an earlier case Frankfurter had expressed himself even more

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133. Id.
134. Id. at 66.
135. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). In this case the Court invalidated an act of Congress which prohibited slavery in federal territory. This act's restriction on the slaveowner's property rights, said Chief Justice Taney, "could hardly be dignified with the name of due process of law." Id. at 450.
forcefully: the argument that the Court should assign a different meaning to the two due process clauses was, he thought, "too frivolous to require elaborate rejection."\textsuperscript{136}

Another textual difficulty with the Black thesis was the obvious one of imprecision and ambiguity of language. If the amendment's framers had intended to make the Bill of Rights enforceable on the states, why had they not said so?, asked Frankfurter. "It would be extraordinarily strange for a Constitution to convey such specific commands in such a roundabout and inexplicit way."\textsuperscript{137}

Justice Frankfurter directed his opinion entirely to the issue of the due process clause. He "put to one side"\textsuperscript{138} the privileges and immunities clause, in the belief that its scope must be confined to that given it in the \textit{Slaughter-House Cases},\textsuperscript{139} in order to prevent the kind of "mischievous"\textsuperscript{140} use to which it had been put in the subsequently overruled case of \textit{Colgate v. Harvey}\textsuperscript{141} (which involved economic regulation), the only instance in which the Court had invalidated legislation on the basis of that clause. However, since due process was, in Frankfurter's view, a flexible concept made for an expanding future, and intended to redress not only ancient abuses but those that "would reveal themselves in the course of time",\textsuperscript{142} it is difficult to see why the due process clause is less susceptible to mischievous use than the privileges and immunities clause.\textsuperscript{143}

While our discussion, then, is presented in terms of due process, it should be noted that Black did not base his theory on the due process clause alone, but rather on "the provisions of the Amendment's first section, separately, and as a whole...."\textsuperscript{144} It was presumably the privileges and immunities clause upon which Black mostly relied, and in a later case he so indicated.\textsuperscript{145} This is

\textsuperscript{136} Malinski v. New York, 324 U.S. 401, 415 (1945) (concurring opinion).
\textsuperscript{137} Adamson v. California, 332 U.S. 46, 63 (1947).
\textsuperscript{138} Id. at 61.
\textsuperscript{139} 83 U.S. (16 Wall.) 36 (1873).
\textsuperscript{140} Adamson v. California, 332 U.S. 46, 61 (1947).
\textsuperscript{141} 296 U.S. 404 (1935); \textit{overruled by} Madden v. Kentucky, 309 U.S. 83 (1940).
\textsuperscript{142} Adamson v. California, 332 U.S. 46, 67 (1947).
\textsuperscript{143} As Justice Douglas recently wrote in concurrence with the Court's decision striking down the death penalty, "whether the privileges and immunities route is followed or the due process route, the result is the same." \textit{Furman v. Georgia}, 408 U.S. 238, 241 (1972).
\textsuperscript{144} Adamson v. California, 332 U.S. 46, 71 (1947).
\textsuperscript{145} See the text at note 295 \textit{infra}. 
the clause upon which Howard and Bingham really pinned their incorporationist hopes. Thus to some extent Black and Frankfurter were talking at cross-purposes: Frankfurter attributed to Black an interpretation of due process, which Black had in large measure assigned to privileges and immunities.

There is, however, another non-historical dimension to Black's position. Moving to meet his Brethren, and particularly Justice Frankfurter, on their own ground, Black refused to consider fundamental liberties as "things apart from the Bill of Rights." Rather, he evaluated the Bill of Rights as the nation's definitive and timeless catalogue of fundamental liberties, the bulwark for the preservation of the freedoms of the citizenry. Black chose his words carefully. He did not make the mistake of listing the Bill's provisions one by one, and then placing the stamp of superlativeness on each of them, as Justice Harlan was accustomed to doing. Instead, he addressed himself to the provisions of the Bill of Rights as a unit; one might almost say, to the very idea of a written Bill of Rights. Rejecting the notion that these were "outdated abstractions", eighteenth century relics, he held that they were the quintessential expressions of the liberties for which men had struggled through the ages. "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..."

Not only had the Court degraded the Bill of Rights by absolving the states of the obligation to respect its provisions, contrary to the intentions of the amendment's framers, but, Black pointed out, it had simultaneously appropriated for itself "a broad power which we are not authorized by the Constitution to exercise."

It was the aim of the Bill of Rights to confine the authority of judges, no less than of legislatures, "within precise boundaries." Indeed, Black introduced the intriguing contention that the limitations placed on judicial authority (by procedural

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146. There are numerous quotations from Howard and Bingham to this effect in Black's Adamson appendix. See, e.g., 332 U.S. 46, 105 (1947).
147. Id. at 86.
149.1. Id. at 70.
150. Id.
amendments) were designed to prevent use of judicial process to suppress freedom of speech, press, and religion, and were therefore "essential supplements to the First Amendment."\textsuperscript{151} Black did not explain why procedural restraints should be necessary to prevent judicial suppression of rights that were, in his view, "absolute",\textsuperscript{152} nor how procedural guarantees which apply generally to defendants in all types of cases, can more effectively safeguard such rights.

Black heaped scorn on an interpretation of due process which took as its measure, not the Bill of Rights, but "today's fashion in civilized decency and fundamentals..."\textsuperscript{153} The Court's approach, he chided, was an "incongruous excrescence" on the Constitution, a natural law formula which was "itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power."\textsuperscript{154} Thus Black approved of the outcome of the Slaughter-House Cases\textsuperscript{155} (though not, it is certain, of the reasoning used) since the challenge to the state-granted monopoly was not based on any specific provision of the Bill of Rights, but on "natural law arguments."\textsuperscript{156}

Black's argument had another aspect, for an understanding of which we must return to consideration of Frankfurter's opinion, which at one point departed from the usual lucidity of his writing. In a mystery-shrouded passage which has scarcely been remarked upon by the commentators,\textsuperscript{157} Frankfurter accused his antagonists of suggesting "merely a selective incorporation" of Bill of Rights provisions into the due process clause:\textsuperscript{158}

Indeed, the suggestion that the Fourteenth Amendment incorporates the first eight Amendments as such is not unambiguously urged. Even the boldest innovator would shrink from suggesting to more than half the States that they may no longer initiate prosecutions without indictment by grand jury, or that

\textsuperscript{151} Id. at 71.
\textsuperscript{152} See Black, The Bill of Rights, 35 N.Y.U.L. Rev. 865 (1960).
\textsuperscript{154} Id. at 75.
\textsuperscript{155} 83 U.S. (16 Wall.) 36 (1873).
\textsuperscript{156} Adamson v. California, 332 U.S. 46, 77 (1947).
\textsuperscript{157} An exception was the Comment, The Adamson Case: A Study in Constitutional Technique 58 Yale L.J. 268 (1949), which contains a valuable overall discussion of the Adamson case.
\textsuperscript{158} Adamson v. California, 332 U.S. 46, 64-65 (1947).
thereafter all the States of the Union must furnish a jury of twelve for every case involving a claim above twenty dollars. There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out.

Whom was Frankfurter singling out for criticism? Black in his opinion showed that he clearly advocated not selective, but total incorporation. He would, wrote Black, "extend to all the people of the nation the complete protection of the Bill of Rights." On the other hand, it is possible to consider the above passage as an attack on Justice Cardozo's position in *Palko v. Connecticut*, since it has been contended by some that Cardozo and Frankfurter used different approaches to due process interpretation. For even though Cardozo scrupulously avoided use of the term "incorporation", he did use the roughly analogous term "absorption", thus lending credence to the belief that he advocated selective incorporation. In other words, Cardozo would reject for inclusion in due process such Bill of Rights provisions as fall below the requirements of "ordered liberty", but would include, lock, stock and barrel, such as are of sufficient stature to meet that standard.

That Black so interpreted Cardozo's opinion is beyond doubt, for Black contrasted "the selective process of the *Palko* decision applying some of the Bill of Rights to the States," with "the *Twining* rule applying none of them." But that Frankfurter did so is most unlikely. The praise which he showered on Cardozo's opinion—he considered it one of the half-dozen "great opinions in this field"—seems to belie the intention. Again, in a "memorandum" prepared while still a member of the Court, but published following his retirement, Frankfurter was at pains to differentiate between judicial use of "incorporation" and of "absorption". "The concept of 'absorption' is a progressive one, i.e., over the course of time something gets absorbed into something else. The sense of the word 'incorporate' implies simultaneity."

159. Id. at 89.
162. Id. at 65.
If neither Black nor Cardozo was the object of Frankfurter's criticism, who then? In the end it appears that it was indeed Black whom Frankfurter had in mind. It should be remembered that Black was reopening a divisive constitutional issue that had remained dormant on the Court since the death of Justice Harlan. Thus, despite his unequivocal statement advocating absorption of the entire Bill of Rights, Black was apparently willing, at least initially, to settle for half the Bill of Rights loaf. How else can one account for Black's strange sentence: "Whether this Court ever will, or whether it now should, in the light of past decisions, give full effect to what the Amendment was intended to accomplish, is not necessarily essential to a decision here." What was essential, continued Black, was that the Court at least get on with the job of incorporating the privilege against self-incrimination. It was this sentence, clearly, which drew Frankfurter's fire.

At the least, said Black, the Court should abandon its "piecemeal" policy of applying only "part of an amendment's established meaning and discard[ing] that part which does not suit the current style of fundamentals." Since, in forbidding the states to extract coerced confessions, the Court had evidently valued the privilege against self-incrimination as "an expression of fundamental liberty, I ask, and have not found a satisfactory answer, why the Court today should consider that it should be 'absorbed' in part but not in full?" (Here Black obviously also had in mind the case of Betts v. Brady, where, as we have seen, the Court refused, over Black's dissent, to extend the full sweep of the sixth amendment's right to counsel guarantee to the states, notwithstanding that its substance had earlier been declared enforceable in Powell v. Alabama. There was nothing novel about this approach, said Black. To his understanding, the guarantees of the first amendment had, one by one, been "literally and emphatically" applied to the states in their "very terms." No less respect was due the privilege against self-incrimination, which had struck even deeper roots in American tradition. Prior to 1789 not a single American state constitution guaranteed freedom of speech (though they did make provision for freedom of legislative

165. Id. at 86.
166. 316 U.S. 455 (1942).
167. 287 U.S. 45 (1932).
At the close of his opinion, Black appropriately drew attention to Justice Iredell's opinion in Calder v. Bull, an eighteenth century case in which the Court's first "great debate" over the scope of judicial power had taken place. That case is best remembered today for Justice Chase's celebrated dictum that "[a]n act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority," even in the absence of an express constitutional restraint. In his classic rejoinder to Chase, Iredell wrote: "[T]he Court cannot pronounce [such a law] to be void merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice." Chase's dictum, in Professor Corwin's view, has triumphed to become "the basic doctrine of American constitutional law," in substance if not in appearance. Black regarded the Court's due process standard as little more than a cover for the implementation of Chase's dictum, with the exception that now the reference point would be the constitutional principle of due process rather than the more nebulous and extra-constitutional standard of the "social compact".

To meet the force of Frankfurter's objection, how would Black, given the inflexibility with which he endowed the due process clause, guard against evils unforeseen by the Framers? In a word, by expanding the perimeters of the Bill of Rights. He would interpret and enforce its basic purposes "so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes." As a consequence, the perimeters of the fourteenth amendment, incorporat-

169. The citations are collected id. at 88, n.14.
170. 3 U.S. (3 Dall.) 385 (1798).
171. Id. at 388.
172. Id. at 388-99.
ing the Bill of Rights, would automatically expand, giving it all the flexibility which he believed to be necessary. From the standpoint of keeping the judiciary within its proper limits, this course was much the preferable one. Judicial review, “of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision thereby affecting policy.”

But the unlimited power which the Court was claiming for itself with its embrace of “the natural-law-due-process formula” posed a danger of the first magnitude to constitutional exercise of legislative authority. For “this formula has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the states as well as the Federal Government.”

That Black intended the due process clause both to encompass, and be limited by, the Bill of Rights, was made clear in his subsequent opinions. In the Adamson case, it is true, Black left it to the reader to spell out this implication of his opinion; he did not, in so many words, say that due process included neither more nor less than the Bill of Rights. It is quite common to find scholars who place the emphasis on Black’s incorporation theory while ignoring or even denying the limiting feature of his opinion. Thus, writing in 1965, Professor Fowler V. Harper stated confidently: “[N]either Justice Black nor anyone else has ever contended that due process was limited to the incorporation of the guarantees of the Bill of Rights. . . .” Yet that Black had indeed intended to so limit due process is not only evident from Justice Murphy’s separate dissent, to be discussed immediately, but is clearly implicit in Black’s reasoning. The other side of Black’s due process coin, as we have seen, was the placing of limits on the maneuverability of the judiciary to make and unmake constitutional rights under the aegis of the due process clause; he wished to put an end to the “accordion-like qualities of this philosophy,” as he once scathingly described it. For

175. Id. at 90-91.
176. Id. at 90.
177. See e.g., his dissenting opinion in Griswold v. Connecticut, 381 U.S. 479 (1965), which is discussed infra.
178. See note 114 supra.
Black to permit the expansion of due process beyond the boundary marked by the Bill of Rights would defeat his purpose of curbing judicial discretion no less than if he were to allow its contraction to a role inadequate to meet the requirements of the Bill of Rights.

The opinion of Justice Murphy, who dissented separately with the concurrence of Justice Rutledge, deserves comment. Murphy agreed with Black's position that "the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment", but not with his corollary that "the latter is entirely and necessarily limited by the Bill of Rights." Murphy foresaw "[o]ccasions . . . where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights." Murphy's biographer calls the opinion "a remarkable performance. Part of Frankfurter's reasoning was grafted onto Black's in a way that undercut both." Two things need to be noted. First, Murphy did not explain his "Bill of Rights plus" theory in terms of either history or logic. It may be that Murphy was persuaded by Black's historical résumé in regard to the inclusiveness of the due process clause, but not in regard to its exclusiveness, or it may be that Murphy was simply following the traditional due process path and that, like Harlan but unlike the majority of the Court, he had come to regard every last provision of the Bill of Rights as protecting a fundamental right. Second, while Murphy made provision for fundamental standards of procedure which go beyond the Bill of Rights' guarantees, he made none for substantive rights which might come to be regarded as fundamental. If the omission was deliberate, Murphy might have intended to accomplish the twin objects of leaving some flexibility in due process and, at the same time, preventing a recurrence of economic due process which, for the most part, was concerned with matters of substance rather than procedure.

Black's goals, then, were three: (1) incorporation of the entire Bill of Rights into the due process clause; (2) failing that, the complete incorporation of at least some of the Bill's procedural provisions; (3) limitation of the scope of due process to the Bill of Rights, so that the two would be perfectly coextensive, due process having neither more nor less potency than the Bill of

181. J. W. Howard, Jr., Mr. Justice Murphy 440 (1968).
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Rights. The supreme irony of Black's position is that it was advocated, in part, in the interest of judicial restraint, yet its acceptance would automatically invalidate, in one swoop, more state laws than any other judgment in the history of the Court. And every succeeding twist and turn in Bill of Rights interpretation would require the states to fall into line, like iron filings in a magnetic field.

Whatever else may be said of the historical materials presented by Black, they certainly demonstrate no intention on the part of the amendment's framers to tailor incorporation of the Bill of Rights in the manner he advocated. Professor Fairman has shown, in his magisterial article,\(^\text{182}\) that certainly Senator Howard, and probably Representative Bingham, advocated incorporation, but that there is little evidence that anyone else, either in Congress or among those who ratified in the states, shared that view. Yet where is the proof that Howard and Bingham would have limited the scope of the amendment to that of the Bill of Rights? (Fairman, too, apparently fell into the trap of seeing only the expansionist feature of Black's theory, for he makes no effort to rebut its limiting aspect.) On this matter Black's "evidence" carries its own refutation. While the enigmatic figure of Jonathan Bingham hovers over almost every page of Black's thirty-two page appendix, there is not the slightest hint in anything Bingham said of such a constricted role for the amendment. The object of Black's greatest concern—that the Court might one day resurrect due process as a protection for property rights against social regulation—would scarcely have evoked Bingham's apprehensions. In common with other radical Republicans of his day, protection of property rights was one of Bingham's cardinal pursuits as a legislator. As for Senator Howard, Black himself quoted him as advocating incorporation, not only of the first eight amendments, but in addition, of all the privileges and immunities guaranteed by the fourth article of the Constitution, "whatever they may be."\(^\text{183}\) Further, neither Justices Harlan and Field, Black's main supports among the previous members of the Court, nor Justices Bradley and Swayne, whom Black also considered as supporting his position, ever expressed themselves in favor of limiting the fourteenth amendment's scope as Black advocated.

\(^{182}\) Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 STAN. L. REV. 5 (1949).

\(^{183}\) Adamson v. California, 332 U.S. 46, 105 (1947). A similar statement by Bingham is quoted \textit{id.} at 115.
In fact, they would clearly have opposed it; Field, Bradley, and Swayne had dissented in the *Slaughter-House Cases*\(^4\) even though, in Black's view, the case was properly decided, since the challenge to the monopoly was not based on a provision of the Bill of Rights. And Harlan said in *Maxwell v. Dow*\(^5\) that he would not attempt a full enumeration of the privileges or immunities of citizens, but that they included "at least those expressly recognized by the Constitution. . . ."\(^6\)

So, while the conflict in the *Adamson* case over the scope of the fourteenth amendment's first section was fought in large measure under the banner of historical evidence and Framers' intentions, it is clear that there were some underlying factors, other than historical, which figured importantly in this dispute. The fact that this nation is a federal union strongly influenced Frankfurter. To impose uniform procedural rules, he believed, "would tear up by the roots much of the fabric of law in the several States."\(^7\) The belief that society is basically progressive was perhaps the main philosophical assumption underlying Frankfurter's position on due process. "It is of the very nature of a free society," he once said, "to advance in its standards of what is deemed reasonable and right."\(^8\) This being so, it would be unwise to limit due process to any neat and tidy formula which would categorize and catalogue rights as permanent fixtures in the constellation of constitutional guarantees. Justice Black, on

\(^{184}\) 83 U.S. (16 Wall.) 36 (1873).

\(^{185}\) 176 U.S. 581 (1900).

\(^{186}\) *Id.* at 606 (dissenting opinion) (Italics added). Justice Douglas, concurring in *Gideon v. Wainwright*, 372 U.S. 335, 346 (1963), lists ten Justices as having favored total incorporation. In addition to the four *Adamson* dissenters (Black, Douglas, Murphy, Rutledge), he names Bradley, Field, Swayne, Clifford, Brewer, and the first Harlan. Of the latter six, his statement is correct only for Field and Harlan. Clifford dissented with Field in *Walker v. Sauvinet*, 92 U.S. 90 (1876), which held that due process did not require the states to grant jury trials in civil cases, as is required of the federal government by the seventh amendment. The argument for incorporation was not presented to the Court in that case, which was decided eighteen years before Field advocated incorporation in *O'Neil v. Vermont*, 144 U.S. 323 (1892). See note 58 *supra*. Brewer, who concurred "in the main" with Harlan's dissent in *O'Neil*, abandoned this view by joining the majority in *Maxwell v. Dow*, 176 U.S. 581 (1900), as Douglas concedes, while Bradley (whose opinion Swayne subscribed to in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)), did not speak of the *entire* Bill of Rights as being safeguarded by the fourteenth amendment. Moreover, Bradley later retracted at least part of his expansive *Slaughter-House* dicta, for in his opinion for the Court in *Missouri v. Lewis*, 101 U.S. 22 (1880), he conceded to the states the authority to abolish trial by jury and other accoutrements of the common law, and adopt instead the procedures of the civil law countries.


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the other hand, was distrustful of the traditional due process formula as tending to limit the protection for civil liberties against state action and was trying to build some certainty into what is at present a shifting concept. Also, he was fearful that the Court might one day resurrect due process as a protection for property rights against social regulation and therefore he wished to limit the scope of the amendment to the protection of the specific provisions of the Bill of Rights.

V. THE GREAT DEBATE CONTINUED: GRISWOLD v. CONNECTICUT

The full implications of Black's views in the Adamson case on the relationship of the fourteenth amendment and the Bill of Rights were finally spelled out in concrete form eighteen years later in Griswold v. Connecticut,\(^1\) where the Court struck down a state statute forbidding the use of contraceptive devices. The opinion of the Court by Justice Douglas was undiscriminating in its application of a broad range of constitutional guarantees. Leaving the impression that he still adhered to his concurrence in Black's Adamson dissent, Douglas managed, much to Black's chagrin, to base this due process decision on the protections of the Bill of Rights, since the Court, as he stated, does "not sit as a super-legislature".\(^2\) True, no one provision in the Bill of Rights, either in terms or by fair implication, guaranteed the use of contraceptive devices, but the Court in its decisions had held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."\(^3\)

What was it that the Court had done in creating "penumbras"? Nothing more, apparently, than to have liberally construed various constitutional provisions so as to embrace rights not specifically mentioned in order to make more secure such rights as were enumerated. In this manner, the first amendment guarantees not only freedom of speech and press as such, but also the right to teach and study foreign languages,\(^4\) to educate one's children,\(^5\) and to associate freely, even to the extent of withholding from a state the membership lists of a politically active organization.\(^6\)

\(^{189}\) 381 U.S. 479 (1965)
\(^{189.1}\) Id. at 482.
\(^{190}\) Id. at 484.
In recognizing the right to associational privacy, continued Douglas, the Court had acknowledged that “the First Amend-
ment has a penumbra where privacy is protected from govern-
mental intrusion.”194 So too were “zones of privacy”195 created by
other constitutional guarantees: the third amendment’s ban
against the quartering of soldiers in private homes, the fourth’s
prohibition of unreasonable searches, and the fifth amendment’s
privilege against self-incrimination. For good measure, Douglas
quoted the words of the ninth amendment without mentioning its
particular relevance: “The enumeration in the Constitution, of
certain rights, shall not be construed to deny or disparage others
retained by the people.”195.1

Douglas swept on to his conclusion: “The present case, then,
concerns a relationship lying within the zone of privacy created
by several fundamental constitutional guarantees. And it con-
cerns a law which, in forbidding the use of contraceptives rather
than regulating their manufacture or sale, seeks to achieve its
goals by means having a maximum destructive impact upon that
relationship. . . .Would we allow the police to search the sacred
precincts of marital bedrooms for telltale signs of the use of con-
traceptives? The very idea is repulsive to the notions of privacy
surrounding the marriage relationship.”196

The difficulties in Douglas’ opinion are manifold. It is simply
misleading to speak of the Constitution as creating zones of pri-
vacy. It is more accurate to speak of zones of liberty. The obverse
of liberty is, of course, privacy: for to say that the state may not
infringe on a particular liberty, is to say that the citizen is free
to shut the state out of his affairs in his exercise of that liberty.
But this is quite different from saying that privacy, without re-
gard to context, is a constitutional value. To separate privacy
from its constitutional moorings, serves to place in the hands of
the Court a power to invalidate legislation in quite the same
degree, and on as flimsy a basis, as the earlier Court was able to
achieve with the term “liberty of contract.”197 And with even less
justification, for the term “liberty” is at least explicitly men-
tioned in the Constitution, while the term “privacy” is not. What
Justice Holmes said of the extravagant application of “liberty”

195. Id. at 484.
195.1. Id.
196. Id. at 485-86.
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to invalidate laws of which the Court disapproved, is no less pertinent to right of privacy: "The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school-laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not." Again, if the extrinsic right of marital privacy cannot be derived from any particular constitutional "zone of privacy," how can it be derived from the multiplicity of such zones? In arithmetical terms, if an apple does not equal an orange, can it be made to equal an orange, a lemon, and a pear?

That Douglas should have taken a Bill of Rights approach, instead of simply designating marital privacy as a fundamental liberty in the by now customary manner of due process interpretation is, as we have seen, understandable. However, his fidelity to Black's limitationist views in Adamson was now mere pretense, repudiated in all but name: for to make due process synonymous with the Bill of Rights is a meaningless gesture if that document emits "invisible radiation" which enables the Court to fashion the same rights as can be carved out of the due process clause itself, without reference to the Bill, under the Court's traditional formula. For constitutional purposes, is there a concrete difference in meaning between Justice Frankfurter's proscription of "conduct which shocks the conscience," and Justice Douglas' phrase, the "very idea is repulsive"?

Justice Goldberg, with the support of Chief Justice Warren and Justice Brennan, concurred. While Goldberg did not share the view that the due process clause either embraced the entire Bill of Rights, or was limited to its specific terms, he agreed with the Court's opinion and judgment because he considered marital privacy a "fundamental and basic" right and as such covered by "the language and history of the Ninth Amendment." The Framers "believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside

198. Id. at 75 (dissenting opinion).
199. The phrase is Justice Holmes', uttered in connection with the tenth amendment, Missouri v. Holland, 252 U.S. 416, 434 (1920).
202. Id. at 499.
203. Id. at 487.
those fundamental rights specifically mentioned in the first eight constitutional amendments.” However, since the ninth amendment has no direct relevance to the states, its unspecified rights being “retained by the people” as against federal encroachment—what purpose did it serve in this case? “The Ninth Amendment simply shows the intent of the Constitution’s authors that other fundamental personal rights should not be denied such protection . . . simply because they are not specifically listed in the first eight constitutional amendments.” This was indeed a remarkable feat of attribution, assigning to the authors of the fourteenth amendment, with no evidence to prove the point, the same views as had animated the authors of the ninth amendment.

But would not the judges be left at large, in determining which rights are fundamental? No, replied Goldberg, their personal views would not be decisive. “Rather, they must look to the ‘traditions and [collective] conscience of our people,’” for their guide—the conventional due process standard. How had Goldberg ascertained that the right to use contraceptives is constitutionally guaranteed? Because, “I cannot believe that it [the Constitution] offers these fundamental rights no protection.” Thus “I cannot believe” is equated with the conscience of the nation, and takes its place in the constitutional litany alongside such phrases as “the very idea is repulsive” and “conduct which shocks the conscience”.

The views of the second Justice Harlan on the matter deserve serious consideration. Like that old judicial warrior who was his grandfather, Harlan waged a long and, for the most part, lonely battle over interpretation of the due process clause. Unlike his grandfather (whom he never mentioned in his due process opinions) the younger Harlan strongly pressed the “fundamental rights” approach.

Harlan concurred in the judgment but not in Douglas’ opinion, because of the inference which he drew that due process had no content beyond “the letter or penumbra of the Bill of Rights.” “While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not depen-

204. Id. at 488.
205. Id. at 492.
206. Id. at 493.
207. Id. at 495.
208. Id. at 499.
dent on them or any of their radiations."209 He believed Black's formula, as a means of achieving judicial restraint, "more hollow than real".209.1 Decisions involving specific provisions of the Bill of Rights were no less amenable to a subjective interpretation by judges than those which construed the due process clause. Judicial restraint was best "achieved . . . only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."210

Justice Harlan's opinion in the Griswold case was brief, for he had previously discussed the Connecticut statute at length in Poe v. Ullman,211 a case which had gone off on a different ground. In his Poe dissent Harlan outlined his views on the due process clause: that while its meaning was not self-explanatory its content was both broader than the procedural fairness which had motivated the writing of Article 39 of Magna Carta, and more flexible than the Black view would allow it. In essence, the clause embraced the fundamental rights of a free people. Though irreducible to formula or code, due process "has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . ."212

The Connecticut statute, to Harlan's mind, was offensive to a fundamental right because the Constitution had, in the third and fourth amendments, granted explicit protection to the privacy of the home, the latter amendment extending to the proscription of "all unreasonable intrusions of whatever character,"213 into the home. While enforcement of the statute did not require the breaking of doors, it was still "grossly offensive to this privacy"214 since invocation of criminal charges would, in the course of a trial, expose to the public "the mode and manner of the married couples' sexual relations. . . ."215

209. Id. at 500.
209.1. Id. at 601.
210. Id.
212. Id. at 542-43.
213. Id. at 550.
214. Id. at 549.
215. Id. at 548.
It would surely be an extreme instance of sacrificing substance to form were it to be held that the Constitutional principle of privacy against arbitrary official intrusion comprehends only physical invasions by the police. . . .

[It is difficult to imagine what is more private or more intimate than a husband and wife’s marital relations.210

The state’s policy, continued Harlan, was capable of enforcement by less intrusive means. Various states and foreign countries implemented their policies disapproving of contraceptives by forbidding or regulating their distribution; none had duplicated the novelty of the Connecticut law forbidding their use. It is interesting to observe, however, that despite his discussion centering on the fourth amendment, and his citation of a bevy of search and seizure cases (including the exclusionary case of Mapp v. Ohio,217 which was decided that very day), Harlan did not rely on the fourth amendment (as made applicable to the states via the fourteenth amendment) but on due process as an independent concept. In that event, what was the relevance of the fourth amendment? That provision was used by Harlan primarily to underscore the privacy of the home as a constitutional value, which due process was then given the function of protecting in contexts other than that of search and seizure—an enlargement, one might say, of the fourth amendment. So, concerning this issue at least, despite the asserted independence of the due process concept, due process drew its vitality, and Harlan discovered a fundamental right, by analogy to a specific provision of the Bill of Rights.

Justice Black, with whom Justice Stewart concurred, wrote a forthright dissent. “I like my privacy as well as the next one,” said Black, “but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.”218 Connecticut’s birth control policy was as offensive to him as to his Brethren, but with the difference that he would not brand a law as unconstitutional merely because he might regard it as irrational or unreasonable, while they had concluded “that the evil qualities they see in the law make it unconstitutional.”219

Where was the right to privacy found in the Constitution?,

216. Id. at 551-52.
219. Id. at 507.
asked Black. "There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities."

The fourth amendment provided an example, but "it belittles that Amendment to talk about it as though it protects nothing but 'privacy'. . . . The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone." Neither the due process clause nor the ninth amendment, properly construed, could serve as a constitutional sanctuary for this "broad, abstract, and ambiguous concept" of right to privacy which lent itself so readily to judicial dilution or expansion. The arguments concerning these two provisions, "turn out to be the same thing—merely using different words" in an attempt to vest the federal judiciary with a legislative power based on ideas of natural justice, and essentially no different from the "catchwords and catch phrases" previously used to invalidate legislation which the judicial stomach could not abide.

The explication of the ninth amendment in this case was, as Black saw it, "a shocking doctrine." That amendment was put into the Constitution to limit the power of the federal government, not to vest its judicial branch with a special power to annul state laws. The power claimed by the Court, said Black, "was not given [it] by the Framers, but rather has been bestowed on the Court by the Court. . . . Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention." The same was of course true, said Black, of the Court's use of the due process clause, about which

220. Id. at 508.
221. Id. at 509.
222. Id.
223. Id. at 511.
224. Id. at 511, n.4.
225. Black drew attention to the proceedings in the Constitutional Convention, where James Wilson had supported Edmund Randolph's proposal for a Council of Revision (to be comprised of the President and unspecified members of the judiciary) with a veto power over national legislation, for the reason that laws might be passed which would be "unjust . . . unwise . . . dangerous . . . destructive" but to which the judges nevertheless could not deny effect because they were not unconstitutional. Yet the proposal was defeated because, as John Dickinson had said in opposition, "the judges must interpret the Laws they ought not be the legislators." Id. at 513-15, n.6.
226. Id. at 518.
227. Id. at 520.
Justice Holmes had once said that he could "see hardly any limit but the sky to the invalidating of those rights [of the states] if they happen to strike a majority of this Court as for any reason undesirable."\(^{228}\) It was not the Court's duty "to keep the Constitution in tune with the times." The Constitution itself had provided the means for its own change—the amending process. "That method of change was good for our Fathers," continued Black caustically, "and being somewhat old-fashioned I must add it is good enough for me."\(^{229}\)

A major weakness in Black's theory may now be observed. The Bill of Rights does not consist entirely of specific provisions. It includes also, in its fifth amendment, a due process clause which limits national power. Now, unless the latter provision has no independent meaning, unless, that is, it is mere shorthand for the remainder of the Bill of Rights, would not its incorporation into the fourteenth amendment endow the judges with the very constitutional flexibility which Black sought to deny them? (One of the most widely criticized substantive due process decisions, in which the Court struck down a minimum-wage law for women, involved the fifth amendment.)\(^{230}\) That Black regarded fifth amendment due process as a potent constitutional weapon, and not as a redundant phrase, is abundantly clear. For example, in *Bolling v. Sharpe*,\(^{231}\) the Court, with Black's acquiescence, ordered desegregation of the District of Columbia's schools on due process grounds, in the absence of an equal protection clause in the Bill of Rights to bind the federal government. In this instance, the due process clause of the fifth amendment was given the same function to perform in breaking down segregation in the federal district as the equal protection clause of the fourteenth amendment was assigned in *Brown v. Board of Education*,\(^{232}\) which struck down segregation in the states.

So, despite Black's formal advocacy of incorporation of the Bill of Rights, it seems that, in order to circumvent the difficulty, he really wanted to see carried over into the fourteenth amendment not the Bill of Rights per se, but only its "specific provi-

\(^{228}\) Baldwin v. Missouri, 281 U.S. 586, 595 (1930) (dissenting opinion).
\(^{230}\) Adkins v. Children's Hospital, 261 U.S. 525 (1923); overruled in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
\(^{231}\) 347 U.S. 497 (1954).
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Due Process opinions”, a term he adverted to frequently233 in his Adamson234 and Griswold234.1 opinions. This, clearly, was also Justice Murphy’s understanding, as the opening sentence of his Adamson dissent, quoted above,235 shows.

Interestingly, though Black was silent on the general question of fifth amendment due process in the context of incorporation, he did attempt to rationalize his joining the Court in the Bolling desegregation case. The Court had “merely recognized,” said Black, “what had been the understanding from the beginning of the country . . . that the whole Bill of Rights, including the Due Process Clause of the Fifth Amendment, was a guarantee that all persons would receive equal treatment under the law.”236 Black cited no history in support of this “understanding”, while the bare words “due process of law” were never, prior to 1954, thought to include a ban on racial segregation. From Black’s standpoint, if an intuitive “understanding,” rather than a clear historical record or the specific constitutional text, is sufficient to shape the fifth amendment’s due process clause to nullify a law, why should not the eighteenth (and nineteenth) century’s concern for the sanctity of property rights, which is much more readily documented,237 permit a construction of the due process clauses that would reject governmental regulation which the judges regard as antithetical to that “understanding”?

A further observation needs to be made. If the privileges and immunities clause alone, as Black at one point contended,238 accomplishes the object of incorporating the Bill of Rights, why elsewhere did he rely on “the provisions of the Amendment’s first section, separately, and as a whole”?239 Could it be that Black was trying to obscure another textual difficulty—the content to be assigned the due process clause? For to assign it any content, beyond the Bill of Rights’ provisions already taken into the privileges and immunities clause, would, of course, defeat Black’s object of reducing judicial maneuverability.

233. See, e.g., the text at notes 154 and 220 supra.
235. See the text at note 180 supra.
237. The threefold nature of the due process clauses (life, liberty, property) itself indicates this. The body of the Constitution and the Bill of Rights contains no provision for equal protection.
238. See the text at note 295 infra.
VI. SELECTIVE INCORPORATION TRIUMPHANT

The process of selective incorporation of Bill of Rights’ provisions which Black in the Adamson\(^\text{240}\) case had strongly urged as an acceptable alternative to his theory of total incorporation became a reality in the 1960’s. Justice Frankfurter had retired from the Court in 1962, and the burden of opposition in the cases to be discussed fell on Justice Harlan. The Court continued to go through the motions of the “ordered liberty” or “fundamental rights” test, but found, after the most perfunctory of discussions, that each of the guarantees incorporated was indeed a constituent of “ordered liberty” and therefore fundamental. Towards the close of the decade Black looked back on his triumph and reflected that “the selective incorporation process has the virtue of having already worked to make most of the Bill of Rights’ protections applicable to the States.”\(^\text{241}\) In only one of his goals did Black fall short of success: he had failed to persuade his colleagues that the boundary marking fourteenth amendment rights should not be pushed beyond that of the Bill of Rights.

The “decade of incorporation” began in 1961 with the decision in \textit{Mapp v. Ohio},\(^\text{242}\) which required the states to exclude from trials evidence that had been taken in violation of the constitutional search and seizure standard. For an understanding of that case we must briefly retrace our steps to the 1949 case of \textit{Wolf v. Colorado},\(^\text{243}\) which exemplifies Frankfurter’s approach to due process. His opinion for the Court held that while the “core” of the fourth amendment’s guarantee against unreasonable searches applied also to the states by virtue of the due process clause, this protection did not extend to the exclusion from state trials of unconstitutionally seized evidence, although an exclusionary rule had been in effect in the federal courts since 1914.\(^\text{244}\) The question, said Frankfurter, was “not to be so dogmatically answered as to preclude the varying solutions”\(^\text{245}\) which the states might wish to choose in dealing with the problem of unlawful searches. He pointed out that most of the English-speaking world, including England itself and thirty of the American states, still followed the common-law rule that the public is entitled to the use of all

\(^{240}\) Adamson v. California, 332 U.S. 46 (1947).
\(^{243}\) 338 U.S. 25 (1949).
\(^{244}\) Weeks v. United States, 232 U.S. 383 (1914).
reliable evidence, no matter how it has been obtained. One could, therefore, scarcely speak of the exclusionary rule as an essential part of the right to security against arbitrary invasion by the police. The right itself was basic, but exclusion of evidence acquired through an invasion of the right was not. In the Mapp case the Wolf doctrine was repudiated and the exclusionary rule was applied to the states, as an essential ingredient of the fourth amendment’s guarantee: “To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.”

Then, in 1962, came Robinson v. California, in which the Court imposed on the states the eighth amendment’s ban on cruel or unusual punishment. There was no discussion in the opinion concerning the fundamental nature of the right; this was presumably regarded as self-evident. The next year, in Gideon v. Wainwright, the Court discarded the “special circumstances” rule of Betts v. Brady, and extended, as a fundamental right, the sixth amendment’s guarantee of right to counsel, to criminal cases tried in the state courts. Regardless of the weak historical antecedents for an unqualified right to the assistance of counsel which had motivated the Betts decision, the Court found access to counsel necessary for the vindication of the defendant’s due process right to a fair trial. Justice Black’s opinion for the Court did not specifically impose a single standard for the federal and state courts to follow, though it seemed clearly to imply as much. Justice Harlan, concurring, nevertheless believed the Court was not obligating itself to “automatically carry over an entire body of federal law and apply it in full sweep to the States.” The Court was soon to show that Harlan’s understanding was incorrect and that it was indeed charting new due process directions.

An important question had remained unresolved by the Mapp case. Did the decision mean that the Court would continue

246. Mapp v. Ohio, 367 U.S. 643, 656 (1961). Justice Black had concurred in the Wolf ruling because he was convinced “that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.” 338 U.S. 25, 39-40. Yet he concurred in Mapp too, because by that time he had arrived at the conclusion that the fourth amendment “considered together with the Fifth Amendment’s ban against compelled self-incrimination” gave the exclusionary rule constitutional standing. 367 U.S. 643, 662. Black’s strange odyssey continued in Coolidge v. New Hampshire, 403 U.S. 443 (1971), where he asserted that the fifth amendment “in and of itself” supports an exclusionary rule. Id. at 498 (dissenting opinion).

249. 316 U.S. 455 (1942).
to apply the doctrine of *Wolf v. Colorado* that only protections at the “core” of the fourth amendment were safeguarded against state action, with the difference that seizures made in violation of these “core” rights would no longer be admissible? Or did the decision mean that the fourth amendment’s standard of reasonableness was carried over intact into due process? *Ker v. California* answered this question in 1963. The Court, speaking through Justice Clark, held that “the standard of reasonableness is the same under the Fourth and Fourteenth Amendments. . . .” It is astonishing that a decision of such moment, from the standpoint of due process interpretation, should have yielded an opinion almost barren of discussion on the matter. Only Justice Harlan disagreed. He would have preferred to stay with the old rule that only state searches which violated principles of “fundamental fairness” were forbidden by the due process clause. He expressed the fear that the *Mapp* and *Ker* decisions would lead to “derogation of law enforcement standards in the federal system,” because of pressures on the Court “to avoid unduly fettering the states.”

The course of selective incorporation continued with gathering momentum through the 1960’s. Half a dozen other provisions of the Bill of Rights were to be incorporated, undiluted, into the due process clause before the decade had run its course. *Malloy v. Hogan,* in 1964, carried over the fifth amendment’s guarantee against self-incrimination (thus discarding *Adamson v. California*); *Pointer v. Texas,* in 1965, the sixth amendment right to confrontation of opposing witnesses; *Klopfer v. North Carolina,* in 1967, the sixth amendment right to a speedy trial; *Washington v. Texas,* also in 1967, the sixth amendment right to compulsory process for obtaining witnesses in the defendant’s favor; *Duncan v. Louisiana,* in 1968, the right to trial by jury; and *Benton v. Maryland,* in 1969, the fifth amendment’s guarantee against being placed twice in jeopardy. *Benton* was, in more ways than one, the capstone case, for the Court in its opinion

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252. Id. at 33.
253. Id. at 45-46.
255. 380 U.S. 400 (1965).
257. 388 U.S. 14 (1967).
Due Process

overruled the landmark decision in *Palko v. Connecticut.* It is unnecessary for our purposes to engage in a detailed discussion of each of the selective incorporation decisions; for only in the *Duncan* case did the Court's opinion make a significant contribution to the ongoing debate on the scope of the due process clause.

The reasons advanced by the Court for its actions were various. The self-incrimination provision was included in due process because "the American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay." The right to a speedy trial had received recognition in the Assize of Clarendon (1166), thus it antedated even Magna Carta, which reaffirmed the right, and each of the fifty states guaranteed it. The prohibition against double jeopardy was established in English and American common law before Independence, and at least "some form of the prohibition" was embodied in the laws of all fifty states. In reality, however, the Bill of Rights analogy was the decisive factor. Thus in * Pointer v. Texas,* the Court said: "The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution;" while in * Washington v. Texas* it was observed that "in recent years we have increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law."

In his separate opinions for all of these cases, in some instances concurring in the judgment and in others dissenting, Harlan presented a forceful exposition of his views. He referred to "the onward march of the long-since discredited 'incorporation' doctrine . . . which for some reason that I have not yet been able to fathom has come into the sunlight in recent years." He could agree, for example, that "principles of justice to which due process gives expression" would forbid states to imprison persons for the sole reason that they had refused to incriminate them-

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263. 380 U.S. 400, 404 (1965).
266. Molloy v. Hogan, 378 U.S. 1, 15 (1964) (dissenting opinion).
selves, or that a conviction following an acquittal on the same charge in a trial free of error could not stand, but not that the states must obey all the nuances of federal criminal procedure required by the fifth and sixth amendments. There was little difference between the all-at-once course advocated by Black and the one-at-a-time approach followed by the Court, which amounted to "little more than a diluted form of the full incorporation theory." In either case, the due process clause was subordinated to the requirements of the Bill of Rights.

The short of it, thought Harlan, was that the Court had pushed the "wholesale" incorporation theory out the door, while readmitting it, Bill of Rights provision by provision, through the window; "the logical gap between the Court's premises and its novel constitutional conclusion can, I submit, be bridged only by the additional premise that the Due Process Clause of the Fourteenth Amendment is a shorthand directive to this Court to pick and choose among the provisions of the first eight Amendments and apply those chosen, freighted with their entire accompanying body of federal doctrine, to law enforcement in the States."

The only explanation the Court had offered for the single standard doctrine, said Harlan, was that it would be incongruous for different federal and state standards to govern vindication of the same constitutional right. "Such 'incongruity', however, is at the heart of our federal system. The powers and responsibilities of the state and federal governments are not congruent; under our Constitution, they are not intended to be." In a sophisticated defense of the principle of federalism which, he thought, was being undermined by the Court's decisions, Harlan pointed to consequences going far beyond the mere diminution of states' discretion in the ordering of their judicial systems:

If the power of the States to deal with local crime is unduly restricted, the likely consequence is a shift of responsibility in this area to the Federal Government, with its vastly greater resources. Such a shift, if it occurs, may in the end serve to weaken the very liberties which the Fourteenth Amendment safeguards by bringing us closer to the monolithic society which our federalism rejects. Equally dangerous to our liberties is the alternative of watering down protections against the Federal

269. Id. at 27.
Government embodied in the Bill of Rights so as not unduly to restrict the powers of the States.\textsuperscript{270}

While the Court largely ignored Harlan's strictures and failed to offer a persuasive rationale for the course it was following, Justice Goldberg's concurrence in \textit{Pointer v. Texas}\textsuperscript{271} did make an attempt to reply to Harlan. Once a Bill of Rights provision is placed in the due process clause, argued Goldberg, it applies to the states "in full strength" because the Court does not have the authority "to experiment with the fundamental liberties of citizens safeguarded by the Bill of Rights."\textsuperscript{272} Goldberg simply assumed that which he set out to prove. For Harlan's point was that even if the substance of a right found in the Bill of Rights is regarded as fundamental and therefore enforceable against the states through the agency of the due process clause, this does not mean that every aspect of that right, as enforced in the federal courts, must likewise be regarded as fundamental. Moreover, if the enumeration of a safeguard in the Bill of Rights is the decisive criterion defining its fundamental nature, it would follow that all the Bill's provisions should be incorporated, a position that Goldberg and the majority clearly forswore.

As for the demands of federalism, Goldberg asserted that the route suggested by Harlan "would require this Court to intervene in the state judicial process with considerable lack of predictability and with a consequent likelihood of considerable friction."\textsuperscript{273} While this is an argument of some weight, it may be observed that the problem of predictability cuts two ways. Disagreeing with the rationale of the \textit{Ker}\textsuperscript{274} decision, Harlan maintained that to subject the states to federal search and seizure standards would place them "in an atmosphere of uncertainty since this Court's decisions in the realm of search and seizure are hardly notable for their predictability."\textsuperscript{275}

Yet Harlan's criticism of the Court's position was at times more persuasive than his defense of his own. To illustrate, inclusion of a right in the due process clause, asserted Harlan, was in no way contingent on its being listed in the Bill of Rights, though concededly its enunciation there "might provide historical evi-

\textsuperscript{270} Id. at 28.
\textsuperscript{271} 380 U.S. 400 (1965).
\textsuperscript{272} Id. at 413.
\textsuperscript{273} Id. at 413-14.
\textsuperscript{274} Ker v. California, 374 U.S. 23 (1963).
\textsuperscript{275} Id. at 45.
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Evidence that the right involved was traditionally regarded as fundamental . . . Harlan’s formulation does not advance us very far in the quest for criteria which would be helpful in the identification of fundamental rights, since all rights enumerated in the Bill of Rights were “traditionally” regarded as fundamental, the right to grand jury indictment no less than the right of free speech. The problem, from the standpoint of a variable due process content, which Harlan advocated, is how shall currently fundamental rights be identified.

This review concludes with Duncan v. Louisiana, a case that gave rise to yet another great debate on the due process clause, which rivalled in intensity of feeling and clarity of exposition that of the Adamson case. In Duncan the Court held that for serious crimes (as distinguished from “petty” offenses) jury trials are required in state courts, because, said Justice White in his majority opinion, “trial by jury in criminal cases is fundamental to the American scheme of justice. . . .” White’s stress on “the American scheme of justice,” was deliberate, as he explained; he believed that the recent cases had applied “a new approach to the ‘incorporation’ debate.” Cases such as Palko v. Connecticut, said White, had resolved the question of the states’ obligations under the due process clause by conducting an inquiry whether “a civilized system could be imagined that would not accord the particular protection” that was claimed. Beginning with the decision in Mapp v. Ohio, however, the Court had “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.” Thus, he seemed to require no more than a demonstration that the right claimed was familiar, rather than

280. Id. at 149 n. 14.
necessary, or more accurately, he would deem it necessary if it was familiar. However, it was strange that he considered the Mapp exclusionary rule as meeting this test of due process, for the rule was unknown to the common law when it was introduced in the federal courts, and ignored by half the states when it was imposed on state process.

The right to a trial by a jury of one's peers bore "impressive credentials," said White. Some would trace its history as far back as Magna Carta. The constitutions of the original states guaranteed jury trial, as had "in one form or another" the constitutions of all states which entered the union subsequently. Finally, said White, it was not the ancient lineage of the right alone that made it fundamental; it was "essential for preventing miscarriages of justice [by arbitrary judges] and for assuring that fair trials are provided for all defendants." This last statement seemed a little strained in view of what White had previously said in response to criticisms of the capacity of juries to determine the facts: that the study by Kalven and Zeisel had shown that juries generally turn in the same verdict as the judge would have arrived at were he trying the case alone.

Justice Fortas, concurring, cautioned against the view that the states were bound to adopt not only the sixth amendment trial by jury requirement, "but all of its bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings." He saw no reason why "the tail must go with the hide," why all the ancillary rules which applied in federal trials, such as the requirement of a unanimous verdict and a jury of twelve, should be fastened on the states. He urged the Court to bear in mind the distinction between "a principle of justice" and "a system of administration of the business of the state . . . We should be ready to welcome state variations which do not impair—indeed, which may advance—the theory and purpose of trial by jury."

Justice Black's concurrence, which Justice Douglas joined,

285. Id. at 151.
286. Id. at 153.
287. Id. at 158.
289. Bloom v. Illinois, 391 U.S. 194, 213 (1968) Fortas' concurring opinion in Bloom, where the Court required trial by jury for criminal contempt proceedings in the state courts, applied also to Duncan.
290. Id. at 213-15.
was essentially a continuation of his Adamson opinion, and more particularly, an attempted rebuttal of Charles Fairman's essay in which the latter cast long shadows of doubt on the worth of Black's historical presentation in the Adamson case. Black called his historical appendix in Adamson "the product of years of study and research," which had "followed 10 years of legislative experience as a Senator of the United States, not a bad way, I suspect, to learn the value of what is said" in Congressional committees and floor debates. He disparaged Fairman's "history" by enclosing the word in quotation marks, and adding that Fairman had relied on what "was not said in the state legislatures" rather than on what was said by Howard and Bingham in the Senate and House, respectively. He knew from his legislative experience that it was to men such as these "that members of Congress look when they seek the real meaning of what is being offered." Black seems to have misconstrued entirely the thrust of Fairman's findings. Fairman's point was that regardless of what members of Congress thought they were proposing, a constitutional amendment requires the approval of the states, and their understanding as to what they are ratifying is of equal importance in construing the amendment's meaning.

Regarding the argument made by Fairman and others that the words of the first section of the fourteenth amendment were an odd way of making the Bill of Rights enforceable against the states, Black thought it was odd to read the amendment differently. "What more precious 'privilege' of American citizenship could there be than that privilege to claim the protection of our great Bill of Rights?" It was inconsistent for judges to speak of the virtues of federalism while at the same time holding in readiness the power to strike down a state law, not because it is in conflict with a provision in the Bill of Rights, but because they regard it as unfair. Nonetheless Black expressed some satisfaction with the selective incorporation approach because it minimized the ability of judges to roam freely in formulating constitutional policy and, by using it, the Court had taken great strides toward complete incorporation of the Bill of Rights.

292. Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, supra note 182. For a more recent and briefer, but equally trenchant attack on Black's historical presentation, see Mendelson, Mr. Justice Black's Fourteenth Amendment, 53 Minn. L. Rev. 711 (1969).
294. Id. at 165.
295. Id. at 166.
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Justice Harlan’s blistering dissent in the Duncan case, with which Justice Stewart concurred, was the most elaborate and far-ranging of his several contributions to the incorporation debate, in many ways comparable to Frankfurter’s notable opinion in the Adamson case and in some ways excelling it. The question, said Harlan, was not whether trial by jury was an ancient or important institution in the administration of criminal justice—it was both—but whether it was required by the due process clause. An interpretation of due process which equated that provision with a requirement of fundamental fairness—the only interpretation Harlan regarded as tenable—would conclude that trial by jury was not a constituent of due process. The Court had conceded that it could not find anything unfair in the defendant’s bench trial, yet it had imposed on the states not only the sixth amendment’s jury trial requirement, but also, Harlan believed, “the sometimes trivial accompanying baggage of judicial interpretation in federal contexts.” The Court had done so, Harlan suggested revealingly, because the majority was divided, and the opinion represented “an uneasy and illogical compromise among the views of various Justices on how the Due Process Clause should be interpreted.”

Both the Court’s approach of selective incorporation and its understanding of history, Harlan protested, were “altogether topsy-turvy.”

Harlan analyzed the three interpretations of the due process clause which had competed for judicial favor: 1) the approach favored since the nineteenth century, until it was discarded through disuse in the 1960’s; 2) total incorporation; 3) selective incorporation. In the first view, “liberty” and “due process of law” are defined “in a way that accords with American traditions and our system of government.” This difficult and discriminating process of adjudication, took account of the progressive qualities of the law and of the great diversities which existed in the nation. The Court had interpreted due process of law to require fair and impartial procedure, and had “sought to define ‘liberty’ by isolating freedoms that Americans of the past and of the present considered more important than any suggested countervailing public objective.”

To be sure, there was an “accidental overlap”, or “parallelism,” between some of the restrictions which

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296. Id. at 172.
297. Id. at 173.
298. Id. at 176.
299. Id. at 177.
were placed on the states by the due process clause and on the federal government by the Bill of Rights, which might indeed serve "as evidence of a historic commitment"\(^{300}\) to certain liberties. "The logically critical thing, however, was not that the rights had been found in the Bill of Rights, but that they were deemed, in the context of American legal history, to be fundamental."\(^{301}\)

The position of absolute incorporation, continued Harlan, had been consistently rejected by all but a few members of the Court and bore the stigma of "overwhelming historical evidence"\(^{302}\) against it, but it, like the earlier view, at least had the virtue of internal logic; "we look to the Bill of Rights, word for word, clause for clause, precedent for precedent because, it is said, the men who wrote the Amendment wanted it that way."\(^{303}\) On the other hand, the selective incorporation theory, currently in favor with the majority, "compromised on the ease of the incorporationist position without its internal logic." The Court was unwilling to face up to a determination of whether denial of trial by jury is fundamentally unfair. It had simply asked whether the sixth amendment's trial by jury provision should be incorporated into the due process clause "jot-for-jot and case-for-case" and answered the question in the affirmative, justifying "neither its starting place nor its conclusion."\(^{304}\)

Why, asked Harlan, must every last ruling of the Court, every "subprinciple," with regard to jury trial in federal courts be regarded as "equally fundamental to ordered liberty"\(^{305}\) in the state courts? To be sure, the requirement of an impartial jury, for example, was clearly fundamental, but a jury of twelve "is not fundamental to anything: there is no significance except to mystics in the number 12".\(^{306}\) Again, why must a jury trial result in a unanimous verdict? England, birthplace of the jury system, had abandoned this requirement in 1967. Finally, the Court's opinion had left for the future the drawing of a line that would separate serious offenses, which require jury trial, and petty crimes, which historically have been exempt from the requirement. Why should that line, when drawn, be imposed uniformly

\(^{300}\). Id.

\(^{301}\). Id. at 179.

\(^{302}\). Id. at 174.

\(^{303}\). Id. at 176.

\(^{304}\). Id. at 181.

\(^{305}\). Id.

\(^{306}\). Id. at 182.
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on the states? The Court was obligated to decide "obscure borderline questions" in federal cases, but surely state legislatures and courts were no less competent to resolve such issues in regard to state trials.

Putting aside the issue of incorporation of sub-principles, by what reasoning, continued Harlan, had the Court decided that the jury trial provision fell into the superlative category of fundamental? As used by the Court the word fundamental "does not mean 'analytically critical to procedural fairness' for no real analysis of the role of the jury in making procedures fair is even attempted. Instead, the word turns out to mean 'old', 'much praised', and 'found in the Bill of Rights'. The definition of 'fundamental' thus turns out to be circular. Harlan’s own analysis yielded a different result. The Court had on several previous occasions denied trial by jury the status of a fundamental right, and time had not brought significant additional evidence to bear on the matter. The same pros and cons that had in the past dominated the heated debate on the virtues of jury trial were being advanced now. The adversary process made such requirements as the right to counsel and to cross-examine opposing witnesses imperative to a fair trial, since there was no satisfactory substitute for them, but it “simply has not been demonstrated . . . that trial by jury is the only fair means of resolving issues of fact.”

Whatever virtues might be ascribed to trial by jury, such as the easing of the burden on judges, the refusal of jurors to enforce harsh laws, the affording to citizens of an opportunity to participate in law enforcement, its “principal original virtue . . . —the limitations a jury imposes on a tyrannous judiciary—has largely disappeared. We no longer live in a medieval or colonial society. Judges enforce laws enacted by democratic decision, not by regal fiat . . . and are responsible not to a distant monarch alone but to reviewing courts, including this one.” Not only had the original purpose of trial by jury disappeared, but it was “a cumber-

307. Id. at 183.
308. In Baldwin v. New York, 399 U.S. 66 (1970), the Court by a 5-3 majority ruled that in state trials, as in federal trials, "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." Id. at 69. Justices Black and Douglas, regarding the distinction between serious and petty crimes as "little more than judicial mutilation of our written Constitution," would have required jury trial for all criminal offenses. Id. at 75.
312. Id. at 188.
some process," costly in time and money to the state and jurors alike, and "contributing to delay in the machinery of justice." In England only the charge of a grave offense entitles a defendant nowadays to a jury trial, but even most such crimes are in fact tried by the court, with only about one percent of defendants actually receiving a jury trial. In the United States, with three-fourths of all crimes triable by jury being settled by guilty pleas, the percentage of jury trials, as opposed to bench trials, is also very small. With trial by jury the exception rather than the rule, it could scarcely be contended that it was an indispensable element of a fair trial.

The urgings of Justices Harlan and Fortas that the newly-fashioned due process right to a jury trial be endowed with a measure of flexibility, were eventually to bear fruit in a manner they could scarcely have anticipated. Two cases decided in 1970 and 1972, respectively Williams v. Florida and Apodaca v. Oregon, raised the very questions which Harlan and Fortas had addressed: whether a unanimous verdict and a jury of exactly twelve persons are necessary to meet constitutional requirements. In Williams Justice White delivered the Court's opinion sustaining Florida's system of impanelling a six-member jury, while in Apodaca he wrote the plurality opinion upholding the Oregon procedure which permits conviction on a ten to two jury vote.

White took a functional approach to each case. Essentially he asked one question: are the common law requirements of a jury of twelve and a unanimous verdict (unstated in the sixth amendment, but long assumed to be implied there) related to the principle purpose of the jury—the prevention of governmental oppression? He found the answer to be negative. The size of the jury was fixed at twelve some time in the fourteenth century in what was "a[n] historical accident," while "the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the state" was as well served by a majority as by a unanimous verdict. "To read the Sixth Amendment as forever codifying [features] so incidental to the real purpose of the Amendment," concluded White, "is to ascribe a blind formalism to the Framers which would require considerably more evi-

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313. Id.
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dence than we have been able to discover in the history and language of the Constitution or in the reasoning of our past decisions.\textsuperscript{318} Even though Williams was a due process decision its holding would obviously apply to federal trials as well, for it was decided on the premise that the due process clause had absorbed the sixth amendment's jury trial provision \textit{in toto}. Apodaca, on the other hand, did not extend to federal trials since Justice Powell, recently appointed to the Court, who cast the decisive vote in the 5-4 decision, was of the view that while unanimity is not a fundamental feature of jury trial, and therefore not required by due process, it is nevertheless mandated by the sixth amendment.\textsuperscript{319}

Justice Harlan, dissenting in the Williams case (he had retired from the Court and died in 1971 before the Apodaca decision) believed that hitherto it would have been considered "unthinkable"\textsuperscript{320} that the sixth amendment did not require either a jury of twelve or a unanimous verdict, and he protested the Court's "circumvention of history," and "cavalier disregard"\textsuperscript{321} of an unbroken line of precedents requiring a jury of twelve. The Court, as he viewed the outcome, was trying to mitigate the severe consequences for the states of the selective incorporation doctrine in which it had imprisoned itself. It was therefore tempering the Duncan\textsuperscript{322} decision and "allow[ing] the States more elbow room in ordering their own criminal systems,"\textsuperscript{323} by diluting federal constitutional protections. In attempting to "cope with national diversity under the constraints of the incorporation doctrine," the Court was demonstrating "a constitutional schizophrenia".\textsuperscript{324}

\textbf{Conclusion: Future Directions}

The Supreme Court's preoccupation with the interpretation of the fourteenth amendment's due process clause—which is at present the most important provision of the Constitution in terms

\begin{itemize}
  \item[319.] Justices Black and Douglas, concurring in Williams, agreed that a six-member jury satisfied the Sixth Amendment's guarantee. In Apodaca, which was decided following Black's retirement and death, Douglas in dissent maintained that a unanimous verdict is constitutionally required.
  \item[321.] Id. at 126.
  \item[322.] Duncan v. Louisiana, 391 U.S. 145 (1968).
  \item[324.] Id. at 136.
\end{itemize}
of the volume of litigation to which it gives rise—shows no sign of coming to an end.

While we cannot foretell how the law of due process will unfold in the future, in recent opinions there are suggestions, perhaps not entirely compatible, of the shape of things to come. One possibility is that the Court may continue to enlarge the area of substantive rights protected by due process, by striking down, in the name of the right to privacy or some other similar concept, legislation which does not accord with the Justices' notion of fundamental liberties. This is the teaching of Griswold v. Connecticut and subsequent due process decisions. Thus the Court has held that the constitutional protection of privacy extends to the reading of obscene matter in the privacy of one's home, even though the first amendment does not protect distribution of obscene materials. Moreover, the Court has transformed the right to marital privacy, as delineated in Griswold, into a general right to sexual privacy, by striking down on grounds of equal protection a statute which permitted physicians to prescribe contraceptives for married persons but not for the unmarried. "If the right of privacy means anything," said the Court, "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." There was no explanation as to why the begetting of a child by an unmarried person must be considered a fundamental right, and Chief Justice Burger's dissent characterized the decision as "hark[ing] back to the heyday of substantive due process." Finally, in one of the most radical decisions it has ever rendered, the Court recognized the right of a woman to terminate

325. 381 U.S. 479 (1965).
326. Stanley v. Georgia, 394 U.S. 557 (1969). It was not the first amendment alone that was involved in this case, said the Court. "For also fundamental is the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy." Id. at 564. In other words, the Court found in this situation an intersection of two rights, each of which standing alone could not have supported the decision. For the first amendment does not protect obscene materials which are distributed or exhibited in public, while an unbridled right of privacy without a first amendment linkage would, as the Court recognized, forbid the government to outlaw the possession of contraband in the home. Justice Black concurred on first amendment grounds exclusively, believing that the rights granted by the amendment are absolute.
329. Id. at 453.
330. Id. at 467.
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her pregnancy through abortion.\textsuperscript{331} The right to abort a fetus was held to be virtually unqualified during the first six or seven months of pregnancy, before the fetus is considered "viable" or a "potential life."\textsuperscript{332}

In connection with the Court's resurrection of substantive due process, it may be noted that Justice Frankfurter even foresaw the possibility of an eventual return of economic due process: "Yesterday the active area in this field was concerned with 'property' . . . Who can say that in a society with a mixed economy, like ours, these two areas are sharply separated, and that certain freedoms in relation to property may not again be deemed, as they were in the past, aspects of individual freedom? . . . [P]rotection of property interests may . . . quite fairly be deemed, in appropriate circumstances, an aspect of liberty."\textsuperscript{333}

Another possible move by the Court might be a retreat from some of the landmark criminal law decisions of the 1960's. There is clear evidence that some Justices wish to overturn \textit{Mapp v. Ohio}\textsuperscript{334}—the decision which inaugurated the Warren Court's "revolution" in the criminal law field—and permit the states to use illegally seized evidence in criminal trials. Chief Justice Burger has denounced the exclusionary rule as "conceptually sterile and practically ineffective"\textsuperscript{335} as a means of restraining unlawful searches, and not worth the "monstrous price"\textsuperscript{336} that he believes society is paying in increased criminality. Similarly, Justice Blackmun, in more restrained language, has asserted that "the Fourth Amendment supports no exclusionary rule."\textsuperscript{337} Burger's vigorous opposition to the rule is of long standing,\textsuperscript{338} antedating his appointment to the Court, and he may be expected to press the matter tenaciously. Indeed, Justice Brennan, speaking also for Justices Douglas and Marshall, has recently expressed the fear that the Court may be preparing to "abandon

\textsuperscript{331.} Roe v. Wade, 410 U.S. 113 (1973).
\textsuperscript{332.} Afterwards, the abortion may take place on a medical judgment that the woman's health (more accurately, her general well-being) requires it. The state may not even require concurrence in the abortion decision by physicians other than the woman's own. See Doe v. Bolton, 410 U.S. 179 (1973).
\textsuperscript{337.} \textit{Id.} at 510 (dissenting opinion).
altogether the exclusionary rule in search and seizure cases. . . ."\textsuperscript{339} The jettisoning of the exclusionary rule, if it should come about, might generate a momentum, difficult to check, which could result in the discarding or reshaping of other epochal criminal law decisions of the Warren Court.

A third possibility, opened up by the recent jury-trial decision in \textit{Apodaca v. Oregon},\textsuperscript{340} is that the Court might reverse direction and distinguish between procedural requirements for the federal and state courts. Thus, while all the important procedural guarantees of the Bill of Rights might continue to be subsumed under the due process clause, they might not be wholly incorporated, with the states being permitted greater flexibility than the federal government. It is true that only Justice Powell advocated this position in \textit{Apodaca}, but his was the decisive vote. Of the Justices now sitting, Justice Stewart had previously urged such an approach,\textsuperscript{341} but in the \textit{Apodaca} case he considered himself bound by the precedent set in \textit{Duncan v. Louisiana}.\textsuperscript{342} It is worth recalling that in \textit{Duncan}, Justice Harlan spoke of the selective incorporation doctrine as an “uneasy and illogical compromise”\textsuperscript{343} among the Justices, presumably among those who favored total incorporation and those who would have wished to continue with the fair-trial rule. If he was correct, a gain of just one or two votes for the position taken by Powell and Stewart might tilt the balance decisively away from complete incorporation of selected Bill of Rights provisions and toward a more flexible standard for the states.

In the event that reconsideration of the selective incorporation doctrine does take place, the Court will be able to retrieve an opportunity missed in the \textit{Adamson} case.\textsuperscript{344} The minority opinions by Black and Frankfurter were so dominant that the issue of applicability of the procedural guarantees of the Bill of Rights to the states was placed on an intellectual or ideological level which precluded careful consideration of each of these rights indi-

\textsuperscript{339} United States v. Calandra, 42 U.S.L.W. 4104, 4112 (Jan. 8, 1974) (dissenting opinion). In this case, the Court held that the exclusionary rule does not apply to grand jury proceedings.

\textsuperscript{340} 406 U.S. 404 (1972).

\textsuperscript{341} In Duncan v. Louisiana, 391 U.S. 145 (1968), Stewart joined in Harlan’s dissent.

\textsuperscript{342} \textit{Id}.

\textsuperscript{343} \textit{Id}. at 172 (dissenting opinion).

\textsuperscript{344} Adamson v. California, 332 U.S. 46 (1947).
individually. By needlessly enlarging the area of judicial conflict, *Adamson* insured that attention would be paid almost exclusively to the issue of incorporation, and not to the equally important issue of which aspects of the procedural rights should be enforced on the states. If it is true that since the Court moved away from *Adamson*, Bill of Rights guarantees have been “swallowed whole” by due process, it is equally true that, for the most part, rights were rejected “whole” before that time. Frankfurter’s opinion—which in a real sense dominated the Court’s thinking on the subject for more than a decade, although it was the expression of but a single Justice—was so firmly fixed on what is truly fundamental as to obliterate any distinctions between the federal government and the states. Frankfurter thus inadvertently subverted the very considerations of federalism which he defended, and as a result, the Court got off on a wrong tack. The more acceptable approach would have been to consider carefully each right both in terms of incorporation and in terms of its various components.

Had the Court been willing to explore the question of differing federal and state due process requirements, it could have done so without disturbing the total incorporation of the first amendment. By any reasonable standard, all of the first amendment rights are fundamental and implicit in the idea of liberty; as substantive rights, they are hardly given to the special nuances of procedural rights, and are not easily susceptible to a varying requirement. Federalism thus has little relevance to the application of first amendment rights. By contrast, so many of the criminal law cases that come from the states involve relatively minor points, concerned with means rather than ends. Without placing every aspect of the procedural rights under the fourteenth amendment’s protection, justice could still be done. Considerations of federalism support the idea that in the field of criminal law the states and the national government need not be treated exactly alike.

Whichever approach the Court chooses to follow, the day of great Court debates over incorporation may be over. Justices Black, Frankfurter, and Harlan are gone, and while their contri-

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345. For the view that first amendment rights do lend themselves to application according to varying federal and state standards, see *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); *Beauharnais v. Illinois*, 343 U.S. 250, 287 (1952) (Jackson, J. dissenting); *Roth v. United States*, 354 U.S. 476, 496 (1957) (Harlan, J., dissenting).
butions continue to loom large, none of the present members of the Court has evinced much interest in continuing the great debate which flared so brilliantly in Adamson v. California.