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JURIES AND INCORPORATION IN 1971

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I. THE POSITIONS RESTATED

On May 20, 1968, the Supreme Court ruled for the first time in *Duncan v. Louisiana*¹ that in all cases involving serious crime the states must provide trial by jury. Prior to this decision, the sixth amendment guarantee was held to apply only to trials in federal courts. Two years later, on June 22, 1970, the high tribunal addressed itself in *Baldwin v. New York* and *Williams v. Florida* to some questions unanswered by the *Duncan* case: a "serious" crime, it announced, was one for which a penalty of over six months imprisonment could be imposed; and a six-member jury would pass constitutional muster.² Still unanswered after *Williams* and *Baldwin* is the question of the constitutionality of less than unanimous verdicts and of juries composed of fewer than six members.³ These and other questions will be discussed later in this paper after a consideration of the "incorporation theory" or the applicability of the Bill of Rights to the states.⁴

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1 391 U.S. 145 (1968).

2 399 U.S. 66 (1970); 399 U.S. 78 (1970).

3 In *De Stefano v. Woods*, 392 U.S. 631 (1968), the Court decided that *Duncan* was not retroactive.

4 Literature on "incorporation" is voluminous. The following list gives the leading cases since 1947 and a sample of the many law journal articles: *Griswold v. Connecticut*, 381 U.S. 479 (1965);

In the *Duncan* case, Mr. Justice Black, joined by Mr. Justice Douglas, wrote a concurring opinion in which he pledged once more his unshaken faith in the theory of "total incorporation" of these guarantees. "I want to emphasize as strongly as ever that the fourteenth amendment was intended to make the Bill of Rights applicable to the States."⁵

Justice John Harlan took issue with Justices Black and Douglas. In his dissent, concurred in by Mr. Justice Stewart, Harlan disagreed not only with the specific ruling of the Court but also with the general "incorporation" theory advanced by his two colleagues on the high bench.⁶ "In short, neither history, nor sense, supports using the fourteenth amendment to put the States in a constitutional strait-jacket with respect to their own development in the administration of criminal or civil law. . . . I therefore fundamentally disagree with the total incorporation view of the fourteenth amendment. . . ."⁷

In 1900, the Court ruled that the states were not required to extend the privilege of trial by jury to those accused of crimes against their laws.⁸ On at least two occasions since that time, this position has been reaffirmed.⁹ In *Duncan v. Louisiana*, the Court interpreted *Maxwell v. Dow* and subsequent reaffirmations as *dicta* relative to the jury-trial guarantee and then stated: ". . . respectfully, we reject the prior dicta regarding jury trial in the criminal cases."¹⁰

Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Adamson v. California, 332 U.S. 46 (1947); Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. LEG. 1 (1968); Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960); Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. REV. 761 (1961); Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965); Green, *The Bill of Rights, the Fourteenth Amendment and the Supreme Court*, 46 MICH. L. REV. 869 (1948); Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 YALE L.J. 74 (1963); Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969); Kauper, *Supreme Court: Trends in Constitutional Interpretation*, 24 F.R.D. 155 (1969); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949); Rudman, "Incorporation" Under the Fourteenth Amendment—*The Other Side of the Coin*, 3 LAW IN TRANS. Q. 141 (1966); Note, *Constitutional Law—Was it Intended that the Fourteenth Amendment Incorporate the Bill of Rights?*, 42 N.C.L. REV. 925 (1964).

5. 391 U.S. at 162, 171.

6. *Id.* at 171.

7. *Id.* at 175-76.

8. *Maxwell v. Dow*, 176 U.S. 581 (1900).

9. *Palko v. Connecticut*, 302 U.S. 319 (1937); *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

10. 391 U.S. at 155.

Harlan asserted that *Maxwell, Snyder, and Palko* had been misread by the *Duncan* majority.¹¹ However, whether *dicta* or not, he asserted that no new evidence had been offered to justify the rejection of these remarks. He honestly admitted that the jury system has virtues, but he frankly underscored the inherent defects which might suggest its modification or even its abolition in certain jurisdictions for certain types of criminal cases.¹² What distressed Harlan—and what upsets him in all “incorporation” cases—is that the Court seems too cavalier in closing down the “laboratories” where the state might make helpful experiments within the federal system.

Justice Black remains unmoved by such a prospect, firmly believing that the drafters of the fourteenth amendment intended to bind the states by all the imperatives of the Bill of Rights, including the command to adopt the jury system, however defective it may be. In 1947, Black made his first serious investigation of the history of the fourteenth amendment¹³ and his *Duncan* opinion reveals that nothing subsequent to that research has shaken his confidence as to his faithful reading of history.

Is such confidence justified? Not a few men with scholarly credentials say “no” in unequivocal language. Chief among these dissenters is Charles Fairman.¹⁴ Justice Black has lent an ear to Fairman’s arguments, but faith in his own findings remains unshattered. In *Duncan v. Louisiana* he wrote:

I have read and studied this article [of Fairman’s] extensively . . . 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. . . . [I]t is far wiser to rely on what *was* said. . . .¹⁵

Fairman’s argument *ex silentio* is infinitely stronger than what Black would admit. Indeed, silence in certain circumstances is often as loud as a deafening chorus. If the 39th Congress and the contemporaneous state

11. *Id.* at 184 n.24, 185 n. 25.

12. *Id.* at 187-89.

13. *Adamson v. California*, 332 U.S. 46, 68, 71-72 (1947) (dissenting opinion).

14. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949). Professor Fairman is a lawyer, constitutional historian, and former professor at the law schools of Stanford and Harvard.

15. 391 U.S. at 165. See also H. BLACK, A CONSTITUTIONAL FAITH 34-42 (1968) [hereinafter cited as BLACK].

legislatures which passed upon the fourteenth amendment *really* believed that they were taking the momentous step of binding the states by the Bill of Rights, we might well expect them to say so either in resounding words of approval or in thundering dissents.

Justice Harlan, of course, finds comforting support in "the overwhelming historical evidence marshalled by Professor Fairman." Like Fairman, Harlan and others have observed that the drafters of the fourteenth amendment used very cumbersome and obscure language if they *really* intended its first section simply to mean that "the rights heretofore guaranteed against federal intrusion by the first eight amendments are henceforth guaranteed against state intrusion as well." But if the words actually found in the amendment were really understood to convey "incorporation", then silence was indeed a strange way for other congressmen to express their reactions as they participated in an action destined to produce such an epochal upheaval in the American federal system.

II. INCORPORATION REVISITED

A. *The Civil Rights Bill of April 9, 1866*

To examine once more in detail the congressional debates on the fourteenth amendment would indeed be an act of supererogation. Let it suffice to offer, by way of brief review, an outline of Black's principal arguments and of the counter arguments made principally by Fairman.

On December 15, 1865, the 39th Congress in its first session established the Joint Committee of Fifteen whose mandate was "to inquire into the condition of the states which formed the so-called Confederate States of America, and report whether they or any of them are entitled to be represented in either house of Congress."¹⁶

On April 6, 1866, the Senate¹⁷ and on April 9, the House¹⁸ voted to override Johnson's veto of the Civil Rights Act which had been introduced in the Senate on January 5, 1866, by Senator Lyman Trumbull,¹⁹ Republican of Illinois, then referred to the Committee on

16. CONG. GLOBE, 39th Cong., 1st Sess. 6, 30, 46 (1865). This was a rebuke for President Andrew Johnson, who, in general accordance with Lincoln's plan, had restored most of the Southern states during his first eight months in office, and who consequently judged that the southern Senators and Representatives were entitled to seats in the 39th Congress. E. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 120-151 (1960) [hereinafter cited as MCKITRICK].

17. CONG. GLOBE, 39th Cong., 1st Sess. 1809 (1866).

18. *Id.* 1861.

19. *Id.* 129.

the Judiciary, debated and finally passed in the ensuing two months by both houses of Congress. This bill wrote into law²⁰ that persons born in the United States and not subject to any foreign power were citizens of the United States, and, without regard to color, were entitled to the same rights as white citizens to contract, to sue, to give evidence, to take, hold, and convey property, and to enjoy the equal benefit of all laws for the security of person and property. It also stipulated that those who, under color of law, caused these rights to be denied to anyone were guilty of a federal offense.

In the meantime, the Joint Committee on Reconstruction had undertaken its investigation of conditions in the South and was considering ways to restore ex-confederate states to the Union. Many congressmen—including John A. Bingham of Ohio, a Representative on the Committee—had serious doubts as to the constitutionality of the Civil Rights Act, although they approved its objectives.²¹ Accordingly, they suggested that an amendment be proposed to provide a firm constitutional basis for such legislation. After much debate, the proposal was accepted and became the first section of the fourteenth amendment.

In 1866, congressmen believed that sections two and five were by far the most important; section two penalized by a reduction of representation in the House those states which withheld the franchise from Negroes; the fifth invested Congress with extensive powers of enforcing the first four sections of the amendment.

The men of 1866 were poor prophets indeed; only the first section has been of any consequence and its “due process” and “equal protection” clauses have worked a constitutional revolution unimagined by those who lived in the Reconstruction period.

In arguing that the drafters of the fourteenth amendment intended to bind the states by all the provisions of the fourteenth amendment, Justice Black has relied heavily on the statements made in 1866 by two men:²² Representative Bingham who was largely responsible for the first section, with the exception of the “citizenship” clause, and Senator Jacob M. Howard of Michigan who presented the amendment to the Senate. Both men were members of the Reconstruction Committee.

20 14 Stat. 27 (1866).

21 CONG. GLOBE, 39th Cong., 1st Sess. 1290-93, 1367 (1866). As these references show, Bingham not only spoke against the bill but also cast a negative vote when the House accepted it on March 13, 1866.

22 *Duncan v. Louisiana*, 391 U.S. 145, 162, 165-67 (1968) (concurring opinion); *Adamson v. California*, 332 U.S. 46, 71, 74, 110 (1947) (dissenting opinion).

Justice Black and Horace Flack have professed to find additional support in the remarks certain congressmen made during the debates on the several civil rights bills proposed between 1871 and 1875 to implement the fourteenth amendment.²³

B. *Bingham's Confusion*

As a preface to the following brief investigation of Justice Black's position, it is apposite to remark once more that the mandate given to the Committee of Fifteen was to inquire into the conditions of the southern states and to make recommendations for their restoration to the Union. Therefore, one should expect that proposals made by this Committee would be limited to the states recently in rebellion and not extended to all the states, effecting in them a profound reform of the entire federal system of government.

Secondly, the first section of the fourteenth amendment appears to have been promoted largely by those who entertained doubts as to the constitutional validity of the Civil Rights Act, finally passed into law on April 9, 1866. It would seem, then, that the two were intended to be co-terminous in scope, that is, aimed at rooting out racial discrimination in the South.²⁴ Even if we admit that the Civil Rights Act was intended for universal application throughout the Nation, its goal was limited to the establishment of equal treatment of the law and not to fastening upon the states either the particular mandates of the Bill of Rights or of any national laws which might recommend themselves as desirable to federal legislators.

Thirdly, the evidence presented by the supporters of total incorporation—and the burden of proof would seem to rest upon them—certainly is not the clear and unimpeachable evidence that should form the basis for such a consequential change in American federalism as it had been understood prior to the Civil War.²⁵

23. *Adamson v. California*, 332 U.S. 46, 110-18 (1947). See also H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 210-277, *passim* (1908) [hereinafter cited as FLACK]. Black places much reliance on Flack's book, hence the attention given this work in the present article.

24. Congressmen, newspapers, and campaigners in 1866 and 1867 repeated again and again the theme of "equal treatment" for blacks and whites. For them, the first section of the fourteenth amendment was an embodiment of the Civil Rights Act of 1866 and little if anything more.

25. Professor Robert Harris writes thus of this evidence:

Although the debates on the fourteenth amendment are important as a discussion of general principle and as one guide among others as to its meaning, they are hardly conclusive because of their ambiguity, their inadequate and routine discussion of the first section, and

Bingham, and others, apparently believed that the "privileges and immunities" clause of Article IV of the Constitution was a compendious phrase for the Declaration of Independence and the Bill of Rights: the guarantees of the first eight amendments were commands directed to the states from the very beginning but with no power vesting in Congress to enforce them against delinquent state governments. This accounts for Bingham's belabored remark that the first section of the fourteenth amendment took away no power from the states.²⁶

Thus, in Bingham's constitutional world, the states had always been forbidden to have an establishment of religion, to prohibit their people from bearing arms, and to conduct, without a jury, criminal trials or civil trials where more than twenty dollars were involved. Since these injunctions were, according to Bingham, included in the "privileges and immunities" clause of Article IV of the Constitution, then logically the states were so bound even before 1791, the year that the same commands were placed upon the federal government by the ratification of the Bill of Rights.

Actually, during the 1866 debates Bingham never did spell out this logical conclusion to which his premises lead. And the closest he ever came at that time to asserting that his proposal was to bind the states to the Bill of Rights was in a long, rambling speech in the House on February 28, 1866.²⁷ But it must be remembered that at that moment the

the confusion, not to say ignorance, of some of the speakers, among whom Bingham was the most prominent.

R. HARRIS, *THE QUEST FOR EQUALITY* 34 (1960) [hereinafter cited as HARRIS]. He particularizes this combination of confusion and ignorance in these words:

In identifying the principles of the Declaration of Independence with those of the Constitution, Trumbull and others were but repeating one of the gross errors of the abolitionists. Their understanding of the privileges and immunities clause of Article IV was completely erroneous, and the identification of the first eleven amendments with grants of power [to the federal government] was a monstrous absurdity which displayed an ignorance both of constitutional history and of judicial precedents.

Id. 30. Senator Lyman Trumbull was chairman of the Judiciary Committee which presented the Civil Rights Bill in 1866. He was a very active participant in the debates on the fourteenth amendment.

A member of the Committee of Fifteen has written that the clause "relating to 'privileges and immunities' comes from Mr. Bingham of Ohio. Its euphony and indefiniteness of meaning were a charm to him." Quoted in Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *STAN. L. REV.* 5, 19 (1949).

26. By way of example, see Bingham's last major speech in the House before the voting on the amendment, *CONG. GLOBE*, 39TH CONG., 1st Sess. 2542-43 (1866). He persisted in this error at least until 1871. See *id.* 42nd Cong., 1st Sess. App. 81, 85 (1871) (speech of March 31 on the Anti-Klan bill).

27. *Id.* 39th Cong., 1st Sess. 1089-1095 (1866).

Representatives were debating Bingham's *original* draft of the relevant part of section one of the amendment. This part read as follows:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities in the several states, and to all persons in the several states equal protection in the rights of life, liberty, and property.²⁸

This was not accepted. Instead, the House voted to postpone action on the subject²⁹ because even some Radical Republicans feared that the proposal would not win a two-thirds vote due to the extensive powers it vested in Congress.³⁰ In any event, Bingham's original draft disappeared. When, on April 30, 1866, the Committee on Reconstruction reported a comprehensive five-part proposal of what was to become the present fourteenth amendment—save for the citizenship clause—the first section was a negation of power to the states rather than a positive grant of power to Congress.³¹

In the ensuing debates on this final draft—from April 30 to May 14—Bingham did not repeat his February 28th statement, which was his closest avowal in 1866 of total incorporation of the Bill of Rights. Professor Harris remarks that, when discussing this final draft, Bingham and his associates were inclined “to use grandiose rhetoric and ambiguous language and to identify aspiration with reality.”³²

C. Senator Howard Speaks

On May 23, the Senate turned its attention to the five-part amendment which the House had passed on May 10, 1866. Substituting for the ailing William Fessenden, Senator Jacob Howard presented the proposal and made a clear and unequivocal statement that the first section was intended to bind the states by the Bill of Rights.³³ Nobody in the upper chamber contradicted him on this point.

28. *Id.* 1034. It was introduced in the House on February 26, 1866.

29. *Id.* 1095.

30. HARRIS 33-34; J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT 189-190* (1956) [hereinafter cited as JAMES]; MCKITRICK 340.

31. CONG. GLOBE, 39th Cong., 1st Sess. 2265, 2286 (1866). Five years later Bingham would claim that the alteration had not weakened his initial draft—a claim which Professor Harris characterizes as “an example of his obscure thinking.” HARRIS 34. See also Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 137 (1949); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140, 161 (1949).

32. HARRIS 37.

33. CONG. GLOBE, 39th Cong., 1st Sess. 2764-67 (1866).

Mr. Justice Black relies heavily on these words of Howard as support for his theory of total incorporation.³⁴ In the face of such a clear expression, we are reduced to three questions: did the Senate accept Howard's interpretation when it voted affirmatively for the fourteenth amendment on June 8, 1866; did the House agree when it voted on May 8 and again on June 13 in approving the Senate's alterations; and did the state legislatures agree when they ratified the Amendment? Finally, as to Senator Howard himself, are his actions in the years from 1866 to 1868 consistent with the words he spoke on May 23, 1866?

Professor Fairman addressed himself to these questions in an elaborate analysis of the whole matter.³⁵ What follows in the next few pages is, for the most part, a sketch of his extensive research.

First, although no colleague rose to contradict Howard, several Senators made statements in the ensuing debates which are inconsistent with his interpretation of the meaning of the first section of the fourteenth amendment. These statements would lead readers to conclude that for them section one was drafted simply to forbid the states to deny equal treatment of their own laws. None of the participants in the debate, except Howard, mentioned the Bill of Rights. The last two Senators to speak on the relevant phrases both confess that they were still troubled as to the meaning of "privileges and immunities"—in spite of Howard's long and detailed exposé which Justice Black finds such a satisfying explanation. As the last man to speak before the Senate passed the amendment, Reverdy Johnson³⁶ of Maryland stated he would vote negatively because he did not know "what will be the effect of that [clause on no abridgement of privileges and immunities]."³⁷

Since the Senate had somewhat altered the House's version of the amendment, the proposal returned to the lower chamber for its approval, which was readily given on June 13 without any reference being made to the statement of Senator Howard three weeks earlier.³⁸ Any one of the following reasons could possibly account for this silence: first, nobody in the House had heard of Howard's speech or at least of the "incorporation" passage; second, legislators in the lower chamber

34. 391 U.S. at 162, 165; BLACK 34-40.

35. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 64-134 (1949).

36. Johnson was also a member of the Joint Committee and was "easily one of the most distinguished members of the committee," one whose frequent appearances before the Supreme Court "caused his opinion in legal matters to be respected." JAMES 45.

37. CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866).

38. *Id.* 3149.

knew of it but were not moved to comment since the "incorporation" theory was universally accepted; third, they failed to mention the theory because it was viewed as a novel idea, personal to Howard alone, and merited no discussion. Which of these three is the correct explanation for the complete silence of House members relative to Howard's remarks will become manifest in the following few paragraphs.

Insofar as the press was concerned, Flack made this remark: "There does not seem to have been any statement at all as to whether the first eight amendments were to be applicable to the States or not. . . ."³⁹ Flack must have been excluding the *New York Times* and the *New York Tribune*, for both did quote in full Howard's statement in which he included the guarantees of the Bill of Rights under the "privileges and immunities" of the fourteenth amendment.⁴⁰ In view of this meagre national coverage, it is difficult to see how the country as a whole could have been aware of Howard's interpretation of the disputed words, let alone have accepted his statement as a valid interpretation of their meaning.

The congressional election of November, 1866, was looked upon as a national referendum on the fourteenth amendment⁴¹ and thus one might expect that the campaign speeches would reveal the intent of the framers of the fourteenth amendment. Professor Fairman has read a number of these addresses, including those of Bingham, those of the House Speaker, and those of five Senators who had heard Howard's Senate speech of May 23, 1866.⁴² He discovered not a word spoken by these campaigners suggesting a belief in the theory that Section 1 had incorporated the Bill of Rights.

As for the state legislatures which ratified the fourteenth amendment between June, 1866, and July, 1868, only four men—all from Massachusetts—are recorded as expressing belief in "incorporation".⁴³ Some of the other states had laws or constitutional provisions inconsistent with the guarantees of the Bill of Rights, yet no conscience twitched when the legislators voted to accept the strictures of Section 1 as the supreme law of the land.⁴⁴

39. FLACK 153.

40. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 68 (1949).

41. MCKITRICK 448.

42. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 78 (1949).

43. *Id.* 118-19.

44. *Id.* 82-132.

In the period between 1867 and 1870, the reconstructed states prepared new constitutions and submitted them to Congress for its approval. Some of these constitutions contained provisions contrary to certain guarantees in the Bill of Rights.⁴⁵ In spite of such nonconformity, they won a vote of acceptance from the Congress, both Bingham and Howard being active in the study which preceded this vote. Howard's sharp eye detected a section in Georgia's constitution which, he alleged, violated the "no impairment of contract clause" of Article I, Section 10 of the federal Constitution.⁴⁶ The Senate agreed with him and the Georgia legislature was required to remove the offending words. But no reproach was directed at another provision of this same constitution which, contrary to the seventh amendment, denied jury trials in civil cases.⁴⁷

D. Contemporary Court Cases

If the drafters of the fourteenth amendment had really intended to bind the states by the Bill of Rights, it is reasonable to suppose that news of this revolutionary intention surely would have reached members of the state and federal judiciaries. But in *Twitchell v. Pennsylvania*,⁴⁸ decided on April 5, 1869, the Justices of the Supreme Court of the United States failed even to mention the first section of the fourteenth amendment. Nor did the petitioner, a murderer condemned to death, ever refer to it. He did, however, claim that certain procedural guarantees of the fifth and the sixth amendments had been denied him—forgetting, perhaps, the import of *Barron v. Baltimore*.⁴⁹ But Chief Justice Chase, underscoring the doctrine of the *Barron* decision, dismissed the case for want of jurisdiction.

The *Twitchell* case was decided eight months after the fourteenth amendment became part of the Constitution. Very likely it had been prepared by counsel for the petitioner weeks in advance of its presentation to the court at a time when there was much talk about the new amendment. If section one had been deemed relevant, it surely would have been invoked by someone involved in this piece of litigation.

The same must be said of the 1870 case of *Justices of the Supreme Court of New York v. United States ex rel. Murray*.⁵⁰ A violation of the

45. *Id.* 126-132.

46. *Id.* 129-130.

47. *Id.* 128.

48. 74 U.S. (7 Wall.) 321 (1869).

49. 32 U.S. (7 Pet.) 242 (1833).

50. 76 U.S. (9 Wall.) 274 (1870).

seventh amendment was claimed, but the Court rejected the contention that the Bill of Rights limited the state; *Barron* and *Twitchell* were cited by Justice Nelson to support his position that "the ten amendments . . . are limitations upon the power of the Federal Government, not upon the States." Again no reference was made to the fourteenth amendment.

In December, 1868—five months after promulgation of the fourteenth amendment—the New Hampshire Supreme Court decided *Hale v. Everett*, a case which raised the question of religious freedom.⁵¹ In the course of its elaborate study of religious liberty and of the close relationship that had long existed between the church and the State of New Hampshire, the court stated that the states had exclusive authority in religious matters.⁵² The dissenter, Judge Doe, eloquently defended the disqualified preacher in an opinion of one hundred and fifty-three pages, but he penned not one word about the fourteenth amendment.⁵³

In *Rowan v. State*,⁵⁴ the plaintiff contended that failure to be indicted by a grand jury violated the "privileges and immunities" and the "due process" clauses. In rejecting this contention, the Wisconsin Supreme Court ruled that "there is nothing in the 14th Amendment" preventing the states from abolishing this procedure "if the people of the state find it wise and expedient" to do so.⁵⁵

E. *Civil Rights 1870-1875*

In one section of his 1908 book, *The Adoption of the Fourteenth Amendment*, Horace Flack attempted to discover the congressional interpretation given to the fourteenth amendment by the Senate and by the House during the seven years which immediately followed its ratification.⁵⁶ He treated in considerable detail the several measures proposed by the 41st, the 42nd, and the 43rd Congresses in the years 1869 to 1875—measures designed to clothe the fourteenth amendment with legislation. These proposals culminated in the Civil Rights Act which President Grant signed into law on March 1, 1875. Speaking of the congressional discussion held in April, 1871, during a special session

51. *Hale v. Everett*, 53 N.H. 1 (1868). In this case, involving two warring factions of a Unitarian congregation, a preacher had been denied his pulpit for straying from orthodoxy. The court upheld this denial.

52. *Id.* at 9.

53. *Id.* at 14.

54. 30 Wis. 129 (1872).

55. *Id.* at 148. See also *Wiemer v. Bunbury*, 30 Mich. 201, 208 (1874), where Judge Cooley and a full court said that amendments 4 and 5 were not limitations "upon state power."

56. FLACK 210-277.

of the 42nd Congress, Flack wrote that "the debates furnish the best evidence and material, except for the debates on the [fourteenth] amendment itself, as to what was really intended by the amendment."⁵⁷ And what was really intended? Among other things, concluded Flack, the April, 1871, debates prove that the fourteenth amendment aimed at binding the states by the strictures of the Bill of Rights.⁵⁸ He then attempted to reinforce this finding by a study of other debates in Congress on relevant legislation proposed in the ensuing four years.

First of all, it should be made clear that the debates reviewed by Flack were not debates on any bill designed to compel the states to extend to their citizens freedom of speech or religion or the right of counsel in criminal cases or any other specific right spelled out in the first eight amendments. The relevant measures all concerned acts of racial discrimination and naturally the discussions these bills provoked were generally centered around the extent of the power invested in Congress by the fourteenth amendment to take affirmative action against discriminatory action by private parties. However, participants in these debates did refer frequently to the Bill of Rights and its relation to the fourteenth amendment. Thus, their statements merit serious consideration.

Flack's treatment reveals that several Senators and Representatives in the years 1870-1874 stated explicitly that in their opinion the guarantees of the Bill of Rights were intended to be included among those privileges and immunities of the fourteenth amendment which the states were henceforth not to abridge. It might also possibly be inferred that other congressmen who heard such views expressed and yet voiced no disapproval must have expressed acquiescence by their silence. One should, however, make such an inference only with great reservation, for the proposals then before Congress, like freedom for Negroes to enter restaurants and inns, were unrelated to any of the guarantees of the Bill of Rights; thus, remarks concerning these guarantees generally were gratuitous *obiter dicta* and really called for neither confirmation nor denial. But as a matter of fact, a number of law-makers did deny that such rights had been made binding upon the states by the 1866 amendment.

On March 31, 1871, the House engaged in debate over a bill designed to invest federal authorities with power to outlaw the violence of

57. *Id.* 249.

58. *Id.* 94, 277.

Klansmen against Negro voters.⁵⁹ In arguing that Congress had authority to pass such a measure, Bingham stated explicitly that in 1866 he had intended to include the Bill of Rights in the privileges and immunities clause of the fourteenth amendment.⁶⁰

One wonders why Bingham had not spoken with equal clarity during the 1866 debates. Never once did he assert simply and unmistakably: "The section incorporates the Bill of Rights and makes its guarantees applicable against the states." These words would have been the obvious ones to employ had he really espoused the incorporation theory in 1866.⁶¹ Relying only on Bingham's ambiguous statements and on the evidence marshalled by Flack,⁶² one could hardly conclude that the people,

59. *Id.* 233-36. Bingham's statements on this occasion provoked a long and sharp exchange with Garfield and Farnsworth who challenged him on his interpretation of the second draft of section one, which was the one finally approved. CONG. GLOBE, 42nd Cong., 1st Sess. App. 115-16 (1871).

60. *Id.* App. 84. In treating this debate, Flack asserted that Bingham's utterances on the meaning of Section 1 carry more weight than any others. FLACK 231-32.

61. Representative Garfield was in the House in 1866 and had heard Bingham and others elaborate on the fourteenth amendment. In 1871, four days after hearing Bingham express his afterthoughts on the subject, he was prompted to retort: "My colleague can make but he cannot unmake history." CONG. GLOBE, 42nd Cong., 1st Sess. App. 151 (1871).

62. Flack recounts the reactions and interpretations of those who heard Bingham and fellow expounders of the amendment when they spoke in 1866. The words of Representative Storm are most apposite. He uttered them on March 31, 1871, immediately after Bingham's speech in which he professed the doctrine of "total incorporation". *Id.* App. 86. Flack recounts the event thus:

Mr. Storm, of Pennsylvania, said that little attention was given to the first section when the amendment was before the House, because the attention of the country was called to the question of changing the basis of representation. He furthermore declared that if the views now announced by those advocating the bill had been uttered when the Amendment was before Congress, it would never have been ratified, and added: "If the monstrous doctrine now set up as resulting from the provisions of that Fourteenth Amendment had ever been hinted at, that Amendment would have received an emphatic rejection at the hands of the people." He also stated that the first section was but a reenactment of the Civil Rights Bill through superabundant caution.

FLACK 236-37. Flack comments that:

Mr. Storm seems to have stated the question fairly, and no doubt he was right in saying that had the people been informed of what was intended by the Amendment, they would have rejected it. But it is equally true that there were statements made by men in Congress at the time to show something of what was really meant by it, but these statements seem to have been lost sight of on account of the more stirring and exciting political questions of the time.

Later, Flack writes that "the great mass of the people never really comprehended the meaning and purpose of the amendment." *Id.* 209.

This honest admission seems to detract considerably from Flack's earlier assertion that, in 1866, immediately before the vote was taken in the House on the fourteenth amendment, the following two things were true: (1) Bingham had made it "evident that he intended to confer power upon the Federal Government, by the first section of the amendment, to enforce the Federal Bill of Rights in the States. . . ."; (2) Bingham's position "must have been understood by all the members present." *Id.* 80-82.

Congress, or the state legislatures understood that the fourteenth amendment was to bind the states by the Bill of Rights.

F. Support From the South

In addition to Bingham, Flack lists approximately ten other Senators or Representatives who clearly stated their acceptance of the doctrine of "incorporation" of the Bill of Rights.⁶³ All such statements were made during the debates of various civil rights bills proposed in the years 1871-1875.

On December 1, 1873, Senator Sumner moved that the Senate proceed to the reconsideration of his bill which had already been debated at length in 1872.⁶⁴ The measure forbade discrimination in public schools, inns, restaurants, and common carriers; it also prohibited the exclusion of Negroes from jury service. In addressing himself to the measure,⁶⁵ Thomas D. Norwood stated without equivocation that the fourteenth amendment bound the states by all the imperatives of the Bill of Rights. He specifically mentioned freedom of the press, the right to bear arms, the guarantee against cruel and unusual punishment, etc. He asserted that, before the adoption of the fourteenth amendment, "any State might have established a particular religion, or restricted freedom of speech." After 1868, he continued, such was impossible. Moments later, he said: "The people of the United States laid upon the States the same inhibitions which they laid seventy years ago on the United States."

In view of such unqualified statements, Flack seems to be most justified in claiming Norwood as an exponent of total incorporation.⁶⁶ However, it must be remembered that the Senator was a Democrat from Georgia who found the Civil Rights Act then being debated most odious. Thus, in arguing against its provisions, Norwood aimed at proving that the drafters of the fourteenth amendment had intended to create no *new* rights or privileges which were not already mentioned in the Constitution. That amendment, he maintained, merely bound the states by those mandates therein enumerated just as these mandates had always

63. It is ironic that all of these men were Democrats and, with the exception of Senator A.J. Thurman, all were from the South. Politics indeed make strange bedfellows: Republican John Bingham, intrepid crusader for strong central control of civil rights, finds these states' righters to be the most articulate supporters of his "incorporation" doctrine.

64. 2 CONG. REC. 2, 10 (1873).

65. *Id.* App. 242 (1874). Sumner's bill of December 1, 1873, was sent to the judiciary committee and reported back April 29, 1874. FLACK 266.

66. *Id.*

bound the national government. But, since neither Article IV, Section 2, nor the Bill of Rights had ever compelled nor authorized the federal government to forbid segregated schools, trains, hotels, etc. within its jurisdiction, so neither did the fourteenth amendment bind the states to eliminate such accommodations within their borders. "This construction makes the operation of the State and the Federal Government harmonious. . . . It will be only necessary to look to the Constitution to determine if a privilege or immunity of a citizen of the United States is abridged by a State, and a tyro can answer the question."⁶⁷

An alluring and seductive simplicity did attach to such a constitutional construction, and it fitted perfectly the purposes of Southern Democrats. It was a patriotic, noble and magnanimous proposal to call for a nation-wide, unqualified application of the Constitution within the borders of every state exactly as that document stood in 1791. The word "exactly" here is controlling, for if it were to be so applied—no more and no less—then it is true that abolition of racial discrimination could not have been demanded of southern states nor of their citizens. Norwood's speech of May 4, 1874, echoed one given in 1872 by another Democrat. During the 1872 debates on the Sumner proposal, Senator A.G. Thurman of Ohio delivered a long address on the "source, or fountain of the rights, privileges, and immunities" of citizens of the United States.⁶⁸ Flack commented thus: "The significant thing in his speech was, what was the virtual statement that the first eight amendments were made applicable to the States by the Fourteenth Amendment."⁶⁹ The following analysis will test whether such an avowal was really a "significant thing" or merely a neat maneuver like that of Norwood's.

The Ohio Senator expressed strong opposition to the sections eliminating segregation in public and semi-public accommodations, including schools and churches. Then, to make his point that the Founding Fathers had covered the field thoroughly, he ran through the many guarantees found in the Constitution:⁷⁰ all citizens were entitled to jury trials, freedom from established religions, protection against cruel punishment, right of *habeas corpus*—and presumably all with federal

67. 2 CONG. REC. App. 242 (1874).

68. CONG. GLOBE, 42nd Cong., 1st Sess. App. 25-27 (1872).

69. FLACK 255.

70. CONG. GLOBE, 42nd Cong., 2nd Sess. App. 25-27 (1872).

protection even against state abridgement. It was a munificent allowance, except that Thurman's majestic grant seems like a clever bit of rhetoric: since the Founding Fathers detailed so carefully so many rights and privileges, he appears to be pleading, how can anyone assert that they would have failed to include an integrated education had this ever been deemed to be a right or a privilege. Like Norwood, he posed as a great patriot as he argued for applying to the states everything provided for in the original Constitution itself.

On the same day that Thurman made his 1872 remarks, Senator John Sherman of Ohio engaged in a sharp exchange with a solon from Wisconsin, Matthew Carpenter.⁷¹ In Sherman's utterances, Flack purports to find confirmation for his doctrine of complete incorporation.⁷² There seems little justification for drawing such a conclusion since, except for jury trials, Sherman mentioned no other guarantees of the Bill of Rights. Thus, he might have embraced only the theory of selective incorporation—the theory which Mr. Justice Black finds so unacceptable. In other words, Sherman might have thought that the fourteenth amendment was intended to extend federal protection only of those rights deemed fundamental to an ordered scheme of liberty, and that a jury trial was to be so classified. He says nothing of other rights.

At this juncture, Senator Carpenter protested appositely that "it being well settled that that constitutional provision [jury trials] applies to nothing but Federal courts, how does it authorize us to legislate for the State courts?"⁷³ In answer, Sherman pointed to the fourteenth amendment which, in his opinion, made effective within the states the privileges and immunities of Article IV, a phrase embracing in some inexplicable way the right to jury trials, a right "as old as the common law." Sherman thus seems to have believed that, even before the sixth amendment was added to the Constitution, the states were bound to grant jury trials, but that there was no way to force them to do so until

71. *Id.* 844. Flack refers to Senator Carpenter as "one of the ablest men in the Senate." FLACK 253.

72. Mr. Sherman also held that the right of trial by jury was a right which could not be taken away, since the adoption of that amendment [the fourteenth]. In other words, he thought that the first eight amendments were binding on the States by the adoption of the fourteenth amendment.

FLACK 256.

73. CONG. GLOBE, 42nd Cong., 2nd Sess. 844 (1872).

the ratification of the fourteenth amendment. Bingham had argued in this same manner in 1866.⁷⁴

On January 31 and February 1, 1872, Carpenter expressed doubt as to the constitutional validity of a provision in the Sumner bill prohibiting any racial discrimination practiced "by trustees and officers of church organizations." He quoted the first amendment's religion and speech clauses, observing that it was added to "allay the fears . . . that the Government would become a despotism." Then, referring to the commentary of Justice Story on the Constitution, Carpenter continued: "[I]t cannot be that those who framed the Constitution of the United States intended to and thought they had, carefully excluded the whole subject of religion from Federal control or interference."⁷⁵ The Wisconsin Senator gave no indication here or elsewhere that by reason of the fourteenth amendment the federal government was henceforth permitted to exercise control over this subject.

On February 27, 1875, the date the Civil Rights Act was passed in the Senate, Carpenter announced that he could not support the bill's ban on discrimination in jury selection. "No one will deny," Carpenter stated, "that today, after all the amendments, a state has a right to administer justice, according to her own Constitution and laws, in obedience to the Constitution of the United States, in her own courts."⁷⁶ This assertion plus those he made in 1872 seem to add up to a clear disavowal of the doctrine of total "incorporation."

G. *The Blaine Amendment 1875-1876*

It is regrettable that Flack's 1908 study covered only the period from 1865 to February 27, 1875, the day on which the Civil Rights Bill was enacted by Congress. As stated earlier in the present work, the debates in 1866 on the fourteenth amendment were so vague and confusing that they are not an accurate guide as to what its drafters intended.⁷⁷

The many measures introduced in Congress between 1870 and 1875 to implement that amendment produced cascades of rhetoric but little material that was really germane either to Flack's investigation or to that undertaken by Justice Black in more recent years. Indeed, none of the several proposals discussed during this period had anything to do with the Bill of Rights. The rights of Negroes to attend churches with

74. See notes 25, 26, 29, 30 *supra*.

75. CONG. GLOBE, 42nd Cong., 2nd Sess. 731 (1872).

76. 3 CONG. REC. 1863 (1875).

77. See notes 25, 26, 32 *supra*.

whites, to eat in their restaurants, to attend their schools, to sit with them on juries are not to be found among the guarantees of the first eight amendments. A person could have taken any position on "incorporation" and stayed uncommitted on the 1870-1875 rights bills.

When Bingham, Norwood, Thurman and a few other legislators avowed their endorsement of total "incorporation", they were merely uttering *obiter dicta* which called for neither rebuttal nor acceptance. Some listeners, like Senator Carpenter, did challenge the proponents of this doctrine, but those who remained silent did not thereby register an affirmation of the theory. It is submitted that Flack might have come to an entirely different conclusion on "incorporation" had he made a study of the material treated below.

On December 14, 1875, Representative James Blaine introduced in the House Joint Resolution 1 which stated:

Resolved by the Senate and House of Representatives, that the following be proposed to the several States of the Union as an Amendment to the Constitution

ARTICLE XVI

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or delivered from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.⁷⁸

Nearly eight weeks earlier, Blaine had written an open letter to a "Man from Ohio" which was printed in the *New York Times* on November 29, 1875.⁷⁹

78. 4 CONG. REC. 205 (1875).

79. My Dear Sir:

The public school agitation in your late campaign is liable to break out elsewhere. . . . [T]he only settlement that can be final is the complete victory for non-sectarian schools. . . . The First Amendment of the Constitution, the joint product of Jefferson and Madison, proposed in 1789, declared that 'Congress shall make no law respecting the establishment of religion, nor prohibiting the free exercise thereof.' At that time when the powers of the federal government were untried and undeveloped, the fear was that Congress might be a source of danger to perfect religious liberty, and hence all power was taken from it. At the same time, states were left free to do as they pleased in regard to 'an establishment of religion,' for the Tenth Amendment, proposed by that eminent jurist, Theophilus Parsons, and adopted contemporaneously with the First, declared that "All powers not delegated to the States. . . ."

A majority of people in any state in this Union can, therefore, if they desire it, have an

This letter reveals that Blaine believed the following: first, the first amendment was intended to bind Congress only; second, by reason of the tenth amendment, the states were free to establish religions; and third, the fourteenth amendment did not apply to the states so as to forbid either official churches or the public maintenance of sectarian schools. One other highly interesting point seems implicit in this letter. Blaine does not appear to have believed that aid to sectarian schools was forbidden merely by the clauses reading: "No state shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof"; this inhibition, it would seem, was to be laid upon the states only by the supplementary clauses of his proposal. In a like manner, he apparently did not believe that such aid to religion from the federal government was forbidden by the provisions found in the first amendment.

On August 4, 1876, the House Judiciary Committee unanimously approved the proposal after making this addition: "This article shall not vest, enlarge, or diminish legislative power in the Congress."⁸⁰ Five of the ten members of the Committee—Frye, Hunton, Knott, Lawrence,⁸¹ and Starkweather—had been in Congress for one or all of the debates on

established church—under which the minority can be taxed for the erection of church edifices which they never enter and for the support of creeds which they do not believe. This power was actually exercised in many states long after the adoption of the federal Constitution, and although there may be no danger of its revival in the future, the possibility of it should not be permitted. . . .

And in curing this constitutional defect, all possibility of hurtful agitation on the school question shall also be ended. Just let the old Jefferson-Madison amendment be added to the inhibitory clause in Section 10, Article 1 of the federal Constitution, viz: 'No state shall make any law respecting an establishment of religion, nor prohibiting the free exercise thereof; and no money raised by taxation for the support of the public schools or derived from any public funds therefor, shall ever be under the control of any religious sect, nor shall any money so raised ever be divided between religious sects or denominations!'

This, you will observe, does not interfere with any state from having just such a school system as the citizens may prefer, subject to the one single and simple restriction that the schools shall not be made the arena for sectarian controversy or theological disputation. This, it seems to me, would be comprehensive and conclusive, and would be fair alike to Protestant and Catholic, to Jew and Gentile, leaving the religious conscience of every man free and unmolested.

80. 4 CONG. REC. 5180 (1876).

81. William Lawrence of Ohio had been in the House when this proposal was debated. He was present for the discussion of the Civil Rights Bill of April, 1866, and contributed one of the longest and most scholarly exposés of its meaning when he gave the final speech on the day the House voted to override the veto of President Johnson. CONG. GLOBE, 39th Cong., 1st Sess. 1832-39 (1866). On August 7, 1876, Lawrence introduced his own amendment that "No state shall make any law respecting an establishment of religion nor prohibiting the free exercise thereof." 4 CONG. REC. 5319 (1876).

measures introduced to implement the fourteenth amendment on which debates Flack relies so heavily.

Of the thirteen representatives who spoke on the Blaine proposal on August 4, 1876,⁸² nine had been in Congress when one or more of the relevant rights bills was under discussion. Of all the 1876 House members, ten were in the historic 39th Congress which proposed the fourteenth amendment,⁸³ and four had been articulate participants. Forty had been members of the 42nd Congress which debated the Anti-Klan Bill. "These debates," Flack declares, "furnish the best evidence and material, except for the debates on the amendment itself, as to what was really intended by the Amendment."⁸⁴ It was on this occasion that Bingham offered his afterthoughts on the first section which, according to Flack, "carry more weight than any others" as an authoritative interpretation of its meaning.⁸⁵

Several men who were not in Congress during the important decade 1865-1875, had been in the state legislatures which ratified the fourteenth amendment; others held some other public office. In either capacity, they must have been compelled to hear much about the meaning of this important proposal.

Thus, an inference of capital importance can be drawn from the fact that not a single voice was raised suggesting that the Blaine measure was unnecessary by reason of the fourteenth amendment. All who participated in the House discussion on August 4, 1876, must have done so with tacit acceptance of the assumption articulated by Representative Nathaniel Banks of Massachusetts:

If the Constitution is amended so as to secure the object embraced in the principal part of this proposed amendment it prohibits the States from exercising the power they now exercise. Congress at present has no power to legislate upon this subject in any way or form.⁸⁶

On August 7th, and more fully on August 14th, the Senate debated the Blaine Amendment, which had recently been sent up from the lower house after passage by a vote of 180 to 7.⁸⁷ These debates are highly significant for the present study. Sixteen members of the 39th Congress

82. 4 CONG. REC. 5189-5191 (1876).

83. These were Banks, Blaine, Buchard, Conger, Hale, Hoar, Holman, Hunton, Kasson, and Lawrence.

84. FLACK 249.

85. *Id.* 230-31.

86. 4 CONG. REC. 5191 (1876).

87. 4 CONG. REC. 5245-46, 5561-62, 5580-5595 (1876).

which proposed the fourteenth amendment to the states⁸⁸ were Senators in the 44th Congress. Justin Morrill, George Boutwell, and Roscoe Conkling⁸⁹ were on the Joint Committee on Reconstruction—the “Committee of Fifteen” which had framed the fourteenth amendment.⁹⁰ The Senate Committee on the Judiciary to which the Blaine resolution was sent, consisted of seven Senators—three of whom were in the 39th Congress.⁹¹

88. These were Allison, Anthony, Blaine, Boutwell, Conkling, Cragin, Dawes, Edmunds, Frelinghuysen, Hitchcock, Howe, J. Morrill, L. Morrill, Sherman, and Windon. L. Morrill retired in July, 1876, and Blaine was appointed to replace him but did not take his seat until December.

89. All three voted for the Blaine Amendment on August 14, 1876. 4 CONG. REC. 5595 (1876).

90. “That amendment was prepared in form by Senators Conkling and Williams and myself.” G. BOUTWELL, *REMINISCENCES OF SIXTY YEARS IN PUBLIC LIFE* 41 (1902). In 1866, Conkling and Boutwell were Representatives.

91. One of these men, Roscoe Conkling, a Republican from New York, had brought to Congress legal experience gained as a practicing lawyer and as a district attorney in his home state. Since he was a prominent member of the Committee which had written the fourteenth amendment, his discussion of the Blaine proposal—a veritable concrete interpretation of a basic principle of this amendment by its contemporaries—must be read with the keenest interest. See B. KENDRICK, *JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION* (1914).

George Edmunds, a Republican lawyer from Vermont and the “ablest constitutional lawyer in Congress”, was another member of the Senate Committee on the Judiciary who had been in the 39th Congress. U.S. CONGRESS, *BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS 1774-1961*, at 847 (1961) [hereinafter cited as *BIOGRAPHICAL DIRECTORY*]. For the judgment about Edmund’s reputation as a constitutional lawyer, see 6 *DICTIONARY OF AMERICAN BIOGRAPHY* 25 (1935) [hereinafter cited as *DICTIONARY BIOGRAPHY*].

Allen Thurman, a Democratic member from Ohio, was not in this Congress, but his legal ability is attested to by the fact that he had been chief justice of the Supreme Court of Ohio prior to the Civil War. *BIOGRAPHICAL DIRECTORY* 1714. Moreover, it was Thurman’s Senate speech in 1872 which Flack deemed so significant an indication of belief in incorporation. FLACK 255.

Although appointed to the Senate in 1866, Frederick Frelinghuysen, Republican from New Jersey, did not take his seat until November 12, 1866, five months after Congress had concluded its discussion of the fourteenth amendment. *BIOGRAPHICAL DIRECTORY* 1714. However, at the time that the New Jersey state legislature was debating and ratifying this amendment, Frelinghuysen held the office of attorney general of his state. New Jersey ratified the fourteenth amendment by a close vote on September 10th and 11th, 1866. Frelinghuysen was not appointed to the Senate until after the death of his predecessor, William Wright. *BIOGRAPHICAL DIRECTORY* 1853. Thus, it seems certain that Frelinghuysen must have been well acquainted with a proposal which was then provoking such sharp dispute even in northern states and especially in New Jersey. In 1866, after the Democrats had captured New Jersey, the state legislature voted to repeal the act of ratification of the previous legislature. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *STAN. L. REV.* 5, 88 (1949).

The Judiciary Committee also included among its members, the Republican George Wright, who had helped to found the law school at the University of Iowa, and who was a professor of law during the whole period in which the fourteenth amendment was proposed, debated and finally ratified by the states. Before coming to the Senate in 1871, he had been a justice on the Supreme Court of Iowa for sixteen years. *BIOGRAPHICAL DIRECTORY* 1851.

Timothy Howe was the fifth of the Republicans on the Judiciary Committee. Before entering the political arena at the national level, Howe had been a practicing lawyer and a justice on the Supreme

The Senate debates on Blaine's proposal were protracted and spirited, not to say bitter. The scrutiny to which it was subjected proved that the resolution had elicited much excitement and called forth considerable effort from members of the upper chamber. A detailed study of this debate would be highly rewarding, but lack of space demands that remarks be limited to points of major importance.

Of transcendent importance is the fact that no newspaper printed a single word and no Senator uttered a single syllable suggesting that the fourteenth amendment had already made the first amendment applicable to the states and thus rendered the "establishment" and "free exercise" clauses of the Blaine proposal superfluous. All who engaged in the discussion appear to have assumed without question that the states were still unfettered by federal control in the area of religion. Furthermore, the solons who accepted this assumption were no ordinary lawmakers, but rather, recognized leaders in the upper chamber,⁹² a fact of major

Court of Wisconsin. *Id.* 1084. Howe was in the Senate when it debated the fourteenth amendment and was there for all the debates on the rights' proposals made to clothe it with legislation.

John Stevenson of Ohio was one of the two Democrats on the Judiciary Committee to which the Senate entrusted the Blaine Amendment. To a distinguished career in politics and law, he added experience as a Senator during the debates on the bills proposed between 1871 and 1875.

92. James Blaine, who introduced the resolution, had been speaker for the forty-first, forty-second and forty-third Congresses. His resignation from the House for an appointment to the Senate was so timed that he was unable to participate in the debates on his own measure in either house.

Issac Christiancy had served seventeen years on the Supreme Court of Michigan and for two years was the chief justice of that tribunal. BIOGRAPHICAL DIRECTORY 1851. More than ordinary attention, therefore, must be given to his opening remarks that the first part of Blaine's proposal is "simply imposing on the States what the Constitution already imposes on the United States, and that is all correct." 4 CONG. REC. 5245 (1876). The implication is unmistakable.

Oliver P. Morton of Indiana came to the Senate in March, 1867, too late for the debates on the fourteenth amendment but he was present, active and vocal for all the implementing measures introduced during the next eight years. Moreover, from late 1865 to the passing of the fourteenth amendment, Morton had been in close contact with Washington, a confidant of the President and of congressional leaders as well. JAMES 159, 164, 182; MCKITRICK 159, 306-310. Not only did he expound its meaning in public, but as governor of Indiana, he presented it to the state legislature on January 10, 1867, with the reassuring message that "no public measure was ever more fully discussed before the people, better understood by them." IND. S.J. 42 (1867); IND. H.J. 48 (1867); cf. JAMES 191. This is a great exaggeration; although Morton probably understood the amendment perfectly, the ordinary people were very much in the dark.

It is significant that, although the Indiana constitution contained provisions inconsistent with the Bill of Rights, neither the governor nor his knowledgeable legislators hinted that changes would be imperative with the adoption of the fourteenth amendment. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 106 (1949).

This silence in January 1867 speaks volumes. So did Morton's volcanic eruptions on August 14, 1876. For instance, when Democrat William Eaton of Connecticut asserted that the proposal was

importance in concluding that the "incorporation" doctrine was unknown to the Senate of 1876. In the voting that ensued upon these debates, party lines held firm; 28 Republicans said "yea", 16 state's rights Democrats chorused back "no."⁹³ And, thus, the proposal failed to receive the necessary two-thirds vote.

Some facts deserve repetition before concluding this section of the present study. Significantly, 27 Senators were in the 44th Congress whose understanding of the fourteenth amendment is pivotal to the central issue. Fifteen had been members of the 39th Congress; the others had participated in the ratification, or the rejection, of this amendment by the state legislatures. The House had 50 members with the same background. Thus, their collective interpretation of this amendment is an excellent indication of the official interpretation given to it in 1866. Both by their words and by their silence in 1876, they uttered an emphatic denial that those who proposed or those who ratified the fourteenth amendment ever conceived its purpose to be the binding of the states by the strictures of the Bill of Rights.

Actually, there were more than the 77 star witnesses mentioned above. Every member of the 44th Congress had been an adult in 1866, and most of them had been at that time holders of responsible public positions. Eighty-two members of the 44th Congress in 1876 had also been in the 42nd Congress when Bingham gave what Flack accepts as an official interpretation of section one.⁹⁴ Moreover, there were hundreds of writers, thousands of laymen keenly interested in politics, scores of professors of law and government, and a multitude of Protestant clergymen crusading for the objects of the Blaine proposal. These men and women were not children when the fourteenth amendment was being discussed as the leading issue of its day. If—to believe Justice Black—"one of the chief objects" of section one was by intention and by design "to make the Bill of Rights applicable to the states,"⁹⁵ how was it possible to keep this vast body of intelligent people universally ignorant of the fact? Or, if they were aware of the fact in 1866, what was it that so dulled their powers of recall in 1876? And, if they did recall the fact, what made them so obtuse to the possibilities inherent in the "incorporation" doctrine as a medium

unnecessary since the states had their own prohibitions against official religion, the Indiana solon uttered the testy rejoinder that, "[T]herefore he leaves it in the power of any state by a change in its organic law to make an established church." 4 CONG. REC. 5591-92 (1876).

93. 4 CONG. REC. 5595 (1876).

94. FLACK 231-32.

95. *Adamson v. California*, 332 U.S. 46, 71 (1947) (dissenting opinion).

for realizing that object whose consummation was so devoutly to be wished? "No Establishment", by decree of the national government, was theirs for the mere asking of these legislators. The votes were at hand both in the Senate and in the House.⁹⁶ But the request was not made—because in 1876 no one believed in Justice Black's theory of "incorporation".

III. THE STATES AND JURY TRIALS

Much territory has been covered since the beginning of this study. In the light shed by the above inquiry, it is submitted that Justice Black is in error when he maintains that the drafters of the fourteenth amendment, as well as all those participating in the passage and ratification thereof, deliberately intended to fasten the mandates of the Bill of Rights upon the states; and that, consequently, the Court has no other choice but to compel the states to grant jury trials in all criminal cases as well as in all civil cases involving more than twenty dollars.

But students of criminal law might also have some arrows in their quivers for those Justices who reject Black's theory of incorporation but have, nonetheless, felt justified in fastening on the states the jury requirement in criminal cases. In doing so, the Justices had to conclude that such procedure was "of the very essence of ordered liberty",⁹⁷ "an immutable principle of justice",⁹⁸ "a fundamental right", or a guarantee whose denial would violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."⁹⁹

In earlier and less sophisticated days, the common man in the street might have so qualified trial by jury—although the Supreme Court consistently refused to do so for a full century after ratification of the

96. That is, if the fourteenth amendment had *already* forbidden state establishment of religion, then Congress could have easily passed "appropriate legislation" "to enforce" the prohibition.

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

98. *Twining v. New Jersey*, 211 U.S. 78, 93, 106-07 (1908).

99. *Powell v. Alabama*, 287 U.S. 45, 67 (1930). It should be noted, however, that some justices fasten the jury requirement on the states but disdain the *Palko-Twining-Powell* criteria. This is transparently clear in the case of Black and Douglas, the apostles of complete incorporation. Marshall, a "selective incorporationist", may entertain this position also. Mr. Justice Fortas' concurring opinion reveals that, although he held that the due process clause requires the states to grant jury trials in case of non-petito offenses, he dissociated himself from the "implication" in the majority opinion that the sixth amendment must be applied to the states with "all of its bag and baggage" such as unanimity and the twelve-man requirement. *Bloom v. Illinois*, 391 U.S. 194, 211 (1968) (Opinion applies as well to *Duncan*).

fourteenth amendment.¹⁰⁰ It seems strange that the Court should reverse itself at this late day, at a time when sophisticated critics as well as the example of highly civilized countries cast lengthening shadows of doubt on the desirability of a jury, let alone its indispensability, for achieving justice.

In 1964, R.M. Jackson, a highly respected British expert on criminal procedure, wrote, "I should like to think that the traditional ideas of the jury as a safeguard of the subject had been decently buried."¹⁰¹

In 1952, a professor of criminal procedure in Switzerland—"the most democratic of modern state systems"¹⁰²—used these blunt words: "Things should be called by their proper names: the introduction of the jury into Switzerland can be written off as a failure."¹⁰³ As a matter of fact, only ten of the twenty-five Swiss cantons permit jury trials in criminal cases and none provide them in civil cases.¹⁰⁴

In France, another highly civilized country, no "great fondness for the jury system" exists and the French generally view it "as an instrument designed to becloud and confuse the issues in a case."¹⁰⁵ Moreover, as in Switzerland,¹⁰⁶ a jury is granted only in a limited number of very serious cases, and even when granted, the jurors sit with a three-judge panel and often decide by a simple majority.

Perhaps the most trenchant criticism of the jury was penned by an American, the late Judge Jerome Frank.

To my mind a better instrument than the usual jury trial could scarcely be imagined for achieving uncertainty, capriciousness, lack of uniformity, disregard of the [rules] and unpredictability of decisions.¹⁰⁷

Similar criticism could easily be multiplied—and, indeed, so could praise of the system. But, even if the supporters should outnumber the critics and the credits outweigh the debits, there seems slight justification for demanding juries in all serious criminal cases on the dubious grounds

100. See notes 8, 9 *supra*.

101. R. JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* 273 (1964).

102. G. CODDING, *THE FEDERAL GOVERNMENT OF SWITZERLAND* 55 (1961).

103. Clerc, *Un' Experience du Jury*, *MÉLANGE* 219 (1952 Geneve).

104. O'Brien, *The Swiss Question the Jury*, 32 *SASKATCHEWAN L. REV.* 31, 39, 41 (1967); O'Brien, *The Jury in Switzerland*, 33 *BROOKLYN L. REV.* 58, 65-66 (1966).

105. H. ABRAHAM, *THE JUDICIAL SYSTEM: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND AND FRANCE* 113 (1968).

106. O'Brien, *The Jury in Switzerland*, 33 *BROOKLYN L. REV.* 58, 65-66 (1966). This author has talked much with French and Swiss magistrates and professors of law and concludes that at least within these ranks there exists a fairly universal coolness toward the jury system.

107. J. FRANK, *COURTS ON TRIAL* 123 (1950).

that they are “of the essence of ordered liberty” and grounded “in immutable principles of justice.”

Additional reasons give rise to dissatisfaction with the Court’s handling of *Duncan* and *Baldwin*. The first of these cases was disposed of by ruling that Duncan had been accused of a “serious” crime and that for all serious crimes a trial by jury must be permitted.¹⁰⁸ The Court measured gravity not by the penalty actually meted out to Duncan—which was incarceration for six months—but by the two-year imprisonment that could have been laid upon him according to the relevant Louisiana assault and battery statute.¹⁰⁹ It went no further since the 1968 case was easily disposed of by this limited ruling, and a self-imposed canon of venerable age counsels the judiciary against anticipating questions of constitutional law not absolutely necessary for settling the case in actual litigation.¹¹⁰

If one takes a broad view of the Court’s function, the wisdom of this rule of restraint will perhaps manifest itself. But *Duncan* and *Baldwin* will surely invite legitimate concern about the Court’s piecemeal writing of a code of criminal procedure—one fragment once or twice every year—a method which keeps lower courts, state legislatures, and law enforcement officers in a state of perpetual doubt as to what portions of their activities the high tribunal might one day disapprove and disallow. Moreover, such a method encourages myriad appeals (most of them hopeless and without merit) which consume precious court time and much public money. Thus, our already over-burdened judges and our over-taxed citizens are exploited by over-litigious plaintiffs and underscrupulous counsel while those people with honest grievances often see justice denied them because of justice delayed.

In *Duncan v. Louisiana*, the Court ruled simply that a jury must be provided in every “serious” criminal case and that a crime was “serious” if the respective law made it possible for a person to be imprisoned for two or more years. To buttress this ruling, the Court declared that the following was almost universally true within the states:

Crimes subject to trial without jury, which occasionally include simple battery, are punishable by no more than one year in jail. Moreover, in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term, although

108. 391 U.S. 145 (1968).

109. See notes 1, 3 *supra*.

110. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1938).

there appear to have been exceptions to this rule. We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense. Consequently, appellant was entitled to a jury trial and it was error to deny it.¹¹¹

To predict from this well hedged statement where the court would ultimately set "the exact location of the line between petty offenses and serious crimes" would have required the rare gifts of a skilled diviner. However, a conscientious legislative body might have reasonably concluded that non-jury trials for offenses subject to ten months in prison would be well within the Court's allowance. If such bodies there were and if such had so guessed, they were proven to be in egregious error a few months later.

Surely, it would not have taken an over-bearing or hard-driving Chief Justice to have elicited from his brethren on the Bench the "six-month" ruling—or some other rule—at the time of the *Duncan* decision in May, 1969. At that time, the Court was surely fully aware that in the very near future it would be compelled to render a decision on this point and that its refusal to do so in the instant case was only to invite needless litigation with all the attendant inconveniences to multiples of judges, law-makers, and plain participants destined to be caught up in the legal controversies that would inevitably ensue. On remand, *Duncan* would probably be entitled only to a five-man jury.¹¹² If, to be on the safe side, Louisiana had decided to grant anything more, a *sine qua non* prerequisite would have been an amendment of its constitution; and such revisions always require great measures of time and effort in any state. Moreover, how extensive should the revision be? Louisiana's constitution permits nine to three verdicts in all except capital cases—a provision not in conformity with the common law jury demanded for trials in federal courts.

111. 391 U.S. at 161-62.

112. Article VII, § 41 of the Louisiana Constitution reads thus:

All cases in which the punishment may not be at hard labor shall . . . be tried by the judge without a jury. Cases, in which the punishment is necessarily at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must render a verdict.

In response to the *Duncan* decision, Louisiana lowered the penalty for certain misdemeanors to six months and provided for jury trials when the penalty could exceed six months. LA. CRIM. PROC. CODE ANN. Art. 779 (West Supp. 1969).

Louisiana might have decided to gamble, exploiting Duncan in its efforts to get constitutional revision cheap: First, retry appellant before a five-man jury, letting him, if found guilty, shoulder the burden of appealing up the judicial ladder to the Supreme Court once more. Should the Court reverse this second conviction, Louisiana could have resorted to its twelve-man jury provisions with the less than unanimous verdict. Retrial, a third conviction and a series of appeals would again face Duncan. A unanimous verdict of guilt would, of course, have most likely brought the case to a conclusion. But a nine to three decision against Duncan would be another invitation to follow the labyrinthine path of appeal. Reversal and remand would have meant a fourth trial, predictably the last if the verdict should be guilty by all twelve jurymen.

In the 1970 *Williams* case, Court watchers were once more forced into the guessing game. In the name of judicial restraint, the Court coyly announced that, "We have no occasion in this case to determine what minimum number can constitute a 'jury'. . . ." ¹¹³ Slight comfort for hard-pressed officials in states which provide for less than six-man juries; ¹¹⁴ having heard the first alarming thud in *Williams*, they must now wait anxiously for the Court to drop the second judicial shoe in some unannounced jury case yet to come.

The constitutionality of nonunanimous verdicts was not before the Court in either the *Williams* or the *Baldwin* case. But a number of states do sanction such verdicts, ¹¹⁵ as do most countries which provide juries, ¹¹⁶ including England, the mother of the jury system. Such allowances are certain to be challenged, and the Court, by force of its own previous actions, will be compelled to utter another solemn pronouncement on their constitutional validity.

Until the high tribunal does settle these two issues, scores of men and women will undoubtedly be tried and found guilty according to procedures clouded by constitutional uncertainties—an unhealthy atmospheric condition produced by the ill-advised tinkering of the Court with the states' judicial systems.

The even tighter strictures imposed on the states by the 1970 decision of *Baldwin v. New York* collide once again with the flexible adjustments demanded by a "pluralistic society"—to quote Chief Justice Burger. ¹¹⁷

113. 399 U.S. at 91 n. 28.

114. *Id.* at 138-43 (appendix to opinion of Harlan, J.).

115. *Id.* See also note 112 *supra*.

116. See, e.g., O'Brien, *The Swiss Question the Jury*, 33 SASKATCHEWAN L. REV. 31, 40-44 (1967).

117. 399 U.S. at 77 (dissenting opinion).

This same concern can be easily detected in the dissenting opinion of Justice Harlan to *Williams*, which concludes with a plea that the Court "reconsider the 'incorporation' doctrine before its leveling tendencies further retard development in the field of criminal procedure by stifling flexibility in the States."¹¹⁸ Justice Stewart's more trenchant dissent brands the doctrine "plainly and simply wrong as a matter of fact and law."¹¹⁹

This writer shares the concern expressed in these three opinions and likewise endorses the indictment which Justices Harlan and Stewart returned against the incorporationists. In addition to this endorsement, another critical observation seems justified—one relative to the "fragmentary" writing of constitutional law—perhaps a necessary, if regrettable, piece of the bag and baggage that accompanies the institution of judicial review. The Court puts no gloss on fundamental rights of the Constitution except in the process of deciding actual "cases and controversies". A critic might well doubt whether the Court would have harnessed the States with the jury mandate had the question been considered *in abstracto* after a cool and scholarly study of some weeks into the actual works of the institution both here and abroad.

In the *Duncan* case—as in many cases involving criminal procedure—the atmosphere was hardly congenial to such a calm and academic investigation. The Court might well have detected racial bias in the fairly heavy sentence meted out to a Negro boy for "assaulting" a white boy. To register its disapproval and to redress a possible miscarriage of Justice, the high tribunal could not simply reduce the sentence or demand a new trial before another judge. Nor could it merely enjoin Louisiana alone to grant *Duncan* a jury trial. Its sole recourse was to pen paeans of praise for the jury system as an institution which fits conveniently within the spacious contours of the due process clause of the fourteenth amendment and thus binds *all* the states.

To write a constitution in this fragmentary fashion in response to each emotional and often strident plea for a redress of real or imaginary injustice¹²⁰ is not the part of wisdom, nor does it do credit to those whose high duty it is to give certainty to the law within a legal system that was destined to last for the ages.

118. 399 U.S. at 138.

119. *Id.* at 143.

120. See B. PRETTYMAN, *DEATH AND THE SUPREME COURT* (1962), for an excellent treatment of several "hard cases" in which the courts appear to have given some bizarre interpretations to laws and constitutions in their supreme efforts to bar the application of the death penalty to defendants in the instant cases.

Other aspects of the *Duncan*, the *Baldwin* and the *Williams* cases merit consideration at this juncture. In *Baldwin v. New York*, Justice Hugo Black, the dean of the incorporationist school, wrote a concurring opinion in which he agreed with the view that *Baldwin* was entitled to a jury trial; but he did not adhere to the Court's ruling that the states have authority to provide for non-jury trials in those cases where punishment is imprisonment for six months or less.¹²¹ Fundamentalist as he is in interpreting the Nation's basic legal document, Black underscored the word "all" in the clause of Amendment VI which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." ¹²² He thus charged the Court with usurping the power to amend by qualifying the comprehensive phrase "all criminal prosecutions" with the addition of the word "serious". Black rejected the idea that such considerations as "the administrative inconvenience to the State" could justify any narrowing of the jury privilege.¹²³

Without entering here into an analysis of Black's position, it is proper to observe that if his interpretation were accepted and the states compelled to grant jury trials for *all* crimes, then the "speedy trial" guarantee, also found in Amendment VI, could very possibly be jeopardized in many states because of the additional burdens fastened upon the courts. Black's retort would be, either amend the Constitution or improve the judicial machinery. Neither solution would recommend itself very much to most political realists.

It will be rewarding at this point to juxtapose the Black and the Harlan constitutional creeds insofar as they are related to the matter discussed in the two preceding paragraphs. Justice Harlan dissented in *Baldwin v. New York*¹²⁴ on principles he had enunciated in *Duncan v. Louisiana*.¹²⁵ In general, Harlan repudiates the incorporation theory that the drafters of the fourteenth amendment intended to fasten the jury requirements upon the states. In particular, he maintains that the federal principle plus the striking demographic diversity throughout the Nation demands that the states be left with a large measure of freedom in order to fashion judicial systems which they deem best calculated to cope with

121. 399 U.S. at 74-75.

122. *Id.* at 75.

123. *Id.*

124. *Id.* at 74.

125. 391 U.S. at 171 (1968). See also notes 6-12 *supra*.

their peculiar problems.¹²⁶ In his *Baldwin* dissent, Justice Harlan illustrated this point by reference to New York City. He wrote thus:

[P]eculiar local conditions . . . have led the New York Legislature to conclude that trial by jury is more apt to retard than further justice for criminal defendants in New York City.

* * *

New York City's misdemeanor caseload is 39 times that of Buffalo's although its population is only 17 times greater. After today, each of such defendants in New York is entitled to a trial by some kind of jury. It can hardly be gainsaid that a jury requirement . . . will increase delays in calendars, depriving all defendants of a prompt trial. Impressive evidence suggests that this requirement could conceivably increase delays in New York City courts by as much as a factor of eight.¹²⁷

It is important to emphasize the point that Harlan's philosophy would by no means leave him or the Court unarmed if the trial system in any state were actually proven to be unjust generally or unjust in any single case under review. His "due process" approach¹²⁸ is a veritable shotgun behind the door which can be used as need arises to compel states to grant any particular procedural right judged "implicit in the concept of ordered liberty."¹²⁹ Thus, Harlan and fellow expounders of this approach could conceivably demand even jury trials in the states *if* it were to be established that bench trials were unjust. But, as Harlan observed, the Court "ignores the basic fairness of the New York procedure."¹³⁰

In *Duncan v. Louisiana*, the Court wrote as follows:

[B]ecause . . . trial by jury in criminal cases is fundamental to the American scheme of justice . . . the Fourteenth Amendment guarantees a right of jury trials in all criminal cases which—were they tried in a federal court—would come within the Sixth Amendment guarantee.¹³¹

The Court reaffirmed this holding later in *Benton v. Maryland*.¹³² On the one hand, Harlan would not demand the adoption of any particular

126. 399 U.S. at 138 (1970).

127. *Id.*

128. *Id.*

129. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Although Harlan quotes from Cardozo's *Palko* opinion, his theory has some subtle differences from that therein expressed. See H. ABRAHAM, *FREEDOM AND THE COURT* 73-78 (1967).

130. 399 U.S. at 134.

131. 391 U.S. at 149.

132. 395 U.S. 784 (1969).

procedure *unless* its absence meant that *individuals* in state courts were denied fundamental justice. The *Duncan* majority, on the other hand, looked to the American *scheme* of justice. Like admirers of ancient Gothic cathedrals, the Court seemed enamoured of the traditional judicial architecture in America and concerned lest its graceful symmetry be disturbed by removal of the jury requirement.

In *Duncan* the testing ground is narrowed to the standard 'fundamental to the American scheme of justice.' No longer relevant is the question whether a fair legal system could be conceived without the particular procedure. . . .¹³³

IV. JURIES AND FEDERAL COURTS

But if Mr. Justice Harlan was disquieted because the Court in *Baldwin* added one more stricture on the states, he was also greatly exercised by the *Williams* decision with its alarming implications for jury trials in federal courts.¹³⁴

Harlan's anxiety grows out of the basic premise of the incorporationists—whether total or selective—that when guarantees of the Bill of Rights are placed upon the states the states must observe them "jot-for-jot and case-for-case".¹³⁵ That means that "the same constitutional standards apply against both the State and Federal Governments."¹³⁶ Mr. Justice Harlan expresses the position of incorporation thus:

The recent history of constitutional adjudication in state criminal cases is the ascendancy of the doctrine of *ad hoc* ("selective") incorporation, an approach that absorbs one-by-one individual guarantees of the federal Bill of Rights into the Due Process Clause of the Fourteenth Amendment, and holds them applicable to the States with all the subtleties and refinements born of history and embodied in case experience developed in the context of federal adjudication.¹³⁷

But if the federal jury standards were demanded of the states, many untoward dislocations would take place throughout the nation. Therefore, Harlan continues,¹³⁸ the Court has been forced to refashion

133. *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 151 (1968).

134. 399 U.S. at 139.

135. *Id.* at 129.

136. *Benton v. Maryland*, 395 U.S. 784, 795 (1969).

137. 399 U.S. at 130-31.

138. *Id.*

the traditional federal, common-law jury in order to produce the close harmony prescribed by the tenets of the incorporation doctrine, and at the same time to forestall many undesirable disruptions in judicial practices at state and local levels.

For Justice Harlan, this entails a rewriting of history as well as a reversal of an impressive line of Court decisions.¹³⁹ In 1898, for instance, the Court ruled that for purposes of the sixth amendment a jury was one "constituted, as it was at common law, of twelve persons, neither more nor less."¹⁴⁰ In 1930, the Court referred to the twelve-man requirement as "one of the essential elements" of the jury right, the destruction of which would "abridge the right in contravention of the Constitution."¹⁴¹ These decisions, Harlan insists, were based upon the clear "intent of the Framers" of that document.¹⁴²

Thus, the *Williams* ruling which releases even the federal government from the demands to supply juries with all the common-law characteristics offends Harlan's sense of history¹⁴³ as well as his sense of deference to constitutional procedure for effecting constitutional revision.

Mr. Justice Stewart expresses his own mind and that of Justice Harlan's quite concisely:

The 'incorporation' theory postulates the Bill of Rights as the substantive metes and bounds of the Fourteenth Amendment. I think this theory is incorrect as a matter of constitutional history, and that as a matter of constitutional law it is both stultifying and unsound. It is, at best a theory that can lead the Court only to a Fourteenth Amendment dead end. And, at worst, the spell of the theory's logic compels the Court either to impose intolerable restrictions upon the constitutional sovereignty of the individual States in the administration of their own criminal law, or else intolerably to relax the explicit restrictions that the Framers actually did put upon the *Federal* government in the administration of criminal law.¹⁴⁴

Another feature of the Court's opinion caused a certain measure of disquietude for Mr. Justice Harlan. In determining the size of a jury that

139. *Id.* at 126.

140. *Thompson v. Utah*, 170 U.S. 343, 349-50 (1898).

141. *Patton v. United States*, 281 U.S. 276, 288, 290 (1930).

142. 399 U.S. at 123.

143. *Id.* at 124-25. Strictly speaking, the Court did not release the federal government from providing twelve-man juries, but this does seem to follow as the only logical conclusion from the Court's premises. *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 168, n. 24 (1970).

144. 399 U.S. at 143.

would satisfy the constitutional commands of article three¹⁴⁵ and of amendment six,¹⁴⁶ the *Williams* majority relied largely upon a poll of practices in the *states* and then concluded that a six-man jury would so satisfy.¹⁴⁷ Justice Harlan calls this “a constitutional *renvoi*.”¹⁴⁸ One might well ask if the Court will resort to a similar canvass of *state* practices when it answers the question whether a “constitutional” jury may be permitted to render less than unanimous verdicts in *federal* cases.

A highly interesting observation is called for at this point. Justice Harlan has on many occasions accused the incorporationists of unwarranted trespass upon matters within the jurisdiction of the states and of putting the states into a straight-jacket.¹⁴⁹ Thus, it is ironic that Harlan himself might now be accused of trying to put the federal government into that same uncomfortable garment. Of course, every clause in the Constitution that limits the power of government is a small portion of the fabric that makes up the straight-jacket—if one likes the metaphor. The real question in every case is whether or not the Founding Fathers *really* intended that this or that restriction be placed upon state and/or national government.

The jury guarantee does indeed place limitations on government, and the twelve-man requirements, in the opinion of many knowledgeable critics, make the restriction an unreasonable and intolerable one. Thus, Mr. Justice White's Court opinion in *Baldwin v. New York* justifies a loosening of the stricture by arguing that “the primary purpose” of the jury trials is attainable with fewer than twelve jurors.¹⁵⁰ White argues that the essential feature of a jury “lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen”,¹⁵¹ which interposition promotes the jury's primary purpose, namely to guard “against the corrupt or overzealous prosecutor and against the complacent, biased or eccentric judge.”¹⁵²

Harlan's retort is carried in a sharp rhetorical question: what if New

145. “The trial of all Crimes, except in cases of impeachment, shall be by jury. . . .” Art. III, § 2, cl. 3.

146. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .” Amendment VI.

147. 399 U.S. at 99 n. 45. For the details of this poll, *see id.* at 138-43. (Mr. Justice Harlan's dissenting opinion).

148. *Id.* at 122.

149. *Id.* at 130.

150. 399 U.S. at 72.

151. 399 U.S. at 100.

152. *Id.*

York concludes that sufficient "interposition", "community participation" and "shared responsibility" is realized with a three-man jury.¹⁵³ Indeed, critics might well wonder why the Court settled on the number "six". The "purpose" of the jury would be more fully achieved with nine or twelve, and probably much better with twenty-five.

The "primary purpose" argument could be freighted with danger. The Constitution opens with a number of lofty purposes; but the framers were not content to rest their pens until they had prescribed a lengthy list of specific means whereby these purposes—in their own sober judgment—might best be attained. One of the great ends of establishing the Constitution was "to provide for the common defense" and in Articles I and II the founding fathers divided the defense and the war powers between Congress and the President. Would the Court ever be justified in shifting certain legislative powers to the Executive if the Justices were to conclude that "the primary purpose" of "the common defense" might thereby be more effectively assured?

In 1963, Mr. Justice William Brennan recommended "the primary purpose" test as legitimate for interpreting the "religion" clauses of the first amendment.¹⁵⁴ For some fifteen years prior to *Abington*, the Court had been looking to history for guidance in cases involving prayer and bible-reading in public schools and aid to religion in general.¹⁵⁵ But professional historians have characterized the quality of the Court's scholarship as "distressing" and have demonstrated that the findings of the Justices are incredibly inaccurate.¹⁵⁶ Chastened perhaps by these sharp remonstrances, at least one Justice has decided to avoid "the ambiguities of history" and instead has turned to the "broad purposes" of the first amendment.¹⁵⁷

To people of like mind, it makes little difference what *specific* practices were intended to be banned and what were to be allowed by the

153. *Id.* at 134.

154. *Abington Township School Dist. v. Schempp*, 374 U.S. 203, 230-37 (1963) (concurring opinion).

155. *Abington Township School Dist. v. Schempp*, 374 U.S. 203 (1963); *Zorach v. Clauson*, 343 U.S. 306 (1952); *McCollum v. Board of Education*, 333 U.S. 203 (1947); *Everson v. Board of Education*, 330 U.S. 1 (1947).

156. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 9 (1948); Kauper, *The First Ten Amendments*, 37 A.B.A.J. 717 (1951); Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64 (1963); TIME, Oct. 25, 1963, at 54.

157. *Abington Township School Dist. v. Schempp*, 374 U.S. 203, 230-37 (1963) (concurring opinion of Mr. Justice Brennan).

drafters of the first amendment. Their "broad purpose", according to Justice Brennan and followers, was to avoid religious contentions and bar untoward intrusions of government into the realm of religion.¹⁵⁸ Sworn to advance these goals, the Justices of the Supreme Court stand as the vigilant Platonic guardians ever prepared to single out and strike down those *specific* contemporary practices that seem to collide with the *general* "purpose" of the amendment's framers.¹⁵⁹ It is here submitted that such a theory of constitutional construction could well be dangerous to the fundamental postulates of democratic government, and if adopted generally as the rule of constitutional interpretation might subvert the central purpose of a written constitution.

Mr. Justice Harlan appears to have detected that a similar theory of constitutional construction has prompted the Court to strip "off the livery of history",¹⁶⁰ unburden itself of the "yoke of history", and hoist "the anchor to history"¹⁶¹ in order "to establish" justice with more dispatch and effectiveness. If the Court can engage in such "circumvention of history"¹⁶² in order better to achieve "the broad purpose" or "primary purpose" of trial by jury—as contemporary Justices perceive that to be—then scarcely anything in the Constitution is secure from radical change by a simple majority of the Supreme Court.

It is only fair to remark that the *Williams* majority was not entirely

158. *Id.* It seems apposite to observe that strictly speaking the "broad purpose" of the first amendment was to keep the National Government, including the Supreme Court, from meddling in Church-State affairs *within the states*. This latter was *really* the fear "which called for the establishment clause of the first amendment." O'Brien, *The Engel Case From a Swiss Perspective*, 61 MICH. L. REV. 1069 (1963).

159. Holmes' "reasonable man" might easily conclude that religious strife does *not* follow from the school practices which Justice Brennan bans in accordance with his theory. It seems that much more religious animosity was manifest after the Court's decisions than before. Courses on the various sects and official encouragement for children to pray together seem like excellent practices to inculcate understanding of different religions and thus to remove one basic cause of sectarian bitterness. See Griswold, *Absolute in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 UTAH L. REV. 167, 173-76 (1963). In any event a very substantial number of people are of this opinion and the number grows as the spirit of ecumenism advances. State legislatures and school boards generally reflect this opinion. Thus the "reasonable man" test seems to be met and should be sufficient to stay the Court in reaching decisions based on a different personal view of the Justices as to what best promotes the "broad purpose" of the religion clauses of the first amendment.

160. 399 U.S. at 122.

161. *Id.* at 126.

162. *Id.* Here Harlan replies heavily on "numerous pronouncements" of the Court as to the necessity of having twelve jurors for a trial in federal courts. The leading case is *Thompson v. Utah*, 170 U.S. 343 (1898).

unmindful of history. The Justices did indeed review the facts relevant to the writing of those portions of the Constitution which guarantee jury trials in federal cases.¹⁶³ But "the intent of the Framers", they complained, was "an elusive quarry".¹⁶⁴ Unable "to divine precisely"¹⁶⁵ what was the mind of the Founding Fathers as to twelve-man juries, the Court employed other considerations "to determine which features of the jury system, as it existed at common law, were preserved in the Constitution."¹⁶⁶ In turning to the "functions" and "purposes" of juries as pertinent to "the relevant inquiry",¹⁶⁷ the Court was careful to observe that they did no "violence to the letter of the Constitution."¹⁶⁸

V. THE FUTURE OF JURIES

Without measuring the relative strength of the arguments of the *Williams* majority and of those advanced by Justice Harlan, suffice it here to predict that the six-man jury will eventually become the general rule in state and federal cases. It is true that four members of today's Court—Black, Douglas,¹⁶⁹ Marshall¹⁷⁰ and Harlan¹⁷¹—insist that in criminal cases tried before federal courts a jury of twelve must be allowed. And the first three, incorporationists that they are, would lay the same demand upon the states. But Black, Douglas, and Harlan will very likely step down from the Court before long for reasons of age and health; and it is not very probable that all if any of the new appointees will bring to the bench a constitutional theory which requires juries composed of twelve men.

Court crystal gazers interested in divining the future of the jury in America would do well to ponder the position of Chief Justice Burger. In *Baldwin v. New York*, he dissented from the Court's holding that in all "serious" crimes the states are required to grant jury trials.¹⁷² In *Williams v. Florida*, the Chief Justice accepted the Court's ruling that

163. Art. III, § 2, cl. 3; Amendment VI and VII.

164. 399 U.S. at 92.

165. *Id.* at 98.

166. *Id.* at 99.

167. *Id.* at 99-100.

168. *Id.* at 99.

169. *Id.* at 106 (opinion of Justice Black, joined by Justice Douglas, concurring in part and dissenting in part).

170. *Id.* at 116 (opinion of Justice Marshall, dissenting in part).

171. *Id.* at 117 (opinion of Justice Harlan, dissenting in *Baldwin v. New York*, concurring in the result of *Williams v. Florida*).

172. 399 U.S. at 77.

the states may provide for six-man juries in criminal prosecutions.¹⁷³ In neither case was the Court asked to decide whether the states could entirely abolish jury trials in all cases; therefore, Burger had no opportunity to express himself on this question.

Insofar as federal cases are concerned, it seems safe to conclude that the Chief Justice, and a majority of the Court as well, do adhere to the idea that the Constitution permits juries of less than twelve. If *Williams* left any doubts as to Burger's position on this point, events subsequent to that 1970 decision seem to have effaced them. The December 14, 1970, issue of *United States News and World Report* carried an interview with the Chief Justice in which he underscored glaring defects "inherent in the jury system" which call for reforms, chief of which, in his view, would be a reduction of jury size.¹⁷⁴ At this juncture, he was speaking only in general of the system, but immediately thereafter the following significant exchange took place:

Q. If Congress were to pass a law and say that henceforth federal criminal cases and civil cases will be determined by a jury of six, would that be the answer?

A. Conceivably it could be done by the rule-making process of the federal courts, where the rule is proposed by the Judicial Conference Committee on Rules, then submitted to the Supreme Court, and, if approved by the Court, it is placed before Congress and becomes law if not rejected within 90 days.¹⁷⁵

In other words, the *Constitution* does not demand twelve-man juries in any type of case; it is only by the Federal Rules of Criminal Procedure that the mystic number is laid down as a requirement in criminal prosecutions,¹⁷⁶ and that could be changed in the manner suggested above by Burger himself.

A more consequential event was the adoption of a rule on November 12, 1970, by the United States District Court for the District of

173. 399 U.S. at 105. Readers might conclude that Burger embraced the position of Harlan and Stewart in that states are free to abolish jury trials in *all* cases. *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968) (dissenting opinion of Mr. Justice Harlan joined by Mr. Justice Stewart). In a Philadelphia address given on November 4, 1970, Burger said that "even if we should ultimately follow England as to [dropping juries in] civil cases, this should not be the pattern for *criminal cases*." Mimeographed copy, at 9. Nonetheless, he might very well hold that the states should be free in the matter.

174. U.S. NEWS AND WORLD REPORT, December 14, 1970, at 32, 36.

175. *Id.* at 36.

176. FED. R. CRIM. P. 23.

Minnesota which has made mandatory the six-man jury in about 80 per cent of all civil cases started in this district after January 1, 1971.¹⁷⁷ Chief Judge Edward J. Devitt, an authority on jury trials, wrote the new rule for the Minnesota district and in his Memorandum supporting the change he drew heavily upon *Williams v. Florida*, which, he asserted, had overruled *Thompson v. Utah*.¹⁷⁸ The new rule "does not change the requirement of unanimity and the practice under it will recognize the right of three peremptory challenges for each side."¹⁷⁹

Judge Devitt recognized that *Williams* involved only the jury provision of the sixth amendment, but he reasoned that the Supreme Court would hardly be more demanding in civil cases under the seventh amendment than in criminal prosecutions under the sixth.¹⁸⁰ The present rule does permit trials of civil cases before juries of less than twelve jurors but only on stipulation of the parties.¹⁸¹ Minnesota's new rule makes six-member juries mandatory in diversity, FELA and Jones Act cases.¹⁸²

Normally, a like change in procedure would be handed down by the Supreme Court. What is startling here is that Chief Justice Burger—in the opinion of at least one responsible Court follower¹⁸³—knew of the Devitt rule and endorsed it. The writer relied largely upon the following statement made by the Chief Justice in a Philadelphia speech given two days after the Devitt Rule was promulgated:

We need not have a final opinion on the constitutionality of a jury of less than 12, in order to say that the subject is an appropriate agenda item for the legal profession if it wishes to keep the courts from a breakdown.¹⁸⁴

The Court commentator interpreted this as a "Go Ahead"—"an

177. The Rule reads:

It is ordered that, effective January 1, 1971, the local rules of the United States District Court for the District of Minnesota, which became effective January 1, 1970, shall be amended by the addition of a new rule, 6E, reading as follows:

'Rule 6E. In all civil jury cases, jurisdiction for which is based on 28 U.S.C. Sec. 1332, 45 U.S.C. Sec. 688, the jury shall consist of six members.' MEMORANDUM in re Minnesota Local Court Rule, November 12, 1970 [hereinafter cited as Memorandum].

178. Memorandum 2.

179. *Id.* 4.

180. *Id.* 2.

181. FED. R. CIV. P. 48. The voluntary action herein provided for is rarely taken.

182. Memorandum 1.

183. Wehrwein, *Six-man Juries Forecast for U.S. Civil Cases*, The Christian Science Monitor, Dec. 2, 1970, at 6.

184. *Id.*

unusual sign from the high court.”¹⁸⁵ Whether or not this is a legitimate conclusion to draw from this sequence of events, it seems safe to predict from a number of utterances of the Chief Justice that Warren Burger is determined to preside over a number of consequential changes in federal court procedure and that the most important of these will be that touching jury trials in both civil and criminal cases. If a six-man jury passes constitutional muster for criminal and civil cases in state courts and for civil litigation in federal courts, why not for federal procedure in federal cases?

VI. SUMMARY

Interest for the study presented above was sparked by the Court's 1968 ruling in *Duncan v. Louisiana* that the states were obligated to grant jury trials in all criminal cases involving serious crimes. Until that decision, the states had been entirely free from the jury mandate of the sixth amendment. In the 1970 case of *Baldwin v. New York*, the Court stated that a “serious crime” was one which could merit imprisonment for more than six months. In the companion case of *Williams v. Florida*, decided the same day, the high tribunal announced that the constitutional requirement was satisfied by a jury of six.

In the several opinions in these three cases, much was written pro and con the theory that the Bill of Rights was incorporated into the fourteenth amendment and thereby made applicable against the states. Thus, Justices Black and Douglas, the two perennial apostles of total incorporation, approved of *Duncan* as a pronouncement a century overdue. They agreed that Baldwin should be given a jury trial, not as the majority decided because his crime was “serious”, but rather because the sixth amendment guaranteed such procedure in “all criminal prosecutions” without any limiting qualifier. They accepted the *Williams* ruling without reservation, insofar as that case concerned jury trials.¹⁸⁶

185. *Id.* Burger in the same address decries the \$14 million for jury fees in the next federal budget and underscores the “saving in dollars, saving in time and the reduced confusion, if we could cut that by 40% allowing the full twelve-member jury for criminal cases. . . .” He continues by definitely endorsing the jury in such cases. *Agenda for Change*, address given in Philadelphia, November 14, 1970, at 9-10 (mimeographed). Thus, it is clear that he is mostly concerned with civil cases.

186. In *Williams v. Florida*, 399 U.S. 78 (1970), the Court also ruled that neither the self-incrimination guarantee nor the due process clause of the fifth amendment was violated by Florida's notice-of-alibi requirement that a defendant gave the prosecuting attorney advance notice of an alibi defense and disclose his alibi witnesses. Black and Douglas disagreed. *Id.* at 107-08. The present study has not been extended to that portion of the *Williams* case.

The opinions of Justice Harlan reveal that on the above-mentioned points he and Black inhabit the antipodes of the constitutional world. Harlan dissented in *Duncan*, first, because he disavows completely the incorporation theory for which Black has such endearing and enduring devotion, and secondly, because he does not believe a jury to be a right so basic and fundamental that due process would be denied without it.

The *Duncan* opinions of Harlan and Black were carefully studied against the background of debates in Congress from 1866 to 1876. It is the conclusion of this writer that the protracted discussion in the legislative chambers in 1866 on the proposed amendment do not support Black's doctrine of total incorporation of the Bill of Rights. It is also the judgment of the present writer that there is no comfort for devotees of the incorporation theory to be derived from a perusal of the interminable debates that accompanied a number of bills proposed between 1868 and 1875 in order to clothe the recently ratified fourteenth amendment with legislation.

On the other hand, there appears overwhelming and crushing testimony against the incorporationists to be found in the arguments advanced by congressmen pro and con the Blaine amendment which was proposed in 1876 to bind the states by the strictures of the religion clauses of the first amendment. This resolution—unlike the earlier civil rights measures—directly concerned one of the guarantees of the Bill of Rights and thus is more pertinent to any discussion of incorporation. Moreover, many of those who heard the debates and/or participated actively in the discussions in the House and in the Senate on Blaine's proposal had been members of the 39th Congress which drafted the fourteenth amendment just ten years earlier. Others who were in the 1876 Congress had held responsible public office during the period when that amendment was the leading issue of the day. The fact that these scores of star witnesses uttered not a word in 1876 relative to the theory of incorporation of the first amendment into the fourteenth constitutes a thundering denial of Justice Black's thesis that the legislators of the 39th Congress positively intended to make the Bill of Rights applicable to the states.

This conclusion is fortified by a number of decisions rendered by the Supreme Court and by the highest state tribunals shortly after ratification of the fourteenth amendment. Had the incorporation doctrine been known at the time it would have been *the* consequential weapon in the legal arsenal of the defense and a capital point in the opinions of the judges. But not a word was written or uttered suggesting

that the guarantees of the Bill of Rights now sheltered defendants against state action by reason of the fourteenth amendment.

Thus, Justice Harlan seems to be vindicated by history. Nonetheless, he appears to be losing the campaign to proponents of "selective incorporation" in virtue of which one guarantee at a time has been absorbed into the fourteenth amendment. Moreover, his constitutional world has been profoundly shaken by another strange twist. The incorporationists argue that the guarantees of the Bill of Rights must apply with strict uniformity against state and federal government. *Duncan* demanded jury trials in all criminal trials for serious crimes. But since most crimes are tried in state courts, the legal machinery in many states might easily break down if all the requirements of common law juries were uniformly demanded. Thus, argues Justice Harlan, the Court felt compelled in the 1970 case of *Williams v. Florida* to rule that the Constitution is satisfied with six-man juries. Many states provide for such and Court watchers are predicting that federal courts will soon be functioning with the same mini-juries.

Justice Harlan is alarmed by this latest development. He calls it a constitutional *renvoi* that the Court should poll the *States* to discover what the Constitution demands of the *federal* government. One can sympathize with Harlan who has marshalled impressive arguments for demanding the traditional twelve-member juries in all federal trials. But the need for streamlining judicial procedure in every jurisdiction is so pressing and Chief Justice Burger is so dedicated to promoting the required changes that the six-man jury might soon be the general rule in all American courts. The unanimity rule for such juries would appear safe, but jurisdictions which keep the twelve-member jury may well be allowed to convict with ten, nine or possibly even seven affirmative votes.

