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NEO-INCORPORATION: THE BURGER COURT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

*ROBERT L. CORD**

I. INTRODUCTION

OVER three decades have passed since Justice Black wrote that "[t]he scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history."[1] Today, the procedural guarantees of the fourteenth amendment[2] are at the center of that controversy. An analysis of the Burger Court's

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1. Chambers v. Florida, 309 U.S. 227, 235 (1940). The fourteenth amendment has also been a fruitful source of extra-judicial legal writing. See H. Black, A Constitutional Faith 23-42 (1969); B. Cardozo, The Nature of the Judicial Process 76-90 (1921); Avins, Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited, 6 Harv. J. Legis. 1 (1968); Black, The Bill of Rights, 35 N.Y.U.L. Rev. 865 (1960); Brennan, Extension of the Bill of Rights to the States, 44 J. Urban L. 11 (1966); Brennan, The Bill of Rights and the States, 36 N.Y.U.L. Rev. 761 (1961); Crosskey, Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority, 22 U. Chi. L. Rev. 1 (1954); Fairman, A Reply to Professor Crosskey, 22 U. Chi. L. Rev. 144 (1954); Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949); Frankfurter, Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746 (1965); Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929 (1965); Green, The Bill of Rights, the Fourteenth Amendment and the Supreme Court, 46 Mich. L. Rev. 869 (1948); Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 Yale L.J. 74 (1963); Hill, The Bill of Rights and the Supervisory Power, 69 Colum. L. Rev. 181 (1969); Lacy, The Bill of Rights and the Fourteenth Amendment: The Evolution of the Absorption Doctrine, 23 Wash. & Lee L. Rev. 37 (1966); Landynski, Due Process and the Concept of Ordered Liberty: "A Screen of Words Expressing Will in the Service of Desire"?, 2 Hofstra L. Rev. 1 (1974); Mendelson, Mr. Justice Black's Fourteenth Amendment, 53 Minn. L. Rev. 711 (1969); Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation, 2 Stan. L. Rev. 140 (1949); Mykkeltvedt, Justice Black and the Intentions of the Framers of the Fourteenth Amendment's First Section: The Bill of Rights and the States, 20 Mercer L. Rev. 432 (1969); O'Brien, Juries and Incorporation in 1971, 1971 Wash. U.L.Q. 1; Richter, One Hundred Years of Controversy: The Fourteenth Amendment and the Bill of Rights, 15 Loyola L. Rev. 281 (1968-1969). For a discussion of "substantive" due process, see note 109 infra.

2. U.S. Const. amend. XIV, § 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

contributions to this long-standing dispute requires an exploration of earlier approaches.

During the 1940s and 1950s two basic approaches to the relationship between the Bill of Rights—particularly the procedural guarantees of the fourth, fifth, sixth, and eighth amendments—and the fourteenth amendment emerged. Justice Jackson gave a general outline of each when he spoke for the Court in *Fay v. New York:*[3]

> The due process clause is one of comprehensive generality, and in reducing it to apply in concrete cases there are different schools of thought. One is that its content on any subject is to be determined by the content of certain relevant other Amendments in the Bill of Rights which originally imposed restraints on only the Federal Government but which the Fourteenth Amendment deflected against the states. The other theory is that the clause has an independent content apart from, and in addition to, any and all other Amendments. This meaning is derived from the history, evolution and present nature of our institutions and is to be spelled out from time to time in specific cases by the judiciary.[4]

An examination of these two viewpoints is important to an understanding of their development and modification.

The first school about which Justice Jackson spoke embraces a philosophy which envisions the due process clause of the fourteenth amendment as incorporating specific guarantees detailed in the first eight amendments, thus protecting them from state power. Justices who subscribe to this theory hereafter will be referred to as "incorporationists."[5] The other school subscribes to an independent meaning of due process, not specifically derived from any particular amendments, which protects from state infringement all "fundamental rights" essential to the "concept of ordered liberty."[6] The Justices who subscribe to this theory will be referred to as the "ordered liberty" school. A general analysis of the ordered liberty approach to the due process clause of the fourteenth amendment is an appropriate point of departure.

II. The Ordered Liberty Approach

The ordered liberty approach to the meaning and content of the fourteenth amendment due process clause can be traced to within two decades after the amendment's ratification in 1868. In *Hurtado v. California,*[7] Justice Matthews, delivering the opinion of the Court,

3. 332 U.S. 261 (1947).

4. Id. at 287-88.

5. "The architect of the contemporary 'incorporation' approach to the Fourteenth Amendment is, of course, Mr. Justice Black." Williams v. Florida, 399 U.S. 78, 144 (1970) (Stewart, J., concurring). Part III, infra, discusses the origin and development of the incorporation approach.

6. Palko v. Connecticut, 302 U.S. 319 (1937), overruled in Benton v. Maryland, 395 U.S. 784 (1969).

7. 110 U.S. 516 (1884).

stated that the due process clause of the fourteenth amendment, like that of the fifth amendment, required that governmental power be "exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . ."[8] This phrase grew in importance after the Supreme Court's decision in *Twining v. New Jersey*.[9] Justice Moody, speaking for the Court, used the *Hurtado* language to define the protection of the fourteenth amendment.[10] *Twining*, however, did not define those principles which are fundamental to liberty and justice, nor did it specify where they might be found.

The first major attempt by the Supreme Court to answer these inquiries was undertaken by Justice Cardozo in *Palko v. Connecticut*.[11] He began by rejecting the total incorporationist approach which holds that all of the immunities of the Bill of Rights are liberties protected by the fourteenth amendment.[12] To substantiate this rejection, Justice Cardozo listed several immunities protected by the Bill of Rights that the Court explicitly had held not to be protected from state intrusion by the fourteenth amendment.[13] He then stated that some of the protections of the Bill of Rights are guaranteed by the fourteenth amendment.[14] The essence of the opinion was Justice Cardozo's attempt to clarify the Court's method of determining which immunities found in amendments one through eight are also protected by the fourteenth amendment. In so doing he instituted the "ordered liberty" approach to the meaning of the fourteenth amendment due process clause. All the protections against government that are "implicit in the concept of ordered liberty," Justice Cardozo held, are protected from invasion by state power.[15] Under this approach the

8. Id. at 535. See generally Landynski, Due Process and the Concept of Ordered Liberty: "A Screen of Words Expressing Will in the Service of Desire"?, 2 Hofstra L. Rev. 1, 10-13 (1974).

9. 211 U.S. 78 (1908). Twining held that the fourteenth amendment does not include the protection against self-incrimination. Essentially, Twining has been overruled. Malloy v. Hogan, 378 U.S. 1 (1964). See The Supreme Court, 1963 Term, 78 Harv. L. Rev. 143, 223-24 (1964).

10. 211 U.S. at 106.

11. 302 U.S. 319 (1937). Palko, which held that the fourteenth amendment does not include the fifth amendment guarantee against double jeopardy, was overruled in Benton v. Maryland, 395 U.S. 784 (1969).

12. 302 U.S. at 323. The total incorporationist approach of Justice Black is discussed in Part III, infra.

13. 302 U.S. at 323-24. Hurtado was cited for the proposition that the fourteenth amendment does not compel the states to indict solely by grand jury. Twining and subsequent similar cases were listed to show that a state may compel a person to be a witness against himself in a criminal case without violating the fourteenth amendment. Cases indicating that provisions of the fourth, sixth and seventh amendments were inapplicable to the states also were catalogued. Id.

14. 302 U.S. at 324-25.

15. Id.

courts would have to identify those fundamental liberties through a case-by-case analysis.[16]

The Court's rationale in *Palko* illustrates the essentials of the ordered liberty approach. The due process clause has a comprehensive meaning distinctively its own. The immunities considered fundamental to liberty and justice are embodied in the meaning of "ordered liberty" and "due process," both of which restrict state power through the fourteenth amendment. Although all the specific guarantees of the Bill of Rights have value and importance, only those provisions of the first eight amendments which are fundamental rights—essential to a concept of ordered liberty—are protected from the states by the fourteenth amendment.[17] Finally, Justice Cardozo catalogued those rights which the Court, at that time, held to be fundamental and thus protected by the fourteenth amendment: freedom of thought, freedom of speech, and the right to a fair trial.[18]

In *Palko,* Justice Cardozo's analysis of *Powell v. Alabama*[19] illustrates the ordered liberty approach to the relationship between a particular procedural right—which might also be specified in one of the first eight amendments—and the fundamental right to a fair trial inherent in the fourteenth amendment. Justice Cardozo noted that, in *Powell,* the sixth amendment right to counsel, *as such,* was not made applicable to the states by the fourteenth amendment. Rather, the right to counsel *under the circumstances of Powell* was constitutionally required. "The decision turned upon the fact that in the particular situation laid before [the *Powell* Court] in the evidence the benefit of counsel was essential to the substance of a hearing."[20] This language illustrates that the right to a fair trial was viewed as having a meaning

16. The rejection of the incorporationist approach necessitated the adoption of a more flexible concept of due process. It is possible to trace Justice Cardozo's opinion in Palko to an earlier expression favoring flexible interpretation of the constitution. See B. Cardozo, The Nature of the Judicial Process 76-90 (1921).

17. "If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed." 302 U.S. at 326. See generally Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 Yale L.J. 74, 78-81 (1963).

18. 302 U.S. at 326-27. The concept of a "fair trial" has been a major source of controversy in the judicial history of the due process clause. See Green, The Bill of Rights, the Fourteenth Amendment and the Supreme Court, 46 Mich. L. Rev. 869, 876 (1948). Compare Betts v. Brady, 316 U.S. 455 (1942) with Gideon v. Wainwright, 372 U.S. 335 (1963). On the other hand, the Court generally has agreed that all first amendment protections, as well as those listed by Cardozo, are applicable to the states. See Frankfurter, Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746, 747-49 (1965).

19. 287 U.S. 45 (1932).

20. 302 U.S. at 327.

independent of the specific procedural protections of any other amendments.[21]

By holding that "[d]ue process of law requires that the proceedings shall be fair," and that fairness is a "relative, not an absolute concept,"[22] the justices adopting an ordered liberty approach to the due process clause have resisted listing all of the procedural safeguards that make for a fair trial; they maintain that in some circumstances a procedure may be vital, and in others inconsequential. In 1942, for instance, the Court held that the sixth amendment right to counsel in all serious criminal cases was not essential to due process; Justice Roberts reiterated the fair trial–due process philosophy identified with the ordered liberty school of thought:

> As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.[23]

A significant characteristic of the ordered liberty school is its dynamic concept of due process. Spokesmen for this approach, such as Justice Frankfurter, have not provided an exhaustive definition of due process. "Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights."[24] Justice Frankfurter, the dean of the ordered liberty school until his retirement in 1962, viewed due process as embodying the principles of justice commonly held throughout western civilization in general and by the English-speaking peoples in particular.[25] Interpreting the due

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21. Although the reasoning of the Palko decision seems clear, its language has been used for other purposes. Justice Brennan, the architect of the "selective incorporation" approach to the fourteenth amendment, based his theory on the "absorption" language used by Justice Cardozo in Palko. Ohio ex rel. Eaton v. Price, 364 U.S. 263, 274-75 (1960). Justice Brennan appears to have equated "absorption" with "selective incorporation." The invalidity of this thesis was demonstrated by Justice Harlan in his dissent in Malloy v. Hogan, 378 U.S. 1, 22-25 (1964). See Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 Yale L.J. 74, 80-81 (1963). But see Landynski, Due Process and the Concept of Ordered Liberty: "A Screen of Words Expressing Will in the Service of Desire"?, 2 Hofstra L. Rev. 1, 31-39 (1974). See also notes 87 and 148 infra.

22. Snyder v. Massachusetts, 291 U.S. 97, 116 (1934).

23. Betts v. Brady, 316 U.S. 455, 473 (1942), overruled in Gideon v. Wainwright, 372 U.S. 335 (1963).

24. Wolf v. Colorado, 338 U.S. 25, 27 (1949), overruled in Mapp v. Ohio, 367 U.S. 643 (1961).

25. Solesbee v. Balkcom, 339 U.S. 9, 16-17 (1950) (Frankfurter, J., dissenting); Malinski v. New York, 324 U.S. 401, 413-14 (1945) (Frankfurter, J., concurring). The validity of this

process clause and the fair trial concept as generative principles, the ordered liberty school rejects a rigid incorporation concept that limits these principles to the particulars of the first eight amendments.[26]

Justice Frankfurter nevertheless recognized that the lack of an authoritative formulation of the content of the due process clause raised serious problems. How are the states to determine what the fourteenth amendment demands in terms of state criminal procedures? What role does the ordered liberty approach to due process demand of the Supreme Court and lower court judges in discovering the canons of decency and fairness inherent in this historical concept? Does this approach to due process allow judges unlimited discretion in the interpretation of constitutional law by substitution of personal predilections for fixed legal principles?

Justice Frankfurter often addressed himself to these questions; he understood the Court's role to be that of carefully giving content to the due process clause through a case-by-case analysis.[27] Viewing the Court's role in a particular case narrowly, Justice Frankfurter and the other ordered liberty justices consistently have urged that the Court not engraft a rigid set of procedures onto the due process clause. Judicial self-restraint, they argued, would preclude the Court from using a specific case to address itself to a host of unlitigated issues not properly before the Court.[28] On the other hand, for Justice Frankfurter, case-by-case analysis of due process did not mean that constitutional law is to be declared on an ad hoc basis. Rather, there are guiding principles, not procrustean rules, to delimit the interpretations of the Court:

> The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process.[29]

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principle, and of the ordered liberty school as a whole, has been challenged. "Confine [the ordered liberty approach], as Mr. Justice Frankfurter is now attempting, to 'the notions of justice of English-speaking peoples' (however odd these 'notions' may be), and it is still so broad as to be meaningless . . . ." Green, The Bill of Rights, the Fourteenth Amendment and the Supreme Court, 46 Mich. L. Rev. 869, 899 (1948) (footnote omitted).

26. "[The] standards of justice [of English-speaking peoples] are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia." Malinski v. New York, 324 U.S. 401, 417 (1945) (Frankfurter, J., concurring).

27. See Adamson v. California, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring).

28. Cf. Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 696-97 (1959) (Frankfurter, J., concurring).

29. Rochin v. California, 342 U.S. 165, 170 (1952) (footnote omitted).

Justice Frankfurter recognized that a flexible and dynamic concept of due process could be a source of judicial confusion and uncertainty. He warned that judges may be tempted to rely upon their own ideas of social or legal justice if they fail to realize that their proper judicial role is to reflect, rather than to renovate the historical sense of justice as seen in the light of contemporary needs. Essentially, ordered liberty justices should be viewed as seekers and proclaimers of the law, and not as creators of the law.[30]

Justice Frankfurter was also concerned that the basic limitations on federal judicial authority inherent in the division of power established by a federal system must not be altered by the due process guarantee. "Due process of law . . . is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice."[31] The ordered liberty justices have maintained that jurisdiction over criminal justice originally was left with the states by the Constitution and was delimited only in general terms by the addition of the fourteenth amendment. Primary responsibility in criminal affairs, although circumscribed somewhat by the demands of due process, remains with the states.[32] Incorporation by the fourteenth amendment of the specific criminal procedures of amendments one through eight could mean a serious limitation, if not an end to state authority in these matters. Thus, incorporation is viewed by this school of justices as harmful to the principles of federalism.

Another argument advanced against the incorporation approach to the fourteenth amendment is that it would be a grand act of judicial legislation contrary to the Constitution. As Justice Frankfurter noted,

> [t]he notion that the Fourteenth Amendment was a covert way of imposing upon the States all the rules which it seemed important to Eighteenth Century statesmen to write into the Federal Amendments, was rejected by judges who were themselves witnesses of the process by which the Fourteenth Amendment became part of the Constitution.[33]

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30. See id. at 170-72. It is interesting to contrast Justice Frankfurter's opinion in Rochin with a more recent extra-judicial statement. "The words of the Constitution are so unrestricted by their intrinsic meaning or by their history or by tradition or by prior decisions that they leave the individual justice free, if indeed they do not compel him, to gather meaning not from reading the Constitution but from reading life." J. Simon, In His Own Image: The Supreme Court in Richard Nixon's America 6 (1973).

31. 342 U.S. at 168.

32. Malinski v. New York, 324 U.S. 401, 412-13 (1945) (Frankfurter, J., concurring).

33. Adamson v. California, 332 U.S. 46, 63-64 (1947) (Frankfurter, J., concurring). One witness to the birth of the fourteenth amendment felt otherwise. The first Justice Harlan, characterized by Justice Frankfurter as an "eccentric exception," indicated that the fourteenth amendment did incorporate the first eight amendments. Id. at 62.

The short answer to the theory that the due process clause is legislative shorthand for the Bill of Rights is that "it is a strange way of saying it."[34]

To review, the ordered liberty approach to the due process clause of the fourteenth amendment reveals adherence to the following principles: due process has its own meaning independent of other parts of the Constitution; due process protects from state intrusion the fundamental rights "implicit in the concept of ordered liberty;"[35] the indefinable concept of due process necessitates a case-by-case analysis which gives contemporary content to this constitutional guarantee; the primary role of the courts is to articulate the blend of historical values and current standards which satisfy the due process requirements; in the process of performing this judicial function, judges must be extremely careful lest they elevate their own predilections to constitutional dogma; the justices should avoid altering the division of judicial power created by the federal system; and the due process clause should not be used to implement judicial usurpation of legislative functions. Thus, the ordered liberty justices are concerned with both the constitutional guarantees of the individual as represented by the standards of the due process clause and the restriction of judicial authority in our constitutional system.

The ordered liberty justices initially subscribed to a small list of procedural essentials common to all fair trials. Such rights as effective notice of the charge, an adequate opportunity to defend,[36] an impartial tribunal,[37] an impartial jury untainted by interest or dominated by fear,[38] and a jury selected without racial discrimination[39] were held to be ingredients essential to a fair trial. Generally, however, the ordered liberty justices saw the fair trial guarantee of *Palko* as mandating different procedural safeguards in diverse circumstances.[40] In *Betts v. Brady*[41] the Court held that an indigent's right to counsel in a state criminal case was guaranteed by the fourteenth amendment only if the special circumstances of that case necessitated the appointment of

34. Id. at 63. Ordered liberty justices have rejected the argument that the framers of the fourteenth amendment intended to overrule the holding of Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). In that case Chief Justice Marshall held that the first eight amendments were restraints solely on the exercise of federal governmental power.

35. Palko v. Connecticut, 302 U.S. 319, 325 (1937), overruled in Benton v. Maryland, 395 U.S. 784 (1969).

36. Snyder v. Massachusetts, 291 U.S. 97 (1934), noted in 34 Colum. L. Rev. 767 (1934).

37. Tumey v. Ohio, 273 U.S. 510 (1927).

38. Moore v. Dempsey, 261 U.S. 86 (1923).

39. Norris v. Alabama, 294 U.S. 587 (1935).

40. See generally Green, The Bill of Rights, the Fourteenth Amendment and the Supreme Court, 46 Mich. L. Rev. 869 (1948).

41. 316 U.S. 455 (1942), overruled in Gideon v. Wainwright, 372 U.S. 335 (1963).

counsel in order to ensure a fair trial. Except for the procedural essentials common to all fair trials,[42] the special circumstances rule was applied to all other specific procedural rights.

An erosion of the special circumstances rule can be seen in Justice Frankfurter's opinion for the Court in *Wolf v. Colorado.*[43] After rejecting the incorporationist approach, Justice Frankfurter held:

> 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. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause.[44]

Justice Frankfurter's language indicates that the security of one's privacy is a right not dependent upon the existence of special circumstances.

In *Gideon v. Wainwright,*[45] Justice Harlan explicitly rejected the special circumstances rule.

> In noncapital cases, the "special circumstances" rule has continued to exist in form while its substance has been substantially and steadily eroded. . . . The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the *Betts v. Brady* rule is no longer a reality.
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> . . . .
>
> The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence.[46]

Subsequent to *Gideon,* Justice Harlan wrote other opinions in which he abandoned the special circumstances rule.[47] This new ordered liberty approach to due process was significantly different than the case-by-case analysis used by the ordered liberty majority on the Supreme Court during the 1940s and 1950s.[48]

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42. See notes 36-39 supra and accompanying text.

43. 338 U.S. 25 (1949), overruled in Mapp v. Ohio, 367 U.S. 643 (1961).

44. Id. at 27-28.

45. 372 U.S. 335, 349 (1963) (Harlan, J., concurring).

46. Id. at 350-51.

47. See, e.g., Klopfer v. North Carolina, 386 U.S. 213, 226 (1967) (concurring opinion) (right to a speedy trial incorporated into fourteenth amendment); Pointer v. Texas, 380 U.S. 400, 408 (1965) (concurring opinion) (sixth amendment right of confrontation incorporated into fourteenth amendment).

48. Perhaps this change reflected an attempt by the ordered liberty justices to accommodate their position with the incorporation approach adopted by a majority of the Court in the 1960s. However, neither the erosion of the special circumstances rule nor the existence of the incorporation majority should be equated with the demise of the ordered liberty approach to the due

III. The Incorporation Approach

A. *Justice Black and Total Incorporation*

"I believe that the Fourteenth Amendment made the Sixth applicable to the states,"[49] wrote Justice Black in a 1942 dissenting opinion that represented the first clear embrace of the "incorporation theory" by a contemporary Supreme Court justice.[50] Justice Black, as a total incorporationist, saw the first section of the fourteenth amendment as literally embodying all of the wording and content of the specific guarantees of the first eight amendments.[51] Consequently, he maintained that section one and especially the due process clause of the fourteenth amendment circumscribe state authority in precisely the same manner as the Bill of Rights conditions federal actions.[52]

According to Justice Black, an examination of the debates leading to the adoption of the fourteenth amendment in the Senate and House showed that its sponsors had as their purpose "to make secure against invasion by the states the fundamental liberties and safeguards set out in the Bill of Rights."[53] Incorporation, far from being an act of judicial expansion, was viewed by Justice Black as judicial obedience to the clear historical command of the amendment's proponents in the Congress.

The foundations of the incorporationist approach were not limited to a technical analysis of the legislative history of the fourteenth

process clause. See the concurring opinions of Justices Harlan and Stewart in Williams v. Florida, 399 U.S. 78, 117, 143 (1970).

49. Betts v. Brady, 316 U.S. 455, 474 (1942) (footnote omitted) (Black, J., dissenting), overruled in Gideon v. Wainwright, 372 U.S. 335 (1963). Justices Douglas and Murphy joined in Justice Black's dissent.

50. The incorporation theory, however, did not originate with Justice Black. See Landynski, Due Process and the Concept of Ordered Liberty: "A Screen of Words Expressing Will in the Service of Desire"?, 2 Hofstra L. Rev. 1, 38 n.186 (1974).

Since Betts v. Brady was decided in 1942, Justice Black's opinions invariably have reflected his incorporationist philosophy. E.g., Williams v. Florida, 399 U.S. 78, 108 n.2 (1970) (separate opinion); Duncan v. Louisiana, 391 U.S. 145, 162 (1968) (concurring opinion); Pointer v. Texas, 380 U.S. 400 (1965); Rochin v. California, 342 U.S. 165, 174 (1952) (concurring opinion); Adamson v. California, 332 U.S. 46, 68 (1947) (dissenting opinion); see also H. Black, A Constitutional Faith 23-42 (1969).

51. Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting).

52. See id. at 89-90. An essential element of all traditional incorporation theories is that the fourteenth amendment does not apply to the states merely a watered-down version of the Bill of Rights. Malloy v. Hogan, 378 U.S. 1, 10-11 (1964); see Part IV infra.

53. Betts v. Brady, 316 U.S. 455, 474 n.1 (1942) (Black, J., dissenting). Justice Black later undertook a detailed examination of the legislative history of the first section of the fourteenth amendment. The results were appended to his dissenting opinion in Adamson v. California, 332 U.S. 46, 92-123 (1947). Justice Black's historical analysis of the fourteenth amendment precipitated a wide-ranging debate in the legal periodicals. See note 1 supra and sources listed therein.

amendment. Additionally, Justice Black was concerned that if the ordered liberty concept should prevail, due process would remain a vague phrase interpreted to embody the Court's own changing notions of decency and justice.

> I cannot consider the Bill of Rights to be an outworn 18th Century "strait jacket" as the *Twining* opinion did. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights.[54]

Justice Black often attacked the ordered liberty concept of due process as a "natural law" theory that expands the Supreme Court's power unwisely, unconstitutionally and unnecessarily.[55] For him, the due process clause, if understood as a shorthand formula for the specific guarantees of the Bill of Rights, would eliminate the case-by-case review necessary under the ordered liberty approach. The continual necessity of review by the Supreme Court to determine the nebulous content of the fourteenth amendment guarantees was challenged by Justice Black as failing to provide adequate guidelines for state legislatures and for state courts. In fact, Justice Black decried as vague, inadequate and somewhat baffling the very process by which the Supreme Court justices themselves were to determine the commands of the due process clause.[56]

Justice Black also saw the ordered liberty doctrine as seriously harming the federal division of power by subjecting the states to the whim and caprice of the federal judiciary.[57] He argued that, under the ordered liberty approach, constitutional law was not fixed in the area of procedural guarantees. Consequently, the state courts were not provided with sufficiently precise federal opinions to allow them to predict when a criminal proceeding should be reversed for want of a "fair trial." More importantly, since the finding of a denial of fundamental fairness in a proceeding is based upon the particular facts in that case alone, reversals do not necessarily set adequate general standards for the states to follow.

Essentially Justice Black believed that only total incorporation was

54. Adamson v. California, 332 U.S. 46, 89 (1947) (Black, J., dissenting).
55. Id. at 75.
56. Rochin v. California, 342 U.S. 165, 175-76 (1952) (Black, J., concurring).
57. Adamson v. California, 332 U.S. 46, 82-83 (1947) (Black, J., dissenting).

consistent with "the great design of a written Constitution."[58] Otherwise "the accordion-like qualities of [the ordered liberty] philosophy [would] inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights."[59] The fourteenth amendment, Justice Black contended, did not protect any fewer nor any *more* rights than those specified in amendments one through eight. This close-ended concept of due process distinguished Justice Black from all other incorporationists.[60] Justices who embraced any open-ended concept of due process were categorized by Justice Black as holding a natural law theory of due process.[61] Consequently, Justice Black rejected not only an ordered liberty approach to due process, but also all "emanation" or "penumbra" theories which hold that fundamental rights other than those specifically enumerated in the first eight amendments are also protected by the due process guarantee.[62]

B. *Ultra-Incorporation*

Since the incorporation theory was adopted by Justice Black in 1942, three justices[63] have embraced a variation on the incorporation theme which appropriately might be labeled ultra-incorporation. Unlike the total incorporation position of Justice Black, the ultra-incorporationists accept as a *minimum* guarantee of due process the rights protected by the first eight amendments. Looking beyond those particular guarantees, the ultra-incorporationists believe that the due process protection may well embrace other fundamental rights not specified in the Bill of Rights. These rights may "emanate" from other rights specified in amendments one through eight or they may have an independent existence.[64] Ultra-incorporation might be viewed as

58. Id. at 89.

59. 342 U.S. at 177.

60. See Griswold v. Connecticut, 381 U.S. 479, 507 (1965) (Black, J., dissenting). Justice Black's dissent is crucial to an understanding of his incorporation position. In Griswold, he rejected Justice Douglas' opinion of the Court and Justice Goldberg's concurring opinion because they took the position that rights not specified in the Bill of Rights, such as "marital privacy," are protected by the fourteenth amendment. No other incorporationist justices joined in Justice Black's dissent. Justice Stewart, who did join in Justice Black's dissent, later rejected the incorporation theory in Williams v. Florida, 399 U.S. 78, 144-45 (1970) (Stewart, J., concurring).

61. See Adamson v. California, 332 U.S. 46, 69-73 (1947) (Black, J., dissenting).

62. Compare Justice Black's dissenting opinions in Griswold v. Connecticut, 381 U.S. 479, 507 (1965) and Adamson v. California, 332 U.S. 46, 68 (1947).

63. Justices Murphy, Rutledge and Douglas.

64. Compare Griswold v. Connecticut, 381 U.S. 479 (1965) (Douglas, J.) with Adamson v. California, 332 U.S. 46, 123 (1947) (Murphy, J., dissenting). See Roe v. Wade, 410 U.S. 113, 212 n.4 (1973) (Douglas, J., concurring).

somewhat of an amalgam of the total incorporation position and an open-ended approach to due process. As such it was viewed as an evil by Justice Black, as was any theory with a flexible concept of due process.

The earliest judicial embodiment of ultra-incorporation is contained in Justice Murphy's dissent in *Adamson v. California.*[65] Justice Murphy previously had joined Justice Black's dissent in *Betts v. Brady*[66] and had indicated subsequently that he subscribed to an incorporation theory;[67] but not until his statement in *Adamson* were his differences with Justice Black apparent. There, he reaffirmed his agreement with Justice Black's attempt to gain majority recognition for the incorporation doctrine, but he added a major qualification which clearly distinguished his position:

> While in substantial agreement with the views of Mr. Justice Black, I have one reservation and one addition to make.
>
> I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.[68]

The position of Justice Rutledge paralleled that of Justice Murphy. He concurred in Justice Murphy's dissenting statement in *Adamson,*[69] and like Justice Murphy, did not join Justice Black's dissent. The inflexibility of the Black opinion seems to have been unacceptable to both of them.

Had Justice Douglas passed from the judicial scene at the end of the 1940s, as did Justices Murphy and Rutledge, one would classify him as a total incorporationist similar to Justice Black. Prior to the early 1960s, there was little reason to suspect that they might part company philosophically over the scope of the due process clause. Like Justice Murphy, Justice Douglas had concurred in the original Black in-

65. 332 U.S. 46, 123 (1947) (Murphy, J., dissenting).

66. 316 U.S. 455, 474 (1942) (Black, J., dissenting), overruled in Gideon v. Wainwright, 372 U.S. 335 (1963).

67. Lyons v. Oklahoma, 322 U.S. 596, 605-07 (1944) (Murphy, J., dissenting) (fourteenth amendment prohibition against self-incrimination identical to fifth amendment prohibition).

68. 332 U.S. at 123-24. It is interesting to note that Justice Murphy alludes only to procedural rights which might be protected by the fourteenth amendment in addition to those specified in the first eight amendments. In Roe v. Wade, 410 U.S. 113 (1973), Justice Douglas claimed that Justice Murphy espoused a version of substantive due process. Id. at 212 n.4 (Douglas, J., concurring). See note 81 infra. Ironically, Justice Douglas, himself, at one time attempted to use Justice Murphy's dissent in Adamson as a basis for a substantive due process argument. See Poe v. Ullman, 367 U.S. 497, 516 n.8, 521 n.13 (1961) (Douglas, J., dissenting).

69. 332 U.S. at 123.

corporation opinion in *Betts v. Brady.*[70] Unlike Justice Murphy, however, Justice Douglas chose to join Justice Black's dissent in *Adamson.*[71] Apparently, at that time he had no reservations about the Black opinion or saw no need to express them. What seems most significant is that he chose not to join the Murphy-Rutledge opinion which advocated a broader form of incorporation.

In 1961, evidence emerged that Justice Douglas had abandoned the rigid total incorporation position held by Justice Black. Dissenting in *Poe v. Ullman,*[72] Justice Douglas stated that "[t]hough I believe that 'due process' as used in the Fourteenth Amendment includes all of the first eight Amendments, I do not think it is restricted and confined to them."[73] Justice Douglas noted that the Court in previous cases had used an "emanation" theory to expand protected "liberty" to include such rights as the freedom to travel, the freedom of privacy and the freedom to bring up one's children.[74] Although these liberties, as such, are not mentioned in the Constitution, Justice Douglas maintained that they derive from specific constitutional guarantees or from the conditions essential for the perpetuation of a free society.[75]

There was no immediate reaction from Justice Black. His brief dissent was confined to an expression of regret that the constitutional issues were not "reached and decided."[76] The differences between Justices Douglas and Black concerning the scope of the due process protection became clearer, however, in *Griswold v. Connecticut.*[77] In that case, Justice Douglas, speaking for the Court, embraced an "emanation" theory,[78] whereas Justice Black dissented, sharply denouncing the "emanation" theory and its flexible due process approach as a revived version of natural law.[79]

Taken together, *Poe* and *Griswold* indicate that in 1965 Justice Douglas embraced an ultra-incorporationist position. In 1973, however, in *Roe v. Wade,*[80] Justice Douglas specifically denied subscribing to the Murphy-Rutledge due process approach:

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70. 316 U.S. 455, 474 (1942) (Black, J., dissenting), overruled in Gideon v. Wainwright, 372 U.S. 335 (1963).

71. 332 U.S. at 92.

72. 367 U.S. 497, 509 (1961).

73. Id. at 516.

74. Id. at 516-17, 521. Justice Douglas quoted from Adamson v. California, 332 U.S. 46, 124 (1947) (Murphy, J., dissenting) to support his emanation statement. 367 U.S. at 521 n.13.

75. Id. at 516-17.

76. Id. at 509 (Black, J., dissenting).

77. 381 U.S. 479 (1965).

78. Id. at 482-86.

79. Id. at 509-13, 518-20 (Black, J., dissenting).

80. 410 U.S. 113 (1973).

There are, of course, those who have believed that the reach of due process in the Fourteenth Amendment included all of the Bill of Rights but went further. Such was the view of Mr. Justice Murphy and Mr. Justice Rutledge. . . . Perhaps they were right; but it is a bridge that neither I nor those who joined the Court's opinion in *Griswold* crossed.[81]

The apparent distinction is that Justice Douglas' emanations and penumbras are derived from specific rights found in the first eight amendments, whereas the fundamental rights discussed by Justices Murphy and Rutledge in *Adamson* may exist independently of the Bill of Rights.[82]

C. *Selective Incorporation*

The incorporation majority which emerged on the Supreme Court in the early 1960s contained several justices who regarded the relationship between the Bill of Rights and the fourteenth amendment in a way perhaps most suitably described as a fundamental rights approach to selective incorporation.

Abstractly stated, this view of the fourteenth amendment rests on two basic maxims. First, the due process clause of the fourteenth amendment incorporates *only* those guarantees in the first eight amendments that are fundamental to justice and a free society. Second, the due process clause protects other fundamental rights which may not be mentioned in the Bill of Rights. Implicit in the first proposition has been the assumption that some of the guarantees of the first eight amendments are not incorporated into the fourteenth amendment.[83] Implicit in the second proposition is the belief that due process is not delimited by the Bill of Rights.[84] Consequently, selective

81. Id. at 212 n.4 (Douglas, J., concurring). Justice Douglas' rejection of the Murphy-Rutledge approach appears to be based on the misconception that Justice Murphy's opinion in Adamson was equivalent to a reintroduction of substantive due process. Id. Justice Douglas' characterization of the Murphy-Rutledge approach seems unjustified. See note 68 supra.

82. The validity of this distinction is placed in doubt by Justice Douglas' dissenting opinion in Poe v. Ullman, 367 U.S. 497, 517 (1961). See note 74 supra. On the other hand, in a concurring opinion in Griswold, Justice Harlan also perceived a strict incorporationist approach by Justice Douglas. "[The Court's opinion] seems to me to evince an approach to this case very much like that taken by my Brothers Black and Stewart in dissent, namely: the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights." 381 U.S. at 499 (Harlan, J., concurring); see Landynski, Due Process and the Concept of Ordered Liberty: "A Screen of Words Expressing Will in the Service of Desire"?, 2 Hofstra L. Rev. 1, 41 (1974). Ultimately, however, the distinction may be a semantic one, since an expansive reading of the Bill of Rights automatically results in an expansive reading of the due process clause of the fourteenth amendment.

83. Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 Yale L.J. 74, 76 (1963).

84. Id.

incorporationists subscribe to a flexible due process theory which resembles the ultra-incorporationist and the ordered liberty approaches to due process. The basic distinction between a justice who subscribes to an ultra-incorporation position and one who embraces the fundamental rights approach of selective incorporation seems to be that the former begins with a total incorporation position and adds other fundamental rights, while the latter selectively incorporates from amendments one through eight only those rights deemed fundamental and then adds other fundamental rights. Each theory is essentially open-ended and, as such, is irreconcilable with the closed-ended due process doctrine characteristic of total incorporation.

In the early 1960s, the spokesmen for selective incorporation were Justices Brennan and Goldberg.[85] Justice Brennan subscribed to the principles of incorporation as early as 1960. In a dissent in *Ohio ex rel. Eaton v. Price,*[86] joined by Chief Justice Warren and Justices Douglas and Black, Justice Brennan rejected the ordered liberty doctrine, stating that, although he neither "accepted nor rejected" the proposition that all the guarantees of the Bill of Rights are enforceable against the States, it was clear that the process of "absorption" used by Justice Cardozo in *Palko* was an early manifestation of selective incorporation.[87] Then, focusing on the major tenet of all traditional incorporation approaches to due process, Justice Brennan pointed out that once the fourteenth amendment absorbs a Bill of Rights guarantee, it is applied against the states with a force equal to that exerted upon the federal government.[88]

Justice Brennan elaborated his *Eaton* position the following term. In *Cohen v. Hurley,*[89] he wrote a lengthy dissent which set forth his view of the judicial history of selective incorporation. Repudiating once again the ordered liberty approach to due process, Justice Brennan repeated that a right "absorbed" from the Bill of Rights into the fourteenth amendment does not have diminished efficacy. Further, he charged that those justices who believed that due process has an "independent potency" not reliant upon the Bill of Rights were simply

85. Although Chief Justice Warren did not delineate the tenets of selective incorporation in any of his written opinions, he joined in the important Brennan opinions which did. E.g., Malloy v. Hogan, 378 U.S. 1 (1964).

86. 364 U.S. 263 (1960).

87. Id. at 274-75. Justice Brennan's absorption argument is similar to a theory developed by Justice Black in Adamson v. California, 332 U.S. 46, 85-86, 89 (1947) (Black, J., dissenting). Classification of Justice Cardozo as the first selective incorporationist would appear to be inaccurate. See note 21 supra and note 148 infra.

88. See 364 U.S. at 274-75; see also Part IV infra.

89. 366 U.S. 117, 154 (1961) (Brennan, J., dissenting), overruled in Spevack v. Klein, 385 U.S. 511 (1967). Chief Justice Warren joined in Justice Brennan's dissent.

refusing to accept the reality of incorporation—a process the Court had, in fact, been employing selectively for many decades.[90] This interpretation of *Palko* became the view of the Court's majority when Justice Goldberg, in 1964, joined Justices Black and Douglas, and Chief Justice Warren to support Justice Brennan's opinion in *Malloy v. Hogan*.[91]

In *Pointer v. Texas*,[92] his earliest statement on incorporation, Justice Goldberg subscribed to Justice Brennan's analysis of judicial history. "I adhere to and support the process of absorption by means of which the Court holds that certain fundamental guarantees of the Bill of Rights are made obligatory on the States through the Fourteenth Amendment."[93] By holding that only certain guarantees of the Bill of Rights are obligatory against the states, Justice Goldberg's opinion in *Pointer* had the ring of selective incorporation. In *Griswold v. Connecticut*[94] Justice Goldberg noted, "I do not take the position of my Brother Black in his dissent in *Adamson* . . . that the entire Bill of Rights is incorporated in the Fourteenth Amendment . . . ."[95] Justice Goldberg's concurring opinion in *Griswold* is typical of the selective incorporation approach. Not only did he discard any notion of total incorporation, but, with Chief Justice Warren and Justice Brennan joining him, he also endorsed the incorporation of only fundamental rights. Further, he argued in favor of an open-ended due process concept. First, Justice Goldberg indicated that although he had "not accepted the view that 'due process' as used in the Fourteenth Amendment incorporates all of the first eight Amendments," he did agree that "the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights."[96] Then, citing James Madison and Justice Story to buttress his flexible due process stance against Justice Black's dissent,[97] Justice Goldberg argued that the ninth amendment[98] was written in response to fears that the explicit protection of certain rights in the Constitution could be interpreted as negating the existence of rights not specified.

90. Id. at 156-57.

91. 378 U.S. 1, 10-11 (1964).

92. 380 U.S. 400, 410 (1965) (Goldberg, J., concurring). In Pointer, the sixth amendment right of confrontation was incorporated into the fourteenth amendment. Justice Goldberg also joined in the opinion of the Court.

93. Id. at 414.

94. 381 U.S. 479 (1965).

95. Id. at 492 (Goldberg, J., concurring).

96. Id. at 486.

97. Id. at 507 (Black, J., dissenting).

98. U.S. Const. amend. IX: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Thus, Justice Goldberg reasoned, the very presence of the ninth amendment bears witness that its framers recognized the existence of fundamental rights other than those specified in the first eight amendments.[99]

It can be concluded that the judicial development of the fourteenth amendment has placed primary emphasis on the flexibility of the due process clause. The ordered liberty justices, the ultra-incorporationists and the selective incorporationists all have agreed that the due process clause is not a mere shorthand version of the Bill of Rights. Only Justice Black equated the two constitutional concepts. His consistent adherence to the total incorporationist approach placed him in the anomalous position of advocating an expansive reading of the due process clause during the 1940s and 1950s and a restrictive reading of the due process clause during the 1960s. Throughout, however, his preeminent concern was the preservation of the virtues of a written constitution.[100] Justice Black believed that the strictures of a written constitution would restrain the members of the Court from introducing their own notions of constitutional right and wrong into the vague contours of the due process clause.[101] As noted by Justice Harlan, however, it would appear that Justice Black's formula for implementing judicial self-restraint was unrealistic.

> While I could not more heartily agree that judicial "self restraint" is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real. "Specific" provisions of the Constitution, no less than "due process," lend themselves as readily to "personal" interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed "tune with the times". . . .[102]

IV. The Genesis of Neo-Incorporation

Although mentioned above,[103] a crucial axiom of the ordered liberty approach to due process represented by Justice Harlan must be explored further. If a particular procedural right—which also happens to be protected by the Bill of Rights—is held to be "implicit in the concept of ordered liberty,"[104] federal guidelines defining that right in

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99. 381 U.S. at 488-90.

100. See text accompanying notes 58-59 supra.

101. See text accompanying note 54 supra. On the other hand, "[a] dislike for natural law jurisprudence does not incorporate the Bill of Rights against the States." Richter, One Hundred Years of Controversy: The Fourteenth Amendment and the Bill of Rights, 15 Loyola L. Rev. 281, 294 (1968-69).

102. Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).

103. See text accompanying notes 19-21 supra.

104. See text accompanying note 15 supra.

a federal criminal proceeding do not automatically apply to the states. Justice Harlan made this point carefully in *Gideon v. Wainwright*:[105]

> When we hold a right or immunity, valid against the Federal Government, to be "implicit in the concept of ordered liberty" and thus valid against the States, I do not read our past decisions to suggest that by so holding, we automatically carry over an entire body of federal law and apply it in full sweep to the States.[106]

Under an ordered liberty approach, the states should be free to develop their own criminal procedures—or to adopt the federal rules *if they choose*—so as to guarantee the procedural rights held implicit in the concept of ordered liberty. For example, under Justice Harlan's approach the exact nature of the right to counsel can vary from state to state under the fourteenth amendment as long as the right is sufficiently implemented to be effective.

Precisely the opposite principle is reflected in all the traditional incorporation approaches to the fourteenth amendment. Justice Brennan's majority opinion in *Malloy v. Hogan*,[107] incorporating the fifth amendment privilege against self-incrimination, stated this incorporation principle succinctly: "The Court . . . has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights' . . . ."[108] The *traditional* incorporationist justices believe that when a right, whether procedural or substantive,[109] is incorporated

105. 372 U.S. 335 (1963).

106. Id. at 352 (Harlan, J., concurring) (footnote omitted).

107. 378 U.S. 1 (1964).

108. Id. at 10-11. Justice Brennan is quoting his own dissent in Ohio ex rel. Eaton v. Price, 364 U.S. 263, 275 (1960).

109. It has been suggested that only incorporated substantive rights be applied against the states with equal force as against the federal government. See Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 Yale L.J. 74, 84-88 (1963). The judicial development of the due process schools focused upon procedural due process in state criminal proceedings. Consequently, this Article emphasizes this area of the debate since it tends most clearly to illuminate the philosophical differences among the various schools. It should be noted, however, that recently the due process clause has provided a basis for significant changes in the area of "substantive" due process and procedural due process in civil proceedings.

Substantive due process at one time referred to constitutional restraints placed upon state regulation of private property. It is generally agreed that this economic substantive due process is no longer viable. "[W]ith the New Deal the very words became unmentionable for the Court." Henkin, Privacy and Autonomy, 74 Colum. L. Rev. 1410, 1417 (1974). It has been suggested that economic substantive due process may be enjoying a rebirth under the guise of the application of the federal antitrust laws to state regulatory schemes. Verkuil, State Action, Due Process and Antitrust: Reflections on Parker v. Brown, 75 Colum. L. Rev. 328, 329-40 (1975).

More recently, the "liberty" of Adam Smith has been supplanted by that of John Stuart Mill. See Henkin, Privacy and Autonomy, 74 Colum. L. Rev. 1410, 1417 (1974). The focus of this new substantive due process has been the protection of political and civil liberties. See Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 Yale L.J. 74, 85 (1963). In the early

from the Bill of Rights into the fourteenth amendment, it limits state power with exactly the same force as the particular amendment conditions federal power.[110] The erosion of this basic maxim of the traditional incorporation approach characterizes the development of "neo-incorporation."

When Justice Stewart joined the Court in 1958,[111] the ordered liberty majority was still intact.[112] Only Justices Black and Douglas were firmly convinced of the correctness of the incorporation approach to due process. Initially, Justice Stewart identified with the ordered

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1960s the new substantive due process was thought to include the substantive rights protected by the first and fourth amendments. Id. at 85-88. Both due process schools generally agreed, in fact if not in theory, that the substantive rights of the first and fourth amendments extended to the states by virtue of the fourteenth. See Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959) (first amendment applicable to the states); Wolf v. Colorado, 338 U.S. 25 (1949) (right of privacy, at core of fourth amendment, applicable to the states but exclusionary rule not applicable to the states), overruled in Mapp v. Ohio, 367 U.S. 643 (1961); Frankfurter, Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746, 747-49 (1965). But see Roth v. United States, 354 U.S. 476, 505-06 (1957) (Harlan, J., separate opinion).

Most recently, substantive due process has been associated with the emerging right of privacy. See Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965); Epstein, Substantive Due Process by Any Other Name: The Abortion Cases, 1973 Sup. Ct. Rev. 159; Henkin, Privacy and Autonomy, 74 Colum. L. Rev. 1410 (1974); Kauper, Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case, 64 Mich. L. Rev. 235 (1965); Tribe, Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1 (1973).

Additionally, procedural due process in civil actions has gained in importance in recent years. See Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelley, 397 U.S. 254 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). These cases have so expanded the right to procedural due process that "it has been suggested that due process serves as a general prohibition of government arbitrariness . . . ." The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 84-85 (1974). The Burger Court has limited the expansion of procedural due process in this area. See Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Arnett v. Kennedy, 416 U.S. 134 (1974); Board of Regents v. Roth, 408 U.S. 564 (1972).

110. For this reason, federal case law relating to a particular amendment may be used when applying the amendment to the states.

111. Justice Stewart replaced Justice Burton, an ordered liberty justice. See, e.g., Bute v. Illinois, 333 U.S. 640, 648 (1948).

112. The adherence to ordered liberty–fair trial principles by Justices Frankfurter and Harlan was clear. Chief Justice Warren and Justice Brennan had not yet endorsed selective incorporation; both had joined in or written opinions which employed the fair trial terminology associated with ordered liberty. Justice Brennan used the fair trial approach in Moore v. Michigan, 355 U.S. 155 (1957). He also joined in Justice Burton's opinion in Ashdown v. Utah, 357 U.S. 426 (1958) and Justice Clark's opinion in Breithaupt v. Abram, 352 U.S. 432 (1957), both of which followed the fair trial approach. In his dissents in Breithaupt, supra at 440, and Hoag v. New Jersey, 356 U.S. 464, 473 (1958) and in his majority opinion in Blackburn v. Alabama, 361 U.S. 199 (1960), Chief Justice Warren also used the fair trial approach.

liberty group. In 1959, he joined in the extensively documented Frankfurter denunciation of incorporation in *Bartkus v. Illinois.*[113] Two years later, Justice Stewart's vote was decisive in *Cohen v. Hurley*[114] which sustained the *Twining* and *Adamson* precedents against an enlarged incorporationist minority of Chief Justice Warren and Justices Black, Douglas and Brennan. Shortly thereafter, Justice Stewart began shifting his approach to due process.

The earliest manifestation of Justice Stewart's due process transition is his memorandum opinion in *Mapp v. Ohio.*[115] There, he concurred with Justice Harlan's dissent only insofar as it criticized the majority's view that the controlling constitutional issue of the case was the admissibility of evidence seized without a search warrant. Justice Stewart did not join in the rest of Justice Harlan's opinion which reiterated the concept of privacy implicit in ordered liberty.[116]

Eventually, Justice Stewart dealt with the constitutional issue decided by the majority in *Mapp.* In *Lanza v. New York,*[117] Justice Stewart's opinion for the Court acknowledged that the fourth amendment had been incorporated into the fourteenth. *Mapp* was cited with apparent approval.[118] Justice Stewart considered it "settled" that the fourteenth amendment is a guarantee against the unreasonable conduct of state officials "like" that of the fourth amendment against federal officers.[119]

Three weeks after *Lanza,* in *Robinson v. California,*[120] Justice Stewart held that a state statute which punished drug addiction with imprisonment prescribed a cruel and unusual punishment in violation of the fourteenth amendment. The language employed by Justice Stewart implied that there is no distinction between the eighth and fourteenth amendment guarantees.[121]

Perhaps the most convincing evidence that Justice Stewart had moved toward some kind of incorporation position is found in his

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113. 359 U.S. 121 (1959). Justice Frankfurter stated: "We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such." Id. at 124.

114. 366 U.S. 117 (1961), overruled in Spevack v. Klein, 385 U.S. 511 (1967).

115. 367 U.S. 643, 672 (1961).

116. Id. at 678-86.

117. 370 U.S. 139 (1962).

118. Id. at 142.

119. Id. Justice Harlan, concurring, conditioned his agreement on the understanding that he did not see Justice Stewart's opinion as incorporating the fourth amendment. Id. at 147.

120. 370 U.S. 660 (1962).

121. Id. at 666. That Chief Justice Warren and Justices Black, Douglas and Brennan joined in Justice Stewart's opinion lends support to the inference that Justice Stewart was realigning himself with the incorporationists.

opinions for the Court in *Stoner v. California*[122] and *Stanford v. Texas*.[123] In both decisions, Justice Stewart used federal cases to determine the scope of the fourteenth amendment guarantee against unreasonable searches and seizures.[124] By so doing, he assumed that the fourteenth amendment protection was identical with that of the fourth amendment and that federal cases establishing the meaning of the latter could also be used to determine the meaning of the former.

Scrutinized carefully, however, there is a significant distinction between Justice Stewart's understanding of incorporation and that of the other incorporationists on the Warren Court or even of an ordered liberty proponent like Justice Harlan. This distinction is highlighted by their respective opinions in *Griffin v. California*[125] in which Justice Douglas, joined by Justices Black, Brennan, Goldberg and Clark, held that the "no-comment" rule[126] was part of the fifth amendment privilege against self-incrimination incorporated into the fourteenth. As such, the rule prohibited comment in state courts upon the refusal of a defendant to take the stand in his own defense.[127]

Understanding incorporation to fully apply the federal standards to state proceedings, Justice Harlan concurred in the decision. Accepting incorporation of the fourth and fifth amendments as settled doctrine, Justice Harlan concurred in *Griffin,* as he had in *Aguilar v. Texas,*[128] lest he contribute to weakening the procedural safeguards binding on the federal government. After incorporation, Justice Harlan saw no distinction between the guarantees of the fourth and fifth amendments and those of the fourteenth.

> I agree with the Court that within the federal judicial system the Fifth Amendment bars adverse comment by federal prosecutors and judges on a defendant's failure to take the stand in a criminal trial, a right accorded him by that amendment. And given

122. 376 U.S. 483 (1964).

123. 379 U.S. 476 (1965).

124. 376 U.S. at 488; 379 U.S. at 481. See note 110 supra and accompanying text.

125. 380 U.S. 609 (1965).

126. The "no-comment" rule is operative in the federal courts and generally precludes the prosecutor or the judge from commenting to the jury on the failure of a defendant to take the stand in a proceeding against him.

127. "We said in Malloy v. Hogan . . . that 'the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.' We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." 380 U.S. at 615 (footnote omitted).

128. 378 U.S. 108, 116 (1964). In Aguilar, Justice Goldberg, citing federal cases, reversed a state narcotics conviction because the evidence of heroin possession was obtained pursuant to a search warrant issued without a showing of probable cause under fourth amendment standards. Id. at 109-16.

last Term's decision in *Malloy v. Hogan* . . . that the Fifth Amendment applies to the States in all its refinements, I see no legitimate escape from today's decision and therefore concur in it. I do so, however, with great reluctance, since for me the decision exemplifies the creeping paralysis with which this Court's recent adoption of the "incorporation" doctrine is infecting the operation of the federal system.[129]

But Justice Stewart was not so constrained. In his *Griffin* dissent, he argued that the "no-comment" rule, which grew out of an act of Congress,[130] was not part of the fifth amendment. Instead, Justice Stewart maintained that within the broadly construed confines of the fifth amendment, the states should be free to promulgate their own procedural rules in this area.[131] Justice Stewart's opinion in *Griffin* accepted the language of incorporation but rejected its essence. He indicated that incorporation of a federal procedural right does not necessarily preempt the states' supervisory procedural powers.[132] The necessity of this preemption was previously regarded as one of the fundamental distinctions between the incorporation and ordered liberty approaches to due process.[133] In seeking to apply to the states only the general principles of the fifth amendment guarantee against self-incrimination, Justice Stewart in effect abandoned the traditional understanding of incorporation[134] in favor of a new concept—"neo-incorporation."[135]

Neo-incorporation appears to embrace the terminology of the traditional incorporation approach but not its substance. According to the neo-incorporation approach, a procedural right, which is admittedly incorporated from the Bill of Rights into the fourteenth amendment,

129. 380 U.S. at 615-16.

130. Id. at 620 n.4.

131. Id. at 623.

132. Id.

133. See text accompanying notes 103-10 supra.

134. Subsequent to his opinions in Griffin, Justice Stewart has continued to exhibit a less than straightforward approach to the due process clause of the fourteenth amendment. He joined Justice Harlan's dissents attacking incorporation in Benton v. Maryland, 395 U.S. 784, 801 (1969) and Duncan v. Louisiana, 391 U.S. 145, 171 (1968). In 1970, Justice Stewart himself denounced the incorporation theory in Williams v. Florida, 399 U.S. 78, 143 (1970) (concurring opinion). In 1972, however, concurring with the incorporationists, Justice Stewart wrote dissents to Johnson v. Louisiana, 406 U.S. 356, 397 (1972) and Apodaca v. Oregon, 406 U.S. 404, 414 (1972). There, he argued that the sixth amendment right to a jury trial was incorporated by Duncan and that this right includes the unanimity rule.

135. Another commentator, recognizing the same dichotomy which gave rise to the concept of neo-incorporation, offers an alternative explanation. Rights which are deemed fundamental should be totally incorporated; therefore, federal standards will apply to the states. If, however, a right is not fundamental, the federal standards need not be applied to the states unless "under the peculiar circumstances of the case the facts show that an accused person has been denied essential justice or fairness . . . ." Bartholomew, The Gitlow Doctrine Down to Date, 50 A.B.A.J. 139, 141 (1964).

may have a different effect on procedures in state criminal cases than the original right has on procedures in federal criminal prosecutions.

An example of neo-incorporation is Justice Fortas' concurring opinion in *Duncan v. Louisiana.*[136] After joining the Court's opinion incorporating the sixth amendment's guarantee of trial by jury in all non-petty criminal prosecutions, Justice Fortas in his own opinion disagreed with the interpretation that the fourteenth amendment required following "not only the Sixth Amendment but all of its bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings."[137] Arguing that the states should have leeway to develop their own concept of trial by jury, Justice Fortas saw no reason whatever to assume that the incorporation of this sixth amendment right required imposition on the states of ancillary federal rules or "federal requirements such as unanimous verdicts or a jury of 12 . . . ."[138]

Justice White, like Justice Stewart, a holdover from the Warren Court, has also followed a neo-incorporationist fourteenth amendment approach. Justice White's concurrence with the majority in *Aguilar v. Texas*[139] and in *Pointer v. Texas*[140] indicates his basic incorporationist tendencies, as does his opinion for the Court in *Duncan v. Louisiana.*[141]

Even though he has supported the general principle of extending many of the specific Bill of Rights guarantees to the states, Justice White frequently differed with the Warren Court's traditional incorporationists[142] as to the scope of those guarantees and the limitations which they place on state authority. Justice White's dissenting opinions in *Robinson v. California,*[143] *Malloy v. Hogan,*[144] and *Escobedo v. Illinois*[145] reflect these differences.

Justice White's agreement with Justice Stewart's dissent in *Griffin v. California*[146] and his subsequent opinions and voting record on the

136. 391 U.S. 145, 211 (1968).

137. Id. at 213; see Comment, Due Process and Jury Trials in State Courts, 10 Ariz. L. Rev. 492, 504 (1968).

138. 391 U.S. at 213.

139. 378 U.S. 108 (1964).

140. 380 U.S. 400 (1965) (incorporating the sixth amendment right of confrontation).

141. 391 U.S. 145 (1968) (incorporating the sixth amendment right to trial by jury in all nonpetty criminal cases). Justice White rejected the ordered liberty approach to the due process clause. Id. at 149 n.14.

142. Chief Justice Warren and Justices Black, Douglas, Brennan and Goldberg.

143. 370 U.S. 660, 685 (1962).

144. 378 U.S. 1, 33 (1964).

145. 378 U.S. 478, 495 (1964).

146. 380 U.S. 609, 617 (1965). Justice Stewart's dissent in Griffin is discussed in the text accompanying notes 130-35 supra.

Burger Court attest to his continued fidelity to a narrow construction of incorporated procedural rights and his belief in the primacy of state autonomy over criminal procedures, both of which characterize neo-incorporation.

V. The Rise of Neo-Incorporation: The Burger Court

Of the judges on the Burger Court, the due process approaches of Justice Marshall and the four Nixon appointees remain to be considered.

Justice Marshall is an incorporationist—most likely a selective incorporationist. His opinion for the Court in *Benton v. Maryland*[147] rejected the philosophy of and overruled the holding of *Palko*.[148] Justice Marshall noted that the Court has " 'increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law.' "[149]

Justice Marshall also is a traditional incorporationist, as distinct from a neo-incorporationist, because of his view that "[o]nce it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice' . . . the same constitutional standards apply against both the State and Federal Governments."[150]

At first glance it appears that the four Nixon appointees[151] have also embraced some kind of incorporationist approach and several of the Burger Court's decisions support this conclusion.

In *Procunier v. Martinez*,[152] the opinion of the Court delivered by Justice Powell evidenced little distinction between the relationship of the first and fourteenth amendments. With Justice Rehnquist writing the opinion of the Court in *Michigan v. Tucker*,[153] the majority—

147. 395 U.S. 784 (1969), noted in 23 Vand. L. Rev. 835 (1970).

148. 395 U.S. at 794. At one time it was claimed that the doctrine of selective incorporation was derived from Palko. See note 21 supra. This theory has been criticized. Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 Yale L.J. 74, 80-81 (1963). Professor Henkin correctly predicted that once the Court incorporated the double jeopardy provision "the doctrine of selective incorporation would require the Court to apply the double jeopardy provision whole, and to overrule Palko!" Id. at 81.

149. 395 U.S. at 794, quoting Washington v. Texas, 388 U.S. 14, 18 (1967); see Gustafson v. Florida, 414 U.S. 260, 267 (1973) (Marshall, J., dissenting); United States v. Robinson, 414 U.S. 218, 238 (1973) (Marshall, J., dissenting); Schneble v. Florida, 405 U.S. 427, 432 (1972) (Marshall, J., dissenting); Williams v. Florida, 399 U.S. 78, 116 (1970) (Marshall, J., dissenting in part); Benton v. Maryland, 395 U.S. 784 (1969).

150. 395 U.S. at 795.

151. Chief Justice Burger, appointed June 23, 1969, replaced Chief Justice Warren. Justice Blackmun, appointed May 14, 1970, replaced Justice Fortas. Justice Powell, appointed December 9, 1971, replaced Justice Black. Justice Rehnquist, appointed December 15, 1971, replaced Justice Harlan.

152. 416 U.S. 396 (1974).

153. 417 U.S. 433 (1974).

which included the Chief Justice and Justices Blackmun and Powell—cited with apparent approval *Malloy's* incorporation of the fifth amendment privilege against self-incrimination[154] and *Griffin's* interpretation of the privilege to include the "no-comment" rule.[155] Similarly, in *Davis v. Alaska,*[156] Chief Justice Burger—joined by Justices Blackmun and Powell, as well as Justices Douglas, Brennan, Stewart and Marshall—reversed the petitioner's conviction based on the failure of the trial court to apply fully the right of confrontation incorporated by *Pointer v. Texas* and *Douglas v. Alabama.*[157] Additionally, the dissent by Justice White, in which Justice Rehnquist joined, did not challenge Chief Justice Burger's premise that the sixth amendment right of confrontation has been incorporated within the due process clause.[158] In *Cady v. Dombrowski,*[159] the Court's opinion by Justice Rehnquist and the dissent by Justice Brennan[160] assumed that the fourth amendment ban on unreasonable searches and seizures is applicable to the states.[161]

Though the foregoing cases establish the incorporationist tendencies of the Nixon appointees, the evidence is ample that, regarding several important Bill of Rights procedural guarantees, they are not *traditional* incorporationists. Together with the votes of Justices White or Stewart or both, a neo-incorporationist majority in procedural rights now dominates the Burger Court.

A. *Neo-Incorporation and the Right to Jury Trial*

In 1968, Justice White, speaking for the Court in *Duncan v. Louisiana,*[162] held "that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee."[163] It appeared that this federal right with all its particulars had been made applicable to state courts. However, the neo-incorporationist tendencies of the Burger Court majority, which includes Justice White, have led to a significantly different result.

154. Id. at 440.

155. Id. at 441 n.14.

156. 415 U.S. 308 (1974).

157. Id. at 315.

158. Id. at 321.

159. 413 U.S. 433 (1973), noted in 35 U. Pitt. L. Rev. 712 (1974).

160. 413 U.S. at 450. Justice Brennan was joined by Justices Douglas, Marshall and Stewart.

161. More recent cases also indicate that the present members of the Court subscribe to some kind of incorporation position. See, e.g., Breed v. Jones, 419 U.S. 894 (1975); Daniel v. Louisiana, 420 U.S. 31 (1975). But see Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (Rehnquist, J., dissenting).

162. 391 U.S. 145 (1968).

163. Id. at 149.

In *Williams v. Florida*,[164] Justice White, again speaking for the Court, held that "the 12-man panel is not a necessary ingredient of 'trial by jury' . . . ."[165] Justices Douglas and Black agreed to this holding which allowed for a de facto double standard for jury membership in federal and state trials.[166] Only Justice Marshall dissented based on his belief that the sixth amendment does require a twelve person jury.[167] Thus, for Justice Marshall the fourteenth amendment also requires a panel of twelve in state criminal cases.

Johnson v. Louisiana[168] and *Apodaca v. Oregon*[169] are true Burger Court decisions, Justices Powell and Rehnquist having succeeded Justices Black and Harlan. In both cases a neo-incorporationist approach replaced traditional incorporation principles. In *Johnson*, Justice White, speaking for a majority which included all the Nixon appointees, addressed the issue of whether the fourteenth amendment's incorporated right to trial by jury required a unanimous verdict.[170] Noting that the Court had "never held jury unanimity to be a requisite of due process of law,"[171] Justice White upheld the state trial court's nine to three verdict of guilty.[172]

Although there was no opinion of the Court in *Apodaca v. Oregon*,[173] Justice White, in announcing the judgment of the Court,[174] spoke again to the key constitutional issue dividing the justices.

> In *Williams v. Florida* . . . we had occasion to consider a related issue: whether the Sixth Amendment's right to trial by jury requires that all juries consist of 12 men.

164. 399 U.S. 78 (1970); see Note, The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense, 81 Yale L.J. 1342 (1972).

165. 399 U.S. at 86. To be accurate the Williams decision was not truly a Burger Court product. Of the two Nixon appointees then on the Court, only Chief Justice Burger participated in the case although Justice Blackmun had taken his seat on the Court some thirteen days before the decision was announced.

166. Id. at 107. Justices Douglas and Black attempted to maintain a traditional incorporationist view while upholding the constitutionality of a less than twelve person state criminal jury. For these two justices, the fourteenth amendment was not seen as a vehicle carrying different procedures to the states. Rather, they construed the sixth amendment as not requiring a twelve person jury in federal cases; therefore, the fourteenth amendment does not place such a requirement on the states. Id.

167. Id. at 116-17. Justice Marshall quoted Thompson v. Utah, 170 U.S. 343 (1898), in which the Court stated that the sixth amendment guarantees a jury "of twelve persons, neither more nor less." Id. at 349.

168. 406 U.S. 356 (1972), noted in 61 Geo. L.J. 223 (1972).

169. 406 U.S. 404 (1972).

170. 406 U.S. 356, 357-58 (1972).

171. Id. at 359.

172. Id. at 365.

173. 406 U.S. 404 (1972).

174. Justice White's opinion was joined in by Chief Justice Burger and Justices Blackmun and Rehnquist.

After considering the history of the 12-man requirement and the functions it performs in contemporary society, we concluded that it was not of constitutional stature. We reach the same conclusion today with regard to the requirement of unanimity.[175]

In both *Johnson* and *Apodaca,* the three traditional incorporationists—Justices Douglas, Brennan and Marshall—dissented.[176] Their objections were expressed in Justice Douglas' dissenting opinion which denounced the neo-incorporationist principles at work.[177] Seeing the unanimity rule as part of the constitutional guarantee of trial by jury, Justice Douglas argued that "[t]he result of today's decisions is anomalous: though unanimous jury decisions are not required in state trials, they are constitutionally required in federal prosecutions. How can that be possible when both decisions stem from the Sixth Amendment?"[178] Reviewing several of the previous cases which incorporated Bill of Rights guarantees, Justice Douglas emphasized the frequently repeated *Malloy* phrase—that the fourteenth amendment does not impose upon the states a "watered down" version of the Bill of Rights. Justice Douglas concluded by stating, "I would construe the Sixth Amendment, when applicable to the States, precisely as I would when applied to the Federal Government."[179] Lack of common subscription to this principle separates the traditional and neo-incorporationists in other procedural rights cases as well.

B. *Neo-Incorporation and the Protection Against Double Jeopardy*

In 1972 the Supreme Court, in a per curiam opinion, dismissed the writ of certiorari which it earlier had granted in *Duncan v. Tennessee.*[180] That case raised the issue whether the fifth amendment double jeopardy restriction, incorporated into the fourteenth amendment in *Benton v. Maryland,*[181] prohibited a second trial for armed robbery where the second indictment was identical in all respects to the first except in the description of the weapon.[182]

175. 406 U.S. at 406.

176. Justice Stewart, having denounced the incorporation approach to the fourteenth amendment in Williams v. Florida, 399 U.S. 78, 143 (1970) (concurring opinion), wrote a dissenting opinion in both these cases stating, as did the three traditional incorporationists, that Duncan incorporated the sixth amendment right to a jury trial and that this right includes the unanimity rule. 406 U.S. at 414. See also note 134 supra.

177. 406 U.S. at 380.

178. Id. at 383.

179. Id. at 388.

180. 405 U.S. 127 (1972) (per curiam).

181. 395 U.S. 784 (1969).

182. The first trial, based on an erroneous indictment charging a pistol was used, ended in a directed jury verdict for acquittal. The second indictment, which charged that a 22 caliber rifle was used, led to the conviction which was appealed. 405 U.S. at 128-29.

While the neo-incorporationist majority held that the case did not present a clear double jeopardy issue because those questions were closely interrelated with Tennessee's rules of criminal pleading,[183] the Court's three traditional incorporationists dissented, arguing that federal fifth amendment standards were clear and should be applied.[184] Justice Brennan, citing *Green v. United States*,[185] stated that "a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again."[186] Further Justice Brennan stressed the Court's holding in *Kepner v. United States*:[187] "It has long been the rule of this Court that 'former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict, *and it was found upon a defective indictment.*' "[188] Concluding that "[t]he majority's refusal to address these issues [was] inexplicable,"[189] the dissent argued that the double jeopardy protection under the fourteenth amendment should be the same as under the fifth amendment and that federal cases made clear the substance of the fifth amendment guarantee. A traditional incorporation approach to the fourteenth amendment would have had it so. Instead, because of the dismissal of the writ of certiorari, the guilty verdict in the second trial stood, thus establishing a different double jeopardy standard in the state courts.

Another proposition concerning double jeopardy that separated the three remaining traditional incorporationists from the rest of the Burger Court involved the so-called "single transaction" principle. Since *Ashe v. Swenson*,[190] Justices Brennan, Douglas and Marshall have maintained that after *Benton* incorporated the fifth amendment protection against double jeopardy, prosecutions must "join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction."[191] Although the Court in *Harris v. Washington*[192] made clear that "collateral estoppel in criminal trials is an integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments,"[193] in *Robinson*

183. Id. at 127.

184. Id. Justice Brennan's dissent was joined by Justices Douglas and Marshall.

185. 355 U.S. 184 (1957).

186. 405 U.S. at 130-31, quoting Green v. United States, 355 U.S. 184, 188 (1957).

187. 195 U.S. 100 (1904).

188. 405 U.S. at 131, quoting Kepner v. United States, 195 U.S. 100, 130 (1904) (emphasis added by Justice Brennan).

189. 405 U.S. at 133.

190. 397 U.S. 436 (1970).

191. Id. at 453-54 (Brennan, J., concurring).

192. 404 U.S. 55 (1971).

193. Id. at 56. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443.

v. Neil,[194] Justice Rehnquist, writing for the majority, implied that the "dual sovereignties" concept enunciated in *Bartkus v. Illinois*[195] was not precluded by collateral estoppel.[196] Thus, under *Bartkus,* where a single criminal act violates both state and federal law, each sovereignty may constitutionally prosecute once. It is these multiple prosecutions arising out of a single transaction that have caused concern to Justices Brennan, Douglas and Marshall; they would use the single transaction test to give a greater restrictive effect to the constitutional prohibitions against double jeopardy.[197]

C. *Neo-Incorporation and the Right of Confrontation*

Schneble v. Florida[198] is another Burger Court decision which reflects the dual standard concerning procedural rights characteristic of neo-incorporation. Writing for the Court, Justice Rehnquist held that the admission of a confession of guilt by a codefendant is harmless error in a state criminal case when there is independent evidence to support a jury verdict.[199] *Schneble* originally had been remanded by the Warren Court[200] to the Florida Supreme Court for further consideration in light of the United States Supreme Court's decision in *Bruton v. United States.*[201] *Bruton* in effect held that

> despite instructions to the jury to disregard the implicating statements in determining the codefendant's guilt or innocence, admission at a joint trial of a defendant's extrajudicial confession implicating a codefendant violated the codefendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.[202]

Roberts v. Russell[203] held that *Bruton* must be applied to the states because *Pointer v. Texas*[204] had incorporated the sixth amendment's right of confrontation.[205]

In his dissenting opinion in *Schneble,* Justice Marshall, speaking for

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194. 409 U.S. 505 (1973).

195. 359 U.S. 121 (1959).

196. 409 U.S. at 510.

197. Id. at 511 (Brennan, J., concurring); see Wells v. Missouri, 419 U.S. 1075 (1974) (mem.) (Brennan, J., dissenting); Harris v. Washington, 404 U.S. 55, 57 (1971) (per curiam) (Brennan, J., dissenting); Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Brennan, J., concurring). Justices Douglas and Marshall joined Justice Brennan in each of these opinions.

198. 405 U.S. 427 (1972).

199. Id. at 431-32. Justice Rehnquist was joined by Chief Justice Burger and Justices White, Stewart, Blackmun and Powell.

200. Schneble v. Florida, 392 U.S. 298 (1968).

201. 391 U.S. 123 (1968).

202. Roberts v. Russell, 392 U.S. 293 (1968) (per curiam).

203. Id.

204. 380 U.S. 400 (1965).

205. 392 U.S. at 294.

the three traditional incorporationists,[206] disagreed with the majority's finding that there was independent evidence to support the jury verdict; therefore, the admission of the confession, in violation of *Bruton*, was not harmless error.[207] Justice Marshall speculated that perhaps the majority intended "to emasculate *Bruton*."[208] That indeed may have been their purpose, but the neo-incorporation majority on the Burger Court could—consistent with its view of the fourteenth amendment—preserve *Bruton* under the sixth amendment while applying a "watered-down" version of the right of confrontation in state cases such as *Schneble*.[209]

D. *Neo-Incorporation and the State's Burden of Proof*

In 1970, the Supreme Court held that the fourteenth amendment guarantee of due process requires that an accused shall not be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[210] This holding notwithstanding, in *Cupp v. Naughten*,[211] the Burger Court, through Justice Rehnquist, further pursued the double standard in criminal procedures which characterizes neo-incorporation.

Cupp raised the question whether a charge to a jury in a state criminal case that "[e]very witness is presumed to speak the truth"[212] unconstitutionally "shifted the State's burden to prove guilt beyond a reasonable doubt and forced [the defendant] instead to prove his innocence."[213] The trial judge had also charged the jury that the

206. Justices Marshall, Douglas and Brennan.

207. Schneble v. Florida, 405 U.S. 427, 437 (1972) (Marshall, J., dissenting).

208. Id.

209. A more recent case which raised the issue of a double standard for the right to confrontation is Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Certiorari was issued to review a conviction reversal by the United States Court of Appeals for the First Circuit based upon improper remarks made to the jury in the prosecutor's summation in a state trial. The Court's opinion by Justice Rehnquist held that in the context of the trial, the prosecutor's improper remarks did not violate DeChristoforo's due process rights because the comments were characterized in advance as opinion, and not as evidence. Id. at 646-47. In his dissent, Justice Douglas argued that the prosecutor's statements constituted a violation of the incorporated right of confrontation because the prosecutor, though not a witness, nevertheless added to the trial record. Id. at 650-51. Arguing that this speculation by the prosecutor would not be admissible in a federal court, Justice Douglas cited Kercheval v. United States, 274 U.S. 220 (1927). 416 U.S. at 650. Although Justices Brennan and Marshall did not fully join in Justice Douglas' dissent, they did join in that portion of Justice Douglas' dissent which argued that the reversal of the conviction should have been sustained, because the judge's instruction to the jury to disregard the prosecutor's remarks was insufficient to cure the error. Id. at 652.

210. In re Winship, 397 U.S. 358, 364 (1970).

211. 414 U.S. 141 (1973).

212. Id. at 142.

213. Id. at 143.

defendant was entitled to a presumption of innocence and emphasized that the state had a burden of proof beyond a reasonable doubt.[214] Consequently, the Court did not find the "presumption-of-truthfulness" instruction a matter of constitutional dimension.[215] Taking note of the fact that nine cases from various federal courts of appeals "had expressed disapproval of the presumption-of-truthfulness instruction,"[216] Justice Rehnquist pointed out that these reversals of conviction all dealt with federal, not state court proceedings.[217] Justice Rehnquist stated that these conviction reversals by the federal circuit courts were an exercise of the "so-called supervisory power of an appellate court to review proceedings of trial courts,"[218] thus implying that no federal constitutional questions were at issue in the cases.[219]

The dissent by Justice Brennan, in which the other two traditional incorporationists joined, countered that the United States Courts of Appeals in every federal circuit have "disapproved of presumption-of-truthfulness instructions and have often expressed their objections in terms of constitutional values."[220] The dissenting justices rejected the "supervisory capacity" argument and instead claimed that at issue in these cases was the constitutional burden of proof which the due process clause places upon the government. Constitutionally based in due process under the fifth amendment, the burden of proving guilt beyond a reasonable doubt was equally applicable to the states under the fourteenth amendment and was subverted by the "presumption-of-truthfulness instruction."[221]

VI. CONCLUSION

It may be tempting to equate neo-incorporation with a "warmed over" ordered liberty approach to the fourteenth amendment.[222] Yet, it has been characteristic of all the varieties of incorporationist justices, including the neo-incorporationists, to use federal cases establishing the substance of amendments four, five, six and eight to determine, in part, the procedural guarantees of the fourteenth amendment. Because all

214. Id. at 148-49.

215. Id. at 149.

216. Id. at 144 n.4.

217. Id. at 146.

218. Id.

219. See Murphy v. Florida, 95 S. Ct. 2031, 2038 (1975) (Burger, C.J., concurring); Hill, The Bill of Rights and the Supervisory Power, 69 Colum. L. Rev. 181, 193-213 (1969).

220. Cupp v. Naughten, 414 U.S. 141, 151 n.2 (1973) (Brennan, J., dissenting). "Moreover," Justice Brennan wrote, "the presumption-of-truthfulness instruction itself is constitutionally defective." Id. at 153.

221. Id. at 154-55.

222. Cf. Williams v. Florida, 399 U.S. 78, 118 (1970) (Harlan, J., concurring).

ordered liberty justices have invariably insisted that the fourteenth amendment has meaning and content independent of the Bill of Rights, federal cases could not be used to define the guarantees of the fourteenth amendment, and fourteenth amendment state cases could not be used to determine the scope of federal procedural rights under amendments four, five, six and eight. The Burger Court majority has exhibited this distinguishing characteristic of incorporation by using federal cases to determine the scope and meaning of fourteenth amendment procedural guarantees[223] and the converse.[224] They have thus displayed some kind of incorporation approach as distinct from an ordered liberty approach.

Neo-incorporation as manifested by the Burger Court in state procedural rights cases appears to be a "half-way house" between the substance of ordered liberty and that of traditional incorporation as expressed in the Warren Court decisions of the 1960s. At this point in the history of the Burger Court, it seems that the thrust for congruency in federal and state criminal procedures—the central goal of traditional incorporationists since 1942—is being decreased.[225] The extent to which the neo-incorporation approach will permit different procedures to be used in state criminal cases is not certain after only a few years of the Supreme Court's new procedural rights voting alignment.

Speculation about the future of the incorporation approach to due process brings to mind a concern long expressed by former Justice Harlan. In a number of opinions,[226] Justice Harlan predicted that, in the long run, the incorporation approach to due process would not lead to strengthened criminal procedures in state courts, but, instead, would lead to a "derogation of law enforcement standards in the federal system . . . ."[227] For instance, in *Williams v. Florida*,[228] the Court held that a twelve member jury is not constitutionally required in state criminal trials. Using the logic of traditional incorporation in reverse, Justice Harlan, concurring, stated that the necessary consequence of the Court's decision "is that 12-member juries are not *constitutionally* required in *federal* criminal trials either."[229] Justice

223. Davis v. Alaska, 415 U.S. 308 (1974) (Burger, C.J.); Lefkowitz v. Turley, 414 U.S. 70 (1973) (White, J.); Cady v. Dombrowski, 413 U.S. 433 (1973) (Rehnquist, J.).

224. See, e.g., United States v. Calandra, 414 U.S. 338 (1974) (Powell, J.); United States v. Robinson, 414 U.S. 218 (1973) (Rehnquist, J.).

225. It was always the assumption of the traditional incorporationists that this congruence would be brought about by the application of the stricter federal rules of procedure in the state courts and not the inverse. See text accompanying notes 128-29 supra.

226. See Williams v. Florida, 399 U.S. 78, 130 (1970) (Harlan, J., concurring), and cases cited therein.

227. Id., citing Ker v. California, 374 U.S. 23, 45-46 (1963) (Harlan, J., concurring).

228. 399 U.S. 78 (1970).

229. Id. at 118.

Harlan pointed out that under an ordered liberty approach this "backlash" would not be necessary.[230]

> The internal logic of the selective incorporation doctrine cannot be respected if the Court is both committed to interpreting faithfully the meaning of the federal Bill of Rights and recognizing the governmental diversity that exists in this country. The "backlash" in *Williams* exposes the malaise, for there the Court dilutes a federal guarantee in order to reconcile the logic of "incorporation," the "jot-for-jot and case-for-case" application of the federal right to the States, with the reality of federalism.[231]

The prospect of the Supreme Court undoing procedural safeguards in the federal court system to satisfy the ritual of incorporation is not a pleasant one.[232] Perhaps, the neo-incorporationist approach to the fourteenth amendment makes the incorporation "malaise" described by Justice Harlan less critical for the moment. By using the language of incorporation, the Burger Court majority appears to pay deference to stare decisis, while eroding the substance of traditional incorporation so as not to burden the states with the stricter federal procedural standards. At this point in time, one conclusion seems certain. The neo-incorporationist approach to the fourteenth amendment due process clause illustrates at least one Burger Court procedural rights revisionist policy in conflict with the Warren Court legacy.

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230. Id. at 129.

231. Id.

232. It should be noted that in several instances the Burger Court majority has defined more narrowly the procedural guarantees of the Bill of Rights as they directly apply to the federal government. The logic of the incorporation doctrine makes these decisions applicable to the states. The three traditional incorporationists still on the Court—Justices Douglas, Brennan and Marshall—have unsuccessfully opposed this trend. Throughout his judicial career, Justice White has consistently advocated a narrow interpretation of the protections afforded the individual by the Bill of Rights. E.g., Malloy v. Hogan, 378 U.S. 1, 33-34, 37-38 (1964) (dissenting opinion); Escobedo v. Illinois, 378 U.S. 497-99 (1964) (dissenting opinion); Robinson v. California, 370 U.S. 660, 685-89 (1962) (dissenting opinion). Justice White and the four Nixon appointees have established a trend toward a more narrow interpretation of federal procedural rights provided for by the Bill of Rights. See United States v. Wilson, 420 U.S. 322 (1975) (wider judicial summary contempt power available against witnesses who refuse to accept statutory transactional immunity as substitute for fifth amendment privilege against self-incrimination); United States v. Calandra, 414 U.S. 338 (1974) (exclusionary rule is not part of fourth amendment and does not limit grand jury's power to compel a witness to answer questions based on evidence obtained from a prior unlawful search and seizure); United States v. Robinson, 414 U.S. 218 (1973) (search incident to valid arrest requires no additional justification); United States v. Ash, 413 U.S. 300 (1973) (sixth amendment right to counsel not violated if pre-trial photographic identification of defendant is attempted in absence of defendant's counsel); United States v. Dionisio, 410 U.S. 1 (1973) (grand jury subpoena to give voice exemplars not a seizure within meaning of fourth amendment or an invasion of fifth amendment privilege against self-incrimination); Kastigar v. United States, 406 U.S. 441 (1972) (fifth amendment privilege against self-incrimination not violated by compulsory process to testify before a federal grand jury subsequent to grant of limited immunity by federal government).