The Bill of Rights and the Fourteenth Amendment: The Evolution of the Absorption Doctrine

Alex B. Lacy, Jr.
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ABSORPTION DOCTRINE

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During this century the Supreme Court has developed many new doctrines relating to the constitutional law of civil liberties. One of the most important of these doctrines has been the "absorption" doctrine under which the Court has made various parts of the first eight amendments to the Constitution applicable against state action by including them in the liberty of the due process of law clause of the Fourteenth Amendment. Since the doctrine has very significant implications for the concept and practice of American federalism as well as the development of civil liberty in the United States and since the content of due process under this doctrine has been consistently expanded in each of the last five terms of the Court, it seems pertinent now to give a brief analysis of the relation between the Bill of Rights and the first section of the Fourteenth Amendment under this doctrine.

For more than one hundred years after the adoption of the Bill of Rights the Supreme Court consistently held the position that these amendments applied only against the Federal government. As several scholars have pointed out, this probably was the intent of the early statesmen who sponsored the amendments in Congress and ratified them in the state legislatures. The First Amendment on its face is clearly directed only against the Federal government, for it begins, "Congress shall make no law...." However, the other amendments are stated as general prohibitions, and it was inevitable that the argument should be developed that these

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2The Court sometimes uses the term "incorporation" as a synonym. For instance, see Justice Goldberg's concurring opinion in Pointer v. Texas, 380 U.S. 400, 410 (1965). But the term "incorporation" has some unfortunate implications. See the concurring opinion of Justice Harlan in Pointer v. Texas, 380 U.S. 400, 408 (1965). "Absorption" is probably the more useful term and the Court might be well advised to use it consistently. See the dissenting opinion of Justice Brennan in Cohen v. Hurley, 366 U.S. 117, 154 (1961).

3In particular see Dumbauld, The Bill of Rights (1957).
amendments protecting basic liberties logically should apply against all government—state and federal.

The Supreme Court's position in relation to this argument was developed in 1833 in *Barron v. Baltimore*. Mr. Chief Justice Marshall, participating in his last constitutional decision, delivered the opinion of the Court. Marshall concluded that the Constitution conferred powers on the federal government and that "the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes." Marshall went on to observe that when the framers intended to list prohibitions applying to the states, they specifically mentioned the states—referring to sections nine and ten of Article I. Since the first eight amendments contain no expression indicating an intention to apply them to the state governments, "some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed. We search in vain for that reason." He also noted that at the time of ratification it was generally understood that the amendments demanded security against the apprehended encroachments of the federal government, not against the state government.

After *Barron v. Baltimore*, no major attempt was made to apply the Bill of Rights against the States until after the Civil War. The adoption of the Fourteenth Amendment once again opened up the possibility of constitutional protection against the deprivation of basic liberties by state governments. However, in the Court's first major interpretation of that amendment in the Slaughter House cases of 1873, the Court rendered the privileges and immunities clause of the Fourteenth Amendment virtually impotent by making a distinction between citizenship of the United States and citizenship of the several states, by giving a very narrow scope to national citizenship, and by deciding that the clause only protected the rights of national citizenship. The Court summarily disposed of the plaintiff's claims under the due process and equal protection clauses by holding that the former did not possess a substantive meaning and therefore

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4Id. at 247.
5Id. at 249.
6In support of this contention Marshall might have cited Alexander Hamilton's Federalist Paper No. 84 and the arguments of James Madison in the debate on the amendments in the First Congress.
783 U.S. (16 Wall.) 36 (1873).
8The absorption of the Bill of Rights into the Fourteenth Amendment would
could not be a limitation on the state's police power and that the latter was so narrow in scope that it would probably never be invoked except to protect the Negro.

The Court did begin to develop a substantive meaning for the due process clause in the 1890's permitting it to review the content of state laws, but this new doctrine was applied in the beginning to safe-

have occurred at this time had the opinion of Justices Bradley, Swayne, and Field prevailed. As Justice Bradley stated the case in his dissenting opinion:

It is pertinent to observe that both the clause of the Constitution referred to, and Justice Washington in his comment on it, speak of the privileges and immunities of citizens in a State; not of citizens of a State. It is the privileges and immunities of citizens, that is, of citizens as such, that are to be accorded to citizens of other States when they are found in any State; or, as Justice Washington says, 'privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free government.'

Id. at 116.

Justice Field also argued that some of the rights of the Bill of Rights contain specific restrictions upon Congress, some impliedly restrict Congress, and some are "declaratory of certain rights of the people which cannot be violated." O'Neill v. Vermont, 144 U.S. 323, 362 (1892). He concluded:

While, therefore, the ten Amendments, as limitations on power, and, so far as they accomplish their purpose and find their function in such limitations, are applicable only to the Federal government and not to the States, ye., so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon State power by ordaining that no State shall make or enforce any law which shall abridge them. If I am right in this view, then every citizen of the United States is protected from punishments which are cruel and unusual. It is an immunity which belongs to him, against both State and Federal action. [Field then mentions the searches and seizures and confrontation of witnesses clauses.] These rights, as those of citizens of the United States, find their recognition and guaranty against federal action in the Constitution of the United States, and against state action in the Fourteenth Amendment.

Id. at 363-64.

Justice Harlan with whom Justice Brewer concurred "in the main" was even more lucid:

I fully concur with Mr. Justice Field, that since the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty, or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. . . . These rights are principally enumerated in the earlier amendments to the Constitution.

Id. at 370.

Note Justice Harlan's distinction that "any person," not just "citizens" have the protection. Also note that Justice Brewer may have abandoned the position that the entire Bill of Rights applies to the states when he joined the majority in Maxwell v. Dow, 176 U.S. 581 (1900). Justice Clifford may also have supported absorption through the privileges and immunities clause. See his dissent with Justice Field in Walker v. Sauvinet, 92 U.S. 90, 92 (1876).
guard property rights and the liberty of contract from state social legislation. So the amendment which was originally designed to protect the rights of Negroes recently freed from slavery still had little potency insofar as the protection of civil liberty was concerned.

However, in one interesting case in 1897, the Court, considering the specific protection involved in **Barron v. Baltimore** (the right of just compensation), declared in **Chicago, B. & Q.R. Co. v. Chicago** that the due process clause required the states to pay just compensation for private property taken for public use. In that case the Court concluded that just compensation had not been denied and the statute was upheld. In a long, rambling majority opinion by Justice Harlan, the Court did not mention the Fifth Amendment requirement that private property shall not be taken without just compensation, but viewed the just compensation requirement as an incident to the exercise of eminent domain which was, as Chancellor Kent had put it, "recognized by all temperate and civilized governments, from a deep and universal sense of its justice." Obviously, at this time, a majority of the members of the Court was interested in defining due process independently of the Bill of Rights.

In 1908, in **Twining v. New Jersey**, while deciding that the self-incrimination protection of the Fifth Amendment was not a part of the due process of law guarantee of the Fourteenth Amendment, the Court suggested that the defendant's claims merited consideration because "it is possible that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law." However, the 1908 Court, significantly,

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10 Id. at 238.
11 166 U.S. 226 (1897).
12 211 U.S. 78, 99 (1908).
emphasized that "if this is so, it is not because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law."\(^\text{13}\)

The major question for the Court in 1908 then involved a definition of the scope of the concept of due process of law. Justice Moody for the majority did not hesitate to admit that the concept would be a difficult one to define. Indeed, he felt that "Few phrases of the law are so elusive of exact apprehension as this."\(^\text{14}\) He noted that the Court had always declined to give a comprehensive definition of the term and that definition would have to be "gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise."\(^\text{15}\)

In spite of this difficulty in achieving a definition, Moody felt that there were certain general principles which narrowed the field of discussion. Relying heavily on the Court's previous discussion of this question in *Murray's Lessee* and in *Hurtado*,\(^\text{16}\) he argued that these principles centered around the idea that "the words 'due process of law' are equivalent in meaning to the words 'law of the land,' contained in that chapter of Magna Carta which provides that 'no freeman shall be taken, imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land.'"\(^\text{17}\)

In this light the Court felt that the content of due process of law could be determined "by an examination of those settled usages and modes of proceedings existing in the common and statutory law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after their settlement of this country..."\(^\text{18}\) The Court pointed out that this was not to mean that all such practices settled on in England and practiced here by our ancestors would be essential elements of due process of law. That would put the law in a straitjacket. However, "no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained

\(^{13}\)Ibid.

\(^{14}\)Id. at 99-100.

\(^{15}\)Id. at 100.


\(^{17}\) *Twining v. New Jersey*, 211 U.S. 78, 100.

\(^{18}\) Ibid.
from time to time by judicial action, which have relation to process of law, and protect the citizen in his private right, and guard him against the arbitrary action of government." Thus under this test the content of due process was to be determined rather independently of the content of the Bill of Rights. The fact that an asserted right was included in the Bill of Rights would simply be one piece of evidence in support of the argument that it was a "fundamental principle" and therefore essential to due process. The self-incrimination protection did not measure up to the test.

The Twining Court was not unaware that its decision would have significant implications for the concept of federalism in the United States. It pointed out in relation to the self-incrimination claim that, until the 14th Amendment was passed, the privilege of self-incrimination had its origin in the constitutions and laws of the states, and that persons appealing to it must look to the state for their protection, "since by the unvarying decisions of this Court the first ten Amendments of the Federal Constitution are restrictive only of national action." The total impact of the Fourteenth Amendment was not clear but some of its implications for federalism were clear:

The 14th Amendment withdrew from the States powers theretofore enjoyed by them to an extent not yet fully ascertained, or rather, to speak more accurately, limited those powers and restrained their exercise. There is no doubt of the duty of this court to enforce the limitations and restraints wherever they exist, and there has been no hesitation in the performance of the duty. But wherever a new limitation or restriction is declared, it is a matter of grave impact, since, to that extent, it diminishes the authority of the State, so necessary to the perpetuity of our dual form of government, and changes its relation to its people, and to the Union.

In 1911 the Court ruled that the right to a jury trial was not essential to due process and threw further light on the question of definition when Justice Lipton observed in the majority opinion:

Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the Constitutional laws of a state and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process.

The Court again revealed that it was very much concerned about

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20 Ibid.
21 Ibid. at 92.
22 Ibid.
the impact of the Fourteenth Amendment on federalism when it quoted *In re Kemmler* to the effect that the Amendment "did not radically change the whole theory of the relation of the state and Federal Governments to each other and of both governments to the people." The jury trial protection under this approach to the concept could not qualify as a part of due process.

This concern of the Court with the potential impact of an expanding due process concept on federalism probably had much to do with the Court's long reluctance to write much meaning into the first clause of the Fourteenth Amendment. As late as 1922 the Court was of the opinion that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech,' or the 'liberty of silence.'"

However, it was in regard to freedom of speech that the break was to come. In *Gitlow v. New York* the Court announced the absorption doctrine and initiated a series of decisions which in the next two decades was to hold all of the cherished First Amendment freedoms immune from state invasion:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the first amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.

Although the Court found in *Gitlow* that the New York Criminal Anarchy statute did not abridge the First Amendment protection, this statement did initiate the process of selective absorption of parts of the first eight amendments into the Due Process Clause of the Fourteenth Amendment. *Barron v. Baltimore* is still good law but the absorption doctrine has removed most of its potency.

With the *Gitlow* announcement of the selective absorption principle in 1925 the Court was actually adopting a "middle of the road" approach to the question of the relation between the Bill of Rights and the Fourteenth Amendment. At least six Justices before 1925 had expressed the view that the Fourteenth Amendment protected all of the privileges and protections of the Bill of Rights from infringement by the states. Black, Douglas, Murphy, and Rutledge were later to argue

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2136 U.S. 436, 448 (1890).
23666 U.S. 652, 666 (1928).
24See Note 8, supra. In his dissenting opinion in *Twining v. New Jersey*, Justice Harlan made it clear that he thought the absorption doctrine could apply to the
that all of the Bill of Rights should be embraced by the Due Process Clause of the Fourteenth Amendment.27

The evolution of the absorption doctrine after its adoption by the Court in Gitlow can be divided into two periods for purposes of analysis. The first period begins with the statement in Gitlow in 1925 and ends in 1947 with the controversial Adamson v. California.28 This period is characterized by the gradual absorption of all of the "preferred status"29 First Amendment rights into the Due Process Clause of the Fourteenth Amendment and the exercise of a high degree of caution in relation to the absorption of the rest of the Bill of Rights. In general, during this period the Court interpreted the doctrine very conservatively. The second period begins with Wolf v. Colorado30 in 1949 and extends to the present. It is characterized by the absorption of other rights in the Bill of Rights which might be very generally described as procedural rights which have not enjoyed a preferred status in the past. During this period, especially the latter part of it, the Court has taken a very liberal interpretation of the doctrine and may now be approaching the position of Justices Black, Douglas, Murphy, and Rutledge that all of the Bill of Rights should be applied to the states through the Due Process Clause of the Fourteenth Amendment.

The Court was very slow in developing the doctrine after 1925. The Court mentioned without elaboration in Whitney v. California31 and Fiske v. Kansas32 the idea that the right of free speech and free press was a part of the liberty of the Due Process Clause. It didn't actually use the doctrine to invalidate a state statute until 1931. In Stromberg v. California the Court used the doctrine to declare that one clause of a California statute appeared to be invalid on its face because it was repugnant "to the guarantee of liberty contained in the 14th Amendment."33 Since it was not clear that the lower court had reached a decision on that point, the case was remanded for further proceedings.

Due Process Clause as well as the Privileges and Immunities Clause: "In my judgment, immunity from self-incrimination is protected against hostile state action, not only by...the Privilege and Immunities Clause, but also by...the Due Process Clause." 211 U.S. 78, 117.

27See the dissenting opinions in Adamson v. California, 332 U.S. 46, 71, 72, 124 (1947), and the discussion of these opinions, infra. Also see Poe v. Ullman, 367 U.S. 497, 515-22 (1961).
28332 U.S. 46 (1947).
32274 U.S. 380, 382 (1927).
33283 U.S. 359, 369 (1931).
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In the same term the Court, in a more significant action, used the absorption of the free press protection to invalidate the “Minnesota Gag Law.” However, the Court did not elaborate on the doctrine. Chief Justice Hughes for the majority simply noted that “It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the 14th Amendment from invasion by state action.” The Court split five to four in the case but the minority did not object to the inclusion of the free press protection in the concept of liberty of the Fourteenth Amendment. They only objected to the scope given “free press” by the majority.

In 1932 in Powell v. Alabama, one of the famous Scottsboro cases, the Court had its first opportunity since Gitlow to apply the absorption doctrine to a non-First Amendment guarantee of the Bill of Rights, the Sixth Amendment guarantee of right to counsel. However, the Court avoided the doctrine; and, relying on the logic of Chicago, B. & Q.R. Co. v. Chicago, decided that the liberty of the Due Process Clause did require a state to provide counsel in a capital case where the defendant was ignorant, illiterate, or feebleminded because this right is of a fundamental character and inherent in the very of free government.

In the course of the majority opinion in Powell v. Alabama Justice Sutherland gave attention to the argument, first raised in Hurtado v. California, that the Due Process Clause of the Fourteenth Amendment meant the same thing as the Due Process Clause of the Fifth Amendment and that, since the Bill of Rights specifically mentioned right to counsel, it was apparently not embraced by the Due Process Clause of the Fifth. Sutherland again used Chicago B. & Q.R. to dem-

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3Id. at 707. Also see Grosjean v. American Press Co., 297 U.S. 233, 243-44 (1936).
4See Justice Butler’s dissenting opinion, 283 U.S. 701, 723.
5287 U.S. 45 (1932).
6166 U.S. 226 (1897).
7287 U.S. 45, 67-68, 71-72. Note that the Chicago, B. & Q.R. Co. v. Chicago logic was also used in Hebert v. Louisiana, 272 U.S. 312, 316-17 (1926): “...[due process] does require...that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as ‘law of the land.’” Since this case did not involve a right included in the Bill of Rights, the absorption doctrine was not in question. Also note that the Court itself has had great difficulty in determining in later cases exactly what it had decided in Powell. See the discussion in Gideon v. Wainwright, 372 U.S. 335 (1963), infra.
8110 U.S. 516 (1884).
onstrate that Hurtado did not stand alone and that this logic could not be considered a rule for the Court.\textsuperscript{41}

The Court applied the logic of the free speech and press cases to other First Amendment freedoms during the 1930's without contributing significantly to the development of the doctrine. In 1934 the Court absorbed the "free exercise of religion" clause in Hamilton v. Regents of the University of California.\textsuperscript{24} The appellants contended that the First Amendment right, as a part of the "liberty" of the Due Process Clause of the Fourteenth Amendment, conferred the right to be students in the state university free from obligation to take military training as one of the conditions of attendance. The Court agreed that the "liberty" of the Due Process Clause did embrace the "free exercise" clause of the First Amendment:

> There need be no attempt to enumerate or comprehensively to define what is included in the "liberty" protected by the due process clause. Undoubtedly it does include the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training.\textsuperscript{43}

However, ironically, the Court ruled that the "free exercise" clause did not support the contention of the appellants in regard to the requirement of military training for students at the state university.

In 1937 the Court added the First Amendment freedom of assembly guarantee to the list in De Jonge v. Oregon and gave the most elaborate statement of the logic behind the absorption doctrine since Gitlow v. New York in Chief Justice Hughes' majority opinion:

> Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution... the right to peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental... the First Amendment of the Federal Constitution expressly guarantees that right against abridgement by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,—principles which the Fourteenth Amendment embodies in the general terms of its due process clause.\textsuperscript{44}

\textsuperscript{293} U.S. 245 (1934).
\textsuperscript{293} U.S. 245, 262. See the concurring opinion of Justice Cardozo, 293 U.S. 245, 265.
\textsuperscript{299} U.S. 353, 364 (1937).
This first, brief indication of the criteria to be used in deciding which parts of the Bill of Rights should be absorbed was elaborated in detail eleven months later by Cardozo in his majority opinion in *Palko v. Connecticut*.45

The appellant in *Palko v. Connecticut* argued that a conviction in a state court of murder in the first degree on a second trial of a criminal prosecution after a conviction of murder in the second degree had been set aside on appeal taken by the state violated the double jeopardy immunity created by the Fifth Amendment, and that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also. Indeed, Palko's argument was even broader: "Whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment."46

Cardozo made it clear that the Court rejected this argument for complete absorption: "There is no such general rule."47 In reviewing previous cases on the question Cardozo listed a catalogue of rights that had or had not been absorbed. Significantly, in the latter list he included the right to counsel, basing the absorption on the Powell case, as well as the First Amendment rights of free speech and press, peaceable assembly, and free exercise of religion.48 After surveying the cases, Cardozo attempted to develop a "rationalizing principle" upon which the dividing line between the cases could be based:

The line of division may seem to be wavering and broken if there is a hasty catalogue of cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. [Emphasis added.] To abolish them is not to violate "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."... Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them.... We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights

45302 U.S. 319 (1937).
47302 U.S. 319, 323.
48Id. at 324.
and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. 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.... This is true, for illustration, of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition of nearly every other form of freedom.\textsuperscript{49}

The kind of double jeopardy involved in this case, Justice Cardozo concluded, was not essential to a scheme of ordered liberty.

Butler dissented but did not write an opinion. Therefore, it is impossible to tell from the record whether he objected to Justice Cardozo's interpretation of the absorption doctrine.

This first major analysis of the absorption doctrine in an opinion of the Court was a rather conservative one. The criteria for distinguishing between rights that should and should not be absorbed, as it was developed by Justice Cardozo, would appear to weigh the balance in favor of the state in most civil liberties claims which involved rights protected by the first eight amendments. Unless a First Amendment claim was involved, the burden of proof rested with the individual making the claim. On the other hand, Justice Cardozo's principle was flexible and would permit the Court to consider contemporary thought about each liberty in making decisions on claims. The principle didn't place the Court in a straitjacket or limit absorption only to the "preferred status" First Amendment since Justice Cardozo himself believed that Powell had, in effect, absorbed the right to counsel protection of the Sixth Amendment. On the whole, the "essential to a scheme of ordered liberty" principle appeared to provide a reasonably satisfactory way for the Court to determine the relationship between the Bill of Rights and the Due Process Clause of the Fourteenth Amendment. However, it was to be more than a decade before the Court was to find a non-First Amendment protection in the Bill of Rights that met the requirements of the Cardozo principle, and it was to be a quarter of a century before any really effective absorptions of non-First Amendment freedoms would take place under this criterion. Although it would appear that recent cases have significantly altered the Cardozo principle, as we will see, the Court continues to apply it in form.

In 1940, without making any specific connection with the principles of the Fifth and Sixth Amendments relating to minimal pro-

\textsuperscript{49}Id. at 325-27.
procedure, the Court held that the Due Process Clause of the Fourteenth Amendment offered a procedural safeguard against the use of coerced confessions in state courts. Since this protection was not specifically mentioned in the Bill of Rights, no question of absorption was raised.\(^5\)

Also in 1940, in a case in which the Court actually appeared to make its decision on the basis of the “free exercise of religion” clause absorbed in Hamilton, the Court noted that the “establishment of religion” protection of the First Amendment should also be considered to be a part of the liberty of the Due Process Clause of the Fourteenth Amendment.\(^6\) The Court actually considered a claim under the establishment clause clearly divorced from the “free exercise” clause for the first time in 1947 in Everson v. Board of Education.\(^5\)\(^2\)

This well known case involved a New Jersey statute which authorized its local school districts to make rules and contracts for the transport of children to and from schools. The Board for the township of Ewing reimbursed parents for money spent by them for the bus transportation of their children on buses operated by the public school transportation system whether the children went to public school or Catholic parochial school.

Black in his majority opinion in Everson appeared to take it for granted that the establishment clause was within the scope of the liberty of the Fourteenth Amendment under the absorption doctrine.\(^5\)\(^3\) He did not elaborate on the point except to develop a detailed argument in support of the “wall of separation” doctrine which, in fact, made a good case for the “fundamental” character of the establishment clause. However, Black and the majority did not believe that the New Jersey statute was a violation of the “wall of separation” interpretation of the clause. Significantly, the four dissenting Justices\(^5\)\(^4\) in two lengthy opinions also did not raise any question about the absorption of the establishment clause; but argued that, if this statute and the action in Everson did not violate the clause, then its position as a fundamental liberty was weakened.\(^5\)\(^5\)

Earlier in 1947 the Court had had another opportunity to consider the absorption of a non-First Amendment protection of the Bill of

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\(^6\)Cantwell v. Connecticut, 310 U.S. 300, 303 (1940).
\(^5\)\(^2\)330 U.S. 3 (1947).
\(^5\)\(^3\)Id. at 7, 8.
\(^5\)\(^4\)Justices Jackson, Rutledge, Frankfurter, and Burton.
\(^5\)\(^5\)See the dissenting opinions of Jackson and Rutledge, 330 U.S. 3, 18-63.
Rights. The appellant had been convicted of murder and sentenced to be electrocuted. He had been placed in the electric chair and the switch had been thrown, but, presumably because of some mechanical difficulty, death did not result. A new death warrant was issued by the Governor setting a new execution date. Appellant argued that this would violate the Due Process Clause of the Fourteenth Amendment because of the double jeopardy provision of the Fifth Amendment and the cruel and unusual punishments provision of the Eighth Amendment. The Court split five to four in its decision. Four members of the Court in the majority opinion assumed for purposes of discussion, without so deciding, that violation of the double jeopardy and cruel and unusual punishments provisions of the Bill of Rights would be in violation of the Due Process Clause of the Fourteenth Amendment. They decided that the appellant's experience did not violate either of these provisions of the Bill of Rights.

Frankfurter in a concurring opinion argued that the majority decision should have been made on the ground that the provisions of the Fifth and Eighth Amendments were not embraced by the Due Process Clause of the Fourteenth.

Without discussing the absorption principle, Justice Burton, joined by Douglas, Murphy, and Rutledge, argued in a dissenting opinion that the warrant for a second effort at execution did abridge the Due Process Clause of the Fourteenth Amendment.

Obviously, one could not safely conclude from this case, as Justice Black did in Adamson v. California, that the Fifth and Eighth Amendment protections had been absorbed.

The first major debate within the Court on the absorption doctrine and Justice Cardozo's interpretation of it came later in the October, 1946, term of the Court in Adamson v. California. The case involved a rather complex self-incrimination claim. The appellant's claims were not lucidly stated but he appeared to cite the absorption doctrine and apply it to the Fifth Amendment protection to argue that the self-incrimination protection was essential to a fair trial, was a fundamental freedom under the Chicago, B. & Q.R. Co. v. Chicago logic, and within the scope of the privileges and immunities clause. In a five to four decision, with Justices Black, Douglas, Rutledge, and Murphy dis-
senting, and Justice Frankfurter writing a concurring opinion, the Court ruled against appellant on each argument.

Justice Reed for the majority seemed to admit that the Due Process Clause of the Fourteenth Amendment embraced the right to a fair trial; but, relying on *Twining* and *Palko*, he rejected the notion that the concept embraced the self-incrimination protection. In interpreting *Palko*, Reed emphasized Cardozo's rejection of the idea that the Due Process Clause of the Fourteenth Amendment drew all of the rights of the Bill of Rights under its protection. However, in doing so, Reed changed the emphasis of Cardozo's argument by appearing to base the decision on the demands of the federal system. The demands of federalism had not been particularly important for Cardozo in *Palko*.

While Reed gave the absorption doctrine very little attention in the majority opinion, Frankfurter discussed it in detail in his concurring opinion, the second of several major opinions that he was to write on the doctrine before his retirement from the Court. He would have followed *Twining* and *Palko* to the letter as having settled the constitutional law of the relation of the Fifth Amendment to the Fourteenth beyond doubt. He felt that to include this protection in due process would fasten "fetters of unreason upon the States." Frankfurter rejected Cardozo's principle of selective absorption while supporting his "essential to a scheme of ordered liberty" criterion as a satisfactory way of measuring the scope of due process independent of the Bill of Rights. In effect, his argument represented a return to the position of the Court in *Chicago, B. & Q. R. Co. v. Chicago*.

Frankfurter noted that during the seventy-year history of the Fourteenth Amendment forty-three Justices had passed on its scope and only one of them (apparently referring to Justice Black), "who may respectfully be called an eccentric exception," held the belief that the due process clause was "a shorthand summary of the first eight Amendments." He added that these Justices, some of whose services in the cause of human rights and the spirit of freedom are the most conspicuous in our history, and some of whom witnessed the writing of the Fourteenth Amendment, were mindful of "the relation of our federal system to a progressively democratic society and therefore duly regardful of the scope of authority that was left to the states even after

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62Id. at 53-54.
63Ibid.
64Id. at 59
65Id. at 61
66Id. at 62.
the Civil War." The "demands" of the federal system found an even more central place in Frankfurter's opinion than in the majority opinion.

Then Frankfurter attacked the selective absorption principle:

There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out. Nor are we given the calculus for determining which go in and which stay out. If the basis of selection is merely that those provisions of the first eight Amendments are incorporated which commend themselves to individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test. . . . If all that is meant is that due process contains within itself certain minimal standards which are "of the very essence of a scheme of ordered liberty," Palko v. Connecticut, . . . putting upon this Court the duty of applying these standards from time to time, then we have merely arrived at the insight which our predecessors long ago expressed. 68

In raising these questions about the absorption principle as stated by Cardozo, Justice Frankfurter appeared to be particularly concerned about the implication for the federal system if the more procedural guarantees of the Bill of Rights were absorbed: "As judges charged with the delicate task of subjecting the government of a continent to the Rule of Law we must be particularly mindful that it is 'a constitution we are expounding,' so that it should not be imprisoned in what are merely legal forms even though they have the sanction of the Eighteenth Century." 69

Justice Frankfurter did not stop with simply questioning the selective absorption principle. He offered an alternative theory:

The Due Process Clause of the Fourteenth Amendment has an independent potency, precisely as does the Due Process Clause of the Fifth Amendment in relation to the Federal Government. It ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth. 70

In other words, the Due Process Clause of the Fourteenth Amendment should be interpreted entirely independent of the Bill of Rights. Again Frankfurter indicated that the most important implication of this interpretation related to the federal system:

67Ibid.
68Id. at 65
69Id. at 66.
70Ibid.
A construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights would... tear up by the roots much of the fabric of law in the several States, and would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom.71

Then the only issue for solution in the present case was whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the Constitution entitled him. He concluded with the majority that it did not.

Black developed his interpretation of the absorption doctrine in a long dissenting opinion in which Douglas concurred.72 Black's position was that the first eight Amendments should be completely absorbed "to extend to all the people of the nation the complete protection of the Bill of Rights."73 However, he realized that it would be very difficult for the Court, in the light of past decisions, to adopt this position. In fact, he left the question open as to whether or not it should adopt his position,74 even though he believed that "to hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution."75 Being realistic, Black concluded that the real choice apparently must be between the selective process of Cardozo's principle in Palko and the Twining rule which would apply none of the Bill of Rights to the states. Evaluating these alternatives, he chose Palko's selective absorption. In the case at hand he would have overruled Twining and absorbed the self-incrimination protection.

In supporting his basic contention that all of the first eight Amendments should be absorbed into the liberty of the Due Process Clause of the Fourteenth Amendment, Black like Frankfurter used primarily historical evidence. He surveyed the historical events that culminated

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71332 U.S. 46, 67. It should be noted that, although Frankfurter did not write any major opinions on the absorption cases in the 1960's, he apparently did not retreat from his position in Adamson. See Frankfurter, Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746 (1965). He still believed that due process in practice was "perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of the powerful social standards of a progressive society." Griffin v. Illinois, 351 U.S. 12, 20-21 (1956). Compare Judge Learned Hand's discussion of due process in Daniel Reeves, Inc. v. Anderson, 43 F.2d 679, 682 (1930).
72332 U.S. 47, 68-124. Also see the dissent of Murphy with whom Rutledge concurred, 332 U.S. 47, 124-25.
73Id. at 89.
74Id. at 75.
75Id. at 89.
in the Fourteenth Amendment in detail and concluded that both those who supported the Amendment and those who opposed it believed that one of the chief objects of the Amendment was to make the Bill of Rights applicable to the states.\(^7\) "With full knowledge of the impact of the Barron decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case announced."\(^7\) To support this conclusion with as much evidence as possible, Justice Black added to his opinion a long appendix in which he presented the historical evidence in detail.\(^7\)

In addition to this lengthy historical argument, Black also rested his case on the contention that the Second through the Eighth Amendments were "essential supplements to the First Amendment."\(^7\) In other words, the Bill of Rights had to be viewed as a unit. Insofar as I can determine, this was a novel argument for the Court. Unfortunately, Black didn't develop it very fully in Adamson and it has not received much attention from the Court since. The present Court majority on the absorption question might well find that this could be an effective argument to support their liberal interpretation of the doctrine in future cases.

Adamson v. California might be regarded as a transitional case on the absorption doctrine, marking the end of the first period under consideration and the beginning of the second. During the first period the Court had developed a rationale to support the doctrine in Palko v. Connecticut, and it had applied the selective absorption, "essential to a scheme of ordered liberty" principle to absorb all of the First Amendment freedoms into the liberty of the Due Process Clause of the Fourteenth Amendment. In addition, it had considered the double jeopardy and self-incrimination clauses of the Fifth Amendment, the cruel and unusual punishments provision of the Eighth Amendment, and the right to counsel clause of the Sixth Amendment in relation to the selective absorption criterion without making a clear decision for absorption in relation to any of them.

The opinions in Adamson also set the tone for the Court's approach to the absorption doctrine in the second period with two relatively new members of the Court, Black and Frankfurter, delineating the basic questions that the Court would have to face in relation to the doctrine. During the early part of the second period very little new absorption activity took place, but during the latter part of the

\(^7\)Id. at 71-72.
\(^7\)Id. at 72.
\(^7\)Id. at 92-124.
\(^7\)Id. at 70-71.
period the Court has appeared to be moving gradually in the direction of Black's position with a very liberal interpretation of Cardozo's selective absorption principle.

Early in the second period the Court faced the selective absorption principle again in *Wolf v. Colorado.*80 The question to be decided there was whether a conviction by a state court for a state offense denied the due process of law required by the Fourteenth Amendment because evidence that was admitted at the trial was obtained under circumstances that would have rendered it inadmissible in a prosecution for violation of a federal law in a federal court because there decreed to be an infraction of the Fourth Amendment as interpreted under the exclusionary rule of *Weeks v. United States.*81

Frankfurter delivered the opinion of the Court and, faithful to his opinion in *Adamson,* concluded that, although 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"82 and therefore a part of the protection of the Due Process Clause, the exclusionary rule was only a federal rule of evidence which was not basic to the liberty. Thus Frankfurter wrote at least a part of the searches and seizures protection into the Fourteenth Amendment without using the absorption doctrine. His opinion in *Wolf,* however, was a little softer than his opinion in *Adamson.* He emphasized that due process was a "living principle" which could not be confined within a permanent catalogue of rights, but which must be altered from time to time by the Court through the "gradual and empiric process of 'inclusion and exclusion.'"83

Frankfurter's position in *Wolf* was strengthened because Black, in a concurring opinion, agreed with him that the exclusionary rule was not an essential part of the searches and seizures protection.84 For the record, Black repeated his belief that the Fourteenth Amendment embraced the Fourth in its entirety.

Justices Douglas, Murphy, and Rutledge wrote dissenting opinions in which they referred to the dissenting opinions in *Adamson* and argued that the exclusionary rule was an essential aspect of the searches and seizures protection.85

During the 1950's there were no major new developments in rela-

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81 332 U.S. 383 (1949).
83 Id. at 27.
84 Id. at 39-40.
85 Id. at 40-48.
tion to the absorption doctrine, but beginning in 1961 the doctrine has undergone major changes. Each term of the Court since then has applied the doctrine to expand the scope of the Due Process Clause of the Fourteenth Amendment.

The first case in this series was *Mapp v. Ohio* in 1961 in which the Court decided that the *Weeks* exclusionary rule was of constitutional origin and an essential part of the searches and seizures protection.\(^8^6\) In a five to four decision the Court decided that *Wolf* on that point was based on factual considerations. It reviewed the factual considerations and decided that they could no longer be controlling for the Court.\(^8^7\)

Clark in his majority opinion was very precise in stating that the Fourth Amendment meant the same thing when applied against the states that it meant when applied against the Federal Government:

> Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the Weeks rule the assurance against unreasonable searches and seizures would be 'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coerced evidence as not to merit this Court's high regard as a freedom "implicit in a scheme of ordered liberty."\(^8^8\)

It was clear then that the searches and seizures protection as interpreted in Federal cases would apply in full against the states.

Clark apparently anticipated that the minority would raise the question of the demands of federalism and he attempted to meet this position by arguing that the majority decision would contribute to a healthy federalism:

Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage

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\(^{8^7}\) Id. at 650-51, 653.

\(^{8^8}\) Id. at 655.
disobedience to the Federal Constitution which it is bound to uphold. . . . Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their own mutual obligation to respect the same fundamental criteria in their approaches.\textsuperscript{89}

This "double standard" argument on the implications of the decision for the federal system was to become a major theme for the majority in later cases.

Black wrote a concurring opinion in\textit{Mapp} in which he noted that he was "still not persuaded that the Fourth Amendment standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands."\textsuperscript{90} However, he voted with the majority because he believed that it had become clear in cases since\textit{Wolf} that when the searches and seizures protection is considered together with the Fifth Amendment's ban against compelled self-incrimination, "a constitutional basis emerges which not only justifies but requires the exclusionary rule."\textsuperscript{91} Of course, Black reached this conclusion on the ground that the Fourteenth Amendment made the Fifth Amendment's provision against self-incrimination applicable to the States.\textsuperscript{92}

Douglas also wrote a concurring opinion in which he argued that the exclusionary rule was an essential part of the searches and seizures protection.\textsuperscript{93} He specifically indicated his support of Clark's "double standard" argument on federalism.\textsuperscript{94}

Harlan, in a dissenting opinion in which Whittaker and Frankfurter joined in full and Stewart joined in part, argued that the majority had ignored the principle of stare decisis, which he thought was particularly important in constitutional adjudication, and had "reached out" to overrule\textit{Wolf}.\textsuperscript{95} His main point was that the Court could have reached its decision on firm, settled First Amendment grounds; and that, in effect, the rule that decisions of constitutional issues should be avoided wherever possible had been ignored when the Court based its decision on the searches and seizures claim.\textsuperscript{96} Har-
lan then turned his attention to the exclusionary rule and argued that it derived not from the Constitution, but from the "supervisory power" of the Court over the federal judicial system. But even assuming that the Weeks rule is of Constitutional origin, he argued that Wolf did not decide that "the Fourth Amendment as such is enforceable against the States as a facet of due process . . . but the principle of privacy 'which is at the core of the Fourth Amendment.'" The Fourth Amendment then states a particular command based on a general principle and only this general principle was embraced by the Fourteenth in Wolf.

Harlan then gave his estimate of the relationship of this case to the demands of the federal system:

The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience on the part of those who might like to see things move faster among the States in this respect. Problems of criminal law enforcement vary widely from State to State. . . . For us the question remains, as it has always been, one of state power, not one of passing judgment on the wisdom of one state course or another. In my view this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement.

Harlan went on to question the majority's argument that their decision would promote a healthy federalism. "An approach which regards the issue as one of achieving procedural symmetry or of serving administrative convenience surely disfigures the boundaries of this Court's functions in relation to the state and federal courts."

Mapp obviously opened up the possibility that other decisions relating to the absorption of non-First Amendment guarantees of the Bill of Rights might be reconsidered. In its next session the Court was faced with one such reconsideration in Robinson v. California. Referring to Louisiana ex rel. Francis v. Resweber, the Court decided that a state statute which makes it a criminal offense, punishable by imprisonment for not less than ninety days nor more than one year, to be addicted to the use of narcotics, even though the accused

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97 Id. at 678.
98 Id. at 679.
99 As was noted above in the discussion of Wolf, this does appear to be a fair interpretation of Justice Frankfurter's opinion.
100 367 U.S. 643, 680-81.
101 Id. at 681.
had never touched a narcotic drug within the state or been guilty of any irregular behavior there, inflicted a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Stewart wrote the majority opinion. Frankfurter did not participate in the decision.

Douglas wrote a concurring opinion in which he assumed that *Francis v. Resweber* had settled the absorption issue. Harlan wrote a concurring opinion in which he did not question the absorption of the Eighth Amendment's provision. White dissented because he felt that the principle of stare decisis had not been followed and that the majority's interpretation of cruel and unusual punishments was novel.

In the next session, the Court took another look at the relationship of the right to counsel provision of the Sixth Amendment to the Fourteenth Amendment in the celebrated case of *Gideon v. Wainwright*. In particular, the Court was called upon to review the decision in *Betts v. Brady* that the right to counsel of an indigent charged with a felony was not "fundamental and essential to a fair trial" and therefore was not absorbed. In the majority opinion Black quoted Sutherland's opinion in *Powell v. Alabama* to support his conclusion that the right to counsel protection was essential to a scheme of ordered liberty: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Betts v. Brady* was overruled and the Sixth Amendment's provision became a part of the Due Process Clause of the Fourteenth.

Clark wrote a concurring opinion in which he noted that he based his decision on the belief that the distinction between capital and non-capital cases should be erased in right to counsel cases arising in the states. He rested his decision on the Fourteenth Amendment independent of the Sixth.

Harlan wrote a concurring opinion in which he agreed that the right to counsel protection should be applied in *Gideon* but argued that *Betts v. Brady* should have been given a "more respectful burial" by the majority. He added a note to his opinion in which he raised...
a very important question about the nature of the absorption process as it had developed in *Mapp, Robinson,* and *Gideon:*

When we hold a right or immunity, valid against the Federal Government to be 'implicit in a scheme 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. Any such concept would disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions. . . . In what is done today I do not understand the Court to depart from the principles laid down in *Palko v. Connecticut* . . . or to embrace the concept that the Fourteenth Amendment 'incorporates' the Sixth Amendment as such.113

Douglas in his concurring opinion in *Gideon* addressed himself particularly to Harlan's argument and it was obvious that the two justices had very different interpretations of the absorption doctrine and of Cardozo's interpretation of it in *Palko.* Douglas pointed out that ten justices in the history of the Court had held the position that the entire Bill of Rights was embraced by the Fourteenth Amendment.114

In direct response to Harlan he added:

My Brother Harlan is of the view that a guarantee of the Bill of Rights that is made applicable to the States by reason of the Fourteenth Amendment is a lesser version of that same guarantee as applied to the Federal Government. Mr. Justice Jackson shared that view. But that view has not prevailed and rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees.115

With these opinions in *Gideon,* the lines for a more detailed discussion of the absorption doctrine were set. That discussion, the most important treatment of the absorption doctrine since *Adamson v. California* in 1947, took place in the next session of the Court in *Malloy v. Hogan.*116

In *Malloy* the Court was once again called upon to weigh the self-incrimination protection of the Fifth Amendment against absorption criteria. After reviewing the development of the doctrine and placing

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113 *Id.* at 352.
114 *Id.* at 345-46. See the discussion of the privileges and immunities clause, supra note 8. Also see the discussion of the dissenting opinions in *Adamson v. California,* 332 U.S. 46 (1947), supra at note 72.
particular emphasis on *Mapp v. Ohio* and the relation of the Fifth Amendment to the Fourth, Brennan in his majority opinion overruled *Twining* and *Adamson* to hold that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States."\(^{117}\) For the majority there was no doubt that the self-incrimination protection met Justice Cardozo's criterion and that the shift from *Twining* and *Adamson* reflected "recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay."\(^{118}\)

Brennan was unequivocal in pointing out that the Fifth Amendment protection was absorbed in its entirety:

The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement.... The State urges, however, that the availability of the federal privilege to a witness in a state inquiry is to be determined according to a less stringent standard than is applicable in a federal proceeding. We disagree. We have held that the guarantees of the First Amendment... the prohibition of unreasonable searches and seizures of the Fourth Amendment... and the right to counsel guaranteed by the Sixth Amendment... are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment... 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."\(^{119}\)

Using the same argument that the majority had developed in *Mapp v. Ohio*,\(^ {120}\) Brennan concluded that to have different standards determine the validity of a claim of the privilege would be "incongruous."\(^ {121}\)

Douglas joined the opinion of the Court but noted that he adhered to his concurrence in *Gideon*.\(^ {122}\) White and Stewart dissented on grounds not relating to the absorption principle.\(^ {123}\) However, Harlan wrote a dissenting opinion, in which Clark joined, basing his decis-

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\(^{117}\)Id. at 6.

\(^{118}\)Id. at 7.

\(^{119}\)Id. at 8, 10-11.


\(^{121}\)337 U.S. 1, 11 (1964).

\(^{122}\)Id. at 14.

\(^{123}\)Id. at 33-38.
ion squarely on his opposition to the Court's interpretation of the absorption principle.

Harlan agreed that continuing re-examination of the constitutional conception of the Due Process Clause was necessary and that this re-examining process could include *proper* reference to guarantees of the Bill of Rights, but he read the majority opinion as accepting in fact what it rejects in theory: the application to the States, via the Fourteenth Amendment, of the forms of federal criminal procedure embodied within the first eight Amendments to the Constitution. While it is true that the Court deals today with only one aspect of state criminal procedure, and rejects the wholesale "incorporation" of such federal constitutional requirements, the logical gap between the Court's premises and its novel constitutional conclusion can, I submit, be bridged only by the additional premise that the Due Process Clause of the Fourteenth Amendment is a shorthand directive to this Court to pick and choose among the provisions of the first eight Amendments and apply those chosen, freighted with their entire accompanying body of federal doctrine, to law enforcement in the States.\(^\text{124}\)

The only result of this process would be "compelled uniformity, which is inconsistent with the purpose of our federal system."\(^\text{125}\)

Harlan went on to argue that the majority had misread the meaning of Cardozo's opinion in *Palko*. As he read *Palko*, Cardozo was simply restating the position of the Court in *Twining*; and, although he used the term "absorption," he intended for the content of the Due Process Clause to be entirely independent of the provisions of the Bill of Rights. The inclusion of a particular provision in the Bill of Rights might provide historical evidence that the right involved was traditionally viewed as fundamental but inclusion of the right in the Fourteenth Amendment was entirely independent of the first eight Amendments.\(^\text{126}\) Thus in this case the majority was simply mistaken when it argued that the Fifth Amendment privilege was an essential mainstay of our criminal justice system.\(^\text{127}\) It was certainly clear beyond any doubt, Harlan added, that Cardozo's metaphor of absorption "was not intended to suggest the translation of case law surrounding the specifics of the first eight Amendments to the very different soil of the Fourteenth Amendment's Due Process Clause."\(^\text{128}\)

In summary, Harlan felt that the prohibitions of the Fourteenth

\(^{124}\text{Id. at 15.}\)
\(^{125}\text{Id. at 16.}\)
\(^{126}\text{Id. at 22-24.}\)
\(^{127}\text{Id. at 19.}\)
\(^{128}\text{Id. at 24.}\)
Amendment against state action should be grounded "squarely on due process, without intermediate reliance on any of the first eight Amendments." "Incongruity" is at the core of the federal system and the Court's approach to the Due Process Clause carries "serious implications for the sound working of our federal system in the field of criminal law." The only alternative to encroachment on the States' sovereignty would be dilution of federal standards.

In 1965, in Pointer v. Texas and Douglas v. Alabama, the Court, relying on the arguments of the majority in Mapp, Gideon, and Malloy, absorbed the confrontation of witnesses protection of the Sixth Amendment and made it applicable against the states "according to the same standards that protect those personal rights against federal encroachment."

Harlan wrote another opinion in Pointer, this time concurring in the result, because he believed the right to be fundamental and thus reflected in due process, in which he indicated that he was more concerned than ever about the majority's philosophy which "increasingly subjects state legal processes to enveloping federal judicial authority." Stewart also concurred but did not join in the decision to "absorb" the Sixth Amendment protection.

Perhaps the most significant thing about these two cases for the evolution of the absorption doctrine is that Goldberg in a concurring opinion took the strongest position in support of the doctrine as interpreted by the majority that any Justice had taken since the early opinions of Black and Douglas. In responding directly to Harlan's position, Goldberg argued for the application of the provisions of the Bill of Rights in their "full strength" against the states. He suggested that Harlan's position would not further any legitimate view of federalism, but that this was not the issue anyway because "to deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual. In my view, this promotes rather than undermines the basic policy of avoiding excess concentr-
tion of power in government, federal or state, which underlies our concepts of federalism.”

Thus by the mid-1960's Cardozo's basic interpretation of the absorption principle had been applied by the Court, to absorb not only all of the liberties of the First Amendment but, also, in full strength, the Fourth Amendment, the Just Compensation Clause of the Fifth Amendment, the Fifth Amendment's privilege against self-incrimination, the Eighth Amendment's prohibition of cruel and unusual punishments, and the right to counsel and confrontation of witnesses provisions of the Sixth Amendment.

The right to a grand jury indictment and double jeopardy provisions of the Fifth Amendment, the jury trial provision of the Sixth Amendment, and the excessive bail-excessive fines provision of the Eighth Amendment are the major portions of the Bill of Rights presently not absorbed into the liberty of the Due Process Clause of the Fourteenth Amendment.

However, it is quite possible that the Court, using the interpretation of the absorption doctrine that it used in Mapp v. Ohio, Robinson v. California, Gideon v. Wainwright, Malloy v. Hogan, Pointer v. Texas, and Douglas v. Alabama in the last five sessions, would also absorb each of the remaining provisions in the Bill of Rights if the proper cases are presented to the present Justices. Although Goldberg, who on the basis of his opinion in Pointer would have been a very strong supporter of the absorption principle in relation to any part of the Bill of Rights, is no longer on the Court, it should be noted that there is every reason to expect that Justice Fortas will adhere to the recent majority position on the doctrine. It should be remembered that Fortas prepared a brief for the appellant in Gideon v. Wainwright in which, although he gave relatively little attention to interpretation of the absorption doctrine, he noted on the “demands of federalism” argument: “A decision overruling Betts would benefit the federalist principle by eliminating a principal irritant.”

In effect, the Court in liberalizing its application of the absorption doctrine in the 1960's has recognized that the requisites of an ordered

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138Id. at 410.
139By repeated references in the recent cases to the decision on the subject in Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 225 (1897).
140See Hurtado v. California, 110 U.S. 516 (1884).
142See Jordan v. Massachusetts, 225 U.S. 167 (1912).
143See Brief for Appellant, p. 34.
liberty in the 1960's are far more multifarious and complex than they were when *Barron v. Baltimore* was decided, when the Fourteenth Amendment was written, or perhaps even when Cardozo presented his interpretation of the absorption doctrine in *Palko v. Connecticut*. The doctrine in the 1960's has become a major tool through which the Court has been able to attempt to solve some of the toughest civil liberties problems our society faces. It is likely to remain an important and useful doctrine for a long time to come.