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CHAPTER 1

Incorporation and the Right to a Jury Trial

DUNCAN V. LOUISIANA
391 U.S. 145 (1968)

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Today the right to a jury trial is a *national* Sixth Amendment right. Any criminal defendant in the United States facing the possibility of more than six months of imprisonment upon conviction has the right to demand a jury trial.[1] Not only the federal government but also every state has to respect this right. In the nineteenth century, the constitutional rights of criminal defendants were vastly different. At that time, the Bill of Rights, including the Sixth Amendment, restricted only what the federal government could do.[2] Though certain provisions of the Constitution, such as the ones prohibiting *ex post facto* laws or suspensions of the writ of *habeas corpus*, were applicable to states, the Bill of Rights was not. States could legally violate all the rights protected from federal infringement by the Bill of Rights, including those concerned with criminal justice. Not until the twentieth century did the Supreme Court begin to "incorporate" many of the particular provisions of the Bill of Rights into the Fourteenth Amendment's due process clause, thereby applying them against the states. By this process of *incorporation*, the Court created a national set of substantive and procedural rights.

[1]*Baldwin v. New York*, 399 U.S. 66 (1970); *Blanton v. North Las Vegas*, 109 S.Ct. 1289 (1989).

[2]See *Barron v. Baltimore*, 7 Pet. (32 U.S.) 243 (1833).

In *Duncan v. Louisiana* (1968), the justices debated the pros and cons of incorporation as they considered whether to apply the Sixth Amendment right to a jury trial against the states. The case concerned a defendant who had been convicted of simple battery after a trial without a jury. He appealed his decision to the Supreme Court, claiming that he had a Sixth Amendment right to a jury trial and that Louisiana had a constitutional obligation to respect his wish to be tried by a jury. Though the jury was an old and sacred institution, it was not at all clear that defendants had a constitutional right to a jury trial. No doubt the Sixth Amendment barred the federal government from denying a jury trial to a defendant who refused to waive the right, but were the states operating under similar or identical restraints? This question depended on the legitimacy of the doctrine of incorporation. *Duncan* is therefore a useful case to examine the role that the Supreme Court has played not only in creating a national set of substantive rights but also in fashioning a constitutional code of criminal procedure.

Evaluating what the Supreme Court has done by incorporating the Bill of Rights into the Fourteenth Amendment's due process clause requires balancing the values of federalism and individual rights. It is obvious that every Supreme Court decision incorporating a provision of the Bill of Rights limits the ability of state legislatures to experiment. Of course, today there is consensus that certain rights are so important that state legislatures should not be allowed to tamper with them. But where should the line be drawn? Despite the value of legislative experimentation at the state level, is every right found in the Bill of Rights equally worthy of being nationalized? In 1932, Justice Louis Brandeis, one of the twentieth century's great defenders of individual rights, gave his estimation of the value of local experimentation:

> Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. . . . But in the exercise of this high power, we must ever be on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.[3]

Brandeis is reminding us that the Supreme Court can go too far in the direction of extending and protecting individual rights. By narrowing the range of legislative options, the Court can prevent experimentation and thereby shut out the "light of reason." Is Brandeis correct? Does the value of experimentation have any bearing on whether the Supreme Court should have nationalized the Bill of Rights?

Besides encouraging experimentation, the American federal system fragments political power. There are a number of advantages to such a system of de-

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[3]*New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932), Brandeis dissenting.

centralized political decision making. First, it discourages the growth of a monolithic national government capable of as much evil as it is of good. In *Federalist No. 51,* James Madison explained how a large *federal* republic prevents tyranny. First, in a federal system,

> the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[4]

In this fashion, federalism complements the separation of powers. The powers of each state government and the national government are divided and distributed to separate legislative, executive, and judicial "departments." The branches can therefore "check and balance" each other, allowing each government to control itself. But the federal system permits the governments to control each other, providing Americans with a "double security."

Madison also thought that federalism preserved liberty in a way quite different from the method of checks and balances. A country that respected the principle of federalism could be much larger than a unitary state. Size was significant because a large country would have a "multiplicity of interests" that would make it very difficult for one faction to dominate and oppress the others.[5] Hence federalism prevented tyranny not only by functioning as a vital part of a system of checks and balances but also by providing the political structure for a large and diverse country.

In your view, do Madison's arguments have any relevance to the twentieth century? Do the states check and balance the federal government? Does the size of the United States contribute to the American commitment to individual rights and limited government? Do Madison's arguments have any bearing on the creation of a national set of individual rights, including the rights of the accused? Should state legislatures have the discretion to enact radically different codes of criminal procedure? Do the states confront such different problems that they should have the power to "experiment" in this fashion? Does state control over criminal procedure advance the cause of freedom? Is it possible that a judicially created set of national rights is a step in the direction of tyranny? If so, in what ways?

Another purported virtue of federalism is that it promotes democracy by letting people at the local level, not bureaucrats in Washington, D.C., make significant policy decisions. Is this true? Is it important that people who are most affected by an issue be given the authority to resolve it? Does such a system let those who are most familiar with local conditions and realities shape the policies

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[4]*The Federalist Papers,* ed. Clinton Rossiter (New York: Mentor, 1961), p. 323.

[5]Ibid., pp. 324–325. For a more elaborate explanation of Madison's views concerning the value of large states, see his famous *Federalist No. 10.*

that affect their lives? Do you think Americans would have more political satisfaction if they had more control over their local affairs? Would local control over criminal procedure deepen the American commitment to democracy?

Experimentation, prevention of tyranny, and democracy are the primary values that underlie the American principle of federalism. Their significance must be weighed when evaluating what the Supreme Court has done by nationalizing the Bill of Rights, including the right that will be considered more fully in this chapter, the right to a jury trial. The Supreme Court's twentieth-century nationalization of the Bill of Rights was based on the due process clause of the Fourteenth Amendment:

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

At the time of the Fourteenth Amendment's ratification in 1868, there was little reason to believe that the due process clause would become the constitutional vehicle for the creation of a national set of individual rights immune from both federal and state control. After all, an identical clause restricting the federal government had been part of the Fifth Amendment for many years. The way that it had customarily been interpreted hardly anticipated the awesome role that the Fourteenth Amendment clause would play in the twentieth century. For example, in *Den v. Hoboken Land and Improvement Co.* (1856), the Supreme Court said that judges must interpret "due process" by looking to "settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors."[6] The clause was therefore a guarantee that imposed on the federal government a limited number of common-law procedures. The federal government could deprive someone of life, liberty, or property only if it followed these procedures. So understood, it was in no way a constitutional basis for a national set of individual rights, whether of the substantive or of the procedural type.[7]

Though the phrase "due process" had a rather limited meaning in the period immediately preceding the Civil War, the clause of the Fourteenth Amendment (1868) that forbade any state from enforcing any law "which shall abridge the privileges or immunities of citizens of the United States" arguably provided the textual basis for a national set of rights. However, in the *Slaughterhouse Cases* (1873), a 5–4 decision, the Court declined to interpret this phrase in a way that would allow the federal judiciary to become the defender of individual rights

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[6] *Den v. Hoboken Land and Improvement Co.*, 18 How. (59 U.S.) 272, 276–277 (1856).

[7] One notorious exception to the general mid-nineteenth-century view that "due process" was merely a procedural guarantee was Chief Justice Roger B. Taney's infamous decision in *Dred Scott v. Sandford*, 19 How. (60 U.S.) 393 (1857). Taney claimed that the federal law outlawing slavery in certain federal territories deprived citizens of their property without due process of law. At the time, Taney's "substantive" view of due process received little support.

against the states. American citizens, the Court said, had rights as citizens of the federal government and as citizens of the states in which they resided. The "privileges and immunities" clause protected only the former "bundle" of rights, not the latter. The Court then went on to list the kinds of rights that were dependent on federal citizenship. Because the Court's majority could not believe that the Fourteenth Amendment radically changed the relations between the federal government and the states, the list was small and unimpressive. Included were the right to participate in and interact with the federal government, the right of free access to American seaports, the right of federal protection when abroad, the right to use the navigable waters of the United States, and the privilege of the writ of *habeas corpus*.[8] All other rights were dependent on state citizenship and were therefore subject to state control. Thus in 1873 the Supreme Court interpreted the privilege and immunities clause in such a way that it could not provide the basis for a broad set of national individual rights enforced by the federal judiciary against the states.[9]

The dissents in the *Slaughterhouse Cases* bitterly contested the majority's conclusions. For instance, Justice Stephen J. Field said that the majority's view of the privilege and immunities clause reduced it to "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."[10] Field envisioned the Fourteenth Amendment as a constitutional shield for a national set of rights enforced by the judiciary against the states. These rights were based on the "natural and inalienable" rights that all "free governments" recognize. Field's dissent therefore anticipated what the Supreme Court was going to accomplish, first by relying on substantive due process and later by relying on the doctrine of incorporation.

However, a decade after the *Slaughterhouse Cases*, in *Hurtado v. California* (1884), the Supreme Court refused to interpret the due process clause of the Fourteenth Amendment in a way that would impose national restrictions on the criminal procedures of states. Hurtado had been convicted of murder after having been indicted by information (an indictment by a district attorney) rather than by a grand jury (the constitutionally required federal procedure). His argument, relying on the customary interpretation of due process, was that indictment by information conflicted with the settled "modes of proceeding" of the common law and for that reason violated the due process clause of the Fourteenth Amendment.

In response, the Supreme Court admitted that if a "mode of proceeding" coincided with the common law, it was within due process, but held that the converse was not true. Some procedures, like indictments by information, were compatible with due process even though they were unknown to the common law. To

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[8]See *Slaughterhouse Cases*, 16 Wall. (83 U.S.) 36, 79 (1873).

[9]It should also be noted that the majority in the *Slaughterhouse Cases* quickly dismissed arguments claiming that the Thirteenth Amendment and the due process and equal protection clauses of the Fourteenth Amendment constitutionally authorized the federal judiciary to defend a broad set of national rights against the states.

[10]*Slaughterhouse Cases*, 16 Wall. (83 U.S.) 36, 96 (1873).

conclude otherwise, to hold that any procedure not recognized by the common law was not due process, would be "to deny every quality of the law but its age and to render it incapable of progress or improvement."[11] Moreover, the Court said it was unreasonable to claim that due process under the Fourteenth Amendment required a grand jury indictment. After all, if the Court interpreted the due process clause of the Fourteenth Amendment in this fashion, it would make the grand jury provision of the Fifth Amendment superfluous. The due process clause of the Fifth Amendment would already require grand jury indictments, thereby rendering the grand jury provision pointless. But since no constitutional clause should be interpreted to make another meaningless,[12] the Court concluded that the due process clause of the Fourteenth Amendment did impose some restrictions on how states could deprive someone of life, liberty, and property, but they were not identical to the restrictions imposed on the federal government by the Bill of Rights.

The Court discussed an example of a procedure not prohibited by the Bill of Rights that the due process clause of the Fourteenth Amendment would prohibit. If a state adopted a special procedure for a "particular person or a particular case," the Court said it would not qualify as due process, and the federal judiciary would step in.[13] In general, however, deference to state legislatures would be the norm because due process refers to the "law of the land in each state, which derives its authority from the inherent and reserved powers of the State." The state must stay within "the limits of those fundamental principles of liberty and justice," but the "greatest security" for these rights "resides in the right of the people to make their own laws, and alter them at their pleasure."[14]

What do you think of Hurtado's argument that due process had to be equated with common-law procedures? Should the federal judiciary invalidate any criminal procedure of a state that is not sanctified by eighteenth-century common law? Would such a response unduly circumscribe the state's ability to experiment with new forms of procedure? But what of the Court's conclusion that none of the criminal justice guarantees of the Bill of Rights can be applied against the states? Is this an extreme reading of the due process clause of the Fourteenth Amendment? Does it really matter whether the due process clause of the Fourteenth Amendment has a meaning different from that of the due process clause of the Fifth? And finally, does the Court have too high an opinion of state legislatures when it says that the best way to preserve "fundamental rights" is to let people of any particular state "make their own laws, and alter them at their pleasure"?

Hurtado constituted a sharp rejection by the Supreme Court of any sort of uniform constitutional code of national criminal procedure. However, notwithstanding this decision, within fifteen years the Court relied on the due process

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[11]*Hurtado v. California*, 110 U.S. 516, 529 (1884).

[12]Idem, 534–535.

[13]Idem, 535.

[14]Idem. *Hurtado* was a 7–1 decision. Justice John M. Harlan I, dissented, arguing that the Bill of Rights should be applied against the states. Harlan's policy of "total incorporation" did not receive much support on the Court until *Adamson v. California*, 332 U.S. 46 (1947).

clause to invalidate state socioeconomic regulations on the ground that they were "unreasonable" deprivations of "liberty of contract." In *Allgeyer v. Louisiana* (1897), the Court invalidated a law that prohibited anyone from obtaining insurance on Louisiana property from a marine insurance company that had not complied with state law.[15] In the Court's view, such a law was an unreasonable infringement of the freedom to contract protected by the Fourteenth Amendment. Liberty of contract was a part of the "life, liberty, and property" that the state could not take away without due process. Since the law was unreasonable, it was not in accord with due process.

Allgeyer was an important and controversial case because the Court interpreted due process as a substantive, rather than as a procedural, limitation. Louisiana had not violated fundamental procedures in the way that it had made the law or in the way that it had enforced it. Instead, it had violated a substantive right of individuals by enacting a law that "unreasonably" infringed on the liberty of contract. Accordingly, in *Allgeyer*, the Court did under the due process clause what it had earlier declined to do in the *Slaughterhouse Cases* under the "privileges or immunities" clause. The decision increased the number of national economic rights and sharply expanded the judiciary's role in protecting such rights from state interference.

The high point of substantive due process was *Lochner v. New York* (1905), a case in which the Court invalidated a state law that prohibited bakers from working more than ten hours a day or sixty hours a week[16] The Court often invoked this doctrine in the decades that followed,[17] but it came under heavy attack during the New Deal. The Court abused its power, commentators argued, by injecting a *laissez-faire* economic philosophy into the Fourteenth Amendment's due process clause.[18] The end result, after a bruising battle with President Franklin Roosevelt, was that the Court gradually abandoned the substantive due process doctrine and retired from the socioeconomic area.[19] By the mid-1940s, the Court would no longer invalidate socioeconomic laws of the states on the ground that they violated a national right to contract.

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[15]165 U.S. 578 (1897). For the origins of the substantive due process doctrine, see *Munn v. Illinois*, 94 U.S. 113 (1877); *Railroad Commission Cases*, 116 U.S. 307 (1886); and *Mugler v. Kansas*, 123 U.S. 623 (1887).

[16]198 U.S. 45 (1905).

[17]See *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926); and *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

[18]For a more thorough discussion of substantive due process and the events of the New Deal, see H. L. Pohlman, *Constitutional Debate in Action, Volume 1: Governmental Powers* (New York: HarperCollins, 1995), ch. 2.

[19]See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Olsen v. Nebraska*, 313 U.S. 236 (1941); and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). Of course, it is arguable that the Court revived the substantive due process doctrine during the 1960s and 1970s when it invalidated state laws (prohibiting the use of contraceptives and abortion) based on a right to privacy.

However, by retreating from the socioeconomic field, the Court did not abandon substantive due process. Even before the New Deal, the Court had already incorporated certain substantive rights found in the Bill of Rights and applied them against the states. Especially important rights that were nationalized in this fashion were the freedoms of speech,[20] of the press,[21] and of religion.[22] Accordingly, though the Supreme Court may have abused its powers in the way that it applied substantive due process in the socioeconomic area, the doctrine of liberty of contract in the early twentieth century bridged the chasm separating the nineteenth-century tradition of judicial passivity in regard to a national set of individual rights and the more modern outlook embodied in the doctrine of incorporation. Though the right to contract was eventually repudiated, the Court's experience applying it against the states prepared the way for the Court's distinctive twentieth-century role: the protection of a set of uniform national rights against both the federal and the state governments.

By incorporating the First Amendment into the Fourteenth Amendment, the Court rejected the *Hurtado* principle that no provision of the Bill of Rights could be applied against the states through the due process clause. Even if the phrase "due process" appeared in both the Fifth and Fourteenth Amendments, and even if the phrase in the Fifth could not possibly be equivalent to other rights listed in the Bill of Rights, the Court slowly and tentatively incorporated certain rights listed in the Bill of Rights into the due process clause of the Fourteenth Amendment.

In *Palko v. Connecticut* (1937), though the Court rejected the argument that the double jeopardy clause of the Fifth Amendment was incorporated into the Fourteenth Amendment, Justice Benjamin Cardozo explained the new understanding of the relationship between the Bill of Rights and the due process clause of the Fourteenth Amendment. He said that due process consisted of the "'fundamental principles of liberty and justice that lie at the base of all our civil and political institutions'" and that they were of the "the very essence of a scheme of ordered liberty."[23] Any state law that violated "fundamental rights" would therefore be invalidated. Such rights, of course, did not have to be mentioned in the Bill of Rights. On the other hand, if a certain right was essential for "a scheme of ordered liberty," it would not be surprising if it were listed in one of the first eight amendments. The due process clause only incorporated fundamental rights, but the Bill of Rights was a good place for the Court to begin its analysis of whether any particular right was fundamental or not.

Cardozo's fundamental rights approach to due process did not, of course, treat all the rights contained in the Bill of Rights equally. There were three options. Such "preferred freedoms" as speech, press, and religion the Court incorporated fully. The federal judiciary would protect these rights from state action to the same degree that it protected them from federal action.

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[20]See *Gitlow v. New York*, 268 U.S. 652 (1925); and *Fiske v. Kansas*, 274 U.S. 380 (1927).

[21]See *Near v. Minnesota*, 283 U.S. 697 (1931).

[22]*Hamilton v. Regents of the University of California*, 293 U.S. 245 (1931); and *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[23]*Palko v. Connecticut*, 302 U.S. 319, 328, 325 (1937).

Other rights within the Bill of Rights were partially incorporated. The Court would apply the "core" of the right against the states, but it would not have the same scope as it had against the federal government. For instance, certain forms of double jeopardy might violate the due process clause, but not the kind practiced by Connecticut in *Palko*. After being indicted for first-degree murder, a jury found Palko guilty of second-degree murder, and the judge sentenced him to life imprisonment. Based on a state law, the prosecution appealed, arguing that the trial judge had made several errors. Connecticut's highest court agreed with the prosecution and remanded Palko over for a retrial, at which time he was convicted of first-degree murder and sentenced to death. The retrial, Cardozo argued, was not a violation of due process. All that the state wanted was a trial free from substantial legal error. The retrial was constitutional even though the Fifth Amendment prohibited the federal government from doing what Connecticut had done.[24] In short, double jeopardy was incorporated against the states, but the right against the states did not have the same scope as it had against the federal government.

Finally, Cardozo concluded, there were provisions of the Bill of Rights that were in no way essential to "a scheme of ordered liberty." These rights were completely outside the due process clause. In Cardozo's judgment, the right to a jury trial was one of these nonfundamental rights.[25] Hence in 1937 the Supreme Court's view was that states had no constitutional obligation to respect the right to a jury trial.

The fundamental rights approach to the due process clause of the Fourteenth Amendment reigned supreme without serious challenge until *Adamson v. California* (1947), at which time a debate concerning the meaning of due process erupted on the Court. In this case, Adamson claimed that his murder conviction violated the Fourteenth Amendment because at his trial the prosecution had commented on his failure to take the stand. The Supreme Court, in a 5–4 decision, ruled that what California had done did not violate the due process clause. Even though it would have violated the Fifth Amendment privilege against self-incrimination if the federal government had commented on a defendant's failure to testify on his own behalf, states were free to engage in such a practice because it did not violate the defendant's fundamental right to a fair trial. The Court did not consider the Fifth Amendment privilege against self-incrimination to be fundamental.

In his dissent, Justice Hugo Black articulated a theory of due process that will forever be linked to his name: the doctrine of total incorporation. According to Black, the due process clause of the Fourteenth Amendment fully incorporated *all* the provisions of the Bill of Rights. His argument was twofold. First, he insisted

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[24]The right to counsel was another example, according to Cardozo, of a right that had different contours depending on whether the federal government or a state government was involved. In *Powell v. Alabama*, 287 U.S. 45 (1932), the Court ruled that no state could convict an indigent defendant of a capital crime without providing him with counsel. However, in *Palko*, Cardozo said that the earlier decision did not turn on how the Sixth Amendment was interpreted. Instead, the ruling was that in the particular circumstances of the case, the defendants could not have received a "fair hearing" without counsel. See *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

[25]*Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

that the framers intended the Fourteenth Amendment to create a set of national rights equivalent to those that had previously been applicable only against the federal government. The Supreme Court therefore had a constitutional obligation to enforce the Fifth Amendment against the states. Second, he claimed that Cardozo's fundamental rights approach to the due process clause was nothing other than the discredited "natural-law formula" that the Court had used to invalidate socioeconomic laws during the heyday of liberty of contract. The Court should therefore abandon this "subjective" interpretation of due process for the "objective" standards embodied in the Bill of Rights. The discretion of courts would thereby be confined. Laws violating the Bill of Rights would be invalidated, but states would be free to enact all other laws without fear of judicial abuse of power. Finally, there was no reason to fear that total incorporation would confine the states to an "18th Century straitjacket." Since the provisions of the Bill of Rights were not "outdated abstractions" but rather vital principles of continuing relevance, judicial enforcement of them would ensure the preservation of liberty in the United States (see Box 1.1).

In a concurring opinion, Justice Felix Frankfurter defended Cardozo's fundamental rights approach to due process and attacked Black's thesis of total incorporation. First, he denigrated Black's claim that the framers of the Fourteenth Amendment intended to nationalize the Bill of Rights. It would be "extraordinarily strange" for the framers to have used the phrase "due process" to impose on the states the specific rights, liberties, and procedures listed in the Bill of Rights. They would have had to have been either "ignorant of" or "indifferent to" the traditional meaning of the Fifth Amendment's due process clause: "settled usages and modes of proceeding." After all, "due process of law" cannot mean one thing in the Fifth Amendment and another in the Fourteenth. Second, Frankfurter denied that the fundamental rights approach to due process inevitably degenerated into "the idiosyncrasies of a merely personal judgment." To decide if a law violated due process, judges must consider whether it offends those "canons of decency and fairness which express the notions of justice of English-speaking peoples." Though this standard is nowhere "authoritatively formulated," it does not leave a judge "wholly at large" (see Box 1.2).

Which justice has the more justifiable approach to understanding the meaning of due process and the degree to which the judiciary should enforce a national set of rights against both the federal government and state governments? What do you make of the fact that the justices disagreed so sharply about the intentions of those who framed the Fourteenth Amendment or that, ever since this decision, debate has raged in academic circles concerning the historical purpose of the Fourteenth Amendment?[26] Do these historical investigations have any

[26]Soon after *Adamson* was decided, Charles Fairman, a prominent constitutional authority, attacked Black's interpretation of the historical purpose of the Fourteenth Amendment. See his article "Does the Fourteenth Amendment Incorporate the Bill of Rights?" *Stanford Law Review* 2 (1949): 5–173. Coming to Black's defense, William Crosskey responded to Fairman's charges in "Charles Fairman, 'Legislative History,' and the Constitutional Limitations on State Authority," *University of Chicago Law Review* 22 (1954): 1ff. For the most recent battle of this war over historical intent, see Raoul Berger, *The Fourteenth Amendment and the Bill of Rights* (Norman: University of Oklahoma Press, 1989); and Michael K. Curtis, *No State Shall Abridge the Fourteenth Amendment and the Bill of Rights* (Durham, N.C.: Duke University Press, 1986).

BOX 1.1

JUSTICE BLACK ON INCORPORATION

. . . My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. . . .

. . . I further contend that the "natural law" formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power. . . .

. . . [In *Allgeyer v. Louisiana,*] the Court in 1896 applied the due process clause to strike down a state statute which had forbidden certain types of contracts. In doing so, it substantially adopted the rejected argument of counsel in the Slaughter-House Cases, that the Fourteenth Amendment guarantees the liberty of all persons under "natural law" to engage in their chosen business or vocation. . . .

The foregoing constitutional doctrine, judicially created and adopted by expanding the previously accepted meaning of "due process," marked a complete departure from the Slaughter-House philosophy of judicial tolerance of state regulation of business activities. Conversely, the new formula contracted the effectiveness of the Fourteenth Amendment as a protection from state infringement of individual liberties enumerated in the Bill of Rights. Thus the Court's second-thought interpretation of the Amendment was an about face from the Slaughter-House interpretation and represented a failure to carry out the avowed purpose of the Amendment's sponsors. This reversal is dramatized by the fact that the Hurtado Case, which had rejected the due process clause as an instrument for preserving Bill of Rights liberties and privileges, was cited as authority for expanding the scope of that clause so as to permit this Court to invalidate all state regulatory legislation it believed to be contrary to "fundamental" principles. . . .

I cannot consider the Bill of Rights to be an outworn 18th Century "strait jacket.". . . Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of

the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. . . .

It is an illusory apprehension that literal application of some or all of the provisions of the Bill of Rights to the States would unwisely increase the sum total of the powers of this Court to invalidate state legislation. The Federal Government has not been harmfully burdened by the requirement that enforcement of federal laws affecting civil liberty conform literally to the Bills of Rights. Who would advocate its repeal? It must be conceded, of course, that the natural-law-due-process formula, which the Court today reaffirms, has been interpreted to limit substantially this Court's power to prevent state violations of the individual civil liberties guaranteed by the Bill of Rights. But this formula also has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government. . . .

Source: Adamson v. California 322 U.S. 46, 71–90 (1947).

practical value for constitutional adjudication? Should they be the controlling factor in how the due process clause of the Fourteenth Amendment is interpreted? And what of the potential for judicial abuse of power? Is Black correct that the fundamental rights approach to the Fourteenth Amendment invites judges to apply their own personal prejudices? Is Frankfurter's response to this issue either persuasive or adequate? What of Black's doctrine of total incorporation itself? Could it be said that imposing the Bill of Rights on the states in one fell swoop is itself a form of judicial abuse of power? Is Black insincerely using a historical argument to embody into constitutional law his own preference for a national set of rights?

By coming within one vote of a majority in favor of total incorporation, *Adamson* marked the high point of Black's doctrine.[27] Never again did Black's view of the due process clause of the Fourteenth Amendment come so close to becoming law, though the Court continued to expand the set of national rights enforceable against the states, first by using the traditional fundamental rights approach and later by formulating a new doctrine called *selective incorporation*. An example of the former was *Wolf v. Colorado* (1949), in which the Court held that the due process clause incorporated the central core of the Fourth Amendment but not the remedy used in federal courts to enforce the right to be free from unreasonable searches and seizures—the exclusionary rule.[28] By this sort of fundamental

[27]In fact, only Justice William O. Douglas joined Black's dissent in *Adamson*. Justice Wiley B. Rutledge joined Justice Frank Murphy's separate dissent that fully incorporated the Bill of Rights against the states but rejected Black's corollary that confined the due process clause to *only* the provisions of the Bill of Rights. Murphy wanted to incorporate all of the provisions of the Bill of Rights but reserve the power of courts to invalidate state laws that violated fundamental rights not listed in the Bill of Rights.

[28]338 U.S. 25 (1949).

BOX 1.2

JUSTICE FRANKFURTER ON INCORPORATION

. . . Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court—a period of seventy years—the scope of that Amendment was passed upon by forty-three judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government. . . . Among these judges were not only those who would have to be included among the greatest in the history of the Court, but—it is especially relevant to note—they included those whose services in the cause of human rights and the spirit of freedom are the most conspicuous in our history. . . . [T]hey were also judges mindful of the relation of our federal system to a progressively democratic society and therefore duly regardful of the scope of authority that was left to the States even after the Civil War. And so they did not find that the Fourteenth Amendment, concerned as it was with matters fundamental to the pursuit of justice, fastened upon the States procedural arrangements which, in the language of Mr. Justice Cardozo, only those who are "narrow or provincial" would deem essential to "a fair and enlightened system of justice." To suggest that it is inconsistent with a truly free society to begin prosecutions without an indictment, to try petty civil cases without the paraphernalia of a common law jury, to take into consideration that one who has full opportunity to make a defense remains silent is, in de Tocqueville's phrase, to confound the familiar with the necessary.

The short answer to the suggestion that the provision of the Fourteenth Amendment, which ordains "nor shall any State deprive any person of life, liberty, or property, without due process of law," was a way of saying that every State must thereafter . . . have a trial by a jury of twelve in criminal cases . . . is that it is a strange way of saying it. It would be extraordinarily strange for a Constitution to convey such specific commands in such a roundabout and inexplicit way. . . .

. . . It ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth. . . . Are Madison and his contemporaries in the framing of the Bill of Rights to be charged with writing into it a meaningless clause? To consider "due process of law" as merely a shorthand statement of other specific clauses in the same amendment is to attribute to the authors and proponents of this Amendment ignorance of, or indifference to, a historic conception which was one of the great instruments in the arsenal of constitutional freedom which the Bill of Rights was to protect and strengthen. . . .

And so, when, as in a case like the present, a conviction in a State court is here for review under a claim that a right protected by the Due Process Clause of the Fourteenth Amendment has been denied, the issue is not whether an infraction of one of the specific provisions of the first eight

Amendments is disclosed by the record. The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the State court under review.

Source: Adamson v. California, 332 U.S. 46, 62–68 (1947).

rights approach, the Court had, by the late 1950s, applied some elements of the majority of the criminal procedures listed in the Bill of Rights, but not all of them.[29]

In the early 1960s, primarily at the urging of Justice William Brennan, the Court slowly abandoned the traditional fundamental rights approach to due process in favor of selective incorporation. The central premise of this doctrine was that not all of the rights listed in the Bill of Rights were applicable to the states. Only those that were "fundamental" were "selectively incorporated." In this sense, selective incorporation respected the value of federalism more than Black's doctrine of total incorporation did. However, one tenet of the selective incorporation doctrine did not favor federalism. If a provision of the Bill of Rights was incorporated into the Fourteenth Amendment, its full scope had to be applied against the states. The right applied against the states had to be equal in scope to the one applied against the federal government. According to Brennan, the Court should no longer enforce provisions of the Bill of Rights more sharply against the federal government than against the states. All incorporated rights were to have equal contours, whether enforced against federal or state action.

In a steady progression of cases in the field of criminal justice, the selective incorporation doctrine produced a uniform constitutional code of criminal proce-

[29]For a list of these cases, see Jerold H. Israel, "Selective Incorporation: Revisited," *Georgetown Law Journal* 71 (1982): 285–286.

dure. *Mapp v. Ohio* (1961)[30] overturned *Wolf v. Colorado* and applied the exclusionary rule against the states. In *Betts v. Brady* (1942), relying on the "fundamental fairness" approach, the Court had held that a state had to supply an indigent felony defendant with an attorney only if "special circumstances" made a fair trial impossible existed. Approximately twenty years later, on the ground that the right to counsel was fundamental, the Court ruled in *Gideon v. Wainright* (1963) that the Fourteenth Amendment imposed the same right to counsel on the states that the Sixth Amendment imposed on the federal government.[31] States were obliged to supply all indigent defendants with attorneys in felony cases. In *Malloy v. Hogan* (1964), the Court applied against the states the same rules governing the privilege against self-incrimination that had operated against the federal government.[32] Other rights were similarly added to the evolving set of national rights of the accused.[33]

In the latter half of the 1960s, the Court addressed the issue as to whether the federal right to a jury trial guaranteed by the Sixth Amendment was fundamental and therefore fully applicable against the states. The right to trial by jury was, of course, old and venerable. In 1215, by signing the Magna Carta, King John made it law in England that "no free man shall be taken or imprisoned . . . or outlawed or exiled or in any way destroyed except by the lawful judgment of his peers or by the laws of the land." Though vague, these words sanctified the idea of popular participation in the administration of criminal justice and contributed to the growth of the common-law jury: a group of twelve laypersons whose primary responsibility was to decide the issue of guilt or innocence by a unanimous vote. Included within the Bill of Rights of 1689, the right to a jury trial had become one of the sacrosanct principles of the English constitution. William Blackstone, a renowned eighteenth-century legal commentator, referred to it as a "palladium" of liberty.[34]

Across the Atlantic Ocean, the American colonists cherished the jury as much as their English counterparts. In the Declaration of Independence, one of the charges against King George III was that he had deprived the colonists "in many cases of the benefits of Trial by Jury." Since this was one of the rights for which they fought, the framers included it in the Bill of Rights. In *The Federalist Papers,* Alexander Hamilton commented on the widespread support for this particular right. While those who favored the new federal constitution regarded the jury "as a valuable safeguard to liberty," those who opposed it considered the jury "the very palladium of free government."[35] Later in the nineteenth century, the French observer Alexis de Tocqueville described the American attitude toward

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[30]367 U.S. 643 (1961).

[31]*Betts v. Brady,* 316 U.S. 455 (1942); *Gideon v. Wainright* 372 U.S. 355 (1963).

[32]378 U.S. 1 (1964).

[33]See *Pointer v. Texas,* 380 U.S. 400 (1965) (right to confront opposing witnesses); *Klopfer v. North Carolina,* 386 U.S. 213 (1967) (right to a speedy trial); and *Washington v. Texas,* 388 U.S. 14 (1967) (right to compulsory process for obtaining witnesses).

[34]Harry Kalven, Jr., and Hans Zeisel, *The American Jury* (Boston: Little, Brown, 1966), p. 7.

[35]*Federalist Papers,* p. 499.