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Selective Incorporation Revisited

Jerold H. Israel
University of Michigan Law School, israelj@umich.edu

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JEROLD H. ISRAEL**

INTRODUCTION

In June 1960 Justice Brennan's separate opinion in *Ohio ex rel. Eaton v. Price*[1] set forth what came to be the doctrinal foundation of the Warren Court's criminal procedure revolution. Justice Brennan advocated adoption of what is now commonly described as the "selective incorporation" theory of the fourteenth amendment. That theory, simply put, holds that the fourteenth amendment's due process clause fully incorporates all of those guarantees of the Bill of Rights deemed to be fundamental and thereby makes those guarantees applicable to the states. During the decade that followed *Ohio ex rel. Eaton v. Price*, the Court found incorporated within the fourteenth amendment all but a few of the thirteen Bill of Rights guarantees that relate to the criminal justice process.[2] For many observers, these selective incorporation rulings were the Warren Court's primary achievement in the criminal justice field.[3] Measured by the number of prosecutions affected, the selective incorporation rulings had a monumental impact; in a single decade those rulings expanded the reach of constitutional regulation of criminal procedure many times beyond that which had been attained through all of the Court's constitutional rulings over the previous 170 years.[4]

** Alene and Allan F. Smith Professor of Law, University of Michigan Law School. B.B.A. 1956, Case Western Reserve University; LL.B. 1959, Yale Law School.

1. 364 U.S. 263, 274-76 (1960) (separate opinion of Brennan, J.). The lower court's judgment in *Eaton* was affirmed by an equally divided court. Justice Brennan's separate opinion, joined by Chief Justice Warren and Justices Black and Douglas, argued for reversal. The following year, Justice Brennan presented a more complete statement of the selective incorporation doctrine in his dissenting opinion in Cohen v. Hurley, 366 U.S. 117, 154-60 (1961). *See generally* Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 (1961). Justice Brennan's opinions were not the first to suggest the selective incorporation doctrine, but they were the first both to articulate it clearly and to advance it as a preferred position. Justice Black discussed selective incorporation in his dissenting opinion in Adamson v. California, 332 U.S. 46, 85-87, 89 (1964), but he preferred adoption of the broader theory of total incorporation. *See infra* note 139 (discussing Justice Black's dissent in *Adamson*). Justice Harlan's dissent in Hurtado v. California, 110 U.S. 516, 538 (1884), arguably also may be viewed as based on a selective incorporation theory, but his analysis is ambiguous and the opinion might be urging total incorporation. *See infra* note 188 (discussing Justice Harlan's dissent in *Hurtado*).

2. The thirteen consist of (1) the fourth amendment guarantees relating to searches and seizures; the fifth amendment guarantees relating to (2) grand jury indictment, (3) double jeopardy, (4) due process, and (5) self-incrimination; the sixth amendment guarantees relating to (6) a public and speedy trial, (7) an impartial jury, (8) notice of the nature and cause of the accusation, (9) confrontation of opposing witnesses, (10) compulsory process, and (11) assistance of counsel; and the eighth amendment prohibitions against (12) excessive bail and fines and (13) cruel and unusual punishment.

3. Every scholarly review of the Warren Court's criminal procedure decisions has recognized the selective incorporation rulings as one of the two or three primary achievements of the criminal procedure revolution. *See, e.g.*, Allen, *The Judicial Quest for Penal Justice: The Warren Court and Criminal Cases*, 1975 U. ILL. L. F. 518, 527; Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 794-96 (1970); Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1329-30 (1977). Indeed, Justice Brennan has suggested that selective incorporation decisions may be the most "significant" of all the Warren Court rulings "in preserving and furthering the ideals we have fashioned for our society." Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 492-93 (1977).

4. State prosecutions account for approximately 95% of all felony prosecutions. Y. KAMISAR, W.

This article reexamines the selective incorporation doctrine from the perspective gained through having observed its application for approximately twenty years. Selective incorporation has been the subject of considerable commentary,[5] but little attention has been given to its underlying rationale. This article explores that rationale and considers the extent to which the decisions of the Burger Court have adopted its basic premises. Although many have viewed selective incorporation as a doctrine founded merely on a desire of the Warren Court majority to extend the constitutionalization of criminal procedure, several additional value judgments also contributed to the doctrine's adoption. The Burger Court majority has accepted the doctrine without fully accepting all of those value judgments. The continued application of selective incorporation rests on considerations somewhat different from those that led to its adoption. This article suggests that the key to the Court's adherence to selective incorporation has been a flexibility in constitutional interpretation that permits consideration of factors that the original supporters of selective incorporation largely rejected.

To explore this thesis, one must be familiar not only with the selective incorporation theory, but also with the theories that served as its forebearers. Selective incorporation was an outgrowth of two quite different theories dealing with the relationship between the fourteenth amendment and the Bill of Rights, both of which had been advanced within the Court for many years prior to *Ohio ex rel. Eaton v. Price*. The ability of selective incorporation to command majority support during the 1960's best can be understood in light of the division within the Court that those two theories had spurred. Similarly, an analysis of the value judgments underlying the selective incorporation doctrine requires an appreciation of the values underlying those antecedent theories. Unfortunately, a review of those prior theories and their treatment by the Court cannot be as brief today as it would have been in the 1960's, when both theories were given extensive coverage in almost every course in constitutional law or criminal procedure. Even those who are already familiar with the terrain may find the review worthwhile, however, as the development of those theories constitutes one of the more interesting chapters in our constitutional history.

I. DEVELOPMENTS PRIOR TO THE 1960'S

Prior to the adoption of the fourteenth amendment in 1868, *Barron v. Balti-*

LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 2 (1980). Only the roughest estimates can be made of the total number of misdemeanor prosecutions. *See* Argersinger v. Hamlin, 407 U.S. 25, 34 n.4 (1972) (estimate of four to five million misdemeanor cases, exclusive of traffic offenses). The number of federal misdemeanor prosecutions (including both 18 U.S.C. § 3401 misdemeanors and 18 U.S.C. § 1(3) petty offenses), however, is so low—approximately 100,000 in 1980—that one can safely say that state prosecutions account for more than 98% of all misdemeanor prosecutions. 1980 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES 11, 90-91.

5. There was extensive discussion of the doctrine's rationale and historical basis during the 1960's. *See, e.g.*, Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965); Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1964); Wiehofen, *Supreme Court Review of State Criminal Procedure*, 10 AM. J. LEGAL HIST. 189 (1966); Cushman, *Incorporation, Due Process, and the Bill of Rights*, 51 CORNELL L. REV. 467 (1966). Subsequent articles have focused on the practical impact of the doctrine. See, for example, the articles cited *supra* in note 3.

more[6] had firmly established that the Bill of Rights was intended to constrain only the newly established federal government. Since the language of only a few of the amendments clearly evinces that intent,[7] it is not altogether surprising that the plaintiff in *Barron* argued that the other amendments were not so limited. He maintained that the fifth amendment prohibition against the taking of property without just compensation applied to state as well as federal action.[8] Rejecting that contention, Chief Justice Marshall stated that the question presented was "of great importance, but not of much difficulty."[9] He noted that the Constitution had been established by the people of the United States "for their own government and not for the government of the individual State. Each State established a constitution for itself, and in that constitution, provided such limitations and restrictions in the powers of its particular government, as its judgment dictated."[10] In the few instances in which the framers thought that federal constitutional intervention in a state's treatment of its citizens was necessary, the Constitution explicitly provides that the particular provision applies to the states. Thus, article I, section 10 provides that "[n]o State shall . ... pass any Bill of Attainder, ex post facto law, or law impairing the Obligation of Contracts."[11] Justice Marshall reasoned: "Had Congress [which proposed the amendments] engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language."[12]

In framing the fourteenth amendment, the thirty-ninth Congress clearly "engaged in the extraordinary occupation"[13] described by Justice Marshall in *Barron*. As in article I, section 10, the language of the amendment explicitly indicates the goal of "affording the people additional protection from the exercise of power by their own governments."[14] What was not so clear was the extent to which Congress intended to pursue that goal. The meaning of section one of the fourteenth amendment proved to be especially troublesome. That section provides:

> 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

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6. 32 U.S. (7 Pet.) 242 (1833).

7. Those are the first, sixth, and seventh amendments. The first amendment refers to actions of Congress. The sixth amendment refers to juries selected from the state and district (presumably the federal judicial district) in which the crime was committed. The seventh amendment speaks of jury determinations not being reexamined in any "Court of the United States." For a contrary view of the purpose of the Bill of Rights, see 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1049-82 (1953) (except for first and seventh amendments, Bill of Rights intended to apply to states). *But see* Fairman, *The Supreme Court and the Constitutional Limitations in State Governmental Authority*, 21 U. CHI. L. REV. 40 (1953) (attacking Crosskey's methodology and concluding that Bill of Rights not intended to apply to states).

8. 32 U.S. (7 Pet.) at 247.

9. *Id.*

10. *Id.*

11. U.S. CONST. art. I, § 10.

12. 32 U.S. (7 Pet.) at 250.

13. *Id.*

14. *Id.*

> 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.[15]

Congress obviously intended the first sentence of section one to override the ruling in *Dred Scott v. Sanford*.[16] That infamous decision held that a Negro, because his "ancestors were imported into this country, and sold as slaves," could not become a "citizen" within the meaning of the Constitution and therefore was not entitled to the "privileges and immunities guaranteed by that instrument to the citizen," including the privilege of suing in a federal court.[17] In granting both national and state citizenship to all persons born in the United States, the first sentence of section one nullified *Dred Scott* and ensured that both the recently freed and previously freed blacks would thereafter be "citizens" under the Constitution.

Beyond the granting of citizenship, the precise objective of section one is more difficult to ascertain. The second sentence indicates an intent to protect the freed blacks, as well as others,[18] from abuses of state power. The limitations it sought to impose, however, are couched in terms—such as "equal protection" and "due process"—that are open to varying interpretations. In the years since the adoption of the fourteenth amendment, a substantial part of the Supreme Court's workload has been devoted to defining and redefining those terms. One of the more difficult issues considered in that process has been the extent to which the prohibitions of section one encompass the guarantees found in the Bill of Rights—that is, the extent to which the fourteenth amendment imposes upon the states prohibitions identical or similar to those imposed upon the federal government by the Bill of Rights. Prior to 1960 two different positions had been advanced within the Court regarding that issue. The "fundamental fairness" position had consistently won the support of a majority; the "total incorporation" position had been advanced at different times in dissents. Not all of the justices supporting either of those positions agreed on its precise scope. Some might therefore say that actually three or four different positions had been advanced.[19] For our purposes, however, it is best to focus on the two major positions, treating the less substantial divisions as variants of those positions. The total incorporation position is examined first.

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15. U.S. CONST. amend XIV, § 1.

16. 60 U.S. (19 How.) 393 (1857).

17. *Id.* at 403. The Court also declared the Missouri Compromise to be unconstitutional, nonwithstanding its conclusion that Scott could not bring suit. *Id.* at 452.

18. Although the "one pervading purpose" of the Reconstruction amendments was to guarantee "the freedom of the slave race," the protections afforded were not limited to those of "African descent." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70-72 (1872). The congressional supporters of the amendment also were concerned with discriminatory actions that southern states had taken against white loyalists, and there was discussion of the equity of protecting "all persons, whether citizens or strangers [*i.e.*, aliens]." *See* R. BERGER, GOVERNMENT BY JUDICIARY 217-18 (1977).

19. The separate position of Justice Black, as opposed to other supporters of total incorporation, regarding the scope of the due process clause led to characterization of his position as "total incorporation" and their position as "total incorporation plus." *See infra* notes 115-18, 162-63 and accompanying text (discussing views of Justice Black and other Justices supporting total incorporation). The different approaches of the pre-1930's and post-1930's fundamental fairness rulings might also be characterized as distinct positions, particularly in light of the different values considered to be protected by the Bill of Rights. *See infra* text accompanying notes 180-264 (discussing these fundamental fairness rulings).

A. TOTAL INCORPORATION

The total incorporation position holds that the fourteenth amendment incorporates all of the Bill of Rights guarantees and thereby applies those guarantees to state action in the same manner that they are applied to the actions of the federal government. Total incorporation was first suggested in Justice Bradley's dissent in the *Slaughter-House Cases*,[20] the first fourteenth amendment case to come before the Court. It was not advanced in a clear-cut fashion, however, until Justice Field did so in 1892 in his dissent in *O'Neil v. Vermont*.[21] Although Justice Douglas once counted ten justices who supported the total incorporation position, others view the correct number as six or seven.[22] The important count, in any event, is the number of Justices sitting at one time who supported the position, and that count never rose above four.

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20. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 118-19 (1873) (Bradley, J., dissenting). Justice Bradley argued that the privileges and immunities of citizenship protected by the fourteenth amendment included "the right of *habeas corpus*, the right of trial by jury, of free exercise of religious worship, the right of free speech and a free press, the right peaceably to assemble for the discussion of public measures, the right to be secure against unreasonable searches and seizures, and . . . including almost all of the rest, the right of *not being deprived of life, liberty, or property without due process of law*," as well as "still others . . . specified in the original constitution, or in the early amendments of it." *Id.* at 118 (emphasis in original). Whether he meant to include all of the Bill of Rights guarantees is unclear. His reference to "still others" found in the "early amendments" suggests that he did, but six years later, in Missouri v. Lewis, 101 U.S. 22 (1879), he authored an opinion in which he stated that there was "nothing in the constitution" that would prevent a state from adopting the "civil law and its method of procedure for one county and the common law and its method for others." *Id.* at 31. Although Justice Bradley's focus in *Lewis* was on the equal protection requirements of the fourteenth amendment, his statement raises doubts as to whether he viewed the seventh amendment right to jury trial in civil cases as a privilege and immunity of national citizenship. Justice Swayne, who had joined Justice Bradley's dissent in *Slaughter-House Cases*, also joined his opinion for the Court in *Missouri v. Lewis*.

21. 144 U.S. 323, 360-63 (1892). *See infra* text accompanying note 83 (quoting from Justice Field's dissent in *O'Neil*). The first Justice Harlan, in a separate dissent in which Justice Brewer concurred "in the main," noted his agreement with Justice Field that the fourteenth amendment protected from state invasion those "fundamental rights of life, liberty, or property recognized or guaranteed by the constitution," which rights were "principally, enumerated in the earlier Amendments of the Constitution." 144 U.S. at 370-71. As noted by Professor Morrison, although several cases decided between the *Slaughter-House Cases* and *O'Neil* presented an opportunity for advancement of the total incorporation theory, that theory was not squarely put to the Court by counsel until 1887. Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 140, 145-47 (1949).

22. Justice Douglas' list is found in his concurring opinion in Gideon v. Wainwright, 372 U.S. 335, 346 (1963). He included Justices Bradley and Swayne dissenting in Slaughter-House Cases, 83 U.S. (16 Wall.) at 124; Justice Clifford dissenting in Walker v. Sauvinet, 92 U.S. 90, 93 (1876); Justice Field, the first Justice Harlan, and Justice Brewer dissenting in O'Neil v. Vermont, 144 U.S. at 366; and Justices Black, Douglas, Murphy, and Rutledge dissenting in Adamson v. California, 332 U.S. 46, 71 (1946). There is some question as to the position taken by Justices Bradley and Swayne in the *Slaughter-House Cases*. *See supra* note 20 (discussing Justice Bradley's and Justice Swayne's position on total incorporation). Although Justice Clifford joined Justice Field's dissent in *Walker v. Sauvinet*, which would have required the states to provide jury trials in civil cases, the argument for total incorporation had not yet been squarely made, *see* Morrison, *supra* note 21, at 145-48, and Justice Clifford was no longer on the Court when Justice Field dissented in *O'Neil*. Justice Brewer, although accepting the dissenting position in *O'Neil*, later abandoned total incorporation in Maxwell v. Dow, 176 U.S. 581 (1900). Thus, Professor Landynski suggests the correct number is six: the four dissenters in *Adamson* (Black, Douglas, Murphy, and Rutledge), Justice Field, and the first Justice Harlan. Landynski, *Due Process and the Concept of Ordered Liberty*, 2 HOFSTRA L. REV. 1, 38 (1974). Justice Frankfurter might have counted one less, including only the first Justice Harlan and the four *Adamson* dissenters. He noted in *Adamson*:

> Between the incorporation of the Fourteenth Amendment into the constitution and the beginning of the present membership of the Court—a period of seventy years—the scope of that Amendment was passed upon by forty-three judges. Of all these judges, only one, who may respectfully be called an eccentric exception, indicated the belief that the Fourteenth Amend-

Thus, total incorporation was always a minority position. It was, however, an exceptionally influential minority position and significantly contributed to the Court's eventual adoption of the selective incorporation position.

1. The Rationale of Total Incorporation

Dissenting in *Adamson v. California*,[23] Justice Black cited the "provisions of the [fourteenth] amendment's first section, separately, and as a whole,"[24] as the textual basis for total incorporation. Because the privileges and immunities clause had received a narrow construction in prior cases, and because the equal protection clause seemed inapplicable, Justice Black's statement was interpreted as advocating that the incorporation of the Bill of Rights occur primarily through the due process clause.[25] Justice Frankfurter in his *Adamson* concurrence immediately challenged this use of the due process language.[26] Surely, he argued, if the thirty-ninth Congress had intended to make the first eight amendments applicable to the states, it would not have done so by including a prohibition against the denial of due process. "It would be extraordinarily strange," he stated, "for a Constitution to convey such specific commands in such a round-about and inexplicit way."[27]

Justice Frankfurter's argument appears to be well taken. Inclusion of a sin-

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ment was a shorthand summary of the first eight amendments . . . and that due process incorporated those eight amendments.

332 U.S. at 62. Justice Frankfurter, however, was focusing on the use of the due process clause as a basis for incorporation, *see infra* text accompanying note 127, and therefore probably excluded Justice Field, who relied strictly on the privileges and immunities clause. *See* Mendelson, *Justice Black's Fourteenth Amendment*, 53 MINN. L. REV. 711, 721 (1969).

23. 332 U.S. at 68 (Black, J., dissenting). *See infra* text accompanying notes 100-18 (discussing Justice Black's *Adamson* dissent).

24. 332 U.S. at 71 (Black, J., dissenting). Justice Black's reliance upon the section as a whole, rather than upon the privileges and immunities clause alone, may be explained by differences in the classes of persons covered by the various fourteenth amendment clauses. *See infra* notes 25 & 33 and accompanying text (discussing that explanation). *But see infra* note 34 (noting contention of commentators that privileges and immunities clause can be interpreted as protecting all persons, not just citizens of United States).

25. *See* Comment, *Due Process and the Bill of Rights*, 46 MICH. L. REV. 372, 373 (1948) (Black took view that fourteenth amendment due process clause makes all guarantees of Bill of Rights binding on states); Note, *The Bill of Rights and the Fourteenth Amendment*, 33 IOWA L. REV. 666, 666-67 (1948) (Black's dissent developed theory that fourteenth amendment due process clause protects from state abridgement rights protected from federal abridgement by first eight amendments); Comment, *Due Process—Purpose and Scope of the Fourteenth Amendment*, 21 S. CAL. L. REV. 47, 59 (1947) (Black's opinion construed due process clause to include all guarantees of Bill of Rights); Haigh, *Defining Due Process of Law: The Case of Mr. Justice Hugo L. Black*, 17 S.D.L. REV. 3, 15 (Black advanced incorporation theory of due process). Two other factors also contributed to the view that Justice Black's opinion relied substantially upon the due process clause. First, Justice Frankfurter's concurring opinion, responding to Justice Black's analysis, focused on the due process clause. 332 U.S. at 61 (Frankfurter, J., concurring); *infra* note 127 and accompanying text. Second, because Justice Black apparently viewed total incorporation as protecting aliens and corporations as well as citizens, *see* Mendelson, *supra* note 22, at 715, 721, 724-25, it was assumed that coverage could be achieved only through the due process clause. *But see infra* note 34 (noting contention of commentators that privileges and immunities clause can be interpreted as protecting all persons, not just citizens of United States). On the other hand, the historical material Justice Black cited consists primarily of discussions of the privileges and immunities clause. *See* 332 U.S. at 120 (Black, J., dissenting). Also, primary reliance on due process would have been contrary to the narrow view of due process taken by Justice Black in other cases. *See infra* notes 162-63 and accompanying text (discussing Justice Black's view).

26. 332 U.S. at 63 (Frankfurter, J., concurring).

27. *Id.*

gle guarantee, which itself is only one of many guarantees found in the first eight amendments, hardly indicates a legislative intent to encompass all of the remaining guarantees as well. In a later opinion, Justice Black responded to Justice Frankfurter's claim that total incorporation lacked textual support. Justice Black argued that although the total incorporation theory relied on the historic purpose of the fourteenth amendment "as a whole," it looked to the language particularly of the privileges and immunities clause.[28] That clause had also been emphasized in the opinions of the earlier dissenters supporting total incorporation, especially Justice Field's dissent in *O'Neil v. Vermont*.[29]

The privileges and immunities clause clearly does offer a more satisfactory textual basis for total incorporation than the due process clause.[30] Analyzing the language without regard to its historical usage, the phrase "privileges or immunities of citizens of the United States" can readily be construed to include the constitutional guarantees provided United States citizens as protection against the national government. As Justice Black noted, "[W]hat more precious 'privilege' of American citizenship could there be than the privilege to claim the protection of our great Bill of Rights?"[31] The fourteenth amendment was designed to provide the citizen with protection against state action; a prohibition against state abridgment of the "privileges or immunities of citizens of the United States" would be an "eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States."[32] Reliance on the privileges and immunities clause presents its own difficulties, however. If the privileges and immunities clause was intended to make the Bill of Rights applicable to the states, a clause prohibiting a state from depriving any person of life, liberty, or property without due process of law would seem extraneous. The fifth amendment already provides such protection, and if the privileges and immunities clause includes all of the Bill of Rights guarantees, it encompasses a due process guarantee as well as the other guarantees in the first eight amendments.

Perhaps the best response to the contention that total incorporation renders the due process clause superfluous lies in the different classes of persons pro-

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28. Duncan v. Louisiana, 391 U.S. 145, 165-66 (1968) (Black, J., concurring). While emphasizing the language of the privileges and immunities clause in particular, Justice Black persisted in relying on the "Fourteenth Amendment, *as a whole*." *Id.* at 166 n.1 (emphasis in original).

29. 144 U.S. at 337 (Field, J., dissenting); *see infra* text accompanying note 83 (quoting from Justice Field's dissent in *O'Neil*). Justice Bradley's dissent in the *Slaughter-House Cases* also had relied on the privileges and immunities clause. 83 U.S. at 112 (Bradley, J., dissenting); *see supra* note 20 (discussing Justice Bradley's dissent in the *Slaughter-House Cases*). Justice Harlan's position was less clear. His dissent in *O'Neil* may have relied upon the due process clause as well as upon the privileges and immunities clause. *See* 144 U.S. at 370. Furthermore, his dissent in *Hurtado* relied on due process, although it is debatable whether that opinion advanced a total incorporation position. 110 U.S. at 538 (Harlan, J., dissenting); *see infra* note 188 (discussing Justice Harlan's *Hurtado* dissent); *see also* Morrison, *supra* note 21, at 146 (same).

30. Professor Tribe, however, suggests that total incorporation could have emerged either "as an elaboration of the privileges and immunities of national citizenship" or as "a translation of fourteenth amendment 'liberty' into the freedoms secured by the Bill of Rights, with the understanding that depriving someone of such liberty 'without due process of law' means doing so 'where the federal government could not.'" L. TRIBE, AMERICAN CONSTITUTIONAL LAW 567 (1978) (footnote omitted) (citing Black, *Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 34 (1970)).

31. Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, J., concurring).

32. *Id.*

tected by the privileges and immunities and due process clauses.[33] In particular, the former clause refers to the protection of citizens, while the latter refers to "any person," which includes aliens as well as citizens.[34] This response, however, raises the problem of why the framers of the fourteenth amendment would have desired to grant such privileges as jury trial and grand jury indictment only to citizens when, with respect to the federal government, the Bill of Rights made them available to all persons.[35]

Supporters of total incorporation suggest that any deficiencies in the textual support for their position are more than offset by a historical record that clearly shows the framers' intent to make the Bill of Rights applicable to the states. They interpret that record as showing that the congressional supporters

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33. One way in which the clauses differ is in their treatment of corporations. Corporations fall outside the protection of the privileges and immunities clause, Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907), but within the reference to "persons" protected by the due process and equal protection clauses, Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949); Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886).

34. Professor Ely has argued that the privileges and immunities clause need not be interpreted as protecting only citizens:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" *could* mean that only citizens are protected in their privileges or immunities, but it surely doesn't have to. It could just as easily mean there is a set of entitlements, "the privileges and immunities of citizens of the United States," which states are not to deny to anyone. In other words, the reference to citizens may define the class of rights rather than limit the class of beneficiaries. Since everyone seems to agree that such a construction would better reflect what we know of the purpose, and since it is one the language will bear comfortably, it is hard to imagine why it shouldn't be followed.

J. ELY, DEMOCRACY AND DISTRUST 25 (1980) (footnotes omitted) (emphasis in original). Professor Ely starts from the premise that there was "no conscious intention to limit the protection of the clause to citizens." *Id.* The amendment's supporters, however, distinguished between the protection of citizens through the privileges and immunities clause and the protection of all persons, including aliens, through the due process and equal protection clauses. *See* R. BERGER, *supra* note 18, at 217-20; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1865-66) (statement of Sen. Howard). Professor Yarborough suggests that Justice Black may have shared Professor Ely's view, at least in part:

> A reading of the debates on the fourteenth amendment's adoption reveals that its sponsors included within the [privileges and immunities] clause's meaning certain rights (e.g., those of the Bill of Rights) which historically had applied to all persons, as well as other rights applicable to citizens alone. Justice Black apparently recognized and accepted this anomaly. He agreed, for example, that the safeguards of the Bill of Rights extended, via the fourteenth amendment, to all persons in state cases. However, in conference discussion of *Edwards v. California* [*see infra* note 41], he indicated that the right of interstate travel was a fourteenth amendment privilege of national citizenship which extended its protection only to citizens, not aliens.

Yarborough, *Justice Black, The Fourteenth Amendment and Incorporation*, 30 U. MIAMI L. REV. 231, 270 (1976). Professor Mendelson views Justice Black's opinion in *Adamson* as a result-oriented attempt to "homogenize" the two clauses. Mendelson, *supra* note 22, at 715. He argues that Justice Black "borrow[ed] the privileges and immunities language as a reference to the Bill of Rights from one [clause] and the word 'persons' to get the desired coverage from another" and thereby "create[d] a new constitutional provision." *Id.*

35. *See* Fairman, *Does the Fourth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 59 (1949). Professor Fairman notes that "[a]s a matter of formal analysis then [accepting arguendo total incorporation], one might attribute to the [Joint House and Senate] Committee a design to give the citizen the protection of the entire Bill of Rights, and then consciously duplicating in part, to extend to aliens, or to corporations, or to both, a particular one of the several guarantees of Amendments I to VIII. Such a view would, however, be quite unrealistic." *Id. See also* Bridges v. California, 314 U.S. 252, 280-81 (1941) (Frankfurter, J., dissenting) (arguing that freedom of speech must be "absorbed" by the due process clause rather than by the privileges and immunities clause in order to protect both aliens and corporations).

of the fourteenth amendment were dissatisfied with state protection of individual liberties and intended through that amendment "to nationalize civil liberties in the United States."[36] In an appendix to his dissenting opinion in *Adamson*,[37] Justice Black set forth various statements made during the congressional debate on the amendment that support this view of the amendment's purpose.[38] Relying especially on the statements of Representative Bingham, a key draftsman of section one, and of Senator Howard, who presented the amendment before the Senate,[39] Justice Black concluded that "with full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that decision had announced."[40] According to Justice Black, the supporters sought to accomplish this end primarily through the privileges and immunities clause, which would encompass the Bill of Rights guarantees as well as other fundamental rights.[41]

Critics of this historical analysis argue that it gives far too much weight to

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36. E. CORWIN, LIBERTY AGAINST GOVERNMENT 118 (1948).

37. 332 U.S. at 92-123 (Black, J., dissenting).

38. *Id.* Other reviews of the historical record favorable to total incorporation include H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limits on State Authority*, 22 U. CHI. L. REV. 1 (1954); Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980); Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237 (1982).

39. 332 U.S. at 99-123. Although Justice Black relied primarily on the statements of Bingham and Howard, he also cited a statement by Representative Stevens, comments by congressional critics of the proposed amendment, the general concerns reflected in the Report of the Joint Committee on Reconstruction, and newspaper articles of the time (as canvassed in H. FLACK, *supra* note 38, at 140-46). *See also* Yarborough, *supra* note 34, at 249-50 (concluding that Justice Black's most significant evidence for total incorporation was Bingham and Howard's statements in congressional debates).

40. 332 U.S. at 72.

41. *Id.* at 74-75. Although it is unclear exactly how far Justice Black would have carried the privileges and immunities clause under his interpretation of the fourteenth amendment, he clearly would not have limited it to the Bill of Rights guarantees. *See* Edwards v. California, 314 U.S. 160, 177-81 (1941) (Douglas, J., with Black, J., concurring) (recognizing that interstate travel is protected by the privileges and immunities clause). His later opinions suggest that, apart from the Bill of Rights guarantees, he would have included only rights relating directly to the *Slaughter-House* view of privileges and immunities—that is, rights that owe their existence to the federal government, federal constitution, or federal laws. *See infra* text accompanying note 69 (discussing *Slaughter-House*). Senator Howard and Representative Bingham, on the other hand, apparently took a much broader view of the clause's function apart from its incorporation of the Bill of Rights. Senator Howard, in the very same speech in which he suggested total incorporation, stated that the privileges and immunities clause would encompass the fundamental rights noted in Justice Bushrod Washington's opinion in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230). *See infra* note 53 (quoting from Justice Washington's opinion).

Based in large part on his opposition to the concept of substantive due process, Justice Black took a very narrow view of due process. *See* H. BLACK, A CONSTITUTIONAL FAITH 23-42 (1968); Haigh, *Defining Due Process: The Case of Mr. Justice Black*, 17 S.D.L. REV. 1, 37 (1972) (Justice Black defined due process as the law of the land, that is, the Constitution and valid statutes as judicially construed); *see also infra* note 163 and accompanying text. To accept the privileges and immunities clause as encompassing *Corfield* would have been to accept the same type of fundamental fairness or "natural law" view of constitutional rights that Justice Black so firmly opposed in his interpretation of the due process clause. *See* Landynski, *supra* note 22, at 37 (suggesting that Justice Black sought to limit the fourteenth amendment privileges and immunities to rights relating to national citizenship, although characterizing this position as not supported by any historical materials); J. ELY, *supra* note 34, at 28 (taking a similar position).

Certainly, none of the earlier supporters of total incorporation would have subscribed to Black's limited view of fourteenth amendment privileges and immunities. *See* Landynski, *supra* note 22, at 37-38 (discussing views of Bradley, Field, the first Harlan, and Swayne); *see also infra* note 118 and accompanying text (discussing views of other *Adamson* dissenters).

the statements of only two members of Congress.[42] The critics note that there is "little evidence that anyone else, either in Congress or among those who ratified in the states, shared . . . [Bingham and Howard's] view."[43] The critics stress that section one of the amendment was presented to the Congress and the ratifying states as designed basically to provide a constitutional foundation for the Civil Rights Act of 1866.[44] That Act declared all persons born in the United States to be citizens and provided that such citizens, without regard to race, would have the "same right in every State" to contract, sue, and hold and inherit property, and to enjoy the "full and equal benefits of all laws and proceedings for the security of person and property" as were "enjoyed by white citizens."[45] In seeking to constitutionalize this prohibition against discrimination, the framers might well have relied entirely on the equal protection and due process clauses.[46] In that case, the privileges and immunities clause would be construed as merely reinforcing the grant of national citizenship in the amendment's first sentence by prohibiting state interference with such rights of national citizenship as already existed, rather than as adding to those rights.[47] This construction logically precludes also reading the clause as extending the Bill of Rights to state proceedings.

Critics of the total incorporation theory acknowledge, however, another possibility that comes closer to Justice Black's position. The framers of the fourteenth amendment may have sought to strengthen the Civil Rights Act by

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42. Fairman, *supra* note 35, is undoubtedly the leading critical analysis of Justice Black's review of the historical record. Later works building on that article include Fairman, *The Supreme Court and the Constitutional Limitations on State Governmental Authority*, 21 U. CHI. L. REV. 40 (1953), and Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954); R. BERGER, *supra* note 18, at 134-56, and Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981); and Mykketvedt, *Justice Black and the Intentions of the Framers of the Fourteenth Amendment: The Bill of Rights and the States*, 20 MERCER L. REV. 432 (1969). Professor Fairman also has argued that Representative Bingham "did not understand *Barron v. Baltimore* and therefore did not understand the question of incorporation." Fairman, *supra* note 35, at 34-35; *see also* Duncan v. Louisiana, 391 U.S. 145, 175 n.9 (1978) (Harlan, J., dissenting) (citing Fairman).

43. Landynski, *supra* note 22, at 37. Others have seen the historical record as considerably more ambiguous than suggested by Justice Black and his supporters, or by Professor Fairman, *supra* note 42, and his supporters. *See* Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U.L.Q. 405, 407:

> The legislative history of this provision of the amendment, in Congress, is otherwise about as revealing as the legislative history of the equal protection clause. By that I mean that it affords a license to take anything from it that the interpreter wishes to put in it. If recent scholarship on the fourteenth amendment has revealed anything, it has revealed that in this area truth, like beauty, lies in the eyes of the beholder. The primary rules of construction are two: (1) The language does not mean what it says. (2) The language does not say what it means. With these tools at hand, the conclusion is readily reached that any clause was intended to have the broadest effect or that it was intended to have no effect at all.

44. Berger, *supra* note 42, at 440-41; Mykketvedt, *supra* note 42, at 438. *See generally* Jones v. Mayer, 392 U.S. 409, 436 (1968) (some members of Congress supported the fourteenth amendment in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the states).

45. Act of April 19, 1866, ch. 31, § 1, 14 Stat. 27, 27.

46. While equal protection obviously is aimed at discrimination, the due process clause also can be viewed, in its historical context, as directed primarily at discrimination. *See infra* text accompanying notes 162-63 (discussing Justice Black's reading of the due process clause as basically requiring only a consistent and fair application of pre-existing law).

47. This basically was the view of the amendment later taken in the *Slaughter-House Cases*. *See infra* text accompanying notes 59-70 (discussing apparent rejection of total incorporation theory by Court in *Slaughter-House Cases*).

extending its protection beyond the prohibition of discrimination to provide the newly freed citizens not just with pre-existing rights of national citizenship, but also with those basic rights noted in the Civil Rights Act, and perhaps others as well, as they traditionally had been enjoyed by white men.[48] To do this, the framers quite naturally would have turned to the language found in article IV of the Constitution, which provides that citizens of each state "shall be entitled to all privileges and immunities" of the citizens in the several states.[49] In the leading interpretation of the privileges and immunities clause of article IV, Justice Bushrod Washington, sitting on circuit in *Corfield v. Coryell*,[50] noted that the privileges and immunities language encompassed those rights that were "fundamental . . . to citizens of all free governments."[51] Justice Washington's list of fundamental rights included each of the rights noted in the Civil Rights Act.[52] Admittedly, Justice Washington's list of rights was not exhaustive, and his analysis might readily be extended to include some of the guarantees in the Bill of Rights, although none were mentioned in his *Corfield* opinion.[53] But the critics argue that the inclusion of all the Bill of Rights in the list of fundamental rights was beyond the understanding of the time.[54] Evidence that not all of the guarantees of the Bill of Rights were viewed as essential to the "security of person or property"[55] is found in the fact

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48. Although this view is contrary to the *Slaughter-House* view of the amendment, it finds considerable support in the congressional debates. Fairman, *supra* note 35, at 9-12, 24-68, 138-39; R. BERGER, *supra* note 18, at 29-51.

49. U.S. CONST. art. IV, § 2, cl. 1.

50. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

51. *Id.* at 551.

52. *Id.* at 551-52.

53. *Id.* Justice Washington noted:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature fundamental: which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."

Id. The *Corfield* opinion was well known and was frequently cited during the congressional debates on both the fourteenth amendment and the Civil Rights Act. *See* R. BERGER, *supra* note 18, at 41-44; Fairman, *supra* note 35, at 9-12.

54. R. BERGER, *supra* note 18, at 35-36; Fairman, *supra* note 35, at 137-39.

55. *See supra* text accompanying note 45 (quoting from § 1 of Civil Rights Act of 1866).

that several were not provided to any citizen—white or black—under the laws of various states. In particular, a substantial number of states did not provide citizens with either the fifth amendment right to prosecution by grand jury indictment or the full scope of the seventh amendment right to jury trials in civil cases.[56] Indeed, several of those states ratified the amendment without any indication that they believed that their state law would have to be changed.[57] In sum, the critics of Justice Black's analysis contend that, even assuming that the privileges and immunities clause was designed to expand the privileges of national citizenship, it was not intended to go beyond the standard announced in *Corfield*, which certainly did not incorporate all of the Bill of Rights.

2. Rejection by the Court

Although the total incorporation doctrine was not squarely presented to the Supreme Court until 1887,[58] the doctrine already had been foredoomed by the earlier ruling in the *Slaughter-House Cases*,[59] the Court's first decision interpreting the fourteenth amendment. *Slaughter-House* involved a challenge by a group of butchers to a Louisiana statute that granted one corporation the exclusive right to operate a slaughterhouse within the city of New Orleans.[60] The butchers argued that this grant of a monopoly violated their right to carry on a trade, recognized in *Corfield* as a privilege and immunity of citizenship, and therefore was contrary to the recently enacted fourteenth amendment.[61] The Court rejected that claim in a 5-4 decision.[62] The majority relied substantially on the phrasing of the fourteenth amendment's two references to citizenship. The first sentence of the amendment refers to both national and state citizenship. The second sentence, on the other hand, refers only to abridgment of the privileges and immunities of United States citizenship. The Court concluded that the privileges and immunities of state citizenship, recognized in *Corfield*, obviously were intended to remain within the protection of article IV and of the states themselves.[63] The fourteenth amendment sought to protect only the privileges and immunities of national citizenship.[64] The Court noted that this interpretation was consistent with "the whole theory of the relations of the state and federal governments to each other."[65] On the other hand, adoption of the plaintiffs' position would make the Court "a perpetual censor upon all leg-

56. *See* Adamson v. California, 332 U.S. 46, 64 (Frankfurter, J., concurring) (stating that at time of ratification nearly half of ratifying states did not have requirements as rigorous as fifth amendment for instituting criminal proceedings through grand jury); Fairman, *supra* note 35, at 84-134 (describing rights that states provided citizens at time of ratification of fourteenth amendment).

57. Examining the available records of the legislatures that ratified or rejected the amendment, Professor Fairman found only one item—a rejected state legislative report—that evidenced a view that the amendment might incorporate the Bill of Rights. *See* Fairman, *supra* note 35, at 84-134.

58. Morrison, *supra* note 21, at 147.

59. 83 U.S. (16 Wall.) 36 (1873).

60. *Id.* at 57.

61. *Id.* at 51-55.

62. *Id.* at 83, 111. The butchers also argued unsuccessfully that the monopoly violated the thirteenth amendment and the due process and equal protection clauses of the fourteenth amendment. *Id.* at 49-57.

63. *Id.* at 78-79.

64. *Id.* at 75-78.

65. *Id.* at 78.

islation of the States."[66] Consistent with its position in *Barron*, the Court refused to accept an argument that sought dramatically to alter federal-state relations without the support of language "which expresses such a purpose too clearly to admit of doubt."[67]

Because the *Slaughter-House* majority limited the protected privileges to those of national citizenship, it was unlikely that the fourteenth amendment would be construed as requiring the states to recognize the guarantees found in the Bill of Rights. The *Slaughter-House* opinion cited as examples of privileges of national citizenship the right to travel from state to state, the claim of protection on the high seas, and the "privilege of the writ of habeas corpus."[68] The Court noted that the privileges and immunities of national citizenship were confined to that class of rights that "owe their existence to the Federal government, its National character, its Constitution, or its laws."[69] Although the rights created by the Constitution were included, those rights, under *Barron*, applied only to the citizen's dealings with the federal government. Thus, when the Court cited the "right to peaceably assemble and petition for redress" as a privilege of national citizenship, it did not suggest thereby that the fourteenth amendment now required a state to recognize a general right of assembly and petition similar to that found in the first amendment. Rather, consistent with the theory of *Slaughter-House*, peaceably assembling or petitioning would be protected from state interference only insofar as those activities were aimed at the federal government.[70] The *Slaughter-House* majority thus appeared to reject total incorporation, because a state's refusal to recognize a Bill of Rights guarantee would have no bearing upon national citizenship unless it interfered with the citizen's exercise of rights relating to the federal government.

The dissents in *Slaughter-House* are sometimes viewed as more hospitable than the majority opinion to total incorporation.[71] That view, however, is applicable principally to Justice Bradley's dissent, which was not joined by the other dissenters. Justice Bradley's opinion certainly suggests that he might have included within the privileges and immunities clause all of the guarantees of the Bill of Rights.[72] Justice Field's dissent, which was joined by the other dissenters, did not go beyond the position that the fourteenth amendment now protected those "fundamental" privileges and immunities of citizenship recog-

66. *Id.*
67. *Id.*
68. *Id.* at 79.
69. *Id.*
70. *See* Hague v. C.I.O., 307 U.S. 496, 512-13 (1939) (freedom to assemble peaceably to discuss federal labor enactments is a privilege or immunity of a United States citizen secured against state abridgment by § 1 of the fourteenth amendment). But cf. J. ELY, *supra* note 34, at 196, suggesting that the *Slaughter-House* majority's reference to the constitutional rights of citizens could have led to adoption of the total incorporation position. Professor Ely's suggestion seems to ignore the *Slaughter-House* majority's assumption that the fourteenth amendment created no new privileges and immunities, but only prohibited state interference with those that already existed. The privileges that already existed under the Bill of Rights did not give citizens absolute rights to free speech, jury trial, and so forth, but simply gave them a right to have the federal government act (or refrain from acting) in a certain way with respect to those interests.
71. *See* J. ELY, *supra* note 34, at 196-97 (suggesting that dissenting Justices clearly accepted the total incorporation position).
72. *See supra* note 20 (discussing Justice Bradley's dissent).

nized in *Corfield*.[73] This position arguably would not include several of the Bill of Rights guarantees.[74] In any event, while the attempts of Justices Bradley and Field to give fourteenth amendment protection to economic rights shortly thereafter bore fruit in due process decisions,[75] the *Slaughter-House* majority's view of the privileges and immunities clause remained the accepted standard for that provision.

The first case after *Slaughter-House* in which the Court directly addressed the total incorporation issue was *In re Kemmler*,[76] decided in 1890.[77] A unanimous Court, relying on *Slaughter-House*, reasoned that the privileges and immunities of national citizenship arose out of "the nature and essential character of the national government" and therefore did not encompass immunity from state imposition of a punishment alleged to be cruel and unusual.[78] A year later, *McElvaine v. Brush*,[79] another case involving an alleged violation of the eighth amendment, was decided on the same grounds.[80] Four months later, in *O'Neil v. Vermont*,[81] a division appeared within the Court. The *O'Neil* majority refused to consider defendant's cruel and unusual punishment claim because it had not been assigned as error.[82] Justice Field, a dissenter in *Slaughter-House*, treated the claim on its merits and concluded that the privileges and immunities clause was applicable:

> While, therefore, the ten Amendments, as limitations on power . . . are applicable only to the Federal government and not to the States, yet, as far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon state power by ordaining that no State shall make or enforce any law which shall abridge them.[83]

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73. *See* 83 U.S. (16 Wall.) at 96-98 (Field, J., dissenting).

74. *See supra* text accompanying notes 49-57 (*Corfield* standard did not encompass all of Bill of Rights). Justice Field did, however, specifically adopt a selective incorporation position in later opinions. *See infra* text accompanying note 83 (quoting from Justice Field's opinion in *O'Neil v. Vermont*).

75. *See* L. TRIBE, *supra* note 30, at 429-34 (tracing Supreme Court's adoption of Justice Field's and Justice Bradley's view that fourteenth amendment protects economic rights); J. NOWAK, R. ROTUNDA & T. YOUNG, CONSTITUTIONAL LAW 392-97 (1978) (same).

76. 136 U.S. 436 (1890).

77. Three earlier cases had held that particular Bill of Rights guarantees applied only to the federal government and that the rights recognized therein were not privileges and immunities of national citizenship. *See* Walker v. Sauvinet, 92 U.S. 90 (1875) (seventh amendment right to trial by jury); United States v. Cruikshank, 92 U.S. 542 (1875) (first amendment rights to assemble and petition and second amendment right to bear arms); Presser v. Illinois, 116 U.S. 252 (1886) (second amendment right to bear arms). As Professor Morrison notes, however, the "broad proposition that the Fourteenth Amendment incorporates the Bill of Rights as such" was not presented in any of those cases. Morrison, *supra* note 21, at 145-47. Similarly, Hurtado v. California, 110 U.S. 516 (1884), held that due process did not require a grand jury indictment, but the Court did not consider a total incorporation contention based on the privileges and immunities clause. Justice Harlan's *Hurtado* dissent might be read as advocating total incorporation, but it used a due process analysis and did not state precisely what rights would be included under that analysis. *See infra* note 188 (discussing Justice Harlan's *Hurtado* dissent).

78. 136 U.S. 436, 448 (1890).

79. 142 U.S. 155 (1891).

80. *Id.* at 159.

81. 144 U.S. 323 (1892).

82. *Id.* at 331.

83. *Id.* at 363.

Although he cited *Slaughter-House*,[84] Justice Field did not explain how his position could be reconciled with the narrow view of the privileges and immunities clause taken by the majority in that case. The first Justice Harlan, in a separate dissent with which Justice Brewer concurred "in the main,"[85] expressed his agreement with Justice Field's conclusion that the fourteenth amendment encompassed those rights "enumerated in the earlier Amendments."[86]

Although the cruel and unusual punishment cases appeared to have settled the issue, total incorporation was debated again in *Maxwell v. Dow*[87] and *Twining v. New Jersey*,[88] decided respectively in 1900 and in 1908. The majority opinion in *Maxwell* considered defendant's incorporation contention at length, perhaps because a counsel for the first time had cited one of the speeches in the congressional debate that had advanced the incorporation concept.[89] The majority noted that the cited speech was not sufficient to support defendant's position.[90] Because a proposed constitutional amendment must be ratified by state legislators who would be unaware of the congressional debate, the "safe way is to read [the amendment's] language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted."[91] An extensive review of past decisions,[92] including five pages devoted to *Slaughter-House* alone,[93] convinced the majority that the fourteenth amendment had been properly construed as not including the various Bill of Rights guarantees among the privileges and immunities of national citizenship.[94] Justice Harlan dissented,[95] although he apparently recognized the weight of the precedents, as he made no effort to distinguish *Slaughter-House* or the other cases cited by the majority.

In *Twining* the majority again relied upon its prior decisions,[96] and Justice Harlan again dissented.[97] The majority recognized, however, that the total incorporation position had some merit. "This view," it noted, "has been, at different times, expressed by justices of this court . . . and was undoubtedly that entertained by some of those who framed the Amendment. It is, however, not profitable to examine the weighty arguments in its favor, for the question is no

84. *Id.* at 361.
85. *Id.* at 371.
86. *Id.* at 370.
87. 176 U.S. 581 (1900). Defendant claimed that the fourteenth amendment had been violated both by his prosecution without grand jury indictment (a violation of the fifth amendment guarantee) and by his trial before a jury of eight persons (an alleged violation of the sixth amendment, which was said to require a jury of twelve). *Id.* at 582.
88. 211 U.S. 78 (1908). Defendant claimed that the fifth amendment privilege against self-incrimination was protected by the fourteenth amendment and that the privilege had been violated by an instruction to the jurors that they might draw an unfavorable inference from defendant's failure to testify. *Id.* at 83.
89. Morrison, *supra* note 21, at 154-55.
90. 176 U.S. at 601.
91. *Id.* at 602.
92. *Id.* at 584-600.
93. *Id.* at 587-91.
94. *Id.* at 597-98.
95. *Id.* at 605-17 (Harlan, J., dissenting).
96. 211 U.S. at 90-114.
97. *Id.* at 114-27 (Harlan, J., dissenting).

longer open in this Court."[98]

No Supreme Court opinion gave the total incorporation theory serious attention for almost forty years following *Twining*.[99] Then, in 1947, the dissenting opinions in *Adamson v. California*[100] suddenly resurrected the theory. *Adamson* involved a challenge to a California statute that permitted a defendant's failure to testify to be commented upon by the trial court and prosecutor, and to be considered by the jury.[101] The Court assumed arguendo that, had this been a federal case, application of the statute would have violated the defendant's fifth amendment privilege against self-incrimination.[102] Previous cases had held that the due process guarantee of "fundamental fairness" might bar certain practices that would also be contrary to a particular Bill of Rights guarantee,[103] and defendant argued that those cases should be extended to his case.[104] He also argued, in the alternative, that the fifth amendment privilege was applicable to state proceedings under the privileges and immunities clause of the fourteenth amendment.[105] Although one might have thought at the time that only defendant's first argument had any chance of success, it was defendant's total incorporation contention that almost won the day. Justice Black, in a lengthy dissent joined by Justice Douglas, argued that the earlier decisions should be overruled and the fourteenth amendment held to completely incorporate the Bill of Rights guarantees.[106] Justice Murphy, in a much shorter dissent joined by Justice Rutledge, noted that he agreed with Justice Black that "the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment."[107] Thus, almost eighty years after the adoption of the fourteenth amendment, the Court came within one vote of dramatically reshaping the amendment's scope.

Justice Black justified overturning many years of precedent on essentially two grounds. First, he argued that the past decisions had simply misconstrued the purpose of the fourteenth amendment. The Court had failed to recognize that "one of the chief objects . . . [of] the provisions of the Amendment's first section, separately, and, as a whole, . . . was to make the Bill of Rights, applicable to the states."[108] Justice Black attributed this failure to the Court's lack of consideration in previous cases of the full historical record.[109] Citing the

98. *Id.* at 98.

99. In Palko v. Connecticut, 302 U.S. 319 (1937), the total incorporation argument was advanced by defense counsel, but rejected by the Court in a single sentence. *Id.* at 323 ("[t]here is no such general rule"). Justice Black was a member of the Court at the time, but apparently had "not completely developed his views regarding the fourteenth amendment." Yarborough, *supra* note 34, at 237. Between *Palko* and *Adamson*, there were several cases in which Justice Black readily could have advanced the total incorporation position, but he offered no more than a hint of his acceptance of that viewpoint. *See id.* at 238-44.

100. 332 U.S. 46 (1947).

101. *Id.* at 48-49.

102. *Id.* at 50.

103. *See infra* text accompanying notes 217-26 (discussing *Powell v. Alabama*).

104. 332 U.S. at 50.

105. *Id.* at 49-50.

106. *Id.* at 74-75.

107. *Id.* at 124 (Murphy, J., dissenting).

108. *Id.* at 71-72 (Black, J., dissenting).

109. *Id.* at 72. Justice Black noted that "[n]either the briefs nor opinions in any of . . . [the prior] cases, except *Maxwell v. Dow* . . . [made] reference to the legislative and contemporary history," and *Maxwell* had considered only a single congressional speech. *Id.* at 73.

congressional debates and other materials described earlier in this article,[110] Justice Black maintained that the historical record "conclusively demonstrate[d] that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights."[111]

Although relying primarily on the historical record, Justice Black also stressed that adoption of the total incorporation position would remove the Court from the pitfalls of the fundamental fairness approach that past cases had used in applying the fourteenth amendment's due process clause.[112] Justice Black's criticism of this approach to due process adjudication will be considered at length later in this article.[113] It is sufficient to note here that he viewed that approach as unacceptably vague and open-ended, and as inviting decisions based on the subjective, idiosyncratic views of individual Justices. Total incorporation, he argued, would lead the Court back to the "clearly marked constitutional boundaries . . . of policies written into the Constitution."[114]

Justice Black's assumption that total incorporation would foreclose continued reliance on a "fundamental fairness" standard of due process obviously rested on more than a mere incorporation of the Bill of Rights into the fourteenth amendment. The Bill of Rights, after all, included a due process clause and that clause was repeated in the fourteenth amendment itself. Although total incorporation would permit reliance upon the various other Bill of Rights provisions, it would still leave open the use of the due process clause for those cases that did not fit within those provisions, and it would not, in itself, bar continued application of a "fundamental fairness" concept of due process in such cases. To completely foreclose reliance upon this concept, a new definition of due process also was needed. In a previous opinion, not cited in his *Adamson* dissent, Justice Black had offered such a standard, viewing due process as requiring little more than an even-handed application of pre-existing law.[115] Justice Black obviously believed that, with total incorporation making the other provisions of the Bill of Rights available in state cases, the Court would no longer find a need for a fundamental fairness view of due process and would turn to his more narrow standard of due process.[116] It was this

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110. *See supra* text accompanying notes 37-41, and *supra* note 39.

111. 322 U.S. at 74-75. Presumably Justice Black also considered the language sufficiently explicit to be similarly understood by the state legislatures that ratified the amendment.

112. *Id.* at 90.

113. *See infra* notes 265-301 and accompanying text.

114. 322 U.S. at 92.

115. United Gas Pub. Serv. Co. v. Texas, 303 U.S. 123, 153 (1938) (Black, J., concurring) (due process satisfied when defendant has by laws of state received a fair trial according to procedures applicable to case). Justice Black's narrow interpretation of the procedural requirements of due process was not set forth as clearly in *United Gas* as in later cases, *see infra* text accompanying note 163, but his position was well known to other members of the *Adamson* Court. *See* Yarborough, *supra* note 34, at 244-54 (discussing Justice Black's writing of his *Adamson* dissent and the response to it by the other Justices).

116. Some commentators have viewed Justice Black's narrow view of due process as being part of the total incorporation position, but there is nothing in the historical support for total incorporation that ties it to such a limited view of due process. *See* Note, *The Adamson Case: A Study in Constitutional Technique*, 58 YALE L.J. 268, 271 (1949).

assumption that led Justice Murphy to write a separate dissent in which he expressed agreement with total incorporation, but noted that he was "not prepared to say" that the fourteenth amendment was "entirely and necessarily limited by the Bill of Rights."[117] "Occasions may arise," he noted, "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."[118]

The majority opinion in *Adamson*, authored by Justice Reed, gave only brief attention to the total incorporation position. Considering first the privileges and immunities clause, Justice Reed noted that total incorporation was inconsistent with the interpretation of that clause that had prevailed since *Slaughter-House*.[119] That interpretation had been adopted by "justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment."[120] Moreover, it reflected a viewpoint that had become "embedded in our federal system as a functioning element in preserving the balance between national and state power."[121] The conclusion of the prior cases simply would not be disturbed.

Turning to the possibility of incorporating the Bill of Rights under the due process clause, Justice Reed noted that past decisions also foreclosed that alternative. The long line of cases applying the "fundamental fairness" standard clearly was inconsistent with the view that the due process clause incorporated the Bill of Rights.[122] Although the majority did not refer specifically to Justice Black's historical analysis, it obviously found that analysis unconvincing in supporting total incorporation through the due process clause. "[N]othing has been called to our attention," the majority noted, "that [suggests] either the framers of the Fourteenth Amendment or the states that adopted [it] intended its due process clause to draw within its scope the earlier amendments to the Constitution."[123]

Justice Frankfurter, in a separate concurring opinion, offered a more extensive response to Justice Black. Justice Frankfurter suggested, in a single sentence, that the privileges and immunities clause was not at issue.[124] He apparently believed that a departure from the *Slaughter-House* view of that

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117. 332 U.S. at 124.

118. *Id. See* Yarborough, *supra* note 34, at 252-54 (discussing background of Justice Murphy's dissent). Although Justice Douglas joined Justice Black's dissent in *Adamson*, his subsequent opinions indicate that his views were much closer to those expressed in Justice Murphy's dissent. *See* Poe v. Ullman, 367 U.S. 497, 516 (1961) (Douglas, J., dissenting) (due process includes first eight amendments but is not confined to them). *Compare In re* Winship, 397 U.S. 358, 364 (1970) (opinion of Court joined by Douglas, J.) (due process requires proof beyond reasonable doubt in criminal trials) *with id.* at 377 (Black, J., dissenting) (due process does not require proof beyond reasonable doubt because not mentioned in Bill of Rights). *Compare also* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (opinion of Court by Douglas, J.) (fundamental constitutional guarantees create zones of privacy not specifically mentioned in Bill of Rights) *with id.* at 521 (Black, J., dissenting) (no constitutional right of privacy). *See generally* Karst, *Individual Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula"*, 16 U.C.L.A. L. REV. 716 (1969) (discussing Douglas' views of incorporation from *Adamson* to *Griswold*).

119. 332 U.S. at 51-53.

120. *Id.* at 53.

121. *Id.*

122. *Id.*

123. *Id.* at 54.

124. *Id.* at 61 ("I put to one side the Privileges or Immunities Clause of [the Fourteenth] Amendment").

clause would necessarily carry with it the protection of far more than the Bill of Rights, as suggested by the *Slaughter-House* dissenters,[125] and would thus open the door to "mischievous uses" that would be disowned by every member of the Court.[126] Accordingly, his opinion was "concerned solely with a discussion of the Due Process Clause of the Fourteenth Amendment."[127]

Although much of Justice Frankfurter's opinion focused on the language of the due process clause and the concept of "fundamental fairness" that it embodied,[128] other portions of his opinion challenged the total incorporation theory without regard to the clause of the amendment upon which it was based. Like the majority, Justice Frankfurter stressed that total incorporation had been rejected by "judges who were themselves witnesses of the process by which the Fourteenth Amendment became part of the Constitution."[129] Arguments that the first eight amendments "were concealed within the historical phrasing of the Fourteenth Amendment were not unknown at the time of its adoption," and a "surer estimate of their bearing was possible for judges at the time than distorting distance . . . [was] likely to vouchsafe."[130] Those Justices were well aware that what was submitted to the states for ratification was the proposed amendment itself, not the "[r]emarks of a particular proponent of the Amendment, no matter how influential."[131] Ratification of the amendment by states whose own methods of prosecution were inconsistent with the fifth amendment requirement of prosecution by grand jury indictment indicated that the states did not view the amendment as incorporating the Bill of Rights.[132]

Justice Frankfurter also stressed the practical consequences of total incorporation. Those "sensitive to the relations of the states to the central government as well as the relation of some of the provisions of the Bill of Rights to the process of justice"[133] could hardly insist upon state compliance with every procedural requirement constitutionally imposed upon the federal government. Some of the Bill of Rights requirements "are enduring reflections of experience with human nature," but others merely "express the restricted views of Eighteenth-Century England regarding the best methods for ascertainment of facts."[134] Surely, he argued, "[to] suggest that it is inconsistent with a truly free

125. *See supra* notes 71-74 and accompanying text.

126. 332 U.S. at 61-62. *See supra* note 41 (discussing whether historical materials cited by Justice Black would require that privileges and immunities clause be viewed as protecting "natural law" rights noted by Justice Washington in *Corfield* as well as guarantees in Bill of Rights). Justice Frankfurter cited Colgate v. Harvey, 296 U.S. 404 (1935), as such a "mischievous use." 332 U.S. at 61-62. *Colgate* held unconstitutional a state law that imposed different tax burdens on income earned from loans made within and without the state. Five years after it was decided, *Colgate* was overruled by Madden v. Kentucky, 309 U.S. 78 (1940), in an opinion joined by all of the *Adamson* dissenters, including Justice Black.

127. 332 U.S. at 61 (Frankfurter, J., concurring). Thus, as noted in Landynski, *supra* note 22, at 30: "[T]o some extent Black and Frankfurter were talking at cross-purposes [in *Adamson*]: Frankfurter attributed to Black an interpretation of due process, which Black had in large measure assigned to privileges and immunities."

128. For a discussion of the arguments relating to the language of the clause, see *supra* text accompanying notes 27-28. For a discussion of the development of the fundamental fairness concept, see *infra* notes 143-301 and accompanying text.

129. 332 U.S. at 64 (Frankfurter, J., concurring).

130. *Id.* (footnote omitted).

131. *Id.*

132. *Id.*

133. *Id.* at 63.

134. *Id.*

society to begin prosecution without an indictment, to try petty civil cases without the paraphernalia of a common law jury, to take into consideration that one who has full opportunity to make a defense remains silent is, in de Tocqueville's phrase, to confound the familiar with the necessary."[135] A long line of Justices, including many whose "services in the cause of human rights . . . are the most conspicuous in our history,"[136] had refused to impose such requirements on the states.

Without doubt, Justice Frankfurter's illumination of the practical consequences of total incorporation—particularly the imposition of the requirement that states prosecute by indictment and provide jury trials in civil cases involving claims above twenty dollars—raised problems for the supporters of total incorporation. Justice Black maintained, however, that the Bill of Rights was not an "outworn 18th Century 'straight jacket.' "[137] The federal government had not been "harmfully burdened" by application of the Bill of Rights guarantees; neither would the states be so burdened.[138]

The dissenters in *Adamson* had the luxury of knowing that their position would not immediately be adopted by the Court. Recognizing this, Justice Frankfurter raised the question whether even the "boldest innovator" would actually compel the states to bring their traditional procedures into compliance with the fifth amendment grand jury and seventh amendment civil jury trial guarantees.[139] The answer to Justice Frankfurter's question came, perhaps, in *Ohio ex rel. Eaton v. Price*.[140] In *Price* Justice Brennan noted that neither he nor Chief Justice Warren had either accepted or rejected the total incorporation position.[141] Justice Brennan advocated, however, the alternative of selective incorporation.[142] Through that doctrine the Court eventually could impose upon the states all of the procedural guarantees of the Bill of Rights except for the grand jury indictment and civil jury trial requirements.

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135. *Id.* at 62-63.

136. *Id.* at 62.

137. *Id.* at 89 (Black, J., dissenting).

138. *Id.* at 90. Supporters of total incorporation must have recognized that the practical difficulties of total incorporation would be somewhat greater than Justice Black's statement suggested. In particular, literal application of the seventh amendment right of jury trial in all cases involving more than $20 would impose intolerable strains on already overburdened state courts. The federal government had avoided granting jury trials in minor civil cases by limiting the jurisdiction of federal courts to cases involving substantial monetary claims. The states could not realistically follow the same approach. *But see* I. BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 487 (1965) (arguing that $20 threshhold could be ignored as "de minimis" requirement and that only "serious problem" posed by total incorporation was fifth amendment grand jury requirement).

139. 332 U.S. at 64-65 (Frankfurter, J., concurring). Justice Frankfurter suggested that total incorporation was not "unambiguously urged" by Justice Black. *Id.* Justice Black's dissent noted that "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." *Id.* at 75. To sustain Adamson's claim, Justice Black noted, the Court did not need to go beyond holding that the privilege against self-incrimination was applicable to the states. Justice Black also made it clear, however, that while he preferred selective incorporation to traditional due process analysis, he would rather follow the "original purpose" and "extend to all the people of the nation the complete protection of the Bill of Rights." *Id.* at 89.

140. 364 U.S. 263 (1960) (per curiam) (4-4 decision).

141. *Id.* at 274-75 (separate opinion by Brennan, J.).

142. *Id.* at 275.

B. FUNDAMENTAL FAIRNESS

Unlike the doctrine of total incorporation, the fundamental fairness doctrine rests solely on the due process clause. The doctrine has basically two elements. First, the doctrine reads the due process clause as prohibiting state action that violates those rights of the individual that are deemed to be "fundamental." Over the years, the Court variously described the standard for determining whether a particular right is fundamental. Due process was said to require adherence to those "principles of liberty and justice"[143] that are "implicit in the concept of ordered liberty,"[144] that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[145] and that "lie at the base of all our civil and political institutions."[146] Due process also was described as prohibiting state actions that "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses;"[147] that are "repugnant to the conscience of mankind;"[148] or that deprive the defendant of "that fundamental fairness essential to the very concept of justice."[149] Although these different phrasings arguably suggest some subtle variations in content, they generally have been understood as expressing a single standard, frequently described in shorthand form as the "ordered liberty" or "fundamental rights" standard.

The second element of the fundamental fairness doctrine concerns the relationship between the "ordered liberty" standard and the guarantees found in the Bill of Rights. Simply put, it maintains that there is no necessary correlation between the protection afforded by the Bill of Rights and the requirements of due process. The concept of due process has "an independent potency,"[150] which exists apart from the Bill of Rights, although in a particular case it may afford protection that parallels that of a Bill of Rights guarantee. It was this second element of the fundamental fairness doctrine that led to its eventual rejection. Accepted by a majority of the Supreme Court for almost one hundred years, the fundamental fairness doctrine was discarded in the 1960's when the Court adopted through selective incorporation a quite different view of the relationship between the Bill of Rights guarantees and the "ordered liberty" standard of due process.

1. The Rationale of Fundamental Fairness

The fundamental fairness position proceeds from the premise that the fourteenth amendment's due process clause was designed to make applicable to the states the same concept of due process that the fifth amendment's due process

143. Hurtado v. California, 110 U.S. 516, 535 (1884).
144. Palko v. Connecticut, 302 U.S. 319, 325 (1937).
145. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
146. Hurtado v. California, 110 U.S. 516, 535 (1884); *see also* Twining v. New Jersey, 211 U.S. 78, 106 (1908) (describing as "fundamental" a "principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government").
147. Malinski v. New York, 324 U.S. 401, 417 (1945) (Frankfurter, J., concurring).
148. Palko v. Connecticut, 302 U.S. 319, 323 (1937).
149. Lisenba v. California, 314 U.S. 219, 236 (1941).
150. Adamson v. California, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring).

clause traditionally had made applicable to the federal government.[151] At the time of the adoption of the fourteenth amendment there were only a few Supreme Court decisions interpreting the fifth amendment's due process clause, but the basic nature of the clause was well established. The concept of due process dated back to the Magna Carta, and English and American commentators had discussed it at length.[152] The proponents of fundamental fairness viewed those authorities as having established a flexible standard of justice that focused on the essence of fairness rather than the familiarity of form. Due process, under this view, was "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights."[153] Indeed, Justice Frankfurter described it as "perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society."[154] Its basic objective was to provide "respect enforced by law for that feeling of just treatment which has evolved through centuries of Anglo-American constitutional history and civilization."[155] Thus, it had a "natural law" background,[156] which extended beyond procedural fairness and imposed limits as well on the substance of state regulation.[157]

Whether the drafters of the due process clauses of the fourteenth and fifth amendments intended the clauses to have either the flexibility or the breadth provided by the fundamental rights concept of due process is open to debate. Commentators have criticized the imposition of substantive due process limits as beyond the purpose of the two clauses,[158] and some have argued that the procedural protections of due process originally were viewed as more closely related to historical usage.[159] Nonetheless, the Court persistently and almost

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151. *See* Hurtado v. California, 110 U.S. 516, 534 (1884) (fourteenth amendment due process clause restrains states in same way as fifth amendment due process clause restrains federal government); Adamson v. California, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring) (fourteenth amendment due process clause has same potency in relation to states as does fifth amendment due process clause in relation to federal government).

152. *See* Hurtado v. California, 110 U.S. 516 (1884) (citing numerous commentaries and cases); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856) (same).

153. Betts v. Brady, 316 U.S. 455, 462 (1942).

154. Griffin v. Illinois, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring).

155. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

156. *See generally* C. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 104-165 (1930); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928) (second installment at 42 HARV. L. REV. 365 (1928)).

157. On the development of substantive due process, see L. TRIBE, *supra* note 30, at ch. 8 (describing rise and fall of substantive due process protection of contractual liberty) and ch. 15 (discussing substantive due process protection of "rights of privacy and personhood"). Although due process decisions applying nonprocedural constitutional specifics, such as the first amendment, are sometimes treated as distinct from "substantive" due process, the early decisions clearly viewed those guarantees as merely another element of the substantive law limitations imposed by the due process clause. *See* Whitney v. California, 274 U.S. 357, 373 (Brandeis, J., concurring) (due process applies to "matters of substantive law as well as matters of procedure" and thereby encompasses right of free speech).

158. *See* Berger, *"Law of the Land" Reconsidered*, 74 NW. U.L. REV. 1 (1979); R. BERGER, *supra* note 18, at 249-69; Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56 (1931); *see also* Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 411-14 (1977) (discussing the historical origins of the "spacious conception" of liberty protected by the clause). *But see* R. MOTT, DUE PROCESS OF LAW § 41-54, 62, 68 (noting colonial and early American support for substantive due process); *id.* § 113-21 (noting pre-civil war support).

159. *See* R. BERGER, *supra* note 18, at 193-214 (discussing intent of framers); Kadish, *Methodology*

unanimously accepted the flexibility and breadth embodied in the "ordered liberty" standard.[160] Although Justices disagreed as to the protections required by the ordered liberty standard, only Justice Black clearly rejected the use of that standard to determine procedural requirements.[161] Justice Black maintained that due process required only an evenhanded application of those procedures previously established by law in the particular jurisdiction. Looking to the language of the Magna Carta that required adherence to the "law of the land,"[162] Justice Black read the due process clause as granting only a "right to be tried by independent and unprejudiced courts using established procedures and applying valid pre-existing laws."[163] Although the Court recognized that

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and Criteria in Due Process Adjudication—A Survey and Criticism, 66 YALE L.J. 319, 321-25 (1957) (discussing earlier due process decisions). Some find support for this view in Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856). The Court there stated that due process "look[ed] to those settled usages and modes of proceeding existing in the common and statute law of 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." *Id.* at 277. This statement, however, can be read as merely indicating that such "settled usages" were in accord with due process, not that departures from settled usages would necessarily violate due process. *See* Hurtado v. California, 110 U.S. 516, 528-29 (1884). Moreover, *Murray's Lessee* also looked to then current practice in the states, which might suggest that even initially accepted "settled usages," if subsequently rejected by many states as "unsuited" to the current "civil and political condition," could then be found to violate due process.

160. As will be seen, *infra* text accompanying notes 302-14, the ordered liberty standard is used under the selective incorporation doctrine as well as under the fundamental fairness doctrine. It apparently also would be retained for independent application by those Justices, other than Justice Black, supporting total incorporation. *See supra* note 118 and accompanying text (discussing view that procedures not proscribed by specific Bill of Rights guarantees may fall so short of fundamental fairness as to violate due process).

161. Perhaps the same can also be said as to substantive protections. Although several Justices have criticized the concept of substantive due process, apart from its absorption of such Bill of Rights guarantees as the first amendment, it is not clear whether any Justice, aside from Justice Black, has gone so far as completely to reject that concept. Consider, for example, the opinions of Justice Stewart in Griswold v. Connecticut, 381 U.S. 479, 528 (1965) (dissenting) (criticizing doctrine of substantive due process), and Roe v. Wade, 410 U.S. 113, 167 (1973) (concurring) (accepting doctrine in light of *Griswold*).

162. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 424 (1765-1769).

163. Duncan v. Louisiana, 391 U.S. 145, 169 (1968) (Black, J., concurring). Other opinions by Justice Black expressing this position include North Carolina v. Pearce, 395 U.S. 711, 743-44 (1969) (concurring in part and dissenting in part); *In re* Winship, 397 U.S. 358, 382 (1970) (dissenting); *In re* Gault, 387 U.S. 1, 62 (1967) (concurring); and United Gas Pub. Serv. Co. v. Texas, 303 U.S. 123, 151-52 (1938) (concurring). *See also* H. BLACK, A CONSTITUTIONAL FAITH 30-34 (1968); Haigh, *Defining Due Process of Law: The Case of Mr. Justice Hugo Black*, 17 S.D.L. REV 1, 18-25 (1972).

When Justice Black spoke of the government's obligation to adhere to pre-existing law—*i.e.*, to refrain from creating new law for the particular case—he assumed that the Bill of Rights guarantees were part of that pre-existing law. *See In re* Winship, 397 U.S. at 382 (Black, J., dissenting) ("For me, the only correct meaning of that phrase [due process] is that our Government must proceed according to the 'law of the land'—that is, according to written constitutional and statutory provisions as interpreted by court decisions"). The assumption that the Bill of Rights guarantees were part of the states' as well as the federal government's pre-existing law followed from Justice Black's acceptance of the total incorporation doctrine. Using the Bill of Rights' specific guarantees, Justice Black frequently found unconstitutional the same actions that the majority held invalid under its "ordered liberty" concept of due process. *See* Turner v. United States, 396 U.S. 398 (1970) (federal statutory presumptions analyzed by majority under ordered liberty standard and by Justice Black under several guarantees, including sixth amendment right to jury trial and fifth amendment privilege against self-incrimination). However, if a state practice did not violate a specific Bill of Rights guarantee, and the state had applied that practice in an evenhanded manner, the practice could not be held unconstitutional under Justice Black's view, even though it was contrary to basic traditions of American criminal procedure. See *In re* Winship, 397 U.S. 358 (1970), in which Justice Black argued that the Constitution could not be interpreted to require that proof of guilt be established beyond a reasonable doubt. *Id.* at 377.

evenhanded administration of preexisting procedures was an element of "ordered liberty,"[164] it also consistently rejected Justice Black's contention that due process required no more than regular adherence to the "law of the land."[165]

Proponents of the fundamental fairness position contend that once one accepts the flexible concept of due process embodied in the "ordered liberty" standard, one must concede that the content of due process will not necessarily be restricted to the Bill of Rights guarantees. Clearly, the proponents argue, as a "standard for judgment in the progressive evolution of the institutions of a free society,"[166] due process may impose limits beyond those found in the specifics of the Bill of Rights. Even though a particular practice was historically accepted as consistent with a specific Bill of Rights guarantee, changes in technology or "refinement[s] in our sense of justice" may render it contrary to the "ordered liberty" standard as contemporarily interpreted.[167] The extension of due process beyond the specifics of the Bill of Rights guarantees was implicitly recognized, it is argued, by the inclusion of a due process clause in the fifth amendment.[168]

Whether the fourteenth amendment due process clause provides protection also encompassed under the specific guarantees of the Bill of Rights (that is, the guarantees other than the fifth amendment due process clause) is, perhaps, a more troublesome issue. In one of the earlier fourteenth amendment cases, *Hurtado v. California*,[169] the Court suggested that due process encompassed only safeguards other than those found in the specific Bill of Rights guarantees. Fourteenth amendment due process paralleled fifth amendment due process, the Court argued, and if the fifth amendment clause encompassed any of the rights found in the remaining Bill of Rights guarantees, there would have been no reason to add those other guarantees to the Bill of Rights.[170] Thus, to read the fourteenth amendment due process clause as encompassing rights protected by the specific Bill of Rights guarantees would be contrary to the "recognized canon of interpretation" that one of several interrelated provisions should not be read to render the other provisions superfluous.[171] The *Hurtado* suggestion was short-lived, however, and the Court eventually found within fourteenth amendment due process various rights also protected by specific Bill of Rights guarantees.[172] Because due process was such a vague guarantee,

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164. *See* Moore v. Dempsey, 261 U.S. 86, 91 (1923); Hicks v. Oklahoma, 447 U.S. 343 (1980).

165. Indeed, it is not clear that Justice Black always adhered to that viewpoint. *See* Henkin *supra* note 5, at 76 n.12 (citing cases in which Justice Black found state violations of due process that were not covered by a specific Bill of Rights guarantee); Yarborough, *supra* note 34, at 254 n.110 (same). Consider also Justice Black's joinder in the opinion of the Court in Bolling v. Sharpe, 347 U.S. 497 (1954) (fifth amendment due process clause encompasses a concept of equal protection and thereby bars racially segregated schools in District of Columbia).

166. Malinski v. New York, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).

167. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 6 (1956).

168. *See* Adamson v. California, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring) (framers of Bill of Rights cannot be charged with writing into it a "meaningless clause").

169. 110 U.S. 516 (1884).

170. *Id.* at 534-35.

171. *Id.*; *see also* Davidson v. New Orleans, 96 U.S. 97, 105 (1878) (fourteenth amendment due process clause does not prohibit taking by state because, unlike fifth amendment, fourteenth amendment contains no taking clause).

172. *See infra* text accompanying notes 217-37 (discussing these various rights). The earlier opinions

the framers of the Bill of Rights could well have thought it desirable to add more specific provisions, even though the rights encompassed might also be protected by the fifth amendment's due process clause. The canon of interpretation cited in *Hurtado*, the Court later noted, was simply an "aid to construction" that must yield to the "ordered liberty" standard of due process.[173] That standard, by its very terms, encompasses all truly fundamental rights, regardless of whether those rights are recognized in a particular Bill of Rights guarantee.[174]

Once it was acknowledged that the "ordered liberty" standard could encompass rights that were also protected by the Bill of Rights guarantees, the question arose as to how the Court was to determine which of those rights were safeguarded by due process. The fundamental fairness position rejected the assumption that a particular right was "implicit in the concept of ordered liberty" merely because it was recognized in the Bill of Rights. Not all of the Bill of Rights guarantees could be deemed basic to a free society. Some, for example, merely reflected "the restricted views of Eighteenth-Century England regarding the best methods for the ascertainment of facts."[175] States might adopt other procedures, in light of current knowledge, and equally provide for fundamental fairness. In the case of still other guarantees, the core element of the guarantee might be fundamental while its other aspects might constitute only details of implementation that had come to be a part of the guarantee merely by force of custom. Analyzed from the independent perspective of the "ordered liberty" standard, only the core element of the guarantee would be a requisite of due process. In sum, under the fundamental fairness position, some rights protected by the first eight amendments might be found totally encompassed by fourteenth amendment due process, others partially encompassed, and still others completely excluded.

As it later developed,[176] a key element of the fundamental fairness doctrine was its focus on the particular factual setting of the individual case. If a defendant contended that a state had denied him due process by failing to recognize a right protected by the Bill of Rights, the issue presented was not whether that right, viewed in the abstract, was "implicit in the concept of ordered lib-

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simply ignored the *Hurtado* argument, and it was not until 1932, in Powell v. Alabama, 287 U.S. 45, 65-67 (1932), that it was openly considered and rejected.

173. Powell v. Alabama, 287 U.S. 45, 67 (1932).

174. *Id.* This view of due process finds support in Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856), the leading decision on the scope of the fifth amendment's due process clause at the time of the adoption of the fourteenth amendment. The Court there suggested that in determining whether a particular procedure violated due process, the Court would first look to whether it conflicted with any of the provisions of "the constitution itself." *Id.* at 277. Of course, this statement, taken literally, would go beyond the fundamental fairness doctrine to suggest "total incorporation" of at least the procedural guarantees of the Bill of Rights. *See* J. ELY, *supra* note 34, at 194 n.52 (noting this possibility, but also describing *Murray's Lessee*'s comment in this regard as "unnecessary and somewhat bizzare"). The Court in *Murray's Lessee* had also suggested, at an earlier point in the opinion, that constitutional provisions other than those in the Bill of Rights also safeguarded rights recognized in the Magna Carta, such as the right to jury trial, 59 U.S. at 276, and perhaps the Court's reference may have been only to those constitutional provisions. In any event, the opinion clearly suggested an overlap in the protections afforded by the due process clause and certain other procedural provisions in the Constitution.

175. Adamson v. California, 332 U.S. 46, 63 (Frankfurter, J., concurring).

176. *See infra* text accompanying notes 217-64 (discussing development of fundamental fairness doctrine after 1930).

erty." Rather, the issue was whether the state's action had resulted in a denial of fundamental fairness in the context of the particular case. As the Court noted in *Betts v. Brady*:[177]

> [The] [a]sserted 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.[178]

Due process under this approach was to be defined on a case-by-case basis, with "its full meaning . . . gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise."[179]

2. Application of Fundamental Fairness: Pre-1930's Cases

The Court's application of the fundamental fairness doctrine can be divided roughly into two periods. During the first period, extending from the adoption of the fourteenth amendment to the early 1930's, the Supreme Court reviewed comparatively few state criminal cases. In those cases considered, the Court generally ruled against the defendant's due process claim. Moreover, if the claim was based on the state's refusal to recognize a particular aspect of a Bill of Rights guarantee, the Court did not always limit its ruling to the aspect relied on by the defendant. Rather, the Justices tended to speak broadly of the state's ability to provide fundamental fairness without regard to any aspect of the guarantee.

The first major due process ruling of this period was *Hurtado v. California*.[180] Hurtado had been tried for murder on a prosecutor's information, following a finding of probable cause at a preliminary hearing.[181] Hurtado claimed that fourteenth amendment due process required state authorities to prosecute by grand jury indictment, as was required of federal authorities by the fifth amendment.[182] With only Justice Harlan dissenting, the Court flatly rejected Hurtado's claim.[183] As noted previously, the *Hurtado* majority initially suggested that the due process clauses should not be read as duplicating the specific Bill of Rights provisions and thereby rendering those provisions superfluous.[184] The Court then went on, however, to discuss the defendant's claim using a traditional fundamental fairness analysis. The Court noted that due process encompasses only those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"[185] and therefore emphasizes "the very substance of individual rights" rather than "particular forms of procedure."[186] Focusing on the function of the grand jury

177. 316 U.S. 455 (1942).
178. *Id.* at 462.
179. Twining v. New Jersey, 211 U.S. 78, 99-100 (1908).
180. 110 U.S. 516 (1884).
181. *Id.* at 517-18.
182. *Id.* at 520.
183. *Id.* at 538.
184. *See supra* text accompanying note 171 (discussing the *Hurtado* reasoning).
185. 110 U.S. at 535.
186. *Id.* at 532.

rather than its form, the Court found that California had adopted a satisfactory substitute that "carefully considers and guards the substantial interest of the prisoner."[187] Justice Harlan's dissent relied on the recognition of the right to grand jury indictment in both English practice and in the fifth amendment,[188] but the majority stressed that traditional usage was not conclusive of whether a right was fundamental. The Court noted:

> The Constitution of the United States . . . was made for an undefined and expanding future, and for people gathered and to be gathered from many nations and of many tongues. . . . There is nothing in [the] Magna Charta . . . which ought to exclude the best ideas of all systems of every age.[189]

Thus, the Court concluded, "any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of legislative power, in furtherance of the general public good, which regards and preserves . . . principles of liberty and justice, must be held to be due process of law."[190]

The classic fundamental fairness analysis expounded by the *Hurtado* Court could readily be extended to encompass at least some aspects of specific Bill of Rights guarantees. This extension could occur, however, only if the Court rejected *Hurtado*'s initial suggestion that due process does not overlap specific Bill of Rights guarantees. In *Chicago, Burlington & Quincy Railroad v. Chicago*,[191] decided in 1897, the Court did exactly that, freeing the fundamental fairness doctrine from the limitation of *Hurtado*'s initial suggestion. The *Chicago Railroad* Court concluded that due process prohibited a state from taking property without providing just compensation.[192] Justice Harlan's opinion for the Court mentioned neither *Hurtado* nor the fifth amendment's taking clause; it merely noted that the right to compensation for appropriated property was a "principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice."[193]

After *Chicago Railroad*, several Supreme Court opinions considered, but rejected, fourteenth amendment due process claims based upon procedural safeguards found in the fifth and sixth amendments.[194] The two cases giving those claims the most extensive consideration were *Maxwell v. Dow*[195] and *Twining v. New Jersey*.[196] In *Maxwell* the defendant challenged the state's use of an eight person jury, arguing that the fourteenth amendment, like the sixth amend-

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187. *Id.* at 538.

188. *Id.* (Harlan, J., dissenting). Justice Harlan's dissent, although focusing on the history and importance of the grand jury, suggested at one point that a right might be established as an essential element of due process solely by virtue of its inclusion in the Bill of Rights. *Id.* at 546-48. That reasoning, of course, would have led to incorporation of all of the Bill of Rights as part of due process.

189. *Id.* at 530-31.

190. *Id.* at 537.

191. 166 U.S. 226 (1897).

192. *Id.* at 241. The Court held against the railroad, however, because the railroad failed to show that compensation received fell short of "just compensation." *Id.* at 247-56.

193. *Id.* at 238 (citing Gardner v. Newburgh, 2 Johns. Ch. 162 (N.Y. Ch. 1816) (Kent, C.)).

194. *See* Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. R. 746. 755-76 (1965) (citing cases); *see also* Maxwell v. Dow, 176 U.S. 581, 602-05 (1900) (same).

195. 176 U.S. 581 (1900).

196. 211 U.S. 78 (1908).

ment, required a jury of twelve.[197] Using the fundamental fairness analysis of *Hurtado*, the Court concluded that "[i]f the State has the power to abolish the grand jury . . . the same course of reasoning which establishes that right will and does establish the right to alter the number of the petit jury from that provided by the common law."[198] The Court suggested, moreover, that the right to trial by a jury in any form had never been viewed as a "necessary requisite of due process."[199]

In *Twining* the defendant contended that fourteenth amendment due process was violated by a jury instruction that allowed the jury to draw an unfavorable inference from his failure to testify.[200] For the purposes of argument the Court assumed that had the instruction been given in a federal prosecution it would have violated the defendant's fifth amendment privilege against self-incrimination.[201] The Court also acknowledged that the fourteenth amendment could encompass rights safeguarded in the Bill of Rights, but this was so "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."[202] Using traditional fundamental fairness analysis, the Court concluded that defendant's claim did not rest on such a right. The substantial limits upon the privilege against self-incrimination traditionally recognized in "English law,"[203] the rejection of the privilege in civilized countries "outside the domain of the common law,"[204] and the fact that "four only of the thirteen original States insisted upon incorporating the privilege in the Constitution,"[205] led the Court to conclude that the privilege against self-incrimination was "not an unchangeable principle of universal justice."[206]

Although the pre-1930's rulings consistently rejected procedural due process claims invoking safeguards specified in the Bill of Rights, the Court did uphold a few due process claims based on other procedural defects.[207] In each

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197. In both *Maxwell* and *Twining*, defendants relied on both the privileges and immunities clause and the due process clause. *See supra* text accompanying notes 87-98 (discussing *Maxwell* and *Twining*). Justice Harlan dissented in both cases, relying primarily on the privileges and immunities clause. *See supra* text accompanying notes 95-97.

198. 176 U.S. at 602-03.

199. *Id.* at 603-05. *See also* Duncan v. Louisiana, 391 U.S. 145, 150 n.14 (1968) (describing *Maxwell* as a case "opinioning that States might abolish jury trial").

200. 211 U.S. at 83.

201. *Id.* at 114.

202. *Id.* at 99.

203. *Id.* at 104-05 (noting particularly the English bankruptcy practice of compelling a bankrupt to submit to examination).

204. *Id.* at 113. The Court noted:

> The wisdom of the exemption has never been universally assented to since the days of Bentham; many doubt it to-day, and it is best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient . . . . It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law.

Id.

205. *Id.* at 109.

206. *Id.* at 113.

207. During the same period, convictions also were invalidated when defendants presented procedural claims not based on the due process clause. *See* Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213, 216-17 (1959) (citing cases in which Court held that equal protection clause prohibits racial discrimination in jury selection and that prohibition against *ex post facto* laws applies to certain retroactive procedural changes).

instance the defendant stressed the basic unfairness of the state practice rather than any parallel protection in the Bill of Rights. In *Moore v. Dempsey*,[208] a case involving alleged domination of a trial by potential mob violence, the Court reasoned that due process was violated because the "whole proceeding is a mask—[in which] . . . counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and . . . the State courts failed to correct the wrong."[209] The Court in *Moore* emphasized the totality of the circumstances rather than the deprivation of specific safeguards such as an impartial jury or effective assistance of counsel. In *Tumey v. Ohio*[210] the Court held that due process requires an impartial judge,[211] though that safeguard is not mentioned in the specific guarantees of the Bill of Rights.[212] After examining the English and American common law, which established "the greatest sensitiveness over the existence of any pecuniary interest" in the trial judge,[213] the Court concluded that the defendant had been denied a fair tribunal where the trial judge received a fee only when he found the defendant guilty.[214]

Tumey and *Moore* reflected a willingness of the Court to find due process violations, without regard to the specifics of the Bill of Rights, when state practices directly threatened the accuracy of the fact-finding process. This willingness continued in the second major period of fundamental fairness analysis.[215] The significant change during that period, from 1930 to 1960, was in the Court's approach to claims based on safeguards found in the Bill of Rights, many of which did not relate directly to the reliability of the guilt-determining process.[216]

3. Application of Fundamental Fairness: The Post-1930's Cases

In applying the fundamental fairness doctrine from the early 1930's through the early 1960's, the Court was far more willing to find within the due process clause certain aspects of the procedural guarantees of the Bill of Rights. The Court viewed due process as encompassing many of the same basic principles as the Bill of Rights guarantees, but generally assumed that due process limits on state action derived from those principles were narrower than the limits imposed on the federal government by the Bill of Rights. *Powell v. Ala-*

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208. 261 U.S. 86 (1923).
209. *Id.* at 91.
210. 273 U.S. 510 (1927).
211. *Id.* at 531.
212. The sixth amendment refers only to an "impartial jury." U.S. CONST. amend. VI.
213. *Id.* at 525. *Tumey* involved a misdemeanor charge tried before a local Mayor's Court, on which the mayor served, in effect, as the justice of the peace. *Id.* at 516. The Court examined the statutes and cases dealing with the compensation of magistrates in both the United States and England, starting with a 1388 statute and continuing to the date of the decision. *Id.* at 524-31.
214. *Id.* at 520.
215. *See e.g.*, Mooney v. Holohan, 294 U.S. 103 (1935) (prosecutor's knowing reliance on perjured testimony violates due process); *In re* Murchison, 349 U.S. 13 (1955) (trial on contempt charge before judge who conducted secret "one-man" grand jury proceedings in which contempt allegedly occurred violates due process); Thompson v. Louisville, 362 U.S. 199 (1960) (conviction totally devoid of evidentiary support violates due process).
216. Why the Court turned to a more expansive view of due process during this particular time has been a matter of very interesting speculation. *See* Allen, *supra* note 207, at 218-19 (suggesting, *inter alia*, that the abuse of the criminal justice process in the emerging totalitarian regimes of the early 1930's made the Court more sensitive to the importance of the criminal justice process to the character of the nation); Wiehofen, *supra* note 5, at 192-93 (noting changes in the Court's ability to control its docket, and liberalization of habeas corpus procedure, leading to review of more criminal cases).

bama,[217] decided in 1932, was the first case to apply the fundamental fairness doctrine in this fashion.

The defendants in *Powell*, nine young and illiterate blacks, had been convicted of rape, a capital offense.[218] They had not been represented by counsel of their own.[219] Instead, the trial judge had "appointed" all members of the local bar to represent them, which resulted in representation that was insufficient by any standard.[220] The Supreme Court first concluded that due process had been violated when the trial judge denied defendants an opportunity to secure counsel of their own choice.[221] Second, assuming that defendants would have been unable to secure counsel, due process was violated by the trial judge's failure to appoint counsel who would provide effective representation.[222] The Court based neither ruling on a simple reference to the sixth amendment right to counsel, stating that the sixth amendment by itself did not establish that the right to counsel was fundamental.[223] The Court looked beyond the sixth amendment to the development of the right to counsel in American jurisprudence.[224] It found that at least twelve of the thirteen original states had recognized a defendant's right to representation by retained counsel in all serious criminal prosecutions.[225] The right to appointed counsel followed from the due process requirement of a fair hearing; when defendants, as those in *Powell*, were incapable of representing themselves, appointed counsel was a prerequisite for a fair hearing. This need was reflected in the "unanimous accord" among the states in appointing counsel for indigent defendants, at least in capital cases.[226]

The *Powell* due process ruling on appointment was limited to the special circumstances suggested by that case—"a capital case . . . where the defendant . . . is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy or the like."[227] Six years later, in *Johnson v. Zerbst*,[228] the Court held that the sixth amendment right to counsel required federal courts to appoint lawyers for indigent defendants in all felony cases.[229] Defendants in state cases immediately argued that the due process right to counsel should extend as far as the sixth amendment right.[230] Relying on a fundamental fairness analysis, the Court rejected that contention in *Betts v. Brady*,[231] holding that the due process clause was "less rigid and more fluid"

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217. 287 U.S. 45 (1932).
218. *Id.* at 50, 52.
219. *Id.* at 49.
220. *Id.* at 56.
221. *Id.* at 71.
222. *Id.*
223. *Id.* at 66.
224. *Id.* at 61-65.
225. *Id.* at 64-65.
226. *Id.* at 73.
227. *Id.* at 71. Although there was language in *Powell* that could be read as extending the right to appointed counsel beyond such circumstances, the Court carefully limited its holding. *Id.*. *Cf.* Israel, Gideon v. Wainwright: *The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 236-37 (noting limitation in *Powell* holding and criticizing Justice Black's failure to recognize that limitation in his *Gideon* opinion).
228. 304 U.S. 458 (1938).
229. *Id.* at 460, 463.
230. *See* Betts v. Brady, 316 U.S. 455, 462-63 (1942).
231. 316 U.S. 455, 471 (1942); *see supra* text accompanying note 178 (quoting *Brady*).

than the sixth amendment.[232] The Court stated that the due process clause required appointed counsel only when the facts of the particular case indicated that the assistance of counsel was needed to ensure a fair trial.[233]

In the years following *Powell*, due process cases considering various Bill of Rights safeguards used an approach similar to that taken in the right-to-counsel cases. In *Wolf v. Colorado*,[234] for example, the Court held that the due process clause encompasses the major element of the fourth amendment, but not the amendment's full protection. The *Wolf* Court initially concluded that the "security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society . . . [and] therefore implicit in the 'concept of ordered liberty.' "[235] The Court then held, however, that the fourth amendment remedy of excluding illegally seized evidence was not required by due process.[236] A review of contemporary practices in the American states and the ten jurisdictions of the United Kingdom convinced the Court that the exclusionary rule was not essential to the implementation of the protected right of privacy and therefore should not be imposed on the states through the fourteenth amendment.[237]

In several other cases decided during the same period, the Court rejected due process claims based upon a particular aspect of a Bill of Rights guarantee, but suggested that other aspects of the guarantee might be encompassed by due process. *Palko v. Connecticut*[238] is illustrative.[239] In that case, defendant challenged a Connecticut statute that permitted the state to appeal defendant's initial acquittal, gain reversal on the basis of a trial court error, and then retry the defendant on the same charge.[240] The Court assumed that a similar federal practice would violate the double jeopardy clause of the fifth amendment.[241] Applying fundamental fairness analysis, the Court framed the issue narrowly:

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232. *Id.* at 462.

233. *Id.* at 471-73; *see also* Israel, *supra* note 227, at 231-61 (discussing due process right to counsel cases from *Powell* to *Gideon*). Factors establishing a right to appointed counsel included the seriousness of the offense, the complicated nature of either the offense or the possible defenses, events during trial raising difficult legal questions, and the personal characteristics of the defendant, such as youth or mental incapacity. *Id.* at 249-52.

234. 388 U.S. 25 (1949).

235. *Id.* at 27. Whether this language meant that due process protected against all searches that violated the fourth amendment, or only against those searches that violated the "core" of that amendment, is unclear. *See* Kamisar, Wolf *and* Lustig *Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1101-08 (1959); Frank, *The United States Supreme Court: 1948-49*, 17 U. CHI. L. REV. 1, 33 (1949).

236. 338 U.S. at 33.

237. *Id.* at 29-31.

238. 302 U.S. 319 (1937).

239. Other cases in the same category include Adamson v. California, 332 U.S. 46, 53-55 (1947) (due process permits prosecution to comment on defendant's failure to testify, but might prohibit statute declaring that "a permitted refusal to testify would compel an acceptance of the truth of the prosecution's evidence"); Brock v. North Carolina, 344 U.S. 424, 429 (1953) (Frankfurter, J., concurring) (due process permitted retrial of defendant after state-requested mistrial, but might be violated when trial court clearly abused its discretion in declaring mistrial); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463, 471, 475-76 (1947) (combining the plurality, concurring, and dissenting opinions) (due process did not bar second attempt at execution after first failed, but would forbid some cruel and unusual punishments); Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934) (described *infra* note 259).

240. 302 U.S. at 320-21. In *Palko*, defendant had been tried for first degree murder, convicted of second degree murder, and then retried for first degree murder following the prosecution's successful appeal. *Id.*

241. *Id.* at 322-23.

"Is that kind of double jeopardy to which the statute has subjected [defendant] a hardship so acute and shocking that our polity will not endure it?"[242] The answer here was "No," but the Court suggested that the answer might be otherwise "if the state were permitted after a trial free from error to try the accused over again."[243] The state in *Palko* was not "attempting to wear the accused out by a multitude of cases with accumulated trials," but simply seeking to obtain a single trial "free from the corrosion of substantial legal error."[244]

In another set of cases decided during the same period, the Court found due process violated by practices that arguably were contrary to a particular Bill of Rights guarantee, but studiously avoided drawing an analogy to that guarantee. Thus, without mentioning the sixth amendment right to notice of the specific offense charged, the Court in *Cole v. Arkansas*[245] held that a state supreme court violated the due process clause when it affirmed the conviction of defendants charged and tried for one offense on the ground that they had actually committed another offense.[246] Similarly, although the Court in *Twining* had said that the privilege against self-incrimination was not a part of due process,[247] the Court, without mentioning the privilege, developed a standard barring state use of coerced confessions that was based on the same underlying values as the privilege.[248] In the first due process confession cases of this period, the Court barred the use of confessions obtained through police techniques, such as physical abuse of the defendant, that were likely to produce statements of doubtful reliability.[249] But the Court gradually came to bar confessions whenever police interrogation methods had "critically impaired" the defendant's "capacity for self-determination,"[250] without regard to whether those methods were likely to produce an untrustworthy statement.[251] Police

242. *Id.* at 328.

243. *Id.*; *see also* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 469 (1947) (Frankfurter, J., concurring) (state would offend due process "by brutal subjection of an individual to successive retrials on a charge on which he has been acquitted").

244. 302 U.S. at 328.

245. 333 U.S. 196 (1948).

246. *Id.* at 202. The Supreme Court in *Cole* held that the state court, on review of defendant's convictions for promoting an unlawful assembly, could not affirm the convictions under another section of the same statute prohibiting the entirely separate offense of use of force to prevent another from engaging in a lawful vocation. *Id.* The indictments referred only to the unlawful assembly offense, and the jury had been charged only for that offense. *Id.* at 197-99.

247. Twining v. New Jersey, 211 U.S. 78, 114 (1908); *see* Palko v. Connecticut, 302 U.S. 319, 325 (1938) (dicta) (citing *Twining*); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (dicta) (citing *Twining*).

248. *See* Malloy v. Hogan, 378 U.S. 1, 18-19 (1964) (Harlan, J., dissenting) (discussing various due process confession cases and noting their failure to mention fifth amendment); *see also* Y. KAMISAR, POLICE INTERROGATION AND CONFESSIONS 1-25 (1980) (discussing historical development of confessions standard up to 1964); O. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 31-62, 90-119 (1973) (same).

249. *See, e.g.,* Brown v. Mississippi, 297 U.S. 278, 285-86 (1936) (whipping); Chambers v. Florida, 309 U.S. 226, 239-40 (1940) (persistent interrogation during a week of incommunicado detention); Ward v. Texas, 316 U.S. 547, 555 (1942) (techniques confusing and implicitly threatening to prisoner).

250. Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (Frankfurter, J.); *see also* Watts v.Indiana, 338 U.S. 49, 53 (1949) (statement produced by sustained police pressure does not issue from free choice and therefore must be barred from evidence).

251. *See* Spano v. New York, 360 U.S. 315, 323 (1959) (official pressure, fatigue, and ploy on friendship); Leyra v. Denno, 347 U.S. 556, 558-59 (1954) (interrogation by psychiatrist who misrepresented himself as doctor called to treat defendant's sinuses); *see also* Townsend v. Sain, 372 U.S. 293, 321-22 (1963) (drug acting as truth serum).

coercion violated due process, the Court noted, because the "ordered liberty" standard required adherence to an "accusatorial" rather than an "inquisitorial" system of proof, with the state lacking the power to force a defendant to convict himself "out of his own mouth."[252] The same concept of an accusatorial system also underlies the fifth amendment privilege against self-incrimination, although the Court did not draw the analogy until many years later.[253]

By the late 1950's the Court had indicated, either through holding, dictum, or implication, that the due process clause included elements of most of the criminal procedure guarantees found in the Bill of Rights. The ordered liberty standard encompassed at least one aspect of each of the following guarantees: the fourth amendment prohibition against unreasonable searches,[254] the fifth amendment double jeopardy bar,[255] the fifth amendment privilege against self-incrimination,[256] the sixth amendment right to a public trial,[257] the sixth amendment right to notice,[258] the sixth amendment right to confrontation of opposing witnesses,[259] the sixth amendment right to the assistance of counsel,[260] and the eighth amendment prohibition against cruel and unusual punishment.[261] The Court also had held, however, that the ordered liberty

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252. Watts v. Indiana, 338 U.S. 49, 54 (1949); *see also* Rogers v. Richmond, 365 U.S. 534, 541 (1961) (citing other confession cases that recognize this principle). The due process cases also suggested that the admissibility of confessions depended in part upon the offensiveness of the police conduct in each case. Y. KAMISAR, *supra* note 248, at 10-25. But the Court apparently found police conduct short of physical abuse offensive because it was inconsistent with an accusatorial system. *See* Townsend v. Sain, 372 U.S. 293, 307-09 (1963) (if drug acting as truth serum given to defendant, confession inadmissible even if police unaware of drug's effect).

253. Malloy v. Hogan, 378 U.S. 1, 7 (1964). The fifth amendment privilege as understood during this period arguably would not have been the basis for excluding coerced confessions even in a federal case. Bram v. United States, 168 U.S. 532 (1897), treated the police coercion of confessions as an aspect of fifth amendment law, *id.* at 542, but the prevailing view was that the compulsion referred to in the fifth amendment was only that produced by a court order to testify—that is, the compulsion resulting from subjecting a witness to the "cruel trilemma of self-accusation, perjury or contempt." Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). It was not until Miranda v. Arizona, 384 U.S. 436 (1966), that the Court removed this traditional limit on the privilege's scope and held that nonjudicial compulsion violated the privilege. *Id.* at 467. *See* Y. KASIMAR, *supra* note 248, at 35-37, 48-68 (discussing—and criticizing—various authorities supporting pre-*Miranda* view that fifth amendment does not extend to police station and therefore only due process clause covers coerced confessions).

254. Wolf v. Colorado 338 U.S. 25, 28 (1949) (due process clause forbids unreasonable searches and seizures, but does not require exclusionary rule).

255. *See* Palko v. Connecticut, 302 U.S. 319, 328 (1937) (dictum) (due process clause may bar some retrials of defendant on same charge); Brock v. North Carolina, 344 U.S. 424, 427-28 (1953) (due process clause may bar some retrials after mistrials).

256. *See supra* text accompanying notes 247-53 (due process clause bars use of coerced confessions).

257. *In re* Oliver, 333 U.S. 257, 273 (1948). *Oliver* involved an unusual proceeding—a summary contempt proceeding held before a one-man grand jury acting in secret session. *Id.* at 258-59. The Court found the contempt proceeding analogous to a criminal trial, stressed the fundamental nature of the right to a public trial, and held that the secrecy of the proceeding resulted in a denial of due process. *Id.* at 265-73.

258. Cole v. Arkansas, 333 U.S. 196, 201 (1948). For a discussion of *Cole*, see *supra* notes 245-46 and accompanying text.

259. See Snyder v. Massachusetts, 291 U.S. 97 (1934), finding no due process violation when a jury viewed the scene of a crime in the absence of defendant, *id.* at 108, but noting that due process requires defendant's presence when necessary to secure a "fair and just hearing," *id.* at 107-08, and citing the right to confrontation as one justification for requiring defendant's presence. *Id.* at 106.

260. *See supra* text accompanying notes 217-33 (discussing due process right to counsel).

261. *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463, 471, 475-76 (1947) (combining the plurality, concurring, and dissenting opinions) (due process clause forbids some cruel and unusual punishments).

standard did not encompass various other aspects of these same guarantees[262] and did not require prosecution by indictment, as the fifth amendment requires in federal prosecutions, under any circumstances.[263] Although the Court's partly-in and partly-out treatment of most of the criminal procedure guarantees followed logically from traditional fundamental fairness analysis, other Bill of Rights guarantees found to be fundamental were treated differently. In holding that the due process clause afforded protection against the taking of property without providing just compensation and the abridgment of the freedoms of speech, press, and religion, the Court had indicated that these protections were equal in scope to their counterparts in the fifth and first amendments.[264]

4. Subjectivity and Fundamental Fairness

In *Adamson v. California*[265] Justice Black, in the course of urging adoption of total incorporation,[266] launched a vigorous attack against the alleged subjectivity of the fundamental fairness doctrine. Although Justice Black could not convince a majority of the Court to adopt total incorporation, his criticism of the fundamental fairness doctrine contributed substantially to the development of selective incorporation, the eventual majority position. A major argument advanced in favor of selective incorporation was that it would offer far less potential for a subjective application of the ordered liberty standard than did the fundamental fairness doctrine.[267] Justice Black's criticism also may have contributed, in part, to the development of per se rules in some of the

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262. *See, e.g.,* Palko v. Connecticut, 302 U.S. 319, 323 (1937) (due process clause allows government appeal and new trial that would be prohibited by fifth amendment double jeopardy clause); Adamson v. California, 332 U.S. 46, 50, 56 (1947) (due process clause allows comment on defendant's failure to testify that would be prohibited by fifth amendment privilege against self-incrimination); Betts v. Brady, 316 U.S. 455, 464-65, 471 (1942) (due process clause does not always require appointment of counsel in felony cases; sixth amendment requires appointment of counsel in all federal felony cases).

263. Hurtado v. California, 110 U.S. 516, 538 (1884). *Hurtado* was reaffirmed in numerous cases, including Lem Woon v. Oregon, 229 U.S. 586, 589 (1933), and Gaines v. Washington, 277 U.S. 81, 86 (1928).

264. Although Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897), did not state that due process protection against takings without compensation would be equal in scope to the fifth amendment protection, subsequent cases drew no distinction between takings by state and federal governments. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (discussing fifth and fourteenth amendment protections against takings without compensation as if equivalent); Griggs v. Allegheny County, 369 U.S. 84, 89 (1962) (applying fifth amendment precedent to a takings claim brought under fourteenth amendment). Similarly, while early opinions had suggested that due process protection of freedom of speech might not be as extensive as first amendment protection, *see* Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting), subsequent cases indicated that the same standards applied to both state and federal cases involving first amendment freedoms. *See* Douglas v. City of Jeannette, 319 U.S. 157, 162 (1943); Board of Educ. v. Barnette, 319 U.S. 624, 639 (1943). A few Justices continued to maintain, however, that fourteenth amendment protection of the freedom of speech and press might not be as broad as first amendment protection. *See* Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 182, 190 (1969) (citing opinions of Justices Holmes, Harlan, and Jackson). *See also infra* notes 437-42 (discussing the first amendment precedent).

265. 332 U.S. 46 (1947).

266. *See supra* text accompanying notes 106-18 (discussing Justice Black's dissent in *Adamson*).

267. *See infra* text at notes 464-75 (discussing the subjectivity argument). Of course, Justice Black would have abandoned the ordered liberty test altogether, *see supra* notes 161-63 and accompanying text, but the supporters of selective incorporation would not have gone that far to avoid subjective adjudication. *See infra* text accompanying notes 474-75. Indeed, neither would the other Justices supporting total incorporation have gone that far. *See supra* note 118 (other Justices favored retaining due process concept for cases not covered by Bill of Rights).

1950's decisions applying the fundamental fairness doctrine.[268]

Justice Black contended in *Adamson* that the fundamental fairness doctrine permitted the Court to "substitut[e] its own concepts of decency and fundamental justice for the language of the Bill of Rights."[269] Application of the fundamental fairness standard, he noted in a subsequent case, "depend[ed] entirely on the particular judge's idea of ethics and morals" rather than upon "boundaries fixed by the written words of the Constitution."[270] Although Justice Black thought that many fundamental fairness decisions reflected this idiosyncratic approach to adjudication,[271] perhaps his prime examples were the decisions in *Rochin v. California*[272] and *Irvine v. California*.[273]

In *Rochin* the police, having "some information" that defendant was selling narcotics, entered his home without a warrant and forced open the door to his bedroom.[274] When the surprised defendant immediately shoved two capsules believed to be narcotics into his mouth, the police grabbed him and attempted to extract the capsules, but the defendant then swallowed them.[275] The police then took the protesting defendant to a doctor, who forced an emetic solution into defendant's stomach, causing him to vomit the morphine capsules.[276] Describing the police action as "conduct that shocks the conscience,"[277] the Court held that due process no more permitted the use of the capsules in evidence than it would a coerced confession.[278] "Due process," the Court added, was a principle that "precludes defining . . . more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.' "[279]

In *Irvine*, although the plurality described the police action as flagrant and deliberate misconduct,[280] it held that the conduct did not reach the level of offending that sense of justice.[281] The police there had made repeated illegal entries into defendant's home to install secret microphones, including one in his bedroom, with which they listened to his conversations for over a month.[282] The plurality distinguished *Rochin* as a case involving "coercion, violence [and] brutality to the person" rather than, as in *Irvine*, a "trespass to property, plus eavesdropping."[283] Justice Frankfurter, however, who had written the

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268. Consider, for example, the right to counsel decisions discussed in Israel, *supra* note 227, at 242-45, 249-51 (discussing unqualified right to hired counsel in all cases and to appointed counsel in capital cases).

269. 332 U.S. at 89 (Black, J., dissenting).

270. Duncan v. Louisiana, 391 U.S. 145, 169 (1968) (Black, J., concurring).

271. *See* Adamson v. California, 332 U.S. 46, 79-91 (1947) (Black, J., dissenting) (criticizing cases in which Court applied fundamental fairness standard); Rochin v. California, 342 U.S. 165, 176 (1952) (Black, J., concurring) (same); Griswold v. Connecticut, 381 U.S. 479, 514-16 (1965) (Black, J., dissenting) (same).

272. 342 U.S 165 (1952).

273. 347 U.S. 128 (1954).

274. *Id.* at 166.

275. *Id.*

276. *Id.*

277. *Id.* at 172.

278. *Id.* at 173.

279. *Id.*

280. 347 U.S. at 132 (plurality opinion).

281. *Id.* at 133.

282. *Id.* at 132.

283. *Id.* at 133.

opinion of the Court in *Rochin*, concluded that the two cases were not distinguishable. Although "[t]here was lacking [in *Irvine*] physical violence, even to the restricted extent employed in *Rochin*," the police had engaged in "a more powerful and offensive control over the Irvines' life than a single, limited trespass."[284] Justice Black argued, in a subsequent case,[285] that this division of the Court in *Irvine* revealed that the "*ad hoc* approach" of the Court in *Rochin* and *Irvine* consisted of no more than determining whether "five justices are sufficiently revolted by local police action" to "shock [the police action] into the protective arms of the Constitution."[286]

In both *Rochin* and *Irvine* Justice Frankfurter took sharp exception to Justice Black's characterization of the Court's fundamental fairness analysis as basically subjective. Justice Frankfurter admitted that the case-by-case application of the ordered liberty standard required the exercise of judicial judgment in an "empiric process" for which there was no "mechanical yardstick."[287] This lack of fixed standards did not mean, however, that judges were "at large" to draw upon their "merely personal and private notions" of justice.[288] In each due process case, the Court was required to undertake a "disinterested inquiry pursued in the spirit of science."[289] Past cases illustrated that this inquiry looked not to personal preferences, but to external evidence of permanent and pervasive notions of fairness, such as the positions taken in the federal constitution and early state constitutions, the standards currently applied in the various states, and the viewpoints of other countries with similar jurisprudential traditions.[290] Moreover, in evaluating that evidence and reaching its conclusion, the Court was limited by the traditional standards of judicial review, requiring reasoned results that build upon prior decisions.[291] Thus,

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284. *Id.* at 145 (Frankfurter, J., dissenting).

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

286. *Id.* at 665 (Black, J., concurring) (quoting Irvine v. California, 347 U.S. 128, 138 (1954) (Clark, J., concurring)). Another case often cited along with *Rochin* and *Irvine* as illustrating the subjectivity of fundamental fairness analysis is Breithaupt v. Abram, 352 U.S. 432 (1957). The Court there held that the taking of a blood sample from an unconscious driver, who had been involved in a fatal accident and was believed to be intoxicated, did not violate due process. 352 U.S. at 433-35. The majority stressed that the taking of a blood sample had become "routine in our everyday life," and the interests of society in gaining scientific evidence of intoxication, to help deter "the increasing slaughter on our highways," outweighed "so slight an intrusion" of a person's body. *Id.* at 436, 439. In dissent, Chief Justice Warren, joined by Justices Black and Douglas, argued that reversal was required if *Rochin* "is to retain its vitality and stand as more than an instance of personal revulsion against particular police methods." *Id.* at 440. *See also* Kamisar, *Due Process and Criminal Procedure*, in CONSTITUTIONAL LAW HANDBOOK 1, 35 (National Colleges of District Attorneys ed. 1977) ("[i]t is difficult to avoid the conclusion that only personal reaction to the stomach pump, the blood test and electronic surveillance in a bedroom can distinguish the results in *Rochin*, *Breithaupt* and *Irvine*. The *Breithaupt* and *Irvine* dissenters certainly thought so").

287. 347 U.S. at 147 (Frankfurter, J., dissenting).

288. *Rochin*, 342 U.S. at 170 (Frankfurter, J.)

289. *Id.* at 192.

290. *See* Kadish, *supra* note 159, at 329-33. Professor Kadish noted four different sources that the Court frequently considered in seeking to establish prevailing moral judgments: (1) the opinions of the progenitors of American institutions (*e.g.*, colonial history, early state constitutions, and federal constitutions); (2) the implicit opinions of the policy making organs of state governments; (3) the explicit opinions of other American courts; and (4) the opinions of other countries in the Anglo-Saxon tradition. *Id.* at 329-33. Professor Kadish concluded that due process determinations did lend themselves to rational inquiry, although the Court's institutional limitations posed difficulties in pursuing an appropriate inquiry. *Id.* at 346-63.

291. *Id.* at 358-63.

while the fundamental fairness standard might require a more finely tuned analysis than other areas of constitutional adjudication, it rested on a process of rational inquiry entirely consistent with the "nature of our judicial process."[292]

Justice Black's criticism of the fundamental fairness doctrine also rested in part on his assumption that the alternative of relying upon the "clearly marked constitutional boundaries" of specific Bill of Rights guarantees would offer far less room for subjective judgments.[293] Justices favoring the fundamental fairness doctrine challenged this assumption. Justice Harlan, for example, argued that Justice Black's formula for achieving judicial restraint was "more hollow than real."[294] Justice Harlan suggested that the specific provisions of the Bill of Rights often were as amenable to a subjective interpretation as the fundamental fairness standard of due process.[295] Under Justice Black's position, the focus of judicial inquiry would be shifted from the flexible concept of ordered liberty to equally flexible terms found in most of the amendments. Terms like "probable cause," "unreasonable search," and "speedy and public trial" are hardly self-defining.[296] Justice Harlan acknowledged that reliance upon the specifics of the Bill of Rights was likely to produce different results from reliance upon the fundamental fairness doctrine,[297] but the analysis involved would be no less subjective.

Indeed, Justice Black's own position in *Rochin* supports Justice Harlan's response. Justice Black agreed that there had been a constitutional violation in

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292. *Rochin*, 342 U.S. at 170-71 (Frankfurter, J.).

293. Adamson v. California, 332 U.S. 46, 92 (1947) (Black, J., dissenting). Justice Black did not go as far as to suggest that reliance on the specific guarantees would totally eliminate subjectivity. His theory merely was that "unfettered judicial subjectivity [was eliminated] by pinning down constitutional adjudication to the interpretation of specific written language." Kadish, *supra* note 159, at 337. He recognized that not all of the specific guarantees were stated in "absolute and unqualified language," that provisions like the fourth amendment prohibition against unreasonable searches did "require courts to choose between competing policies." Rochin v. California, 342 U.S. 165, 176 (1952) (Black, J., concurring). The fourth amendment, however, itself directed the Court to make such choices; "no express constitutional language grant[ed] . . . judicial power to invalidate *every* state law of *every* kind deemed 'unreasonable' or contrary to the Court's notion of civilized decencies." *Id.* (emphasis in original). *But cf.* J. ELY, *supra* note 34, at 14-41 (discussing impossibility of "clause bound interpretism" in light of open-ended provisions such as due process clause, equal protection clause, and ninth amendment).

294. Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring). Justice Harlan concluded that judicial restraint was best achieved 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." *Id.*; *see also* Duncan v. Louisiana, 391 U.S. 145, 172-83 (1968) (Harlan, J., dissenting).

295. *Griswold*, 381 U.S. at 501 (Harlan, J., concurring).

296. *See* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 937 (1965). Judge Friendly notes:

> There is grave risk of self-delusion in the reiterated references to the declarations of fundamental principles in the Bill of Rights as "specifics" . . . . The Court ought never to forget the reminder of one of its greatest members: "Delusive exactness is a source of fallacy throughout the law." [Texas v. Corrigan, 257 U.S. 312, 342 (1921) (Holmes, J., dissenting).] However ardent the desire may be, no facile formula will enable the Court to escape its assigned task of deciding just what the Constitution protects from state action . . . .

Friendly, *supra*.

297. Pointer v. Texas, 380 U.S. 400, 408-09 (1965) (Harlan, J., concurring); Duncan v. Louisiana, 391 U.S. 145, 172 (1968).

Rochin, but he based that conclusion on the fifth amendment privilege against self-incrimination rather than on the "evanescent" standard of fundamental fairness.[298] To find that the privilege had been violated, however, Justice Black arguably had to make value judgments very much like those required by a fundamental fairness analysis. To treat the stomach pumping as compulsory self-incrimination, Justice Black had to conclude that the privilege extended to obtaining nontestimonial evidence, as well as testimonial evidence, and prohibited physical compulsion, as well as the compulsion of a court order. The highly debatable nature of the first proposition, in particular, is evinced by later cases indicating that a majority of the Court, unlike Justice Black, would not have accepted it.[299] Moreover, as Justice Black's own dissent in one of those later cases indicates, to justify applying the fifth amendment to the compulsion of nontestimonial evidence, one must turn to basically the same kind of analysis of the nature of society's "respect for the dignity of the individual"[300] as was employed in Justice Frankfurter's opinion for the Court in *Rochin*.[301]

II. THE ADVENT OF SELECTIVE INCORPORATION

A. FUNDAMENTAL FAIRNESS AND SELECTIVE INCORPORATION: SIMILARITIES AND DIFFERENCES

During the 1960's the prevailing due process theory shifted from the fundamental fairness doctrine to the selective incorporation doctrine. The two doctrines are much alike in several respects. Both read the due process clause as encompassing only those rights deemed fundamental under an "ordered liberty" standard. Both recognize that the "ordered liberty" standard includes substantive as well as procedural rights and is not limited to rights established by historical usage at the time of the Constitution's adoption.[302] Both agree that the "ordered liberty" standard may encompass rights that extend beyond

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298. *Rochin*, 342 U.S. at 175-77.

299. *See* Schmerber v. California, 384 U.S. 757, 761 (1966) (extraction of blood sample from injured person over his objection does not violate fifth amendment privilege). The majority held that the privilege only prohibits compelling a person "to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Id.* Blood test evidence, "although an incriminating product of compulsion," was not testimonial and did not "relat[e] to some communicative act or writing" of the defendant. *Id.* at 765. Justice Black dissented in *Schmerber* and other cases resting on the distinction between physical and testimonial evidence. *Id.* at 773-78 (Black, J., dissenting); Gilbert v. California, 388 U.S. 263, 277-78 (1967) (Black, J., dissenting).

The *Schmerber* majority accepted the *Rochin* precedent—based upon due process considerations, rather than upon the fifth amendment privilege—but found, on the basis of Breithaupt v. Abram, discussed *supra* note 286, that the case before it "did not offend 'that "sense of justice" ' of which we spoke in *Rochin v. California*, 342 U.S. 165.' " 384 U.S. at 760 (quoting *Breithaupt*, 352 U.S. at 435).

300. *See* Kadish, *supra* note 159, at 347 (suggesting that respect for individual dignity is one value inherent in due process and reflected in self-incrimination privilege).

301. *Compare Rochin*, 342 U.S. at 173 ("[t]o attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence is to ignore the reasons for excluding coerced confessions") *with Schmerber*, 384 U.S. at 775 (Black, J., dissenting) (criticizing the "shadowy distinction" drawn by the majority between "physical evidence" and testimonial evidence, and challenging the "hierarchy of values that allows the State to extract a human being's blood to convict him . . . but proscribes compelled production of his lifeless papers").

302. *See supra* text accompanying notes 153-60 (discussing concept of a flexible, evolving due process that encompasses both procedural and substantive rights and is not tied to historical practice).

the specific Bill of Rights guarantees, as well as rights found within those guarantees.

There is a crucial disagreement, however, about how the "ordered liberty" standard should be used in identifying fundamental rights. Initially, the two doctrines differ in the scope of the right assessed under the "ordered liberty" standard when that right is found in a Bill of Rights guarantee. The fundamental fairness doctrine focuses on that aspect of the guarantee that was denied by a state in a particular case and often assesses the significance of that element of the guarantee in light of the special circumstances of the individual case.[303] The selective incorporation doctrine, on the other hand, focuses on the total guarantee rather than on a particular aspect presented in an individual case. It assesses the fundamental nature of the guarantee as a whole rather than any one principle based on the guarantee. For example, in *Palko v. Connecticut*[304] the Court asked whether the ordered liberty standard required freedom from "that kind of double jeopardy" imposed upon the defendant Palko.[305] In a selective incorporation inquiry the Court would ask whether the general prohibition against double jeopardy is "fundamental to the American scheme of justice."[306]

The difference in the scope of the right assessed carries over to the scope of the rulings under the two doctrines. Theoretically, fundamental fairness rulings should go no further than to establish due process protection parallel to the one aspect of the Bill of Rights guarantee presented in the particular case.[307] Selective incorporation, however, judges the guarantee as a whole and produces a ruling that encompasses the full scope of the guarantee. Under selective incorporation, when a guarantee is found to be fundamental, due process "incorporates" the guarantee and extends to the states the same standards that apply to the federal government under that guarantee. Thus, under selective incorporation a ruling that a particular guarantee is within the "ordered liberty" concept carries over to the states the "entire accompanying doctrine" interpreting that guarantee.[308] This has led some commentators to describe selective incorporation as giving a "wholesale character" to each such ruling.[309]

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303. The fundamental fairness rulings varied in the weight they gave to the special circumstances of the case and arguably were not always consistent in this regard. For example, Kamisar, *supra* note 235, at 1101-02, notes that the Supreme Court in Wolf v. Colorado, 338 U.S. 25 (1949), apparently gave no consideration to the facts of the illegal search, which suggests that no exclusion of illegally seized evidence would be required no matter how egregious the invasion of privacy. On the other hand, in Rochin v. California, 342 U.S. 165 (1952), the offensiveness of the police methods in that case was key to the finding of a due process violation. *Id.* at 172-74. The Court in Irvine v. California, 347 U.S. 128 (1954), again considered the particular police conduct in that case, but found no violation. *Id.* at 133. *See also supra* text accompanying notes 234-37, 272-86 (discussing *Wolf, Rochin*, and *Irvine*).

304. 302 U.S. 319 (1937).

305. *Id.* at 327. *See supra* text accompanying note 242 (discussing application of fundamental fairness doctrine in *Palko*).

306. *See* Duncan v. Louisiana, 391 U.S. 145, 148 (1968).(discussed *infra* in text accompanying notes 311-13, 357-59).

307. Not all fundamental fairness rulings were so limited, however. See, for example, the rulings on first amendment rights and the right to just compensation for appropriated property, discussed *supra* in the text accompanying note 264 and *infra* in the text accompanying notes 437-43. See also the positions taken by Justices Clark and Stewart, discussed *infra* in the text accompanying note 375.

308. Malloy v. Hogan, 378 U.S. 1, 16 (1964) (Harlan, J., dissenting).

309. Amsterdam, *supra* note 3, at 294-95; *see also* G. GUNTHER, CONSTITUTIONAL LAW 488 (10th ed. 1980) (discussing "wholesale" approach of Court).

The selective incorporation doctrine also departs from the fundamental fairness doctrine in its analysis of the "ordered liberty" concept. Whereas the fundamental fairness doctrine asks whether a "fair and enlightened system of justice" would be "impossible" without a particular safeguard,[310] the selective incorporation doctrine "proceed[s] upon the . . . 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."[311] Accordingly, it directs a court to test the fundamental nature of a right within the context of that common law system of justice, rather than against some hypothesized "civilized system" or a foreign system growing out of different traditions.[312] The question to be asked, the Court has noted, is whether a procedure "is necessary to an Anglo-American regime of ordered liberty."[313] Consistent with this approach, the Court gives considerable weight to the very presence of a right within the Bill of Rights because that presence reflects an important body of opinion as to the need for such a right in a common law system.[314]

B. THE DECISIONS OF THE SIXTIES

The shift from fundamental fairness to selective incorporation began with a series of Supreme Court majority opinions sufficiently ambiguous to make it uncertain whether the Court had adopted selective incorporation as the majority position. The Court's failure to explicitly recognize the new doctrine probably stemmed in part from the composition of the majority in those earlier cases. In each instance, the opinion for the Court was joined by at least one Justice who did not accept the new doctrine, but apparently found equally broad protection of the particular right under a very liberal view of the fundamental fairness doctrine.[315] In addition, two Justices joining the majority, Jus-

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310. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

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

312. *Id.*

313. *Id.* at 150 n.14. The emphasis on applying the "ordered liberty" standard in the context of an Anglo-American system of justice is found primarily in cases dealing with procedural rights. The Anglo-American process of adjudication does, of course, differ in many respects from the civil law systems found in many other countries. Arguably, the uniqueness of America's traditions, political structure, and institutions should lead to a similar emphasis on an American concept of justice in evaluating matters of substantive due process. In assessing the fundamental nature of those substantive limitations that have a direct bearing upon the criminal justice process, for example, the prohibition against cruel and unusual punishment, the Court has looked to American traditions. *See* Robinson v. California, 370 U.S. 660, 666-67 (1962) (noting general recognition in this country that persons addicted to drugs are "in a state of mental and physical illness").

314. *See* Pointer v. Texas, 380 U.S. 400, 404 (1965) (inclusion of right to confront witness in sixth amendment indicates it is fundamental); Washington v. Texas, 388 U.S. 14, 18 (1967) (court has "increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process"); Bloom v. Illinois, 391 U.S. 194, 212 (1968) (Fortas, J., concurring) (Bill of Rights is guide for content of due process); *see also* Duncan v. Louisiana, 391 U.S. 145, 183 (1960) (Harlan, J., dissenting) (criticizing selective incorporation cases for having defined "fundamental" as meaning basically " 'old,' 'much praised' and 'found in the Bill of Rights' ").

315. Justice Stewart joined the opinion of the Court in Gideon v. Wainwright, 372 U.S. 335 (1963), wrote the opinion for the Court in Robinson v. California, 370 U.S. 660 (1962), and joined the plurality opinion in Ker v. California, 374 U.S. 23 (1963). He wrote separately, however, rejecting selective incorporation, in Pointer v. Texas, 380 U.S. 400, 409 (1965) (Stewart, J., concurring), and joined Justice Harlan's dissents criticizing the selective incorporation doctrine in Duncan v. Louisiana, 391 U.S. 145,

tices Black and Douglas, probably had not yet relinquished their hope of gaining majority support for total incorporation.[316]

The first of these cases that arguably produced the complete incorporation of a Bill of Rights guarantee was *Mapp v. Ohio*,[317] which overruled in part *Wolf v. Colorado*[318] and held that due process required exclusion of unconstitutionally seized evidence.[319] Noting that *Wolf* had recognized that due process encompassed the "basic search and seizure prohibition" of the fourth amendment,[320] the Court reasoned that it logically followed that due process should enforce that prohibition through the one remedy that was equally a part of the fourth amendment.[321] *Mapp* made it clear that the fourth amendment right of privacy protected by due process would be enforced by "the same sanction of exclusion as is used against the Federal Government."[322] It was unclear, however, whether that right of privacy incorporated precisely the same standards for judging the constitutionality of state searches as were applied under the fourth amendment. Although *Mapp*'s description of *Wolf* seemed to support the view that the same standards should be applied,[323] *Wolf* itself had been decided under a fundamental fairness analysis that might give a narrower scope to what the Court in *Wolf* described as that privacy "at the *core* of the Fourth Amendment."[324] Two years after *Mapp*, however, in *Ker v. California*[325] the Court erased any doubts as to whether *Mapp* fully incorporated the fourth amendment. The constitutionality of state searches, the Court held, should be judged under precisely the same standards applied to federal

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171 (1968) (Harlan, J., dissenting), and Benton v. Maryland, 395 U.S. 784, 801 (1969) (Harlan, J., dissenting). Justice Stewart, in a separate opinion in Williams v. Florida, 399 U.S. 78 (1969), stated: "I think this theory is incorrect as a matter of constitutional history, and that as a matter of constitutional law it is both stultifying and unsound." *Id.* at 143 (Stewart, J., concurring).

Justice Clark wrote the majority opinion in Mapp v. Ohio, 367 U.S. 643 (1961), and the plurality opinion in Ker v. California, 374 U.S. 23 (1963), but joined Justice Harlan's dissent criticizing selective incorporation in Malloy v. Hogan, 378 U.S. 1, 14 (1964) (Harlan, J., dissenting).

316. *See* Gideon v. Wainwright, 372 U.S. at 345-47 (Douglas, J., concurring). The votes of Justices Black and Douglas were crucial to the support of selective incorporation throughout the 1960's because no more than four other Justices supported the doctrine at any one time. From 1962 to 1965 additional support came from Chief Justice Warren and Justices Brennan, Goldberg, and White. Justice Fortas, who replaced Justice Goldberg in 1965, did not support the doctrine in its entirety. *See infra* text accompanying notes 376-81 (discussing Justice Fortas' views). Justice Marshall, however, who replaced Justice Clark in 1967, fully supported the doctrine. *See* Benton v. Maryland, 395 U.S. 784 (1969) (Marshall opinion applying selective incorporation doctrine).

317. 367 U.S. 643 (1961).

318. 338 U.S. 25 (1949).

319. 367 U.S. at 655-56.

320. *Id.* at 654 (quoting Irvine v. California, 347 U.S. 128, 134 (1954)).

321. 367 U.S. at 655. Justice Black joined the majority opinion, providing the necessary fifth vote, but he noted in a concurring opinion that he viewed the exclusionary rule as required by "the interrelationship between the Fourth and Fifth Amendments," rather than the fourth amendment alone. *Id.* at 662 (Black, J., concurring).

322. *Id.* at 655.

323. The *Mapp* Court noted that *Wolf* had rendered "the Fourth Amendment's right of privacy" enforceable against the states and had extended "the substantive protections of due process to all constitutionally unreasonable searches—state or federal." *Id.* at 655-56. Earlier in *Mapp*, however, the Court described *Wolf* as applying the "*basic* search and seizure prohibition" of the fourth amendment to the states. *Id.* at 654 (emphasis added) (quoting Irvine v. California, 347 U.S. 128, 134 (1954)).

324. 338 U.S. at 27 (emphasis added); *see also supra* note 235 (discussing scope of due process protection under *Wolf*).

325. 374 U.S. 23 (1963).

searches under the fourth amendment.[326]

The year following *Mapp*, in *Robinson v. California*,[327] the Supreme Court held that due process was violated by a state statute making it a crime to be addicted to narcotics.[328] Any punishment of the mere status of addiction, the Court found, constitutes "cruel and unusual punishment in violation of the Fourteenth Amendment."[329] Justice Stewart, who had not yet taken a firm position on the selective incorporation doctrine, wrote the opinion for the Court.[330] His opinion indicated that at least certain violations of the eighth amendment would also violate due process,[331] but left uncertain whether due process prohibited all punishments that would violate the eighth amendment. In later years, however, the Court read *Robinson* as having decided that due process does exactly that.[332]

Gideon v. Wainwright,[333] decided the next year, arguably was the first case to explicitly adopt the selective incorporation analysis.[334] Justice Black's opinion for the Court in *Gideon*, however, was not without ambiguities. Overruling *Betts v. Brady*,[335] *Gideon* held that the fourteenth amendment requires appointment of counsel in state courts under the same standard that the sixth amendment imposes on federal courts.[336] Justice Black read the prior due process cases as holding "that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the states by the Fourteenth Amendment."[337] The *Brady* Court had erred, he argued, when it concluded that the sixth amendment right to counsel was not such a fundamental right.[338]

In suggesting that the full guarantee was "made obligatory upon the states," Justice Black's analysis was clearly contrary to the fundamental fairness doctrine. His opinion, however, failed to acknowledge the true fundamental rights analysis of *Betts v. Brady*. That case had not totally rejected the fundamental character of the sixth amendment right to counsel; rather, it had found that the

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326. *Id.* at 30-31. The reference was to constitutional standards alone. The Court noted that there were additional "principles governing the admissibility of evidence in federal criminal trials," imposed pursuant to the Court's "supervisory authority over the administration of justice in the federal courts," that related to federal searches. *Id.* at 31.

327. 370 U.S. 660 (1962).

328. *Id.* at 667.

329. *Id.*

330. *See supra* note 315 (discussing Justice Stewart's participation in apparently conflicting opinions on selective incorporation); *infra* text accompanying note 375 (same).

331. Justice Stewart did not discuss the issue of incorporation, but merely cited *Louisiana ex rel. Francis v. Resweber*, discussed *supra* at note 239, in concluding that punishment of a disease "would doubtless be . . . an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 370 U.S. at 666. *Francis* was based upon a fundamental fairness analysis and did not suggest that eighth and fourteenth amendment protections against cruel and unusual punishment were necessarily coextensive.

332. Gideon v. Wainwright, 372 U.S. 335, 341-42 (1963); Pointer v. Texas, 380 U.S. 400, 412 (Goldberg, J., concurring); Furman v. Georgia, 408 U.S. 238, 240-41, 257-58 n.1 (1972) (Brennan & Douglas, JJ., concurring).

333. 372 U.S. 335 (1963).

334. *See* L. LUSKY, BY WHAT RIGHT? 161 (1975) (*Gideon* "inaugurated the process of *selective* 'incorporation' ").

335. 316 U.S. 455 (1942); see *supra* text accompanying notes 232-33 (discussing *Betts v. Brady*).

336. 372 U.S. at 342.

337. *Id.*

338. *Id.*

right was fundamental under some circumstances and not others.[339] The doctrinal significance of overruling *Brady* was therefore muddied. Justice Harlan, in a concurring opinion, noted his understanding that the Court had not departed from the fundamental fairness principles of *Palko v. Connecticut*,[340] nor embraced the concept "that the Fourteenth Amendment 'incorporates' the Sixth Amendment as such."[341] Justice Douglas, in a separate concurrence, disagreed.[342] He described the fundamental fairness approach as reflecting a "view that a guarantee of the Bill of Rights that is made applicable to the States by reason of the Fourteenth Amendment is a lesser version of the same guarantee as applied to the Federal Government" and noted that that view simply "ha[d] not prevailed."[343]

The following year, in *Malloy v. Hogan*,[344] the Court clearly indicated that Justice Douglas' response to Justice Harlan was the majority view.[345] *Malloy* held that the privilege against self-incrimination was a fundamental right and therefore safeguarded against state action under the applicable federal standard of the fifth amendment.[346] Rejecting the prosecution's contention that due process protection might be "less stringent" than that provided by the fifth amendment itself, the Court noted that cases such as *Ker v. California*[347] and *Gideon* had "rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down,' subjective version of the individual guarantees of the Bill of Rights."[348] Once the Court had determined, upon analysis of an entire guarantee,[349] that it protected a fundamental right, that guarantee "[was to] be enforced against the States under the Fourteenth Amendment according to the same standards that . . . [protect] against federal encroachment."[350]

Malloy left no doubt that selective incorporation had become the prevailing doctrine, and a series of cases decided during the remainder of the decade reaffirmed that position. Those cases held applicable to the states, under the same standards applied to the federal government, the sixth amendment rights to a speedy trial,[351] to a trial by jury,[352] to confront opposing witnesses,[353] and to compulsory process for obtaining witnesses,[354] and the fifth amendment

339. *See supra* notes 232-33 and accompanying text (discussing *Brady*).
340. *See supra* notes 238-44 and accompanying text (discussing *Palko*).
341. *Gideon*, 372 U.S. at 352 (Harlan, J., concurring).
342. *Id.* at 345 (Douglas, J., concurring).
343. *Id.* at 346-47 (Douglas, J., concurring).
344. 378 U.S. 1 (1964).
345. *Id.* at 10-11.
346. *Id.* at 3.
347. 374 U.S. 23 (1963).
348. *Malloy*, 378 U.S. at 10-11 (quoting Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 275 (1960)).
349. *Malloy*, 378 U.S. at 10. In determining that the fifth amendment privilege was fundamental, *Malloy* did not look to the particular fifth amendment standard involved in the particular case, the standard requiring a judge to accept a claim of the privilege unless it is "perfectly clear" that the witness' answer "cannot possibly" furnish a link in the chain of evidence needed to prosecute. Instead, *Malloy* considered the entire privilege, noting its recognition in past cases as an "essential mainstay" of an accusatorial system of justice, and determined that it was obligatory on the state. *Id.* at 7-8.
350. *Id.* at 10.
351. Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).
352. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).
353. Pointer v. Texas, 380 U.S. 400, 403 (1965).
354. Washington v. Texas, 388 U.S. 14, 18-19 (1967).

prohibition against double jeopardy.[355] In each of these cases the Court applied a selective incorporation analysis, and in two instances it overruled long-standing fundamental fairness decisions.[356] Moreover, in *Duncan v. Louisiana*[357] the Court noted that it had narrowed the focus of the inquiry under the "ordered liberty" standard; the crucial issue was not whether a particular right was "fundamental to fairness in every criminal system that might be imagined," but whether it was "fundamental in the context of the criminal processes maintained by the American States."[358] The *Duncan* Court recognized that this approach, along with the focus on the nature of the right as a whole,[359] was far more likely to produce a finding that a particular right was implicit in the concept of "ordered liberty."[360]

By the end of the decade the Court had, as Justice Brennan later noted, changed the "face of the law."[361] The decisions of the 1960's had selectively incorporated all but four of the Bill of Rights guarantees relating to the criminal justice process: public trial, notice of charges, prohibition of excessive bail, and prosecution by indictment. Of these four remaining guarantees, it seemed likely that all except prosecution by indictment would be held to be fundamental once they were squarely presented for decision. *In re Oliver*,[362] a 1948 ruling that found a due process violation in a denial of a public trial, had been described in dictum as having selectively incorporated that sixth amendment guarantee.[363] Because *Oliver* also spoke of due process protection of "[a] person's right to reasonable notice of a charge against him,"[364] a similar reading

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355. Benton v. Maryland, 395 U.S. 784, 787 (1969).

356. *Benton* overruled Palko v. Connecticut, 302 U.S. 319 (1937). 395 U.S. at 794. *Duncan* overruled Maxwell v. Dow, 176 U.S. 581 (1900). 391 U.S. at 155. *See also* note 419 (discussing selective incorporation overrulings).

357. 391 U.S. 145 (1968).

358. *Id.* at 149 n.14. *See supra* text accompanying notes 310-14 (discussing narrowed analysis of "ordered liberty" concept under selective incorporation doctrine).

359. Although the precise issue posed in *Duncan* was whether due process was violated by the failure to provide a jury trial on a misdemeanor charge punishable by two years imprisonment, the Court's analysis of the fundamental nature of the sixth amendment right treated the importance of the right to jury trial in general. 391 U.S. at 146-57. Only after the Court held that the sixth amendment right was fundamental did it consider whether the right applied to a two year misdemeanor charge. *Id.* at 159-62.

360. *Id.* at 150, n.14. The Court stated:

> When the inquiry is approached in this way the question whether the States can impose criminal punishment without granting a jury trial appears quite different from the way it appeared in the older cases opining that States might abolish jury trial. See, e.g., Maxwell v. Dow, 176 U.S. 581 (1900). A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. Yet no American State has undertaken to construct such a system. . . . In every State . . . the structure and style of the criminal process—the supporting framework and the subsidiary procedures—are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial.

Id.

361. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493 (1977) (also referring to cases of the same period expanding the scope of particular guarantees).

362. 333 U.S. 257 (1948).

363. *See* Washington v. Texas, 388 U.S. 14, 18 (1967) (listing public trial as one of the sixth amendment rights "held applicable to the States" and citing *Oliver*); Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (including right to public trial among list of incorporated rights and citing *Oliver*).

364. 333 U.S. at 273 (1948).

seemed likely concerning the notice provision of the sixth amendment.[365] Possible incorporation of the eighth amendment's prohibition of excessive bail was perhaps more questionable, but early in the 1970's the Court indicated that it was likely to deem that provision fundamental also.[366] The only guarantee that appeared unlikely to be incorporated was the fifth amendment requirement of prosecution by indictment; *Hurtado v. California*,[367] which held that prosecution by indictment was not obligatory on the states,[368] continued to be accepted without challenge.[369]

The selective incorporation opinions of the 1960's were never unanimous. Justice Harlan was the most persistent objector. He could find "no support either in history or reason"[370] for what he described as "little more than a diluted form" of the previously "discredited" total incorporation theory.[371] He urged continued application of the traditional fundamental fairness approach, although he apparently had no quarrel with *Duncan*'s insistence that the fundamental nature of a right be determined within the context of an "Anglo-American regime of ordered liberty."[372] Justice Harlan reached the same result as the Court in several cases,[373] but he stressed that his rulings were limited to the particular aspect of the Bill of Rights guarantee presented in the individual case.[374] On occasion Justices Stewart and Clark joined Justice Harlan's criticism of the selective incorporation doctrine; they also joined opinions, however, in which the Court indicated that the due process clause

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365. Without mentioning the sixth amendment, the Court in Cole v. Arkansas, 333 U.S. 196 (1948), also found that notice of the specific charge is a constitutional right of every accused in state and federal courts and that denial of notice is a violation of due process. *Id.* at 201. *See* notes 245-46 and accompanying text (discussing *Cole*).

366. In Schilb v. Kuebel, 404 U.S. 357 (1971), the Court found it unnecessary to reach that issue, but noted that "[b]ail, of course, is basic to our system of law . . . and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment." *Id.* at 365.

367. 110 U.S. 516 (1884).

368. *Id.* at 538; *see also supra* text accompanying notes 180-90 (discussing *Hurtado*).

369. *See, e.g.,* Beck v. Washington, 369 U.S. 541, 545 (1962) (noting consistent denial of grand jury for state prosecutions since *Hurtado*); Alexander v. Louisiana, 405 U.S. 625, 633 (1932) (federal concepts of "grand jury" not obligatory on states); Gerstein v. Pugh, 420 U.S. 102, 119 (1975) (approving prosecution by information). *See also supra* note 263 (citing earlier decisions reaffirming *Hurtado*).

370. Benton v. Maryland, 395 U.S. 784, 808 (1969) (Harlan, J., dissenting).

371. Pointer v. Texas, 380 U.S. 400, 408-09 (1965) (Harlan, J., concurring).

372. Duncan v. Louisiana, 391 U.S. 145, 179 (1968) (Harlan, J., dissenting); *see supra* text accompanying note 313 (describing Anglo-American approach to ordered liberty concept). In applying the fundamental fairness doctrine, Justice Harlan looked to Anglo-American sources, but gave much less weight than the majority to a particular prohibition's inclusion in the Bill of Rights. *Duncan*, 391 U.S. at 179 (Harlan, J., dissenting); *see Benton*, 395 U.S. at 808 (Harlan, J., dissenting) (criticizing Court's use of Bill of Rights in determination of fundamental rights); *supra* note 314 and accompanying text (discussing Court's reliance on Bill of Rights to determine fundamental rights).

373. See Justice Harlan's concurring opinions in Washington v. Texas, 388 U.S. 14, 23 (1967), Pointer v. Texas, 380 U.S. 400, 408 (1965), and Gideon v. Wainwright, 372 U.S. 335, 349 (1963). Justice Harlan continuously stressed, however, that the difference between a fundamental fairness approach and a selective incorporation approach "is not an abstract one whereby different verbal formulae achieve the same results." Williams v. Florida, 399 U.S. 78, 129 (1970) (Harlan, J., concurring).

374. *See, e.g., Washington*, 388 U.S. at 24-25 (Harlan, J., concurring) (denial of defendant's right to call codefendant as witness violates due process); *Pointer*, 382 U.S. at 408-09 (Harlan, J., concurring) (use of preliminary examination testimony of witness not subject to cross-examination violates due process); *Gideon*, 372 U.S. at 352 (Harlan, J., concurring) (indigent defendants in felony cases have a due process right to appointed counsel).

made a particular guarantee fully applicable to the states.[375] They apparently believed that the fundamental fairness standard, as to that guarantee, required protection parallel to that provided against the federal government.

Justice Fortas expressed perhaps the most significant disagreement with the majority, from the viewpoint of its subsequent impact, in *Duncan v. Louisiana.*[376] Unlike Justices Harlan, Stewart, and Clark, Justice Fortas apparently accepted selective incorporation as the general rule.[377] A guarantee like the jury trial provision, however, required a different approach. Justice Fortas noted that the Court here was concerned with "more than a principle of justice applicable to individual cases."[378] The sixth amendment also imposed a "system of administration"; it prescribed, for example, the size of the jury (twelve) and the form of their verdict (unanimous).[379] Such requirements, he argued, might very well not be fundamental and, therefore, should not be applied to the states.[380] It was not necessary to adhere so "slavishly" to the selective incorporation doctrine as to impose upon the states the total sixth amendment guarantee, including "all its bag and baggage, however securely or insecurely affixed they may be by law and precedent . . . ."[381]

Responding to Justice Fortas' concern, as well as to Justice Harlan's warning against incorporation "jot-for-jot and case-by-case,"[382] the *Duncan* majority acknowledged that previous interpretations of the sixth amendment, relating to such matters as jury size, may have been influenced by the fact that they would apply only in the "limited environment" of the federal courts, where "uniformity is a more obvious and immediate consideration."[383] The Court noted, however, that "our decisions interpreting the Sixth Amendment are always subject to reconsideration."[384]

C. SELECTIVE INCORPORATION IN THE POST-1960'S

In the years since the 1960's the battle over selective incorporation has been fought primarily in cases in which a substantial number of Justices believed that a pre-incorporation precedent interpreting a particular guarantee should not be applied to the states. The choice posed for those Justices has been between a route the *Duncan* majority seemed to suggest and a return to fundamental fairness analysis. If they chose the route suggested by *Duncan*, they could reconsider the past precedent and hold it no longer to be required by the guarantee, thus avoiding application to the states while adhering to the concept

375. *See supra* note 315 (reviewing votes of Justices Stewart and Clark on selective incorporation issues).

376. 391 U.S. 145, 211 (1968) (Fortas, J., concurring).

377. Justice Fortas joined the opinions for the Court in Klopfer v. North Carolina, 386 U.S. 213 (1967), and Washington v. Texas, 388 U.S. 14 (1967). In *Duncan* he noted his agreement with the incorporation of the first amendment, the fourth amendment, the fifth amendment privilege against self-incrimination, and the sixth amendment rights to counsel and to confrontation. 391 U.S. at 214 (Fortas, J., concurring).

378. *Duncan*, 391 U.S. at 214 (Fortas, J., concurring).

379. *Id.*

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

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

382. *Id.* at 181 (Harlan, J., dissenting).

383. *Id.* at 158 n.30.

384. *Id.*

of full application of all incorporated guarantees. If they chose to return to fundamental fairness, they could retain the prior interpretation, but discard the concept of full application, and hold that the interpretation related to a matter not sufficiently fundamental to extend to the states. In each instance, the majority of the Court favored the *Duncan* alternative and adhered to the concept of full application of all incorporated guarantees.

The first case to present this choice was *Williams v. Florida*,[385] which challenged the sixth amendment requirement of a twelve-person jury.[386] The majority adhered to full incorporation of the sixth amendment right to jury trial,[387] but found that earlier cases assuming that a jury must contain twelve persons had gone beyond the basic protection provided by the jury trial guarantee.[388] Justice Harlan argued that the Court had taken a "circuituous route" to reach a result proper in a state case, but not in a federal case.[389] He urged a return to the fundamental fairness doctrine because that route would permit the states to retain six-person juries, while giving full recognition to the history of the sixth amendment, which clearly mandated twelve-person juries.[390] Justice Harlan stood alone on this approach, however.[391]

Two years later, in a very similar case, again only one Justice expressed a preference for the fundamental fairness doctrine, although that preference determined the outcome of the case. *Apodaca v. Oregon*[392] presented the question whether a state could allow a less than unanimous jury verdict.[393] Eight Justices proceeded from a selective incorporation viewpoint and treated the question as requiring an interpretation of the sixth amendment, made applicable to the states through the fourteenth amendment. Four Justices concluded that the sixth amendment required unanimity,[394] and four concluded that it permitted nonunanimous verdicts of the type involved in the *Apodaca* case.[395]

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385. 399 U.S. 78 (1970).

386. The issue in *Williams* was whether a state could use a six person jury to try a noncapital felony offense. *Id.*

387. *Id.*

388. *See id.* at 90-103 (discussing history of twelve person jury and holding six person jury constitutional).

389. *Id.* at 118-19 (Harlan, J., concurring).

390. *Id.* at 129-38 (Harlan, J., concurring).

391. Justice Stewart, who had joined Justice Harlan's dissent in *Duncan*, 391 U.S. at 171 (Harlan, J., dissenting), joined the majority opinion in *Williams*, 399 U.S. at 78, apparently because he felt bound by the *Duncan* precedent. *See* Apodaca v. Oregon, 406 U.S. 404, 414 (1972) (Stewart, J., dissenting) (relying on *Duncan* in concluding unanimous verdict required). Chief Justice Burger also did not join Justice Harlan in *Williams*, 399 U.S. at 117 (Harlan, J., dissenting). However, he later advocated a return to the fundamental fairness doctrine in at least some settings. *See infra* notes 399 & 401 (discussing opinions joined by Chief Justice Burger that argue against selective incorporation).

392. 406 U.S. 404 (1972).

393. *Id.* at 406. *Apodaca* involved a 10-2 verdict in a felony case. A companion case, Johnson v. Louisiana, 406 U.S. 356 (1972), upheld a 9-3 verdict in a felony case. *Id.* at 363. *Johnson* had arisen before *Duncan* and therefore was decided on the basis of the due process clause without reference to an incorporated sixth amendment. *Id.* at 358-59.

394. These dissenting Justices in *Apodaca* were Justice Douglas, 406 U.S. at 381, Justice Brennan, *id.* at 396, Justice Marshall, *id.* at 400, and Justice Stewart, *id.* at 414. Justices Brennan, Marshall and Stewart also dissented in *Johnson*, discussed *supra* note 393, and thus found nonunanimous jury verdicts unconstitutional with or without incorporation of the sixth amendment. Justice Douglas relied upon the sixth amendment in both cases.

395. *Id.* at 406. Justice White wrote the plurality opinion, which Chief Justice Burger, Justice Blackmun, and Justice Rehnquist joined. *Id.*

Justice Powell argued that this was an appropriate situation for application of the more flexible fundamental fairness doctrine.[396] Applying that doctrine, he would hold that a state could utilize nonunanimous jury verdicts,[397] although he would reach the opposite result for federal cases under the sixth amendment.[398] Because Justice Powell contributed the deciding vote in the case, the state's use of nonunanimous verdicts was therefore upheld, even though the same Court would have reached a different result in a federal case under the sixth amendment.

Justice Powell persisted in the position he urged in *Apodaca* and subsequently gained the support of Chief Justice Burger and Justice Rehnquist.[399] In *Crist v. Bretz*[400] Justice Powell extended that position to a double jeopardy problem, arguing that the due process standard for when double jeopardy attaches should be more flexible than the fifth amendment standard previously applied in federal cases.[401] As in *Apodaca*, however, the majority adhered to selective incorporation and held that the attachment of jeopardy occurred at the same point in both federal and state cases.[402]

Even if the challenge presented to the selective incorporation doctrine in cases such as *Apodaca* and *Crist* had been successful, it would not have destroyed the heart of the doctrine. Justice Powell's opposition to "jot-for-jot" incorporation is very much like that of Justice Fortas.[403] Although he has carried his opposition beyond the jury trial right, Justice Powell has expressed concern only about applying to the states requirements that he characterizes as "details" of constitutional administration.[404] He has not suggested that the Court return to a fundamental fairness doctrine in dealing with search and seizure, speedy trial, or various other criminal procedural rights.[405] Justice Rehnquist has suggested that he would like a broader return to fundamental

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396. *Id.* at 373 (Powell, J., concurring).

397. *Id.*

398. *Id.* at 371 (Powell, J., concurring).

399. See Ballew v. Georgia, 435 U.S. 223 (1978), in which Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, expressed his opposition to "full incorporation of the Sixth Amendment," but agreed that a five member jury violates due process. *Id.* at 245-46 (Powell, J., concurring). *See also* Ludwig v. Massachusetts, 427 U.S. 618, 632 (1976) (Powell, J., concurring) (fourteenth amendment right to jury trial not same as sixth amendment right).

400. 437 U.S. 28 (1978).

401. *Id.* at 52-53 (Powell, J., dissenting). Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, argued that attachment of jeopardy under the fifth amendment did not occur until the first witness was sworn. *Id.* at 51-52. If it did occur, however, with the empanelment of the jury, as prior federal cases suggested, then the swearing of the first witness should still be a satisfactory starting point in state cases under a more flexible due process standard. *Id.* at 52-53. On this issue, Justice Powell noted, there was "no basis" for "jot-for-jot" incorporation under the fourteenth amendment. *Id.* at 53.

402. *Id.* at 38.

403. *See supra* text accompanying notes 376-81 (discussing Justice Fortas' disagreement with selective incorporation doctrine).

404. *Apodaca*, 406 U.S. at 375 (Powell, J., concurring) (referring to "details of the Federal Sixth Amendment standards").

405. *See* Israel, *supra* note 3, at 1331 (Justice Powell applies same constitutional standards for search and seizure and speedy trial in federal and state proceedings); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 440 n.23 (1974) (Justice Powell applied federal fourth amendment terms to state search and seizure issues); *see also* Johnson v. Louisiana, 406 U.S. 356, 375 n.15 (1972) (Powell, J., concurring) (rejection of incorporation of sixth amendment right to jury unanimity does not require rejection of every incorporation precedent).

fairness analysis,[406] but has yet to advocate an across-the-board rejection of selective incorporation. Thus, at least for the near future, a full scale revival of the fundamental fairness versus selective incorporation controversy is unlikely. To appreciate why the doctrine remains stable, notwithstanding a Court composition considerably different from that of the 1960's, closer attention must be given to the rationale underlying the selective incorporation doctrine.

III. THE RATIONALE OF SELECTIVE INCORPORATION

In 1965 Judge Henry Friendly, speaking of selective incorporation, noted that "it does seem extraordinary that a theory going to the very nature of our Constitution and having such profound effects for all of us should be carrying the day without ever having been explicated in a majority opinion of the Court."[407] Although selective incorporation continues to "carry the day," the Court has yet to offer a full-fledged exposition of the doctrine's underlying justifications. Although numerous opinions have described the doctrine's application,[408] and *Duncan v. Louisiana*[409] explained the shift in the focus of the "ordered liberty" standard,[410] no majority opinion has set forth in detail the rationale that supports the doctrine as a whole. Indeed, there are those who argue that the doctrine has no coherent constitutional rationale.[411] They contend that it constitutes no more than a result-oriented modification of the total incorporation theory—an attempt to achieve total incorporation, minus the civil jury trial and grand jury guarantees.[412] The Court simply wanted to expand fourteenth amendment protection of civil liberties by applying to the states all but two of the constitutional guarantees, and selective incorporation was created as a doctrine that would eventually lead to exactly that result. Selective incorporation, they argue, is a doctrine that lacks the textual and historical support of either total incorporation or fundamental fairness and is justified only by its end product.[413]

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406. *See* Buckley v. Valeo, 424 U.S. 1, 291 (1976) (Rehnquist, J., concurring). Justice Rehnquist's view is that "not all the strictures which the First Amendment imposes upon Congress are carried over against the States by the Fourteenth Amendment, but rather it is only the 'general principle' of free speech . . . that the latter incorporates." *Id.*

407. Friendly, *supra* note 296, at 934. Graham states that

> [t]his process has been called "selective incorporation," "absorption," "inclusion," and other names by various legal scholars, who have been unable to agree on a label for the theory because the Supreme Court has never explained it in detail in a majority opinion and thus has had no occasion to give it a name. While this is only a minor embarrassment to the Supreme Court, it permits critics to point out that, however handy or beneficial the "selective incorporation" theory has been as an instrument of legal change, there seems to be no clear constitutional rationale for it.

F. GRAHAM, THE SELF INFLICTED WOUND 44 (1970).

408. *See* Benton v. Maryland, 395 U.S. 784, 794 (1969) (describing application of the doctrine in various 1960's cases); Duncan v. Louisiana, 391 U.S. 145, 148-50 (1968) (same).

409. 391 U.S. 145 (1968).

410. *Id.* at 149 n.14; *see supra* notes 310-14, 357-60 and accompanying text (discussing emphasis on role of the guarantee within an "Anglo-American regime of ordered liberty").

411. Duncan v. Louisiana, 391 U.S. 145, 174-76 (1968) (Harlan, J., dissenting); Pointer v. Texas, 380 U.S. 400, 409 (1965) (Harlan, J., concurring); L. LUSKY, *supra* note 334, at 163; Henkin, *supra* note 5, at 77.

412. L. LUSKY, *supra* note 334, at 163.

413. *Duncan*, 391 U.S. at 176, 180-81 (Harlan, J., dissenting); *Pointer*, 380 U.S. at 409 (Harlan, J., concurring); Henkin, *supra* note 5, at 77-78. Professor Henkin argues that

Although the Court has not responded to such criticism, individual Justices have. They have set forth in their separate opinions several justifications for the shift from fundamental fairness to selective incorporation.[414] Together they offer four reasons why selective incorporation provides a truer application of the "ordered liberty" standard than a fundamental fairness analysis: (1) selective incorporation is consistent with the earlier due process decisions, which recognized that "ordered liberty" looked to the "absorption" of individual guarantees;[415] (2) selective incorporation reduces the potential for "impermissible subjective judgments" in defining due process;[416] (3) selective incorporation promotes certainty in the law and thereby facilitates state court enforcement of due process standards;[417] and (4) selective incorporation places in more appropriate perspective the "legitimate interests of federalism."[418] It is not clear whether each supporter of selective incorporation would accept all four of these interrelated justifications. It is certain, however, that they all have relied upon at least one of the four.

A. PRIOR PRECEDENT AND THE "ABSORPTION" OF INDIVIDUAL GUARANTEES

It may seem strange that a doctrine that resulted in the overruling of so many decisions[419] has been justified by reference to prior precedent, but sev-

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> [s]elective incorporation finds no support in the language of the amendment, or in the history of its adoption. Indeed it is more difficult to justify than Justice Black's position that the Bill of Rights was wholly incorporated. There is some evidence that some persons associated with the adoption of the amendment contemplated that it might apply the Bill of Rights to the states. There is no evidence, and it is difficult to conceive, that anyone thought or intended that the amendment should impose on the states a selective incorporation . . . . It is conceivable, again, that the phrase "privileges and immunities of citizens of the United States" might include a reference to the whole Bill of Rights. Surely there is no basis for finding that some "specifics" of the Bill of Rights are, while others are not, privileges and immunities of national citizenship. Even the phrase "due process of law" might conceivably be a short-hand expression for the whole Bill of Rights. It is hardly possible to see in that phrase some purpose to select some specifics of the Bill of Rights and an insistence that they be selected whole.

Id.

414. *See, e.g.,* Pointer v. Texas, 380 U.S. 400, 411-14 (1965) (Goldberg, J., concurring) (selective incorporation, consistent with earlier due process decisions, promotes predictability in state law enforcement, reduces subjectivity in defining due process, and enhances "legitimate interests of federalism"); Cohen v. Hurley, 366 U.S. 117, 157, 158-59 (1961) (Brennan, J., dissenting) (selective incorporation, consistent with earlier due process decisions, reduces subjective determinations of due process); Adamson v. California, 332 U.S. 46, 85-86, 89 (1947) (Black, J., dissenting) (selective incorporation consistent with earlier due process decisions).

415. Pointer v. Texas, 380 U.S. 400, 411 (1965) (Goldberg, J., concurring) (comparing subjectivity of fundamental fairness doctrine); Cohen v. Hurley, 366 U.S. 117, 157 (1961) (Brennan, J., dissenting) (same); Adamson v. California, 332 U.S. 46, 85-86, 89 (1947) (Black, J., dissenting) (same, but arguing primarily for total incorporation).

416. Pointer v. Texas, 380 U.S. 400, 412-13 (1965) (Goldberg, J., concurring); Cohen v. Hurley, 366 U.S. 117, 158-59 (1961) (Brennan, J., dissenting); Ohio *ex. rel.* Eaton v. Price, 364 U.S. 263, 274-75 (1960) (per curiam) (Brennan, J., separate opinion).

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

418. *Id.* at 413-14 (Goldberg, J., concurring).

419. See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961), which held the exclusionary rule applicable to the states through the fourteenth amendment, overruling in part Wolf v. Colorado, 338 U.S. 25 (1949); Gideon v. Wainwright, 372 U.S. 335 (1963), which held the sixth amendment right to appointed counsel for indigent defendants in felony cases applicable to the states, *id.* at 339, 342, overruling Betts v. Brady, 316 U.S. 455 (1942); and Benton v. Maryland, 395 U.S. 784 (1969), which held the double jeopardy clause of the fifth amendment applicable to the states through the fourteenth amendment, *id.* at 787, overruling Palko v. Connecticut, 302 U.S. 319 (1937).

eral Justices have offered precisely that justification for the selective incorporation doctrine.[420] They point to statements in various earlier opinions, written before selective incorporation was adopted, describing certain provisions of the Bill of Rights as having been "absorbed" by due process or "made applicable" to the states by due process.[421] They cite, in particular, Justice Cardozo's opinion for the Court in *Palko v. Connecticut*,[422] the opinion that coined the "ordered liberty" phrase.[423] In the course of rejecting defendant's double jeopardy claim, the *Palko* opinion noted that due process afforded protection against state violations of those rights "which the First Amendment safeguards against encroachment by Congress," as well as the "right of one accused of crime to the benefit of counsel."[424] These safeguards, Justice Cardozo stated, had been "taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption."[425] Justice Brennan has argued that this statement "more accurately and frankly" describes what occurred in the earlier "ordered liberty" cases than does the fundamental fairness doctrine.[426] The "absorption process" looked to the entire guarantee, as does the selective incorporation doctrine.[427] Justice Black agreed that "[n]othing in the *Palko* opinion requires that when the Court decides that a Bill of Rights' provision is to be applied to the States, it is to be applied piecemeal."[428] Justice Goldberg similarly argued that reference to an "absorption process . . . make[s] clear that what is protected by the fourteenth amendment are 'rights,' which apply in every case, not solely in those cases

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420. See the opinions cited *supra* note 414.

421. *Pointer*, 380 U.S. at 411 (Goldberg, J., concurring); *Cohen*, 366 U.S. at 157 (Brennan, J., dissenting); *Adamson*, 332 U.S. at 86 (Black, J., dissenting); *cf.* Frankfurter, *supra* note 194, at 747 (collecting Supreme Court opinions stating first amendment "made applicable" to states by process of "absorption" into fourteenth amendment).

422. 302 U.S. 319 (1937); *see Pointer*, 380 U.S. at 411 (Goldberg, J., concurring); *Cohen*, 366 U.S. at 157 (Brennan, J., dissenting); *Adamson*, 332 U.S. at 86 (Black, J., dissenting). Justice Goldberg argued that the recognition of a process of absorption had "its origins at least as far back as Twining v. New Jersey." Pointer v. Texas, 380 U.S. at 412 (Goldberg, J., concurring). In Twining v. New Jersey, 211 U.S. 78 (1908), the Supreme Court stated that "it is possible that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law." *Id.* at 99. Justice Black, however, argued that *Palko*'s reference to the process of absorption was inconsistent with *Twining*'s "refus[al] to hold that any one of the Bill of Rights' provisions was made applicable to the States by the Fourteenth Amendment," and that *Palko* "must be read as overruling *Twining* on this point." Duncan v. Louisiana, 391 U.S. 145, 163 (1968).

423. *Id.* at 325; *see* Henkin, *supra* note 5, at 80 (discussing *Palko* and Justice Cardozo's coining of "ordered liberty").

424. 302 U.S. at 324; *see supra* text accompanying notes 238-44 (discussing *Palko*).

425. 302 U.S. at 326.

426. Cohen v. Hurley, 366 U.S. 117, 157 (1961) (Brennan, J., dissenting).

427. Justice Frankfurter, however, pointed out that in none of

> these opinions is the word "incorporation," or any closely related term, used. The cases say the First is "made applicable" by the Fourteenth or that it is taken up into the Fourteenth by "absorption," but not that the Fourteenth "incorporates" the First. This is not a quibble. The phrase "made applicable" is a neutral one. 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. One writes a document incorporating another by reference at the time of the writing.

Frankfurter, *supra* note 194, at 747-48.

428. Adamson v. California, 332 U.S. 46, 86 (1947) (Black, J., dissenting).

where it seems 'fair' to a majority of the Court to afford the protection."[429]

As several commentators have noted, however, any support for selective incorporation that may be derived from the reference in *Palko* and similar cases to an "absorption process" rapidly disappears when one reads those cases in their entirety.[430] Earlier opinions used terms like "absorption" simply as shorthand descriptions for the end result of a fundamental fairness analysis that ordinarily fell far short of the incorporation of a total guarantee. The Supreme Court in *Palko*, for example, recognized that although certain aspects of the double jeopardy prohibition were not fundamental, other aspects might be fundamental.[431] Moreover, the right to counsel as interpreted in *Powell v. Alabama*[432] was among the *Palko* opinion's illustrations of "absorbed" rights.[433] Yet, the *Powell* Court specifically limited absorption of that right, at least with respect to appointed counsel, to the special circumstances of that case.[434] Quite clearly, due process could "absorb" or "make applicable" only certain aspects of a Bill of Rights guarantee and, even then, do so only under special circumstances. Justice Brennan derogatorily characterized such limited holdings as applying "a watered down, subjective version of the individual guarantees of the Bill of Rights."[435] Those rulings, however, were not deviations from the *Palko* analysis, as Justice Brennan asserted;[436] rather, they were the logical products of that analysis.

On the other side, the Justices favoring selective incorporation could point to a line of cases that appeared to "absorb" certain Bill of Rights guarantees, whole and intact, notwithstanding the fundamental fairness doctrine. Opinions treating the several guarantees of the first amendment and the just compensation provision of the fifth amendment frequently indicated that those guarantees were fully embodied in due process and enforced against the states under the same standards applied to the federal government.[437] Theoretically,

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429. Pointer v. Texas, 380 U.S. 400, 412 (1965) (Goldberg, J., concurring).

430. Henkin, *supra* note 5, at 80, 84 (noting that Justice Cardozo in *Palko* "quite clearly rejected" idea that specifics of Bill of Rights must be incorporated completely); Landynski, *supra* note 22, at 22-23 ("misconception" that Judge Cardozo advocated selective incorporation; "abundantly clear" no intention for provisions of Bill of Rights to be "swallowed whole"); *see also* Malloy v. Hogan, 378 U.S. 1, 23-24 (1964) (Harlan, J., dissenting) ("apparent that Mr. Justice Cardozo's metaphor of 'absorption' was *not* intended to suggest the transplantation of case law surrounding the specifics of the first eight Amendments") (emphasis in original).

431. 302 U.S. at 328; *see supra* text accompanying notes 238-44 (discussion of *Palko* and Court's suggestion that result might be different if state permitted to retry defendant after trial free from error).

432. 287 U.S. 45 (1932)

433. 302 U.S. at 324.

434. *See supra* text accompanying notes 217-33 (discussing *Powell* decision). The *Palko* Court itself stated:

> The decision [*Powell*] 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.

302 U.S. at 327.

435. Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 275 (1960) (per curiam) (Brennan, J., separate opinion).

436. *Id.* at 274-75 (arguing that Wolf v. Colorado, 338 U.S. 25 (1949), and Betts v. Brady, 316 U.S. 455 (1942), deviated from *Palko*).

437. *See supra* note 264 and accompanying text (discussing these cases).

fundamental fairness analysis would dictate that a ruling in a case involving a single principle of freedom of speech (for example, the prohibition against prior restraints) go no farther than to hold that principle alone to be "implicit in the concept of ordered liberty."[438] Yet, free speech cases decided during the same period as *Palko* and similar fundamental fairness cases regularly suggested that all aspects of the first amendment, not merely that aspect presented in the case before the Court, were embodied in due process.[439] The Court commonly began an opinion by noting that the fourteenth amendment made the first amendment applicable to the states and then proceeded to discuss the issue presented solely in terms of the history and policy of the first amendment.[440] The Court majority never once stopped to consider whether a particular principle might not be essential to "ordered liberty."[441]

Although there were fewer cases dealing with the other guarantees of the first amendment, the analysis in those cases was quite similar to that in the free speech cases.[442] In cases dealing with the fifth amendment right to just compensation, on the other hand, the Supreme Court was not nearly as open in recognizing full absorption. The Court's opinions did not describe the relationship between the fourteenth amendment and the fifth amendment guarantee, but frequently cited federal and state cases interchangeably, never suggesting that the protection afforded by the two amendments might differ.[443]

If the due process clause could, in effect, "incorporate" the whole of the first amendment and the just compensation clause of the fifth amendment, would that not provide adequate precedent for selectively incorporating other guarantees as well? Admittedly, *Palko*, *Powell*, and other fundamental fairness rulings adopted a quite different approach, but what distinguished one line of cases from the other? Were these simply two lines of inconsistent precedent, with the Court free to choose one over the other, or was there some rational basis for distinguishing those cases that totally absorbed particular guarantees? The Court itself had suggested only one such ground of distinction and that related to the special treatment of first amendment rights.

In the course of distinguishing between those guarantees that had been

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438. *Palko*, 302 U.S. at 325.

439. *See* Speiser v. Randall, 357 U.S. 513, 530 (1958) (Black, J., concurring) (providing list of cases in which first amendment held applicable to the states "in all its particulars"); Cohen v. Hurley, 366 U.S. 117, 156, (1961) (Brennan, J., dissenting) (citing "decisions since 1925 [that] have extended against state power full panoply of First Amendment protections"); *supra* note 264 (discussing free speech and just compensation cases indicating that same standards applied to both state and federal cases).

440. *See* Staub v. City of Baxley, 355 U.S. 313, 321 (1958); Thomas v. Collins, 323 U.S. 516, 518 (1945); Douglas v. Jeannette, 319 U.S. 157, 162 (1943).

441. Individual Justices, however, have suggested that not all first amendment principles are equally applicable to the states. Justice Harlan took that position in obscenity cases. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 706-08 (1968) (Harlan, J., dissenting); Memoirs v. Massachusetts, 383 U.S. 413, 456 (1966) (Harlan, J., dissenting); Roth v. United States, 354 U.S. 476, 503-04 (1957) (Harlan, J., dissenting). Justice Jackson advanced a similar position in Beauharnais v. Illinois, 343 U.S. 250, 287 (1952) (Jackson, J., dissenting), which dealt with a state statute prohibiting group libel. *Id.* at 251. The majority, however, rejected that view in each instance. Hill, *supra* note 264, at 190.

442. *See* Palko v. Connecticut, 302 U.S. 319, 324 (1937) (listing cases involving freedom of the press, freedom of assembly, and free exercise of religion); *see also* Everson v. Board of Educ., 330 U.S. 1 (1947) (establishment clause of first amendment).

443. *See, e.g.,* Griggs v. Allegheny County, 369 U.S. 84, 85 (1962) (discussing what constitutes a taking); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (same); McGovern v. New York, 229 U.S. 363, 369 (1913) (discussing what constitutes just compensation).

"brought within the Fourteenth Amendment by a process of absorption"[444] and those that had not, the Court in *Palko* noted especially the unique role of freedom of speech and thought.[445] That freedom, the Court noted, "is the matrix, the indispensable condition, of nearly every other form of freedom."[446] The Court subsequently spoke of the "preferred position" of all first amendment rights, including freedom of religion.[447] This statement suggests that the Court considered first amendment guarantees so important that it automatically deemed each and every aspect of those guarantees essential to ordered liberty. This assumption involved more than simply deciding initially what would eventually have been concluded after a case-by-case analysis under the traditional fundamental fairness analysis. For among those first amendment guarantees made automatically applicable to the states were several that rested on quite fine and highly debatable distinctions of a type not usually recognized by due process.[448]

The preferred position doctrine distinguished the first amendment cases, but failed to explain the absorption of the fifth amendment right to just compensation. The just compensation cases, however, arguably did less to undermine the traditional fundamental fairness cases because the Court studiously avoided any language stating that it was absorbing or making applicable the fifth amendment guarantee.[449] The Justices supporting selective incorporation never claimed that the just compensation cases did more than recognize by implication the absorption concept.[450]

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444. Palko v. Connecticut, 302 U.S. 319, 326 (1937).

445. *Id.* at 327.

446. *Id.*

447. Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). Other cases taking this position, although not necessarily using the "preferred position" language, are collected in J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 75, at 719 n.3.

448. *See, e.g.,* Poulos v. New Hampshire, 345 U.S. 395, 402-08 (1953) (first amendment guarantees of free speech and religion not violated by city ordinance requiring license because state supreme court construed ordinance to allow licensing officials no discretion; distinguished from licensing systems based on broad criteria and thereby allowing discretion to deny a license for reasons unrelated to proper regulation); Zorack v. Clauson, 343 U.S. 306, 308-09, 311-12, 315 (1952) (first amendment guarantee of freedom of religion and establishment clause not violated when state laws permit students to leave school during school hours to attend religious activities outside school grounds; distinguished from "released time" program in which religious instruction took place in public school classrooms); Kovacs v. Cooper, 336 U.S. 77, 81-83, 89 (1949) (first amendment guarantee of free speech not violated by city ordinance prohibiting sound trucks broadcasting in "loud and raucous" manner in "city streets"; distinguished from ordinance barring all sound amplification without permission of police chief).

449. The opinions in these cases, in fact, made little if any reference to the fifth amendment, focusing instead on the fourteenth. *See, e.g.,* Griggs v. Allegheny County, 369 U.S. 84, 85 (1962) (issue whether county "has taken an air easement . . . for which it must pay just compensation as required by Fourteenth Amendment"); Pennsylvania Coal Co. v. Mahon, 260 U.S 393, 415 (1922) (fifth amendment presupposes that property is taken for public use, but still requires compensation, and "similar assumption is made in these decisions upon the Fourteenth Amendment"); McGovern v. New York, 229 U.S. 363, 371, 373 (1913) (compensation awarded did not reflect such a "disregard of plain rights" as to constitute "a denial by the State of due process of law"); Chicago B. & Q.R.R. v. Chicago, 166 U.S. 226, 228 (1897) (" 'due process of law' requires compensation to be made or secured to owner of private property taken for public use"). Apart from a single reference to the fifth amendment in *Pennsylvania Coal*, quoted *supra*, the only indication given that the Court was applying fifth amendment principles was its reliance on federal cases decided under the fifth amendment. *See Griggs*, 369 U.S at 88; *McGovern*, 229 U.S. at 372.

450. *See* Cohen v. Hurley, 366 U.S. 117, 155 (1961) (Brennan, J., dissenting) (*Chicago Railroad* "in fact if not in terms, applied the Fifth Amendment's just-compensation requirement to the States").

Perhaps the best analysis distinguishing both the just compensation cases and the first amendment cases from traditional fundamental fairness cases was proposed by Professor Henkin in an article written in 1963.[451] Professor Henkin argued that a distinction should be drawn between substantive and procedural Bill of Rights guarantees.[452] Both the first amendment guarantees and the fifth amendment just compensation provision would fall in the substantive category, as would the fourth amendment prohibition against unreasonable searches and the eighth amendment prohibition against cruel and unusual punishment.

Selective incorporation was appropriate for such substantive rights, Professor Henkin argued, because of the nature of the standards applied in defining such rights.[453] Those standards commonly reflected "developing values, developing attitudes on the relation of government and individual, of order and liberty, applied to the issues of a new day."[454] Because the Court considered phrases like "freedom of speech," "unreasonable searches," and "establishment of religion" sufficiently flexible to permit "standards reflecting respective needs of order and of liberty," there was no reason to assume different values would apply to the actions of the states as opposed to the federal government.[455] The same basic touchstones were involved whether the Court was looking to the "ordered liberty" standard or to the particular substantive guarantee. The procedural provisions of the Bill of Rights, on the other hand, contained "considerable specificity, including the accretions those amendments have acquired in the history of their application to the federal government."[456] Thus, the standards for interpreting the guarantee and the standards of "ordered liberty" were quite different, requiring the application of traditional fundamental fairness analysis to each state case.[457]

The distinction offered by Professor Henkin went a considerable way toward explaining the pre-1960's cases. Not all substantive rights had been fully absorbed within the fourteenth amendment, but the cases did appear to reflect his procedural/substantive distinction.[458] The Court's opinions, however, failed to make any reference to the distinction. This may be explained, in part, by the fact that no Justice was likely to concede that all substantive guarantees were as flexible as Professor Henkin suggested. A few Justices, in fact, would proba-

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451. *See* Henkin, *supra* note 5.
452. *Id.* at 84-88.
453. *Id.* at 86.
454. *Id.*
455. *Id.*
456. *Id.* at 87.
457. *Id.*
458. The first amendment cases and the just compensation rulings clearly fit the distinction. *See supra* text accompanying notes 437-43 (discussing first amendment and fifth amendment right to just compensation as fully embodied in due process). The search and seizure cases and cruel and unusual punishment cases pose more difficulty. In Wolf v. Colorado, 338 U.S. 25 (1949), the court refused to absorb the exclusionary rule into the fourteenth amendment. *Id.* at 33. *Wolf* could be viewed as having absorbed the fourth amendment standard for unreasonable searches and as having rejected simply the procedural rule that was "not a necessary incident of the substantive protection." Henkin, *supra* note 5, at 87 n.45. The court in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), held that electrocuting a defendant a second time was not a violation of due process, *id.* at 463, but indicated that due process prohibited at least some cruel and unusual punishments. *Id.* at 462. Thus, it certainly had not closed the door to complete incorporation of the eighth amendment guarantee.

bly have said that no substantive guarantees were that flexible. Justice Black, for example, certainly would not have agreed with Professor Henkin's comments that any substantive guarantee was "specific only in identifying the right protected, but not as to elaborating the standard of protection . . . [for] the latter must derive from contemporary enlightenment."[459] Although other Justices probably would have accepted Professor Henkin's characterization for most aspects of a substantive guarantee, they probably would have rejected it for others. For example, the Court viewed the warrant clause of the fourth amendment, a substantive guarantee, as a fairly specific provision, largely controlled by historical practice.[460] Some Justices also would probably have rejected Henkin's view of procedural rights, at least for those procedural guarantees that had been modified considerably in light of contemporary values. The Court had extended the sixth amendment right to counsel, for example, far beyond historical practice to reflect contemporary values relating to the Court's treatment of indigents.[461]

Notwithstanding these shortcomings, the distinction between substantive and procedural guarantees, taken as a rough dividing line, offered a convincing rationale for the differences found in the two lines of pre-1960's cases. That distinction also offered the strongest foundation, in terms of analysis of past precedent, for adoption of a selective incorporation rationale, although that foundation was limited. It would not have supported the selective incorporation decisions of the 1960's beyond those incorporating the fourth[462] and eighth amendments.[463]

B. SELECTIVE INCORPORATION AS A MEANS OF AVOIDING SUBJECTIVITY

Taking a page from Justice Black's argument favoring total incorporation,[464] opinions supporting selective incorporation argued that selective incorporation avoids much of the subjectivity inherent in the fundamental fairness doctrine.[465] Selective incorporation reduces subjectivity because the circum-

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459. Henkin, *supra* note 5, at 86. Professor Henkin recognized that Justice Black did not find this degree of flexibility in the first amendment. *Id.* at 86 n.42. For a discussion of Justice Black's views on the first amendment, see generally Black & Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962). Justice Black also did not find such flexibility as to the other amendments. *See generally* Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960) (Bill of Rights contains absolute guarantees, not mere admonitions). For an example of Justice Black's views on evolution and flexibility in the fourth amendment, see his dissenting opinion in Katz v. United States, 389 U.S. 347 (1967), in which he rejected the majority's holding that electronic eavesdropping constituted a search. *Id.* at 364 (Black, J., dissenting).

460. *See* Gouled v. United States, 288 U.S. 298, 309 (1921) (warrants may be issued only for fruits, instrumentalities, or contraband, not "mere" evidence); Marron v. United States, 275 U.S. 192, 196 (1927) (no seizure unless item described in warrant). The Court's construction of other aspects of the fourth amendment was similar. *See* Olmstead v. United States, 277 U.S. 438, 466 (1928) (no search or seizure unless physical trespass occurs); Frank v. Maryland, 359 U.S. 360, 366 (1959) (no warrant requirement for health inspection of dwelling).

461. Compare Johnson v. Zerbst, 304 U.S. 458 (1938) (sixth amendment right to counsel requires appointment of counsel for indigent defendants in all felony cases) with the historical practices on the appointment of counsel described in Powell v. Alabama, 287 U.S. 45, 60-66 (1932) (no general right to appointed counsel at common law) and Betts v. Brady, 316 U.S. 455, 464-71 (1942) (same).

462. *See supra* text accompanying notes 317-26 (discussing *Mapp v. Ohio* and *Ker v. California*).

463. *See supra* text accompanying notes 327-32 (discussing *Robinson v. California*).

464. *See supra* notes 266-86 and accompanying text.

465. *See* Cohen v. Hurley, 366 U.S. 117, 158 (1961) (Brennan, J., dissenting) (only impermissible

stances of each particular case are irrelevant to the determination of whether a right is necessary to "ordered liberty." Thus, the doctrine avoids the "extremely subjective and excessively discretionary" judgments that result from evaluating a right only as it bears on particular factual circumstances.[466] Selective incorporation also reduces subjectivity by focusing on the fundamental nature of the Bill of Rights guarantee as a whole, rather than on a particular aspect of the guarantee: "[O]nly impermissible subjective judgments can explain stopping short of the full sweep of the specific [guarantee] being absorbed."[467] Finally, once the Court holds a guarantee fundamental, discretion is reduced because the Court's analysis focuses on the language and history of the guarantee. There is no need for reference, in case after case, to the standard of "ordered liberty." This is significant even if one assumes, as Justice Frankfurter argued, that the determination of fundamental fairness is guided by objective evidence of pervasive notions of justice.[468] Selective incorporation, once applied, has the advantage of "avoid[ing] the impression of personal, ad hoc adjudication by every court which attempts to apply the vague contents and contours of 'ordered liberty' to every different case that comes before it."[469]

Critics of selective incorporation rejected the assumption that fundamental fairness is substantially more subjective than application of a specific guarantee.[470] Moreover, they noted, even if that assumption is accepted, it does not necessarily follow that selective incorporation is preferable to fundamental fairness. A judgment still must be made whether the additional potential for subjectivity in the fundamental fairness doctrine is justified by other attributes of the doctrine.

The critics argued that proponents of selective incorporation, by choosing selective over total incorporation, implicitly recognized that eliminating subjectivity should not necessarily be the controlling factor in a choice between fourteenth amendment doctrines.[471] Selective incorporation does not eliminate

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subjective judgments prevent total incorporation of particular guarantee); Pointer v. Texas, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring) (fundamental fairness causes subjective determination of due process); Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Black, J., concurring) (selective incorporation "keeps judges from roaming").

466. Pointer v. Texas, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring).

467. Cohen v. Hurley, 366 U.S. 117, 158 (1961) (Brennan, J., dissenting).

468. *See supra* text accompanying notes 287-92 (discussing Justice Frankfurter's position).

469. Henkin, *supra* note 5, at 77. One commentator notes:

> When the Supreme Court injects itself into the eminently local function of maintaining law and order by overturning a state criminal conviction, it is more likely to arouse public denunciation for "handcuffing the police" and helping criminals, than praise for protecting constitutional liberties—especially when the decision rests not on any specific constitutional prohibition, but on the vague strictures of the due process clause.

Wiehofen, *supra* note 5, at 194.

470. Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Harlan, J., dissenting); Friendly, *supra* note 296, at 935-36; *see supra* notes 294-301 and accompanying text (discussing Justice Harlan's position).

471. In general, supporters of the fundamental fairness doctrine argued that none of the doctrines was less subjective than the other. *See supra* notes 293-97 and accompanying text (noting their response to contention that total incorporation was less subjective). They also noted, however, that supporters of selective incorporation, who complained of subjectivity in fundamental fairness analysis, were nevertheless adopting part of that analysis—the ordered liberty standard—rather than discarding it completely by turning to total incorporation. *See* Friendly, *supra* note 385, at 935-97 (quoted *infra*

completely the subjectivity that supposedly is inherent in the "ordered liberty" standard, because the selective incorporation doctrine still applies that standard to determine whether a particular guarantee is fundamental. Admittedly, the "ordered liberty" standard is applied less frequently than under the fundamental fairness doctrine, but the quality of the decision is the same.[472] Indeed, one might add that aside from Justice Black,[473] Justices supporting selective incorporation would not eliminate the use of a fundamental fairness analysis tied to circumstances of the particular case; they accept the view that due process protection extends beyond the specifics of the Bill of Rights,[474] though the extent of such additional protection often depends on precisely that type of analysis.[475]

C. FACILITATING STATE ENFORCEMENT OF DUE PROCESS STANDARDS

The movement from the fundamental fairness doctrine to selective incorporation was also justified as necessary to ensure effective state court enforcement of due process limitations. Critics of the traditional fundamental fairness doctrine argued that it produced due process standards too uncertain to be applied consistently by state courts.[476] Supreme Court decisions tied to the totality of the circumstances of the individual case had failed to provide a "substantial yardstick for the states."[477] For example, the "case-by-case approach" of the Supreme Court rulings on confessions left the state courts free to "find author-

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note 472 as to parallel in judgments made under fundamental fairness and selective incorporation). Cf. the authorities cited *supra* note 413.

472. Thus, Judge Friendly stated:

> [I]n Mr. Justice Brennan's phrase, "only impermissible subjective judgments can explain stopping short of the incorporation of the full sweep of the specific being absorbed." With all respect I do not find this last proposition self-evident. It is not obvious to me why determining which of the interests protected by the Bill of Rights against the nation shall also be protected against the states, or holding that the amendments mean something hardly suggested by their text, are permissible objective judgments, but deciding whether the interests selected for protection against the states ought to receive precisely the same protection that they do against the nation would be an "impermissible subjective" one.

Friendly, *supra* note 296, at 935-36.

473. Consistent with his narrow view of due process, *see supra* notes 163-65 and accompanying text, Justice Black, concurring in Duncan v. Louisiana, 391 U.S. 145 (1968), stated: "The selective incorporation process, if used properly, does limit the Supreme Court in the Fourteenth Amendment field to specific Bill of Right protections *only* and keeps judges from roaming at will in their own notions of what policies outside the Bill of Rights are desirable and what are not." *Id.* at 171 (emphasis added).

474. See, for example, the cases cited *infra* in note 475 and *supra* in the second paragraph of note 163. *Cf. supra* notes 116-18 (discussing positions of Justices Murphy, Rutledge, and Douglas in *Adamson*).

475. *See, e.g.,* United States v. Lovasco, 431 U.S. 783, 788-90 (1977) (Court using fundamental fairness analysis to decide whether pre-indictment delay violates accused's due process rights; issue outside of scope of sixth amendment guarantee to speedy trial, which only applies after formal indictment or information); Gagnon v. Scarpelli, 411 U.S. 778, 788, 790 (1973) (*Betts v. Brady* case-by-case analysis should be used to determine whether due process requires right to counsel at probation hearing); Shepphard v. Maxwell, 384 U.S. 333, 352 (1966) (totality of circumstances analysis applied to find due process violation resulting from trial and pretrial publicity).

476. *See* Pointer v. Texas, 380 U.S. 400, 414 (1965) (Goldberg, J., concurring) (discussing difficulties faced by states attempting to apply rule of Betts v. Brady, 316 U.S. 455 (1945), and support of state attorneys general for a flat requirement); Green, *The Bill of Rights, The Fourteenth Amendment and the Supreme Court*, 5 MICH. L. REV. 869, 897 (1948) (fundamental fairness analysis has left state courts and prosecutors uncertain about powers and duties).

477. Way, *The Supreme Court and State Coerced Confessions*, 12 J. PUB. L. 53, 61 (1963).

ity for affirming or rejecting almost any type of confession."[478] Admittedly, the Court did not stress the special circumstances of each individual case in all of its fundamental fairness rulings relating to the criminal justice process,[479] but even if the Court suggested that a particular aspect of a guarantee was fully embodied in due process, that still left unsettled the treatment of various other aspects of that same guarantee. The end result, as Justice Goldberg put it, was to "require . . . [the] Court to intervene in the state judicial process with considerable lack of predictability and with a consequent likelihood of considerable friction."[480] Moreover, at a time when the criminal side of the Court's docket was growing more and more active,[481] it was unclear whether the Court had the capacity to develop both a general body of principles interpreting specific guarantees for federal criminal cases and a second-level, "shadow" group of principles for all of the issues posed in the state cases.[482]

Compared to the fundamental fairness doctrine, the "practical utility" of selective incorporation was "undeniable."[483] Once the Court held a particular guarantee fundamental, state courts were directed to the specific language of that guarantee and to the various decisions interpreting that language in the context of federal prosecutions.[484] Precedent then clearly resolved numerous issues and offered basic guidelines for the resolution of others.

Of course, the value of the federal precedent in this regard varied with the subject matter. There were areas in which the federal decisions were not at all predictable.[485] Other guarantees had been an infrequent subject of federal litigation, producing no more than a few very general discussions of the basic content of the guarantee.[486] There was also a question whether "rules which [bore] a constitutional label may in fact have been the expression of a supervisory power of the federal courts over federal law enforcement at a time when it was not necessary to differentiate between Constitution and supervision."[487] Nevertheless, overall, reference to precedent interpreting the incorporated Bill

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478. *Id.*

479. *See supra* note 303 (examples of fundamental fairness rulings that varied in weight accorded special circumstances of case). Consider also Chandler v. Fretag, 348 U.S. 3 (1954), in which the Court held that a defendant's right to secure counsel of his own choice is not limited to cases involving special circumstances.

480. Pointer v. Texas, 380 U.S. 400, 413-14 (1965) (Goldberg, J., concurring).

481. *See* Green, *supra* note 476, at 897 (by 1948 two-fifths of cases before Court were reviews of state criminal convictions, with ratio increasing each year).

482. *See* Amsterdam, *supra* note 405, at 440 n.23 (discussing "intolerable confusion" that would result if second-level "shadow" fourth amendment construed to govern states); Green, *supra* note 476, at 897 (case-by-case review under Fair Trial Rule placed unsupportable burden upon Court).

483. L. LUSKY, *supra* note 334, at 163.

484. *See* Israel, *supra* note 3, at 1328-29 (noting that issues presented in cases like Malloy v. Hogan, 378 U.S. 1 (1964), Benton v. Maryland, 395 U.S. 784 (1969), and Gideon v. Wainwright, 372 U.S. 335 (1963), could be resolved by reference to federal precedent once Court determined relevant Bill of Rights guarantee applicable to states).

485. *See* Ker v. California, 374 U.S. 23, 45 (1963) (Harlan, J., concurring) (referring to Court's decisions interpreting the fourth amendment search and seizure provision); *see also* Amsterdam, *supra* note 405, at 349 ("[f]or clarity and consistency, the law of the fourth amendment is not the Supreme Court's most successful product").

486. *See* Israel, *supra* note 3, at 1329 n.40 (noting limited federal precedent dealing with sixth amendment's compulsory process clause).

487. Freund, *Constitutional Dilemmas*, 45 B.U.L. REV. 13, 19 (1965); *see also* Friendly, *supra* note 296, at 938 (distinguishing standards that rest on Constitution from ones derived from other sources of federal power).

of Rights guarantees provided substantially more certainty for state courts than the fundamental fairness rulings that preceded incorporation.[488]

The advantage of facilitating state enforcement of constitutional standards was not lost upon the Justices opposing the selective incorporation doctrine. Justice Harlan in *Gideon v. Wainwright*[489] relied on precisely that factor in agreeing to a due process standard requiring appointment of counsel in all felony cases.[490] Justice Harlan was aware that the previous state enforcement had been problematic because of the rule that due process required appointed counsel only when special circumstances indicated that the assistance of counsel was needed to ensure a fair trial.[491] Past decisions of the Court had liberalized the special circumstances rule of fundamental fairness to the point that a serious criminal charge in itself constituted special circumstances.[492] That "evolution," however, had not been "fully recognized by many state courts" that were "charged with the front-line responsibility for the enforcement of constitutional rights."[493] The time had come, Justice Harlan concluded, to abandon the special circumstances rule in favor of a standard that left no doubt as to the state's obligation to appoint counsel in serious criminal cases.[494] To do otherwise would, in the long run, do a "disservice to the federal system."[495]

Gideon was for Justice Harlan, however, a special case. To adopt a due process standard that parallelled the sixth amendment guarantee did not, in reality, extend the state's obligation beyond what had been required under a case-by-case analysis of fundamental fairness.[496] In such an instance facilitating convenience of administration coincided with the interests of federalism. The same was not true when application of a Bill of Rights guarantee went substantially beyond what was required by a fundamental fairness due process analysis.[497] Professor Gunther asks whether the unpredictability of the fundamental fairness approach "[is] more harmful to state autonomy concerns than a more rigid—possibly more interventionist, yet also more certain" selective

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488. The benefit was not only to the state courts. Professor Lusky stated that

> [t]his availability of accumulated case law also results in a corresponding economy of effort on the part of defense counsel and thus facilitates constitutional defenses in the general run of criminal cases. Indigent defendants in such cases (which is to say, most persons accused of serious crime) are represented by lawyers serving pursuant to judicial appointment or as employees of a legal service organization. Incorporation enables these hard-pressed lawyers to cite controlling precedents; they need not start from scratch, approaching the elusive issue of fundamental injustice as an original proposition in each case.

L. LUSKY, *supra* note 334, at 164.

489. 372 U.S. 335 (1963).

490. *Id.* at 351 (Harlan, J., concurring). Justice Harlan would include all cases carrying the "possibility of a substantial prison sentence," which apparently would encompass all felonies. *Id.*

491. *Id.* The Court had created the "special circumstances" rule in Betts v. Brady, 316 U.S. 455 (1942), and Powell v. Alabama, 287 U.S. 45 (1932); *see supra* notes 227-33 and accompanying text (discussing *Powell* and *Betts* and special circumstances rule).

492. Gideon v. Wainwright, 372 U.S. 335, 351 (1963) (Harlan, J., concurring).

493. *Id.*

494. *Id.*

495. *Id.*

496. *See id.* at 351 (*Gideon* ruling does no more than "make explicit something that has long since been foreshadowed in our decisions").

497. *Id.* at 352 (applying entire body of federal law to states would "disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government").

incorporation approach.[498] Justice Harlan would have answered no on two grounds. First, he believed that fundamental fairness was no more uncertain than selective incorporation.[499] Indeed, because the Court's interpretations of Bill of Rights guarantees were not always clear, the states sometimes would encounter more uncertainty if they were forced to apply those guarantees fully incorporated.[500] Second, he believed that the key to the Constitution's recognition of state autonomy lay in allowing the states to develop their own rules for obtaining fundamental fairness, "not [in] achieving procedural symmetry or . . . serving administrative convenience."[501]

As suggested by Justice Harlan's second point, whether one views the administrative advantage of selective incorporation as a sufficient justification for the adoption of that doctrine depends, in large part, on how one measures the doctrine's impact upon what Justice Goldberg described as the "legitimate interests of federalism."[502] The doctrine's advantage in facilitating state court administration was not likely to be a convincing factor for a Justice who believed selective incorporation undercut basic principles of federalism. The same was true of the alleged advantage of selective incorporation in reducing the potential for subjective, ad hoc adjudication (or, at least, in countering the impression of subjectivity). These were not new justifications to the Justices who had applied the fundamental fairness doctrine over the years. They had been suggested in various dissents criticizing the fundamental fairness doctrine, initially by the first Justice Harlan[503] and later by Justice Black.[504] The key factor, if there was one other than the results produced,[505] in the persuasiveness of the other elements of the rationale underlying the selective incorporation doctrine was a different perception of the "legitimate interests of federalism." Once the Court concluded that the principles of federalism were

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498. G. GUNTHER, *supra* note 309, at 487. *See also* Pointer v. Texas, 380 U.S. 400, 413-14 (1975) (employment of same standard would eliminate uncertainty and reduce state-federal friction, thus promoting "legitimate interests" of federalism); Amsterdam, *supra* note 405, at 441 n.23 (application of different standards for federal and state search and seizure cases "would produce and perpetuate intolerable confusion and . . . do more damage to the substantial interest of the state than is done by the theoretical trauma of incorporation").

499. See Justice Harlan's concurrence in Griswold v. Connecticut, 381 U.S. 479 (1965), which argues that specific constitutional provisions are as susceptible to a judge's personal interpretations as the due process clause. *Id.* at 501.

500. See Justice Harlan's concurring opinion in Ker v. California, 374 U.S. 23 (1963), which notes that application of fourth amendment standards to the states would place "the states, more likely than not, in an atmosphere of uncertainty since this Court's decisions in the realm of search and seizure are hardly notable for their predictability." *Id.* at 45 (Harlan J., concurring).

501. Mapp v. Ohio, 367 U.S. 643, 682 (1961) (Harlan, J., dissenting). Justice Harlan was responding to the majority's argument that application of the fourth amendment exclusionary rule to the states would promote "[f]ederal-state cooperation in the solution of crime under constitutional standards . . . if only by recognition of their now mutual obligation to respect the same fundamental criteria." *Id.* at 658 (Harlan, J., dissenting). *See also* Duncan v. Louisiana, 391 U.S. 145, 176-77 (1967) (fundamental fairness standard imposes a "more discriminating" and "difficult" process of adjudication, but is required by interests of federalism).

502. Pointer v. Texas, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring).

503. Hurtado v. California, 110 U.S. 516, 546 (1884) (Harlan, J., dissenting) (criticizing majority for singling out certain principles of liberty as fundamental for no "satisfactory" reason).

504. Adamson v. California, 332 U.S. 46, 89 (1947) (Black, J., dissenting) (discussing Justice Black's justification for total incorporation); *see supra* text accompanying notes 265-68 (discussing Justice Black's dissent in *Adamson*).

505. *See supra* text accompanying notes 411-13 (discussing argument that selective incorporation solely result-oriented).

as well served by selective incorporation as by fundamental fairness,[506] the doctrine's advantages with respect to subjectivity and administrative convenience could prevail.

D. THE LEGITIMATE INTERESTS OF FEDERALISM

Reviewing the Supreme Court's due process decisions for a twenty-five year period immediately following *Powell v. Alabama*,[507] Professor Allen noted that "the first and most striking fact to emerge from a survey of the Court's opinions . . . is the obvious importance of the Court's interpretation of the obligation of federalism in the development of the applicable constitutional doctrine."[508] Although the opinions rested primarily on the historical development of the concept of due process, they rarely failed to note the need to respect the "sovereign character of the several states"[509] by giving the states the widest latitude consistent with assuring fundamental fairness.[510]

This concern for the principle of federalism was hardly a new development in the interpretation of the fourteenth amendment. The *Slaughter-House* majority[511] referred to the "whole theory of the relations of the state and federal government" in rejecting a broad reading of the privileges and immunities clause.[512] Equal protection rulings relating to state procedures noted the importance of leaving the states free to prescribe their "own modes of judicial proceedings."[513] In addition, early due process decisions that refused to hold particular guarantees part of ordered liberty frequently stressed that to decide otherwise would intrude upon "the full power of the state to order its own affairs and govern its own people."[514]

Although most fundamental fairness opinions did not attempt to identify the interests at stake in intruding upon state authority, Justices Frankfurter and Harlan did so in several separate opinions that responded to the possible adoption of a total or selective incorporation doctrine. Those opinions tended to identify three concerns of federalism. First, rulings that went beyond the minimum requirements of fundamental fairness would undermine the values of local control of the criminal justice process.[515] Second, application of the same

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506. Proponents of selective incorporation argued that it *better* served principles of federalism, by eliminating friction between federal and state courts, *supra* notes 414 & 498, and by promoting federal-state cooperation, *supra* note 501.

507. Powell v. Alabama, 287 U.S. 45 (1932); *see supra* text accompanying notes 217-27 (discussing *Powell*).

508. Allen, *supra* note 207, at 251.

509. Ashcraft v. Tennessee, 322 U.S. 143, 157 (1944) (Jackson, J., dissenting).

510. *See* G. GUNTHER, *supra* note 309, at 487 ("consciousness of federalism concerns and respect for state policy-makers permeate the majority positions of the *Palko-Adamson* traditions"); Way, *supra* note 477, at 56 (Court's decisions replete with expressions of deference to states' right to control own systems of justice).

511. 83 U.S. (16 Wall.) 36 (1873).

512. *Id.* at 78; *see supra* notes 59-75 and accompanying text (discussing *Slaughter-House*).

513. Missouri v. Lewis, 101 U.S. 22, 31 (1878); *see also* Hayes v. Missouri, 120 U.S. 68, 70 (1887) (state may vary among judicial districts number of peremptory challenges; matter wholly under control of state legislature).

514. Twining v. New Jersey, 211 U.S. 78, 106 (1908); *see also* Maxwell v. Dow, 176 U.S. 581, 605 (1900) (states have right to "decide for themselves what shall be the form and character of the procedure in . . . trials").

515. *See* Ker v. California, 374 U.S. 23, 45 (1963) (Harlan, J., concurring) (states are best able to deal

constitutional standards to the federal and state government would ignore major differences between the federal and state criminal justice systems.[516] Third, incorporation of Bill of Rights guarantees would fail to leave adequate room for the diversity and experimentation needed to eventually devise a wiser and fairer criminal justice system.[517] Opinions supporting selective incorporation recognized all three of these concerns, but either rejected or downgraded them. The legitimate interests of federalism were far narrower for the selective incorporation Court of the 1960's than they had been for the Courts that applied the fundamental fairness doctrine.

1. The Values of Local Control

The principle of federalism preserves local control of government by respecting the autonomy of the states. Preserving local control has various advantages: it avoids centralized power and the potential for abuse inherent in the concentration of governmental authority; it promotes democracy by allowing decisions to be controlled by the population most directly affected; it permits laws to be formulated in accordance with local conditions and to be enforced by persons who are familiar with local concerns; and it permits the diversity necessary for the survival of pluralism. These advantages arguably have special significance as applied to the criminal justice field. Despite expansion of federal legislative power, the enactment and enforcement of criminal laws remains primarily the responsibility of the states. Within the states, the traditional policy has been one of widely dispersed enforcement authority, as evidenced by division of police and prosecutorial authority among numerous local agencies.[518]

The Justices supporting the fundamental fairness doctrine feared that imposition of federal constitutional limitations might destroy the advantages of local control.[519] The Supreme Court, far removed from the local scene, had to exercise caution, limiting its authority to the imposition of those "principles of decent procedure" that were basic to a free society and therefore accepted by the vast majority of local communities.[520] Indeed, if the states' power to deal with local crime was "unduly restricted," responsibility for local crime control might shift to the federal government, bringing closer "the monolithic society which our federalism rejects."[521]

The Justices supporting the selective incorporation doctrine had an entirely different perspective. They did not see the limitations imposed by the Court as interfering with the true interests of local control. To them, what was occurring was quite different from the usual transfer of state authority to the federal government. The Court's rulings did not take enforcement responsibility from

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with own peculiar law enforcement problems); Mapp v. Ohio, 367 U.S. 643, 646 (1961) (Harlan, J., dissenting) (same).

516. *See infra* note 533 (citing cases in which Justice Harlan articulated this concern).

517. *See* Adamson v. California, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring) (incorporation would deprive states of opportunity to reform legal process to extend area of freedom).

518. *See* H. KERPER & J. ISRAEL, INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM 407-08, 426-27 (2d ed. 1979).

519. *See infra* note 533 (citing opinions making this argument).

520. Allen, *supra* note 207, at 253.

521. Malloy v. Hogan, 378 U.S. 1, 28 (1964) (Harlan, J., dissenting).

local police agencies and place it in the hands of a national police agency. Nor did the rulings take the responsibility for defining crime from local legislatures and place it in the hands of Congress. The Court was acting only to protect the individual, and the Justices saw in that purpose a crucial distinction. Thus, Justice Goldberg reasoned that

> to deny the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual. In my view this promotes rather than undermines the basic policy of avoiding excess concentration of power in government, federal or state, which underlies our concepts of federalism.[522]

The distinction drawn by Justice Goldberg speaks to only one of the values served by local control—the avoidance of excess concentration of power. Did the Court fail to recognize others, such as the advantage of local control over policy-setting agencies? It seems unlikely. Those advantages, more likely, were simply viewed as subordinate to safeguarding the rights and liberties of the individual. The Court in the past had subordinated those same values to its enforcement of other constitutional safeguards. Applying the first amendment to the states, it had intervened in such traditional areas of state regulation as education[523] and the licensing of professions.[524] The Court had rejected local community policies dealing with such obvious matters of local concern as door-to-door solicitations[525] and the use of parks for public assemblies.[526] Thus, the Court viewed protection of first amendment rights as a matter of national concern, outweighing considerations of judicial self-restraint and deference to the values of local control.

For the Justices supporting the selective incorporation doctrine, protection of the rights of the accused fell in the same category: a national concern outweighing considerations of judicial deference to local control. The Justices might have concluded, as observers have noted, that the increased mobility of the population had "made America too much one country"[527] to justify the deference to local diversity that had produced a "checkerboard of human

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

523. *See* McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) (state supported schools providing religious instruction in their classrooms violate first amendment establishment clause).

524. *In re* Anastaplo, 366 U.S. 82, 97 (1961) (discussing first amendment limitations upon state bar admission standards); Baird v. State Bar, 401 U.S. 1, 5-8 (1971) (same).

525. *See* Martin v. Struthers, 319 U.S. 141, 149 (1943) (local ordinance prohibiting door-to-door distribution of handbills violates first amendment freedom of speech clause).

526. *See* Niemotko v. Maryland, 340 U.S. 268, 273 (1951) (city's arbitrary denial of permit to religious organization to conduct Bible meeting in park violates first and fourteenth amendments; constitutional guarantees have "firmer foundation than the whims or personal opinions of a local governing body").

527. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J., 221, 274 (1973). Professor Wellington argues that

> contemporary technology, a population moving frequently across state lines, and the expanding role of the federal government in law enforcement have made America too much one country for considerations of federalism to sustain at a constitutional level any dramatic difference between the procedural safeguards afforded criminal defendants in federal and state proceedings.

Id.

rights" in the field of criminal procedure.[528] Perhaps they viewed local authorities as having forfeited any right to judicial deference by their continued failure to control lawlessness in law enforcement.[529] An often cited passage[530] from an article by Illinois Supreme Court Justice Schaefer provides still another explanation for the subordination of the values of local control:

> Considerations of federalism of course remain important. But in the world today they must be measured against the competing demands arising out of the relation of the United States to the rest of the world. The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law. That measurement is not taken merely in retrospect by social historians of the future. It is taken from day to day by the peoples of the world, and to them the criminal procedure sanctioned by any of our states is the procedure sanctioned by the United States.[531]

It may be too extreme to say that the Justices supporting selective incorporation believed federalism was "dead,"[532] but certainly they would no longer place federalism on the plane it once occupied. When it came to balancing society's need for protection from crime against the interests of suspected and accused persons, the states were to receive no greater deference for their judgments than the federal government.

2. Differences in State and Federal Criminal Justice Systems

Even accepting the subordination of values of local control, it was still possible to argue that the different problems faced by the state criminal justice system required more flexible standards than those applied to the federal system.

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528. F. GRAHAM, *supra* note 407, at 39-40. Graham notes that

> if a person had driven across the country at that time from New York to San Francisco, he would have passed through four states (Indiana, Illinois, Missouri and California) in which the police would have been unlikely to search him or his car without probable cause, since their courts would not have permitted the fruits of the search to be used in evidence. In eight others (New York, New Jersey, Pennsylvania, Ohio, Kansas, Colorado, Utah and Nevada) officers could have made a search which did not measure up to Fourth Amendment standards and could have used the findings against the traveler in court. In a nation where state lines had otherwise become so unimportant, this checkerboard of human rights had to be short-lived.

Id.; *see also* Davidow, *One Justice For All: A Proposal to Establish by Federal Constitutional Amendment, A National System For Criminal Justice*, 51 N.C.L. REV. 259, 259 (1972) (proposing a uniform system of administration of criminal justice by federal courts).

529. Justice Brennan stated that

> [f]ar too many cases come from the states to the Supreme Court presenting dismal pictures of official lawlessness, of the illegal searches and seizures, illegal detentions attended by prolonged interrogation and coerced admissions of guilt, of the denial of counsel and downright brutality. Judicial self-restraint which defers too much to the sovereign powers of the states and reserves judicial interference for only the most revolting cases will not serve to enhance Madison's priceless gifts of the "great rights of mankind secured under this Constitution."

Brennan, *supra* note 3, at 778.

530. The passage is cited, for example, in Miranda v. Arizona, 384 U.S. 436, 480 (1965), Coppedge v. United States, 369 U.S 438, 449 (1961), and Chase v. Page, 343 F.2d 167, 171 (10th Cir. 1965).

531. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956).

532. *See* Kurland, *supra* note 43, at 414 ("[f]ederalism is dead, if by federalism we mean the retention by the states of areas of government in which they are sovereign").

Justice Harlan advanced that argument in several opinions,[533] and the positions taken by Justices Fortas and Powell in the jury trial cases rested partly on that ground.[534]

What were the relevant differences that might have supported separate constitutional standards for federal and state proceedings? First, the character of the laws enforced was different. State police "enforce a far wider spectrum of laws varying from minor traffic infractions to major crimes, many of which are uncovered by chance or on emergency pleas for assistance; the federal officers handle much more specialized kinds of crimes which, typically, involve substantial, deliberate investigation."[535] Second, the caseloads of federal and state systems were substantially different. Many state prosecuting agencies and courts had to deal with far more cases per official than federal agencies, yet the states had far fewer resources at their disposal.[536] Finally, differences were evident in the quality and training of state and federal officials. Although F.B.I. officers were college graduates and received extensive training, states insisted on no more than a high school diploma and provided very limited training.[537] In addition, the state system of electing prosecutors and judges produced officials whose credentials often could not match those of federal appointees.[538] In sum, the states had to do more with less and hence required standards that gave them more leeway in implementing the basic principles underlying the Bill of Rights guarantees. A "jot-for-jot" application of standards developed in the context of federal proceedings would put "the States, with their differing law enforcement problems . . . in a constitutional straight jacket."[539]

The Justices supporting selective incorporation responded to this argument in a somewhat indirect fashion in *Duncan v. Louisiana*.[540] The state in *Duncan* argued that the sixth amendment jury trial guarantee was unsuited to state proceedings, particularly in its requirements of twelve person juries and unanimous verdicts.[541] The Court acknowledged that those requirements had been developed in the somewhat different context of federal judicial proceedings, but noted that most of the states had jury trial provisions equal in breadth to

533. *See, e.g.,* Chimel v. California, 395 U.S. 752, 769 (1969) (Harlan, J., concurring) (expanded warrant requirement forced on state officials "facing widely different problems of local enforcement"); Duncan v. Louisiana, 391 U.S. 145, 193 (1968) (Harlan, J., dissenting) (imposition of sixth amendment on states ignores local variations); Malloy v. Hogan, 378 U.S. 1, 16 (1964) (Harlan, J., dissenting) (incorporation disregards "all relevant differences which may exist between state and federal criminal law and its enforcement"); Ker v. California, 374 U.S. 23, 45 (1963) (Harlan, J., concurring) (extension of federal power over state unwise because "[s]tates, with their differing law enforcement problems should not be put in a constitutional straitjacket").

534. *See supra* text accompanying notes 377-81 and 392-401 (discussing respectively Justice Fortas' and Justice Powell's incorporation views).

535. Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices*, 34 ROCKY MTN. L. REV. 150, 166 (1962); *see also* F. GRAHAM, *supra* note 407, at 29 ("states' 99.6 per cent of the offenses include almost all the rapes, murders, muggings and other forms of voilence").

536. *See* H. KERPER & J. ISRAEL, *supra* note 518, at 199 (discussing caseloads handled in the state systems).

537. *Id.* at 411-12 (discussing varying entrance and training standards).

538. *Id.* at 429, 446-47 (summarizing criticism of state selection system); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1121-24 (1977) (noting reasons, including selection process, for generally "higher level of talent" on federal bench).

539. Ker v. California, 374 U.S. 23, 45 (1963) (Harlan, J., concurring).

540. 391 U.S. 145 (1968).

541. *Id.* at 158 n.30.

the sixth amendment.[542] Only four states used juries of fewer than twelve persons in felony cases.[543] Moreover, the pre-incorporation sixth amendment rulings were "always subject to reconsideration."[544] Indeed, the Court reconsidered those rulings in the later cases of *Apodaca v. Oregon*[545] and *Williams v. Florida*[546] and relieved the States of the requirements of unanimous verdicts and twelve person juries.[547]

Duncan suggests that the Court accepted the possibility that constitutional standards developed in pre-incorporation cases might create an intolerable "straight jacket" for the states,[548] but thought that, instead of rejecting selective incorporation, it should reexamine the constitutional grounding of pre-incorporation precedents. As Justice Harlan noted, that response had its costs.[549] If the Court were to apply the same constitutional standards to both state and federal governments, while making those standards more flexible to avoid unduly restricting the states, the end result would be a "watering down [of] protections against the Federal government."[550] Justice Harlan expressed concern, in particular, about the possible "derogation" of standards applied to federal law enforcement officers.[551] Several majority opinions indicated, however, that the Court did not see the need for a wholesale reexamination of pre-incorporation standards to meet the special demands of the state criminal justice systems.[552] The Court was not necessarily suggesting that the unique practical problems faced by state criminal justice systems were irrelevant to the shaping of constitutional standards, but it apparently viewed the differences between federal and state systems as less substantial than proponents of separate standards suggested.[553]

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542. *Id.*

543. *Id.* The Court assumed that the requirement of a twelve person jury applies only to "serious criminal cases." *Id.*

544. *Id.*

545. 406 U.S. 404 (1972).

546. 399 U.S. 78 (1970).

547. *See supra* text accompanying notes 385-98 (discussing holding and rationale of *Apodaca* and *Williams*).

548. Ker v. California, 374 U.S. 23, 45 (1963) (Harlan, J., concurring).

549. Malloy v. Hogan, 378 U.S. 1, 28 (1964) (Harlan, J., dissenting).

550. *Id.*

551. Ker v. California, 374 U.S. 23, 45-46 (1963) (Harlan, J., concurring); *see also* Chimel v. California, 395 U.S. 752, 769 (1969) (Harlan, J., concurring) (federal/state standards might be diluted in interest of promoting state flexibility); Aguilar v. Texas, 378 U.S. 108, 116 (1969) (Harlan, J., concurring) (same).

552. *See* Ker v. California, 374 U.S. 23, 34 (1963) (state may develop workable rule governing search and seizure to meet "practical demands" of law enforcement and investigation so long as consistent with Constitution); Mapp v. Ohio, 367 U.S. 643, 659 (1961) (suggesting that application of federal exclusionary rule would not render state police ineffective). In various other cases in which the dissenters pointed to differences in the state and federal systems, *see supra* note 533, the majority did not respond. *See, e.g.,* Malloy v. Hogan, 378 U.S. 1, 16 (1964) (Harlan, J., dissenting) (noting that majority did not address differences between state and federal criminal law and its enforcement).

553. Opinions have often emphasized that newly imposed standards were consistent with realities of law enforcement. *See, e.g.,* Terry v. Ohio, 392 U.S. 1, 12, 23 (1968) (stop and frisk standards should not create unreasonable risks to police); Miranda v. Arizona, 384 U.S. 436, 481 (1966) (limits imposed on interrogation should not create undue interference with proper system of law enforcement); Mapp v. Ohio, 367 U.S. 643, 659 (1961) (application of federal exclusionary rule to state will not "fetter" law enforcement). Although Justices Black and Douglas have suggested that the "practical effects" of a ruling are irrelevant, Williams v. Florida, 399 U.S. 78, 111 (1970) (Black, J., with Douglas, J., concurring in part and dissenting in part), the Court as a whole has not shared that view—at least where the "constitutional command" is not "unequivocal." *Cf.* Payton v. New York, 445 U.S. 573, 602 (1980)

This view was entirely tenable. Federal constitutional standards developed in pre-incorporation cases applied to the full range of federal law enforcement activities. Although the FBI often dealt with cases permitting a more thorough and planned investigation than typical state cases, federal police agencies in the District of Columbia and in federal enclaves had primary responsibility for enforcement of the full spectrum of criminal laws.[554] The enforcement problems faced in the District of Columbia, in particular, were similar to those faced in most large urban communities.[555] The police there dealt with the same distribution of offenses and faced the same difficulties in recruiting and training qualified personnel.[556] The courts and prosecutors handled the same problems of heavy caseloads and limited resources.[557] Moreover, the Justices, through their docket and their local newspapers, were obviously aware of those problems.[558] If the pre-incorporation standards of federal cases were consid-

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(practical considerations of hampered law enforcement must give way to "unequivocal constitutional commands"). *See generally* Elson, *Balancing Costs in Constitutional Construction: The Burger Court's Expansive New Approach*, 17 AM. CRIM. L. REV. 160 (1979) (Burger Court giving broader consideration to practicality concerns when determining scope of constitutional right).

554. In addition to law enforcement responsibilities in the District of Columbia, federal agencies have enforcement authority in national parks and Indian reservations. UNITED STATES ATTORNEY GENERAL, FIRST ANNUAL REPORT—FEDERAL LAW ENFORCEMENT AND CRIMINAL JUSTICE ASSISTANCE ACTIVITIES 338-343 (1972); *see* INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES 105-14 (1957) (discussing exclusive and concurrent federal jurisdiction over private and federally owned lands). Thus, the federal system, as well as the states, faces the special problems of administering justice in sparsely populated regions. The logistical problems in summoning jurors, for example, could bear as heavily upon the federal court in Montana as it could upon the Montana state courts.

555. At the time of the adoption of selective incorporation, the District of Columbia accounted for approximately 1300 of 38,000 federal felony filings. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 131 (1963).

556. *See generally* U.S. PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT 142-229 (1966) (evaluating organizational components of metropolitan police departments). In fact, from 1960 to 1965 the increase in the total FBI index offenses for the District of Columbia was more than twice that of cities ranging in population from 500,000 to one million. *Id.* at 105.

557. *Id.* at 235-37, 248-69; *see also* H. SUBIN, CRIMINAL JUSTICE IN A METROPOLITAN COURT—THE PROCESSING OF SERIOUS CRIMINAL CASES IN THE D.C. COURT OF GENERAL SESSIONS 112-17 (1966). Admittedly, unlike many of their state counterparts, the United States Attorney for the District and the judges of the two courts trying criminal cases (District Court for felonies and serious misdemeanors, and Court of General Sessions for minor offenses) were appointed rather than elected. Arguably, this difference made them more able to cope with higher federal standards. On the other side, however, the element of community pressure introduced by the election process cautioned against allowing a lesser standard for state proceedings. *Cf.* Stone v. Powell, 428 U.S. 465, 525 (1976) (Brennan, J., dissenting) ("[s]tate judges popularly elected may have difficulty resisting popular pressures not experienced by federal judges given lifetime tenure designed to immunize them from such influences"). *But see* Wolf v. Colorado, 338 U.S. 25, 32 (1949) (less justification for exclusionary rule in state proceedings because "public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself"); Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) (local invasions of liberties more amenable to political correction).

Interestingly, in 1970 there was a complete reorganization of the District of Columbia court system, with the Superior Court replacing the United States District Court as the court of general jurisdiction. Superior Court judges lack the tenure and salary protections of article III judges, although they are still appointed rather than elected. United States v. Palmore, 411 U.S. 389, 410 (1973). Their susceptibility to community pressures is now similar to that of judges in those states that use an appointment system for selecting judges. *See id.* at 418-20 (Douglas, J., dissenting); H. KERPER & J. ISRAEL, *supra* note 518, at 445-48.

558. As in any community, the local criminal justice system manages to receive a fair amount of attention in the Washington papers. It may safely be assumed that most, if not all, of the Justices were familiar with that coverage. In any event, a significant number of each year's certiorari petitions presented cases from the District, and several of the Court's more significant rulings in the criminal justice field were cases from the District. *See* Mallory v. United States, 354 U.S. 449, 455-56 (1957)

ered appropriate for the realities of enforcement in the District, as well as in other parts of the varied federal system, they were likely to be appropriate for the state systems as well.[559] That numerous states already were following the federal standards under local law also suggested that those standards met the practicable needs of the state systems.[560] If a few of those standards failed to meet such needs, then reexamination was appropriate for both the federal and state systems. The residents of the nation's capital were as much entitled to effective law enforcement as the residents of any of the states.

3. Diversity and Experimentation

In *New State Ice Co. v. Liebman*[561] Justice Brandeis admonished the Court not to unduly interfere with state experimentation:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is

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(lengthy detention following arrest without taking accused before available magistrate or informing of right to such hearing violates Federal Rule of Criminal Procedure 5(a) and requires exclusion of confession); Green v. United States, 355 U.S. 184, 191 (1957) (implied acquittal through jury's decision to convict only on second degree murder barred reprosecution on first degree charge following appellate reversal); Jones v. United States, 362 U.S. 257, 264-65 (1959) (motion to suppress standing available to defendant without possessory interest in place searched). As a result, the role of the District in the federal criminal justice system probably loomed larger than its contribution to the total number of felony prosecutions, 1300 out of 3800, *supra* note 555, might suggest. At least, that was the author's impression while clerking during the 1959 and 1960 terms.

559. It should be noted that this analysis of the Court's assumptions about the suitability of pre-incorporation standards rests primarily on the author's speculation. There was no reference to the parallel between the District of Columbia and the typical state system in any of the selective incorporation opinions. Apart from Duncan v. Louisiana, 391 U.S. 145 (1968), the only responses to arguments concerning the "constitutional straightjacket" on local law enforcement were the comments in Mapp v. Ohio, 367 U.S. 643, 659 (1967), and Ker v. California, 374 U.S. 23, 34 (1963). In *Mapp* the Court suggested that the federal experience and the experience of those states that had adopted the exclusionary rule indicated that application of the rule would not render state police ineffective. 367 U.S. at 659. In *Ker* the Court noted:

> The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures. . . . Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques.

374 U.S. at 34.

560. Several of the major incorporation opinions pointed to the large number of states that would have rejected, under local law, the practice being rejected under an incorporated constitutional guarantee. *See, e.g.,* Mapp v. Ohio, 367 U.S. 643, 651 (1961) ("movement toward rule of exclusion has been halting but seemingly inexorable"); Klopfer v. North Carolina, 386 U.S. 213, 219 (1967) (rejecting North Carolina rule that right to speedy trial does not afford protection against unjustified trial postponement when accused discharged from custody; noting that rule rejected by every other state court); Washington v. Texas, 388 U.S. 14, 17 n.4 (1967) (no laws in other jurisdictions cited by counsel or found by Court that disqualify coparticipants in crime from testifying for each other).

561. 285 U.S. 262 (1932).

> arbitrary, capricious, or unreasonable. . . . But in the exercise of this high power, we must ever be on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.[562]

One of the major justifications advanced for the fundamental fairness doctrine is that it pays heed to Justice Brandeis' admonition by providing ample room for diversity (and thus experimentation) in state procedure. Indeed, the importance of allowing leeway for experimentation was noted in the first of the fundamental fairness opinions, *Hurtado v. California*.[563] The Court stressed that due process ought not to preclude a state, if it so desires, from looking beyond the common law and basing its process on "the best of all systems of every age," letting the "new and various experiences of our own situation and system mold and shape it into less uniform forms."[564] In subsequent years, the fundamental fairness cases continued to reflect this philosophy, which was best summarized by Justice Frankfurter.[565] The Supreme Court's mood, he noted, had been "insistently cautious."[566] This was proper because the fourteenth amendment should not be "the basis of a uniform code of criminal procedure federally imposed. . . . Alternative modes of arriving at truth" should not be barred.[567] As in the area of economic regulation, "Here too, freedom must be left for new, perhaps improved, methods 'in the insulated chambers afforded by the several states.' "[568]

When the Court shifted to selective incorporation, Justices critical of the new doctrine argued that the majority was failing to take into account the value of experimentation, as expressed by Justice Brandeis.[569] Justice Goldberg responded that although the Brandeis admonition had relevance to the application of the doctrine of substantive due process in the area of social and economic rights, recognition of the state's capacity to experiment did not extend to "experiment[s] with the fundamental liberties of citizens safeguarded by the Bill of Rights."[570] Justice Black offered a similar response.[571]

The rejection of the Brandeis admonition by Justices Goldberg and Black suggests a position that absolutely refuses to give weight to the value of experimentation whenever a state innovation alters the traditional rights of the ac-

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562. *Id.* at 311 (Brandeis, J., dissenting).

563. 110 U.S. 516 (1884)

564. *Id.* at 531.

565. Frankfurter, *The Supreme Court Writes on Man's Rights*, in LAW AND POLITICS 192 (A. MacLeish & E. Prichard eds. 1939).

566. Frankfurter, *supra* note 565, at 192.

567. *Id.*

568. *Id.* at 193 (quoting Justice Holmes's dissent in Traux v. Corrigan, 237 U.S. 312, 344 (1921)). The Holmes dissent criticized the "use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the states." *Id.*

569. Duncan v. Louisiana, 391 U.S. 145, 193 (1968) (Harlan, J., dissenting); Johnson v. Louisiana, 406 U.S. 356, 376 & n.16 (1972) (Powell, J., concurring); *see also* Williams v. Florida, 399 U.S. 78, 133 (Harlan, J., concurring) (incorporation fails to leave enough room for governmental and societal experimentation).

570. Pointer v. Texas, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring).

571. In Duncan v. Louisiana, 391 U.S. 145 (1968), Justice Black stated, "I have never believed that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the Bill of Rights." *Id.* at 170 (Black, J., dissenting); *see also* Johnson v. Louisiana, 406 U.S. 356, 386-87 (1972) (Douglas, J., dissenting) (construing Bill of Rights and fourteenth amendment to permit states to experiment with basic rights of people opens veritable "Pandora's box").

cused.[572] This absolutist position would deny leeway for experimentation even when the experiment did not challenge the basic values underlying a constitutional guarantee, but sought only to establish a new, equally effective mode of implementing those values. Concerned that the selective incorporation doctrine would be so construed, Justice Fortas argued, in the context of the jury trial guarantee, that the doctrine might actually do a disservice to the basic values protected by the constitution.[573] Surely, he noted, "[W]e should be ready to welcome state variations which do not impair—indeed which may advance—the theory and purpose of trial by jury."[574] Justice Powell similarly noted that given the increasing importance of empirical study as a basis for decisionmaking, it would be foolhardy to prevent the states from experimenting with variations in jury trial procedure.[575] The "same diversity of local legislative responsiveness that marked the development of economic and social reforms . . . might well lead to valuable innovations with respect to determining—fairly and more expeditiously—the guilt or innocence of the accused."[576]

The decisions in *Williams v. Florida*[577] and *Apodaca v. Oregon*,[578] holding that the sixth amendment requires neither twelve person juries nor unanimous verdicts,[579] suggest that, Justices Goldberg and Black notwithstanding, the Court did not intend selective incorporation to preclude giving weight to the value of experimentation. In both cases, Justices supporting selective incorporation were willing to grant leeway to states to conduct experiments aimed at achieving greater efficiency without subordinating the policies of the jury trial guarantee. Unlike other experiments that the Court had rejected, the states here were not arguing that the values underlying the guarantee had to be sacrificed to interests of expediency.[580] Instead, they maintained, and the Court agreed, that their innovations safeguarded the values underlying the sixth amendment to the same extent and with the same degree of effectiveness as the requirements imposed by the pre-incorporation cases.[581] *Williams* and

572. Of course, to say that there can be no experimentation with "fundamental liberties" does not answer the question whether a particular state experiment implicates such a liberty. *See* Friendly, *supra* note 296, at 955. Justices Goldberg and Black certainly meant to say that they would not construe the fourteenth amendment narrowly in order to provide leeway for experimentation. *Cf. supra* note 565 (Justice Holmes' view on experimentation). And they may have meant to say that any experimentation even remotely affecting fundamental liberties was impermissible.

573. Duncan v. Louisiana, 391 U.S. 145, 213-14 (Fortas, J., concurring).

574. *Id.* at 214-15.

575. Johnson v. Louisiana, 406 U.S. 356, 376 (1972) (Powell, J., concurring).

576. *Id.*

577. 399 U.S. 78 (1970).

578. 406 U.S. 404 (1972).

579. *Williams*, 399 U.S. at 101-02; *Apodaca*, 406 U.S. at 410-11.

580. Compare with *Williams* and *Apodaca*, Baldwin v. New York, 399 U.S. 66, 73-74 (1970) (rejecting state's refusal to provide juries for one-year misdemeanors tried in New York City), and Griffin v. California, 380 U.S. 609, 613 (1965) (rejecting state law permitting adverse comment by court or prosecutor on defendant's failure to testify). The state in *Baldwin* argued that the state's interest in administrative convenience overcame the jury trial requirement imposed by pre-incorporation cases. *See* 399 U.S. at 72-73. There was no suggestion, however, that the state practice provided the accused with the same degree of protection as the pre-incorporation cases.

581. *Williams*, 399 U.S. at 101-02 (no difference in results reached by twelve and six person juries, and loss in community representation "negligible"); *Apodaca*, 406 U.S. at 410-14 (although unanimity requirement would produce hung juries in 10-2 verdict case and juries permitted to split would reach verdict in such case, difference does not adversely affect interests protected by jury trial guarantee). Arguably, the conclusion in *Apodaca* that split verdicts were no less effective than unanimous verdicts was not shared by the majority, because the deciding vote was cast by Justice Powell, who applied a fundamental fairness standard. *Supra* text accompanying note 396-97. Justice Powell, however, also

Apodaca indicate that when the state maintains the basic policy of a particular guarantee and simply seeks to provide the same degree of protection in a different form, selective incorporation will permit experimentation with the rights afforded the accused.

Although selective incorporation does not, viewed in this light, require a complete rejection of Brandeis' admonition, it does treat experimentation somewhat differently than the fundamental fairness doctrine. First, under selective incorporation, the Court holds that the relevant Bill of Rights guarantee, not just the due process clause, allows a particular experiment. That holding, therefore, extends the opportunity to conduct that experiment to the federal government as well as the state. After *Williams*, for example, the sixth amendment prohibited neither the federal government nor the state from using six person juries. Tying together state and federal experimentation in this fashion does not present the difficulties in criminal procedure that it would elsewhere. In the social and economic context considered by Justice Brandeis, state experimentation was preferred over federal experimentation.[582] The social or economic experiment of an individual state was "without risk to the rest of the country,"[583] but federal legislation applied throughout the nation. In the field of criminal procedure, however, experimentation by the federal government affects only one of fifty-one criminal justice systems: the federal system. The state systems, which handle the vast bulk of all criminal prosecutions,[584] are not subjected to the federal innovation.

Selective incorporation differs from the fundamental fairness doctrine secondly in the scope of experimentation it permits. As *Williams* and *Apodaca* demonstrate, selective incorporation permits only experiments that provide alternative forms of protection without detracting from the basic values of the particular guarantee. Fundamental fairness, on the other hand, allows experimentation that fails to implement those values as effectively, at least when the values are not substantially undercut.[585] Moreover, earlier fundamental fairness cases indicate that the doctrine could allow a complete trade-off of the basic elements of a particular guarantee for a new procedure providing an alternative route to fundamental justice. In *Hurtado v. California*,[586] for example, the state was allowed to substitute a probable cause review by a magistrate

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concluded that there was "no reason to believe that a unanimous decision of 12 jurors is more likely to serve the high purpose of jury trial." 406 U.S. at 374 (Powell, J., concurring).

When the Court later found that neither a smaller jury nor a split-verdict of a six person jury would as effectively serve the purposes of the sixth amendment, it struck down the state experiment. *See* Burch v. Louisiana, 441 U.S. 130, 139 (1979) (rejecting five-to-one jury vote for nonpetty offenses); Ballew v. Georgia, 435 U.S. 223, 245 (1978) (rejecting five person jury).

582. *See supra* text accompanying note 562 (discussing Justice Brandeis' position on experimentation).

583. *Id.*

584. H. KERPER & J. ISRAEL, *supra* note 518, at 74-75.

585. *Compare* Adamson v. California, 332 U.S. 46, 55-58 (1946) (under fundamental fairness doctrine, state law permitting adverse comment on defendant's silence held not to violate due process since it merely draws to jury's attention an inference logically arising from defendant's failure to explain or deny the prosecutor's incriminating evidence) *with* Griffin v. California, 380 U.S. 609 (1965) (under selective incorporation doctrine, state law permitting adverse comment on defendant's silence held to violate privilege against self-incrimination by imposing penalty for exercise of privilege); *see also* Friendly, *supra* note 296, at 938-40 (criticizing *Griffin* and noting that "most informed professional opinion" approved allowing limited comment).

586. 110 U.S. 516 (1884); *see supra* text accompanying notes 180-90 (discussing *Hurtado*).

for a grand jury review.[587] And in *Missouri v. Lewis*[588] the Court suggested that a state would not violate the fourteenth amendment by substituting the "civil law and its methods of procedure" for the common law system of adjudication.[589]

Consider, in this light, the proposal that arrested persons be given complete protection from police interrogation, but be subjected to interrogation by a magistrate in a public proceeding, with their refusal to respond creating an adverse inference. Such a proposal would have been acceptable constitutionally under even the later fundamental fairness cases.[590] Yet, under the selective incorporation doctrine and the current interpretation of the self-incrimination clause, the same proposal faces constitutional problems that are "formidable."[591] Certainly it would not pass muster simply because it is an even-handed approach—adding protection at one point and subtracting protection at another—entirely consistent with "the 'immutable principles of justice' as conceived by a civilized society."[592]

IV. SELECTIVE INCORPORATION AND THE CURRENT COURT

Commenting on the "pendulum of federalism" in the Supreme Court, Professor Howard wrote that

> [i]t is striking, perhaps surprising, that the Burger Court, having slowed the momentum of the "criminal justice" revolution of the 1960's, has at the same time stuck to the basic premise of the incorporation doctrine: that when a procedural guarantee is applied to the states, it is applied with the same force as when it is applied to the federal Government.[593]

As Professor Howard suggests, the continued adherence to selective incorporation is hardly an action that follows automatically from the composition of the current Supreme Court. There clearly are major differences in philosophy separating the Burger Court majority of the last decade from the Warren Court majority that adopted selective incorporation. It generally is agreed that the Burger Court is less receptive to claims of the accused than its predecessor,

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587. 110 U.S. at 538.

588. 101 U.S. 22 (1879).

589. *Id.* at 31; *see supra* note 20 (discussing *Lewis*).

590. *Cf.* Adamson v. California, 332 U.S. 46 (1946) (court allowed prosecutor to comment on defendant's failure to testify); *see also* Kauper, *Judicial Examination of the Accused—A Remedy For the Third Degree*, 30 MICH. L. REV. 1224, 1239-44 (1932) (proposal for judicial interrogation of criminal defendant with refusal to answer magistrate's questions admissible against accused at trial); Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments On A Remarkable Article*, 73 MICH. L. REV. 15, 22-25 (1974) (discussing Kauper's proposal in light of later precedent).

591. Kamisar, *supra* note 590, at 33. Kasimar makes a valiant attempt to find constitutional support for such a proposal, notwithstanding Griffin v. California, 380 U.S. 609, 615 (1965), which rejected a state law permitting adverse comments on defendant's failure to testify. Kasimar, *supra* note 590, at 33 n.70. *See also* Frankel, *From Private Fights toward Public Justice*, 51 N.Y.U. L. REV. 516, 529-30 (1976) (suggesting that *Griffin* ruling "not so central and inevitable as to preclude restudy in an altered context").

592. Adamson v. California, 332 U.S. 46, 60 (1946) (Frankfurter, J., concurring). On the other hand, an even-handed approach might induce the Court to reconsider and reject its *Griffin* ruling, at least in this context. *See* Frankel, *supra* note 591, at 531 (suggesting same).

593. Howard, *The Supreme Court and Federalism*, in THE ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE REPORT, THE COURTS: THE PENDULUM OF FEDERALISM 49, 54 (1979).

although the precise extent of that difference is a matter of dispute.[594] More significantly, the Burger Court has exhibited a "renewed sensitivity to the prerogatives of the states."[595] That sensitivity to states' rights is reflected in various rulings relating to criminal procedure.[596] For example, the Burger Court rulings on federal habeas corpus review of state convictions have substantially restricted, if not overruled, the Warren Court's liberal "deliberate by-pass" standard of *Fay v. Noia*.[597]

Overall, the current Court's views on the obligations of federalism appear to come closer to those of Justice Harlan than to those of the Warren Court majority that adopted selective incorporation over Justice Harlan's rigorous opposition.[598] Why then, has the Court nevertheless continued to adhere to the selective incorporation doctrine?

Although respect for precedent may have played a role in preserving the doctrine, that factor has not likely been controlling in itself. On an issue that has been described as "going to the very pulse of sound constitutional adjudication,"[599] the principle of stare decisis hardly poses an insurmountable obstacle to change.[600] Selective incorporation never had a firm base in prior precedent,[601] and the Burger Court has not hesitated to chip away at other Warren Court decisions that it viewed as unjustified departures from the lessons of history.[602] It would not have been difficult for the Court to at least reject "jot-for-jot" incorporation in selected areas, as urged by Justice

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594. *Compare* L. LEVY, AGAINST THE LAW (1974) (Burger Court has consistently departed from major Warren Court precedents) *with* Chase, *The Burger Court, the Individual and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. REV. 518, 519 (1977) (Burger Court has retreated from Warren Court's expansive view of fourth and fifth amendments) *with* Israel, *supra* note 3, at 1349 (in some areas Burger Court has been even more protective of criminal defendants than Warren Court).

595. *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1329 n.22 (1982). *See generally* Monaghan, *The Burger Court and "Our Federalism"*, 43 LAW & CONTEMP. PROBS. 39, 43-47 (summer 1980) (discussing "Burger Court's brand of federalism" as it relates to access to federal courts to challenge state criminal proceedings).

596. Consider, in addition to the cases cited *infra* note 597, the Burger Court's imposition of limits on federal injunctions against state criminal proceedings, discussed in Howard, *supra* note 593, at 60-61, and Monaghan, *supra* note 595, at 43-47.

597. 372 U.S. 391, 438 (1963) (liberal federal habeas relief available absent knowing and deliberate failure to raise constitutional contention in state proceeding). Compare with *Fay v. Noia*, Wainwright v. Sykes, 433 U.S. 72, 97 (1977) (no habeas review of claims if petitioner failed to lodge timely objection under state contemporaneous objection rules unless petitioner shows sufficient cause for failure to raise claim and resulting prejudice; *Fay v. Noia* not applicable), and Engle v. Issac, 102 S. Ct. 1558, 1572 (1982) (cause and prejudice test of *Wainwright v. Sykes* also applies to constitutional claims relating to factual guilt).

The Court has also limited the range of constitutional issues cognizable on habeas review. *See* Stone v. Powell, 428 U.S. 465, 494-95 (1977) (when state provided opportunity for full and fair litigation, habeas petitioner may not raise claim that evidence obtained in unconstitutional search or seizure was introduced at trial). *See* Popper, *De-Nationalizing the Bill of Rights*, in THE ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE REPORT, THE COURTS: THE PENDULUM OF FEDERALISM 81 (1979) (discussing *Stone* and related cases).

598. *Compare* Wainwright v. Sykes, 433 U.S. 72, 87 (1972) (described *supra* note 597) *with* Fay v. Noia, 372 U.S. 391, 466-67 (1963) (Harlan, J., dissenting) (arguing for similar bar to habeas relief based on defendant's failure to raise proper objection in state courts).

599. Williams v. Florida, 399 U.S. 78, 118 (1970) (Harlan, J., dissenting).

600. *Id.* at 119-20 (Harlan, J., dissenting).

601. For an analysis of the rationale of selective incorporation, see *supra* text accompanying notes 407-592.

602. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 87-88 (1972) (restricting "deliberate by-pass" habeas rule of Fay v. Noia, 372 U.S. 391 (1963)); Younger v. Harris, 401 U.S. 37, 50-51 (1971) (narrowly construing Dombrowski v. Pfister, 380 U.S. 479 (1965) on availability of injunction against state criminal proceeding); Hudgens v. NLRB, 424 U.S. 507, 518, 520-21 (1976) (expressly overruling Amal-

Powell.[603]

Selective incorporation was most likely saved by its workability. It provides exceptional administrative convenience at a very low cost to the underlying concerns of the Court's renewed interest in federalism. Although selective incorporation does not provide a symbol of respect for state sovereignty, as did fundamental fairness, it does provide sufficient flexibility to avoid the disastrous consequences to state criminal justice systems that had been predicted by those who opposed its adoption.

A. PRESERVING ADMINISTRATIVE CONVENIENCE

Selective incorporation was adopted, in part, because the Court thought it provided a clearer guideline for state courts than the fundamental fairness doctrine.[604] The Burger Court arguably is less concerned that state officials will purposefully misuse vague constitutional standards.[605] That, however, does not eliminate the need to provide substantial direction in a matter of everyday concern to those officials. If selective incorporation offered a significant advantage in providing such direction in the 1960's, it offered an even greater advantage a decade later. Over that decade the Court issued over 200 rulings in the field of constitutional criminal procedure.[606] State courts have been able to rely on each of these rulings regardless of whether the case involved a federal or state proceeding. A return to fundamental fairness would raise doubts about the continued vitality of many of those cases as applied to those states. Those cases that arose in the federal system would automatically be suspect, and even cases involving state proceedings could be questioned: Might the Court have reached a different result if it had looked to a fundamental fairness concept of due process rather than a specific guarantee?

Arguably, the impact of the shift back to the fundamental fairness doctrine could have been limited by confining that shift to a particular type of constitutional standard. Justice Fortas in a sixth amendment case suggested that fundamental fairness analysis was most appropriately applied to standards prescribing a "system of administration."[607] That suggestion, however, likely left open the possibility of encompassing various guarantees besides the sixth amendment right to a jury trial. Could not a fourth amendment standard relating to standing or a fifth amendment standard governing the judge's role in assessing a claim of self-incrimination also be categorized as a standard of administration, as opposed to a standard defining the basic right? For that reason the distinction drawn by Justice Fortas, and perhaps supported by Jus-

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gamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968); no first amendment right to picket in shopping center).

603. *See supra* text accompanying notes 403-05 (discussing Justice Powell's opposition to "jot-for-jot" incorporation).

604. See *supra* text accompanying notes 476-506.

605. Howard, *supra* note 593, at 56.

606. J. ISRAEL & W. LAFAVE, CRIMINAL PROCEDURE IN A NUTSHELL: CONSTITUTIONAL LIMITATIONS 79 (1st ed. 1971).

607. Duncan v. Louisiana, 391 U.S. 145, 213-14 (1968) (Fortas, J., concurring) (discussed *supra* text accompanying notes 376-81). Compare Professor Hill's criticism of the failure of Justices both supporting and opposing selective incorporation to ask "whether the case presents an issue of definition (including minimum degree of implementation), or is one in which there is an issue of implementation but no real disagreement over definition of the right." Hill, *supra* note 264, at 192.

tice Powell,[608] might have created only slightly less confusion than a complete rejection of selective incorporation.

The administrative costs of overturning selective incorporation would have been substantial, but perhaps not so great as to preclude rejection of the doctrine if it had produced the disastrous results predicted by those who opposed it. Critics argued that selective incorporation would produce rulings that either hamstrung the effective administration of the state criminal justice systems[609] or "watered down" the protections afforded against the federal government.[610] The key to the retention of selective incorporation probably lies in the Court's belief that neither of these consequences is inevitable—that the doctrine provides sufficient flexibility in the interpretation of individual guarantees to give appropriate consideration to the needs of the state systems and that the Court has sufficient authority to impose higher standards upon the federal system when appropriate.

B. AVOIDING THE CONSTITUTIONAL STRAIGHTJACKET

1. The Problem of "Peripheral Accretions"

By the 1970's even the most vigorous opponents of selective incorporation acknowledged that the core values of the various incorporated guarantees should be applied to the states.[611] Justice Harlan, for example, although he contested incorporation of the fifth amendment privilege against self-incrimination, rejected the notion that all elements of the privilege were beyond the requirements of fundamental fairness.[612] Due process, he stated, clearly would prohibit a state "from imprisoning a person solely because he refused to give evidence which may incriminate him."[613] Similarly, in *Duncan v. Louisiana*[614] the dissenters argued only that due process permitted the state to dispense with a jury trial for the "simple battery" involved in the case, not that it permitted the state to convict defendants on serious felony charges without the protection of a jury.[615]

The "constitutional straightjacket"[616] that was the predicted product of selective incorporation stemmed primarily from what Professor Henkin described as the "peripheral survivals or accretions in the Bill of Rights."[617] The

608. *See supra* text accompanying notes 403-05 (discussing Justice Powell's concern about applying to states requirements focusing on details of administration).

609. Ker v. California, 374 U.S. 23, 45 (Harlan, J., concurring) (selective incorporation will place states in "constitutional straight jacket").

610. Malloy v. Hogan, 378 U.S. 1, 28 (1964) (Harlan, J., dissenting).

611. *But see* Black, *supra* note 459, at 878 (suggesting that some Justices would balance even core values against the convenience of law enforcement and eliminate those values when unduly burdensome).

612. *See* Malloy v. Hogan, 378 U.S. 1, 15 (1964) (Harlan, J. dissenting). *But see* Twining v. New Jersey, 211 U.S. 78, 112-13 (1908) (suggesting all aspects of privilege against self-incrimination inapplicable to states under fundamental fairness doctrine).

613. *Malloy*, 378 U.S. at 15 (Harlan, J., dissenting).

614. 391 U.S. 145 (1968).

615. *Id.* at 171-72 (Harlan, J., with Stewart, J., dissenting). The dissenting Justices assumed that the "simple battery" was not within the petty offense category and that application of the sixth amendment therefore would require a jury trial. *Id.*

616. Williams v. Florida, 399 U.S. 78, 130 (1970) (Harlan, J., concurring).

617. Henkin, *supra* note 5, at 83. The "peripheral survivals or accretions in the Bill of Rights" are

specific guarantees supposedly were encrusted with various detailed standards for their implementation that were unduly rigid and burdensome as applied to a state system.[618] To eliminate those standards would be most difficult because they usually were established by the common law history of the particular guarantee as well as pre-incorporation precedent.[619]

The decisions in *Apodaca v. Oregon*[620] and *Williams v. Florida*[621] suggested, however, that removal of such "peripheral accretions" was far from an impossible task.[622] Of course, there was disagreement about exactly which standards were needed to ensure the integrity of the guarantee and which reflected no more than one convenient mode of implementation.[623] Surely, many standards retained to ensure the integrity of a specific guarantee would have been rejected under the fundamental fairness doctrine. Under the fundamental fairness doctrine, the individual in effect bore the burden of showing that justice could not be served without the application of the right in question. A Court could hold a long-standing interpretation of a guarantee inapplicable to the states because it was not clearly recognized as essential to safeguarding the core values of that guarantee.[624] Selective incorporation, on the other hand, placed the burden on the state to show that the long-standing interpretation was beyond the needs of the guarantee. Selective incorporation gave the Justices less flexibility in dealing with what they viewed as outmoded or unnecessary standards of implementation,[625] but it still left them sufficient leeway to

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specifics in the Bill of Rights that may be anachronistic and therefore should not be imposed on the states through selective incorporation. *Id.*

618. Baldwin v. New York, 399 U.S. 66, 143 (1970) (Stewart, J., dissenting). Those advancing this argument did not deny that these same standards may have been burdensome for the federal system as well, but because they were intended by the framers, the federal system had no alternative but to accept them. *Id.*

619. *See* Williams v. Florida, 399 U.S. 78, 126 (1970) (Harlan, J., dissenting) (sixth amendment requirement of 12 person jury dictated by both precedent and pronouncements of Court).

620. 406 U.S. 404 (1972).

621. 399 U.S. 78 (1970).

622. See the discussion of *Apodaca* and *Williams supra* text accompanying notes 385-98.

623. *See, e.g.,* Crist v. Bretz, 437 U.S. 28, 37-38 (1978) (discussed *supra* note 401); Apodaca v. Oregon, 406 U.S. 404, 406 (discussed *supra* text accompanying notes 392-98); Griffin v. California, 380 U.S. 609, 615 (discussed *supra* note 585).

624. *See* Wolf v. Colorado, 338 U.S. 25, 26 (1949) (fourth amendment right against unreasonable search and seizure not applicable to states under fourteenth amendment).

625. Perhaps for some Justices, both the fundamental fairness and selective incorporation doctrines would be equally flexible. Justice Douglas reported that Chief Justice Hughes once told him that at "the constitutional level . . . ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections." W. DOUGLAS, THE COURT YEARS 8 (1980). From that perspective, the same result might be reached whether the Justice looked to the fundamental fairness standard or one of the more specific Bill of Rights guarantees. Yet, for other Justices there are various issues—at least those where the emotions are not so strong—on which the language, history, and precedent under a specific guarantee demand a result that would not be reached under a fundamental fairness test. The dissenting opinions of Justice Harlan in several of the selective incorporation cases are illustrative. In Malloy v. Hogan, 378 U.S. 1 (1964), Justice Harlan was willing to argue that (1) fundamental fairness did not require a particular procedure, and (2) if the specific guarantee were applied to the states, it also did not require that procedure. *Id.* at 15-16 (rejecting application to states of federal standard for privilege against self-incrimination). In Baldwin v. New York, 399 U.S. 66 (1970), however, although Justice Harlan was willing to hold a procedure unnecessary under the fundamental fairness standard, he could not reach the same result under the specific guarantee. *See id.* at 118 (Harlan, J. dissenting) (applying fundamental fairness standard, jury trial unnecessary for misdemeanors, but if specific guarantee applied, petty offense limitation prevailed and jury trial required). *See also supra* note 615 (discussing dissent in *Duncan v. Louisiana*).

act when they believed such standards would impose a substantial burden on the states.[626]

2. Considering Local Circumstances

Another element of the predicted "constitutional straightjacket" was the rigidity of selective incorporation, which would require the same pattern of proceedings for all fifty-one jurisdictions.[627] There supposedly would be no opportunity to take account of the diverse settings in which state criminal justice systems operate, and application of a single constitutional standard would undercut effective local traditions, particularly those relating to judicial proceedings.[628] Here again, however, selective incorporation proved more flexible than its critics had suggested. Post-incorporation rulings established that states could justify local variations based on their particular needs.

In *North v. Russell*,[629] for example, a two-tier trial system for misdemeanors, with nonlawyer magistrates operating at the first level, was sustained as an appropriate balance of the limited resources of rural communities and the rights of the defendants.[630] The Court pointed to "the interest of both the defendant and the State, to provide speedier and less costly adjudication" and the "convenience to those charged to be tried in or near their own community rather than travel to a distant court where a law trained judge is provided."[631] It was sufficient that a full fledged trial, with a jury and lawyer-judge, was available at the second tier and could be reached by the defendant without suffering any substantial imposition at the first tier.[632]

Similarly, in *Shadwick v. Tampa*[633] the Supreme Court recognized the "stiff and unrelenting caseloads" borne by many municipal courts and held that the

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626. For instance, in Williams v. Florida, 399 U.S. 78 (1970), the Court did not require the states to adopt the federal standard of a twelve person jury, which it termed "a historical accident, unnecessary to effect the purposes of the jury system." *Id.* at 102. Significantly, the Court noted that at least nine states provided for less than twelve person juries. *Id.* at 99 n.45. It is likely that the Court acted at least partly to avoid burdening those states with an unnecessary standard.

Conversely, when all but a few states already followed a standard, the Court found no state interest requiring it to discard years of pre-incorporation precedent supporting the standard, even when the standard was not essential to protect the basic guarantee. In Baldwin v. New York, 399 U.S. 66 (1970), for example, the Court held unconstitutional New York's failure to provide jury trials for misdemeanors with maximum sentences of one year imprisonment. *Id.* at 73. The traditional six month limitation on the petty offense exception to the jury trial guarantee was no less the product of "a historical accident, unnecessary to effect the purposes of the jury system," *Williams*, 399 U.S. at 102, than the twelve person jury. The line could just as readily have been drawn at one year, the traditional cut-off point for misdemeanors. New York State, however, stood alone with the one year misdeameanor dividing line, and even New York employed it only in New York City. *Baldwin*, 399 U.S. at 71-72. Although the New York City criminal justice system obviously faced an exceptionally heavy caseload, there was no reason to believe that it could not accommodate a dividing line that was being applied in all of the other large cities in the United States. *Id. See generally* Smith and Pollack, *The Courts Stand Indicted in New York City*, 68 J. CRIM. L. & CRIMINOLOGY 252 (1977) (commentary on inadequacies of city's criminal courts).

627. Duncan v. Louisiana, 391 U.S. 145, 214 (1968) (Fortas, J. concurring).

628. *Id.*

629. 427 U.S. 328 (1976).

630. *Id.* at 336.

631. *Id.*

632. *Id.* at 334; *see also* Ludwig v. Massachusetts, 427 U.S. 618, 630 (1976) (upholding two-tier system with right to jury trial only at second tier when state allowed defendant to move to that tier without presenting defense at first level).

633. 407 U.S. 345 (1972).

fourth amendment was not violated by the issuance of arrest warrants for municipal ordinance violations by nonlawyer clerks of the court.[634] Justice Powell's opinion for a unanimous Court noted that the issuance of warrants by judges or lawyers was preferred, but then, in language reminiscent of earlier fundamental fairness opinions, it added:

> But our federal system warns of converting desirable practice into constitutional commandment. It recognizes in plural and diverse state activities one key to national innovation and vitality. States are entitled to some flexibility and leeway in their designation of magistrates, so long as all are neutral and detached and capable of the probable-cause determination required of them.[635]

North, *Shadwick*, and various search and seizure opinions recognizing the special problems of local law enforcement indicate there is a substantial potential for accommodation to community diversity within a framework of selective incorporation.[636] Of course, not all claims for accommodation have been successful.[637] There probably is somewhat less room for accommodation than would be available under a fundamental fairness standard,[638] but there clearly is sufficient flexibility to recognize most claims for variation that are based on substantial local concerns.

3. Allowing for Innovations

Critics of selective incorporation also argued that the selective incorporation doctrine would preclude innovative experiments that might otherwise improve

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634. *Id.* at 353.

635. *Id.* at 353-54.

636. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976) (recognizing difficulties of securing impounded automobiles against theft and therefore upholding routine inventory searches as reasonable); Cady v. Dombrowski, 413 U.S. 433, 436 (1973) (upholding warrantless search of auto towed to private garage; noting police acted to protect public safety because driver may have left gun in car); Schenckloth v. Bustamonte, 412 U.S. 218, 229-30 (1973) (upholding right to search auto without seeking consent; noting impracticability of requiring advice as to rights before search following traffic stop).

In *Cady* the Court noted that earlier cases involving automobile searches had focused on problems faced by federal officers, whose contact with cars "usually, if not always, involves the detection or investigation of crimes unrelated to the operation of a vehicle." 413 U.S. at 440. As a result of *Mapp*, however, the Court now had to reassess the justification for automobile searches in light of the activities of local officers, who "have more contact with vehicles for reasons related to the operation of vehicles themselves." *Id.* at 441. That activity suggested that the mobility of the vehicle—the factor stressed in the cases involving federal officers—was not the only justification for warrantless searches of automobiles. The need for local officers to make searches independent of criminal investigations, for community caretaking functions, suggested a broader basis for such searches. *Id.* at 441-42.

637. *See* Crist v. Bretz, 437 U.S. 28, 37-38 (1978) (state could not utilize traditional local rule that jeopardy did not attach until first witness sworn); Smith v. Hooey, 393 U.S. 374, 377-78 (1969) (when accused person imprisoned in another jurisdiction demanded speedy trial, state's failure to comply not justified by transportation costs or special problems involved in seeking temporary release from other jurisdiction for purposes of trial). *Compare* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (indigent defendant has right to appointed counsel for petty offense if sentenced to imprisonment on that charge) *and id.* at 40 (Brennan, J., with Douglas & Stewart, JJ., concurring) (suggesting law students may provide representation for indigent defendants) *with* Scott v. Illinois, 440 U.S. 367, 373 (1979) (Court would not "create confusion and impose unpredictable, necessarily substantial costs" by extending *Argersinger* and requiring sixth amendment right to court appointed counsel in misdemeanor cases not involving actual jail sentence).

638. *See supra* note 625 (discussing comparative flexibility of doctrines of fundamental fairness and selective incorporation).

the criminal justice process.[639] Reference to the specific guarantees, as opposed to a fundamental fairness standard, would "retard development in the field of criminal procedure by stifling flexibility."[640] Here again, however, the adverse impact of the selective incorporation doctrine has not been nearly as substantial as the critics suggested.

Selective incorporation undoubtedly precluded some of the more dramatic experiments envisaged by the earlier cases.[641] Yet, past history suggests that the states were unlikely, in any event, to adopt changes that altered the basic structure of the process.[642] The states have not hesitated, however, to adopt less sweeping innovations even when they have been constitutionally suspect.[643] Moreover, the Court has upheld many of those innovations. In *Zicarelli v. New Jersey Commission of Investigation*[644] the Court upheld an immunity statute limited to use and derivative use immunity as co-extensive with the privilege against self-incrimination.[645] In *California v. Green*[646] the Court held that the confrontation clause of the sixth amendment is not violated by admitting a witness' out-of-court statements as substantive evidence if the witness testifies at trial and is subject to full, effective cross-examination.[647] The Court in *Chandler v. Florida*[648] held that, subject to certain safeguards, a

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639. *See supra* note 569 and accompanying text.

640. Williams v. Florida, 399 U.S. 78, 138 (1970) (Harlan, J., dissenting).

641. *See supra* notes 586-89 and accompanying text (discussing experiments allowed by early fundamental fairness cases).

642. A thumbnail sketch of the American criminal justice system might describe it as an accusatorial adversary system that seeks to avoid the conviction of the innocent and to respect the dignity of the individual. The most significant procedural reforms of the last several decades have not sought to alter that structure. *See generally* F. FEENEY, THE POLICE AND PRETRIAL RELEASE (1982) (discussing use of police citations or summonses requiring subsequent appearance as viable alternative to arrest); W. THOMAS, BAIL REFORM IN AMERICA (1976) (tracing progression of bail reform movement and its accomplishments); Burpo, *Electronic Surveillance by Leave of the Magistrate: the Case for the Prosecution*, 38 TENN. L. REV. 14 (1970) (electronic surveillance under title III affords law enforcement officials effective investigation tool without jeopardizing constitutional right to privacy). Although the recent movement for preventive detention may be challenged as inconsistent with that structure, it is defended by its supporters as entirely consistent with the basic precepts of the American system. *See* Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969) (arguing that preventive detention is consistent with presumption of innocence, due process, and historical practice). Commentators have discussed proposals that would incorporate some features of the continental system. *See generally* Weigand, *Continental Cures for American Ailments: European Criminal Procedure As A Model For Law Reform*, in 2 N. MORRIS & M. TONRY, CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 381 (1980). But those proposals have not been carried beyond the stage of law review discussions.

643. Recent state innovations that may be constitutionally suspect include preventive detention measures, *see* Hunt v. Roth, 648 F.2d 1148, 1165 (8th Cir. 1981) (classification of sex offenses as nonbailable violates excessive bail clause), *vacated as moot sub nom.* Murphy v. Hunt, 102 S. Ct. 1181, 1182 (1982) (per curiam), and provisions authorizing detention on less than probable cause to obtain identification evidence. *See* Israel, *Legislative Regulation of Searches and Seizures: The Michigan Proposals*, 73 MICH. L. REV. 221, 238-41 (1974) (citing authorities).

644. 406 U.S. 472 (1972).

645. *Id.* at 476. A similar immunity statute was upheld the same day in Kastigar v. United States, 406 U.S. 441, 453 (1972).

646. 399 U.S. 149 (1970).

647. *Id.* at 164. Use of a witness' out-of-court statements as impeachment evidence was well established, but the California Evidence Code permitted use of such statements to show the truth of the matter asserted therein, a position advocated by the Model Code and Uniform Rules, but adopted (at that time) by only a small number of jurisdictions. *Id.* at 154-55.

648. 449 U.S. 560 (1981).

state can permit the televising of a trial over the defendant's objection.[649]

Not all innovations presented to the Court have been upheld,[650] but the Justices have had no difficulty in giving weight to the value of experimentation. In *Chandler*, for example, the Court noted that Florida adopted guidelines permitting televising trials after a carefully reviewed pilot program had proven successful.[651] Eighteen other states had adopted guidelines allowing televised judicial proceedings with several still "experimenting with such coverage."[652] The issue was under study in yet another dozen states.[653] This strong display of state interest, supported by their generally careful and cautious approach, worked in Florida's favor. The Court stated that because it could not say that the state activity automatically denied due process, it would be guided by Justice Brandeis' admonition in *New State Ice Co. v. Liebman*[654] to respect state experimentation.[655] In restoring the relevance of Justice Brandeis' admonition, *Chandler* may have put to rest the concerns created by the earlier rejection of that admonition by Justices Goldberg and Black.[656]

C. PRESERVING FEDERAL LEADERSHIP BY EXAMPLE

In *Williams v. Florida*[657] Justice Harlan warned the Court that selective incorporation had placed it on the horns of a dilemma.[658] To "[w]iggle free" of the "constitutional straightjacket" of selective incorporation, it would have to develop flexible standards for individual guarantees that allowed the states "more elbow room in ordering their own criminal systems."[659] In many instances, however, those flexible standards would dilute the constitutional protections that the framers intended to apply to the federal system.[660] The result was not only an inappropriate use of judicial review, but a policy that would

649. *Id.* at 582.

650. *See* Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613, 2618 (1982) (holding unconstitutional state statute providing for exclusion of general public and press from trials on rape charges involving victim under age of 18); Brooks v. Tennessee, 406 U.S. 605, 610-11 (1972) (holding unconstitutional state law designed to extend to defendant policy of sequestration of prospective witnesses and requiring that defendant desiring to testify do so before any other defense witnesses heard). Other decisions have allowed experimentation with recoupment programs, which require indigent defendants to reimburse the state for the costs of their legal defense, but the decisions have limited the distinctions that can be drawn in such programs. *See* Fuller v. Oregon, 417 U.S. 40, 47 (1974) (no violation of equal protection clause if statute retains exemptions accorded other judgment debtors, including opportunity to show recovery of legal costs imposes "manifest hardship"); James v. Strange, 407 U.S. 128, 139-40 (1972) (violation of equal protection clause when statute does not afford indigent defendants exemptions available to other civil judgment debtors); Rinaldi v. Yeager, 384 U.S. 305, 309-10 (1966) (violation of equal protection clause when recoupment statute applies only to incarcerated indigents).

651. 449 U.S. at 565-66.

652. *Id.*

653. *Id.*

654. 285 U.S. 262 (1932).

655. 449 U.S. at 579-80. After quoting the admonition in its entirety, *see supra* text accompanying note 561, the *Chandler* opinion noted: "This concept of federalism, echoed by the States favoring Florida's experiment, must guide our decision." *Id.* at 580.

656. *See supra* notes 570-71 and accompanying text (discussing rejection of Brandeis' admonition by Goldberg and Black).

657. 399 U.S. 78 (1970).

658. *Id.* at 118 (Harlan, J., dissenting).

659. *Id.*

660. *Id.*

"discard . . . the possibility of federal leadership by example."[661] The only way out, Justice Harlan argued, was to return to the fundamental fairness standard.[662]

In failing to return to the fundamental fairness standard, the current majority may have concluded that the costs noted by Justice Harlan were outweighed by the administrative convenience of the selective incorporation doctrine. They may also have concluded, however, that those costs have largely been avoided. It is far from clear exactly how often the Court knowingly has, in Justice Stewart's words, "relax[ed] the explicit restrictions that the Framers actually did put upon the Federal Government" in order to avoid "impos[ing] intolerable restrictions upon the constitutional sovereignty of the individual States."[663]

Of the post-incorporation cases in which the Court rejected prior precedent, only the jury trial cases appear outwardly to be "watering down" previous standards to meet the needs of the states,[664] and even then, one cannot be certain. If Congress had concluded that six person juries were appropriate in misdemeanor cases (including nonpetty offenses) tried in the Superior Court of the District of Columbia, would the Court have struck down that statute? Justice Harlan suggested yes,[665] because with only the federal system affected, the weight of the common law practice and federal precedent would have prevailed.[666]

A watering-down process may also have occurred in those post-incorporation decisions in which the Court emphasized the special needs of the states. In *Shadwick v. Tampa*,[667] for example, the Court might not have been willing to permit arrest warrants for ordinance violations to be issued by clerks of the court if the court had been in the District of Columbia. At stake in *Shadwick*

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661. *Id.* at 138.

662. 399 U.S. at 118 (Harlan, J., dissenting).

663. *Id.* at 143 (Stewart, J., concurring).

664. *See* Apodaca v. Oregon, 406 U.S. 404, 406 (1972) (discussed *supra* text accompanying notes 392-98); Williams v. Florida, 399 U.S. 78, 102-03 (discussed *supra* text accompanying notes 385-91); Ludwig v. Massachusetts, 427 U.S. 618 (1976) (discussed *supra* note 632). In *Ludwig* the Court distinguished Callan v. Wilson, 127 U.S. 540, 557 (1880) (holding unconstitutional two-tier court system in District of Columbia), on two grounds. First, the Massachusetts two-tier court system, which failed to provide a jury trial on the first level, did not impose as substantial a burden on the right to jury trial as did the District of Columbia two-tier system. *Ludwig*, 427 U.S. at 630. The second distinguishing factor was that the "sources of the right to jury trial in the federal court" include art. III, § 2, cl. 3, as well as the sixth amendment. *Id.* This second ground suggests the possibility of still retaining separate constitutional standards for federal and state systems in at least this aspect of jury trial administration.

There were, of course, other instances in which the Court rejected the more stringent standards of pre-incorporation cases, but those decisions did not appear to be influenced by any differences in the state and federal criminal justice systems. *See, e.g.*, United States v. Salvucci, 448 U.S. 83, 95 (1980) (rejecting automatic standing for possession offenses in favor of rule requiring defendant to show personal fourth amendment right violated to claim benefit of exclusionary rule); Kastigar v. United States, 406 U.S. 441, 459 (1972) (use and derivative use immunity co-extensive with fifth amendment privilege against self-incrimination; transactional immunity, affording broader protection, not constitutionally required); Warden v. Hayden, 387 U.S. 294, 301-02 (1967) (rejecting distinction between "mere evidence" and instrumentalities, fruits of crime and contraband for valid searches under fourth amendment).

665. Williams v. Florida, 399 U.S. at 129 (Harlan, J., dissenting).

666. *Cf.* Callan v. Wilson, 127 U.S. 540, 557 (1888) (two-tier trial system in District of Columbia that imposes burden of full trial in first tier unconstitutional).

667. 407 U.S. 345, 352 (1972) (discussed *supra* text accompanying notes 633-34).

was adequate funding for the local court,[668] and the Supreme Court probably would have been less concerned with Congress' resources than with those of a state or municipality.[669] On the other hand, the Court would have no reason not to apply standards meant to accommodate the special responsibilities of state law enforcement officers to federal officers with the same responsibilities. For the answers to these problems could not be found in the greater resources of the national government. In short, although there may have been instances in which the Court purposely "diluted" constitutional standards to give the states "more elbow room," most cases adopting flexible standards probably reflect a desire to give both federal and state governments some administrative leeway.[670]

Of course, even when a "watering down" of standards does occur, it should not preclude "federal leadership by example." The Court may always impose higher standards for federal proceedings pursuant to its supervisory authority over the administration of justice in federal courts. As one commentator noted, "[T]he supervisory power possesses a significant potential for reconciling the conflicting desires of the federal judiciary to improve standards for the prosecution of individual rights while exercising the self-restraint appropriate to constitutional adjudication and to the delicate balances of the federal system."[671] Although the boundaries of the supervisory power are unclear, the Court's pre-incorporation exercises of that power firmly establish its authority to reach all aspects of the federal criminal process, including police activities, through the exclusion of evidence.[672] In recent years, the Court has held that certain state practices comport with the federal Constitution, but noted that the supervisory power would bar those practices in federal courts.[673] Of course, leadership through the supervisory power is always subject to congressional

668. 407 U.S. at 351.

669. On the other hand, the use of nonlawyer magistrates was tolerated for many years in the federal system. *Hearings on the U.S. Commisioner System Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Committee*, 89th Cong., 1st Sess. 2,151-52 (1965).

670. Certainly the Court has passed by many opportunities to "water down" standards for the states while keeping higher standards for the federal courts. For example, it has rejected the opportunity to hold pre-incorporation rulings inapplicable to the states by construing those rulings as having been based on the Court's supervisory power rather than a subsequently incorporated constitutional guarantee. *See, e.g.,* Aguilar v. Texas, 378 U.S. 108, 114 (1964) (requirement that warrant affidavit indicate basis for reliability of information grounded on fourth amendment, not supervisory power); Griffin v. California, 380 U.S. 609, 615 (1965) (earlier decisions prohibiting adverse comment on defendant's silence based on self-incrimination clause, not supervisory power); Crist v. Bretz, 437 U.S. 28, 37-38 (1978) (decisions holding jeopardy attaches when jury sworn based on fifth amendment, not supervisory power).

671. Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1666 (1963) (discussing broad scope of Supreme Court's power of supervision over inferior courts).

672. *See id.* at 1656-64 (discussing exclusion of evidence ancillary to supervisory power); Hill, *supra* note 264, at 204-05 (same); *see also* Ker v. California, 374 U.S. 23, 33 (1963) (Court has authority to impose higher standards in area of search and seizure through exclusion of evidence pursuant to its supervisory power).

673. *Compare* Rosales-Lopez v. United States, 451 U.S. 182, 192-93 (1981) (questions designed to identify racial prejudice would be required in federal court when requested by defendant of different racial or ethnic group than victim) *with* Ristaino v. Ross, 424 U.S. 589, 597 n.9, 598 (1976) (no per se rule requiring inquiry into racial prejudice when defendant of different race than victim). *Compare* United States v. Hale, 442 U.S. 171, 180 (1975) (new trial ordered in exercise of supervisory power over lower federal courts because impeachment reference to postarrest silence possibly prejudicial) *with* Fletcher v. Weir, 102 S. Ct. 1309, 1312 (1982) (per curiam) (no violation of due process in state court to impeach defendant's testimony with postarrest silence when no *Miranda* warnings given) *and* Jenkins v.

veto, but Congress has utilized that authority most sparingly.[674] For a Court that finds selective incorporation sufficiently flexible to be responsive to the appropriate needs of federalism, there is no need to reject that doctrine in order to maintain "federal leadership by example."

V. CONCLUSION

Over the years Supreme Court opinions considering the relationship between the Bill of Rights and the fourteenth amendment—particularly as it bears on state criminal justice systems—have referred largely to five concerns: (1) adhering to the language of the amendment and the intent of its framers; (2) avoiding vague standards that invite the Justices to apply their own subjective and idiosyncratic views of basic justice; (3) providing broad protection of individual liberties against state systems too often willing to sacrifice those liberties in the interest of obtaining more "efficient" administration of the criminal laws; (4) giving appropriate recognition to the principles of federalism; and (5) providing sufficient direction to state courts to gain consistent enforcement of federal constitutional standards within the framework of Supreme Court review necessarily limited to a minute portion of all state criminal proceedings. All of these concerns have played some role in shaping the standards adopted by the Court, but the weight given to each has varied from one period to another.

Perhaps no concern has been mentioned more frequently than the first, the need to adhere to the historical purpose of the fourteenth amendment as reflected in its language and the circumstances surrounding its adoption. Yet, neither that language nor history has proven especially confining in the Court's choice of standards. Although total incorporation was rejected in part because it failed to fit the amendment's language and history, it seems likely that the practical consequences of adopting that doctrine played an even larger role in its ultimate rejection. Selective incorporation was adopted notwithstanding similar difficulties in finding textual and historical support for that doctrine.[675] Other positions taken by the Court are also suspect on this score. Consider, for example, the *Slaughter-House* interpretation that the privileges and immunities clause added nothing to the rights of citizenship that did not already exist prior to the adoption of the fourteenth amendment,[676] and the textual and

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Anderson, 447 U.S. 231, 240-41 (1980) (no violation of due process for prosecutor in state court to impeach defendant with prearrest silence).

674. For example, 18 U.S.C. §3501 (1976), which gave the trial judge discretion to determine the voluntariness of confessions before they were received into evidence, purported to overrule the McNabb-Mallory rule, which was a judge-made rule of supervisory control over federal officers that included the right to exclude confessions received during period of illegal detention. *See generally* United States v. Halbert, 436 F.2d 1226 (9th Cir. 1970) (discussing purpose and history of §3501). The Jencks Act, 18 U.S.C. §3500 (1976), which allowed the court to order production of statement transcripts of a government witness after the witness testified, responded to Jencks v. United States, 353 U.S. 657, 668 (1975) (upholding order directing government to produce FBI reports for inspection and impeachment purposes), but largely codified it. C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 417 (2d ed. 1982).

675. Indeed, many would argue that selective incorporation is more difficult to justify by reference to the language and history of the amendment than total incorporation. *Supra* note 413.

676. *See supra* notes 59-75 and accompanying text (discussing *Slaughter-House Cases*). Because the rights of national citizenship already existed as part of the relationship of the citizen to the national

historical support for a reading of the due process clause that encompasses substantive as well as procedural rights.[677]

The Court's rulings also suggest that the second concern, avoiding vague standards that might invite subjective decisionmaking, was far from a dominant factor in the shaping of the fourteenth amendment standards. Although the fundamental fairness doctrine was frequently criticized as leading to subjective judgments, the Court has refused to reject completely the potentially subjective elements of that doctrine. The "ordered liberty" standard remains a part of the selective incorporation doctrine. The Court continues to utilize what is essentially a fundamental fairness standard when it looks to the due process clause to find constitutional protections that extend beyond the specifics of particular guarantees. Many of its post-incorporation due process rulings rest on a standard of overall fairness, tied to the circumstances of the particular case.[678] Indeed, the Court has kept alive the possibility that, as in *Rochin*, a police practice may be deemed "so outrageous" as to violate due process on that ground alone.[679] Finally, decisions based on specific guarantees have not infrequently adopted standards that are as flexible and require as much case-by-case balancing of varied interests as the traditional fundamental fairness analysis.[680]

The third and fourth concerns, providing broad protection of individual liberties and giving appropriate recognition to the principles of federalism, have undoubtedly had the greatest influence upon the development of fourteenth amendment standards. The Court of the 1960's struck a different balance than its predecessors in weighing those concerns, and it was that difference that produced the selective incorporation doctrine. For the pre-1960's Court, which

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government, state interference with those rights would be barred, even in the absence of the fourteenth amendment, as an interference with the function of the federal government. *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 49 (1867) (states may not impose tax for privilege of passing through state; citizens have right to travel freely throughout country). Thus, the *Slaughter-House* decision has been described as rendering the privileges and immunities clause "technically superfluous." Tribe, *supra* note 30, at 423; *see also* E. CORWIN, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 965 (5th ed. 1953) (*Slaughter-House* rendered privileges and immunities clause "practical nullity"); *supra* text accompanying notes 48-57 (discussing probable intent of framers to incorporate *Corfield* concept of privileges and immunities).

677. *See supra* note 158 (citing readings discussing scope of due process clause); J. ELY, *supra* note 34, at 18 (due process clause suggests application only to procedure).

678. *See supra* notes 473-75 and accompanying text (discussing ruling based on circumstances-of-the-case analysis). In at least one instance the Court has turned to a "circumstances-of-the-case" analysis of due process even though the state practices under consideration arguably fell within the general area regulated by specific Bill of Rights guarantees. *See* Chambers v. Mississippi, 410 U.S. 284, 302 (1972) (restrictions of cross-examination and introduction of hearsay testimony constituted violation of due process under facts and circumstances of case; no need to determine if fifth amendment right of confrontation and sixth amendment right to compulsory process violated).

679. The Court in United States v. Russell, 411 U.S. 423 (1973), noted that the Court might some day be presented with a situation of entrapment activity "so outrageous" that due process principles would bar prosecution without regard to the traditional standards of entrapment, and cited *Rochin* by analogy. *Id.* at 431-32; *cf.* United States v. Payner, 447 U.S. 727, 735 n.9 (1980) (outrageous police conduct violates due process).

680. *See* Barker v. Wingo, 407 U.S. 514, 530 (1972) (balancing four factors in determining whether defendant denied constitutional right to speedy trial); Arizona v. Washington, 434 U.S. 497, 514-15 (1978) (balancing interests in determining whether double jeopardy bars retrial following declaration of mistrial). *But cf.* Nowak, *Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & CRIMINOLOGY 397, 400-01 (1979) (arguing that decisions based on specific guarantees tend to rely on definitional analysis and fail to fully explore the interests at stake).

gave more weight to the interests of federalism, the fundamental fairness doctrine was obviously preferred because it readily allowed greater leeway to the state systems. For the Court of the 1960's, which gave greater weight to expanding the protection of the accused, the selective incorporation doctrine was preferred; it made immediately available a large body of federal precedent that extended the rights of the accused substantially beyond the fundamental fairness decisions of the past.[681]

Although fundamental fairness favored one concern and selective incorporation favored the other, each doctrine was sufficiently flexible to strike a new balance within its own framework. The fundamental fairness decisions of the post 1930's managed to move substantially beyond earlier decisions in protecting the accused, and the Justices who supported that doctrine in the 1960's managed to reach many of the same results as the majority that relied on selective incorporation. Similarly, as the Burger Court decisions have shown, selective incorporation does not preclude a renewed emphasis on allowing leeway for diversity in local settings and recognition of the value of experimentation.

In the end, the fifth concern, providing guidance for the state courts, may have proven the most significant factor, if not in the adoption, at least in the retention of selective incorporation. A Justice may view selective incorporation as not sufficiently flexible to allow appropriate deference to local concerns, yet conclude that the doctrine's administrative advantage may do more to promote a vital federalist system than occasional rulings relieving the states of the obligation of following certain constitutional standards applicable to the federal government. The additional degree of certainty about the nature of constitutional regulation arguably will mean far more to the state desiring to shape its process to fit its own needs than the Supreme Court's willingness to give the state slightly greater leeway at the fringes of that regulation.

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681. Arguably, reference to the particular guarantees requires a more expansive reading of the individual liberties even without regard to prior precedent because the language and history of those guarantees provide a "preordained balance of interests," while the fundamental fairness analysis permits "a present balancing in which interests clearly protected by the Constitution are forfeited on behalf of 'contravening considerations.' " Chase, *supra* note 594, at 573. *But cf. supra* note 625 (discussing different approaches to interpretation available under either doctrine). Consider also Professor Nowak's statement:

> Those who argued, as did Justice Black, that this process of incorporation would limit the discretion of the Justices, were mistaken. There is no way to avoid making interpretative decisions on issues relating to topics arguably covered by the Bill of Rights when there is no historic guidance on, nor simple textual resolution of, the issue. States simply do not appear in the Supreme Court of the United States asking for the ability to conduct unreasonable searches without warrants or probable cause, to force defendants to incriminate themselves against their will, to exclude counsel from criminal proceedings, to eliminate juries in criminal cases, or to try defendants twice for the same crime. Yet only such claims could be resolved easily by an appeal to the Bill of Rights.

Nowak, *supra* note 680, at 400.