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THE ADAMSON CASE: A STUDY IN CONSTITUTIONAL TECHNIQUE

"To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them. . . ."

—Alexander Hamilton

". . . constitutional law like other mortal contrivances has to take some chances. . . ."

—Oliver Wendell Holmes, Jr.

An institution which settles general propositions by concrete cases must be peculiarly sensitive to the interrelations of function and technique. The Supreme Court, in reaching decisions, has open to it not only a choice of ends but also a variety of means. When the Court has occasion to probe deeply into the related problems of judicial function and constitutional

1. The Federalist, No. 78.
technique, the result may be a landmark case. Such was *Adamson v. California.*

The specific problem of judicial function there debated is one which has only recently come to the fore—the extent and character of Supreme Court supervision of state criminal procedure. The problem of technique is an older one—the choice of methods involved in using the first section of the Fourteenth Amendment to restrict state action.

The case speaks for itself in highlighting the conflict. Adamson was tried for murder and was subjected, under California constitutional and statutory mandates, to extensive comment by the prosecutor on his failure to take the witness stand in his own behalf. He appealed the resulting conviction on the ground that the state constitution and statute abridged his federal constitutional privilege against self-incrimination guaranteed by the Fifth Amendment and made binding on the states by the privileges and immunities clause of the Fourteenth. This he buttressed by the additional contention that the privilege against self-incrimination inheres in the right to a fair trial, protected by the due process clause of the Fourteenth Amendment.

His conviction was affirmed by a sharply divided Court. Justice Reed, speaking for the majority of five, had no difficulty in disposing of the case on precedent. The claim had often been made, and always decisively rejected, that the Fourteenth Amendment makes the limitations of the Bill of Rights binding on the states. The forlorn history of the privileges and immunities clause testified to the Court's reluctance thus categorically to

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

References herein to the Fourteenth Amendment or to the Amendment are to the first section of the Fourteenth Amendment as set forth above.
5. "... in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." Calif. Const. Art. I, §13.

"The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel." Calif. Penal Code § 1323.
6. That an acute divergence of opinion on the use of the Fourteenth Amendment existed on the Court was presaged by Justice Frankfurter's concurring opinions in Malinski v. New York, 324 U.S. 401, 412 (1945) and Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 466 (1947).
7. Chief Justice Vinson, Justices Burton, Frankfurter, Jackson and Reed.
9. Ever since the Slaughter-House Cases, 16 Wall. 36 (1873), where it was decided that only the privileges of national citizenship are protected against state action by
limit the states. And the due process clause, potent weapon though it was against state economic regulation, proved no categorical reference to Bill of Rights limitations. Further, Justice Reed found, the very problem of self-incrimination had been considered by the Court forty years previously in Twining v. New Jersey, where the claim that the states are barred from abridging the privilege against self-incrimination was rejected. Stare decisis gave a short answer to the problem before the Court.

But the minority was not impressed by short answers. Four justices, led by Mr. Justice Black, thought that the entire judicial history of the Fourteenth Amendment had been a mistake. The Court, they said, must apply the Bill of Rights in toto against the states. But the dissenters disagreed among themselves as to the limits of the Amendment. Justices Murphy and Rutledge, while agreeing with Justice Black as to the incorporation of the Bill of Rights, did not agree that the first eight amendments necessarily comprehend all the protection afforded against state action by the Fourteenth Amendment. The Rutledge-Murphy view is not new to the Court, thanks to a lonely but manful Thirty Year's War carried on by Justice Harlan, and to a traditional minority view of the meaning of the Fourteenth Amendment.

See, e.g., Hurtado v. California, 110 U.S. 516, 538 (1884), Maxwell v. Dow, 176 U.S. Literally hundreds of claims of privilege based on national citizenship have been rejected by the Court. Wherever the argument has been used to encompass Bill of Rights guarantees, it has been unsuccessful. Walker v. Sauvinet, 92 U.S. 90 (1876) (jury trial in suit at common law); Maxwell v. Dow, 176 U.S. 581 (1900) (12-man jury in criminal trial); Twining v. New Jersey, 211 U.S. 78 (1908) (privilege against self-incrimination); Palko v. Connecticut, 302 U.S. 319 (1937) (double jeopardy).

Only a few scattered rights of a national character, such as the right to vote for members of Congress, to petition Congress, to resort to federal courts, are considered embodied in the privileges and immunities clause; it has become in effect a last resort for hopeless constitutional claims. See Note, 9 Geo. Wash. L. Rev. 106, 113 (1940).

The one departure in recent years was speedily rectified. Colgate v. Harvey, 296 U.S. 404 (1935) (right to engage in business outside state of residence held privilege of national citizenship), overruled by Madden v. Kentucky, 309 U.S. 83 (1940). For subsequent attempts to revive the privileges and immunities clause, see note 19 infra.

10. Hurtado v. California, 110 U.S. 516 (1884) (indictment by grand jury). TheTwining and Palko cases, supra note 9, also considered and rejected the due process argument.

11. 211 U.S. 78 (1908).

12. As in the Adamson case, the Court in the Twining case had before it claims based both on privileges and immunities and due process. The privileges and immunities argument, by 1908, was easily disposed of by reference to an unbroken string of decisions going back to the Slaughter-House Cases, supra note 9. A more elaborate discussion was accorded the due process argument, which was rejected on the grounds that in England and in this country at the time of the adoption of the Constitution, due process had not embraced the privilege against self-incrimination. 211 U.S. 78, 100 et seq.


14. 332 U.S. 46, 68.

15. Id. at 123.

16. Alone of the members of his Court, Justice Harlan dissented consistently from the proposition that the Bill of Rights is not included in the Fourteenth Amendment.
Amendment set out in impressive detail in Justice Black's historical appendix.\(^7\)

But the minority's position, as enunciated by Justice Black, embodies a more startling thesis, which has no purely historic justification. It seeks to limit the scope of the Amendment to the specific guarantees of the Bill of Rights.\(^3\) So interpreted, no one clause of the Amendment imports the Bill of Rights and, indeed, none of the separate clauses can have any independent meaning, for the section must be read as a whole to bring the Bill of Rights—and nothing more—to bear upon the states.\(^9\)

Why does Justice Black seek to limit the Fourteenth Amendment to the Bill of Rights guarantees rather than merely to include those guarantees? A double answer must be essayed to this question, in terms of his view of the function of the Supreme Court in relation to the states and his view of the proper technique of constitutional adjudication.

As to function, he believes in general that the Court should refrain from


17. 332 U.S. 46, 92.

18. That limitation rather than mere inclusion is Justice Black's objective is made clear by Justice Murphy's separate dissent. "I agree [with Justice Black] that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights." Id. at 124.

Justice Black's limitation thesis is implicit in his attack on the due process formula. "... to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of 'natural law' deemed to be above and undefined by the Constitution is another." Id. at 91.

19. Justice Black is forced therefore to retreat from his recent sponsorship of the privileges and immunities clause as guarantor of civil rights. See Hague v. CIO, 307 U.S. 496 (1939); Edwards v. California, 314 U.S. 160 (1941). A by-product of abandonment of express reliance on the privileges and immunities clause is broader coverage, since it speaks of "citizens" and would therefore exclude aliens from the enjoyment of personal liberty under the Court's protection.

Since the entire history of attempts to include the Bill of Rights in the Fourteenth Amendment has been marked by the separate use of either due process or privileges and immunities, Justice Black is compelled to pay deference to arguments for inclusion which use these clauses separately. The result is an ambiguity as to precisely what it is in the Fourteenth Amendment that imports the Bill of Rights. "... one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the states." [Emphasis added] 332 U.S. 46, 71.

Where this leaves the separate clauses, and particularly the equal protection clause, is difficult to ascertain.

For a recent attack on imprecision in the labelling of constitutional authority, see Frankfurter, J., dissenting in Bridges v. California, 314 U.S. 252, 280 (1941).
interfering with state economic regulation, but that it should intervene to protect personal liberties from infringement by the state. As to constitutional technique, Justice Black expresses himself vigorously in favor of a close and literal application of precise constitutional provisions. His ideal is adherence to the meaning of the Constitution and certainty in its application. He disapproves of the use of vague formulae to permit increments of judicial power.

Whether the function or the technique counts more heavily is difficult to say, since in his exposition they dovetail so well. Interference with state economic regulation, he points out, has been effected under the aegis of the conveniently broad due process technique. Personal liberties, on the other hand, seem explicitly stated in the Bill of Rights. Therefore, Justice Black sees limitation of the Fourteenth Amendment to the Bill of Rights as performing the double purpose of keeping the Court out of the economic area and active in the personal liberty field. The technique, in his view, leads to the desired function.

It was Justice Black's attack on the due process technique that drew the fire of Justice Frankfurter's concurring opinion. Speaking completely in terms of judicial history, Justice Frankfurter interposed a strong defense of the due process formula. That formula, he indicates, has served to bring into the law the prevailing notions of fundamental rights peculiar to an era. It is for him an index of the constitutional Zeitgeist.

20. E.g., "... the invalidation of regulatory laws by this Court's appraisal of 'circumstances' would [not] readily be classified as the most satisfactory contribution of this Court to the nation." 332 U.S. 46, 83. See also Justice Black's dissent in Conn. General Co. v. Johnson, 303 U.S. 77, 83 (1938).


22. "... I further contend that the 'natural law' formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power." 332 U.S. 46, 75.

23. Id. at 79 et seq. See cases collected id. at 83 n. 12.

24. Id. at 70.

25. Id. at 59.

26. The opinions of Justices Black and Frankfurter in this case provide an interesting contrast on the rhetorical level. Justice Frankfurter stresses judicial history and minimizes the intent of the framers of the Fourteenth Amendment. Justice Black concentrates on the intent and dismisses as a "mistake" the subsequent judicial interpretation of the Amendment. Both manage to buttress their approaches with citation to equally respectable canons of constitutional construction. Compare 332 U.S. 46, 63 (Constitution must be read in light of plain meaning of the language) with 332 U.S. 46, 72 (Constitution must be read through eyes of its framers).

27. The formula's appellation, of course, is drawn from the wording of the Fourteenth Amendment's first section. Thus, for example, in its employment, specific reference may be either to "due process" or "equal protection." But whichever is used, the criterion is "fundamental notions of justice" rather than specific constitutional provisions. It is this approach, rather than the due process clause itself, which is referred to herein as the "due process technique."
Since Justice Frankfurter does not essay a definition of the Court's function in state cases, the conflict—Bill of Rights against due process, certainty against flexibility—takes place on the level of technique. Assuming, then, Justice Black's concept of the Court's function, what are the historical and logical bases of his proposed technique? Would that technique promote the achievement of the desired function? And, finally, should Justice Black's Bill of Rights technique be found to have disadvantages, does the poor performance of the due process technique nonetheless require the adoption of Justice Black's technique—with its explicit use of Bill of Rights guarantees—to protect such vital personal liberties as the right to a fair trial?

Towards a More Static Jurisprudence: The Black View

The Rhetoric of History. Justice Black's opinion is marked by the deference which he pays to the "intent of the founders." And by far the most immediately impressive feature of his contribution is the elaborate historical appendix which documents the "intent" argument. Although the gist of his position—the limitation thesis—exists independently of the historical disquisition, Justice Black's excursion into the past is so basic to the fabric of his argument that it requires some independent analysis.

His historical position may be summarized as follows. In interpreting the Constitution we should follow intent. There is an intent behind the Fourteenth Amendment. That intent can be ascertained by turning to the words of the man responsible for its form. That man is Congressman John Bingham of Ohio. Congressman Bingham intended that the Bill of Rights be made binding on the states.

Starting at the latter end of this proof, there is ample support for Justice Black's view. The minutes of the Committee on Reconstruction and the debates on the floor as reported in the Congressional Globe make it clear that Bingham did intend to incorporate the Bill of Rights binding on the states.

28. Assuming, but not deciding. An inquiry into the nature of the Supreme Court's function is not within the scope of this discussion.

Perhaps the major problem inherent in what appears to be Justice Black's conception of the Court's function in state cases is the conflict that frequently arises between state regulatory legislation and what we have come to regard as civil liberties. See Prince v. Massachusetts, 321 U.S. 153 (1944) (application of child labor statute to prevent minor from distributing Jehovah's Witness literature); Kotch v. Board of Commissioners, 330 U.S. 552 (1947) (use of statute regulating pilotage training to exercise nepotic control over entrance to profession).

For recent discussion of the Court's function, see Rostow, Book Review, 56 Yale L.J. 1469 (1947); Comment, The Image in the Mirror, 56 Yale L.J. 1356 (1947).

29. The appendix provides an exhaustive documentation of the debates in the Joint Committee on Reconstruction and on the floor of both Houses.

30. No hint of the limitation thesis appears in any of the historical materials available.

31. Justice Black refers to Bingham as "the Madison of the first section of the Fourteenth Amendment." 332 U.S. 46, 74.

32. See, especially, Bingham's speech of February 28, 1866, Cong. Globe, 39th Cong,
cites well and fully to this point. But what is not revealed in those minutes and debates so painstakingly collated by Justice Black is the fact that other purposes motivated John Bingham.

We are not told, for example, that Bingham belonged to the irreconcilable group of "Black Republicans" who sought to crush the defeated South by enhancing national power at the expense of the states. We also fail to learn from Justice Black's historical data that Bingham, like all good abolitionists, viewed the Supreme Court with suspicion and dislike, and that he regarded the Amendment as a weapon for legislative rather than judicial action against the states. And we get no hint of Bingham's position as a railroad lawyer and a strong proponent of economic laissez-faire, which might have made him sympathetic to the very view of due process which is anathema to Justice Black. And there is nothing in what Bingham or anyone else said to suggest that the Amendment was to be exclusively a shorthand reference to the Bill of Rights.

It would seem, then, that the intent which Justice Black imputes to Bingham is only one thread in a tangled skein. But even conceding a limited validity to his interpretation, how much does it prove? A constitutional amendment is the end product of the acquiescence of Congress and the states. Equating the intent of one man with so communal a project seems an oversimplification.

And finally, there comes into question the validity of the postulate under-

1st Sess. (1866) 1089 et seq. See also speech of Senator Howard, May 23, 1866, id. at 2764 et seq.

33 See Graham, The "Conspiracy Theory" of the Fourteenth Amendment, 47 YALt L.J. 371, 392 (1938). The atmosphere in which discussions of the Fourteenth Amendment were carried on partook more of a desire to wreak vengeance on the iniquitous South than to promote person liberty. Only a year after the Amendment was framed, President Andrew Johnson faced impeachment, as much as for anything, for his lenient attitude toward the South.

34. See Bingham's speech of April 24, 1860, CONG. GLOBE, 36th Cong., 1st Sess. 1839 (1860). See also 3 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 171, 189 (1922).


36. The famous conspiracy theory of the Fourteenth Amendment, if accurate, would place on Bingham and Roscoe Conkling the onus of having deliberately worded the Fourteenth Amendment to give judicial protection to corporate property rights as against state regulation. See 2 BEARD, THE RISE OF AMERICAN CIVILIZATION 111-13 (1928). That theory has been rejected by the most careful study made to date. Graham, The "Conspiracy Theory" of the Fourteenth Amendment, 47 YALE L.J. 371 (1938), 48 YALE L.J. 171 (1938).

But even if there was no deliberate attempt to write freedom from state economic regulation into the Amendment, a study of Bingham's views on natural rights and the sanctity of property discloses that such a concept of due process is in line with his own beliefs. Graham, supra, 47 Yale L.J. 371, 393-402. Bingham undoubtedly wished to include the Bill of Rights in the Fourteenth Amendment. This does not mean that he would have been hostile to the use of due process to limit state economic regulation. "... the Civil War of itself consummated a marriage of idealistic and economic elements in American constitutional theory." [Italics in original.] Graham, supra, 48 YALE L.J. 171, 194 (1938).
lying the argument from intent. The original purpose of the Amendment, to the extent that it can be ascertained, may be an important part of its historical meaning. But it can never be the decisive element in the growth of the Constitution as a living organism. Three-quarters of a century of doctrinal development cannot be shrugged off as mere historical error. It is suggested that resort to the intent of the Fathers is an escape from rather than a solution to the problem. If Justice Black's position deserves adoption, it must be on more substantial grounds than the dubious rhetoric of history.

The Logic of Certainty. Pervading the pages of his dissent is Justice Black's distrust of the vagueness and uncertainty of the due process formula. He is haunted by the specter of due process as a clog on state economic legislation. His concern is to prevent a return to that charismatic jurisprudence which enabled the Court to substitute its views on economic policy for those of the legislature. As one means toward that end, he has in the past advanced the view that corporations are not persons within the meaning of the due process clause. That view never won acceptance by the Court. But the limitation of the Fourteenth Amendment to the Bill of Rights represents another line of attack on the same problem. It is a technique more sophisticated than an attempt to separate corporations from natural persons, easily circumvented by the device of the stockholder suit. The law still regards the stockholder as a person.

But is the freedom of the state to regulate business enterprise assured by limitation of the Fourteenth Amendment to the Bill of Rights? The Amendment, powerful judicial weapon through it is, does not exhaust the Constitution's potentiality. There are other clauses which could operate at least as effectively as a restraint on state economic regulation. The recent history of the Commerce Clause testifies to that fact. A court eager to impose its

37. See note 22 supra.
38. "But this formula [due process] has been used in the past and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government." 332 U.S. 46, 90.
39. Justice Black, earlier in dissent, calls the roll of due process cases which "trespass, all too freely." Id. at 83, n. 12. As he himself points out, many of these decisions have since been overruled by a Court with a much reduced propensity "to roam at large." See infra, p. 279.
41. A Court eager to interfere with state economic policy, but barred from the use of the Fourteenth Amendment would still have a wide choice of constitutional weapons. See, e.g., the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3; the Contract Clause, id. Art. I, § 10, Cl. 1; the Privileges and Immunities Clause, id. Art. IV, § 2, Cl. 1; the Supremacy Clause, id. Art. VI, Cl. 2.
42. In the field of taxation of interstate enterprises, the Commerce Clause has far outstripped the Fourteenth Amendment as an instrument for invalidating state economic legislation. Compare Butler Bros. v. McCollan, 315 U.S. 501 (1942) and International Har-
notions of policy on the states will not be thwarted by the frail shield of verbal limitation; state economic regulation is safe from judicial intervention only so long as it pleases the Court to hold it so.

Even if Justice Black's interpretation fails to protect state economic regulation from the Court's scrutiny, it retains an attractive quality. It is true that other constitutional provisions remain as vast reservoirs of judicial power over the states. But adopting his position, would the Fourteenth Amendment then be completely circumscribed and defined? Could limitation to the specific guarantees of the Bill of Rights pin the Amendment down to a precise and certain meaning?

Unfortunately, the judicial history of the first eight amendments does not indicate that its guarantees are particularly specific. Nuances of interpretation have emerged which do not derive from a literal reading. The words of the First Amendment do not lead inevitably to the conclusion that freedom of speech means freedom to carry on peaceful picketing, or that the free exercise of religion means license to distribute leaflets and ring doorbells. Nor, to cite a most recent example, does it necessarily follow that "public rides to private schools" are permissible while the use of released time for religious education in public schools is interdicted by the separation of church and state.

The greater the sweep of the Court's protection of personal liberties, the greater has been the departure from literal adherence to verbal formulae. And consequently, the less "certainty" is achieved.

And even if most of the provisions of the Bill of Rights were to lend themselves to simple and certain construction, there remains an exception. For the Fifth Amendment, like the Fourteenth, contains a due process clause.


The Commerce Clause has become much more vigorous than it seemed as recently as six years ago, See Braden, Umpire to the Federal System, 10 U. of Chi. L. Rev. 27, 48 (1942).

43. See note 41 supra.
47. For a criticism of this departure, which seems somewhat out of keeping with his own favorable attitude toward the fluidity of due process, see Justice Frankfurter, dissenting, in Bridges v. California, 314 U.S. 252, 279 (1941).
48. Justice Black is not, of course, contending for absolute certainty in the application of the Constitution, 332 U.S. 46, 90. But the distinction which he draws (id. at 91) between "particular standards" and "natural law" lapses into logomachy when the Court considers situations far beyond the ambit of the "intent of the founders."
49. "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. AMEND. V.
And their respective histories indicate that in a given climate of opinion
their scope is coterminous. The Fifth Amendment is equally as capable as
the Fourteenth of contraction and expansion to suit changing views of
judicial policy. It would appear that the existence of so elastic a pro-
vision in the Bill of Rights is conclusively fatal to the theory that limitation
to it would bring about a new certainty and predictability in the application
of the Fourteenth Amendment.

Even if Justice Black's proposal does not succeed in limiting the Four-
teenth Amendment, may it not provide a desirable certainty by standardiz-
ing Supreme Court protection of personal liberties? At first glance, whole-
sale application of the Bill of Rights guarantees against state action emerges
in perhaps its most appealing guise in the immediate context of the Adamson
case, the problem of protecting individuals on trial. But on closer inspection,
some of the restrictions on state procedure entailed in blanket inclusion of
the Bill of Rights seem overly rigid.

In many states, the accused is informed of the nature of the charge against
him by information or indictment by one-man grand jury, procedures which
deviate from the common law indictment by grand jury embodied in the
Fifth Amendment. In many states the procedural absolute of the twelve-
man petit jury in criminal cases has been modified. And in many states,
a jury in all suits at common law involving more than twenty dollars (a
somewhat more significant sum in 1789 than today) has not seemed a neces-
Sary concomitant of justice. Yet the rigidity of these procedures would,
under the Black theory, be binding on the states, and would presumably
be enforced against them by the Court.

50. Compare Adair v. United States, 208 U.S. 161 (1903) with Coppage v. Kansas,
236 U.S. 1 (1915) (invalidation of anti-"yellow dog" contract statutes); compare Adkins
v. Childrens Hospital, 261 U.S. 525 (1923) with Morehead v. New York ex rel. Tipaldo,
298 U.S. 587 (1936) (invalidation of minimum wage statutes).

It is worthy of note that West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (due
process—Fourteenth Amendment) overruled the Adkins decision (due process—Fifth
Amendment).

51. "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." Frankfurter, J.,
in 332 U.S. 46, 66.

This difficulty on the purely verbal level is not met by Justice Black in his dissent, un-
less implicit in his position is the assertion that the framers of the Fourteenth Amendment
did intend its due process clause to mean something different from that of the Fifth.

52. For a discussion of the Adamson case in terms of the difficulties involved in impos-
ing federal procedure on the states, see Note, 96 U. of Pa. L. Rev. 272 (1947).

53. Justice Frankfurter accuses the minority of hedging on this point. He states that
Justice Black advocates a "subjective selection" of Bill of Rights guarantees for inclusion
in the Fourteenth Amendment, implying that even Justice Black would balk at enforcing
the restrictive procedural provisions. 332 U.S. 46, 64-5.

A surface plausibility is lent this contention by an ambiguous sentence in Justice Black's
opinion. "Whether this Court ever will, or whether it now should, in the light of past de-
cisions, give full effect to what the Amendment was intended to accomplish is not neces-
sarily essential to a decision here." Id. at 75.
Limitation of the Fourteenth Amendment to the Bill of Rights includes too much; it also fails to include enough. For example, the present sanction for the ban on racial discrimination in jury selection, the equal protection clause, does not appear in the first eight amendments. If the limitation dogma were consistently applied, the Court might find itself unable to cope with the rise of new procedural abuses.

Prognosis Negative. Analysis of the Black position seems to reveal grave defects. Its reliance on appeal to a somewhat ambiguous intent of the framers is a regression to a less realistic school of constitutional rhetoric. Its attempt to confine the ambient play of judicial power to a chartered course is nugatory. Its mechanistic application of a series of unrelated limitations to the states is restrictive and burdensome.

It appears, then, that the technique advanced by Justice Black falls far short of realizing the judicial function for which it is designed. No formula can of itself keep the Court out of the economic area and active in protecting personal liberties. Admittedly, the Bill of Rights technique serves adequately to protect rights expressly enumerated in the first eight amendments. But, while the characteristic inflexibility of Justice Black's technique might be on occasion relaxed to permit the Court to cope with new inroads on personal liberty, his technique still has the disadvantage of imposing restrictive procedures on state criminal administration.

The only remaining issue is whether the due process technique so abjectly fails to protect personal liberties that—practically by default—Justice Black's technique must be adopted. That the Adamson case poses the prob-

Whatever this sentence may mean, it clearly does not mean that Justice Black is receding from his absolutist position on wholesale inclusion of the Bill of Rights. "If the choice must be between the selective process of the Palko decision applying some of the Bill of Rights to the States, or the Twining rule, applying none of them, I would choose the Palko selective process. But rather than accept either of these choices, I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provision of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution." Id. at 89.

A more unequivocal statement could hardly be imagined of the thesis that the Bill of Rights in all its rigor should be applied against the states. Yet Justice Frankfurter chooses to brand the Black position as "subjective selection" and has apparently won approval for his view. See Braden, The Search for Objectivity in Constitutional Law, 57 YALE L.J. 571, 590 (1948); Harris, Due Process of Law, in Symposium, Ten Years of the Supreme Court: 1937-1947, 42 AM. POL. SCI. REV. 32, 41 (1948).

54. See infra, p. 283. The same result might be achieved by the Sixth Amendment's reference to an "impartial" jury.

55. Justice Black seems confident that the Bill of Rights offers adequate protection against new threats to freedom. He admits, however, that the "basic purposes" of the Bill of Rights must be kept in mind if it is to constitute an effective safeguard. This would seem to have more to do with the Court's desire to maintain personal freedom than with the words of the Bill of Rights.

56. Always assuming that as the function for which a suitable technique is being sought. See note 28 supra.
lem in the context of state criminal procedure suggests examination of this field to determine whether the traditional due process technique is being utilized to maintain a democratic balance between private freedom and public order.

**ORDERED LIBERTY AND THE FAIR TRIAL: DUE PROCESS ILLUSTRATED**

*The Great Shift.* A constitutional revolution has transformed the Fourteenth Amendment from the bastion of economic laissez-faire to the bulwark of personal freedom. A survey of Fourteenth Amendment cases from 1932 down to the present shows a progressive diminution of decisions striking down state economic and social regulation. The same period shows a tremendous growth in the invocation and application of the Amendment as a shield for personal liberty.

The most spectacular area of that growth has been in the substantive guarantees of the First Amendment, which have been utilized in the Fourteenth with ever-increasing consistency and effectiveness to give meaning to the word “liberty.” But there has been an equally broad and revolu-

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57. For the classic discussion of the constitutional theory underlying the shift, see Hamilton and Braden, *The Special Competence of the Supreme Court,* 59 YALE L.J. 1319 (1941). A recent discussion of milestone cases on the road to the “new” due process is Harris, *supra* note 53.

58. The following tabular presentation highlights the radical nature of the shift.

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<th>Term of Court</th>
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<th>Claims of restriction of personal liberties</th>
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<td></td>
<td>Total Claims</td>
<td>Upheld Claims</td>
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<td>21</td>
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59. Verbally, this has been accomplished by incorporating the guarantees of the First Amendment into the Fourteenth. See, e.g., Craig v. Harney, 331 U.S. 367 (1947) (press); Thornhill v. Alabama, 310 U.S. 88 (1940) (peaceful picketing); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (religion).
tionary development in the field of procedural protection in criminal trials, the context of the Adamson case.  

That due process guarantees a fair trial is an old constitutional cliche. But until the last fifteen years, no attempt had been made to give the phrase meaning. Scattered procedural guarantees, most of them very obvious, were mentioned, but there was no effort to find a rationale that would set a pattern of Supreme Court action.

Today however, problems of state criminal procedure evoke the great majority of decisions under the aegis of the Fourteenth Amendment. But the Court has been selective in its choice of restrictions to include in the Amendment. The criterion is an elastic one. As it emerged from the alembic of Mr. Justice Cardozo's prose, it is those guarantees "implicit in the concept of ordered liberty." These the states may not abridge. The imparting of substance to Justice Cardozo's phrase has been the recent history of the Fourteenth Amendment.

**Tainted Evidence.** The most widely known of the new restrictions on the states is the ban on coerced confessions. The use of violence to extort a confession from the prisoner vitiates the effect of the confession, and of a conviction obtained by its introduction in evidence. The concept "violence" was at first limited to physical torture. But soon the prohibition was extended to subtler forms of intimidation, as the Court recognized that the 36-hour grilling session is as coercive as the truncheon or rubber hose. As applied to the states, the essence of the fault is that the methods employed must have made it impossible for the confession to be the prisoner's free and voluntary statement.

This differs from the federal rule, which excludes a confession obtained

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60. For an excellent detailed discussion of the cases, see Boskey and Pickering, *Federal Restrictions on State Criminal Procedure*, 13 U. or Chi. L. Rev. 266 (1946). For a bird's-eye view, see Harris, *supra* note 53, at 39–42.


63. At the 1947–48 term of Court, thirteen cases involved state criminal procedure. See note 107 infra.


68. In addition to cases cited notes 65–67 *supra*, see *per curiam* decisions in Canty v. Alabama, 309 U.S. 629 (1940); Vernon v. Alabama, 313 U.S. 547 (1941).

The rule has been reinforced by the recent case of Haley v. Ohio, 332 U.S. 596 (1948). There the Court reversed the murder conviction of a 15-year old boy who, a majority of five felt, had been handled by the police in such a manner as to make his confession the product of fear rather than frankness.
through illegal police methods, such as protracted detention incommunicado.69 The mere fact that the police violated a state statute will not lead the Supreme Court to invoke the Fourteenth Amendment unless it appears that as a result the prisoner's confession was not free. The two rules have a different thrust. The federal rule seeks to inhibit illegal police methods. The state rule is aimed at protecting the individual from coercion.70

Although the Court has not employed the distinction, a line may be drawn between the federal and state rules on the basis of the probative value of the evidence obtained. If the circumstances under which a confession is obtained make it impossible that it should have been voluntary, its value as evidence is thereby diminished, and it should be excluded, because a conviction based on unsatisfactory evidence clashes with the "fair trial" concept of due process.71 If, however, the police methods were illegal but not coercive, the probative value of the confession is not diminished, and its exclusion as evidence constitutes discipline of the police rather than protection of the defendant.72

An analogous situation arises with respect to the federal rule of exclusion of evidence obtained through illegal search and seizure.73 That rule is aimed at the police methods employed rather than at the protection of the defendant.74 The evidence thereby excluded has not lost probative value.

This rule of exclusion has not been applied by the Court to the states, and during the period under discussion, no state search and seizure cases have come before the Court.75 If a case were to arise from a jurisdiction which did not follow the federal rule of exclusion, the probative value rationale would provide a plausible mode of disposing of the problem without upsetting a substantial segment of state criminal procedure. Were the problem to come before it, the Court would have the opportunity of deciding whether protection against illegal searches and seizures is "implicit in the concept of ordered liberty."

Another sort of tainted evidence is that which is known to be perjured.

70. Thus, where the police use illegal methods, but the confessions are "uncoerced," the Court has held that no deprivation of due process results. Lisenba v. California, 314 U.S. 219 (1941). But where the illegal acts complained of amount to coercion, the confessions so obtained will be excluded. Ward v. Texas, 316 U.S. 547 (1942).
72. See cases cited note 69 supra.
74. See Comment, 58 Yale L.J. 144 (1948).
75. The lower court decision in Hague v. CIO, 101 F.2d 774 (3rd Cir. 1939), held that protection against illegal searches and seizures as against state officers was given by the privileges and immunities clause of the Fourteenth Amendment. The Supreme Court decision, 307 U.S. 496 (1939), did not discuss the point.
Although the Court has never reversed a conviction on this ground, in considering Tom Mooney's habeas corpus petition it declared that a conviction knowingly obtained through the use of perjured evidence would be reversed. Here, again, the probative value test should give an easy solution, whether perjured evidence were used knowingly or unknowingly.

An Effective Hearing: The Right to Counsel. Perhaps the most important, and the most controversial of the guarantees applied against the states is the right to counsel. Since a hearing has long been considered an element of due process, it is surprising that the point was not made earlier that, in order to be more than an empty form, a hearing must be had with the opportunity of assistance by counsel.

The first Scottsboro case embodied the guarantee, but limited the ruling of the case to trials for capital offenses. Later, the Court applied it to a non-capital case. It seemed that the right to counsel was being universalized. But in Betts v. Brady the Court decided, over strong dissent, that the right to counsel was not necessary in all state criminal trials, and that the fairness of each proceeding had to be considered on its own merits. Following Betts v. Brady the Court was fairly consistent in granting relief where the right to counsel had not been preserved, but again in the last two years a cautionary note has crept in, and the Court has declined to intervene.

At the last term of Court, the rule of Betts v. Brady was restated in Bule v. Illinois. The difficulties inherent in a case-by-case consideration of right to counsel problems to which the Court was thus remitted were vividly illustrated by a pair of Pennsylvania cases decided later in the same term. Each involved substantially the same situation: a deprivation of the right to

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77. See Morr, loc. cit. supra note 61.
80. 316 U.S. 455 (1942).
81. Justices Black, Douglas, and Murphy. Justice Black's dissent urged that the Sixth Amendment should be equally applicable to the states as to the federal government.
82. Hawk v. Olson, 336 U.S. 271 (1945) (claim of deprivation of right to counsel held good cause of action in habeas corpus proceeding under Fourteenth Amendment); Rice v. Olson, 324 U.S. 786 (1945) (issue of right to counsel raised in habeas corpus petition under Fourteenth Amendment held not automatically waived by plea of guilty); Williams v. Kaiser, 323 U.S. 471 (1945) and Tomkins v. Missouri, 323 U.S. 485 (1945) (convictions vacated where failure to appoint counsel had forced guilty plea).
83. Canizio v. New York, 327 U.S. 82 (1946) (insufficient showing of inadequacy of appointed counsel); Gayes v. New York, 332 U.S. 145 (1947) (collateral attack on deprivation of counsel in first conviction held barred by failure to appeal second conviction, sentence in which was based on existence of prior conviction). The Gayes case, together with Foster, infra, was decided on the same day as Adamson.
85. 333 U.S. 640 (1948) (Justices Black, Douglas, Murphy, and Rutledge dissenting).
counsel aggravated by the trial court’s misreading of state penal statutes. A slight factual variation between the two allowed the Court to arrive at diametric results.\textsuperscript{85}

There seems little question that a happier solution—applicable alike to due process and Bill of Rights techniques—would be to universalize the right to counsel as a Fourteenth Amendment guarantee. The probative value test suggests that without the services of counsel, irrelevant or prejudicial evidence that could easily be excluded by the proper motion or objection may come in freely and bring about a conviction. Further, it seems to violate all notions of fairness to restrict the advantages of procedural technicalities and the rewards of plea-bargaining to those defendants who can afford to engage counsel.

The reluctance of the Court to establish a uniform right to counsel may stem in part from hesitation to impose on the states the great administrative burden that would necessarily be involved. To give meaning to the right to aid of counsel, a comprehensive public defender system, available without cost to all indigent defendants, would have to be established. Yet, until the Court forces this move on the states, whether a man goes to jail may depend on his financial ability to hire a lawyer.

\textit{An Impartial Jury}. That Negroes may not be systematically excluded from a jury which is trying a Negro is a rule so ingrained\textsuperscript{83} that today the Court disposes of discrimination cases by curt \textit{per curiam} opinions. Although the verbal vehicle here used is the equal protection clause, the technique is that invoked in cases formally based on due process.\textsuperscript{87}

But established as the rule against discrimination is, initiative is still with the states. They do not have to make a very ardent effort in the direction of impartiality to satisfy the Court that equal protection is being afforded.\textsuperscript{83}

Racial discrimination is a pretty obvious thing. But subtler forms of exclusion seem to get by the Court; for it has not been willing to impose the strict federal rule on the states. Federally, any selection which discriminates as to economic class\textsuperscript{85} or as to sex\textsuperscript{89} is bad. But the Court has recently rejected attacks on New York’s “blue ribbon” jury system,\textsuperscript{91} even where

\begin{itemize}
\item \textsuperscript{85} Gryger v. Burke, 334 U.S. 728 (1948) (trial court imposed life sentence under misapprehension that it was mandatory—conviction affirmed); Townsend v. Burke, 334 U.S. 736 (1948) (trial court misread defendant’s prior criminal record—conviction reversed).
\item \textsuperscript{86} First laid down in Strauder v. West Virginia, 100 U.S. 303 (1880).
\item \textsuperscript{87} See, e.g., Brunson v. North Carolina, 333 U.S. 851 (1948). Other recent cases where the Court gave a short answer to jury discrimination questions are Patton v. Mississippi, 332 U.S. 463 (1947) and Lee v. Mississippi, 332 U.S. 742 (1948).
\item \textsuperscript{88} In Akins v. Texas, 325 U.S. 398 (1945), the placing of one Negro on the grand jury panel was deemed sufficient to meet the charge of deprivation of equal protection.
\item \textsuperscript{89} Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).
\item \textsuperscript{90} Ballard v. United States, 329 U.S. 187 (1946).
\item \textsuperscript{91} Fay v. New York, 332 U.S. 261 (1947) (labor leader tried by “blue ribbon” jury which did not include members of the working class); Moore v. New York, 333 U.S. 565
\end{itemize}
racial discrimination was alleged. It would seem that equal protection should have meaning North as well as South of the Mason-Dixon line.\textsuperscript{93}

Availability of Remedial Process. Underlying the entire discussion of Supreme Court intervention in state criminal procedure is the premise that the Court will hear charges of the deprivation of due process. Unless this is true, restrictions laid on the states are empty verbalisms.

The Court has had to meet several contentions on the part of the states which, if upheld, would greatly lessen the effectiveness of federal review. It was at one time said that if the state statute under which the complained-of procedure was carried on was itself constitutional, then the Court would inquire no further.\textsuperscript{93} That rule was the product of an era which had developed no clear notion of procedural due process. It has since been rejected explicitly,\textsuperscript{94} after being ignored in many prior decisions.

Another contention has been that the Supreme Court inquires only into the "law," and that determinations of "fact" in the state courts are final. That particular ghost was exorcised over ten years ago,\textsuperscript{95} but it still occasionally crops up as a rhetorical device invoked when the Court decides not to reverse a particular conviction.\textsuperscript{96}

Another attempt to forestall Court review is the contention that "timely objection" has not been made to the procedure questioned. That rule would preclude the raising of the constitutional issue wherever it had not been raised at the trial. The unfairness is apparent, especially when failure to give the aid of counsel is the deprivation of due process alleged.\textsuperscript{97} Fortunately, the Court has decisively rejected this theory, and the validity of an allegedly unconstitutional proceeding may be attacked on appeal or collaterally.

One large stumbling-block has remained intact until very recently. It is an old rule, based on comity and convenience, that the Supreme Court will not intervene until state remedies have been exhausted. But some state procedures are virtually exhaustion-proof. In Illinois, a particularly flagrant example, bemused petitioners may wander for years through a maze of conflicting procedures, without securing a hearing on the merits. More than half of the petitions for certiorari filed in the Supreme Court during the last

\textsuperscript{92} Compare the Fay and Moore cases, note 91 supra with cases from Southern Jurisdictions, note 87 supra.

\textsuperscript{93} Rawlins v. Georgia, 201 U.S. 638 (1906).

\textsuperscript{94} Lisenba v. California, 314 U.S. 219 (1941).


\textsuperscript{96} A particularly egregious example of undue deference to state court findings of fact is Akins v. Texas, 325 U.S. 398 (1945). See note 88 supra.

\textsuperscript{97} Brown v. Mississippi, 297 U.S. 278, 286 (1936).
few years have come from prisoners in Illinois. Finally, last year, in *Marino v. Ragen*, at least three judges decided that even if state remedies were not exhausted, their patience was. Justice Rutledge penned a scathing denunciation of "the Illinois merry-go-round" and warned that in the future, where state remedial processes are a bar rather than an aid to justice, the Court might lay aside the exhaustion rule and allow the federal district courts to entertain habeas corpus petitions, regardless of the putative existence of state remedies.

If the Court follows out this threat, the scope of its review may be greatly broadened. And it will be questionable whether many of its recent decisions will be reliable precedents. Particularly, some of the recent cases where the right to counsel appeared to be narrowed may merely be the result of a deference to state remedial processes which no longer exists.

**Summary.** Today a person who has been railroaded to prison has a good chance of obtaining federal relief. Fifteen years ago he had virtually none. That is the great achievement of procedural due process in the Fourteenth Amendment. Starting almost from scratch in 1932, the Court has built up an impressive corpus of protection for individuals accused of crime.

That degree of protection is largely attributable to the flexibility of the due process technique. A more rigid formula might well have fallen short of the present achievement. And the Court will be provided with continued opportunities to revise and extend its system of minimal safeguards.

True, the Court has been more willing to rectify shocking injustices to individuals than to eliminate general patterns of oppression. But the onus

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<td>1946</td>
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100. Justices Douglas, Murphy and Rutledge. It is a matter for conjecture why Justice Black was not with this group.
101. Three different remedial avenues—coram nobis, writ of error, and habeas corpus—are available, and their respective limitations are so poorly charted that in a given case, a petitioner is almost certain to invoke the "wrong" one. See Justice Rutledge concurring in *Marino v. Regen*, 332 U.S. 561, 569, n. 10 (1947).


102. See the *Carter* and *Foster* cases cited note 83 supra. In both cases, the remedy invoked was writ of error, which is based on the so-called common law record of the original trial; facts sufficient to support an allegation of denial of counsel do not appear therein. Both cases arose in Illinois and may be vitiated as precedent should the dissatisfaction with Illinois procedure voiced by Justice Rutledge's concurrence in the *Marino* case represent the Court's present attitude.
of heading in the latter direction is in any event on the states rather than the Court. By use of the traditional due process technique, the Court can continue to set right the individual cases which come before it. And the doing of justice in a few cases may point the way to a general increase of decency in state criminal procedures.

CONCLUSION: ADAMSON RECONSIDERED

In the light of the recent development and present condition of the due process technique, it seems fair to say that Justice Black's adherents in Adamson were trying for too much. Their attempt was completely to extirpate a constitutional technique which has proven itself capable of constructive change. The result for which they were striving—the broadening of procedural guarantees—is being achieved in a large measure through the same gradual process of accretion which brought the freedoms of the First Amendment under the protection of the Fourteenth.

On the other hand, Justice Frankfurter's concurrence exhibited a deference to stare decisis for its own sake which is not invulnerable to criticism. His position was that self-incrimination is not essential to due process because Twining said so. That attitude would seem fatal to the flexibility which is the due process formula's most valuable attribute.

The case proceeded on an unfortunate level of discourse because of the minority's attempt to impose the entire Bill of Rights on the Court. It might have been more fruitful to re-examine the privilege against self-incrimination in the light of the "fair trial" concept, and to supplement the historical discussion of the Twining case with a critical analysis of the privilege.

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103. That this is by no means a vain hope is demonstrated by recent state cases in which dubious procedures have been rejected for want of due process in terms which closely echo current Supreme Court doctrine. Stonebreaker v. Smyth, 187 Va. 250, 46 S.E.2d 406 (1948) (failure to appoint counsel for inexperienced boy in non-capital case, even where no request for counsel was made, held violation of Fourteenth Amendment); Johnson v. State, -Ind.-, 78 N.E.2d 158 (1948) (beating of 17-year old boy by police shortly before he confessed to commission of murder vitiates confession; implication that result follows Supreme Court mandate despite prior contrary decisions by state court).

104. "After enjoying unquestioned prestige for forty years, the Twining case should not now be diluted, even unwittingly, either in its judicial philosophy or in its particulars. As the surest way of keeping the Twining case intact, I would affirm this case on its authority." 332 U.S. 46, 59-60.

105. The starting point of such an analysis might well be the classic discussion in 8 Wigmore, Evidence § 2251 (1940). After a careful marshaling of the arguments, Wigmore comes to the conclusion that the privilege is justified, primarily because of the deleterious effect which its abolition would have on the administration of criminal justice. 

"... any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must suffer morally thereby." [Emphasis in original] Ibid.

If Wigmore's analysis is accepted, the status of the privilege as a constitutional guarantee against state action may be questioned. If the thrust of the privilege is against low
But instead, the majority satisfied itself with an answer to the Bill of
Rights contention and gave no more than cursory attention to the actual
problem of self-incrimination. It actually said no more than that a rule had
been laid down in Twining.103

But the Adamson decision has at least cleared the air, and there is no
doubt that the Court will continue to use the traditional due process tech-
nique in its consideration of problems arising from state administration of
criminal justice.107

Freed from the problem of choosing between competing techniques, the
Court can give its undivided attention to the problem of its function in the
relation between state and individual. The Adamson minority can turn its
defeat into a far more significant victory by exerting a continued pressure
for the inclusion of more broadly stated guarantees in the Fourteenth Amend-
ment. This is true particularly of Justices Rutledge and Murphy, whose
concern for personal freedom is not, like Justices Black's and Douglas's,
apparently mixed with a desire to impose effective limitations on the Court's
activity.105

They should find that the due process technique is just as amenable to the
desired result as the mechanical rigidity of the Bill of Rights proposal. They
will not be able to commit future Courts to activism in civil rights and restraint in the economic sphere. Neither would the Black formula. It is not
in the nature of our constitutional process that any verbal formula should.103

There will always be an area of uncertainty and discretion. But while the
opportunity is at hand, the Court can build, at least for the near future, a
structure of comprehensive individual safeguards.

standards of administration rather than against unfair coercion of the individual on trial,
then it may have no place as a Fourteenth Amendment guarantee. See supra p. 281.
Like the prevention of illegal action by police, the privilege may represent a desirable
policy, but not be so necessary to a fair trial as to require universalization by Supreme
Court fiat. That was Justice Cardozo's view. "This too might be lost, and justice still be
106. See Mr. Justice Reed, speaking for the Court, 332 U.S. 46, 52-55.
107. The 1947-48 term of Court was crowded with state criminal procedure cases. See
the cases on coerced confessions, note 68 supra; right to counsel, notes 84-85 supra; and
jury exclusion, notes 87, 91 supra.

In addition, the Court had to consider two cases of first impression.
Michigan's one-man grand jury system was up for scrutiny in Re Oliver, 333 U.S. 257
(1948). But the secrecy of defendant's trial on a contempt charge afforded the Court an
opportunity to reverse without considering the constitutionality of the Michigan device.
The right to be notified of the charge against oneself was before the Court in Cole v.
Arkansas, 333 U.S. 196 (1948). The Supreme Court of Arkansas, had affirmed Cole's con-
viction on a ground which was neither specified in the indictment nor brought out at trial.
The Supreme Court's answer was reversal of the conviction.
108. See note 18 supra.
109. "... while unconstitutional exercise of power by the executive and legislative
branches of the government is subject to judicial restraint, the only check upon our own
exercise of power is our own sense of self-restraint.” Stone, J., dissenting in U.S. v. Butler,
297 U.S. 1, 78 (1935).