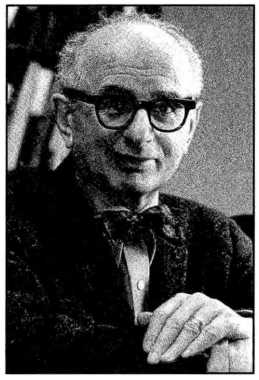
Developments that sparked the most consequential constitutional controversies in American history have enriched the nation with a second and third Bill of Rights.



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2

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THE DEVELOPMENT OF AMERICAN IDEALS

Three Bills of Rights

THE SUBJECT OF CIVIL HISTORY, WROTE EMERSON, IS the quarrel between the two parties that divide the state, the party of conservatism and the party of innovation.[1] This is clearly the case of American constitutional history; and what makes that history interesting, important, and at times even exciting and alarming is that the innovative events have occurred often and with decisive effect. "The law," Roscoe Pound wrote, "must be stable, but it must not stand still."[2] At no time in American history has constitutional law been so unstable—so innovative—so creative as in the last half of the twentieth century.

But often the impression is created, especially when a vacancy occurs in the Supreme Court and a new justice is to be appointed, that there is hardly any stability at all in constitutional law, that, as Heraclitus taught, "All is flux, nothing stands still. Nothing endures but change."[3] This is, I submit, a false impression, or at least an exaggeration. Some very significant new developments have taken place; some new constitutional doctrines and principles have, indeed, evolved; and although they have been and may continue to be challenged, they have, I submit, become a part of the Constitution.

Let me enumerate several of what I consider to be the most important new doctrines or principles that are here to stay, that are not likely to be upset, regardless of the composition of the Supreme Court:

1. that any invidious discrimination based on race, ethnicity, or religion is unconstitutional;
2. that most of the provisions of the Bill of Rights apply to the states just as they apply to the federal government;
3. that there is a right of privacy;
4. that the Constitution guarantees the principle of one person, one vote; that the courts have the power to review legislative apportionment;
5. that apparent infractions of fundamental rights are subject to strict scrutiny;
6. that economic and social legislation is constitutional if reasonable; that with respect to such legislation, the Court is not to act as a superlegislature; that the wisdom of such laws is not the business of the Court;
7. that symbolic acts are protected by the guarantee of freedom of speech;
8. that the guarantee of freedom of speech and press protects literary and artistic work against prior censorship;

9. that police must advise criminal suspects prior to interrogation that they have certain constitutional rights;

10. that although hard-core pornography is not constitutionally protected, a publication is not obscene because it contains four-letter words, for a work must be viewed and judged as a whole, and consideration must be given to its literary, artistic, or other values;

11. that the First Amendment mandates separation of church and state;

12. that public officials and public figures may not recover damages in libel suits unless they can prove actual malice, that the statement was made with knowledge of its falsity, or that it was made with reckless disregard of whether it was true or false;

13. that there are fundamental rights that are constitutionally protected although they are not enumerated in the first eight amendments;

14. that constitutional guarantees apply to students, prisoners, illegitimate children, and other disadvantaged classes of persons;

15. that right to a passport and right to travel are constitutionally protected.

Although some of the above propositions are stated in broad terms, no constitutional right is "absolute." Only Justice Hugo L. Black believed that there are absolutes in the Bill of Rights.[4] A competing or superior public interest may lead the Court to qualify a right, or justices may disagree as to whether the asserted right embraces the facts in the case.[5]

When Justice Thurgood Marshall died in January 1993, some obituaries and editorials stated that the decision of the Supreme Court in the *Brown* case,[6] outlawing racial segregation in public schools, that had been argued by Marshall as counsel of the NAACP Legal Defense and Education Fund, was the most important decision of the century. The opinion for the Court in *Brown* was written by Chief Justice Earl Warren, who years later expressed the opinion that in his judgment it was not *Brown* but the Court decision in the 1962 reapportionment case of *Baker v. Carr*[7] that was the most important during his years of service on the Court, 1953–1969.

From this example alone it is evident that the order of ranking of decisions of the Court in importance is a matter of personal judgment. My own opinion is that the most significant development in constitutional law has been the selective incorporation of most of the first eight amendments of the Constitution into the Fourteenth Amendment to make them effective against the states as they are against the federal government. This has meant the virtual nationalization of the Bill of Rights, a result that may well be called a *second Bill of Rights*.[8] Moreover, the Court has recognized certain rights and liberties, not at all mentioned in the first eight amendments, that are so fundamental that they must be given a constitutional status as guarantees as if they had been enumerated in the Bill of Rights. This development may well be considered a *third Bill of Rights*. It is these two developments that I shall discuss. I shall also discuss the theories and jurisprudential philosophies that are the underpinnings of these developments and that have generated the most significant constitutional debate in American history.

Beginning the Process of Selective Incorporation

In 1833, the Supreme Court unanimously held, in an opinion by Chief Justice John Marshall, that the Bill of Rights applies only to the federal government.[9] Thus, although the federal government is prohibited from taking private property for public use "without just compensation," a state is not under the restriction of the Fifth Amendment, though it may be under a similar restriction by a provision of the state's constitution. Some years following the adoption of the Fourteenth Amendment, Justice John Marshall Harlan (1877–1911) contended that

the Due Process clause took into itself the Bill of Rights and made it applicable to the states.[10] But his was a lonely voice.

In 1925, however, fifty-seven years after the adoption of the Fourteenth Amendment in 1868, the process of "incorporation" was started. Benjamin Gitlow had been convicted under a criminal anarchy statute of New York for having advocated and taught the duty to overthrow the government by force. Although the Supreme Court did not save Gitlow from a jail sentence, the majority opinion by Justice Edward T. Sanford contained the following path-breaking statement:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.[11]

We should note at least two significant aspects of this statement: first, that Justice Sanford did not say that the entire Bill of Rights (or even that the entire First Amendment) was applicable to the states, but that (only) the guarantee of free speech and free press was protected by the Due Process clause; and second, that the basis of this proposition is the judgment that free speech and free press are "fundamental personal rights and 'liberties.'" These two elements have continued to pervade the decisions and opinions of the Court. They may be restated as follows: Incorporation or absorption of the guarantees of the Bill of Rights has proceeded on a piecemeal, case-by-case basis. The Bill of Rights in its totality has not been incorporated into the Due Process clause, but only selectively. Furthermore, only such provisions of the Bill of Rights have been absorbed as were deemed to be "fundamental rights and 'liberties.'"

I think that technically it may be said that, in fact, no provision of the Bill of Rights has been carried over to the Fourteenth Amendment, but that the Court has interpreted the Due Process clause to hold that fundamental rights and liberties are protected against infringement by the states as a denial of due process of law, or perhaps as a denial of the "liberty" guaranteed by the Due Process clause.[12] Justices of the Court have varied in their rationale, as we shall have occasion to see; but for the present, in the interest of simplicity, I shall continue to discuss the process as selective incorporation.

In several cases[13] in the 1930s the Supreme Court confirmed the guarantees of freedom of speech and freedom of the press against infringement by the states. In 1931, in a freedom of the press case, it was possible for Chief Justice Charles Evans Hughes to declare for the Court,

> It is no longer open to doubt that the liberty of the press and of speech is safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guarantee of fundamental rights of person and property.[14]

Note may be taken of the fact that there is no reference to the First Amendment, but only an explication of the essential meaning of the term "liberty" that appears in the Due Process clause.

The next significant development came in the following year, 1932, when the Court, in the famous (or notorious) Scottsboro cases held that the failure of a state trial court in a capital criminal case to provide an effective appointment of counsel for the defendants was a denial of due process of law within the meaning of the Fourteenth Amendment.[15] The Court noted that such right is provided expressly by the Sixth Amendment effective in federal courts; the Supreme Court, however, did not simply carry over this guarantee as if it were compelled mechanically to incorporate the Sixth Amendment into the Fourteenth. What the Court reasoned was that the right to counsel in *capital criminal cases*, in whatever jurisdiction, federal or state, "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"

Two years later, in 1934, in *Hamilton v. Regents*,[16] the Court considered whether the Due Process clause of the Fourteenth Amendment could be construed to guarantee an individual's free exercise of religion. The University of California, a state institution, required students to take courses in military training. Students who were conscientious objectors to war and to training for war claimed that the university's requirement infringed on their religious liberty, and that this liberty was part of the "liberty" protected by the Due Process clause. Although deciding the case against the claims of the students, the Court nonetheless said, "Undoubtedly it [the term 'liberty' in the Due Process clause] 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."

The majority opinion made no mention of the Free Exercise provision in the First Amendment, but clearly by implication the Court "incorporated" that guarantee into the Fourteenth Amendment and made it applicable to the states. In a concurring opinion (in which Justices Louis D. Brandeis and Harlan F. Stone joined), Justice Benjamin N. Cardozo stated: "I assume for present purposes that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment against invasion by the states."

In 1940, in an opinion by Justice Owen J. Roberts for a unanimous Court, the Free Exercise clause of the First Amendment was expressly and sweepingly incorporated into the Fourteenth Amendment. This was in one of a series of cases involving Jehovah's Witnesses.[17] The Court said: "The fundamental concept of liberty embodied in that [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." Just as the federal government may not infringe on the free exercise of religion, so, too, "The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."

The broad language quoted above was, however, too sweeping, for the case involved only the Free Exercise provision of the First Amendment. The case did not involve the Establishment clause, but with respect to the latter Justice Roberts's language foreshadowed what was to come seven years later in the very important New Jersey bus case.[18] In *Everson v. Board of Education*, decided in 1947, in an opinion by Justice Hugo Black, the Court unanimously stressed the impact of the First Amendment's Establishment clause on the states. If the state law is invalid, said Justice Black, "it is because it violates the First Amendment's prohibition against the establishment of religion by law. . . . The First Amendment, as made applicable to the states by the Fourteenth Amendment, commands that a state 'shall make no law respecting an establishment of religion. . . .'" Although the Court by a vote of 5-4 held that the bus fares reimbursed to the students attending a Catholic school were not an "establishment" of religion by the school board, all justices agreed that the First Amendment, incorporated into the Fourteenth, is decisive and applies to the states just as it applies to the federal government. Very little is said in the opinions in the case about the Fourteenth Amendment; the concentration was on the First Amendment, its historical background, and the philosophy on which it was based. The opinions elaborated on the "original intent" of the founders who were responsible for the First Amendment, but said nothing about the "original intent" of the Fourteenth Amendment. This approach of the Court in *Everson* became problematic for some later justices of the Court, and bit its way into ideological conflicts, but I must defer discussion of these matters and continue with discussion of the process of selective absorption of the Bill of Rights into the Due Process clause.

By mid-century, as we have seen, it had been settled that all of the provisions of the First Amendment and the provision of the Sixth Amendment relating to counsel in capital cases had been incorporated into the Due Process clause of the Fourteenth Amendment.

Why *Everson* Is a Landmark Decision

The flowering of individual rights and liberties was, indeed, an extremely slow process. The developments I have thus far discussed took a span of eighty years, 1868–1947. Why was the pace so slow? It is a complicated question; I can venture only a few reasons. The American Civil Liberties Union was not founded until 1920, and in its first decade it concentrated on conscientious objector and free speech cases arising from the suppression of civil liberties during World War I. The organization, under the leadership of Roger Baldwin, did much to arouse a sensitivity to civil liberties issues. At about the time that the ACLU was founded, Justice Oliver Wendell Holmes Jr. began, mainly in dissenting opinions, to alert the Court to the significance of individual fundamental rights and liberties, and in this endeavor he was joined by Justice Brandeis, who took his seat on the Court in 1916. One might say that Holmes and Brandeis picked up where Thomas Jefferson and James Madison had left off; and then, after Holmes and Brandeis, advocacy and defense of fundamental rights became the agenda of Justices Black, William O. Douglas, Frank Murphy, Wiley B. Rutledge, William J. Brennan Jr., Earl Warren, Thurgood Marshall, and others.

To struggle for the vindication of rights and liberties of African-Americans, who were certainly meant to be the chief beneficiaries of the Fourteenth Amendment, the National Association for the Advancement of Colored People (NAACP) was founded in 1909, and its program was greatly enhanced by the formation in 1939 of the NAACP Legal Defense and Education Fund. These persons and organizations awakened the conscience of the nation to recognize the importance of civil liberties and civil rights, and moved the Court from being the ultimate bulwark of private property and enterprise to becoming the court of last resort for the vindication of an individual's fundamental rights.

As I have stated, the most important developments came in the second half of the twentieth century, following the decision, in 1947, of the New Jersey bus case (*Everson v. Board of Education*). Although that case involved only the Establishment clause of the First Amendment, Justice Black's opinion for the Court, and the concurring opinions by Justice Robert H. Jackson and by Justice Rutledge, dramatically concentrated the forces of history, logic, public policy, and rhetorical strength on one central proposition, that is, that the First Amendment *nationalized* the rights and liberties that are enumerated therein. This has made *Everson* a landmark decision. Its importance transcended the facts of the case and is to be found in its seminal quality. For the question quite naturally was implied: Why cannot the same reasoning, *mutatis mutandis*, be applied to the other articles of the Bill of Rights? Why limit the rationale of the case to only the First Amendment? From this time on the Court laid itself open to receiving and adjudicating litigation involving almost the full range of the provisions of the Bill of Rights.

The Due Process Revolution

The *Everson* decision, like the previous First Amendment cases, involved what has been called substantive due process; that is, the decisions were based not on procedural wrongs but on the infringement of substantive rights and liberties, like free speech, free press, free exercise of religion. In 1948, however, the Court considered a case involving the claim of a denial of procedural due process; namely, that the defendant had been denied the right to a public trial, a procedure sanctioned by a Michigan statute. The Court held that the Due Process clause of the Fourteenth Amendment guarantees a defendant the right to be tried and sentenced in a public trial. The opinion of Justice Black for the Court mentioned the Sixth Amendment provision that in all criminal prosecutions, the accused shall enjoy the right to a public trial; but Justice Rutledge, in a concurring opinion, stated that he would put the demand of the Sixth Amendment into the Fourteenth Amendment as a restriction upon the states.[19] A later decision, in 1968, adopted the Rutledge view and inter-

preted the Black opinion as having absorbed or incorporated the Sixth Amendment into the Fourteenth.[20]

In 1961 there came the turn of the Fourth Amendment guarantee against unreasonable searches and seizures to be incorporated into the Fourteenth Amendment. In *Mapp v. Ohio*,[21] one of the most important decisions in federal-state relations (and a case that has aroused much judicial and academic controversy), the Court held that evidence obtained by searches and seizures that would be a violation of the Fourth Amendment is inadmissible in a state court just as it would be inadmissible in a federal court.

In the following year, 1962, in *Robinson v. California*,[22] the Court considered a California statute that made it a crime to be a drug addict. The Court held that the statute was unconstitutional as imposing cruel and unusual punishment in violation of the Eighth Amendment as incorporated into the Fourteenth. Although there has been considerable controversy over whether drug or alcohol addiction is a disease or a criminal offense, the *Robinson* case succeeded in establishing that the Cruel and Unusual Punishment clause of the Eighth Amendment is fully applicable to the states.

As we noted earlier, in the Scottsboro case, in 1932, the Court held that in capital cases the states are required to provide counsel to the defendant. In 1963, in the famous *Gideon* case,[23] the Court extended the rule to apply to almost all criminal cases. The Court, in an opinion by Justice Black, held that the Sixth Amendment guarantees a "fundamental" right; that a provision of the Bill of Rights that is "fundamental and essential to a fair trial" is obligatory upon the states by the Fourteenth Amendment; the Sixth Amendment guarantee of the right to counsel in almost all criminal cases is part of the Due Process clause that is binding upon the states.

It has been said that *Mapp* and *Gideon* were the beginning of the Court's "due process revolution" that has nationalized or constitutionalized state criminal procedures. Specifically as a result of *Gideon*, cities and states now have public defender lawyers that provide counsel to indigent defendants. A study by the Department of Justice in 1984 reported that two-thirds of the population are served by public defenders. Where such lawyers are not provided, trial court judges appoint private attorneys. The far-reaching effect of the Court's decision in *Gideon* can easily be seen.

Next, in 1964, the Court, overruling precedents, held that the states, through the Fourteenth Amendment, are bound by the Fifth Amendment's privilege against self-incrimination. Justice Brennan, for the Court, stated that the Fourteenth Amendment "secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own free will, and to suffer no penalty . . . for such silence."[24]

That the Court in this case absorbed the Fifth Amendment guarantee against self-incrimination became clear beyond any question from the dissenting opinion of Justice Harlan and Justice Tom Clark, who contended that the Due Process clause, *standing on its own foundation*, exacts a standard of justice, whose meaning can be ascertained without reference to the Fifth Amendment.

We have seen that the provisions of the Sixth Amendment guaranteeing the right of assistance of counsel and the right to a public trial in criminal prosecutions were absorbed into the Due Process clause. The same amendment also guarantees that in all criminal cases in the federal courts the defendant shall have the right to be confronted by the witnesses against him. In *Pointer v. Texas*[25] in 1965, the Court unanimously held that this provision, too, is an essential part of the due process guaranteed by the Fourteenth Amendment, binding upon the states.

Two other provisions of the Sixth Amendment, the right to a speedy trial and the right to a trial by jury in criminal prosecutions, were in 1967 and 1968 made requirements of the Fourteenth Amendment.[26]

One important guarantee of the Fifth Amendment—"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"—still remained to be tested for its possible application to state criminal prosecutions. In *Benton v. Maryland*,[27] in 1969, on the last day of Chief Justice Warren's sixteen-year service, the Court declared the guarantee applicable to the states.

Are there still guarantees of the Bill of Rights that remain unincorporated into the Fourteenth Amendment? The following may be listed, although they hardly deserve to be considered fundamental: (1) the Fifth Amendment provision for indictment by a grand jury in cases involving capital or otherwise infamous crime; (2) the Seventh Amendment guarantee of trial by jury in civil cases; (3) the Eighth Amendment prohibition on excessive bail or fines. Then there are the Second Amendment on the right to keep and bear arms, and the Third Amendment, which prohibits quartering of soldiers in any house in time of peace.

We have taken note only of the entry of guarantees of the Bill of Rights into the Fourteenth Amendment. Within the compass of this essay I cannot consider the many subsequent refinements, qualifications, and broad or restrictive interpretations that the Court has imposed on each of the guarantees in the many hundreds of cases that have been considered by the Court. Cases have been decided and then overruled; precedents have received contradictory interpretations by different justices. Constitutional law is more of a jungle or wilderness than a planned garden or park. Despite these facts, it is important to know and to remember that the guarantees, in the plain language in which they were written in the Bill of Rights as restrictions on the federal government, can now be read as equally guarantees that are binding on the states. It is a great tribute to the Supreme Court that it has read the few simple words of the Due Process clause as containing within themselves all of the essential provisions of the First, Fourth, Fifth, Sixth, and Eighth amendments. And most of this monumental achievement came in the relatively short period of two decades, 1947–1969.

Different Philosophical Approaches

It is no surprise that different justices, each coming to his or her task with special ideological baggage, will read the text of a constitutional guarantee differently in the context of a set of facts. This is inevitable. And especially is this inevitable when one bears in mind the basic principle that generated the development that is, for the sake of convenience, referred to as the incorporation doctrine. I think that it is important to understand this point; it involves both history and philosophy.

In 1937 the Court had before it a case in which the claim was made that a Connecticut court had subjected a defendant to double jeopardy. If this case, *Palko v. Connecticut*,[28] had involved a federal prosecution, the Fifth Amendment guarantee against double jeopardy would have applied, but how could the defendant claim the guarantee in a state prosecution? Well, it will be remembered that Justice John Marshall Harlan, as long ago as 1884, and again in 1908,[29] argued, in dissents, that whatever would be an infringement of the Bill of Rights if done in a federal court, should equally be an infringement if done in a state court. In *Palko*, Justice Cardozo, for the Court, rejected this claim by the defendant.[30] Some rights or liberties enumerated in the Bill of Rights had, admittedly, been made applicable to the states, but not because all the guarantees of the Bill of Rights are automatically incorporated into the Fourteenth Amendment. Some guarantees were read into the concept of due process only because—in Justice Cardozo's words that have become famous—"they represented the very essence of a scheme of ordered liberty . . . principles of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."

Justice Cardozo's formulation became the seminal principle that has generated the development that we have been discussing. Although Justice Cardozo rejected the doctrine of incorporation, the justices who have used that doctrine have nonetheless applied it only

to guarantees of the Bill of Rights that they have considered to be "fundamental." The various positions that individual justices have taken can be summarized as follows:

1. Justice Harlan II was the Court's strongest opponent of the doctrine of incorporation. He argued that the doctrine was contrary to the principle of federalism and placed the states into a straitjacket so that it was impossible for them to serve as laboratories for experimenting with different approaches. In place of incorporation, he advocated a test that resembled Justice Cardozo's formulation; namely, is the state's procedure consistent with the "fundamental fairness" guaranteed by the Fourteenth Amendment? Never mind what the Bill of Rights provides as guarantees against the federal government; test the state's action against the guarantee of "fundamental fairness."

2. Justice Black advocated total absorption of the Bill of Rights into the Fourteenth Amendment—that the first eight amendments should be read as mandates directed at both the federal government and the states equally. In this position he was supported by Justices Douglas, Murphy, Rutledge, and Goldberg.

3. Justice Frankfurter strongly opposed the Black position and advocated what essentially was a case-by-case approach in which the "fair trial" test would be used. He would ask, does the state action "shock the conscience"? or is it consistent with "common standards of civilized conduct"? I think that the difference between the Frankfurter and the Harlan tests is more in nuance than in substance.

4. Selective incorporation. Overriding some fine distinctions, what the Court most often accomplished was selective incorporation of the guarantees of the Bill of Rights, the name by which the process is generally and rightly identified.

As illustrative of the different approaches or theories, we can look at the four opinions in the *Duncan v. Louisiana* case.[31] The question before the Court was whether the Sixth Amendment's guarantee of a trial by jury in all criminal cases is equally binding upon the states. By a 7-2 vote the Court decided in the affirmative. In his opinion for the Court, Justice Byron White summarized what had been accomplished by 1968 in placing some provisions of the Bill of Rights under the guarantee of the Due Process clause: the right to compensation for property taken by a state;[32] rights of speech, press, and religion; the right to be free from unreasonable searches and seizures, to be free of compelled self-incrimination, right to have counsel in criminal prosecutions, right to a speedy and public trial, and the right to confront witnesses. In the instant case, the Court held that the Due Process clause guarantees a right of jury trial in all state criminal cases that, were they to be tried in a federal court, would come within the Sixth Amendment's guarantee of trial by jury. A jury trial in criminal cases, said Justice White, is "fundamental to our system of justice. . . . Our conclusion is that in the American states, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right."

Justice Black, with whom Justice Douglas joined, contended that "the Fourteenth Amendment made all of the provisions of the Bill of Rights applicable to the States." He argued strongly against the position of Justice Harlan that "due process is an evolving concept" that entails a "gradual process of judicial inclusion and exclusion"—a doctrine that leaves judges free to decide at any particular time whether a particular rule embodies an "immutable principle of free government" or is a principle "implicit in the concept of ordered liberty," or whether certain conduct "shocks the judge's conscience." This approach, he said, vests unconfined power in the judges, a result that contradicts the belief that we have a written constitution in order to limit government power. The notion that due process requires only "fundamental fairness" makes the concept dependent on a judge's idea of ethics and morals instead of compelling him or her to depend on the boundaries fixed by the written words of the Constitution.

Finally, Justice Black rejected the argument that applying the Bill of Rights to the states interferes with the concept of federalism and prevents states from trying novel social and economic experiments. "I have never believed," he wrote, "that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the Bill of Rights."

Justice Harlan, in a dissenting opinion in which Justice Potter Stewart joined, contended that those responsible for the Fourteenth Amendment never intended that it should be interpreted as incorporating the first eight amendments. Incorporation puts the states into a straitjacket, limiting them and the nation to mid-nineteenth-century conceptions of "liberty" and "due process." The Bill of Rights may be looked to for some guidance in interpreting the Fourteenth Amendment, but the proper process of interpretation starts with an attempt to define "liberty" and "due process" "in a way that accords with American traditions and our system of government." This process entails a "'gradual process of judicial inclusion and exclusion,' seeking, with due recognition of constitutional tolerance for state experimentation and disparity, to ascertain those 'immutable principles . . . of free government which no member of the Union may disregard.'"

When in the past the Court had asserted that certain rights were guaranteed as limits on state action, the important thing was not that these rights had been found in the Bill of Rights, but that "they were deemed, in the context of American legal history, to be fundamental." To emphasize this point, Justice Harlan turned to the opinion of Justice Cardozo in *Palko*, from which he quoted: "If the Fourteenth Amendment has absorbed them [rights guaranteed by the Bill of Rights] the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed." Justice Harlan agreed with Justice Cardozo that the test is whether a right is a "principle of justice so rooted in the traditions and conscience of *our people* as to be ranked as fundamental."[33] "The central proposition of *Palko*," Justice Harlan concluded, "a proposition to which I would adhere, is that 'due process of law' requires only that criminal trials be fundamentally fair."

In a relatively brief concurring opinion, Justice Abe Fortas essentially agreed with Justice Harlan. The draftsmen of the Fourteenth Amendment, he wrote,

> intended what they said, not more or less: that no State shall deprive any person of life, liberty, or property without due process of law. It is ultimately the duty of this Court to interpret, to ascribe specific meaning to this phrase. There is no reason whatever for us to conclude that, in so doing, we are bound slavishly to follow . . . the Sixth Amendment . . . . The Due Process Clause . . . does not command us rigidly and arbitrarily to impose the exact pattern of federal proceedings upon the 50 States. On the contrary, . . . we should, so far as possible, allow the greatest latitude for state differences.[34]

Emergence of a Third (Unwritten) Bill of Rights

Thus far we have considered the "incorporation" of the first eight amendments into the Due Process clause of the Fourteenth Amendment, with the end result that we now have a Bill of Rights that is binding on both the federal government and the states—what I consider the most important constitutional development of the twentieth century and especially since the *Everson* decision in 1947. But the story is incomplete without relating the development of another constitutional process, one that transcends the Bill of Rights, what has been called the "incorporation plus"[35] doctrine—a process by which *new* rights and liberties, both substantive and procedural, have been created and assimilated into the Constitution.

Although this significant development has taken place chiefly since 1947, it will be helpful to an understanding of the matter if we consider two cases that were decided in the 1920s that foreshadowed the need of going outside of and beyond the provisions of the Constitution for the

recognition of rights or liberties that must be considered fundamental and indispensable in a free society.

In the first of the two cases, *Meyer v. Nebraska*,[36] the Court had before it a Nebraska statute that prohibited the teaching of any subject in any public or private school in any language other than English. The law was adopted in 1919 in the course of World War I. Meyer taught in a Lutheran parochial school and used a German translation of the Bible in his teaching.

The Court held that the law violated Meyer's constitutional rights under the Fourteenth Amendment. To reach this conclusion, the Court said that it needs to define the "liberty" that the Due Process clause guarantees. Without doubt, said the Court, the term "liberty"

> denotes not merely freedom from bodily restraint, but also the right of the individual to contract [Meyer had a contract with the school], to engage in any of the common occupations of life [such as teaching], to acquire useful knowledge, *to marry, establish a home and bring up children*, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest. [italics supplied]

As can be readily seen, the case did not involve any question of procedure; "due process" was not involved. What was involved was the meaning of the word "liberty" in the Due Process clause; the case, therefore, is an instance of *substantive* due process. Moreover, the language of the opinion goes beyond the liberty to make a contract to teach; it practically illustrates the meaning of the "pursuit of happiness" of which the Declaration of Independence speaks. It speaks of liberties that do not, except for the reference to the free exercise of religion, point to any of the rights or liberties enumerated in the Bill of Rights. The opinion "incorporates" into the term "liberty" substantive rights that transcend those enumerated in the Constitution.

The second of our two cases, *Pierce v. Society of the Sisters of the Holy Name*,[37] involved an Oregon statute that prohibited attendance at parochial and private schools by children between the ages of eight and sixteen years. Such children were required to attend only public schools. The Court unanimously held the law unconstitutional; it held that under the doctrine of *Meyer v. Nebraska*, the Oregon law unreasonably infringed on the right or liberty of parents to direct the education of their children and their upbringing, and that this infringement threatened the destruction of the school operated by the Society of Sisters, a destruction of their "business" and "property." Said the Court:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children. . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the duty, to recognize and prepare him for additional obligations.

This case, too, is an instance of substantive due process—substantive, not procedural; and it, too, placed a content into the term "liberty" that can claim no foundation in any of the specific liberties enumerated in the Bill of Rights. This case and *Meyer* have often been cited in subsequent cases and have become firmly fixed in American constitutional law.

These two cases offered no jurisprudential theory for their radical conclusions that, in effect, wrote into the Bill of Rights guarantees of new substantive rights, such as

- the right to engage in any of the common occupations of life;
- the right to acquire knowledge;
- the right to marry;
- the right to establish a home and to bring up one's children;
- the right to enjoy privileges recognized at common law as essential to the orderly pursuit of one's happiness;
- the right to teach and the right to study a foreign language;
- the right to attend a private school.

These are all essential rights or liberties that emanate from the constitutional guarantee of "liberty" as the term is used in the Due Process clause.

As we have said, the *Pierce* and *Meyer* cases offer no theoretical foundation for their far-reaching decisions. The Court waited for over four decades to face the theoretical, philosophical underpinnings of the proposition that the Constitution guarantees rights or liberties that are not enumerated in the Bill of Rights. I refer to the birth control case, *Griswold v. Connecticut*, decided in 1965,[38] one of the Court's most important and most controversial decisions.

Connecticut had on its books a statute, seldom enforced, that made it a crime for any person, married or single,[39] to use any kind of contraceptive, or to give information or instruction in its use. The Court, by 7-2, held the statute unconstitutional, and set aside the convictions of officers of the Planned Parenthood League. The statute, the Court held, in an opinion by Justice Douglas, invaded the constitutional right of the privacy of married persons. The case generated no less than six opinions that brought to the fore the long-standing controversy over the incorporation doctrine and elicited theories that make it possible—or impossible—to extract from the concept of "liberty" new substantive rights or liberties that will receive constitutional protection. The constitutional issues that were argued in *Griswold* were heard again throughout the nation twenty-two years later, in 1987, when the Senate debated and rejected the nomination of Robert H. Bork for associate justice of the Supreme Court.

Essentially, what the Court was called on to decide was whether or not the *right of privacy*, and the right to use contraceptives, and the right to give instruction in their use, may be added to the list of substantive rights that have come out of *Pierce* and *Meyer*.

In his opinion for the Court, Justice Douglas leaned heavily on *Pierce* and *Meyer*, and concluded, "And so we affirm the principle of the *Pierce* and the *Meyer* cases." There are, said Justice Douglas, rights that are "peripheral" to the rights expressly enumerated in the Bill of Rights. Freedom of speech and press, e.g., includes the right to distribute, the right to receive, the right to read, freedom of inquiry, and freedom to teach. Without such peripheral rights, the specific rights of speech and press would be less secure. So, too, freedom of association is peripheral to the First Amendment rights. These examples of rights upheld by Supreme Court decisions in the past, said Justice Douglas, suggest that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one."

Justice Douglas referred also to other amendments as contributing to the creation of a zone of privacy that the government may not invade. He also referred to the Ninth Amendment, which provides that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage other rights retained by the people, and he concluded that the Court in the instant case was dealing with a right of privacy "older than the Bill of Rights—older than our political parties, older than our school system."

Justice Goldberg's concurring opinion (in which Chief Justice Warren and Justice Brennan joined), even more than Justice Douglas's opinion for the Court, brought out the theoretical foundations of the line of constitutional jurisprudence that the *Pierce* and *Meyer* cases had projected. Leaving no room for ambiguity, Justice Goldberg began his long opinion with the following summary statement:

> I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. Although I have not accepted the view that "due process" as used in the Fourteenth Amendment incorporates all of the first eight Amendments, I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights.

Justice Goldberg quoted the words of Justice Cardozo that the Due Process clause protects those liberties that are "so rooted in the tradi-

tions and conscience of our people as to be ranked as fundamental," and connected this proposition with the conclusion of *Meyer* that the guarantee of liberty includes the right to marry, establish a home, and bring up children. Although these liberties are not mentioned in the first eight amendments, they do have a constitutional base in the Ninth Amendment, which assumes that the list of rights enumerated in the first eight amendments is not exhaustive, that there are other rights that are retained by the people.

The Ninth Amendment has justly been called "the forgotten amendment."[40] In his opinion for the Court, Justice Douglas mentions the Ninth Amendment, but only timidly, as an afterthought. Not so Justice Goldberg; his opinion salvages the amendment from the oblivion into which it had dropped and gives it a respectability that it eminently deserves. The Ninth Amendment protects those rights and liberties that meet the tests laid down by Justice Cardozo in *Palko*. They thus have a foundation in the Constitution, although they may not be in the list of rights provided by the first eight amendments. Justice Goldberg quoted from a dissenting opinion of Justice Brandeis[41] that, he said, "comprehensively summarized the principles underlying the Constitution's guarantees of privacy":

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

This statement by Justice Brandeis, adopted by Justice Goldberg, is a clear echo of what the Court had said in *Pierce*. In effect, it reads into the Constitution, especially through the Ninth Amendment, the Declaration of Independence.

The case gave Justice Harlan an opportunity to restate his position regarding the doctrine of incorporation. The incorporation doctrine should not be used to restrict the reach of the Due Process clause (as was done by the dissent, as we shall see), no more than it should be used to impose on the states the requirements of the first eight amendments. The Due Process clause should stand, said Justice Harlan, on its own bottom and guarantee the values "implicit in the concept of ordered liberty" (quoting *Palko*). He concluded by emphasizing, among other things, the need for the "solid recognition of the basic values that underlie our society"—again recalling the message of *Palko* and *Pierce*.

In his concurring opinion, Justice White did not get involved in the discussion of the incorporation doctrine but simply held that the Connecticut law deprived married couples of "liberty" without due process of law, "as that concept is used in the Fourteenth Amendment"; and he, too, quoted from *Pierce* and *Meyer*.

Justices Goldberg and Harlan, in their respective concurring opinions, wrote as debaters and with passion; so did Justice Black in his dissenting opinion. Justice Black started his opinion by attacking the Connecticut law as being personally offensive, but, he went on quickly to add, that this offered no basis for declaring the law offensive to the Constitution. As to privacy, he said, "I like my privacy as well as the next one," but unless the government is prohibited from invading it by some specific provision of the Constitution, the action of the government is within its legal powers. There is nothing in the Constitution that gives anyone a right of privacy.

Turning to a consideration of the *Meyer* and *Pierce* cases, Justice Black said that perhaps he might be able to find some constitutional reason for agreeing with the decisions, but he felt compelled to reject, in strong terms, the reasoning of the Court in those cases, for the opinions reflect the "natural law due process philosophy" that the Court has in other cases rejected.

Justice Black likewise attacked the *Palko* propositions about the "traditions and conscience of our people" and the "fundamental principles of liberty and justice." Such formulas, he said, are based on subjective considerations of "natural justice" and are no less dangerous when used to enforce what the Court considers personal rights than when used about economic rights.

Justice Black argued, too, that Justice Goldberg had misread the purport of the Ninth Amendment. The framers of the Bill of Rights intended by this amendment to reassure the nation that the federal government was vested with only limited, expressly stated powers, and that all other powers are reserved to the states. Only this interpretation is consistent with the underlying philosophy of federalism on which the Constitution is based. "And so," said Justice Black, "I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this [Connecticut] state law."

Justice Stewart, in his dissenting opinion, also condemned the law as "unwise" and even "asinine," but this did not make it unconstitutional. Justice Stewart found no provision of the Bill of Rights to have been violated, and to rely on the Ninth Amendment is "to turn somersaults with history." He concluded that he could find no "general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court."

The diversity and clash of opinions in *Griswold* became nationally a pandemonium. Judges, lawyers, professors, politicians, even presidents of the United States argued over "original intent," "incorporation," "natural law," "activism," "privacy." Complex concepts became shibboleths, passwords for "liberal" or "conservative," and the uproar has been maintained for the past thirty years. In 1985 Edwin Meese III, attorney general in the Reagan administration, in a formal address to the American Bar Association, attacked the incorporation doctrine as standing on an "intellectually shaky" foundation,[42] and declared it to be totally without constitutional validity. The crucial concepts became mere political watchwords in the process of selection of Supreme Court justices and of some judges in the federal courts.

The clamor over these concepts and doctrines, especially the right of privacy, increased manifold following the Court's decision in *Roe v. Wade*, 1973.[43] Writing for a majority of seven justices, Justice Blackmun held that a woman had the constitutional right to an abortion as an aspect of her right of privacy. The Court divided pregnancy into three periods or trimesters. In the first trimester, the woman has an essentially unrestricted right to have an abortion; during the second trimester, states may regulate abortion to protect the woman's health; in the third trimester, however, and only then, may the states, in order to protect the potential life of the fetus, impose restrictions on abortion; but, even then, they must permit an abortion to save the woman's life. States, moreover, may not adopt a theory as to when life of a human being begins—they may not decide that life begins at conception, and thus give a fetus the same rights that are enjoyed by an infant.

Justice White and Chief Justice Rehnquist wrote separate dissenting opinions criticizing the majority for enforcing a right not specified in the Constitution.

But first let us note the opinion for the Court. Justice Blackmun said that prior decisions of the Court made it clear that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty', *Palko v. Connecticut*, are included in . . . [the] guarantee of personal privacy." The cases, he said,

> also make it clear that the right has some extension to activities relating to marriage; procreation; contraception; family relationships; and child rearing and education.
>
> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. . . .
>
> We, therefore, conclude that the right of personal privacy includes the abortion decision.

Justice White, dissenting, attacked the majority for simply fashioning "a new constitutional right for pregnant mothers," and said that this was done "with scarcely any reason or authority for its action." This was an exercise, he said, of "raw judicial power."

In his dissenting opinion, Chief Justice Rehnquist conceded that the "liberty" guaranteed by the Fourteenth Amendment "embraces more than the rights found in the Bill of Rights." But the liberty is not absolute; the guarantee means only that one may not be deprived of it without due process of law. What is the test for a deprivation? The law involved in the instant case falls into the area of social legislation, and the test "traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective." The Court's "sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard." The Court should not have applied the standard of "a compelling state interest" but that of "a rational relation to a valid state interest." The fact that a majority of states have had restrictions on abortion proves that the right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." That asserted right was "apparently completely unknown to the drafters of the [Fourteenth] Amendment." The drafters of the amendment "did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this [abortion] matter."

Does Original Intent Really Matter?

The chief justice made several important points. First, he conceded that the term "liberty" that is in the Due Process clause protects more than the liberties enumerated in the first eight amendments. This concession from a leading proponent of a conservative judicial philosophy makes conservative justices just as "activist" as are the liberal justices. Once it is conceded that the meaning of "liberty" is not exhausted by the Bill of Rights, the right of privacy may be just as constitutional and fundamental as is freedom of speech or religious liberty.

Justices Murphy and Rutledge were, I think, the first justices of the Supreme Court to explicitly state that the Fourteenth Amendment does more than incorporate the Bill of Rights as made applicable to the states; the term "liberty" may generate rights and liberties that were never dreamt of in the philosophy of the founders.[44] That was said in 1947. In 1961, Justice Harlan[45] formulated the point with precision: "The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.... [This liberty] is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints,... and which also recognizes,...that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." Thus, whether the matter is approached from the standpoint of the Ninth Amendment or from that of the fecundity of the term "liberty," there is agreement that there are liberties that are constitutionally protected even though they are not enumerated in the Bill of Rights.

Chief Justice Rehnquist's second point is that a statute prohibiting or stringently limiting the right to an abortion in the first trimester of pregnancy is social legislation and not a law infringing on a fundamental right or liberty of a woman. Such a law is not to be subjected to "strict scrutiny." It only needs to satisfy the mere rationality test. Well, what difference does it make? It makes all the difference in the world, for, as Justice Marshall observed, if a statute is subject to strict scrutiny, the statute is always, or nearly always, struck down as unconstitutional, but when the mere rationality test is applied, "there is little doubt about the outcome; the challenged legislation is always upheld."[46] If a woman does not have a fundamental right to an abortion (within the schedule formulated in *Roe v. Wade*), all legislation regulating abortion is in effect beyond constitutional challenge. To date, no majority of the Supreme Court has gone this far, and it is doubtful if a majority of the justices will do so in the foreseeable future.

Third, Chief Justice Rehnquist argued that the framers of the Fourteenth Amendment did not intend that a state legislature should have no power to limit a woman's right to procure an abortion. This is the argument familiarly known as "original intent." It is an argument that has been used in other contexts, and is not one that, in my opinion, carries much weight. Since, however, the argument has been resorted to often, let us consider how much reliance it deserves.

For example, in the *Everson* case, which involved the question whether a state violated the Establishment clause of the First Amendment (as absorbed by the Fourteenth Amendment) by paying the bus fares of students attending a parochial school, both the majority and dissenting opinions resorted to the "original intent" argument, and all justices, without exception, agreed that the "original intent" of the framers was to prohibit any breach of the wall of separation between church and state; yet the Court split 5-4 on whether or not paying the bus fares was in fact a breach in the wall of separation. The "original intent" approach did not answer the ultimate issue.

In his famous dissenting opinion in *Adamson*,[47] Justice Black argued that the original intent of the framers of the Fourteenth Amendment was to incorporate the Bill of Rights into the Due Process clause. That was in 1947. In 1968, in *Duncan v. Louisiana*, Justice Harlan turned to the argument from history and wrote: "The overwhelming historical evidence marshaled by Professor Fairman[48] demonstrates, to me conclusively, that the Congressmen and state legislators who wrote, debated, and ratified the Fourteenth Amendment did not think they were 'incorporating' the Bill of Rights." No words could more strongly state the case from the standpoint of original intent, denying the doctrine of incorporation. But in the same *Duncan* case Justice Black (with Justice Douglas joining) just as emphatically attacked the historical record on which Justice Harlan had relied. "I have read and studied this article [by Charles Fairman] extensively," wrote Justice Black,

> including the historical references, but am compelled to add that in my view it has completely failed to refute the inferences and arguments that I suggested in my *Adamson* dissent. Professor Fairman's "history" relies very heavily on what was *not* said in the state legislatures that passed on the Fourteenth Amendment. Instead of relying on this kind of negative pregnant, my legislative experience [as United States Senator, 1920–1937] has convinced me that it is far wiser to rely on what *was* said, and most importantly, said by the men who actually sponsored the Amendment in Congress.

Here we have two of the most distinguished and most highly respected justices radically disagreeing as to what, indeed, was the "original intent."

As an even more glaring example of the fragile nature of forensic history, consider *Wallace v. Jaffree*,[49] decided in 1985. The issue before the Court was whether a state may require a moment of silence at the beginning of a school day for the purpose of "prayer or meditation." By vote of 6-3, the Court struck down the statute as a violation of the Establishment clause of the First Amendment as incorporated into the Fourteenth Amendment. Our focus of attention, however, is on the dissenting opinion of Justice Rehnquist, who contended that decisions based on *Everson* were wrong, for the Constitution did not impose a "wall of separation" between church and state. After an elaborate analysis of what he considered the original intent of the framers of the First Amendment, he concluded that the Establishment clause forbids establishment of a national church and preference of one sect over another but does not mandate neutrality as between religion and "irreligion."

Despite the fact that in *Everson* all nine justices agreed that the First Amendment's Establishment clause reflected the views of Jefferson and Madison, Justice Rehnquist contended that this view "is demonstrably incorrect as a matter of history." Nor is it important that there were many precedents based on *Everson*, "for *stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history." Apparently, Justice Rehnquist was not self-critical when he wrote this statement, for if the majority had agreed with his reading of history, what would prevent justices, a few years later, from just as

strongly *rejecting* his reading of the historical record—for precedents "cannot bind them as to matters of history"?

Justice White, in a two-paragraph dissenting opinion, stated that he appreciated Justice Rehnquist's explication of the history of the Religion clauses, and so, he added, "Against that history [of course, as explicated by Justice Rehnquist], it would be quite understandable if we undertook to reassess our cases dealing with these clauses, particularly those dealing with the Establishment Clause. . . . I would support a basic reconsideration of our precedents."

"The true meaning of the Establishment Clause," said Justice Rehnquist, "can only be seen in its history." But what is its "true" history? "You are the salt of the earth; but if salt has lost its taste, how can its saltness be restored?"[50] Justices have themselves undermined reliance on history; who can restore its reliability?

Justice Holmes wrote for a unanimous Court, "Upon this point a page of history is worth a volume of logic." That was in 1921, in a case involving the question whether an estate tax is an excise.[51] Seventy years later, in cases much more complex and much more consequential for the nation, one must be quite hesitant about the application and reliability of this aphoristic statement. I think that what Justice Rehnquist has done in *Jaffree* has done much to discredit resort to history, to the pursuit of determining the "original intent" of the framers—the intent of the persons who wrote the articles of the Bill of Rights and of the Fourteenth Amendment, of the congressmen who voted for them, of the state legislators who debated and voted on them.

In addition, there is the disturbing question whether it is right to make the framers the officials who are to say ultimately what the words of the Constitution mean. Are they the invisible justices of the Supreme Court? They wrote the words, they argued over them and voted on them, but is it not for us the living to interpret them, to say what they mean? The president does not nominate historians to fill vacancies on the Supreme Court and to pass judgment on "wie es eigentlich gewesen," "how it actually happened."[52]

During the early years of the Great Depression, the Supreme Court considered a state mortgage moratorium law that extended temporarily the period of redemption from foreclosure sales. In a dissenting opinion for four justices, it was contended that the historical sources of the constitutional prohibition against the impairment of contracts by the states conclusively showed that the intention was to prevent states from giving relief to debtors in times of hardship. Writing for the majority, Chief Justice Hughes sharply rebuffed the historicism of the dissent with a memorable phrase:[53]

> It is no answer . . . to insist that what the provision meant to the vision of [a century ago] it must mean to the vision of our time. . . . It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a *constitution* that we are expounding . . . a constitution intended to endure for ages."[54]

The same line was taken twenty years later in the case of *Brown v. Board of Education*.[55] While the case was pending and was being debated by the justices, the evidence shows that there was the strong likelihood that even though they were all opposed to racial segregation on moral, humanitarian grounds, five of the justices were of the opinion that the original intent of the framers of the Fourteenth Amendment's Equal Protection clause was not to prohibit segregation in public education. A member of the majority was Chief Justice Frederick M. Vinson. On September 8, 1953, he died, just before the case was to be reargued. (At the funeral, Justice Frankfurter remarked to a former clerk: "This is the first indication I have ever had that there is a God.")[56] Frankfurter, though persuaded that the history of the adoption of the Fourteenth Amendment was against desegregation, agonizingly hoped that a judicial basis would be found for a judgment outlawing segregation. With the appointment of Earl Warren as chief justice, the line-up changed, and the new majority was for a desegregation decision.

But there was grave concern that a divided Court decision would lack the moral impact that a desegregation decision desperately

needed. A divided Court could mean a divided nation. Chief Justice Warren and Justice Frankfurter made special efforts to persuade justices not to dissent, and particularly not to write dissenting or even concurring opinions. The great stumbling block was the problem of "original intent." The final draft of the Court's opinion, written by Chief Justice Warren, neatly skirted this issue:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson*[57] was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.

Thus, by bypassing the historical problem, the opinion satisfied all justices, and the Court spoke with one voice. This was the achievement, not of a specialist in forensic history, but of a judicial statesman.

"The end of the matter; all has been heard"[58]

The original Bill of Rights, ratified in 1791, applied only to the federal government. We can think of it as the *First Bill of Rights*; in the twentieth century—and especially since 1947—what may be called the *Second Bill of Rights* has been created by decisions of the United States Supreme Court, which have "incorporated" or "absorbed" most of the guarantees of the first eight amendments of the Bill of Rights, namely the First, the Fourth, the Fifth, the Sixth, and the Eighth.[59] These guarantees have been read into the Due Process clause of the Fourteenth Amendment, ratified in 1868, as applicable to the states. Justice Black, sometimes joined by Justice Douglas, maintained that all of the first eight amendments had been incorporated into the Due Process clause; the Court, however, proceeded only gradually and selectively in the process of incorporation.

Justices Murphy and Rutledge from the first held that the Due Process clause did more than absorb the Bill of Rights, that the concept of "liberty" in that clause made possible the recognition of guarantees that were not enumerated in the first eight amendments. One may say that this proposition was implicit in two cases decided in 1923 that stated that the Constitution guaranteed the right of a person to marry, to found a family, to raise and educate his or her children—all substantive rights that are not mentioned anywhere in the Bill of Rights.

This line of reasoning culminated in *Griswold*, in 1965, when the Court held that the Constitution guaranteed individuals the right of privacy. In 1973 the Court held that a woman's right to choose to have an abortion is an aspect of her right of privacy.

There are thus *unenumerated* rights guaranteed by the Constitution. There is thus, in effect, a *Third Bill of Rights*, unwritten except for the specific fundamental rights that emerge out of decisions of the Court.

We have seen that there have been and are sharp differences of opinion in the Court as to the theories, the jurisprudential and constitutional philosophies on which these momentous developments may be based. The debates over them have been vigorous and are not likely to abate in the foreseeable years ahead. But the debate over "original intent," over whether some constitutional rights are "fundamental" and some not, over whether some laws are subject to "strict scrutiny" when constitutionally challenged, whether unenumerated rights can be justified by the Ninth Amendment, or by the Due Process clause, or on Justice Cardozo's formulation, namely, that asserted rights imposed limits on states because "they represented the very essence of a scheme of ordered liberty, . . . principles of justice so rooted in the traditions and conscience of our people as to be ranked fundamental" (*Palko*)—no voice out of Sinai will be heard to resolve these questions. Cases will continue to be decided by a divided Court, and there will be concurrent and dissenting opinions. I think, however, that the Constitution will continue to contain, not one Bill of Rights, but three.

I cannot, moreover, conclude this discussion without calling attention to a significant cognate development. Starting in the 1970s, following the swearing-in of Justice Rehnquist on January 7, 1972, there was pervasive apprehension that a conservative majority in the Supreme Court may move in a direction that may undo the gains that

had been made on behalf of civil liberties and civil rights. To meet this situation, highest courts of states began to look at the Bills of Rights of the state constitutions in order to avoid the possibility of restrictive decisions by the United States Supreme Court under the provisions of the United States Constitution.

In a law review article in 1977, Justice Brennan wrote about this development:

> But the point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the protective force of state law.[60]

Let me cite a case that will dramatically bring home the force of Justice Brennan's argument. Pursuant to its power to regulate the sale of liquor, the state of New York banned topless dancing in establishments operating under a license to serve liquor. When the statute was challenged by several restaurants and nightclubs, the New York Court of Appeals declared it unconstitutional, for, the court held, topless dancing was a form of protected expression under the First Amendment. By a vote of 7-2, the Supreme Court reversed and held that the ban did not violate the First Amendment, for the state's power to regulate or ban the sale of liquor included the lesser power to ban the sale of liquor on premises where there was topless dancing.[61]

On remand, the case came again before the Court of Appeals, but now, for the first time, it considered the case under the free speech provision of the state constitution, and held that the ban on topless dancing was a violation of the state constitution.[62] Thus, as this case forcefully illustrates, when the United States Constitution does not fully provide certain rights, the issues are by no means foreclosed at the state level under state constitutions.[63]

In a law review article in 1986, Justice Brennan wrote: "Rediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most important development in constitutional jurisprudence of our times."[64] This is probably, I submit, over-generous praise of the development, but that the development deserves high praise is beyond reasonable dispute. The highest acclaim remains for the Second and Third Bills of Rights, and associated with them I would place the Bills of Rights of the state constitutions.

What of the future? With Cardinal Newman, I can say, "Lead kindly Light," but *not* "amid the encircling gloom"; only an obdurate pessimist can despair. At the time of writing this essay, there are only three members of the Court who are confirmed, resolute, conservative ideologues: Chief Justice Rehnquist, and Justices Scalia and Clarence Thomas. If they had the power, they would turn the clock back, and although they profess to be nonactivists, they would undo the accomplishments of the last fifty years.

Thus far, however, there has been only one major setback, affecting the Free Exercise clause of the First Amendment,[65] and some whittling away at the rights of defendants in criminal cases, and abortion rights,[66] but the gains by far outweigh the losses. It would be witless, I think, to anticipate that a majority of the Court would agree on "any extreme of wickedness or folly."[67]

A strong confirmation of this optimistic view came unceremoniously in a case decided in January 1994. The case, *Albright v. Oliver*,[68] on its facts is scarcely important. The decision, by a 7-2 vote, generated no less than six opinions. There was no majority opinion, but the plurality opinion by Chief Justice Rehnquist was joined by Justices O'Connor, Scalia, and Ginsburg, and it is this opinion that merits our attention, for in it Chief Justice Rehnquist, joined by Justice Scalia—two of the three generally identified conservative members of the Court—concedes that the Second and Third Bills of Rights are not threatened to be undone.

Briefly, Albright, the petitioner, claimed that the right to be free from criminal prosecution except upon probable cause was a *substantive* due process "liberty interest" under the Fourteenth Amendment Due Process clause. The plurality opinion was that Albright might have had a claim under the Fourth Amendment, which he did not allege, but that there was no substantive due process "liberty interest" to be free from criminal prosecution except upon probable cause. The Court, said the chief justice, is reluctant to expand the concept of substantive due process because the guideposts are "scarce and open-ended," but he conceded that substantive due process rights have been recognized in matters relating to marriage, family procreation, and the right to bodily integrity. For this proposition the opinion referred to *Planned Parenthood v. Casey*,[69] in which the Court's opinion referred to the *Pierce, Meyer,* and *Griswold* decisions. Then the chief justice went on to say that in the last one hundred or more years, the Court "has concluded that a number of procedural protections contained in the Bill of Rights were made applicable to the States by the Fourteenth Amendment," and he enumerated the protections: the Fourth Amendment's exclusionary rule; the Fifth Amendment's privilege against self-incrimination; the Double Jeopardy clause of the Fifth Amendment; and the Sixth Amendment's rights to counsel, to speedy trial, to compulsory process, and to trial by jury.

Justice Scalia, as mentioned, joined in this opinion, and in the brief concurring opinion that he wrote, he did not challenge the chief justice's summary of rights established by the Court that constitute what I have denominated the Second Bill of Rights and the Third Bill of Rights. These rights as originally defined may be narrowed or broadened in the years to come, but I think it is safe to say that the core of them will remain enshrined as American constitutional law, the twentieth century's gift to the nation. ■

Notes

1 Ralph Waldo Emerson, "The Conservative" (1841), in *Essays and Lectures* (New York: Library of America, 1983), 1.

2 Roscoe Pound, *Interpretations of Legal History* (New York: Macmillan, 1923), 1.

3 From Diogenes Laertius, bk. IX, sec. 8.

4 Hugo L. Black, "The Bill of Rights," 35 N.Y.U. Law Rev. 866 (April 1960).

5 See e.g., *Everson v. Board of Education*, 330 U.S. 1 (1947).

6 *Brown v. Board of Education*, 347 U.S. 483 (1954).

7 *Baker v. Carr*, 369 U.S. 186 (1962). H. J. Abraham, *Freedom and the Court*, 5th ed., (New York: Oxford University Press, 1988), 25.

8 R. C. Cortner, *The Supreme Court and the Second Bill of Rights* (Madison: University of Wisconsin Press, 1981).

9 *Barron v. Baltimore*, 32 U.S. 243 (1833).

10 *Hurtado v. California*, 110 U. S. 516 (1884); *Twining v. New Jersey*, 211 U.S. 78 (1908).

11 *Gitlow v. New York*, 268 U.S. 652 (1925).

12 Cf. dissenting opinion of Justice Felix Frankfurter, *Adamson v. California*, 332 U.S. 46 (1947).

13 *Fiske v. Kansas*, 274 U.S. 380 (1927); *Stromberg v. California*, 283 U.S. 359 (1931); *Near v. Minnesota*, 283 U.S. 697 (1931).

14 *Near v. Minnesota*, 283 U.S. 697 (1931).

15 *Powell v. Alabama*, 287 U.S. 45 (1932).

16 *Hamilton v. Regents*, 293 U.S. 245 (1934).

17 *Centwell v. Connecticut*, 310 U.S. 296 (1940).

18 *Everson v. Board of Education*, 330 U.S. 1 (1947).

19 *In re Oliver*, 333 U.S. 257 (1948).

20 *Duncan v. Louisiana*, 391 U.S. 145 (1968).

21 *Mapp v. Ohio*, 367 U.S. 643 (1961).

22 *Robinson v. California*, 370 U.S. 660 (1962).

23 *Gideon v. Wainwright*, 372 U.S. 335 (1963); Anthony Lewis, *Gideon's Trumpet* (New York: Random House, 1964).

24 *Mallory v. Hogan*, 378 U.S. 1 (1964); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

25 *Pointer v. Texas*, 380 U.S. 400 (1965).

26 *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

27 *Benton v. Maryland*, 395 U.S. 784 (1969).

28 *Palko v. Connecticut*, 302 U.S. 319 (1937).

29 See cases cited note 10 supra.

30 *Palko v. Connecticut*, cited in note 28 supra, was overruled in *Benton v. Maryland*, cited in note 27 supra.

31 See cases cited note 26 supra.

32 *Chicago, B. & O. Ry. Co. v. Chicago*, 166 U.S. 226 (1897).

33 Emphasis supplied by Justice Harlan, not by Justice Cardozo.

34 Justice Abe Fortas, concurring opinion, *Bloom v. Illinois*, 391 U.S. 194 (1968).

35 Abraham, note 7 supra, at 112.

36 *Meyer v. Nebraska*, 262 U.S. 390 (1923).

37 *Pierce v. Society of Sisters*, 268 U.S. 510 (1923).

38 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

39 *Eisenstadt v. Baird*, 405 U.S. 438 (1972), extended right of privacy to unmarried persons.

40 Bennett B. Patterson, *The Forgotten Ninth Amendment* (Indianapolis: Bobbs-Merrill, 1955).

41 *Olmstead v. United States*, 277 U.S. 438 (1928).

42 Abraham, note 7 supra, at 54.

43 *Roe v. Wade*, 410 U.S. 113 (1973).

44 *Adamson v. California*, cited note 12 supra.

45 *Poe v. Ullman*, 367 U.S. 497 (1961).

46 *Massachusetts Board of Retirement v. Murgio*, 427 U.S. 307 (1976).

47 *Adamson v. California*, cited note 12 supra.

48 Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 Stanford Law Rev. 5 (1949).

49 *Wallace v. Jaffree*, 472 U.S. 38 (1985).

50 Matthew 5:13.

51 *New York Trust Co. v. Eisner*, 256 U.S. 345 (1921).

52 Leopold von Ranke, *Geschichten der Romanischen und Germanischen Volker* (1824).

53 *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934).

54 *McCulloch v. Maryland*, 4 Wheat. (U.S.) 316 (1819).

55 *Brown v. Board of Education*, cited note 6 supra.

56 Richard Kluger, *Simple Justice* (New York: Knopf, 1976), 656.

57 *Plessy v. Ferguson*, 163 U.S. 537 (1896).

58 Ecclesiastes 12:13.

59 Guarantees of the Bill of Rights that remain unincorporated are the following: the Second and Third Amendments; the Fifth Amendment provision for indictment by a grand jury in capital cases; the Seventh Amendment guarantee of trial by jury in civil cases; and the Eighth Amendment guarantee against excessive bail or fines.

60 Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harv. L. Rev. 489 (1977), quoted in Robert F. Williams, ed., *State Constitutional Law: Cases and Materials*, 2d ed. (Charlottesville, Va.: Michie Co., 1993), 162.

61 *N.Y. State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981).

62 *Bellanca v. N.Y. State Liquor Authority*, 429 N.E. 765 (N.Y. 1981), cert. Den. 456 U.S. 1006 (1982). See also Williams, op. cit., supra note 60, at 178.

63 See Williams note 60, at 172.

64 Brennan, National Law J., Sept. 29, 1986, Special Section, at S-1; quoted in Williams, note 60, at 161.

65 *Employment Division v. Smith*, 110 S.Ct. 1595 (1990), in which the Court, by 6-3 vote, held that Oregon may punish members of the Native American Church for sacramental use of peyote, and that even practices that are fundamental to

a religion can be banned as long as the prohibition is combined with a "neutral" criminal law of general applicability. Justice O'Connor, though part of the majority, rejected the rationale of Justice Scalia's opinion for the Court. By this decision the Court departed from almost a dozen precedents that held that the government, to justify any substantial burden on religiously motivated conduct, must prove a compelling state interest and that it use means narrowly tailored to achieve that interest. Justice Scalia's opinion practically emasculated the Free Exercise clause of the First Amendment. The Religious Freedom Restoration Act, designed to restore the "compelling interest" test in Free Exercise cases was supported by President Clinton and by a fifty-four member coalition of civil liberties organizations and religious groups. The bill passed both Houses of Congress and was signed by President Clinton on November 16, 1993.

In a case decided in June 1993, *Church of Lukumi v. City of Hialeah*, 124 L.Ed. 2d 472 (1993), the Supreme Court held a city ordinance unconstitutional as a violation of the First Amendment guarantee of the free exercise of religion because the object of the ordinance was suppression of the religion known as Santeria, which practices animal sacrifice as a principal form of devotion. Although there were four opinions, the court unanimously agreed that a governmental regulation that was directed against conduct motivated by religious conviction fails to meet the strict scrutiny test. (This is different from a governmental action that is neutral on its face but may have an impact on some religious conduct. Apparently a law that is neutral and is generally applicable—not aimed at a religious act—is not subject to strict scrutiny but to the rationality test. In any case, the recent cases do not affect the proposition that the guarantee of the free exercise of religion is no less applicable to state than to federal action.)

66 Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993), 330-31, 373-74.

67 Abraham Lincoln, "First Inaugural Address," in Carl Van Doren, ed., *Literary Works of Abraham Lincoln* (New York: Readers Club, 1942) 184.

68 *Albright v. Oliver*, 127 L.Ed. 2d 114 (1994).

69 *Planned Parenthood of Southeastern Pa. v. Casey*, 120 L.Ed.2d 674 (1992).