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Justice Black, the Fourteenth Amendment, and Incorporation

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In his dissent in Adamson v. California, Justice Hugo Lafayette Black first extensively developed his thesis that the fourteenth amendment was intended by its framers to apply the provisions of the Bill of Rights to the states. Justice Black considered the Adamson dissent his most significant opinion, even after his last term on the Supreme Court. Certainly the concept of "total incorporation," which he advanced both in Adamson and in later cases, was among his most controversial constitutional stances. Scholarly critics vehemently condemned his position as contrary to both the fourteenth amendment's history and language, as well as the requirements of federalism, and his thesis was a frequent target of identical charges raised by his principal jurisprudential antagonists, Justices Frankfurter and Harlan. Indeed, even during their last days together at Bethesda Naval Hospital, Justice Harlan ap-

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1. 332 U.S. 46 (1947).
parently attempted to continue the debate in an effort to bolster the
spirits of his revered colleague.³

This article critically examines Justice Black's position on the
incorporation question—its development, nuances, and the views of
its critics. The Justice's incorporation stance and his approach gen-
erally to fourteenth amendment construction reflect his conception
of the judicial function more clearly, perhaps, than his approach to
any other constitutional question. Hopefully, therefore, this study
will provide further insight not only into Justice Black's position
regarding the nature of the fourteenth amendment, but also into the
entire jurisprudence of this unique American jurist.

II. DEVELOPMENT OF A POSITION

During the almost 10 years in which he served on the Supreme
Court prior to the appearance of his Adamson dissent, Justice Black
devoted much of his time and energy to the task of formulating a
position regarding the relationship of the Bill of Rights to the four-
teenth amendment. The conception of law and the judicial function
which guided his search, however, had begun to take shape long
before his appointment to the Court. In law school at the University
of Alabama, he had been taught "that legislators not judges should
make the laws,"⁴ and he early developed an abhorrence of vague
legal standards which left judges free to stamp their personal pre-
dilections on the written law. He early developed, also, a penchant
for clarity, precision, and brevity of legal language. Later in life,
Black liked to recall that as a captain in World War I, he had been
selected to replace his commanding officer's adjutant because his
reports to his commander had been clear and succinct, while those
of his predecessor in the adjutant's position "rambled on and on and
simply had no end."⁵

While serving in the United States Senate from Alabama, Jus-
tice Black's interest in the establishment of clear legal standards
which would limit the scope of judicial discretion intensified as he

³. H. Black, Jr., My Father 259 (1975); letter to author from Mrs. Hugo L. Black, July
6, 1975.
⁵. Interview with Hugo L. Black, in Washington, D.C., Aug. 31, 1970. For discussions of
Justice Black's emphasis on the need for clear, precise legal standards, see, e.g., Yarbrough,
Mr. Justice Black and Legal Positivism, 57 Va. L. Rev. 375, 399-405 (1971); Howard, Mr.
Justice Black: The Negro Protest Movement and the Rule of Law, 52 Va. L. Rev. 1030, 1049-
52 (1967).
watched a majority on the Supreme Court employ substantive due process and other constitutional tools to invalidate measures designed to cope with a depressed economy. Senator Black was a principal supporter of President Roosevelt's plan to pack the federal judiciary with judges receptive to New Deal programs. In that role, he voiced support for the notion that a President is entitled to appoint judges whose decisions would reflect currently prevailing economic and social attitudes. On the Senate floor, he said of the due process guarantee: "That clause is wholly incapable of definition. No one ever has marked its boundaries. It is as elastic as rubber." He emphasized, however, that he intended no "reflection" on Presidents "who appoint Supreme Court Judges who, in interpreting this elastic due-process clause, which means one thing to one citizen and another thing to another citizen, have the philosophy which is the then prevailing sentiment of the country." He further contended that there could be "no charge [raised] against the integrity of any prospective judge on the ground that it is anticipated that with reference to economic predilections after he goes on the bench he will still be the same man that he was before he went there." Black assumed, in fact, that "[m]ost men would be unable to change their natural bent of mind" on becoming judges.

One might conclude from such statements that Senator Black endorsed the notion that a judge should let his own socio-economic views—or at least those reflected in popular opinion—influence his judicial decisions. However, it must be remembered that his remarks were made in the context of his role as an advocate defending an effort to alter the course of federal court decisions through a modification of judicial personnel. It should be remembered, too, that Senator Black never said that he personally approved of judicial decision-making bottomed on the judge's personal philosophy; he said only that the integrity of judges following such an approach should not be challenged. At other points during the court-packing controversy, he voiced strong opposition to judicial legislation and to constitutional amendment via judicial interpretation. In language foreshadowing that in numerous opinions he was to register

6. Interview with Hugo L. Black, supra note 5.
7. 81 CONG. REC. 1294 (1937).
8. Id.
9. Id. at 2828.
10. Id.
throughout his Supreme Court career, he charged in a radio address to the nation on February 23, 1937:

Most of the framers believed in popular government by the people themselves. Like Jefferson, they were not willing to trust lifetime judges with omnipotent powers over governmental polices.

This prevailing dominant five-judge economic and social philosophy is becoming a part of our Constitution—not by amendments approved by our people but by the decisions of lifetime judges. With complete confidence in the integrity of the purposes of those dominant judges who are now following and expanding the economic philosophy of some of their predecessors in the Court, I believe with Justice Holmes, and those other great Justices whose voices have been raised in protest, that their economic-social-constitutional philosophy is contrary to the letter and spirit of our Constitution . . . .

. . . A majority of our judges should not amend our Constitution according to their economic predilections every time they decide a case. By such action they block the orderly and necessary progress of the people and jeopardize our most sacred rights and liberties. Our democracy can work out its own problems within our Constitution if the rights of human beings as human beings are given first importance and if our Constitution is not so misinterpreted and altered as to shackle the democratic processes themselves. . . .

. . . Many of the mistakes of the past have not been because of our Constitution, but because of the alterations and amendments of that great charter by our judges. When our great charter is changed, the people should do it—not the courts. 11

Shortly after his appointment to the Supreme Court, Justice Black launched a vigorous attack on the doctrine of substantive due process. While the dominant coalition developing on the Court in economic cases at the time of Black’s appointment appeared willing merely to reduce—albeit substantially—the bite of the substantive due process concept, 12 Black seemed committed to the doctrine’s complete dismantling. 13 On February 14, 1938, just 6 months after his appointment, the Court upheld, against a due process challenge, 11 Id. at 306-07.


13. See id. at 155, where Justice Black withheld concurrence from that portion of the majority opinion in which the Court held that commercial regulations were not to be pronounced violative of due process unless they lacked any “rational basis.”
a state scheme for fixing public utility rates.\footnote{14} In a concurring opinion, Justice Black wrote that in his view, the fourteenth amendment did not deprive a state of the power "to determine the reasonableness" of intrastate utility rates.\footnote{15} Citing Murray's Lessee v. Hoboken Land and Improvement Co.,\footnote{16} an 1856 Supreme Court decision construing the scope of the fifth amendment due process guarantee, he maintained that the concept had the same meaning as the provision of the English Magna Charta preventing governmental interference with the individual except according to the "law of the land."\footnote{17} Elaborating this position, he quoted with approval the following passage from Davidson v. City of New Orleans,\footnote{18} another early Supreme Court case involving the scope of the due process guarantee:

\begin{quote}
[I]t is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.\footnote{19}
\end{quote}

Early in his career on the Court, Justice Black also challenged the well-known position that the word "person" in the fourteenth amendment, in certain portions at least, includes corporations within its meaning\footnote{20}—a challenge he would continue to raise even after his first decade on the bench,\footnote{21} despite apparent inconsistencies between his views regarding this aspect of fourteenth amendment construction and his willingness to extend first amendment

\begin{footnotes}
15. Id. at 146.
17. 25 Edw. 1, c. 39 (1297).
18. 96 U.S. 97 (1877).
19. Id. at 105. In a dissent from the Court's decision in Polk Co. v. Glover, 305 U.S. 5, announced on November 7, 1938, Justice Black continued his broad attack on substantive due process, observing:

[M]ay the Court . . . hold that the law violates due process because the court is convinced that the legislature might have chosen a wiser, less expensive and less burdensome regulation? If a court . . . has this power, the final determination of the wisdom and choice of legislative policy has passed from legislatures—elected by and responsible to the people—to the courts. Id. at 18-19 (footnote omitted).

See also FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 599 (1942) (Black, J., concurring).
\end{footnotes}
protection to newspaper corporations in state cases via the fourteenth amendment. He declined, however, in his first opportunity as a Justice, to challenge the prevailing interpretation on the Court regarding the relationship of the fourteenth amendment to the Bill of Rights. That opportunity came with the Court's decision in Palko v. Connecticut, announced less than 4 months after Justice Black's appointment.

Speaking for the Palko Court, Justice Cardozo rejected the claim that all the guarantees of the Bill of Rights were, by their term, included within the meaning of the fourteenth amendment. In defending this position, Justice Cardozo appeared to endorse the view advanced in earlier cases—most notably Twining v. New Jersey (1908)—that the fourteenth amendment due process clause did not incorporate the Bill of Rights as such, but simply assured fundamentally fair state proceedings and prohibited unreasonable infringement of fundamental rights. Justice Cardozo conceded that certain Bill of Rights safeguards might be among the fundamental personal rights protected by the fourteenth amendment, but concurred with the assertion of the Twining Court that "[i]f this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."

Despite the obvious significant differences between Justice Cardozo's opinion in Palko and the concept of total incorporation which Justice Black was later to advance, Justice Black joined the decision and opinion of the Court—or, at least, did not choose to dissent. His law clerk at the time the Palko decision was announced has written that Justice Black joined Justice Cardozo's opinion "with some difficulty" and "later said he had been persuaded to do so largely out of regard and admiration for the [opinion's] author." John P. Frank, another of Justice Black's law clerks and a perceptive student of his career, attributed Justice Black's Palko position to "plain inexperience or . . . insufficient opportunity in earlier life to study the subject matter" of the case. Shortly before

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23. 211 U.S. 78 (1908).
24. 302 U.S. at 326 n.4.
25. 211 U.S. at 99.
27. Frank, The New Court and the New Deal, in Hugo Black and the Supreme Court:
his death, Justice Black, too, explained that it "takes time to get a legal opinion formulated" and that he had not completely developed his views regarding the fourteenth amendment at the time Palko was decided.\(^2\)

There is language in Justice Cardozo's Palko opinion suggesting that certain provisions of the Bill of Rights, by their terms, are within the meaning of the fourteenth amendment, and this factor may also have helped to influence Justice Black's decision to join the majority opinion. In rejecting the claim that the fourteenth amendment incorporates the terms of the Bill of Rights, for example, Justice Cardozo responded: "There is no such general rule."\(^2\)

In later years, Justice Black asserted that "[i]mplicit in this statement, and the cases decided in the interim between Twining and Palko and since, is the understanding that some of the eight amendments do apply by their very terms"\(^3\) to the states through the fourteenth amendment. The Court's opinions in Gitlow v. New York\(^3\) and other pre-Palko cases\(^2\) declaring the rights of the first amendment to be implicit in the meaning of the word "liberty" in the fourteenth amendment due process clause lend some degree of support to Justice Black's contention. None of the pre-Palko cases specifically held that the freedoms of the first amendment were identical in nature to analogous freedoms implicit in the fourteenth amendment. The pre-Palko Court's stance appeared to be, as Justice Holmes suggested in his Gitlow dissent, that the free speech principle guaranteed in the fourteenth amendment "perhaps . . . may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language [of the first amendment] that governs or ought to govern the laws of the United States."\(^3\)

In fairness to Justice Black, however, at least some of the pre-Palko cases\(^3\) involving application of the substantive due process-cum-first amendment absorption approach arguably apply

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28. Interview with Hugo L. Black, supra note 2.
29. 302 U.S. at 323.
33. 268 U.S. at 672.
more stringent standards than those implicit in the substantive due process doctrine standing alone.

While Justice Black had not yet embraced the incorporation thesis when *Palko* was decided, he soon began to move in the direction of accepting the construction of the fourteenth amendment which he was later to elaborate in *Adamson*. Perhaps the first public indication of his movement toward acceptance of incorporation was his stance in *Hague v. CIO*,35 decided in early June of 1939. In *Hague*, Justice Black concurred in an opinion of Justice Roberts which briefly summarized the history of the fourteenth amendment's adoption and concluded that the first amendment freedoms of assembly and expression were among the rights of United States citizenship inherent in the fourteenth amendment privileges and immunities clause—a guarantee at least judicially mitigated in the *Slaughterhouse Cases*.36 Justice Black's concurrence in Justice Roberts' opinion suggests that he too had begun an examination of the history surrounding the fourteenth amendment's adoption. His stance in *Hague* was also compatible with his view that the due process guarantee—the provision through which first amendment rights had been drawn within the meaning of the fourteenth amendment in earlier cases—was essentially a requirement that government proceed according to pre-existing law, and not a safeguard of free expression or other substantive rights. Finally, use of the privileges and immunities clause as the vehicle of incorporation would effectively answer the claim that since an identical clause formed a part of the provisions to be incorporated, the framers of the fourteenth amendment could not have intended to apply the Bill of Rights to the states through the amendment's due process clause.

A letter which Justice Black received from Justice Frankfurter in 193937 provides interesting early evidence of Black's developing position on the incorporation question. Justice Frankfurter, a vigorous opponent of incorporation throughout his judicial career and after his retirement from the Court, wrote:

> Perhaps you will let me say quite simply and without any ulterior thought what I mean to say, and all I mean to say, regarding your position on the "Fourteenth Amendment" as an entirety.

35. 307 U.S. 496 (1939).
36. 83 U.S. (16 Wall.) 36 (1873).
37. The letter is on file in the Felix Frankfurter Papers, Library of Congress.
(1) I can understand that the Bill of Rights—to wit Amendments 1-9 inclusive—applies to state action and not merely U.S. action, and that Barron v. Baltimore was wrong. I think it was rightly decided.

(2) What I am unable to appreciate is what are the criteria of selection as to the Amendments—which applies and which does not apply.38

Justice Frankfurter's remark that he was responding to Justice Black's views on the fourteenth amendment "as an entirety" suggests that, even by this time, Justice Black was developing the position, announced in his Adamson dissent, that the fourteenth amendment's first section as a whole, rather than a single clause, incorporated the Bill of Rights. The letter may also be construed as indicating that, at this point, Justice Black had not decided whether all or merely some of the Bill of Rights safeguards were applicable to the states through the fourteenth amendment. It might be noted, however, that Justice Frankfurter continued to query Justice Black as to which of the amendments in the Bill of Rights were incorporated into the meaning of the fourteenth amendment even after Justice Black clearly had opted for total incorporation.39 Moreover, the letter plainly indicates that Justice Black was already contending for total incorporation in his debates on the issue with Justice Frankfurter at the time it was written.

It has been suggested40 that Justice Frankfurter's letter was prompted by the Court's decision41 to review coerced-confession claims raised against state murder convictions challenged in Chambers v. Florida.42 The Court later reversed the Chambers convictions on due process grounds, and Justice Black filed the Court's opinion. Certain language in the opinion seems compatible with the view of Twining and other earlier cases that the due process guarantee authorizes the courts to assure "fundamentally fair" state criminal proceedings. Justice Black wrote, for example, that the due process clause prohibited punishment of persons in criminal cases "until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyranni-

38. Id.
39. See letter from Felix Frankfurter to Hugo L. Black, November 13, 1943, on file in id.
42. 309 U.S. 227 (1940).
cal power”;

Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.

A close reading of the opinion reveals, however, that the construction of due process set forth there is consistent with the essentially “fixed” conception of the fourteenth amendment implicit in the “law of the land” interpretation of the due process guarantee which Justice Black had already embraced, and the concept of total incorporation which he was to develop in Adamson. In Chambers, Justice Black equated due process with the “law of the land” concept; and in describing that portion of the “law of the land” designed to prohibit arbitrary governmental action in the United States, he cited specific safeguards written into the 1787 Constitution and the Bill of Rights. At no point in the opinion did he cite “fundamental fairness” language in Twining or other earlier cases involving a construction of the due process guarantee. Moreover, in Chambers he spoke—for the first time in an opinion—of the “current of opinion . . . that the Fourteenth Amendment was intended to make secure against State invasion all the rights, privileges and immunities protected from Federal violation by the Bill of Rights (Amendments I to VIII)”;

and in citing earlier opinions in support of this position, he noted not only dissents of the first Justice Harlan, an early advocate of total incorporation, but also the opinion of Justice Roberts which he had joined in the Hague case. It should be noted, finally, that the type of governmental action at issue in Chambers was

43. Id. at 236-37.
44. Id. at 241.
45. Id. at 237 n.10.
46. Id. at 235-36 n.8.
47. Id.
within the reach of the fifth amendment’s self-incrimination provisions, and thus, for supporters of incorporation, within the scope also of fourteenth amendment restrictions on state criminal proceedings. For these reasons, acceptance of a flexible, “fair trial” definition of due process would have been unnecessary to the Court’s decision in Chambers.

In his opinion for the Court in Bridges v. California and Times-Mirror Co. v. Superior Court of California,48 two highly significant 1941 cases reversing state contempt-by-publication convictions, Justice Black avoided an in depth examination of the incorporation issue. He did appear to recognize the first amendment as the basis for the claims raised there, however, since he merely cited in a footnote49 the holdings of earlier cases that the first amendment was secure against state abridgment by the fourteenth. Furthermore, the tenor of the opinion was clearly to the effect, as Justice Black later was to write, that “the Fourteenth Amendment literally and emphatically applied the First Amendment to the States in its very terms.”50 At one point in the opinion, for example, Justice Black noted that not until Gitlow had the Court “recognize[d] in the Fourteenth Amendment the application to the states of the same standards of freedom of expression as, under the First Amendment, are applicable to the federal government.”51

Justice Black’s treatment of the first-fourteenth amendment relationship in the opinion prompted further pointed questions from Justice Frankfurter regarding the nature of the incorporation approach. In a dissent, Frankfurter wrote:

We are not even vouchsafed reference to the specific provision of the Constitution which renders states powerless to insist upon trial by courts rather than trial by newspapers. . . . To say that the protection of freedom of speech of the First Amendment is absorbed by the Fourteenth does not say enough. Which one of the various limitations upon state power introduced by the Fourteenth Amendment absorbs the First? Some provisions of the Fourteenth Amendment apply only to citizens and one of the petitioners here is an alien; some of its provisions apply only to natural persons, and another petitioner here is a corpora-

49. Id. at 263 n.6.
51. 314 U.S. at 268.
tion. . . . Only the Due Process Clause assures constitutional protection of Civil liberties to aliens and corporations. Corporations cannot claim for themselves the "liberty" which the Due Process Clause guarantees. That clause protects only their property. . . . The majority opinion is strangely silent in failing to avow the specific constitutional provision upon which its decision rests.52

When the Court considered *Betts v. Brady*53 during the term following the *Bridges-Times-Mirror* decision, the developing debate between Justices Black and Frankfurter continued. Speaking for the *Betts* majority, Justice Roberts rejected the claim that the fourteenth amendment incorporated the terms of the sixth amendment right to counsel and held instead that counsel must be provided in a state criminal case only where the special circumstances of the case dictated that appointment of counsel was necessary to guarantee a "fair trial." In a dissenting opinion, Justice Black argued that "the Fourteenth Amendment made the sixth applicable to the states,"54 but noted that, since his position on the issue had never been accepted by the Court, "[a] statement of the grounds supporting it is . . . unnecessary at this time."55 He further contended that the conviction should be reversed even under the "fair trial" formula, adding, however, that "the prevailing view of due process, as reflected in the opinion just announced . . . gives this Court such vast supervisory powers that I am not prepared to accept it without grave doubts . . . ."56

In conference discussion of the *Betts* case,57 Justice Black had vigorously questioned whether any layman could plan his defense, summon witnesses, and otherwise conduct his trial in the face of organized opposition. He also apparently characterized the fundamental fairness approach to defining due process as one which made judges lawmakers, but added that if he was to pass on what was fair and right, he would say that it made him vomit to think that men could go to prison for a long time after having been tried without the assistance of counsel. More significantly, he contended that a

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52. *Id.* at 280-81.
53. 316 U.S. 455 (1942).
54. *Id.* at 474.
55. *Id.* at 475.
56. *Id.*
57. The discussion which follows is based on the *Betts* conference notes of Justice Murphy, on file in the Frank Murphy Papers, Michigan Historical Collection, University of Michigan.
defendant in a state criminal case was entitled to counsel by virtue of the fourteenth amendment’s history. The amendment, he asserted, was intended to make the Bill of Rights applicable to the states.

Justice Frankfurter challenged Justice Black’s conference stance in Betts. He described due process as a flexible, evolving concept and rejected the incorporation thesis. Acceptance of the incorporation doctrine, he maintained, would uproot state legal structures. Chief Justice Stone appeared, at least partially, to align himself with Justice Frankfurter during the Betts conference. Although erroneously attributing the Palko opinion to Justice Brandeis rather than Justice Cardozo, Stone spoke of the wisdom of the Palko approach to defining due process. Somewhat enigmatically, Justice Jackson observed that he had no feeling for the sanctity of the fourteenth amendment, a constitutional provision adopted during what he termed the “most scandalous and lousy period in” the nation’s history. For the time being, he concluded, he would not upset the state system challenged in Betts.

After the Court’s decision in Betts, Justice Black continued to argue in criminal procedure cases that provisions of the Bill of Rights were applicable to the states through the fourteenth amendment, but for a time he did not attempt an elaborate defense of his position. In Malinski v. New York, a 1945 state coerced-confession case, however, Justice Frankfurter filed a separate opinion reiterating the contentions he had raised during the Betts conference. He applauded “the wisdom of our predecessors in refusing to give a rigid scope to” the fourteenth amendment due process clause or accept, “after impressive consideration,” the view that the clause was intended as “a compendious expression of the original federal Bill of Rights (Amendments I to VIII).” Due process, he asserted, possessed a “potency different from and independent of the specific provisions contained in the Bill of Rights.” It was “not a stagnant formulation of what has been achieved in the past but a standard for judgment in the progressive evolution of the institu-

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58. For an excellent summary of state criminal procedure cases decided by the Court between Betts and Adamson—and Justice Black’s stance in them—see Green, The Bill of Rights, the Fourteenth Amendment and the Supreme Court, 46 MICH. L. REV. 869, 884-94 (1948).
59. 324 U.S. 401 (1945).
60. Id. at 414.
61. Id. at 414-15.
tions of a free society." As such, it incorporated within its scope the steadily evolving "notions of justice of English-speaking peoples," and "expressed a demand for civilized standards of law."

While Justice Black had never suggested that the due process clause alone was the vehicle through which the fourteenth amendment's framers had intended to apply the Bill of Rights to the states, his developing stance on the incorporation question was clearly the principal target of Justice Frankfurter's observations. Nevertheless, Justice Black did not choose to register an immediate response. Instead, he circulated a memorandum informing his colleagues that he would some day write an opinion answering what he considered to be the "natural law" theory implicit in Justice Frankfurter's conception of due process. During the 1946 term, the Adamson case provided the forum for such an opinion.

III. The Adamson Dissent

During the Court's 1946 term, Justice Black apparently first considered developing and defending his incorporation thesis in *Louisiana ex rel. Francis v. Resweber*, the rather bizarre case in which attorneys for convicted murderer Willie Francis had unsuccessfully sought to prevent further state attempts to electrocute their client after initial efforts had been aborted by a malfunctioning portable electric chair. In an opinion announcing the judgment of the Court, joined by Chief Justice Vinson and Justices Black and Jackson, Justice Reed proceeded "under the assumption, but without so deciding, that violation of the principles of the Fifth and Eighth Amendments, as to double jeopardy and cruel and unusual punishment, would be violative of the due process clause of the Fourteenth Amendment," but held that Willie Francis' electrocution did not breach those guarantees. Justice Frankfurter filed a concurring opinion, and Justice Burton registered a dissent joined by Justices Douglas, Murphy, and Rutledge. Originally, Justices Rutledge and Murphy had also drafted dissents, and Justice Jackson had circulated a draft concurrence.

62. Id. at 414.
63. Id. at 416-17.
64. Id. at 414.
67. Id. at 462.
68. The drafts are collected in the Wiley B. Rutledge Papers, now stored in the Yale Law
Justice Black, too, had circulated a typewritten draft concurring opinion which briefly treated the basic themes which he was to elaborate later in the term in his Adamson dissent. While agreeing that the petitioner should be denied relief, he challenged the interpretation of due process set forth in the draft opinion which Justice Reed was then circulating. He maintained that there was “ample support” for holding that the fifth and eighth amendment double jeopardy and cruel and unusual punishment provisions were included within the fourteenth amendment’s meaning. He based his conclusion, he wrote, not on any “mystic natural law” interpretation of due process which authorized judges “to strike down every state law [and procedure] which we think is ‘indecent,’ ‘contrary to civilized standards,’ or offensive to our notions of ‘fundamental justice,’” but on the fourteenth amendment’s history. That history, he wrote, “showe[d] pretty conclusively . . . that the Amendment was clearly intended to prohibit states from subjecting people to cruel and unusual punishments or double jeopardy.”

After Justice Reed modified certain language in his opinion and included in its text the “assumption” that the fourteenth amendment absorbed the relevant principles of the fifth and eighth amendments, Justice Black decided to join him and dropped his plans for a concurrence. The language of the Reed opinion, however, cost Justice Reed the support of Justice Frankfurter. In a memorandum for the conference, Justice Frankfurter wrote:

In order that there be an opinion of the Court, I had hoped to join brother Reed’s opinion in addition to expressing my views. The reason I cannot do so, inter alia, is that I do not think we should decide the case even on the assumption that the Fifth Amendment as to double jeopardy is the measure of due process in the Fourteenth Amendment . . . .

Tactically, it may have been wiser for Justice Black to have employed Francis rather than Adamson as the forum for an elaborate defense of his incorporation thesis. In Francis, Justice Black would have defended his incorporation position in the context of a case in which he found no state violation of the fourteenth amendment, and thus he could have emphasized more easily the limits to

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69. Justice Black’s draft concurrence is also on file in id.
70. Id.
71. The memorandum is on file in id. See also his concurrence in the case, 329 U.S. at 466.
the incorporation doctrine’s impact on state criminal justice systems. An historical defense of incorporation could also have been more easily developed in a case involving the cruel and unusual punishment guarantee, since during debate on the proposed fourteenth amendment in the United States House of Representatives, it was the only Bill of Rights safeguard specifically mentioned by the amendment’s principal author as within the scope of its first section. Justice Black probably chose *Adamson* as a vehicle for his incorporation defense, however, because it involved state procedures quite similar to those unsuccessfully challenged in *Twining v. New Jersey*, the 1908 case which had emphatically rejected the incorporation thesis and reaffirmed the “fundamental fairness” conception of due process.

The *Adamson* case involved a challenge to California regulations permitting a judge or prosecutor to comment on the failure of an accused to take the witness stand in his own defense and attempt to explain or deny adverse evidence. Speaking for the *Adamson* majority, Justice Reed assumed that California’s comment rule fell within the ambit of the fifth amendment’s guarantee against compulsory self-incrimination, but rejected the assertion that the fifth amendment principle was within the meaning of either the privileges and immunities or due process provisions of the fourteenth amendment. He also concluded for the Court that there had been no denial of the “fair trial” required of state proceedings under the due process guarantee as an independent constitutional concept. Justice Frankfurter filed a concurring opinion which condemned the theories of total or selective incorporation of the specific terms of Bill of Rights safeguards into the fourteenth amendment’s meaning, applauded what he regarded as the wisdom of the *Twining* anti-incorporation, “fundamental fairness” approach to defining due process, and warned that the incorporation doctrine posed a threat to the principles of federalism. Justices Black, Douglas, Murphy and Rutledge dissented.

In conference discussion of *Adamson*, Justice Black had agreed that the fifth amendment’s guarantee against compulsory self-incrimination applied to the states, but he initially had abstained from voting because he was not certain whether California’s comment rule violated the fifth amendment principle. Since Justice

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72. See text following note 90 infra.
73. 211 U.S. 78 (1908).
74. Justice Rutledge’s conference notes on Adamson are reprinted in Harper, supra note 65 at 214.
Reed's majority opinion merely assumed that the comment rule infringed the self-incrimination guarantee and then held that the guarantee was not binding on the states, Justice Black did not reach that question in his *Adamson* dissent. Instead, his dissent was devoted primarily to an historical defense of total incorporation and a critique of the prevailing interpretation of due process on the Court.

Justice Black's dissent developed four basic themes. First, he contended that the Court had never adequately "appraise[d] the relevant historical evidence of the intended scope of the first section of the [Fourteenth] Amendment" and observed:

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.\(^{16}\)

Second, he condemned as a "natural law" formula and an "incongruous excrescence on our Constitution"\(^{77}\) the prevailing interpretation of due process on the Court—an interpretation, he contended, which had been rejected by the Court "at least for the first two decades after the Fourteenth Amendment was adopted."\(^{78}\) Perhaps in a vain attempt to secure the support of Justices Murphy and Rutledge for his opinion, Justice Black avoided explicit mention in his dissent of his relatively fixed, "law of the land" conception of due process. Of the "fundamental fairness" approach, however, he wrote:

[U]nder the *Twining* formula, which includes nonregard for the first eight amendments, what are "fundamental rights" and in accord with "canons of decency," as the Court said in *Twining*, and today reaffirms, is to be independently "ascertained from time to time by judicial action . . . ." Thus the power of legislatures became what this Court would declare it to be at a particular time independently of the specific guarantees of the Bill of Rights . . . .\(^{79}\)

He conceded that exercise of the power of judicial review did involve

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75. 332 U.S. 46, 74 (1947) (Black, J. dissenting).
76. *Id.* at 71-72 (footnote omitted).
77. *Id.* at 75.
78. *Id.*
79. *Id.* at 82-83 (citations omitted).
interpretation, "and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision, thereby affecting policy." He added, however:

But to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of "natural law" deemed to be above and undefined by the Constitution is another. "In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other, they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people."

Third, he challenged certain aspects of the majority's—and particularly Justice Frankfurter's—reading of *Palko v. Connecticut* and other earlier cases construing the relationship of the Bill of Rights to the fourteenth amendment. Through the fourteenth amendment, he contended, earlier cases had "literally and emphatically applied the First Amendment to the States in its very terms" and *Palko* and other cases had included the more general implication that "some of the eight amendments do apply by their very terms" to the states via the fourteenth amendment. Moreover, he asserted, "[n]othing in the *Palko* opinion requires that when the Court decides that a Bill of Rights' provision is to be applied to the States, it is to be applied piecemeal. Nothing in the *Palko* opinion recommends that the Court apply part of an amendment's established meaning and discard that part which does not suit the current style of fundamentals." Since earlier cases had prevented the introduction of coerced confessions in state cases "because the principles of the Fifth Amendment are made applicable to the States through the Fourteenth by one formula or another," and since the *Adamson* majority had conceded that due

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80. *Id.* at 90-91.
81. *Id.* at 91-92 (citations omitted). The quoted passage is from Justice Black's dissent in *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 601 n.4 (1942).
82. 302 U.S. 319 (1937).
83. 332 U.S. at 85 (citations omitted).
84. *Id.*
85. *Id.* at 86.
86. *Id.* at 87.
process forbids certain forms of coercion, Black found it difficult to understand why the fifth amendment guarantee against compulsory self-incrimination should not be applied to the states in its full force. Construing *Palko* to endorse a full and literal application of certain Bill of Rights safeguards in state cases, he concluded:

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. 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. But rather than accept either of these choices, I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights. 87

Finally, Justice Black rejected the contention that acceptance of total incorporation would “unwisely” enlarge the scope of national judicial supervision over state laws and proceedings. Application of the Bill of Rights, he wrote, had not “harmfully burdened” the national government. “Who,” he asked, “would advocate its repeal?” 88 He conceded that the “natural-law-due-process formula” was presently being given a limited application, but he added:

[T]his 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. 89

In a lengthy appendix which he attached to his dissent, Justice Black presented historical evidence purporting to support the incorporation thesis. 90 His most significant evidence may be summarized as follows: (1) During debate on the floor of the House of Representatives, Representative John Bingham of Ohio—a key member of the Joint Committee on Reconstruction which produced the fourteenth amendment and the congressman probably most responsible for the language of the amendment’s first section—said that an early version of the amendment would empower Congress to protect the

87. *Id.* at 89.
88. *Id.* at 90.
89. *Id.*
90. *Id.* at 92-123.
“immortal bill of rights” from state infringement. (2) When opponents of an early version of the amendment charged that the amendment was unnecessary since the Bill of Rights already applied to the states, Representative Bingham—who apparently had not been aware, initially, of the Supreme Court decision in *Barron v. Baltimore* limiting application of the Bill of Rights to the national government, and had thought that the states were morally bound by the Bill of Rights but that no authority existed to assure their allegiance—replied that the amendment was needed to empower Congress to enforce the Bill of Rights against the states. (3) After an early version of the amendment had been rejected, a civil rights bill was debated in the House; and Representative Bingham opposed enactment of the bill insofar as it protected the Bill of Rights from state invasion. An amendment to the Constitution would be necessary, he indicated, to authorize such legislation. (4) When Representative Thaddeus Stevens of Pennsylvania, another member of the Joint Committee on Reconstruction, introduced in the House a version of the amendment's first section identical to the final version except that it lacked a citizenship clause, he said that the Constitution limited only the national government and that the privileges and immunities clause of the proposed amendment—originally submitted to the Joint Committee by Representative Bingham—would remedy that defect. Presumably, the constitutional privileges to which he had reference were those of the Bill of Rights, which were not then applicable to the states. (5) When Senator Jacob Howard of Michigan, yet another key member of the Joint Committee, introduced the same proposal in his chamber, he said that its privileges and immunities clause included within its meaning the guarantees of the first eight amendments. (6) When Representative Bingham closed debate on the measure in the House prior to Senate consideration, he said that the first section of the amendment included protection against cruel and unusual punishments. (7) In House debate in 1871 on a bill to enforce the fourteenth amendment, Representative Bingham summarized his role in the 1866 debates on the amendment, asserted that the privileges and immunities of national citizenship which the amendment protected against state infringement were primarily to be found in the first eight amendments, and then listed the specific guarantees of the Bill of Rights.

91. 32 U.S. (7 Pet.) 243 (1883).
Of the *Adamson* dissenters, only Justice Douglas joined Justice Black’s opinion. Justice Murphy, joined by Justice Rutledge, filed a brief dissent in which he agreed that the specific provisions of the Bill of Rights were fully binding on the states, but reserved the question whether a state proceeding might fall “so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.” It is uncertain what efforts Justice Black may have undertaken to secure the concurrence of Justices Murphy and Rutledge in his dissent. Justice Rutledge’s papers make it clear, however, that his law clerk conducted an intensive campaign to persuade Rutledge not to join the Black opinion—a campaign prompted primarily by the clerk’s opposition to Justice Black’s limited conception of due process.

Justice Rutledge’s clerk originally had recommended dismissal of the *Adamson* appeal on the ground that the constitutional claims raised in the case were insubstantial. After Justice Rutledge had dissented from the conference decision to affirm the conviction at issue in the case, his clerk prepared a memorandum, dated March 27, 1947, in which he argued that precedent, “wisdom and judicial statesmanship” were against adoption of Justice Black’s total incorporation thesis. “The system of criminal justice established by the Federal Constitution,” he wrote,

is not the wisest one possible. States, to some extent, though of course not as much as in the field of property rights, should be allowed to experiment, in order that wiser and fairer systems of criminal justice may be devised . . . . It would be intolerable, at the present time, to say that every provision of the Bill of Rights applied to the states.

Justice Rutledge’s clerk also opposed the view that “although all of the provisions of the Bill of Rights are not absorbed into the 14th amendment, the privilege against self-incrimination is so absorbed.” Citing *Twining* and *Palko*, he argued that precedent prevented such a conclusion. He concluded the memorandum by asserting that “in the end non-rigidity in these matters may be the best protection for civil liberties,” adding: “[L]ike bones, when the

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92. 332 U.S. at 124.
93. The discussion of the clerk’s efforts which follows is based on materials in the Wiley B. Rutledge Papers, supra note 68.
94. Id.
As noted previously, Justice Black omitted from his *Adamson* dissent any discussion of his restrictive "law of the land" interpretation of due process as an independent constitutional concept. While *Adamson* was being considered, Justice Black had lunch with the law clerks, and they "subjected him to a cross-examination on his constitutional views." After the session Justice Rutledge's clerk wrote another memorandum to Rutledge in which he expressed surprise regarding Justice Black's due process views.

He [Black] stated, of course, that the bill of rights applies to the states, but he went further than that. He said that independent of the other provisions of the bill of rights the due process clause in the 5th Amendment, and I assume also in the 14th Amendment, had no meaning, except that of emphasis. In short, Black would never hold that a trial or other proceeding was bad solely for want of due process. He would have to find some violation of some other specific clause in the Constitution.\(^7\)

Citing certain types of procedural unfairness which Justice Black's conception of due process might not forbid, he said: "If this is the result of his views I want no part of them. And what is more important, I don't think that you do either."\(^6\) The Constitution, he wrote, "should be just what Black says it should not be, a sort of thermometer—always rising—for the civilized standards of the times."\(^9\) After noting that he also found Justice Black's treatment of the history surrounding the adoption of the fourteenth amendment unconvincing, he concluded:

What Black suggests is both too little and too late. I feel very strongly that you should not associate yourself with it. If my view be damned as "natural law", I do not care. It has proved a workable philosophy . . . . We are advancing gradually. Black's views, far from being an advance, I consider a retrogression in many respects, for he has destroyed due process which you described in Yamashita as "that great absolute."\(^9\)

Originally, Justice Rutledge's clerk had recommended that the Justice join Justice Frankfurter's concurrence, at least if Frank-

\(^{7}\) Id.
\(^{6}\) The memorandum was dated May 28, 1947.
\(^{9}\) Id.
further would agree to remove certain objectionable language (e.g., reference to the Bill of Rights as "parochial") and if Frankfurter's opinion were altered to state that "basic liberties essential to democracy—freedom of speech and press, for example—are subsumed in their full force in the 14th Amendment."[100] Although the clerk continued to oppose the total incorporation concept, he also suggested to Justice Murphy's clerk, on learning that Murphy was writing a separate dissent, that if Murphy agreed with the total incorporation thesis, he "should reserve the question whether 'the due process clause is limited by the Bill of Rights,' for Murphy certainly believes, as witness his opinion in Yamashita . . . that due process is an absolute, independent of other provisions of the Bill of Rights."[101] Justice Murphy did develop his dissent along those lines, of course, and Justice Rutledge concurred—over his clerk's continued opposition to the incorporation doctrine.

Shortly after the Court's disposition of *Adamson* was announced, Justice Murphy wrote Black asking him what changes he wanted Murphy to make in his dissent; and Justice Black's handwritten response furnishes further insight into his views regarding the nature of due process as an independent constitutional requirement at the time *Adamson* was decided. Justice Murphy's draft had quoted Justice Black's statement in *Chambers v. Florida* that due process requires conformity "to fundamental standards of procedure."[102] Quoted out of context, Justice Black wrote, the phrase seemed "to be a near approach to the 'fundamental justice'" language of *Twining* and *Hurtado v. California*, and that appeared to be the "implication" of Murphy's dissent. In Black's view, the *Chambers* opinion did not support such an implication. (In the final version of his dissent, Justice Murphy retained the disputed phrase but omitted reference to *Chambers*). More significantly, Justice Black objected to the implication in the Murphy dissent that, in Justice Black's view, procedural due process could not "go beyond the specific prohibitions of the Bill of Rights." He wrote:

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100. *Id.*
101. This quote is from an undated memorandum from Justice Rutledge's clerk to Justice Rutledge.
103. 309 U.S. 227 (1940).
104. *Id.* at 238.
105. 110 U.S. 516 (1884).
I have not intended to say that in the Adamson opinion so far as procedural due process is concerned. In other words I have not attempted to tie procedural due process exclusively to the Bill of Rights. In fact there are other constitutional prohibitions relating to procedure which I think due process requires to be observed.\textsuperscript{104}

IV. **Refinements of a Position**

In the years following the Adamson decision, Justice Black clarified his position regarding the nature of due process as an independent constitutional concept.\textsuperscript{107} As in his first term on the Court, he continued to espouse the view that under the due process guarantee, government could proceed against the individual only according to the "law of the land."\textsuperscript{108} For him, the due process guarantee, standing alone, did not require observance of any particular set of procedural standards; nor, certainly, did it empower the courts to create rules of procedural "fairness." Instead, the concept gave "all Americans, whoever they are and wherever they happen to be, the right to be tried by independent and unprejudiced courts using established procedures and applying valid pre-existing laws,"\textsuperscript{109} including the safeguards of the 1787 Constitution and the Bill of Rights.

On occasion, Justice Black did write or join opinions which articulated due process standards without reference to specific statutes or constitutional provisions. A number of these standards, however, were merely restatements of sixth amendment guarantees, or were substantially related to such guarantees.\textsuperscript{110} Others seemed compatible with his "law of the land" interpretation of due process;

\textsuperscript{104} Black's reply is in the Frank Murphy Papers, supra note 57.

\textsuperscript{107} For an excellent summary of Justice Black's views regarding the nature of due process, see Haigh, *Defining Due Process of Law: The Case of Mr. Justice Hugo L. Black*, 17 S. Dak. L. Rev. 1 (1971).


he agreed, for example, that due process was violated by convictions based on vague statutes,\(^{111}\) a lack of evidence,\(^{112}\) perjured testimony,\(^{113}\) suppressed evidence,\(^{114}\) or false evidence.\(^{115}\) At one point, he joined Justice Frankfurter in a dissenting opinion which included the observation that proof of guilt beyond a reasonable doubt in criminal cases—a notion "basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'"\(^{116}\) In 1970, however, he dissented from the majority's conclusion that such a standard of criminal guilt was "among the 'essentials of due process and fair treatment,'"\(^{117}\) and condemned the "fundamental fairness" approach to due process on which the majority's decision was based. For a time after Adamson, he continued—as he had in his Chambers opinion—to refer, as the Court's spokesman, to due process as requiring convictions based only on "a charge fairly made and fairly tried" or on "a fair trial in a fair tribunal."\(^{118}\) It seems clear, however, that he meant by this phrase simply a trial in conformity with the Constitution and other elements of the "law of the land." Throughout the remainder of his career, moreover, he continued to reject—absolutely, and without regard to whether economic or noneconomic liberties were at stake—substantive due process and related doctrines which in his judgment clothed courts with general authority to rule on the wisdom of legislative policy.\(^{119}\)


\(^{115}\) See, e.g., Miller v. Pate, 386 U.S. 1 (1967).


\(^{118}\) See, e.g., In re Murchison, 349 U.S. 133, 136 (1955); In re Oliver, 333 U.S. 257, 278 (1948).


During the 1940's and 1950's, a shifting coalition on the Court under the leadership of Justice Frankfurter resisted incorporation, as such, of the procedural safeguards of the Bill of Rights into the meaning of the fourteenth amendment. In 1949, the Court, per Justice Frankfurter, did agree that the "security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society" and thus "enforceable against the States through the Due Process Clause" of the fourteenth amendment;\textsuperscript{120} but the Court refused to accept the contention that the amendment's due process guarantee was "shorthand for the first eight amendments of the Constitution and thereby incorporates them."\textsuperscript{121} With Justice Harlan's appointment to the Court in 1955, Justice Frankfurter secured a strong ally in his battles against incorporation. Initially, Justices Harlan and Frankfurter apparently differed somewhat over the nature of due process. When, for example, Justice Harlan circulated to Justice Frankfurter a draft of his opinion in \textit{NAACP v. Alabama},\textsuperscript{122} holding that a freedom of association lay within the penumbra of the first amendment and was binding on the states through the fourteenth amendment's due process guarantee, Justice Frankfurter caustically responded: "Why in heaven's name must we, whenever some discussion under the Due Process Clause is involved, get off speeches about the First Amendment?"\textsuperscript{123} Later, he wrote Justice Harlan: "Little did I dream in my early days when we were dealing with explicit curtailments of speech that loose rhetoric in the service of recently discovered doctrinaire views by members of the Court would be snowballed into a talismanic mouth of 'First Amendment' in dealing with state action . . . ."\textsuperscript{124} Justice Harlan's retort at the time was to say that he had "the most serious misgivings about your suggested approach, if I understand you correctly."\textsuperscript{125} In later years, however, Justice Harlan largely embraced Justice Frankfurter's position—albeit giv-

\begin{itemize}
\item \textsuperscript{120} Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).
\item \textsuperscript{121} Id. at 26. \textit{See also} Irvine v. California, 347 U.S. 128 (1954); Rochin v. California, 342 U.S. 165 (1952).
\item \textsuperscript{122} 357 U.S. 449 (1958).
\item \textsuperscript{123} Letter from Felix Frankfurter to John Marshall Harlan, April 23, 1958, on file in the Felix Frankfurter Papers, supra note 37.
\item \textsuperscript{124} Letter from Felix Frankfurter to John Marshall Harlan, April 24, 1958, on file in \textit{id}.
\item \textsuperscript{125} Letter from John Marshall Harlan to Felix Frankfurter, April 24, 1958, on file in \textit{id}.
\end{itemize}
ing that position a more elaborate and elegant exposition that his mentor had developed and perhaps ascribing to due process a somewhat more concrete meaning than Justice Frankfurter would have accepted.\(^{126}\)

Despite the anti-incorporationist efforts of Justices Frankfurter and Harlan, during the last decade of his career Justice Black had the pleasure of participating in the Court's piecemeal incorporation, by their terms, of most of the procedural guarantees of the Bill of Rights into the fourteenth amendment's meaning—\(^{127}\)—a process which accelerated and took clearer shape after Justice Frankfurter's retirement in 1962. With one exception, Justice Black tactfully refrained from elaborating his total-incorporation thesis in the incorporation cases of the 1960's. Instead, he applauded the majority's selective-incorporation approach and concluded that unlike the Frankfurter-Harlan interpretation of due process,

> [t]he selective incorporation process, if used properly, does limit


\(^{127}\) See Benton v. Maryland, 395 U.S. 784 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968); Washington v. Texas, 388 U.S. 14 (1967); Klopfer v. North Carolina, 386 U.S. 213 (1967); Pointer v. Texas, 380 U.S. 400 (1965); Mulloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Ker v. California, 374 U.S. 23 (1963); Robinson v. California, 370 U.S. 660 (1962); Mapp v. Ohio, 367 U.S. 643 (1961). The incorporation explosion of the 1960's was foreshadowed by an opinion which Justice Brennan, joined by Chief Justice Warren and Justices Black and Douglas, filed in Ohio ex rel. Eaton v. Price, 364 U.S. 263 (1960). Justice Stewart took no part in the consideration of the case, and the Court divided equally on the question whether to sustain the constitutionality of an ordinance permitting building inspectors to make warrantless inspections. In his opinion, Justice Brennan indicated that he and the Chief Justice had "neither accepted nor rejected" total incorporation. Id. at 275. He also asserted that the due process test articulated in the Palko case was not, in his judgment, "a license to the judiciary to administer a watered-down, subjective version" of the Bill of Rights in state cases. Id.

Despite language to the contrary in the 1960's cases, it now appears that the Court, as presently constituted, may ascribe a somewhat different meaning to certain of the Bill of Rights safeguards, as incorporated, than the meaning attached to those rights in the Bill of Rights itself. See, e.g., Apodaca v. Oregon, 406 U.S. 404 (1972). Shortly before his death, Justice Harlan cited as a major danger of the incorporation approach a tendency to relax Bill of Rights standards in federal cases in order to avoid unduly fettering the states through the incorporation process. Williams v. Florida, 399 U.S. 78, 117 (1970) (concurring). See also Duncan v. Louisiana, 391 U.S. 145, 182 n.21 (1968) (dissenting).

the Supreme Court in the Fourteenth Amendment field to specific Bill of Rights' protections only and keeps judges from roaming at will in their own notions of what policies outside the Bill of Rights are desirable and what are not. And, most importantly for me, the selective incorporation process has the virtue of having already worked to make most of the Bill of Rights' protections applicable to the States.\textsuperscript{128}

In fact, as the Court's spokesman in the landmark right-to-counsel case of \textit{Gideon v. Wainwright}\textsuperscript{129} which overruled \textit{Betts v. Brady},\textsuperscript{130} he even employed the semantics of selective incorporation—leaving to Justice Douglas the filing of a separate opinion in support of total incorporation.

The one exception to Justice Black's policy of silence during the incorporation explosion of the 1960's was his concurring opinion in \textit{Duncan v. Louisiana},\textsuperscript{131} the 1968 decision applying the sixth amendment right to trial by an impartial jury to the states. It is not clear why Justice Black chose to reiterate and defend his total incorporation thesis in \textit{Duncan}. Perhaps in that presidential election year, he believed that his retirement from the Court was imminent and a final statement of his position was in order; perhaps he was moved to draft an opinion by Justice Harlan's frequent and eloquent attacks on the varieties of incorporation. Whatever the reason for his speaking out on the question, in his \textit{Duncan} concurrence Justice Black reiterated his views about the relationship of the Bill of Rights to the fourteenth amendment; explained his "law of the land" interpretation of due process; condemned as a "natural-law" formula, once again, the Frankfurter-Harlan conception of due process which Justice Harlan had defended in a \textit{Duncan} dissent; and responded to those who had challenged his reading of the fourteenth amendment's history. He also answered Justice Harlan's charge—a charge originally raised, apparently, by Justice Frankfurter in \textit{Adamson}\textsuperscript{132}—that if, indeed, the framers of the fourteenth amendment had intended its first section to incorporate the Bill of Rights, they had employed "exceedingly peculiar" language to achieve such a purpose.\textsuperscript{133} Stressing his view that the fourteenth amendment's

\begin{thebibliography}{9}
\bibitem{128} Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Black, J., concurring).
\bibitem{129} 372 U.S. 335 (1963).
\bibitem{130} 316 U.S. 455 (1942).
\bibitem{131} 391 U.S. 145 (1968).
\bibitem{132} Adamson v. California, 332 U.S. 46, 63 (1947) (concurring).
\bibitem{133} Duncan v. Louisiana, 391 U.S. at 175 n.9.
\end{thebibliography}
first section, "as a whole," incorporated the Bill of Rights, he observed:

I can say only that the words "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" seem to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States. What more precious "privilege" of American citizenship could there be than that privilege to claim the protection of our great Bill of Rights? I suggest that any reading of "privileges or immunities of citizens of the United States" which excludes the Bill of Rights' safeguards renders the words of this section of the Fourteenth Amendment meaningless.

His conclusion: "if anything, it is 'exceedingly peculiar' to read the Fourteenth Amendment differently from the way I do." Justice Black's concurring opinion in *Duncan* suggests that, in his view, the fourteenth amendment's privileges and immunities clause was the vehicle through which the amendment's framers intended to apply the specific substantive and procedural safeguards of the Bill of Rights to the states, while the due process guarantee was to have the same meaning as the due process clause in the fifth amendment. Justice Black never made it entirely clear whether, in his judgment, the privileges and immunities clause possessed a meaning independent of the Bill of Rights; however, on several occasions, he did appear to subscribe to such a position. In 1941, in *Edwards v. California*, for example, he joined a concurring opinion in which Justice Douglas argued that the clause guaranteed a right of interstate travel; and shortly before his death he reiterated his acceptance of that view, adding somewhat enigmatically that his was not a "logically pure" constitutional philosophy but "only as [logically pure] as humanly possible." Moreover, some of the very excerpts from the congressional debates over the fourteenth amendment's adoption which he cited in his Adamson appendix—a portion of which he quoted from again in his Duncan concurrence—are clearly supportive of the notion that the clause was

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134. *Id.* at 166 n.1 (emphasis in original).
135. *Id.* at 166 (footnotes omitted).
136. *Id.* at 167.
137. 314 U.S. 160, 177.
138. Interview with Hugo L. Black, supra note 2.
139. 391 U.S. at 166-67.
indeed intended by its sponsors to guarantee other rights than those specified in the Bill of Rights.

Assuming that Justice Black did ascribe to the privileges and immunities clause a meaning independent of the Bill of Rights' specific guarantees, it is still uncertain what approach he would have followed in determining the meaning. Presumably, he would have bottomed his interpretation of the clause on historical records regarding the intent of its framers. Perhaps, also, he believed that the content of the privileges and immunities of national citizenship could be discovered through an inquiry into the nature of the union. During conference discussion of Edwards v. California, for example, he based his contention that the privileges and immunities clause incorporates a right to interstate travel on the assumption that "we are a nation and that people can travel from place to place." It is obvious, however, that such an approach smacks of the Frankfurter-Harlan formula for defining due process which Justice Black found so thoroughly distasteful; and that factor alone may explain his failure to have clarified his position regarding the nature of the privileges and immunities guarantee.

Apart from his views regarding its citizenship and equal protection provisions, then, Justice Black apparently attributed the fol-

140. From Justice Murphy's conference notes on Edwards, on file in the Frank Murphy Papers, supra note 57.


Perhaps Justice Black developed his views regarding the content of equal protection most fully in his dissenting opinion in Harper v. Virginia Board of Elections, 383 U.S. 663, 670 (1966). As with the due process clause, he believed that the equal protection guarantee should not be utilized as a "handy instrument to strike down state laws which the court feels are based on bad governmental policy," id. at 673, and while he wrote and joined opinions invoking a strict, "compelling interest" standard in certain cases involving equal protection claims, his stance in such cases can be reconciled with the lenient, "reasonable basis" standard which he generally favored applying in the equal protection field. See Yarbrough, supra note 141, at 481-82. Moreover, he at times seemed reluctant to invalidate discriminatory regulations even on a finding that they lacked a "rational" basis. When, for example, Justice Murphy circulated a draft of his opinion for the Court in Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949), a case in which the Court unanimously upheld a South Carolina statute prohibiting life insurance companies from operating undertaking businesses, and undertakers from serving as agents for life insurance companies, Justice Black said of certain language in the Murphy draft: I do not think that we can strike down a state statute because we are unable to say that the remedy has a "relation" to "real evils." At most, I suppose such
following content to the fourteenth amendment’s first section. First, he believed that the section’s provisions, taken as a whole, were intended by their framers to make the guarantees of the Bill of Rights fully binding on the states. Second, he believed that the amendment’s due process clause, like its fifth amendment counterpart, required government to proceed against the individual only according to the “law of the land.” This meant that governmental proceedings to deny a person life, liberty, or property must be non-discriminatory and must accord (a) with the requirements of pre-existing federal and state constitutional and statutory provisions and (b) with procedural standards tied to the historic conception of “law of the land,” including protections against convictions based on vague statutes, a lack of evidence, perjured testimony, or false evidence. Finally, while he apparently believed that the amendment’s privileges and immunities clause was the vehicle through which its framers intended to apply the specific substantive and procedural guarantees of the Bill of Rights to the states, he never said that the clause was limited in meaning to the Bill of Rights. Indeed, there is evidence supportive of the view that he believed, late as well as early in his judicial career, that the clause had a meaning independent of the Bill of Rights—a meaning presumably to be discovered, however, through an examination of historical intent, or perhaps through an inquiry into the nature of the union, and not through an appeal to abstract judicial notions of fundamental rights.

V. THE CRITICS

The language of constitutional provisions rarely is completely self-evident in meaning, and records of historical intent in the constitutional field are often fragmentary and obscure. As a conse-

142. For an examination of the problems which confront the judge seeking to determine historical intent in the constitutional field, see Anderson, The Intention of the Framers: A
quence, the judge whose interpretative approach focuses on the "literal" meaning of constitutional provisions and other indicia of historical intent seems inherently more vulnerable to systematic criticism than his brethren who accept—or enthusiastically embrace—constitutional ambiguity, and the inevitability of judicial legislation which such ambiguity spawns as the rule rather than the exception in constitutional adjudication. In his tendency to discover clear commands in the Constitution's language, Justice Black had no peer on the Supreme Court; nor did his constitutional interpretations as targets of criticism on and off the Court. While numerous scholarly writings support his thesis, the attacks on his views regarding the relationship of the fourteenth amendment to the Bill of Rights have been particularly intense.

Shortly after Justice Black's Adamson dissent appeared, the Stanford Law Review published two articles which remain the most extensive critiques of his total incorporation thesis. The first, authored by Professor Charles Fairman, vehemently challenged Black's position regarding the intent of those involved in the fourteenth amendment's adoption and accused the Justice of having deliberately distorted the amendment's history. Professor Fairman was singularly unimpressed with Justice Black's reliance on the statements of Representative John Bingham, whom Black had characterized as "the Madison of the first section of the Fourteenth Amendment." Initially at least, Fairman caustically observed, Bingham had erroneously thought that the Bill of Rights safeguards were already binding on the states and that an amendment was needed merely to clothe the Congress with enforcement authority in the civil rights field. Moreover, wrote Fairman, while Bingham did speak often of the "immortal bill of rights" during debates over the proposed amendment's adoption, he specifically mentioned only one Bill of Rights guarantee—the eighth amendment prohibition against cruel and unusual punishments—as falling within the amendment's ambit. Indeed, only Senator Howard of the amend-

143. For a listing of those writings at least somewhat supportive of the view that the fourteenth amendment was intended to incorporate the Bill of Rights, see Haigh, supra note 107, at 33-34.
144. Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949).
146. Fairman, supra note 144, at 34-36.
147. Id. at 134.
ment's supporters—and none of its congressional opponents—mentioned the first eight amendments in attempting to delineate the proposal's scope. Professor Fairman did acknowledge that during the 1871 congressional debates over the amendment's meaning, Representative Bingham had mentioned amendments I through VIII. He maintained, however, that "what Bingham said in 1871 formed no part whatsoever of the facts that produced the Fourteenth Amendment . . . . He had made history, but his afterthoughts should not be allowed to remake it."\(^{148}\)

Fairman also asserted that the failure of the amendment's opponents—in Congress, in the press, in political campaigning, or in the state legislative debates over its ratification—to attack the amendment as an attempt to bind the states to the requirements of the Bill of Rights was "far more substantial" evidence of its meaning "than a few words uttered by Bingham and Howard in the debates of 1866."\(^{149}\) In his judgment, neither Congress, the state legislatures, nor the people would have tolerated so radical an alteration in the federal system, and had the amendment been designed to implement such a change, its opponents would surely have turned that factor to their advantage. The available historical evidence indicated, Fairman wrote, that the framers of the fourteenth amendment "had no clear idea as to the confines of" its privileges and immunities guarantee.\(^{150}\) He added:

Justice Cardozo's gloss on the due process clause [in \textit{Palko}] . . . comes as close as one can to catching the vague aspirations that were hung upon the privileges and immunities clause. This accommodates the fact that freedom of speech was mentioned in the discussion of 1866, and the conclusion that, according to contemporary understanding, surely the federal requirements as to juries were not included.\(^{151}\)

Of Justice Black's position, then, Professor Fairman concluded: "the record of history is overwhelmingly against him."\(^{152}\)

In a companion article,\(^{153}\) Professor Stanley Morrison examined

\(^{148}\) \textit{Id.} at 137.
\(^{149}\) \textit{Id.} at 138.
\(^{150}\) \textit{Id.}
\(^{151}\) \textit{Id.} at 139.
\(^{152}\) \textit{Id.}
\(^{153}\) Morrison, \textit{Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation}, \textit{2 STAN L. REV.} 140 (1949).
the judicial history of the fourteenth amendment’s construction by
the Supreme Court and condemned Justice Black’s disregard for
stare decisis, observing:

[The incorporation theory] does not appear even to have been
presented to that Court in the argument of counsel until 1887 [in
Spies v. Illinois]. It did not receive the support of any Supreme
Court judge until 1892 [in O’Neil v. Vermont]. Between 1868
and 1947, only three judges of the Court [the first Justice Harlan
and Justices Field and Brewer] favored the doctrine, one of
whom [Justice Brewer] shortly recanted. On the other side are
the large number of judges, many of them eminent, who listened
to the argument and voted on the question. Some of these were
mature men when the Fourteenth Amendment was adopted. The
reaction of these men, as well as the failure of counsel in the
earlier cases even to raise the question, affords ample proof that
if the Amendment was designed to incorporate the Bill of Rights,
this was not generally known to its contemporaries.\textsuperscript{154}

Professor Morrison noted, too, that the early Justices who embraced
incorporation appeared to base their positions, partially at least, not
on the fourteenth amendment’s history, but on the sort of “natural-
law”—“fundamental rights” theory which Justice Black abhor-
red.\textsuperscript{155} Moreover, like Fairman, Morrison, noting that a Supreme
Court Justice simply did “not have the time for exhaustive his-
torical research,”\textsuperscript{156} challenged Justice Black’s reading of the his-
tory surrounding the fourteenth amendment’s adoption.\textsuperscript{157} Finally,
he contended that Justice Black’s historical conclusions may have
been influenced by his desire to eliminate entirely the use of sub-
stantive due process as a tool for protecting economic freedom from
what Black, as a New Deal liberal, would consider to be socially
desirable governmental controls, while at the same time establish-
ing an interpretation of the fourteenth amendment which would
adequately protect personal, noneconomic liberties from state in-
fringement.\textsuperscript{158} His history, Morrison wrote, made “it possible for Mr.
Justice Black to have his cake and eat it too.”\textsuperscript{159}

\textsuperscript{154} Id. at 159, 150 (footnote omitted).
\textsuperscript{155} Id. at 172 n.63.
\textsuperscript{156} Id. at 162.
\textsuperscript{157} Id. at 161-63.
\textsuperscript{158} Id. at 166-67.
\textsuperscript{159} Id. at 167. Other critical analyses of Justice Black’s reading of the fourteenth
amendment’s history include Mendelson, \textit{Mr. Justice Black’s Fourteenth Amendment}, 53
Construing his incorporation thesis to limit the fourteenth amendment’s meaning to the Bill of Rights, Justice Black’s critics have also charged that even had the amendment’s sponsors intended its privileges and immunities clause to incorporate the Bill of Rights, they obviously had not intended to limit its meaning to those guarantees. Shortly after Adamson was decided, for example, a law review comment agreed that there was “ample support” for Justice Black’s conclusion that Representative Bingham intended incorporation, but added, “that the intent which Justice Black imputes to Bingham is only one thread in a tangled skein.”

In addition to attacking Justice Black’s reading of the fourteenth amendment’s history, his critics have also complained that his incorporation thesis is incompatible with the language of the amendment’s first section. As noted previously in this article, critics have charged that the amendment’s framers would have employed clear and direct language had they meant its first section to incorporate, by its terms, the Bill of Rights. Had the privileges and immunities clause been intended to serve as shorthand for the Bill of Rights, incorporation critics have further argued, the due process clause in the fourteenth amendment would have been superfluous, since there was already a due process clause in the Bill of Rights itself. On the other hand, had the due process clause been intended as the vehicle of incorporation, it is strange that the framers would have employed a clause which forms a mere part of the Bill of Rights as a general guarantee incorporating within its meaning all the rights of the first eight amendments.

Along these same lines, critics following the lead of Justice Frankfurter’s dissenting opinion in Bridges v. California have expressed doubt whether, as Justice Black was supposed to have be-

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162. See, e.g., Morrison, supra note 153, at 158.


164. 314 U.S. 252, 280-81 (1941) (Frankfurter, J., dissenting).
lied, the language of the amendment's first section can be construed to extend the safeguards of the Bill of Rights to aliens as well as citizens.\textsuperscript{165} By its language, critics observe, the amendment's due process clause reaches all persons, but under Justice Black's interpretation, the clause, standing alone, does not incorporate within its meaning any particular set of substantive and procedural rights. Moreover, the privileges and immunities clause—the guarantee to which Senator Howard and Representative Bingham specifically referred in explaining that the fourteenth amendment would incorporate the Bill of Rights—clearly appears limited in its meaning to citizens, not aliens. Justice Black's conclusion that the provisions of the amendment's first section, separately and as a whole, incorporated the first eight amendments was designed, suggests Wallace Mendelson, one of the Justice's harshest and most persistent critics,\textsuperscript{166} to enable Black to avoid the problems which the amendment's language posed for those wishing to impose the requirements of the Bill of Rights upon the states.

In effect, Mr. Justice Black homogenized provisions . . . . To change the figure, the Justice treats the terms of the different clauses as interchangeable. Borrowing the privileges and immunities language as a reference to the Bill of Rights from one, and the word "persons" to get the desired breadth of coverage from another, he creates a new constitutional provision.\textsuperscript{167}

Several other themes, touched upon earlier in this article, have also been prominent in attacks on the Black thesis. Justices Frankfurter and Harlan, among others, charged that the incorporation doctrine robs the states of the autonomy to which they are entitled under the federal system; the states, they contended, should not be placed in a constitutional straight-jacket fashioned in the eighteenth century. They also maintained that application of the Bill of Rights by its terms in state cases might lead to a dilution of Bill of Rights standards in federal cases. Finally, they challenged Justice Black's notion that the specific language of the Bill of Rights placed

\textsuperscript{165} See, e.g., Mendelson, \textit{supra} note 159, at 714-15.

\textsuperscript{166} See, e.g., \textit{W. Mendelson, Justices Black and Frankfurter: Conflict in the Court} (2d ed. 1968); \textit{Hugo Black and Judicial Discretion}, \textit{85 Pol. Sci. Q.} 17 (1970).

\textsuperscript{167} \textit{Id.} at 715.
a tighter rein on creative judges than the “vague contours” of the due process guarantee. Concurring in *Griswold v. Connecticut*, for example, Justice Harlan observed: “‘Specific’ provisions of the Constitution, no less than ‘due process,’ lend themselves as readily to ‘personal’ interpretations by judges. . . .”

Much of the criticism directed against Justice Black’s views regarding the nature of the fourteenth amendment and its relationship to the Bill of Rights is substantial. Nevertheless, persuasive arguments can also be raised in defense of Justice Black’s position.

1. Some of the criticisms raised against Justice Black’s views seem to flow from a basic misunderstanding of his thesis. As noted previously, Justice Black never said that the privileges and immunities clause and other provisions of the fourteenth amendment’s first section were limited in meaning to the Bill of Rights. Justice Black also never said that the fourteenth amendment due process guarantee—a guarantee which obviously forms part of the Bill of Rights—incorporated all the language of the first eight amendments; and it would appear eminently logical to conclude, as Justice Black apparently did, that the amendment’s framers intended the privileges and immunities clause to incorporate, *inter alia*, the specific safeguards of the Bill of Rights, while the due process clause would have the same meaning and serve the same purpose as its fifth amendment counterpart. Finally, Justice Black would never have accepted or rejected incorporation on the basis of federalism or related policy considerations; his judicial philosophy rejected the view that judges should base their constitutional interpretations on notions of what is “just” or “socially desirable,” and there is strong evidence to indicate that he was consistently faithful to that philosophy.

2. Much is made of Representative Bingham’s confusion about the meaning to be attached to *Barron v. Baltimore*. Initially, during congressional debates over the fourteenth amendment’s adoption, Bingham apparently did believe, contrary to *Barron*, that the Bill of Rights itself placed a moral obligation on the states and that the amendment was needed merely to clothe

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169. 381 U.S. 479 (1965).

170. *Id.* at 501.


Congress with enforcement authority. This obviously reflects adversely on Bingham's credentials as a student of constitutional law. On the other hand, it also demonstrates that Bingham was intent on enforcing the Bill of Rights against the states through the fourteenth amendment. As Justice Black's Adamson appendix indicates, changes in the proposed amendment's language appear to reflect an increasing awareness of Barron on the part of the amendment's sponsors, and a corresponding need to recast the amendment in language compatible with the Barron rule. The initial draft simply gave Congress civil rights enforcement power; a later draft adopted the broader language which was eventually enacted.

3. While only Senator Howard specifically listed all of the first eight amendments in elaborating the fourteenth amendment's meaning during congressional debates on its adoption, no member of Congress disputed his interpretation. Furthermore, as Justice Black's Adamson appendix demonstrates and Professor Fairman conceded, the amendment's sponsors spoke often of the amendment as incorporating the "bill of rights." Whatever the ultimate limits to the meaning of that phrase, surely the first eight amendments can arguably be included within its construction. Indeed, the rarity with which the first eight amendments were specifically cited during the congressional debates may be explained by the fact, as Justice Black suggested in his Duncan concurrence, that the mere mention of the phrase "privileges or immunities of United States citizens" first conjures up in the popular mind—if not in that of the legal technician—the guarantees of the Bill of Rights.

4. If an examination of the intent of its framers is an appropriate means for determining the meaning of a constitutional provision, Justice Black's emphasis on the statements of the fourteenth amendment's sponsors would appear to be the most reliable method of discovering historical intent. Along these lines, in rejecting Professor Fairman's findings, Justice Black observed in Duncan:

I have read and studied [Fairman's] article extensively, including the historical references, but am compelled to add that in my view it has completely failed to refute the inferences and arguments that I suggested in my Adamson dissent. Professor Fairman's "history" relies very heavily on what was not said in the state legislatures that passed on the Fourteenth Amendment.

173. See, e.g., 332 U.S. at 94-95, 104.
Instead of relying on this kind of negative pregnant, my legislative experience has convinced me that it is far wiser to rely on what was said, and most importantly, said by the men who actually sponsored the Amendment in the Congress. I know from years in the United States Senate that it is to men like Congressman Bingham, who steered the Amendment through the House, and Senator Howard, who introduced it in the Senate, that members of Congress look when they seek the real meaning of what is being offered. And they vote for or against a bill based on what the sponsors of that bill and those who oppose it tell them it means.\footnote{5. 391 U.S. at 165.}

5. While opponents of the fourteenth amendment’s adoption did not specifically argue that the amendment would impose the Bill of Rights on the states, they clearly had the opportunity to raise such a contention. Senator Howard, the amendment’s principal Senate sponsor, did clearly claim that the fourteenth amendment would impose the first eight on the states, and Representative Bingham’s statements also provided ample basis for such a charge. In view of the opportunities afforded the amendment’s opponents by the statements of Howard and Bingham, the absence of such charges would appear to be less proof that Justice Black was wrong than evidence that the amendment’s opponents were an unusually docile and inept group of debaters, or did not appreciate the broader implications of incorporation, or perhaps even believed that, at least in the abstract, the people would support the notion that the guarantees of the Bill of Rights should apply to state, as well as federal, public officials.

6. It is true, of course, that litigants before the Supreme Court did not raise the incorporation thesis for years after the fourteenth amendment’s adoption.\footnote{6. See, e.g., Justices v. Murray, 76 U.S. (9 Wall.) 274 (1869); Twitchell v. Pennsylvania, 74 U.S. (7 Wall.) 321 (1868).} It is equally true that the Court has consistently rejected the thesis and that few individual Justices on the Court in the half century following its adoption embraced an interpretation of the fourteenth amendment even roughly compatible with Justice Black’s position. Given, inter alia, the limited meaning attached to the privileges and immunities clause in the \textit{Slaughterhouse Cases}\footnote{7. 83 U.S. (16 Wall.) 36 (1872).} and the Court’s development of due process
as a tool to protect propertied interests, however, it is difficult to square early interpretations of the amendment with the history surrounding its adoption. Moreover, the Court's early reluctance to endorse incorporation seems to have been based as much on policy considerations as on the amendment's history. For example, in summarizing its history and rejecting the incorporation thesis in the Twining case, Justice Moody conceded that there were "weighty arguments" supportive of incorporation, but concluded for the Court that had the thesis prevailed, "it is easy to see how far the authority and independence of the states would have been diminished."

7. The wording of the fourteenth amendment's privileges and immunities clause does appear clearly to limit its coverage—and thus, if one accepts incorporation, Bill of Rights coverage—to citizens in state cases. As one writer has noted, however, the words of the clause were probably intended as "words of definition not of limitation." A reading of the debates on the fourteenth amendment's adoption reveals that its sponsors included within the clause's meaning certain rights (e.g., those of the Bill of Rights) which historically had applied to all persons, as well as other rights applicable to citizens alone. Justice Black apparently recognized and accepted this anomaly. He agreed, for example, that the safeguards of the Bill of Rights extended, via the fourteenth amendment, to all persons in state cases. However, in conference discussion of Edwards v. California, he indicated that the right of interstate travel was a fourteenth amendment privilege of national citizenship which extended its protection only to citizens, not aliens.

177. 211 U.S. at 98.
178. Id. at 96.
179. Green, supra note 58, at 904.
180. 314 U.S. 160 (1941).
181. Frank Murphy Papers, supra note 57. Justice Black's critics have also charged, of course, that the Justice was inconsistent when he contended, in certain cases—Wheeling Steel Corp. v. Glander, 337 U.S. 562, 576-81 (1949) (Douglas, J., joined by Black, J., dissenting) and Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 85-90 (1938) (Black, J., dissenting)—that the word "person" in the fourteenth amendment's due process and equal protection clauses did not include corporations within its meaning, and assumed in another case, Bridges v. California, 314 U.S. 252 (1941), that the fourteenth amendment freedom of the press guarantee, as incorporated from the Bill of Rights, did extend to newspaper companies. See, e.g., Mendelson, supra note 159, at 715. Those raising such a charge of inconsistency, however, should remember that Justice Black did not consider the due process guarantee or the equal protection clause the vehicle of incorporation. Moreover, the language of the first amendment, which Justice Black believed to have been incorporated within
8. Perhaps criticisms of Justice Black's thinking regarding the fourteenth amendment's meaning should be evaluated in the context of opposing interpretations. As Justice Harlan conceded in his *Duncan* dissent, there appears to be no basis at all in logic or history for the doctrine of selective incorporation which the *Duncan* majority reaffirmed. Moreover, the Frankfurter-Harlan interpretation of due process is clearly inconsistent with the meaning attached to that guarantee at the time of the fourteenth amendment's adoption or for years thereafter. Apparently no American court ascribed a substantive due process meaning to the clause until 1856. The Supreme Court early rejected the view that the guarantee authorized courts to rule on the reasonableness of legislation, and arguably did not fully embrace substantive due process until 1905. In the words of Black critic Stanley Morrison, when Justice Black sought "to abolish substantive due process, he [was] on solid ground historically. If the [due process] clause is to be interpreted in accordance with the meaning it had to the framers and others in 1868, the doctrine cannot be justified. It is . . . a later excrescence derived from natural-law sources."

Essentially the same conclusion is in order regarding the contention of Justices Frankfurter and Harlan—among many if not all other modern Justices—that the due process clause requires "fundamentally fair" proceedings. While there is obviously much language in late nineteenth and early twentieth century Supreme Court opin-

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182. 391 U.S. at 172-73.
183. Wynehamer v. New York, 13 N.Y. 378 (1856). For an excellent examination of the meaning of due process prior to the Civil War see Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 460 (1911). Of Wynehamer, the first case to employ a substantive due process interpretation to a state constitutional due process guarantee, Corwin wrote:

[T]he Wynehamer decision found no place in the constitutional law that was generally recognized throughout the United States in the year 1856. Neither had it been foreshadowed by decisions in similar cases in other States, nor was it subsequently accepted in such cases. Also it met locally an immense amount of hostile criticism, both lay and professional. Altogether it must be considered an adversity, for the time being, to the derived doctrine of due process of law. *Id.* at 474-75.


ions which would support such a flexible interpretation, at the
time of the amendment's adoption and for years afterwards, the
Court actually applied an interpretation of the clause closely paral-
leling Justice Black's "law of the land" interpretation. In his
Twining opinion—which Justice Frankfurter characterized as
"cloudless" during conference discussion of Adamson and
further praised in his Adamson concurrence—Justice Moody, for ex-
ample, employed seemingly expansive language in describing the con-
tent of due process, but then added:

The essential elements of due process of law [as a procedural
requirement] . . . are singularly few, though of wide application
and deep significance . . . Due process requires that the court
which assumes to determine the rights of parties shall have juris-
diction . . . and that there shall be notice and opportunity for
hearing given the parties . . . Subject to these two fundamental
conditions, which seem to be universally prescribed in all systems
of law established by civilized countries, this court has, up to this
time, sustained all state laws . . . regulating procedure, evi-
dence, and methods of trial, and held them to be consistent with
due process of law.

Justice Moody's summary of the Court's due process precedents
hardly amounts to a broad and flexible injunction against court
proceedings which judges may find "shocking to the conscience." Of
course, one of the Frankfurter-Harlan persuasion might respond
that, after all, due process is an evolving concept and the clause's
meaning simply had not evolved to any significant extent when
Justice Moody's opinion in Twining was written. The impression
remains, however, that despite expansive rhetoric to the contrary in
certain of the Court's opinions, the Court for years after the adop-
tion of the fourteenth amendment gave due process a relatively
fixed, limited meaning.

Historically, then, Justice Black was correct in his complete
rejection of substantive due process. His "law of the land" inter-
pretation was also essentially correct as a description of due process,

186. See generally, e.g., Maxwell v. Dow, 176 U.S. 581 (1900); Hurtado v. California, 110
U.S. 516 (1884). See also the pre-fourteenth amendment case involving interpretation of the
fifth amendment due process clause, Murray's Lessee v. Hoboken Land & Improv. Co., 59
U.S. (18 How.) 272 (1856).
187. Frank Murphy Papers, supra note 57.
188. 332 U.S. at 59.
189. 211 U.S. 78, 110 (1908).
at least at the time of the fourteenth amendment's adoption and probably for years thereafter. So construed, due process was indeed a "living" concept—but only in the sense that the constitutional, legislative, and administrative rules embodied in the "law of the land" were ever changing, and not to the extent that the concept absorbed within its meaning changing judicial notions of justice and social utility. Such a conclusion in no way establishes that Justice Black was correct on the incorporation issue. However, it does enhance, the Justice's credentials as a student of the fourteenth amendment's history—and perhaps somewhat discredits those of his critics.

The most damaging evidence against Justice Black's thesis may be the apparent failure of counsel in early cases to advance a total incorporation construction of the fourteenth amendment. However, even here a number of points can be raised in defense of the Black stance. Twitchell v. Pennsylvania and Justices v. Murray were the two pertinent cases which followed most closely the amendment's adoption. In Twitchell, decided on April 5, 1869, the Court cited Barron in refusing to overturn a state murder conviction on fifth and sixth amendment grounds. Justice Black's critics wonder why "[n]either counsel nor any member of the Court seemed aware of 'incorporation,' though it might have saved a man's life." One might also wonder, however, why apparently no mention at all was made of the fourteenth amendment in the case. Whether one accepts Justice Black's reading of the fourteenth amendment's history, or Professor Fairman's, it does seem strange that counsel for the defendant in Twitchell did not at least attempt to claim a fourteenth amendment violation in his client's case. That no such claim was even made suggests not that Justice Black was wrong, but that counsel for the defendant was unaware that the amendment was designed to have some impact, whatever its nature, on state proceedings. A more thorough examination of Twitchell would appear necessary before its value as evidence challenging the Black thesis can be properly assessed.


191. 74 U.S. (7 Wall.) 321 (1869).
192. 76 U.S. (9 Wall.) 274 (1869).
193. Mendelson, supra note 159, at 721.
The evidential value of *Justices v. Murray* is also doubtful. The case first arose in the early 1860's, and while the *Murray* Court did reaffirm *Barron*, the case actually involved the effect of the seventh amendment on the power of a federal appellate court. Moreover, intervening between the *Murray* decision and the next case in which, according to Professor Morrison, an incorporation claim could appropriately have been raised, were the *Slaughterhouse Cases*.

The *Slaughterhouse* Court emasculated the meaning of the privileges and immunities clause, the clause which the fourteenth amendment’s sponsors may have intended to incorporate the Bill of Rights. That factor, plus the collapse of Reconstruction in the late 1870’s and a general judicial undermining of the goals of the fourteenth amendment’s most vigorous congressional backers, may well have accounted for the failure of counsel to raise the total incorporation thesis before 1887. Finally, of course, well before 1887, litigants were claiming that certain Bill of Rights’ guarantees—those of relevance to their particular cases and the only ones, presumably, which they would have been interested in asserting—were within the scope of the fourteenth amendment.

VI. CONCLUSION

Justice Black’s desire for precise legal standards and his opposition to judicial legislation were clearly reflected in his interpretation of the fourteenth amendment’s first section. While all constitutional provisions obviously are susceptible to varying constructions, the language of specific guarantees in the Bill of Rights and Justice Black’s “law of the land” conception of due process arguably are clearer, more precise, and more restrictive of judicial creativity than the Frankfurter-Harlan due process formula. Moreover, while Justice Black apparently did not limit the meaning of the privileges and immunities clause to the Bill of Rights, any further meaning which the Justice might have attached to that guarantee would have been tied to the fourteenth amendment’s history, and not to his notions of what was “just,” “reasonable,” or “socially desirable.”

194. 83 U.S. (16 Wall.) 36 (1872).
From the perspective of Justice Black's entire judicial career, it would appear that Professor Morrison was wrong when he suggested that the Justice deliberately distorted the fourteenth amendment's history in order to prevent state interference with noneconomic liberty, while allowing states virtually unlimited authority over economic freedom. Justice Black's willingness to uphold governmental regulations which he found personally distasteful, his refusal to extend the scope of personal rights beyond what he deemed to be the Constitution's "literal" or historically intended meaning, and material in the papers of deceased Justices make it difficult to believe that his interpretation was bottomed on policy considerations of any sort. It is entirely possible that Justice Black was unconsciously influenced by his conception of law and the judicial function in his efforts to discover the fourteenth amendment's meaning. It is difficult to accept the notion, however, that Justice Black deliberately distorted history in order to ascribe a relatively definite, fixed gloss to the vague language of the fourteenth amendment's first section. While comporting perhaps with his desire for clear legal standards to restrain the creative judge, such an approach would itself have constituted a flagrant exercise in judicial creativity. It thus would have been completely contrary to the Justice's deep-seated and consistently held beliefs about the proper role of the judge in constitutional adjudication.