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Williams v. Florida: End of a Theory - Part I

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NEAR THE END of the term in June 1970 the Supreme Court of the United States decided two cases, one of which, Williams v. Florida, marks the beginning of the end of the theory on which the other case, Baldwin v. New York, was decided. Both cases were decided on the same day.

In Baldwin v. New York the Court, on the basis that the due process clause of the fourteenth amendment made the sixth amendment provision for trial by jury in all criminal prosecutions applicable to the states, invalidated the section of the New York City Criminal Court Act which allows a denial of a jury trial on a charge that could result in more than six months imprisonment.

But in Williams v. Florida the Court sustained Florida’s statutory provision for a jury of six persons in non-capital criminal cases. One is thus warranted in hoping that Williams will be the straw that breaks the back of the incorporation theory and its makeshift double, “selective incorporation.”

Ironically enough, it was trial by jury, although under the seventh amendment provision for such a trial in suits at common law where the value in controversy exceeded twenty dollars, that Justice Frankfurter cited as an example in challenging the historical correctness of the incorporation theory in his concurring opinion in Adamson v. Cali-
The incorporation theory was propounded by Justice Black in his dissent in that case. Justice Frankfurter answered:

Even the boldest innovator would shrink from suggesting to more than half the States that they may no longer initiate prosecutions without indictment by grand jury, or that thereafter all the States of the Union must furnish a jury of twelve for every case involving a claim above twenty dollars. . . .

II. THE INCORPORATION THEORY

In Adamson v. California, the United States Supreme Court sustained the validity of California constitutional and statutory provisions permitting comment on a defendant's failure to take the stand in a criminal case and rejected the contention that the fourteenth amendment made the fifth amendment privilege against self-incrimination applicable to the states. Justice Black, in a dissent in which Justice Douglas joined, and with the agreement on this point of Justices Murphy and Rutledge, expressed the view that historically "one of the chief objects that the provisions of the [Fourteenth] Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states."

Two years later these four justices adhered to this view in Wolf v. Colorado, where the Court affirmed a state court conviction based on evidence obtained as a result of an unreasonable search, although Justice Black concurred with the majority on the ground that "the federal exclusionary rule is not a command of the fourth amendment but is a judicially created rule of evidence which Congress might negate."

The view which Justice Black propounded in his dissent in Adamson became known as the incorporation theory. The Court never accepted it, as Justice Black admitted in the second of his three James S. Carpentier lectures at the Columbia Law School in 1968:

Although I assure you that I am still trying, I have never been able at any one time to get a majority of the Court to agree to my belief that the Fourteenth Amendment incorporates all of

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5. Id. at 64–65.
7. Id. at 71–72.
9. Id. at 39–40. A federal conviction based upon evidence obtained in like manner by federal officials would have been reversed. Weeks v. United States, 232 U.S. 383 (1914).
the Bill of Rights' provisions (the first eight Amendments to the Constitution) and makes them applicable to the states. . . . 11

Justice Douglas, in his concurring opinion in *Gideon v. Wainwright*, 12 listed ten justices (the first Justice Harlan, Justices Field, Black, Douglas, Murphy, Rutledge, Bradley, Swayne, probably Justice Brewer, and seemingly Justice Clifford) who accepted the view that the fourteenth amendment's first section made the safeguards of the Federal Bill of Rights applicable to the states, but then added: "Unfortunately it has never commanded a Court." 13

On the Court, the severest critics of Justice Black's incorporation theory have been Justices Frankfurter and Harlan; and historically they are correct. The framers of the fourteenth amendment did not intend its first section to make the first eight amendments applicable to the states. The evidence amply supports Professor Charles Fairman's conclusion with reference to Justice Black's position: "In his contention that Section I was intended and understood to impose amendments I to VIII upon the states, the record of history is overwhelmingly against him." 14

Indeed, the framers of the fourteenth amendment did not give much more hard thought to the meaning of its first section, than did the barons at Runnymede give to the phrase "law of the land" in the Magna Charta which they drew from King John. If one had asked one of the barons what law of the land meant, he would have done well if he could have repeated what Henry II told the five judges he appointed for the whole kingdom in 1178: He told them "to do right judgment." 15 Comparably, the framers of the fourteenth amendment could not have given specific content to its due process clause. That job was for the bench and bar.

11. Id. at 36.


13. Id. at 346, *cited in Malloy v. Hogan*, 378 U.S. 1, 4 n.2 (1964). In his dissenting opinion in Poe v. Ullman, 367 U.S. 497 (1961), he listed the same ten justices, and commented, referring to the safeguards of the federal Bill of Rights:

Yet the constitutional conception of "due process" must, in my view, include them all until and unless there are amendments that remove them. That has indeed been the view of a full Court of nine Justices, though the members of that court unfortunately did not sit at the same time.

*Id.* at 516.


15. *2 English Historical Documents* 482 (D. Douglas & G. Greenaway eds. 1953). In the years 1176-1178, Henry II instituted a permanent court of professional judges. At first he divided the kingdom into six regions and appointed three judges for each region, but this proved too cumbersome. He then appointed five judges for the whole kingdom.
Justice Black in adherence to his incorporation theory feels, as he has stated at various times, that his theory gives greater certainty with reference to human rights than does the case-by-case approach to due process, which he characterizes as having accordion-like qualities. As he explained in his concurring opinion in *Rochin v. California,* where the Court upset a state court conviction based on evidence obtained by pumping the defendant's stomach against his will:

In the view of a majority of the Court, however, the Fifth Amendment imposes no restraint of any kind on the states. They nevertheless hold that California's use of this evidence violated the Due Process Clause of the Fourteenth Amendment. Since they hold as I do in this case, I regret my inability to accept their interpretation without protest. But I believe that faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards stated by the majority.

What the majority holds is that the Due Process Clause empowers this Court to nullify any state law if its application "shocks the conscience," offends "a sense of justice," or runs counter to the "decencies of civilized conduct. . . .

. . . .

I long ago concluded that the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights. Reflection and recent decisions of this Court sanctioning abridgment of the freedom of speech and press have strengthened this conclusion.17

In his concurring opinion in *Kingsley International Pictures Corp. v. Regents,* where the Court lifted a ban on *Lady Chatterley's Lover,* he added:

We are told that the only way we can decide whether a State or municipality can constitutionally bar movies is for this Court to view and appraise each movie on a case-by-case basis. Under these circumstances, every member of the Court must exercise his own judgment as to how bad a picture is, a judgment which is ultimately based at least in large part on his own standard of what is immoral. The end result of such decisions seems to me to be purely personal determination by individual Justices as to whether a particular picture viewed is too bad to allow it to be seen by the public. Such an individualized determination cannot be guided by reasonably fixed and certain standards. Accordingly, neither States nor moving picture makers can possibly know in

17. Id. at 175, 177.
advance, with any fair degree of certainty, what can or cannot be done in the field of movie making and exhibiting. This uncertainty cannot easily be reconciled with the rule of law which our constitution envisages.\textsuperscript{19}

Justice Black was the only member of the Court who did not see the film in question.

In the second of his three James S. Carpentier lectures in 1968 he used \textit{Rochin} as an illustration and restated his position:

The majority opinion in the \textit{Rochin} case exemplifies in a concrete situation what I object to most in what I consider to be an unwarranted interpretation of the Due Process Clause. For the majority there held that the Due Process Clause empowers the Supreme Court to nullify any state law if its application "shocks the conscience," offends "a sense of justice," or runs counter to the "decencies of civilized conduct." Judges are to measure the validity of state practices, according to the \textit{Rochin} opinion, not only by their reason and by the traditions of the legal profession, but by "the community's sense of fair play and decency"; by the "traditions and conscience of our people"; or by "those canons of decency and fairness which express the notions of justice of English-speaking peoples."\textsuperscript{20}

In his concurring and dissenting opinion in \textit{Williams v. Florida},\textsuperscript{21} in which Justice Douglas joined, Justice Black wrote:

... In my opinion the danger of diluting the Bill of Rights protections lies not in the "incorporation doctrine," but in the "shock the conscience" test on which my Brother HARLAN would rely instead — a test which depends not on the language of the Constitution but solely on the views of a majority of the Court as to what is "fair" and "decent."\textsuperscript{22}

\textsuperscript{19} Id. at 690-91.
\textsuperscript{20} H. Black, supra note 10, at 29-30.
\textsuperscript{21} 399 U.S. 78 (1970).
\textsuperscript{22} Id. at 107. Justice Black reiterated this point of view in his dissenting opinion in \textit{In re Winship}, 397 U.S. 358, 377-78 (1970), where the Court held that a finding of juvenile delinquency had to be beyond a reasonable doubt:

I realize that it is far easier to substitute individual judges' ideas of "fairness" for the fairness prescribed by the Constitution, but I shall not at any time surrender my belief that the document itself should be our guide, not our own concept of what is fair, decent, and right. That this old "shock the conscience" test is what the Court is relying on, rather than the words of the Constitution is clearly enough revealed by the reference of the majority to "fair treatment" and to the statement by the dissenting judges in the New York Court of Appeals that failure to require proof beyond a reasonable doubt amounts to a "lack of fundamental fairness." \textit{Ante}, at 359, 363. As I have said time and time again, I prefer to put my faith in the words of the written Constitution itself rather than to rely on the shifting, day-to-day standards of fairness of individual judges.

In \textit{Smith v. California}, 361 U.S. 147, 157 (1959), another obscenity case, he wrote:

What is the standard by which one can determine when abridgment of speech and press goes "too far" and when it is slight enough to be constitutionally
Justice Clark reasoned comparably to Justice Black in his con-
currence in *Irvine v. California*,23 where the Court sustained a state
court conviction based on evidence obtained through an illegal break-
ing and entering and an illegally secreted microphone:

Of course, we could sterilize the rule announced in *Wolf* by
adopting a case-by-case approach to due process, in which in-
choate notions of propriety concerning local police conduct guide
our decisions. But this makes for such uncertainty and unpredict-
tability that it would be impossible to tell — other than by
guesswork — just how brazen the invasion of the intimate pri-
vacies of one's home must be in order to shock itself into the
protective arms of the Constitution. In truth, the practical result
of this *ad hoc* approach is simply that when five Justices are
sufficiently revolted by local police action, a conviction is over-
turned and a guilty man may go free. *Rochin* bears witness to
this. We may thus vindicate the abstract principle of due process,
but we do not shape the conduct of local police one whit; unpre-
dictable reversals on dissimilar fact situations are not likely to curb
the zeal of those police and prosecutors who may be intent on
racking up a high percentage of successful prosecutions. I do
not believe that the extension of such a vacillating course beyond
the clear cases of physical coercion and brutality, such as *Rochin*,
would serve a useful purpose.24

Justice Stewart in an address in 1968, the same year that Justice
Black gave his James S. Carpentier lectures, pointed out that the
motivational origin of the incorporation theory was the desire for
greater certainty:

allowable? Is this momentous decision to be left to a majority of this Court on
a case-by-case basis? What express provision or provisions of the Constitu-
tion put freedom of speech and press in this precarious position of subordination
and insecurity?

In his dissent in *Adamson v. California*, 332 U.S. 46, 69, 70 (1947),
he said:

This decision reasserts a constitutional theory spelled out in *Twining v.
New Jersey*, 211 U.S. 78, that this Court is endowed by the Constitution with
boundless power under "natural law" periodically to expand and contract con-
stitutional standards to conform to the Court's conception of what at a particular
time constitutes "civilized decency" and "fundamental liberty and justice. . . .

But I would not reaffirm the *Twining* decision. I think that decision and the
"natural law" theory of the Constitution upon which it relies degrade the con-
stitutional safeguards of the Bill of Rights and simultaneously appropriate for
this Court a broad power which we are not authorized by the Constitution
to exercise.

It was in his dissent in *Adamson* that Justice Black indicated that if he could
not have total incorporation he would settle for selective incorporation:

If the choice must be between the selective process of the *Palko* decision applying
some of the Bill of Rights to the States, or the *Twining* rule applying none of
them, I would choose the *Palko* selective process.

Id. at 89.

24. Id. at 138–39.
Shortly before Justice Jackson came to the Court, some of its then more junior members had embraced the comforting theory that the Fourteenth Amendment's substantive impact upon the States could be exactly measured by the specific restrictions that the first eight Amendments imposed upon the National Government. I call this a "comforting" theory, because, for critics of the old Court's subjective approach to due process, it was a theory that appeared to give the Fourteenth Amendment objective content and definable scope. . . .

But the additional certainty which Justice Black hoped to obtain by his incorporation theory is largely illusory anyway. It is true that after *Gideon v. Wainwright* 26 there will no longer have to be a case-by-case examination in noncapital state cases on the lack of counsel issue. Yet even in the area covered by the first eight amendments, the members of the Court have disagreed and will continue to disagree as to the meaning and application of various of the provisions of these amendments under a substantial number of variant circumstances. 27 A striking illustration of this fact was *Ker v. California*, 28 as Justice Harlan pointed out parenthetically 29 in concurring in the result; the eight justices who announced that the fourth amendment was wholly applicable to the states, then divided equally as to whether it had been violated. In any event, the overriding objection to Justice Black's incorporation theory is that it is historically incorrect.

III. "SELECTIVE INCORPORATION"

Despite the historical accuracy of the position of Justices Frankfurter and Harlan, the Court, in its applications of the fourteenth amendment's due process clause, travelled so far in the direction of the result Justice Black sought to obtain in *Adamson* that it seemed substantially to have arrived there, with but the single exception of the fifth amendment provision for indictment by a grand jury. This was the only exception that it seemed safe to say would not be made applicable to the states. The only one of the old cases that would probably withstand the advance was *Hurtado v. California*, 30 where the

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29. Id. at 45.
30. 110 U.S. 516 (1884).
Court decided that a state could proceed by way of an information rather than by indictment by a grand jury. Our jury system, grand as well as petit, was shrinking; and even the fifth amendment would not be able to change this trend.

As the Court continued to approach closer to Justice Black's position in Adamson, Justice Harlan continued to complain. In his concurring opinion in Pointer v. Texas, a recent confrontation case, he grumbled:

This is another step in the onward march of the long-since discredited "incorporation" doctrine . . . , which for some reason that I have not yet been able to fathom has come into the sunlight in recent years. . . .

In his concurring opinion in the more recent case of Griffin v. California, where the Court applied to the states as part of the fifth amendment the federal rule against comment on a defendant's failure to take the witness stand, he grumbled some more: "... the decision exemplifies the creeping paralysis with which the Court's recent adoption of the 'incorporation' doctrine is infecting the operation of the federal system."

Then in his dissenting opinion in Baldwin v. New York, and in his concurring opinion in Williams v. Florida, he summarized the Court's course in nearly arriving at Justice Black's destination in his incorporation theory:

The recent history of constitutional adjudication in state criminal cases is the ascendancy of the doctrine of ad hoc ("selective") incorporation, an approach that absorbs one-by-one individual guarantees of the federal Bill of Rights into the Due Process Clause of the Fourteenth Amendment, and holds them applicable to the States with all the subtleties and refinements born of history and embodied in case experience developed in the context of federal adjudication. Thus, with few exceptions the Court has "incorporated," each time over my protest, almost all the criminal protections found within the first eight Amendments to the Constitution, and made them "jot-for-jot and case-for-case" applicable to the States.

The process began with Mapp v. Ohio, 367 U.S. 643 (1961), where the Court applied to the States the so-called exclusionary
rule, rendering inadmissible at trial evidence seized in violation of the Fourth Amendment, and thereby overruling pro tanto Wolf v. Colorado, 338 U.S. 25 (1949). See my dissenting opinion, 367 U.S. at 672. The particular course embarked upon in Mapp was blindly followed to its end in Ker v. California, 374 U.S. 23 (1963), where the Court made federal standards of probable cause for search and seizure applicable to the States, thereby overruling the remainder of Wolf. See my concurring opinion, 374 U.S. at 44. Thereafter followed Malloy v. Hogan, 378 U.S. 1 (1964), and Griffin v. California, 380 U.S. 609 (1965), overruling Twining v. New Jersey, 211 U.S. 78 (1908), and Adamson v. California, 332 U.S. 46 (1947), and incorporating the Fifth Amendment privilege against self-incrimination by holding that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified." 378 U.S. at 11. See my dissenting opinion in Malloy, 378 U.S., at 14 and my concurring opinion in Griffin, 380 U.S. at 615. The year of Griffin also brought forth Pointer v. Texas, 380 U.S. 400 (1965), overruling Snyder v. Massachusetts, 291 U.S. 97 (1934), and Stein v. New York, 346 U.S. 156, 194 (1953), by holding that the Sixth Amendment's Confrontation Clause applied equally to the States and Federal Government. See my concurring opinion, 380 U.S. at 408. In 1967 incorporation swept in the "speedy trial" guarantee of the Sixth Amendment. Klopfer v. North Carolina, 386 U.S. 213 (1967), and in 1968 Duncan v. Louisiana, supra, rendered the Sixth Amendment jury trial a right secured by the Fourteenth Amendment Due Process Clause. Only last Term the Court overruled Palko v. Connecticut, supra, and held that the "double jeopardy" protection of the Fifth Amendment was incorporated into the Fourteenth, and hence also carried to the States. Benton v. Maryland, 395 U.S. 784 (1969); see my concurring opinion in Klopfer, 386 U.S., at 226; my dissenting opinion in Duncan, 391 U.S. at 171; my dissenting opinion in Benton, 395 U.S. at 784, and my separate opinion in North Carolina v. Pearce, 395 U.S. 711, 744 (1969). In combination these cases have in effect restructured the Constitution in the field of state criminal law enforcement. 87

Justice Black in his concurring and dissenting opinion in Williams v. Florida, 88 in which Justice Douglas joined, indicated his own satis-

37. Id. at 130-32. Some years ago, the writer in Rogge, A Technique for Change, 11 U.C.L.A.L. REV. 481, 514 (1964), wrote:

Indeed, the Court has traveled so far in the direction of the result advocated by Mr. Justice Black that, with three exceptions it had substantially arrived at it. The exceptions are all fifth amendment provisions: indictment by a grand jury; double jeopardy; and the privilege against self-incrimination. The first is the only one of the three of which it may be safely said that it will not be made applicable to the states. . . .

faction at the Court’s approach to the end result he had in mind with his incorporation theory:

As I have frequently stated, in my opinion the Fourteenth Amendment was in part adopted in order to make the provisions of the Bill of Rights fully applicable to the States. See, e.g., Adamson v. California, 332 U.S. 46, 68 (1947) (dissenting opinion). This Court has now held almost all these provisions do apply to the States as well as the Federal Government, including the Fifth Amendment provision involved in this case. See Malloy v. Hogan, 378 U.S. 1 (1964); cases cited in In re Winship, 397 U.S. 358, 382 n. 11 (1970) (BLACK, J., dissenting). . . .

Although the Court nearly arrived at Justice Black’s position in Adamson, it did so not on his reasoning, nor on his total incorporation theory, but rather on the absorption process phraseology of Justice Cardozo in the Court’s opinion in Palko v. Connecticut where the Court sustained a Connecticut statute which gave the state an appeal in criminal cases. In Palko, Justice Cardozo stated that by virtue of the fourteenth amendment’s due process clause, the provisions of the Federal Bill of Rights which were “implicit in the concept of ordered liberty” applied also to the states. This clause brought these provisions “within the Fourteenth Amendment by a process of absorption.” As Justice Frankfurter observed in the Court’s opinion in Bartkus v. Illinois, where the Court sustained a state prosecution of the same acts on which there had been a federal court acquittal, Justice Cardozo’s statement for the Court in Palko “has especially commended itself and been frequently cited in later opinions.” Even Justices Black and Brennan began to cast their opinions in terms of Justice Cardozo’s absorption process reasoning.

39. Id. at 108 n.2. In the second of his three James S. Carpentier lectures in 1968, Justice Black indicated similarly:

Through this process of selective incorporation the Supreme Court has held that the Fourteenth Amendment guarantees against infringement by the states the liberties of the First Amendment, the Fourth Amendment, the Fifth Amendment’s privilege against self-incrimination, the Sixth Amendment’s rights to notice, confrontation of witnesses, compulsory process for witnesses, and the assistance of counsel, and the Eighth Amendment’s prohibition of cruel and unusual punishments. The Fifth Amendment’s provision for just compensation had been applied to the states before the Palko decision by an essentially similar process. . . .

Printed with revisions in H. Black, supra note 10, at 38.

41. Id. at 325.
42. Id. at 326.
43. 359 U.S. 121 (1959).
44. Id. at 127.
On the point of phraseology, only Justice Douglas held out. In his statement joining in the Court's opinion in *Gideon v. Wainwright*, after listing the ten justices who supported the incorporation theory and commenting that unfortunately this view had never commanded a Court, he continued: "Yet, happily, all constitutional questions are always open." He also joined in the Court's opinion in *Malloy v. Hogan*, although in doing so he still adhered to his concurrence in *Gideon*.

The specifics of the first eight amendments which the Court made applicable to the states by the absorption process phraseology of Justice Cardozo became known as selective incorporation. This process reached such a point that in *Benton v. Maryland*, which held the fifth amendment provision against double jeopardy applicable to the states, the Court used what had come to be regarded as the approach in *Palko* to overrule *Palko* itself. As Justice Harlan in his dissenting opinion in *Benton*, in which Justice Stewart joined, commented:

> I would hold, in accordance with *Palko v. Connecticut*, 302 U.S. 319 (1937), that the Due Process Clause of the Fourteenth Amendment does not take over the Double Jeopardy Clause of the Fifth, as such. Today *Palko* becomes another casualty in the so far unchecked march toward "incorporating" much, if not all, of the Federal Bill of Rights into the Due Process Clause. . . . .

More broadly, that this Court should have apparently become so impervious to the pervasive wisdom of the constitutional philosophy embodied in *Palko*, and that it should have felt itself able to attribute to the perceptive and timeless words of Mr. Justice Cardozo nothing more than a "watering down" of constitutional rights, are indeed revealing symbols of the extent to which we are weighing anchors from the fundamentals of our constitutional system.  

Selective incorporation became as dogmatic in application as Justice Black's incorporation theory was wrong in history; for Justices Douglas and Brennan along with Justice Black insisted in their opinions that any of the specifics of the Federal Bill of Rights which the due process clause of the fourteenth amendment absorbed and thus made applicable to the states had to be applied in the same manner and to the same extent in state courts as in federal courts. For instance,

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47.  Id. at 346.
50.  Id. at 808, 809.
in *Ohio ex rel. Eaton v. Price*, Justice Stewart not taking part, sustained an inspection order of a house, Justice Brennan in a statement in which Chief Justice Warren and Justices Black and Douglas joined, wrote:

Some of us have expressed the conviction that the preferable view of the Fourteenth Amendment is that it makes the guarantees of the Bill of Rights generally enforceable against the states. . . . But to them, as well as to us, who have neither accepted nor rejected that view, it is clear that the celebrated passage of Justice Cardozo's opinion in *Palko v. Connecticut* . . . can have no common ground with the view of the *Wolf* case that a minority of the Court now expounds. . . . For the *Palko* opinion refers to a "process of absorption" . . . of specific Bill of Rights guarantees in the Fourteenth Amendment's standard. It is not a license to the judiciary to administer a watered-down, subjective version of the individual guarantees of the Bill of Rights when state cases come before us. To be sure, the contrary view has been urged, occasionally with success; the right to counsel was put on an *ad hoc* basis, *Betts v. Brady*, . . . despite what seems the clear implication to the contrary in *Palko* . . . and recently the surprising suggestion has even been made (never by the Court) that the freedom of speech and of the press may be secured by the Fourteenth Amendment with less vigor than it is secured by the First. . . .

Or again in *Malloy v. Hogan*, where the Court held the fifth amendment privilege against self-incrimination applicable to the states, overruling both *Adamson v. California*, as well as *Twining v. New Jersey*, Justice Brennan wrote for the Court:

The Court thus has 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."
Two illustrations will suffice. After *Mapp v. Ohio,*58 where the Court held that material illegally seized by state officers was inadmissible even in a state court proceeding, overruling its earlier and oft cited case to the contrary, *Wolf v. Colorado,*59 the Court went on in *Ker v. California,*60 and announced that its *Mapp* holding was enforceable against the states not only by the same sanction of exclusion as against the federal government, but also by the same constitutional standard prohibiting unreasonable searches and seizures. Again, after *Malloy v. Hogan,*61 the Court held in *Griffin v. California,*62 that its ruling in *Malloy* was to be taken literally: Accordingly the federal rule against comment on a defendant’s failure to take the stand governed in the states as well.

Three more cases, *Washington v. Texas,*63 where the Court held that the sixth amendment right of an accused to have compulsory process for obtaining witnesses in his favor was applicable to the states, *Duncan v. Louisiana,*64 where the Court held similarly as to the sixth amendment right to trial by jury in all criminal prosecutions, and *Benton v. Maryland,*65 where the Court overruled even *Palko,* persuaded many of those who believed Justice Black’s incorporation theory to be historically incorrect, that the Court, with the exception of the fifth amendment provision of indictment by grand jury, had arrived at Justice Black’s position after all, although in the guise of selective incorporation. In *Washington v. Texas,* Chief Justice Warren in the Court’s opinion wrote that “in recent years we have increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law.”66 In *Benton v. Maryland,* Justice Marshall in the Court’s opinion put Chief Justice Warren’s statement more broadly to make it applicable generally to the specific guarantees of the Federal Bill of Rights.67 Those who felt that Justice Black’s incorporation theory was wrong historically began to resign themselves to the philosophical reflection that even though the Court’s position was historically incorrect, and although state diversity was sacrificed to federal conformity, at least the country would have a higher standard of criminal justice generally than it would have

63. 388 U.S. 14 (1967).
64. 391 U.S. 145 (1968).
66. 388 U.S. at 18.
67. 395 U.S. at 794.
had otherwise. Only Justice Harlan seemed to be holding out for historical accuracy.

IV. JUSTICE HARLAN

When the Court first started on its selective incorporation course, Justice Harlan time and again made clear, and even emphasized, that the Court was not adopting the incorporation theory. In his opinion for the Court in *N.A.A.C.P. v. Alabama*, where the Court held that an Alabama court order which required the N.A.A.C.P. to produce its Alabama membership lists violated the fourteenth amendment's due process clause, he was careful not to say that this clause made the first amendment applicable to the states:

... It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. ... 69

In his concurring opinion in *Alberts v. California* and dissenting opinion in *Roth v. United States*, where the Court sustained state and federal obscenity legislation, he stated:

... We can inquire only whether the state action so subverts the fundamental liberties implicit in the Due Process Clause that it cannot be sustained as a rational exercise of power. See Jackson, J., dissenting in *Beauharnais v. Illinois*, 343 U.S. 250, 287. The States' power to make printed words criminal is, of course, confined by the Fourteenth Amendment, but only insofar as such power is inconsistent with our concepts of "ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 324-325. ...

... I agree with Mr. Justice Jackson that the historical evidence does not bear out the claim that the Fourteenth Amendment "incorporates" the First in any literal sense. ... 72

In his concurring opinion in *Gideon v. Wainwright* he took pains to say:

In what is done today I do not understand the Court to depart from the principles laid down in *Palko v. Connecticut*. ... 

69. Id. at 460.
70. 354 U.S. 476 (1957).
72. Id. at 501, 503.
[O]r to embrace the concept that the Fourteenth Amendment "incorporates" the Sixth Amendment as such. 74

After the Court was on its selective incorporation course, Justice Harlan steadfastly opposed its incorporation reasoning, in concurring opinions when he agreed with the Court's results, and in dissenting ones when he did not. In his dissenting opinion in *Baldwin v. New York* 75 and his concurring opinion in *Williams v. Florida*, 76 he summarized his resistance and reasons therefor:

These decisions demonstrate that the difference between a "due process" approach, that considers each particular case on its own bottom to see whether the right alleged is one "implicit in the concept of ordered liberty," see *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and "selective incorporation" is not an abstract one whereby different verbal formulae achieve the same results. The internal logic of the selective incorporation doctrine cannot be respected if the Court is both committed to interpreting faithfully the meaning of the federal Bill of Rights and recognizing the governmental diversity that exists in this country. The "backlash" in *Williams* exposes the malaise, for there the Court dilutes a federal guarantee in order to reconcile the logic of "incorporation," the "jot-for-jot" and "case-for-case" application of the federal right to the States, with the reality of federalism. Can one doubt that had Congress tried to undermine the common Law right to trial by jury before *Duncan* came on the books the history today recited would have barred such action? Can we expect repeat performances when this Court is called upon to give definition and meaning to other federal guarantees that have been "incorporated"?

In *Ker v. California*, 374 U.S. 23 (1963), I noted in a concurring opinion that "The rule [of "incorporation"] is unwise because the States, with their differing law enforcement problems, should not be put in a constitutional straight jacket, . . . And if the Court is prepared to relax [federal] standards in order to avoid unduly fettering the States, this would be in derogation of law enforcement standards in the federal system . . . ." *Id.*, at 45-46. Only last Term in *Chimel v. California, supra*, I again expressed my misgivings that "incorporation" would neutralize

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74. *Id.* at 352. In *Lanza v. New York*, 370 U.S. 139, 147 (1962), which sustained a contempt conviction for refusal to answer certain questions of a committee of the New York legislature, Justice Harlan wrote in a concurring opinion:

I do not understand anything in the Court's opinion to suggest either that the Fourteenth Amendment "incorporates" the provisions of the Fourth, or that the "liberty" assured by the Fourteenth Amendment is, with respect to "privacy," necessarily coextensive with the protections afforded by the Fourth. On that premise, I join the Court's opinion.


the potency of guarantees in federal courts in order to accommodate
the diversity of our federal system. I reiterate what I said in dis-
sent in Duncan, 391 U.S., at 175-176: "[N]either history nor
sense supports using the Fourteenth Amendment to put the States
in a constitutional straitjacket with respect to their own develop-
ment in the administration of criminal and civil law." Since we
now witness the first major attempt to wriggle free of that "strait
jacket," it is appropriate, I think, to step back and view in per-
spective how far the incorporation doctrine has taken us, and to
put the spotlight on a constitutional revolution that has inevitably
become obscured by the process of case-by-case adjudication.77

Justice Harlan not only pointed out the historical incorrectness
of the incorporation theory; he also indicated his preference for state
diversity rather than federal conformity. He favored carrying forward
the Holmes-Brandeis concept of the states as experimental laboratories.
In his dissenting opinion, in which Justice Stewart joined, in Duncan
v. Louisiana,78 where the Court, under the due process clause of the
fourteenth amendment, held the sixth amendment provision for trial
by jury in all criminal prosecutions applicable to the states, he wrote:

In sum, there is a wide range of views on the desirability of
trial by jury, and on the ways to make it most effective when it
is used; there is also considerable variation from State to State
in local conditions such as the size of the criminal caseload, the
ease or difficulty of summoning jurors, and other trial conditions
bearing on fairness. We have before us, therefore, an almost perfect
example of a situation in which the celebrated dictum of Mr.
Justice Brandeis should be invoked. It is, he said, "one of the
happy incidents of the federal system that a single courageous
state may, if its citizens choose, serve as a laboratory . . . ."
New State Ice Co. v. Liebmann, 285 U.S. 262, 280, 311
(dissenting opinion). . . .79

77. Id. at 129-30. Other of Justice Harlan's concurring and dissenting opinions are:
  Coleman v. Alabama, 399 U.S. 1, 19 (1970) (concurring opinion); Dickey v.
  (dissenting opinion); Chimel v. California, 395 U.S. 752, 769 (1969) (concurring
  opinion); North Carolina v. Pearce, 395 U.S. 711, 744 (1969) (concurring and dis-
  senting opinion); Barber v. Page, 390 U.S. 719, 726 (1968) (concurring opinion);
  Berger v. New York, 388 U.S. 41, 89 (1967) (dissenting opinion); Murphy v.
  Waterfront Commission, 378 U.S. 52, 80 (1964) (concurring opinion); Griswold v.
79. Id. at 193. In the concluding paragraph of his dissenting opinion in Truax v.
  Corrigan, 257 U.S. 312, 344 (1921), Justice Holmes commented:
There is nothing that is more deprecate than the use of the Fourteenth Amend-
ment 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 several States, even though the experiments may seem
futile or even noxious to me and to those whose judgments I most respect.
In *Roth v. United States,* where Justice Harlan took the position that the states have somewhat more leeway in dealing with obscenity under the due process clause of the fourteenth amendment than the federal government has under the first amendment, he argued:

Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the State may do. It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories. State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has immense advantage of providing forty-eight separate centers for such experimentation. Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State might be classed as obscene in another. (To give only a few examples: Edmund Wilson’s “Memoirs of Hecate County” was found obscene in New York . . . ; a bookseller indicted for selling the same book was acquitted in California. “God’s Little Acre” was held to be obscene in Massachusetts, not obscene in New York and Pennsylvania.) And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.

Quite a different situation is presented, however, where the Federal Government imposes the ban. The danger is perhaps not great if the people of one State, through their legislature, decide that “Lady Chatterley’s Lover” goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard. But the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book. The prerogative of the States to differ on their ideas of morality will be destroyed, the ability of States to experiment will be stunted. The fact that the people of one State cannot read some of the works of D. H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me to be intolerable, and violative of both the letter and spirit of the First Amendment.

I judge this case, then, in view of what I think is the attenuated federal interest in this field, in view of the very real

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danger of a deadening uniformity which can result from nationwide federal censorship, and in view of the fact that the constitutionality of this conviction must be weighed against the First and not the Fourteenth Amendment. . . .

Not only did Justice Harlan argue for state diversity rather than federal conformity; he also warned that incorporation would result in a weakening of federal standards in order to accommodate the states, which is, of course, what happened in *Williams v. Florida*, as Justice Harlan, in his concurring opinion, pointed out:

Today's decisions demonstrate a constitutional schizophrenia born of the need to cope with national diversity under the constraints of the incorporation doctrine. In *Baldwin* the Court overrides the consideration of local needs, but in *Williams* it seeks out a minimum standard to avoid causing disruption in numerous instances even though, a priori, incorporation would surely require a jury of 12. The six-man, six-month rule of today's decisions simply reflects the lowest common denominator in the scope and function of the right to trial by jury in this country, but the circumstance that every jurisdiction except New York City has a trial by a jury for offenses punishable by six months in prison obscures the variety of opinion that actually exists as to the proper place for the jury in the administration of justice. . . .

. . . .

It is time, I submit, for this Court to face up to the reality implicit in today's holdings and reconsider the "incorporation" doctrine before its leveling tendencies further retard development in the field of criminal procedure by stifling flexibility in the States and by discarding the possibility of federal leadership by example.

At the end of the Court's term in June 1969, it seemed that Justice Harlan's voice against selective incorporation was nearly alone, and that the cause for historical accuracy, so far as the meaning of the due process clause of the fourteenth amendment was concerned, was lost. Then came the seating of two new members of the Court,
Chief Justice Burger and Justice Blackmun; and Williams v. Florida,\textsuperscript{84} in which, however, Justice Blackmun did not participate.

V. THE BURGER COURT

Justice Stewart, in his concurring opinion in Williams v. Florida\textsuperscript{85} and dissenting opinion in Baldwin v. New York,\textsuperscript{86} expressed himself as in substantial agreement with Justice Harlan and characterized Justice Black's incorporation theory as "that erroneous constitutional doctrine."\textsuperscript{87} He also thought that Justice Harlan was surely right when he said that "it is time for the Court to face up to reality."\textsuperscript{88} In addition, he wrote:

The "incorporation" theory postulates the Bill of Rights as the substantive metes and bounds of the Fourteenth Amendment. 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. It is, at best, a theory that can lead the Court only to a Fourteenth Amendment dead end. And, at worst, the spell of the theory's logic compels the Court either to impose intolerable restrictions upon the constitutional sovereignty of the individual States in the administration of their own criminal law, or else intolerably to relax the explicit restrictions that the Framers actually did put upon the Federal government in the administration of criminal justice. . . .\textsuperscript{89}

Thus, two justices now regard Justice Black's incorporation theory as historically incorrect. In addition, the two new members of the Court, Chief Justice Burger and Justice Blackmun, accept Justice Harlan's approach to federal-state relations, at least in part. For instance, Chief Justice Burger, in his concurring opinion in California v. Green,\textsuperscript{90} where the Court held that the confrontation clause in the sixth amendment does not preclude the introduction of an out-of-court declaration taken under oath and subject to cross-examination to prove the truth of the matters asserted therein when the declarant is available to testify at trial, stated:

I add this comment only to emphasize the importance of allowing the States to experiment and innovate, especially in the area of criminal justice. If new standards and procedures are tried in

\textsuperscript{84} 399 U.S. 78 (1970).
\textsuperscript{85} Id.
\textsuperscript{86} 399 U.S. 66 (1970).
\textsuperscript{87} Id. at 144.
\textsuperscript{88} Id. at 145.
\textsuperscript{89} Id. at 143.
\textsuperscript{90} 399 U.S. 149 (1970).
one State their success or failure will be a guide to others and to the Congress.

The circumstances of this case demonstrate again that neither the Constitution as originally drafted, nor any amendment, nor indeed any need, dictates that we must have absolute uniformity in the criminal law in all the States. Federal authority was never intended to be a "ramrod" to compel conformity to nonconstitutional standards.91

In his dissenting opinion in Baldwin v. New York,92 he added:

I find it somewhat disconcerting that with the constant urging to adjust ourselves to being a "pluralistic society" — and I accept this in its broad sense — we find constant pressure to conform to some uniform pattern on the theory that the Constitution commands it. . . .93

In a state obscenity case, Justice Blackmun, in a dissenting opinion in which Chief Justice Burger and Justice Harlan joined, Hoyt v. Minnesota,94 wrote that he was in general agreement with Justice Harlan's views in this area:

I am not persuaded that the First and Fourteenth Amendments necessarily prescribe a national and uniform measure — rather than one capable of some flexibility and resting on concepts of reasonableness — of what each of our several States constitutionally may do to regulate obscene products within its borders. . . .

At this still, for me, unsettled stage in the development of state law of obscenity in the federal constitutional context I find myself generally in accord with the views expressed by Mr. Justice Harlan in Roth v. United States, 354 U.S. 476, 496, 500-03 (1957); Jacobellis v. Ohio, 378 U.S. 184, 203-04 (1964); and Memoirs v. Massachusetts, 383 U.S. 413, 455-58, 460 (1966), and with those enunciated by the Chief Justice in Cain v. Kentucky, 397 U.S. 319 (1970), and in Walker v. Ohio, supra.95

91. Id. at 171, 171-72.
93. Id. at 77.
95. Id. at 524, 525. In Walker v. Ohio, 398 U.S. 434, 434 (1970), Chief Justice Burger, in dissent wrote:
I dissent from such a summary disposition, not only for the reasons expressed in my separate opinion in Cain v. Kentucky, 397 U.S. 319 (1970), but also because I find no justification, constitutional or otherwise, for this Court's assuming the role of a supreme and unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before it without regard to the
To these circumstances must be added one other. Chief Justice Burger is not as firmly committed to stare decisis as is Justice Harlan. Chief Justice Burger, in his dissenting opinion in *Coleman v. Alabama*, where the Court held that the sixth and fourteenth amendments required counsel at an Alabama preliminary hearing, announced:

> With deference, then, I am bound to reject categorically Mr. Justice Harlan's and Mr. Justice White's thesis that what the Court said lately controls over the Constitution. While our holdings are entitled to deference I will not join in employing recent cases rather than the Constitution, to bootstrap ourselves into a result, even though I agree with the objective of having counsel at preliminary hearings. By placing a premium on "recent cases" rather than the language of the Constitution, the Court makes it dangerously simple for future Courts, using the technique of interpretation, to operate as a "continuing Constitutional convention."  

Indeed, Justice Harlan himself has weakened on stare decisis insofar as *Duncan v. Louisiana* is concerned. In his dissenting opinion in *Baldwin v. New York* and concurring opinion in *Williams v. Florida*, he wrote:

> In taking that course in Baldwin, I cannot, in a matter that goes to the very pulse of sound constitutional adjudication, consider myself constricted by *stare decisis*. . . .

> The principle of *stare decisis* is multifaceted. It is a solid foundation for our legal system; yet care must be taken not to use it to create an unmovable structure. It provides the stability and predictability required for the ordering of human affairs over the course of time and a basis of "public faith in the judiciary as a source of impersonal and reasoned judgments." . . . Woodenly applied, however, it builds a stockade of precedent that confines the law by rules, ill-conceived when promulgated, or if sound in origin, unadaptable to present circumstances. No precedent is sacrosanct and one should not hesitate to vote to overturn this Court's previous holdings — old or recent — or reconsider findings or conclusions of other courts, state or federal. That is not one of the purposes for which this Court was established.


> In my view we should not inflexibly deny to each of the States the power to adopt and enforce its own standards as to obscenity and pornographic materials; States ought to be free to deal with varying conditions and problems in this area. I am unwilling to say that Kentucky is without power to bar public showing of this film; therefore, I would affirm the judgment from which the appeal is taken.


97. Id. at 22-23.


100. 399 U.S. 78 (1970).
settled dicta where the principles announced prove either practically . . . unworkable, or no longer suited to contemporary life . . . . Indeed, it is these considerations that move me to depart today from the framework of Duncan. It is, in part, the disregard of stare decisis in circumstances where it should apply, to which the Court is, of necessity, driven in Williams by the "incorporation" doctrine, that leads me to decline to follow Duncan. Surely if the principle of stare decisis means anything in the law, it means that precedent should not be jettisoned when the rule of yesterday remains viable, creates no injustice, and can reasonably be said to be no less sound than the rule sponsored by those who seek change, let alone incapable of being demonstrated wrong. The decision in Williams, however, casts aside workability and relevance and substitutes uncertainty. The only reason I can discern for today's decision that discards numerous judicial pronouncements and historical precedent that sound constitutional interpretation would look to as controlling, is the Court's disquietude with the tension between the jurisprudential consequences wrought by "incorporation" in Duncan and Baldwin and the counter-pulls of the situation in Williams which presents the prospect of invalidating the common practice in the States of providing less than a 12-member jury for the trial of misdemeanor cases.101

As one amasses these circumstances — the historical incorrectness of the incorporation theory; two Justices, Harlan and Stewart, who recognize the historical incorrectness of the incorporation theory; a Chief Justice, Burger, who shares Justice Harlan's approach to federal-state relations; two Justices, Burger and Blackmun, who are in general agreement with Justice Harlan's views in state obscenity cases; a Chief Justice, Burger, who is not as firmly committed to stare decisis as is Justice Harlan; and Justice Harlan himself weakening in his views on stare decisis on the issue of jury trials in state criminal cases — one begins to have hope that the Court will abandon selective incorporation along with the incorporation theory and return to a case-by-case application of the due process clause of the fourteenth amendment.

If the Court does so, this will not mean that the Warren Court gave a liberal construction to the Constitution, and the Burger Court

101. Id. at 118, 127–29. In United States v. Oregon, 39 U.S.L.W. 4027 (Dec. 21, 1970), where the Court held that the provisions of the Voting Rights Acts Amendments of 1970 fixing the voting age at 18 are constitutional in national elections but not in state and local elections, Justice Harlan, who felt that these provisions were unconstitutional even as to national elections, stated with reference to the Court's one-man one-vote course which began with Baker v. Carr, 369 U.S. 186 (1962):
    Concluding, as I have, that such decisions cannot withstand constitutional scrutiny, I think it my duty to depart from them, rather than to lend my support to perpetuating their constitutional error in the name of stare decisis.

39 U.S.L.W. at 4027.
a strict one. It will mean only that the Court is at long last turning its back on incorrect history and abandoning what Justice Stewart, in his dissenting opinion in Baldwin v. New York and concurring opinion in Williams v. Florida, termed a "mechanistic" approach to the fourteenth amendment. Nor will it mean that the Court will overrule many of its recent cases; it will not. It will simply put them on a case-by-case due process basis. However, a few, such as Baldwin v. New York and Duncan v. Louisiana may fall.

VI. CASE-BY-CASE DUE PROCESS

Long before Justice Black announced his incorporation theory in his dissent in Adamson v. California, and even during the sway of the Court's selective incorporation doctrine, the Court had no difficulty in applying the due process clause of the fourteenth amendment on a case-by-case basis; it did so in case after case. After all, this is the method of the common law.

In 1897, in Chicago, Burlington & Quincy Railroad v. Chicago, the Court, in an opinion by the first Justice Harlan, concluded that a state could not authorize the taking of private property for public use without just compensation, because of the due process clause of the fourteenth amendment.

Subsequently, in Twining v. New Jersey, where the Court sustained a state court practice permitting comment on a defendant's failing to take the stand, Justice Moody speaking for the Court observed:

[I]t 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. Chicago, Burlington & Quincy Railroad v. Chicago. ... If this is so, it is not because those rights are enumerated in the first eight amendments, but because

102. In any event, the words liberal and narrow can be made to mean almost anything. For example, in Coleman v. Alabama, 399 U.S. 1, 14 (1970), Justice Douglas, in joining in Justice Brennan's opinion, stated that "a strict construction of the Constitution" requires the application of the sixth amendment to the states. Id. at 14. This led Justice Stewart, in his dissenting opinion in Baldwin v. New York, 399 U.S. 66, 143 (1970) and concurring opinion in Williams v. Florida, 399 U.S. 78, 143 (1970) to comment, "[a]nd this statement is made in the name of 'strict construction of the Constitution'?" Id. at 144 n.3.
105. Id. at 143.
108. 332 U.S. 46, 68 (1947) (dissenting opinion).
109. 166 U.S. 226 (1897).
110. 211 U.S. 78 (1908).
they are of such a nature that they are included in the conception of due process of law. . . .

In 1915, in Frank v. Mangum\textsuperscript{112} the Court stated by way of dictum, and in 1923 in Moore v. Dempsey\textsuperscript{113} held, in an opinion by Justice Holmes, that a state criminal trial dominated by a mob violated a defendant's due process rights. Later the same term, in Meyer v. Nebraska\textsuperscript{114} and Bartels v. Iowa,\textsuperscript{115} the Court, under the fourteenth amendment's due process clause, struck down state statutes which forbade the teaching in grade schools of any language other than English. The Court's opinions were by Justice McReynolds. Justices Holmes and Sutherland dissented. With reference to the due process clause, Justice McReynolds in Meyer wrote:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . .\textsuperscript{116}

In 1925 in Pierce v. Society of Sisters,\textsuperscript{117} the Court invalidated, as violative of the fourteenth amendment's due process clause, an Oregon act which required parents and guardians to send children to public rather than to private schools. The Court, speaking through Justice McReynolds, reasoned:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.\textsuperscript{118}

A week later, in Gitlow v. New York,\textsuperscript{119} where the Court sustained New York's criminal anarchy act, Justice Sanford, in the Court's opinion, stated by way of dictum:

For present purposes we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgment by Congress — are among the

\textsuperscript{111} Id. at 99.
\textsuperscript{112} 237 U.S. 309, 335 (1915).
\textsuperscript{113} 261 U.S. 86 (1923).
\textsuperscript{114} 262 U.S. 390 (1923).
\textsuperscript{115} 262 U.S. 404 (1923).
\textsuperscript{116} 262 U.S. at 399.
\textsuperscript{117} 268 U.S. 510 (1925).
\textsuperscript{118} Id. at 535.
\textsuperscript{119} 268 U.S. 652 (1925).
fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.\footnote{120}

One will note not only that this statement is dictum, but also that the Court says nothing about incorporation or selective incorporation or absorption of the first amendment by the due process clause of the fourteenth.

In 1927, in \textit{Tumey v. Ohio},\footnote{121} the Court, in a unanimous opinion by Chief Justice Taft, held that a defendant, under the due process clause of the fourteenth amendment, is entitled to a fair trial before a fair tribunal.

Five years later, in \textit{Powell v. Alabama},\footnote{122} a case arising out of the Scottsboro prosecutions, the Court held that a defendant in a capital case was entitled, under the due process clause of the fourteenth amendment, to counsel. The Court reached this result not because of, but in spite of the sixth amendment right to counsel. Justice Sutherland, in the Court's opinion, after quoting from Justice Moody speaking for the Court in \textit{Twining}, continued:

\begin{quote}
While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character.\footnote{123}
\end{quote}

The next year, in \textit{Snyder v. Massachusetts},\footnote{124} the Court, although sustaining a state conviction, nevertheless said in an opinion by Justice Cardozo that the due process clause of the fourteenth amendment proscribed a state procedure which "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."\footnote{125}

The next year, in \textit{Mooney v. Holohan},\footnote{126} the Court in a per curiam decision, ruled that a state conviction obtained by the knowing use of perjured testimony violated the due process clause of the fourteenth amendment, for such a procedure "is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."\footnote{127}

\begin{footnotes}
\item[120] Id. at 666.
\item[121] 273 U.S. 510 (1927).
\item[122] 287 U.S. 45 (1932).
\item[123] Id. at 68.
\item[124] 291 U.S. 97 (1934).
\item[125] Id. at 105.
\item[126] 294 U.S. 103 (1935).
\item[127] Id. at 112.
\end{footnotes}
In the next year, in *Brown v. Mississippi*, the Court unanimously held that a coerced confession violated the fourteenth amendment's due process clause. Chief Justice Hughes, for a unanimous Court, wrote:

> It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

The Court made a case-by-case application of the due process clause of the fourteenth amendment without a reference to the specifics of the first eight amendments, not only before Justice Black announced his incorporation theory but also after the Court embraced the concept of selective incorporation. A good illustration is *Thompson v. Louisville*. An elderly Negro was convicted in the Police Court of Louisville, Kentucky of loitering and disorderly conduct, and fined ten dollars on each charge. The defendant's lawyer said that his client was arrested on sight because he had earlier annoyed the police by obtaining a lawyer to defend him against a prior charge. On the evening in question the defendant went into a cafe to wait for the bus. Two policemen walked in and, so they testified, saw Thompson shuffling or patting his foot on the floor in time to music from a juke box. He was arrested for loitering and when they got him outside he was, so they said, very argumentative. The Court unanimously invalidated the two fines as violative of due process. Justice Black wrote the Court's opinion. He stated that it is "a violation of due process to convict and punish a man without evidence of his guilt." He made no reference whatever to any of the specifics of the first eight amendments.

The Court has made, and will make, such case-by-case applications of the due process clause of the fourteenth amendment, as well as the

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131. *Id.* at 206. *Accord*, Garner v. Louisiana, 368 U.S. 157, 163 (1961), the first of the sit-in cases to reach the Court, reversing the convictions of sixteen Negro students for breach of the peace, because the convictions were "so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment"; Taylor v. Louisiana, 370 U.S. 154 (1962), ruling similarly as to six freedom riders, four of whom went into the waiting room customarily reserved for white people at a bus depot in Shreveport, Louisiana, in order to take a bus to Jackson, Mississippi.
due process clause of the fifth amendment. In the manner described by Justice Miller in the Court's opinion in Davidson v. New Orleans, an opinion which contains, in the words of Justice Frankfurter, "the first full-dress discussion" of the fourteenth amendment's due process clause:

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

The Court has made and will make such case-by-case applications in the manner which Justice Frankfurter comprehensively described in the concluding paragraph of his concurring opinion in Kingsley Pictures Corp. v. Regents:

Unless I misread the opinion of the Court, it strikes down the New York Legislation in order to escape the task of deciding whether a particular picture is entitled to the protection of expression under the Fourteenth Amendment. Such an exercise of the judicial function, however onerous or ungrateful, inheres in the very nature of the judicial enforcement of the Due Process Clause. We cannot escape such instance-by-instance, case-by-case application of that clause in all the varieties of situations that come before this Court. It would be comfortable if, by a comprehensive formula, we could decide when a confession is coerced so as to vitiate a state conviction. There is no such talismanic formula. Every Term we have to examine the particular circumstances of a particular case in order to apply generalities which no one disputes. It would be equally comfortable if a general formula could determine the unfairness of a state trial for want of counsel. But, except in capital cases, we have to thread our way, Term after Term, through the particular circumstances of a particular case in relation to a particular defendant in order to ascertain whether due process was denied in the unique situation before us. We are constantly called upon to consider the alleged misconduct of a prosecutor as vitiating the fairness of a particular trial or the inflamed state of public opinion in a particular case as undermining the constitutional right to due process. Again, in the series of cases coming here from the state courts, in which due process was invoked to enforce separation of church and state, decision certainly turned on the particularities of the specific situations before the Court. It is needless to multiply instances. It is

132. 96 U.S. 97 (1878).
134. 96 U.S. at 104.
the nature of the concept of due process, and, I venture to believe, its high serviceability in our constitutional system, that the judicial enforcement of the Due Process Clause is the very antithesis of a Procrustean rule. This was recognized in the first full-dress discussion of the Due Process Clause of the Fourteenth Amendment, when the Court defined the nature of the problem as a "gradual process of judicial inclusion and exclusion, as the cases presented for decision may be founded." Davidson v. New Orleans, 96 U.S. 97, 104. The task is onerous and exacting, demanding as it does the utmost discipline in objectivity, the severest control of personal predilections. But it cannot be escaped, not even by disavowing that such is the nature of our task. 136

Such case-by-case application will have the definiteness which Justice Cardozo indicated in the Court's opinion in Palko v. Connecticut: 137

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. . . . 138

Such case-by-case application will have the definiteness which Justice Frankfurter indicated in the Court's opinion in Rochin v. California: 139

The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. See Cardozo, The Nature of the Judicial Process; The Growth of the Law; The Paradoxes of Legal Science. These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions. 140

Justice Black, singling out the language in Twining v. New Jersey 141 for his attack, characterizes it as a return to theories of

136. Id. at 696–97.
137. 302 U.S. 319 (1937).
138. Id. at 325.
139. 342 U.S. 165 (1952).
140. Id. at 170–71.
141. 211 U.S. 78 (1908).
natural law. But Justice Frankfurter is right in his response in the Court's opinion in *Rochin v. California* on the case-by-case application of the fourteenth amendment's due process clause: "Due process of law thus conceived is not to be derided as resort to a revival of 'natural law.'" The case-by-case application of the concept of due process not only antedates Justice Black's incorporation theory, but also the natural law theories with which he now seeks to identify it; for the concept goes back to the concept of law of the land in the Magna Charta, as Justice Black himself recognized in his dissenting opinion in *In re Winship*.

Soon after Bracton, litigants began to insist that courts control acts of the crown, and the courts started doing so. Thus began the concept of judicial review. For centuries, more than half a millennium, courts in the Anglo-American judicial system have been using judicial review on a case-by-case basis in order to assure due process of law.

A brief history of these two concepts, due process and judicial review, will show that they are part and parcel of our legal system, and have been for centuries.

VII. LAW OF THE LAND

After Henry II in 1178 appointed five judges for the whole kingdom and told them "to do right judgment," there was sufficient legal development so that when a generation later his son John, Richard I's brother and successor, misused his powers, the result was the Magna Charta. Therein King John promised his barons:

No freeman shall be taken or imprisoned or disseised or exiled, or in any way destroyed, nor will we go upon him, nor send upon him, except by the lawful judgment of his peers or [per legem terrae] by the law of the land.

In the next clause he promised: "To no one will we sell, to no one will we refuse or delay, right or justice." Clause 45 provided: "We will appoint as justices, constables, sheriffs, or bailiffs only such as know the law of the realm and mean to observe it well." The

143. 342 U.S. 165 (1952).
144. *Id.* at 171.
146. 2 ENGLISH HISTORICAL DOCUMENTS 482 (D. Douglas & G. Greenaway eds. 1953).
147. W. McKECHNIE, MAGNA CHARTA 375 (2d ed. 1914).
148. *Id.* at 395.
149. *Id.* at 431.
country had experienced judicial craftsmanship and the barons insisted on maintaining it.

Moreover, an extraordinary procedure was established for enforcing the Magna Charta’s terms. Clause 61 provided for a committee of twenty-five barons. If there were any infractions, four of the twenty-five were to be notified and they in turn were to intimate such violations to the king or if he was absent from the kingdom to his justiciar. If the situation was not corrected in forty days the remedy was that:

[T]hose five- and- twenty barons shall, together with the community of the whole land, distrain and distress us in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained as they deem fit, saving harmless our own person, and the persons of our queen and children; and when redress has been obtained, they shall resume their old relations toward us.\(^{150}\)

King John declared, “They have given me 25 over kings!”\(^{151}\)

After another generation, Bracton, in his \textit{Tractatus de legibus}\(^{152}\) the main part of which was probably written between 1250-1258, could state at one place that the king was under God and the law; and at another, add that the king’s superiors included his court. At one place Bracton wrote:

But the king himself ought not to be under any man, but under God and under the law, for the law makes the king.\(^{153}\)

At another he added:

The king has a superior, God, for example. Likewise the law, through which he has been made king. Likewise his court, namely counts and barons because the counts are so called as being as it were the associates of the king, and he who has an associate, has a master. And therefore if the king be without a bridle, that is without law, they ought to put a bridle upon him, unless they themselves are together with the king without a bridle. \(\ldots\)\(^{154}\)

\(^{150}\) \textit{Id.} at 467.

\(^{151}\) \textsc{I. A. Bryant,} \textit{The Story of England} 301 (1954).

\(^{152}\) 2 H. Bracton, \textit{De Legibus et Consuetudinibus Angliae} (G. Woodbine ed. 1922). \textsc{This was the second great treatise on English law. The first was R. Glanville,} \textit{Tractatus de Legibus,} probably written between 1187-1189, before Henry II’s death.

\(^{153}\) Bracton, \textit{supra} note 152, at 33 (F. 5b). “Ipse autem rex non debet esse sub homine sed sub deo et sub lege, quia lex facit regem.”

\(^{154}\) \textit{Id.} at 110 (F. 34). “Rex habet superiorem, deum scilicet. Item legem per quam factus est rex. Item curiam suam, videlicet comites et barones, quia comites dicuntur quasi socii regis, et qui socium habet, habet magistrum. Et ideo si rex fuerit sine fraeno, id est sine lege, debent ei fraenum apponere nisi insimet fuerint cum rege sine fraeno.”
If the king refused to obey the law, correction would come in the form of the Lord's vengeance, and it might also possibly be "that the community of the realm and the baronage ought to do this and may do it in the court of the king himself,"155 which is of course what the English people sought to do under Oliver Cromwell to King Charles I in 1649.

VIII. CONTROLLING ACTS OF THE CROWN

Not long after Bracton, litigants began to suggest that acts of the king would not subvert the common law. In 1291 it was urged "that a writ, framed and specially conceded by the king's grace, does not abrogate a writ of common law."156 The next year the position was taken that a royal grant was invalid because the grant was based on a deed which was contrary to common law, "especially as the lord king had no wish by that grant to change the common law of his realm."157

Almost from the start, the Year Books158 contained hints that the king was under the law, and had to act in accordance with it.159 In 1338 in the reign of Edward III the court granted replevin against a deputy collector because the warrant pursuant to which he had detained certain cattle had not been under seal.160 The next year the court told a sheriff that he could not justify a refusal to execute a writ of outlawry by showing a private letter from the king to the effect that he had pardoned the offenders.161 If the king wanted to pardon, he had to do so in the way prescribed by law. From the reign of Henry IV to the reign of James I there was a long succession of cases in which the courts, in instances where the crown as parens patriae attempted to make the royal power a source of revenue or a means of enriching favorites, insisted that it be exercised according to law.162 The best known example is The Case of Monopolies, Darcy v. Allen,163 in which the court near the close of Elizabeth I's reign held void a monopoly which she granted to one Darcy, a groom of the Privy Chamber, for the importation as well as the manufacture and sale of playing cards. Elizabeth I made many such

155. 3 Id. at 43 F. 171b. "... quod universitas regni et baronagium suum hoc facere possit et debat in curia ipsius regni.
156. 2 Select Cases in the Court of King's Bench Under Edward I, in 57 SELDEN SOCIETY PUBLICATIONS 58, 59 (G. Sayles ed. 1938).
157. Id. at 67, 68.
158. Casus Placitorum and Reports of Cases in the King's Courts 1272-1278, in 69 SELDEN SOCIETY PUBLICATIONS IV (H. Dunham ed. 1952).
159. See, e.g., Y.B. 21 & 22 Edw. 1, no. 54, 56 (Rolls Series) (1293).
grants. Allen was a freeman of London and influential Londoners actively encouraged him to oppose the monopoly.

IX. CONTROLLING ACTS OF PARLIAMENT

The judges relied upon the common law, not only to control acts of the crown, but even acts of Parliament. Again, there is a line of authorities, upon many of which Sir Edward Coke relied.

The Statute of Westminster the Second (1285)164 provided that the right of action in cessavit was to descend from a lord to his heir; but in Copper v. Gederings,165 Chief Justice Bereford refused to follow the act on the ground that to do so would disturb certain general principles of the common law. This ruling was repeated half a century later in Cessavit 42,166 which was regarded in authoritative sources as the final word on the point.167

The Statute of Carlisle (1307) required the common seal of religious houses to be in the keeping of the prior (who was under the abbot) and four others; or else any deed sealed with it was void.168 But in a case in which an abbot challenged a deed of annuity of his predecessor on the ground of the statute, “the opinion of the Court was that this statute is void for it is [impartient] not feasible to be observed.”169

An act of Parliament seized the lands of alien monasteries into the king’s hands. But in The Prior of Castle Acre v. The Dean of St. Stephen’s,170 in the reign of Henry VII, involving a suppressed priory which was “parson” of a church, a majority of the court of common pleas held that this act could not make the king a parson. Chief Justice Frowyke concluded: “So a temporal act without the assent of the Supreme Head cannot make the king parson.”

Then came the suppression of the monasteries171 under Henry VIII and of the chantries172 under his son and successor, Edward VI. The issue involved whether the king could continue to charge the Church and colleges rent after he had seized their property and

164. 13 Edw. 1, c. 21 (1285) (repealed).
165. Y.B. 3 Edw. 2, 105 (1310).
166. A. FITZ-HERBERT, GRAUNDE ABRIDGEMENT (1565).
167. Natura Brevium clxvi d (1555); A. FITZ-HERBERT, Natura Brevium [209] (481) (M. Hale ed. 1755); see Plucknett, Bonham’s Case and Judicial Review, 40 Harv. L. Rev. 30, 36 (1926).
168. 35 Edw. 1, c. 14 (1307) (repealed).
169. Y.B. Pasch. 27 Hen. 6 (1449), in 1 STATHAM ABRIDGEMENT 114 (M. Klingel-smith ed. 1915) (Annuitie 11). This case is also noted in A. FITZ-HERBERT, GRAUNDE ABRIDGEMENT (Annuitie 41).
170. Y.B. Hil. 21 Hen. 7, 1-5 (1506).
172. An Acte whereby certaine Chantries Colleges Free Chapelle, 1 Edw. 6, c. 14, § 17 (1547).
devised it to others. A group of cases under Elizabeth I beginning with Anonymous\(^{173}\) in 1572 and ending with Stroud's Case\(^{174}\) three years later, where the question was finally settled, decided that the original rent obligations became extinct and raised rent charges instead against the king's grantee.

The judges reached this result because, in their view, the act of Parliament would otherwise have been absurd. In other words, if acts of Parliament disturbed the general principles of the common law, or were not feasible to be performed, or were absurd, the judges either ignored them, or construed them to accord with the common law. In the case of the act which was "impartinent" to be observed, the court expressed the opinion that it was void.

**X. DUE PROCESS OF LAW**

In the course of time, the concept law of the land came also to mean due process of law. King John's successors confirmed and reissued the Magna Charta, sometimes repeatedly. Edward III (1327-1377), in addition to his frequent confirmations of the Magna Charta, in 1354 further provided:

> that no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer [par due proces de lei] by due process of the law.\(^{175}\)

Thus the phrase — due process of law — came into being.

Coke equated the two: "[B]y the law of the land (that is, to speak it once for all) by the due course, and process of law."\(^{176}\) We in this country have made the same identification. Our earlier state constitutions usually used the phrase, by the law of the land.\(^{177}\) Daniel

\(^{175}\) The Statute of the Twenty-Eighth Year of King Edward III, 28 Edw. 3, c. 3 (1354).
\(^{176}\) 2 Inst. * 46. See also 2 id. at * 50. His reference in the latter place to 37 Edw. 3, c. 8 (1363) is to A Statute Concerning Diet and Apparel, 37 Edw. 3, c. 18 (1363).
\(^{177}\) E.g., Del. Const. art. I, § 7 (1792), art. I, § 7 (1831) ("unless by the judgment of his peers or the law of the land"); Ill. Const. art. VIII, § 8 (1818), art. XIII, § 8 (1848) ("but by the judgment of his peers or the law of the land"); Md. Declaration of Rights art. 21 (1776), art. 21 (1851), art. 23 (1864), art. 23 (1867) ("by the judgment of his peers, or by the law of the land"); Mass. Declaration of Rights art. 12 (1780) ("but by the judgment of his peers, or by the law of the land"); N.Y. Const. art. VII, § 1 (1821), art. I, § 1 (1846) ("unless by the law of the land or the judgment of his peers"); N.C. Const. Declaration of Rights § 12 (1776), art. I, § 17 (1868), art. I, § 17 (1876) ("but by the judgment of his peers"); Pa. Const. Declaration of Rights § 9 (1776) ("except by the law of the land, or the judgment of his peers"); art. IX, § 9 (1790), art. IX, § 9 (1838), art. I, § 9 (1874) ("unless by the judgment of his peers or the law of the land"); S.C. Const. art. 41 (1776), art. IX, § 2 (1790) ("but by the judgment of his peers or by the law of the land"), art. I, § 14 (1868) ("but by the judgment of his peers or the law of the land");
Webster, in his argument in the Supreme Court in the *Dartmouth College* case identified the law of the land provision in the New Hampshire Constitution with due process:

One prohibition is "that no person shall be . . . deprived of his life, liberty, or estate, but by judgment of his peers, or the law of the land." . . . Have the plaintiffs lost their franchises by "due course and process of law?"

. . . .

. . . By the law of the land is most clearly intended, the general law. . . . The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. . . .

Conversely, the federal Supreme Court in *Murray's Lessee v. Hoboken Land & Improvement Co.*, its first major decision under the due process clause of the fifth amendment in a case challenging action of the federal government, equated that clause with the law of the land:

The words, "due process of law," were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in *Magna Charta*. Lord Coke in his commentary on those words, (2 Inst. 50), says they mean due process of law. The constitutions which have been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land."

**XI. EDWARD COKE**

Coke gave added meaning to judicial review. In 1608 he became so bold as to tell James I that the king was under the law. The occasion was a Sunday morning conference which arose out of the com-
plaint of Richard Bancroft, Archbishop of Canterbury, about the num-
ber of writs of prohibition which the Court of Common Pleas under
Coke as Chief Justice issued against the Court of High Commission.
Coke's court issued these writs in order to confine the jurisdiction of
the High Commission and thus limit the use of its inquisitional pro-
cedure. On this complaint, the king assembled the judges before him.
He took the position that he in his own person could decide any cause
and therefore he could delegate it to the High Commission. Then, ac-
cording to Coke in his Prohibitions del Roy, the following occurred:

To which it was answered by me, in the presence, and with the
clear consent of all the Judges of England, and Barons of the
Exchequer, that the King in his own person cannot adjudge any
case, . . . but this ought to be determined and adjudged in
some Court of Justice, according to the law and custom of
England; . . . then the King said, that he thought the law was
founded upon reason, and that he and others had reason, as well
as the Judges: to which it was answered by me, that true it was,
that God had endowed His Majesty with excellent science, and
great endowments of nature; but his Majesty was not learned
in the laws of his realm of England, and causes which concern
the life or inheritance, or goods, or fortunes of his subjects, are
not to be decided by natural reason but by the artificial [i.e.
studied] reason and judgment of law, which law is an act which
requires long study and experience, before that a man can attain
to the cognizance of it: that the law was the golden met-wand
and measure to try the cause of the subjects; and which pro-
tected his Majesty in safety and peace: with which the King
was greatly offended, and said, that then he should be under the
law, which was treason to affirm, as he said; to which I said
that Bracton saith, quod Rex non debet esse sub homine sed sub
Deo et lege [that the King himself ought not to be under any
man, but under God and under the law].

Coke's account contains his own heavy gloss. James would never
have permitted without interruption the long speeches which Coke
attributed to himself.

From Sir Julius Caesar and various newsletters, it appears that
at some point James broke in and told Coke he "spoke foolishly."
Himself, the King, as supreme head of justice, would defend to the
death his prerogative of calling judges before him to decide
disputes of jurisdiction. Moreover he would "ever protect the
common law."

"The common law," Coke interjected, "protecteth the King."

183. Id. at 65, 77 Eng. Rep. at 1342-43.
Robert Cecil interceded for Coke and the king was finally mollified. But if Coke grovelled before James, what is even more important than his grovelling is the fact that he insisted that the king was under the law.

After Coke, the idea that the king was under the law spread in England. When Charles I was attempting to collect his ship money in 1638, a constable "prating and grumbling much, uttered these speeches" against it, as reported to the principal lieutenant of Archbishop Laud: "4. Said the king was under a law as much as any subject, and that he could do nothing of himself without his subjects. 5. He confessed that some judges determined it to be law, but the best and most honest had not." The constable belonged to the growing middle class in England, whose members dared to oppose the king.

Coke made equally plain that the acts of Parliament were likewise subject to judicial review. This was in Dr. Bonham's Case, who was a doctor of medicine of the University of Cambridge, and who was fined and later imprisoned by the Royal College of Physicians for practicing medicine without a license from it. Under the Royal College's letters patent, confirmed by statute, half of the fine went to it. But this made it a judge in its own case, which was contrary, according to Coke, to an established maxim of the common law. He declared:

And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: For when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void; . . ."

Although Coke's view on this point was not to prevail in England, it did in the United States.

However, Coke's view had strong support even in England. When James I promoted Coke in 1613 to the less desirable, although more dignified, position of Chief Justice of the Court of King's Bench, Coke's

184. C. Bowen, The Lion And The Throne 305-06 (1956).
187. Id. at 652.
successor in the common pleas, Sir Henry Hobart, espoused Coke's view. In *Day v. Savadge*, Chief Justice Hobart stated that "even an Act of Parliament made against Natural Equity, as to make a Man Judge in his own Cause, is void in itself, . . . ." The next year in *Lord Sheffield v. Ratcliffe*, he spoke more generally:

If you ask me, then, by what rule the judges guided themselves in this diverse exposition of the self same word and sentence? I answer it was by that liberty and authority that Judges have over laws, especially over statute laws, according to reason and best convenience, to mould them to the truest and best use, . . .

But Coke's view of the supremacy of the common law created a problem, for the king's prerogative was part of the common law, as the court held shortly before the Revolution of 1688 in *Godden v. Hales*, and the English people had had enough of the king's prerogative. Better the supremacy of Parliament than this, and after the Revolution of 1688 Parliament did become supreme.

XII. IN THE COLONIES

In this country, Coke's concept of judicial review encompassed legislative as well as executive acts. What Coke said about a controlling common law was in accord with what the Colonists read in French and Dutch publications about natural law. Moreover, in two respects our circumstances were different from those of the English. For one thing, we were not concerned about the king's prerogative. Even more important was the fact that we had written constitutions.

When, in 1684, James II sought to abrogate the charter of the Massachusetts Bay Colony, the people of Boston were said to "hold forth a law book, & quote the Authority of the Lord Cook to Justifie their setting up for themselves; pleading the possession of 60 years against the right of the Crown."}

189. Id. at 237.
191. Id. at 486.

And what my Lord Coke says in *Dr. Bonham's Case* in his 8, Co. is far from any extravagancy, for it is a very reasonable and true saying, that if an act of parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament.

194. *An Account of the Colonies and Provinces of New England in general, More Particularly of that of the Massachusetts, cited in W. Perry, Papers Relating To The History Of The Church In Massachusetts* 39, 42 (1873). The first case in which a court invalidated a legislative act in this country was even earlier. *Giddings v. Browne* (1657), cited in *T. Hutchinson, Collection Of Original Papers Relative To The History Of The Colony Of Massachusetts-Bay* 287 (1709).
Paxton’s Case,105 decided in 1761, involved the legality of writs of assistance. Such writs were the chief weapon for the enforcement of the revenue laws. They were blanket permits issuable to anyone, authorizing the search of any suspected place. The only limitation was that the search had to be in the daytime. The advocate general for the Crown was James Otis. As such, it became his duty to argue for the validity of these writs, which were authorized by an act of Parliament in 1662.106 Instead, Otis resigned his office and took the other side of the case. In a masterful address in which he relied heavily on Coke, James Otis denounced writs of assistance as “the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English law-book.”107 The judges, almost convinced, sent to England for advice. In obedience to orders from the ministry, they subsequently recognized the writs. Although the case was lost, the cause was not. John Adams, who heard Otis’ argument, later wrote:

Every man of a crowded audience appeared to me to go away, as I did, ready to take up arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.108

In 1765 came the Stamp Act, which required stamps to be affixed to most legal documents. Lieutenant Governor Hutchinson of Massachusetts wrote: “our friends to liberty take the advantage of a maxim they find in Lord Coke that an Act of Parliament against Magna Carta or the peculiar rights of Englishmen is ipso facto void.”109 The people’s protests led to the resignation of the only official who had authority to sell the stamps. But this caused a problem for the courts. Were they to admit unstamped documents in evidence? Hutchinson, in his “Summary of the Disorders in the Massachusetts Province proceeding from an Apprehension that an Act of Parliament called the Stamp Act deprives the People of their Natural Rights” reported that a com-

Symonds of Boston ruled against the act there in question on the ground that it was “against a fundamental law in nature.” Id. at 290. He cited H. Finch, Law, Or A DISCOURSE THEREOF (1627), and M. Dalton, The Country Justice (1630). Finch began with the starting point that the common law was “nothing els but common reason.” Finch, supra at 75.

195. Quincy, 51, 401 (Mass. 1761).
196. 13 & 14 Car. 2, c. 11, § 5 (1662).
197. See 2 The Works Of John Adams App. 523 (Chas. Francis Adams ed. 1850); W. Tudor, Life Of James Otis 63 (1823).
198. Letter from John Adams to William Tudor, March 29, 1817, in 8 Old South Leaflets 60.
199. 26 Ms. Archives Of Massachusetts 153-54 [hereinafter cited as Archives], quoted in Plucknett, Bonham’s Case and Judicial Review, 40 Harv. L. Rev. 30, 63 (1926).
mittee of the Massachusetts Assembly proposed a resolve that all courts should do business without stamps and that “the prevailing reason at this time is, that the Act of Parliament is against Magna Charta and the natural rights of Englishmen, and therefore according to Lord Coke null and void.” Justice John Cushing continued to have doubts; but he finally wrote John Adams:

“I can tell the grand jury the nullity of Acts of Parliament, but must leave it to you to prove it by the more powerful arguments of the *jus gladii divinum*, [divine right of the sword] a power not peculiar to kings and ministers.”

Adams responded: “You have my hearty concurrence in telling the jury about the nullity of Acts of Parliament, whether we can prove it by the *jus gladii*, or not. I am determined to die of that opinion, let the *jus gladii* say what it will.”

In a case in Virginia, *Robin v. Hardaway*, some persons of Indian descent sought to vindicate their freedom despite a statute which reduced them to slavery. Their counsel cited, among other authorities, Coke’s opinion in *Dr. Bonham’s Case* and Hobart’s decision in *Savadge*. The court ruled for the plaintiffs, but on the ground that the objectionable statute had been repealed.

XIII. IN THE STATES

When the break between the American Colonies and the mother country finally came, all the Colonies save one, Rhode Island, following habits of thought which had origins going back more than five-and-a-half centuries to the Magna Charta, set forth in written form the structures of their governments and specified various of the rights of the individual as against the state. Rhode Island continued under its charter of 1663. All the rest, in the early years of the Revolution, drafted constitutions. Nine — Connecticut, Delaware, Maryland, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia — did so in 1776, the year of the Declaration of Independence; two — Georgia and New York — did so in 1780; Vermont, which was not one of the original thirteen colonies, drafted a constitution in 1777. Seven of these states — Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Vermont, and Virginia — either as part of their constitutions or separately, also drafted declarations or bills of rights. With these written constitutions and bills of rights, the course of judicial review became even easier.

200. Archives at 183, quoted in Plucknett, supra note 199, at 63.
201. 9 THE WORKS OF JOHN ADAMS 390-91 (Chas. Francis Adams ed. 1854).
The best known case on judicial review in the period prior to the adoption of the Federal Constitution dealing with the validity of state legislation is *Trevett v. Weedon* in Rhode Island. The legislative act in question imposed penalties on all who refused to take the state's paper money at its face value, and provided for the summary trial of offenders without a jury. Weedon was so tried. His lawyer, Major General Varnum, argued that since the act took away the right of trial by jury, it was contrary to Magna Charta and fundamental law. He relied, among his authorities, upon Coke, Hobart, and Vattel. The court ruled in his favor. Three of the five judges expressed the opinion that the act was unconstitutional.

Both before and after this case, the courts of other states — New Jersey, North Carolina and Virginia — held those legislative acts which were at variance with state constitutions to be unconstitutional. The senior counsel for the successful party in the North Carolina case was James Iredell, later a justice on the United States Supreme Court. In defense of his position he wrote a public letter in which he stated:

> We felt in all its rigors the mischiefs of an absolute and unbounded authority, claimed by so weak a creature as man, and should have been guilty of the basest breach of trust, as well as the grossest folly, if the same moment when we spurned the insolent despotism of Great Britain, we had established a despotic power ourselves.

**XIV. Under The Constitution**

As the quotation from Iredell indicates, judicial review was implicit in the way the framers of the Constitution separated governmental powers. They were acutely aware of the danger of vesting too much power in fallible human beings. Accordingly, they constructed the Constitution along the lines of their understanding of Montesquieu's classic triple division of governmental functions into legislative, executive, and judicial branches, using their own ideas and those of Montesquieu, John Locke, and James Harrington concerning checks and balances between the different agencies which exercise governmental power. The three branches were to function in the interest of liberty by balancing and checking each other. Power was to be a check to

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power. The concentration of governmental powers, even in a legislative body, spelled tyranny. As Thomas Jefferson observed:

The concentrating these in the same hand is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one. 206

Or, as James Madison wrote:

The accumulation of all powers, legislative, executive, and judicial, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. 207

However, we do not have to rest upon implication or inference to demonstrate that the framers of the Constitution and the first amendments counted on judicial review for both legislative and executive acts. 208 Jefferson’s letter of March 15, 1789, from Paris, to his friend Madison in this county, and Madison’s statement on June 8, 1789 when he laid his own set of amendments before the first Congress, affirmatively show such reliance. Jefferson was then our minister to France.

The Constitution went into operation in 1789, and the first ten amendments two years later. The fact that the Constitution did not originally have a bill of rights became the strongest objection to its ratification. Its supporters countered with the argument that since the federal government was one of enumerated powers, a bill of rights was unnecessary; indeed, it might even be dangerous, for it would furnish some ground for a contention that such an enumeration was exhaustive. The earliest and leading protagonist of this double-barreled position was James Wilson of Pennsylvania. 209 Later, Alexander Hamilton of New York put Wilson’s argument in its best-known form, 210 although the last installment of this number did not come from

206. 3 THE WRITINGS OF THOMAS JEFFERSON 223 (W. Ford ed. 1894).

It is by balancing each of these three powers against the other two, that the efforts in human nature towards tyranny can alone be checked and restrained, and any degree of freedom preserved in the constitution.

4 THE WORKS OF JOHN ADAMS 185, 186 (Chas. F. Adams ed. 1851).
208. That the framers and ratifiers of the Constitution were familiar with the idea of judicial review, see C. BEARD, THE SUPREME COURT AND THE CONSTITUTION (1912).
209. See 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 436-37 (2d ed. 1888); PAMPHLETS ON THE CONSTITUTION 156 (W. Ford ed. 1888).
the press until after New York, the eleventh state, had ratified the Constitution. Thus, this particular work had little actual effect upon the political course of events.

Madison at first espoused Wilson's thesis. However, under the impact of his correspondence with his friend Jefferson, and the general demands for a bill of rights, he changed his position and became the principal draftsman of the first ten amendments.

Jefferson, in his letter of March 15, 1789 to Madison, wrote:

In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent and kept strictly to their own department merits great confidence for their learning and integrity. In fact what degree of confidence would be too much for a body composed of such men as Wythe, Blair and Pendleton? On characters like these the "civium ardo prava jubentium" [frenzy of the citizens bidding what is wrong] would make no impression.

Wythe, Blair and Pendleton were celebrated judges who constituted Virginia's High Court of Chancery.

Madison studied the proposals of the various states, and prepared his own set of amendments. He presented these to the House on June 8, 1789. Before he did so, he had probably received Jefferson's letter of March 15, 1789, for all of Jefferson's letters came by diplomatic pouch. In making his presentation, Madison took occasion to meet the argument that bills of rights were ineffective by pointing to judicial review:

If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

The first case in which the Supreme Court invalidated an act of Congress was not long in coming. That case was not Marbury v.

211. See 3 J. Elliot, Debates On The Federal Constitution 620 (2d ed. 1888).
214. 1 Annals Of Cong. 439 (June 8, 1789) (J. Gales comp. 1834). The portions of the Annals relating to the first ten amendments in the first Congress are reprinted in B. Patterson, The Forgotten Ninth Amendment 100-217 (1955).
Madison,215 as we popularly suppose. Rather, it antedated Marbury v. Madison by almost a decade. The first case was United States v. Yale Todd.216 Although Yale Todd was not reported, Chief Justice Taney, in a footnote inserted in United States v. Ferreira217 at the direction of the Court, gave the substance of that decision.

Yale Todd arose under a veterans' pension act of 1792.218 This act gave circuit courts of the United States the duty of examining into the claims of pensions as invalids of members of our armed forces during the Revolutionary War and certifying their opinion to the Secretary of War. The different circuit courts, which included the Chief Justice and all but one of the five justices of the Supreme Court, were of the opinion that the act of 1792 was unconstitutional because it assigned to the circuit courts duties which were not of a judicial nature.219 The Circuit Court for the District of New York consisted of Chief Justice Jay, Justice Cushing and District Judge Duane; the Circuit Court for the District of Pennsylvania, of Justices Wilson and Blair, and District Judge Peters; and the Circuit Court for the District of North Carolina, of Justice Iredell and District Judge Sitgreaves. The Circuit Court for the District of New York stated:

That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.

That neither the legislative nor the executive branches, can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner.220

But this court did, in an effort to cooperate, give its members the option of acting as commissioners, but not as judges, in carrying out the provisions of the act. The Circuit Court for the District of Pennsylvania, however, respectfully refused to act at all. Accordingly, the Attorney General made a motion ex officio in the Supreme Court for a writ of mandamus to compel the Circuit Court for the District of Pennsylvania to act in the case of one Hayburn.221 The Court denied the motion. The Attorney General then changed his ground and stated that he was in court on behalf of Hayburn. This caused the Court to take the motion under advisement until the next term. In the mean-

215. 5 U.S. (1 Cranch) 137 (1803).
216. Unreported, 1794.
217. 54 U.S. (13 How.) 40, 52 n. (1851).
219. See Hayburn's Case, 2 U.S. (2 Dall.) 409, 410-14 n. (1792).
220. Id. at 410 n. (emphasis added).
221. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).
time, Congress repealed various sections of the Act of 1792, but inserted a savings clause for the determination of the validity of action taken by those judges who accommodatingly acted as commissioners. It was because of this savings clause that the Yale Todd case arose; and the Supreme Court ruled in favor of the United States, starting from the premise that the Act of 1792, in violation of the Constitution, sought to impose non-judicial functions on federal circuit courts. Chief Justice Taney in his note in Ferreira stated that in Yale Todd the Court determined:

1. That the power proposed to be conferred on the Circuit Courts of the United States by the act of 1792 was not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the courts.

2. That as the act of Congress intended to confer the power on the courts of a judicial function, it could not be construed as an authority to the judges composing the court to exercise the power out of court in the character of commissioners.

Nearly a decade after Yale Todd came the landmark decision in Marbury v. Madison. In a great opinion by Chief Justice Marshall, the Court held that an act of Congress which gave the Court jurisdiction beyond that granted by the Constitution was to the extent of the extra grant void. In the concluding paragraph of his opinion, Chief Justice Marshall said:

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void.

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222. Act of Feb. 28, 1793, ch. 17, 1 Stat. 324. As a consequence of the repeal, no decision on the merits was ever rendered. See Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

223. Act of 1792, § 3, 1 Stat. 325. In the interim between the repealing act and the Yale Todd case, President Washington had Secretary of State Jefferson write to Chief Justice Jay and his associates on whether their advice would be available to the executive branch on various important legal questions. After consulting with their brethren they answered in the negative, "especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been purposely as well as expressly united to the executive departments." 3 Correspondence and Public Papers of John Jay 488-89 (A. Johnston ed. 1891). The reference is to U.S. Const. art. II, § 2, which provides that the President "may require the opinion, in writing, of the principal Officer of each of the executive Departments, upon any subject relative to the Duties of their respective Offices."

224. 54 U.S. at 52, 53 n. In Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796), reversing the Federal Circuit Court for the District of Virginia, and Clerke v. Harwood, 3 U.S. (3 Dall.) 342 (1797), reversing the Maryland High Court of Appeals, the Court invalidated state statutes because they conflicted with the peace treaty of 1783 between the United States and Great Britain.

225. 5 U.S. (1 Cranch) 137 (1803).

226. 5 U.S. at 180.
During the course of his opinion he referred in passing, although not by name, to the ruling in *Yale Todd*, as well as the course of the circuit courts under the Act of 1792. With reference to the circuit courts he commented: "This law being deemed unconstitutional, at the circuits, was repealed, and a different system was established . . ."\(^{227}\) He related the ruling in *Yale Todd*:

The judgment, in that case, is understood to have decided the merits of all claims of that description; and the persons, on the report of the commissioners, found it necessary to pursue the mode prescribed by the law, subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list.\(^{228}\)

Some legal writers have been unable to accept *Yale Todd* as the first case in which the court invalidated an act of Congress.\(^{229}\) This must have seemed to them like a downgrading of *Marbury v. Madison*. But it is not. *Marbury v. Madison* remains the same landmark case. It is still the final word on judicial review of legislative acts. However, it is not the first case to hold an act of Congress unconstitutional. That distinction belongs to *Yale Todd*.

A little over a half century later the Court in *Murray's Lessee v. Hoboken Land & Improvement Co.*,\(^{230}\) in considering the effect of the due process clause of the fifth amendment, had no hesitation in saying:

The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law," by its mere will.\(^{231}\)

Judicial review on a case-by-case basis of executive acts, in order to achieve due process of law, is centuries old. There followed judicial review of legislative, and later still of administrative acts. Moreover, these two concepts — judicial review and due process of law — are part of a continuous legal development of nearly eight centuries, from 1178 when Henry II appointed five judges for the whole kingdom and told them "to do right judgment"\(^{232}\) to the present time. The due

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\(^{227}\) 5 U.S. at 171.  
\(^{228}\) 5 U.S. at 172.  
\(^{230}\) 59 U.S. (18 How.) 272 (1856).  
\(^{231}\) Id. at 276, quoted by Justice Harlan in his concurring opinion and by Justice Black in his dissenting opinion in *In re Winship*, 397 U.S. 358, 372-73 n.5, 380 (1970).  
\(^{232}\) 2 English Historical Documents 482 (D. Douglas & G. Greenaway eds. 1953).
process rights which the individual obtained, Justice Cardozo described in the Court's opinion in *Palko v. Connecticut*\(^{233}\) as "implicit in the concept of ordered liberty." Justice Harlan thinks of such rights as those which fundamental fairness requires.

**XV. FUNDAMENTAL FAIRNESS**

Once the Court unshackles the case-by-case application of the due process clause of the fourteenth amendment from the selective incorporation doctrine which the Court embraced, and the incorporation theory which the Court never accepted, it will have a steadier hand in considering, for due process protection, rights nowhere specifically mentioned in the Constitution under the due process clause of the fifth amendment as to federal action, and under the due process clause of the fourteenth as to state action. Thus will the Court, in its applications of both due process clauses, help us to realize the better angels of our nature. Thus will it enable us to make our reach exceed our grasp. The sky will indeed be the limit, as Justice Holmes in another connection once feared.\(^{234}\)

For instance, the thirteenth amendment forbids slavery and involuntary servitude. But can there be any doubt in today's world that if the thirteenth amendment were not there, the Court would reach the results of this amendment under the due process clauses? Or again, the fourteenth amendment provides for equal protection of the laws. But can there be any doubt that if this clause were not there, the Court would reach most of the results which this clause requires under the companion due process clause? For what can be a greater denial of due process than treatment which is not evenhanded? Indeed, in *Bolling v. Sharpe*\(^{235}\) the Court, under the due process clause of the fifth amendment, outlawed segregation in the public schools of the District of Columbia, a result which it reached in *Brown v. Board of Education*\(^{236}\) under the equal protection clause of the fourteenth amendment as to public schools in the states. Chief Justice Warren, for a unanimous Court said in *Bolling*:


\(^{234}\) In his dissenting opinion in *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930), he said:

I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable.


\(^{236}\) 347 U.S. 483 (1954).
We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness that "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.237

However, since there is an equal protection clause in the fourteenth amendment, the Court should apply it on a case-by-case basis wherever applicable to state action in the same manner that the Court applies the fourteenth amendment's due process clause.

Various of the justices, even some of those who embrace Justice Black's incorporation theory, have indicated their acceptance of a broader role for the due process clauses than the enforcement of the specifics of the Federal Bill of Rights. They include Chief Justice Warren and Justices Harlan, Goldberg, Douglas, Brennan, Murphy, and Rutledge.

In Poe v. Ullman,238 where the appellants challenged the validity of Connecticut statutes prohibiting the use of contraceptive devices and the giving of medical advice in the use of such devices, Justice Harlan, in his dissenting opinion commented:

Indeed the fact that an identical provision limiting federal action is found among the first eight Amendments, applying to the Federal Government, suggests that due process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions.

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If

237. Id. at 498-99. Justice Goldberg, in his concurring opinion in which Chief Justice Warren and Justice Brennan joined in Griswold v. Connecticut, 381 U.S. 479, 486-87 n.1 (1965), pointed out that in this case the Court "derived an equal protection principle from that Amendment's Due Process Clause."

the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint. 239

In *Griswold v. Connecticut*, 240 where the Court invalidated the two same Connecticut statutes which were under attack in *Poe v. Ullman*, Justice Harlan in his concurring opinion added:

> In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325. . . . For reasons stated at length in my dissenting opinion in *Poe v. Ullman*, *supra*, I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom. 241

In the same case, Justice Goldberg, in a concurring opinion in which Chief Justice Warren and Justice Brennan joined, wrote:

> Although I have not accepted the view that "due process" as used in the Fourteenth Amendment incorporates all of the first eight Amendments . . . I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. 242

Some of the justices who accepted the incorporation theory took a comparable approach. Justice Murphy, for instance, indicated such an approach as early as his dissenting opinion in *Adamson v. California* 243 in which Justice Rutledge concurred:

> I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter

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239. *Id.* at 542.
240. 381 U.S. 479 (1965).
241. *Id.* at 500.
242. *Id.* at 486.
is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant condemnation in terms of lack of due process despite the absence of a specific provision in the Bill of Rights.\textsuperscript{244}

Justice Douglas carried forward this idea in his dissenting opinion in \textit{Poe v. Ullman}.\textsuperscript{245} Though I believe that "Due Process" as used in the Fourteenth Amendment includes all of the first eight Amendments, I do not think it is restricted and confined to them. We recently held that the undefined "liberty" in the Due Process Clause of the Fifth Amendment includes freedom to travel. \textit{Kent v. Dulles}. . . . The right "to marry, establish a home and bring up children" was said in \textit{Meyer v. Nebraska} . . . to come within the "liberty" of the person protected by the Due Process clause of the Fourteenth Amendment. As I indicated in my dissent in \textit{Public Utilities Commission v. Pollak} . . . "liberty" within the purview of the Fifth Amendment includes the right of "privacy," a right I thought infringed in that case because a member of a "captive audience" was forced to listen to a government-sponsored radio program. "Liberty" is a conception that sometimes gains content from the emanations of other specific guarantees . . . or from experience with the requirements of a free society.\textsuperscript{246}

One will note that Justice Harlan in his dissent in \textit{Poe v. Ullman},\textsuperscript{247} used the phrase "independent guaranty of liberty and procedural fairness."\textsuperscript{248} For a time, there was an identification of the due process clauses with procedure. For instance, in \textit{Chambers v. Florida}\textsuperscript{249} where the Court suppressed a confession in a state case, Justice Black in the Court's opinion identified the due process clauses of the fifth and fourteenth amendments with "procedural standards."\textsuperscript{250}

\textsuperscript{244} \textit{Id.} at 124.
\textsuperscript{245} 367 U.S. 497 (1961).
\textsuperscript{246} \textit{Id.} at 516-17.
\textsuperscript{247} 367 U.S. 497, 522 (1961) (dissenting opinion).
\textsuperscript{248} \textit{Id.} at 542.
\textsuperscript{249} 309 U.S. 227 (1940).
\textsuperscript{250} \textit{Id.} at 236. Justice Brandeis, dissenting in \textit{Burdeau v. McDowell}, 256 U.S. 465, 477 (1921), wrote: "And in the development of our liberty insistence upon pretrial regularity has been a large factor." In a leading case invalidating confessions, \textit{McNabb v. United States}, 318 U.S. 332, 347 (1943), Justice Frankfurter ended the Court's opinion with these words:

\textbf{The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law.}

In attempting to distinguish between substance and form, one is reminded of Sir Henry Maine's statement about substantive law having "at first the look of being gradually secreted in the interstices of procedure." H. MAINE, \textit{EARLY LAW AND CUSTOM} 389 (1901).

The related ideas of the due process of law and the supremacy of law, we have often embodied in the sentence, we are a government of laws and not of men.
Historically, however, it is not correct to confine due process clauses to any particular area, whether it be procedural safeguards, property rights, or human rights. These clauses have always had their “law of the land” meaning as well. In a time when there was an emphasis on procedure, they may seem to have been limited to procedure. But in a later time when there was an emphasis on property rights, the champions of such rights also relied upon due process clauses. Chief Justice Taney, regarding slaves as property, used the due process clause of the fifth amendment to support his conclusion in the *Dred Scott* case that the provision of one of the two acts known as the Missouri Compromise which prohibited slavery north of 36°30′ north latitude except in Missouri was unconstitutional.

However, his opponents also relied upon due process clauses: they used such clauses in their arguments against slavery. In 1856, the same year as the *Dred Scott* case, the Republican party in its first national platform declared:

> [T]hat, as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty to maintain this provision of the Constitution against all attempts to violate it for the purpose of establishing slavery in any Territory of the United States, by positive legislation prohibiting its extension there...253

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In the government of the Commonwealth of Massachusetts, the legislative, executive, and judicial power shall be placed in separate departments, to the end that it might be a government of laws, and not of men.

4 Ad Adams, supra note 197, at 230. Justice Douglas in his concurring opinion in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 177 (1951), said with emphasis: “This is a government of laws, not of men.” In United States v. United Mine Workers, 330 U.S. 258 (1947), Justice Frankfurter began his concurring opinion with these words:

The historic phrase “a government of laws and not of men” epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic.

Id. at 307–08. He quoted this in his concurring opinion in Cooper v. Aaron, 358 U.S. 1, 23 (1958), arising out of the resistance of Arkansas under the leadership of Governor Orval E. Faubus to desegregation in the public schools as required by the Court’s decision in *Brown v. Board of Educ.*, 347 U.S. 483 (1954).


253. E. Stanwood, *A History Of The Presidency 205* (1884). The Republican party platform of 1860 contained a similar declaration. *Id.* at 229. The relevant provisions are also quoted in J. TenBroek, *The Antislavery Origins Of The Fourteenth Amendment 120–21*, nn.5 & 6 (1951). The more radical theorists, such as Alvan Stewart, found in the federal due process clause a source of congress-
Justice Harlan in his concurring opinion in *Griswold v. Connecticut* cautioned that the incorporation theory could be used to restrict the reach of the fourteenth amendment's due process:

In other words, what I find implicit in the Court's opinion is that the "incorporation" doctrine may be used to restrict the reach of Fourteenth Amendment Due Process. For me this is just as unacceptable constitutional doctrine as is the use of the "incorporation" approach to impose upon the States all the requirements of the Bill of Rights as found in the provisions of the first eight amendments and in the decisions of this Court interpreting them. . .

Justice Harlan's caution had an illustration in that very case, for Justice Black was in dissent. In that dissent in which Justice Stewart joined, Justice Black quoted the warning of Justice Holmes about the sky being the limit, with reference to the Court's rulings in the area of state economic regulation, and in turn voiced his own concern about comparable rulings in the field of human rights in areas beyond the specifics of the first eight amendments:

My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of a duly constituted legislative body and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.

Let us therefore take the due process clauses on a case-by-case application. Moreover, let us take them on the basis of Justice Clark's suggestion in his concurring opinion in *Irvine v. California*, that they mean what five justices of the Court say they do; or, more
accurately, as Justice Black indicated in his concurring and dissenting opinion in which Justice Douglas joined, in *Williams v. Florida*, that they mean what a majority of the Court say they do. Let those who feel that a case-by-case application of the due process clauses produces results which are too indefinite, reflect that in an earlier time there was a comparable objection to equity: equitable relief was said to be as variable as the length of the chancellor's foot. But equity did a needed and creditable job; so has the Federal Supreme Court in its applications of the due process clauses.

We need some final arbiter as well as guide for the questions which come and will continue to come before the Court under the due process clauses. As Justice Douglas recently put it in his concurring opinion in *Gibson v. Florida Legislative Investigation Committee*: "The need of a referee in our federal system has increased with the passage of time, not only in matters of commerce but in the field of civil rights as well."

We have been able to hit upon no better final arbiter than the Court. Indeed, we are fortunate to have this body administer our concepts of judicial review and due process. Under this system, nine trained lawyers apply their disciplined minds to due process questions on a case-by-case basis. They consider the presentations of counsel, deliberate among themselves and give us their reasoned conclusions. As Justice Frankfurter explained in *Bartkus v. Illinois*:

Decisions under the Due Process Clause require close and perceptive inquiry into fundamental principles of our society. The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment.

In the description of the concept of this kind of due process, Justice Frankfurter once again does it best. In his concurring opinion in *Griffin v. Illinois*, where the Court concluded that indigent de-

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259. John Selden (1584-1654), English jurist, antiquary, and chosen patron of the Selden Society, complained:

> Equity is a Roguish thing: for Law we have a measure, know what to trust too; Equity is according to the Conscience of him that is Chancellor, and as it is larger or narrower so is Equity. 'Tis all one as if they should make the Standard for the measure, we call a Foot, a Chancellor's Foot; what an uncertain Measure would this be? One Chancellor has a long Foot, another a short Foot, a third an indifferent Foot; 'Tis the same thing in the Chancellor's Conscience.

*Table Talk of John Selden* 49 (Pollock ed. 1890).
261. 359 U.S. 121 (1939).
262. Id. at 128.
fendants in state criminal cases were entitled to a free copy of the trial transcript where this was necessary for them to be afforded as adequate appellate review as defendants who had money enough to buy transcripts, he aptly stated:

"Due Process" is, 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... 264

In Sweezy v. New Hampshire, 265 in a concurring opinion in which Justice Harlan joined, he added:

The implications of the United States Constitution for national elections and "the concept of ordered liberty" implicit in the Due Process Clause of the Fourteenth Amendment as against the States, Palko v. Connecticut... were not frozen as of 1789 or 1868, respectively. While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning... 266

In areas outside of the Federal Bill of Rights, the Court has swept past the position of Justice Black in its applications of the due process clauses on a case-by-case basis. In like manner the Burger Court will sweep past the Warren Court, and future Courts will sweep past the Burger Court. Such is the nature of the case-by-case application of the due process clauses.

XVI. EQUAL PROTECTION

Not only has the Court from time to time applied the due process clauses of the fifth and fourteenth amendments on a case-by-case basis, but also as to state action it has similarly applied the equal protection clause of the fourteenth amendment. Many decisions in varying situations are illustrative. Under this clause, the Court in Brown v. Board of Education 267 invalidated segregation in the public schools of the states.

264. Id. at 20–21 (concurring opinion).


266. Id. at 266. In that case a socialist who lectured at the University of New Hampshire was sentenced for contempt for his refusal to answer the inquiries of the Attorney General of New Hampshire about his lecture and the activities of his wife and others in the formation of the Progressive Party in that state. The legislature of New Hampshire by a joint resolution had designated the Attorney General as its agent for the investigation of subversive activities. The Court upset the sentence. In Trop v. Dulles, 356 U.S. 86, 101 (1958), Chief Justice Warren in an opinion in which Justices Black, Douglas and Whittaker joined, said with reference to the eighth amendment: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

Under this clause, the Court in *Baker v. Carr*268 (a state legislative apportionment case which corrected the reasoning in *Colegrove v. Green*269) started on what became its one-man, one-vote course. Thereafter it applied its equal protection, one-man, one-vote rule to elections for statewide office in *Gray v. Sanders*, to Congressional districting by the states in *Wesberry v. Sanders*,271 to state legislative reapportionment in *Reynolds v. Sims*272 and five companion cases,273 and to many kinds of local elective governmental units in *Avery v. Midland County*.274 In addition, the Court invalidated the state poll taxes in *Harper v. Virginia Board of Elections*.275

Among the Court’s most numerous cases under this clause are those where it invalidated the systematic exclusion of any recognizable, identifiable group — racial, ethnic, sexual, religious, ethical, economic, social, political, or geographical; more specifically, Negroes,276 persons of Mexican descent,277 daily wage earners as a class,278 or women279 — from the venires on panels from which grand or petit juries are drawn.

Under the equal protection clause, the Court in *Griffin v. Illinois*280 started on a course which, in the words of Chief Justice Burger in the Court’s opinion in the recent case of *Williams v. Illinois*,281 “marked a significant effort to alleviate discrimination against those who are unable to meet the costs of litigation in the administration of criminal justice.”282

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269. 328 U.S. 549 (1946).
Under this clause, the Court held in Baxstrom v. Herold\textsuperscript{288} that a state prisoner was entitled to a review of the determination as to his sanity in conformity with proceedings granted all others civilly committed.

A striking illustration of the Court’s application of the equal protection clause occurred in Hamilton v. Alabama\textsuperscript{284} where, without hearing argument, the Court set aside the contempt conviction of Miss Mary Hamilton, a Negro woman who declined to answer when she was addressed as “Mary” in an Alabama court. The county solicitor had this exchange with Miss Hamilton:

\begin{quote}
Q. Mary, I believe you were arrested — who were you arrested by? A. My name is Miss Hamilton. Please address me correctly.
\end{quote}

\begin{quote}
Q. Who were you arrested by, Mary? A. I will not answer a question until I am addressed correctly.
\end{quote}

She was immediately held in contempt without a hearing. With poetic justice, the Court reversed just as summarily, citing its recent per curiam decision forbidding segregation in state courtrooms\textsuperscript{285}.

Under this clause the Court, at its 1969-1970 term, extended its one-man, one-vote rule to the election of junior college district trustees in Hadley v. Junior College District\textsuperscript{286} and to elections on a city’s general obligation bond issue in Phoenix v. Kolodziejski\textsuperscript{287} and held in Williams v. Illinois\textsuperscript{288} in an opinion by Chief Justice Burger “that an indigent criminal defendant may not be imprisoned in default of payment of a fine beyond the maximum authorized by the statute regulating the substantive offense.”\textsuperscript{289}

However, there is a mystery in the Court’s equal protection decisions, and that is why the mind of Justice Harlan, who has the best comprehension of the case-by-case application of the due process clauses, should boggle at the like application of the equal protection clause. Be that as it may, Justice Harlan in concurring in Williams v. Illinois sounds like Justice Black in the latter’s opposition to the case-by-case application of the due process clause. Justice Harlan in concurring in Williams v. Illinois complained:

The “equal protection” analysis of the Court is, I submit, a “wolf in a sheep’s clothing,” for that rationale is no more than a masquerade of a supposedly objective standard for subjective

\begin{itemize}
\item \textsuperscript{283} 383 U.S. 107 (1966).
\item \textsuperscript{284} 376 U.S. 650 (1964).
\item \textsuperscript{285} Johnson v. Virginia, 373 U.S. 61 (1963).
\item \textsuperscript{286} 397 U.S. 50 (1970).
\item \textsuperscript{287} 399 U.S. 204 (1970).
\item \textsuperscript{288} 399 U.S. 235 (1970).
\item \textsuperscript{289} \textit{Id.} at 241.
\end{itemize}
judicial judgment as to what state legislation offends notions of "fundamental fairness." Under the rubric of "equal protection" this Court has in recent times effectively substituted its own "enlightened" social philosophy for that of the legislature no less than did in the older days the judicial adherents of the now discredited doctrine of "substantive" due process. I, for one, would prefer to judge the legislation before us in this case in terms of due process, that is to determine whether it arbitrarily infringes a constitutionally protected interest of this appellant. . . .

 XVII. CURRENT AND COMING APPLICATIONS

 It may be that in some areas covered by the specifics of the Federal Bill of Rights, such as those relating to obscenity, to jury trials in state criminal cases, to confessions in state cases, and to double jeopardy in state cases, there will seem to some to be a retreat by the Burger Court from the advanced positions taken by the Warren Court. However, if the Court will throw away the incorporation as well as selective incorporation crutches which some of its members use, crutches which the Court never needed and will be stronger without, the Burger Court in areas beyond the specifics of the first eight amendments will sweep past the Warren Court, and future Courts in these areas will sweep past the Burger Court.\textsuperscript{291}

\textsuperscript{290} \textit{Id.} at 259.

\textsuperscript{291} In the next issue the author will discuss the possibilities of the Court's case-by-case application of the due process clause in the areas of obscenity, grand and petit juries, confessions, double jeopardy, capital punishment, whipping posts, prison treatment, imprisonment for debt, alimony jails, replevin, comparable creditor practices, practice of contraception, right to an abortion, miscegenation laws, administrative investigations, administrative determinations, right of privacy, right to know, right to an education, public accommodations, long hair and dress, use of marijuana, environment and pollution, and equal rights for women.