

HENRY FRIENDLY AND THE INCORPORATION OF THE
BILL OF RIGHTS

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ABSTRACT

This essay analyzes the response of one of America’s pre-eminent judges, Henry Friendly, to one of the most far reaching constitutional developments of his time and our time, the incorporation of the Bill of Rights into the Fourteenth Amendment’s Due Process Clause. In the course of addressing the issue, Friendly raised profound concerns about constitutional construction, federalism, the rule of law, and individual liberty that continue to resonate decades later.

KEYWORDS

Incorporation, Bill of Rights, Friendly

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INTRODUCTION

Henry J. Friendly is unknown to nearly all Americans. Indeed, if they were asked to identify him, some, focusing on his name, might imagine him a cartoon character with a hearty laugh. But Friendly was, in the words of a judge renowned for his acerbic evaluations, “the most powerful legal reasoner in American legal history”¹ and “the greatest judge of his time.”² Born in 1903 in upstate New York, Friendly graduated first in his class at Harvard, and at Harvard Law School, where he “became a legend,”³ his grades were perhaps the highest in its history. He then clerked for Justice Brandeis, practiced corporate law with great success for three decades, and in 1959 was appointed to the United States Court of Appeals for the Second Circuit, where he served until his death in 1986, a suicide. Extraordinarily productive, Friendly wrote over a thousand opinions, establishing a reputation for intellectual rigor and practicality that were unrivaled. Very much his own man, he was not intimidated by consensus and apparently took pleasure in pointing to emperors wearing no clothes.

What of incorporation? The Due Process Clause of the Fifth Amendment bars government from depriving “persons ... of life, liberty or property without due process of law.” On its face, the provision would appear entirely and literally procedural; government may deprive us of these things, provided that it follows due process. It may, for example, deprive me of life, but only if I have been properly charged, convicted, and sentenced, with all the rules of criminal procedure followed. But is this all there is to it? According to Hamilton, “The words ‘due process’ have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of the legislature.”⁴

¹ Richard A. Posner, *Foreword*, DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA xiii (2012).

² Richard A. Posner, qtd. in YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 209 (Roger K. Newman ed., 2009). Justice Frankfurter said Friendly was “the best judge now writing opinions on the American scene.” *Supra* note 1, at 356. Erwin Griswold, former Solicitor General and dean of the Harvard Law School, called him “the ablest lawyer of my generation.” Erwin N. Griswold, *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1720 (1986). Judge Aaron P. Brecher thought he was “the greatest judge of his era.” Aaron P. Brecher, *Some Kind of Judge: Judge Henry Friendly and the Law of Federal Courts*, 112 MICH. L. REV. 1179, 1193 (2014). Frederick T. Davis called him “an incomparably towering influence.” Frederick T. Davis, *On Becoming a Great Judge: The Life of Henry J. Friendly*, 91 TEX. L. REV. 339 (2012). Judge Pierre N. Leval observed that “Friendly was revered as a god in the federal courts.” Pierre N. Leval, *On the Award of the Henry Friendly Medal to Justice Sandra Day O’Connor*, 15 GREEN BAG 2d. 257 (2012). Justice Thurgood Marshall said that “he stands on a pedestal all his own.” Kirk Johnson, *A Solemn Tribute to Henry Friendly, a Quiet Giant of the Appellate Bench*, N.Y. TIMES, June 10, 1986. Judge Jon O. Newman considered Friendly “quite simply the pre-eminent appellate judge of his era.” Jon O. Newman, *From Learned Hand to Henry Friendly*, N.Y. TIMES, Mar. 24, 1986.

³ Michael Boudin, *Judge Henry Friendly and the Mirror of Constitutional Law*, 82 N.Y.U. L. REV. 975, 977 (2007). Paul F. Freund, the renowned constitutional scholar, used the same terms. Paul Freund, *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1715 (1986).

⁴ 4 The Papers of Alexander Hamilton 35 (Harold C. Syrett & Jacob E. Crooks eds. 1962).

Yet modern courts have disagreed, as they have devised the oxymoronic substantive due process that broadened the clause's impact.⁵ If government, for instance, deprived me of life because I am left handed, it would not matter if it followed all the rules. The substance of the law is so irrational and arbitrary that regardless of how it was applied, it would deprive me of life without due process.⁶ Accordingly, over the years, the Supreme Court has asked what "liberty" in the Due Process means, and has looked to the Bill of Rights for answers. But to whom does the Bill of Rights, routinely lauded as "an impenetrable bulwark against" government abuse,⁷ apply?

PRE-INCORPORATION

Like so much else, it all begins with John Marshall, who thought the answer was so obvious that it was unnecessary for the victorious litigant even to state his case. *Barron v. Baltimore*, perhaps his last major opinion, saw Barron seeking damages from Baltimore for the results of harbor work, which rendered his wharf useless. Baltimore, he claimed, had taken his property for public use and denied him just compensation, contravening the Fifth Amendment's Takings Clause. The question, Marshall announced, was "of great importance, but not of much difficulty."⁸ In a brief historical argument, Marshall observed that the Constitution had created a central government, that the Bill of Rights was adopted to guard against abuse of power by the central government, and that the states were governed by their own constitutions. Textually, he added, provisions of the Bill of Rights "contain no expression indicating an intention to apply them to the state governments."⁹

⁵ Leading originalists have maintained that the original public meaning of "due process" barred arbitrary action by government because such actions represent the exercise of mere will, which is not authorized by the Constitution. Randy E. Barnett & Evan Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process Clause*, 60 William & Mary L. Rev. 1599 (2019).

⁶ Justice Benjamin Curtis made a similar argument a century and a half ago. The Due Process Clause, he wrote, "is a restraint on the legislative as well as on the executive and judicial functions of the government." Violations, he believed, contravened either the Constitution or "those settled usages and modes of proceeding existing in the common or statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of our country;" *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276, 277 (1856). Similarly, in *Munn v. Illinois*, involving a state price fixing statute, the Court held that under "some circumstances" such statutes may deny due process; 94 U.S. 113, 125 (1877). A careful study concluded, however, that "with respect to the broader police power and fundamental rights assertions of substantive due process . . . neither . . . had gained widespread support by the time of the Fourteenth Amendment's enactment in 1868." Ryan Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L. J. 408, 498 (2010).

⁷ James Madison, 1 ANNALS OF CONG. 457 (1789).

⁸ *Barron v. Baltimore*, 32 U.S. 243, 247 (1833), reaffirmed in *Permoli v. New Orleans*, 44 U.S. 589 (1845) and *Mattox v. United States*, 156 U.S. 237 (1833). Though Marshall focused on the Fifth Amendment, his argument was construed to apply to the entire Bill of Rights.

⁹ *Barron*, at 250.

Therefore, he concluded, it is “intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.”¹⁰ His focus was on the Bill of Rights as an instrument of federalism, that is, as enhancing states by restraining the central government, not as safeguarding individual liberty.

Marshall’s analysis of the text skirted over a textual problem: though the First Amendment begins with “Congress,” and the Seventh Amendment is expressly directed to “any court of the United States,” the remainder of the Bill of Rights is silent as to its application. The Takings Clause, “written in the passive voice,” for example, “invites the question *taken by whom?*”¹¹ If the *entire* Bill of Rights is directed only at the central government, why was the language of application not constant throughout? Why did all of the provisions not contain a central government-only application? Or why did none of them contain such an application, suggesting that it was implicit? That two amendments, the first and the seventh, were singled out may suggest that the remaining amendments should be treated differently.¹² Or should we rely on the legislative history of the Bill of Rights, as Marshall largely does, though legislative histories, as a recent justice reminds us, may be an unreliable technique for inferring meaning?¹³ Is determining to whom the Bill of Rights applies truly “not of much difficulty”?¹⁴

INCORPORATION

Complicating matters is the Fourteenth Amendment adopted after the Civil War, chiefly to protect the freed slaves and their descendants from the predations of the white South. Section 1 provides, *inter alia*: “nor shall any state deprive any

¹⁰ *Id.* at 250–51. Madison, in introducing the Bill of Rights in Congress had proposed that “no state shall violate the equal rights of conscience, of the freedom of the press, or the trial by jury in criminal cases.” *Supra* note 5, at 435. But his effort to make some of its provisions binding upon the states failed. JOSEPH GALES & WILLIAM SEATON, HISTORY OF DEBATES IN CONGRESS 448–59 (1834).

¹¹ Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1012 (2011).

¹² Marshall thought it significant that, in the original pre-amended Constitution, clauses with no targeted application apply to the central government, while clauses expressly directed at states apply to the states. “There is a grammatical irony here, as the much-maligned passive voice turns out to be more determinate than its active-voice counterpart.” *Id.*, 1057. Marshall applied this principle to the Bill of Rights, ignoring that the provisions do not consistently follow this scheme. *Barron v. Baltimore*, 32 U.S. 243, 249 (1833).

¹³ ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 35 (1997); *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993). (Scalia, J.).

¹⁴ Prominent academic authorities seem agreed that Marshall was right. *See, e.g.*, LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 3 (1978); JOHN H. ELY, DEMOCRACY AND DISTRUST 196 n. 58 (1980); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L. J. 1193, 1199 (1992); Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L. J. 1509, 1530–32 (2007). *But cf.*, WILLIAM W. CROSKEY, 2 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1049–82 (1953).

person of life, liberty or property, without due process of law”—an identical clause, except that it is directed at the states, to that found in the Fifth Amendment. What connection, if any, has the Fourteenth Amendment’s Due Process Clause with the Bill of Rights?¹⁵ One authority declared that “it is difficult to imagine a more consequential subject.”¹⁶ Another called it “[o]ne of the most controversial debates in constitutional law,”¹⁷ and a third remarked that “[i]t never seems to die.”¹⁸

Initially, the issue was limited in practical importance by the fact that the Bill of Rights had not yet become “a powerful brake on government.”¹⁹ But in *Hurtado v. California* (1884), Justice John Marshall Harlan the elder touched off the incorporation debate, arguing that history demonstrated that the Bill of Rights’ grand jury provision applied to the states. “‘Due process of law,’ within the meaning of the Constitution,” he said, “does not import one thing with reference to the powers of the states and another with reference to the powers of the general government.”²⁰ The majority, however, followed the lead of Justice Curtis in *Murray’s Lessee* in its emphasis on British practice, though noting that practice would be “preserved and developed by a progressive growth and wise adaptation to new circumstances and situations”²¹ and not by rigidly adhering to old details of law and practice. The thrust of the Court’s argument was that the Fourteenth Amendment’s Due Process Clause guaranteed fundamental fairness, period.

Justice Hugo Black, in a famous dissent in a murder case involving self-incrimination,²² argued forcefully that the legislative history of the Fourteenth Amendment “conclusively demonstrated” that it was intended to incorporate the entire Bill of Rights.²³ As to the majority, he said, “I fear to see the consequences of the Court’s practice of substituting its own concepts of decency and fundamental

¹⁵ Many authorities believe that incorporation should instead have involved the Fourteenth Amendment’s Privileges and Immunities Clause, which is expressly directed at states. The privileges and immunities are not defined, but unlike the Bill of Rights that applies to persons (that is, everyone), apply only to citizens. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 163-74 (1998); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 195-203 (2004); Richard J. Aynes, *Ink Blot or Not: The Meaning of Privileges and Immunities*, 11 U. PA. J. CONST. L. 1295, 1310 (2009). The Court’s ruling in the *Slaughter-House Cases* rendered this impossible. *Slaughter-House Cases*, 83 U.S. 36 (1873).

¹⁶ William W. Van Alstyne, *Foreword*, MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* ix (1986).

¹⁷ Gerhard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?* 94 MINN. L. REV. 102, 103 (2009).

¹⁸ George C. Thomas III, *The Riddle of the Fourteenth Amendment*, 68 OHIO ST. L. J. 1627, 1628 (2007).

¹⁹ AMAR, *supra* note 14, at 205.

²⁰ 110 U.S. 516, 538, 541.

²¹ *Id.*, at 530.

²² *Adamson v. California*, 332 U.S. 46, 68 (1947). Black considered the dissent “his most important opinion.” ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 355 (1998).

²³ Black’s position was supported in CROSSKEY, *supra* note 14, ch. 30, but famously challenged by Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949). Black thought Fairman was biased and wrote the article “to get a job at Harvard.” NEWMAN, *supra* note 22, at 360.

fairness for the Bill of Rights.”²⁴ Today, Black’s views compete with three others. Selective incorporation, as set down by Justice Cardozo in *Palko v. Connecticut* would apply to the states only those portions of the Bill of Rights that are “the very essence of a scheme of ordered liberty.”²⁵ A second view, espoused by Justices Brennan, Warren, and Goldberg,²⁶ would add to selective incorporation certain fundamental rights not listed in the Bill of Rights, like the right to privacy. A third approach connected with Justices Douglas,²⁷ Murphy, and Rutledge²⁸ would embrace not only total incorporation of the rights enumerated in the Bill of Rights, but also other fundamental rights not expressly mentioned but found to exist, like the right of a criminal defendant to be proved guilty beyond a reasonable doubt.²⁹ A different view would deny incorporation altogether, deriving rights simply from due process, which as Justice John Marshall Harlan the younger said, “stands ... on its own bottom.”³⁰ In his view, “due process of law requires only fundamental fairness.”³¹ This position, which had a vogue a century ago,³² is now defunct.

By 1965, in any case, the process of selective incorporation had been operating for nearly three-quarters of a century. The Takings Clause was incorporated in 1897,³³ freedom of speech in 1925,³⁴ freedom of the press in 1931,³⁵ fair trial in 1932,³⁶ freedom of religion in 1934,³⁷ freedom of assembly in 1937,³⁸ establishment of religion in 1947,³⁹ right to a public trial in 1948,⁴⁰ protection against unreasonable searches and seizures in 1949,⁴¹ freedom of association in 1958,⁴² prohibition against cruel and unusual punishment in 1962,⁴³ right to counsel in felony cases in 1963,⁴⁴

²⁴ *Adamson v. California*, 332 U.S. 46, 89 (1947). Black was ready to incorporate the first eight Amendments, but not the open-ended Ninth. *Griswold v. Connecticut*, 381 U.S. 479, 507, 511, 519-20 (1965). The clear implication of Black’s position was that he was advocating judicial self restraint, while Frankfurter, his chief rival on the Court and its most prominent spokesman for self restraint, was in defending a flexible selective approach embracing judicial activism. In the course of doing so, Black redefined the Bill of Rights as encompassing only the first eight amendments.

²⁵ 302 U.S. 319, 325 (1937).

²⁶ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

²⁷ *Id.*, 484. See also *Poe v. Ullman*, 367 U.S. 497, 509, 516.

²⁸ *Adamson v. California*, 332 U.S. 46, 123-24 (1947).

²⁹ *In re Winship*, 397 U.S. 358 (1970). Black dissented, as he did in *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965).

³⁰ *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965).

³¹ *Duncan v. Louisiana*, 391 U.S. 145, 171, 186-87 (1968).

³² See, e.g., *Twining v. New Jersey*, 211 U.S. 78, (1908).

³³ *Chicago, Burlington & Quincy Ry. Co. v. Chicago*, 166 U.S. 226 (1897).

³⁴ *Gitlow v. New York*, 268 U.S. 652 (1925).

³⁵ *Near v. Minnesota*, 283 U.S. 697 (1931).

³⁶ *Powell v. Alabama*, 287 U.S. 45 (1932).

³⁷ *Hamilton v. Regents, University of California*, 293 U.S. 245 (1934).

³⁸ *De Jonge v. Oregon*, 299 U.S. 353 (1937).

³⁹ *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

⁴⁰ *In re Oliver*, 333 U.S. 257 (1948).

⁴¹ *Wolf v. Colorado*, 338 U.S. 25 (1949).

⁴² *NAACP v. Alabama*, 357 U.S. 449 (1958).

⁴³ *Robinson v. California*, 370 U.S. 660 (1962).

⁴⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

privilege against self incrimination in 1964,⁴⁵ right to confront witnesses,⁴⁶ and right to privacy in 1965.⁴⁷

Yet it was at this time that Judge Friendly announced his displeasure with selective incorporation. In his 1965 Morrison Lecture to the California Bar Association, Friendly declared that “it appears undisputed” that selective incorporation has no historical basis and no theoretical foundation.⁴⁸ Though he was no doctrinaire advocate of judicial self restraint, he believed that here courts had gone too far. And the problem was practical, as well as theoretical, for what really troubled him was the assumption that the rights against the two levels of government “receive precisely the same protection.”⁴⁹ Justice William Brennan, for example, had only a year earlier announced that guarantees in the First, Fourth, and Sixth Amendments “are all to be enforced against the states under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.”⁵⁰ Brennan, the supreme judicial politician, invited the Court “to consider incorporation clause by clause and right by right ... as a polite way of achieving total incorporation by indirection.”⁵¹

Friendly’s position was that as the states and the central government have differing constitutional responsibilities, the parameters of the rights should reflect these differences. Thus, as states “have primary responsibility for the security of persons and property,” they should be allotted “more freedom as to a particular selected interest than the Court has chosen to give the Federal Government.”⁵² Adding to the importance of this consideration is that most provisions of the Bill of Rights are vague as to their contours, giving the Court more opportunities to exercise its subjective judgment.⁵³ A high degree of judicial subjectivity is incompatible with the rule of law, he believed. But once the Court’s incorporation decision is made, it lasts “forever.”⁵⁴

To illustrate the point, Friendly discusses the Sixth Amendment as applied by the recent high profile case, *Escobedo v. Illinois*.⁵⁵ Escobedo was arrested and interrogated in connection with the fatal shooting of his brother-in-law. He asked to see his lawyer, who was in the same building, but the police refused. They also failed to advise him of his right to remain silent. After prolonged questioning, Escobedo made a damaging statement to a district attorney; the statement was admitted at trial; and he was convicted of murder. By a five to four vote, Justice Arthur Goldberg,

⁴⁵ *Malloy v. Hogan*, 378 U.S. 1 (1964).

⁴⁶ *Pointer v. Texas*, 380 U.S. 400 (1965).

⁴⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁴⁸ Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 934 (1965). Similar sentiments were later voiced by LOUIS LUSKY, *BY WHAT RIGHT?* 163 (1975) and MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 112 (1986).

⁴⁹ Friendly, *id.*, at 936. Harlan agreed, denying that the Fourteenth Amendment’s Due Process Clause “impose[s] or encourage[s] nationwide uniformity.” *Duncan v. Louisiana*, 391 U.S. 145, 172 (1968).

⁵⁰ *Malloy v. Hogan*, 378 U.S. 1 10 (1964).

⁵¹ AMAR, *supra* note 14, at 219, 220.

⁵² Friendly, *supra* note 48, at 936.

⁵³ *Id.* 937.

⁵⁴ *Id.* 940.

⁵⁵ 378 U.S. 478 (1964).

speaking for the Supreme Court, held that once a police investigation has targeted a suspect and taken him into custody, he must be advised of his right to remain silent and of his right to consult a lawyer. Unless he waives these rights, statements given in violation of these rules cannot be admitted in evidence. The result is justified by the Sixth Amendment's guarantee of a fair trial, he said, and made binding upon the states via the Due Process Clause of the Fourteenth Amendment.

Friendly finds no support for the decision, whether in the language of the Sixth Amendment or its history. The language of the Sixth Amendment indicates that the rights begin when prosecution begins, not at an earlier stage, as in this case. Moreover, historically the Framers' purpose was to ban the English practice of denying defendants charged with felonies other than treason the use of lawyers concerning matters of fact, which, again, was unrelated to this case. How, then, could the Sixth Amendment be introduced in *Escobedo*, which arose out of an entirely different context?

But it is the impracticality of the Court's rigid standards that drew Friendly's contempt. Suppose, he asks, "there is often nothing save the interrogation of suspects on which to go, or at least to get started? Can the Sixth Amendment really mean that the only persons the police may interrogate are those on whom their inquiry has *not* 'begun to focus' . . . ?"⁵⁶ The Court is interpreting a Constitution, not writing a criminal code, he observes, and should avoid absolute rules that allow "no room whatever for reasonable difference of judgment or play in the joints."⁵⁷ "We have no basis for thinking that the founders would have wanted a single absolute to rule these congeries; since we do not know what they would have done and there is nothing like a consensus as to what should now be done, we had best stick fairly closely to what they said and, in the democratic tradition, afford opportunity for reasonable solutions by legislation, rule or decision, and empirical demonstrations of their merit."⁵⁸ Impeding efforts by states to devise workable means to meet their responsibilities, perhaps through innovation, "The Court disserves its great role as a vindicator of the Bill of Rights when it constructs from plainly inadequate data a generalization refuted by the common experience of mankind."⁵⁹

With these views, Friendly opposed the conventional wisdom of the Warren Court, which saw the Bill of Rights almost entirely as a means of protecting individual liberty. Friendly was not insensible to these claims, but for him, as for Marshall, it also posed a central federalism issue. The scope of a particular right, he insisted, can be addressed only after determining against whom the right is supposed to prevail. Ironically, in this emphasis, Friendly not only looked backward to Marshall, but also forward to authorities writing after his, Friendly's, death, who also emphasized the federalism element.⁶⁰

Friendly fought this battle alongside his "close friend"⁶¹ Justice John Marshall Harlan the younger. Harlan had dissented in *Hogan v. Malloy* because the majority's incorporation was "freighted with their entire accompanying body of federal doctrine The ultimate result is compelled uniformity, which is inconsistent

⁵⁶ Friendly, *supra* note 48, at 948.

⁵⁷ *Id.* at 954.

⁵⁸ HENRY J. FRIENDLY, *BENCHMARKS* 258-59 (1967).

⁵⁹ *Id.* at 273.

⁶⁰ *E.g.*, AMAR, *supra* note 14, chs. 11, 12.

⁶¹ DAVID M. DORSEN, *HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA* 41 (2012).

with the purpose of our federal system.”⁶² Friendly and Harlan’s was not always the losing side. *Miller v. California*, which established the basic obscenity rule, gave a central role to community standards,⁶³ for instance, and state criminal trials still need not require unanimous votes⁶⁴ or twelve person juries.⁶⁵ But, in general, incorporated rights are equally binding on the central and state governments.

Friendly’s arguments arrive like hammer striking glass, leaving opposing views in pieces. His is the practical, nonideological voice discussing not the goals on which there is consensus but the means on which there is not. We all want the police to protect us, but not abridge our liberties. We all want to punish only the guilty and spare the innocent. But how is this to be accomplished? Courts speak easily of fairness, but what does this signify? We want, say, a football match to be fair; if one side has more players than the other or is awarded five goals for merely showing up, we would say that something is seriously unfair. Is this model transferable to criminal justice? One answer is: no. Where the competing football teams are of equal worth, the police and criminals are not. Thus, we permit the police to lie to criminals, for example, but not the criminals to lie to police. The criminal law is not a game; criminals are our enemy, not merely our competitors.

Yet can we be confident that the police are correct in claiming the suspect to be a criminal? So wary are we of the power of the state and the possibility of error that we stack many rules against it. Though the police may be certain he is guilty, the law compels us to presume the defendant is innocent and place the burden of proof upon the prosecution; too, the prosecutor is supposed to serve justice, while the defense attorney serves only his client, and unlike the prosecutor has no obligation to inform the other side of the evidence he intends to use. “Better that ten guilty escape than that one innocent suffer” is Blackstone’s governing cliché.⁶⁶ Friendly might agree that this was the Court’s position, too.

To which we can easily imagine Friendly asking, Why? A deontological view would hold that it is simply wrong to punish the innocent. Taken to the extreme, however, this would rule out all prosecutions, for it is obvious that even the best system will be imperfect and convict some innocent persons. Avoiding this absurdity, most of us are consequentialists. If the one innocent was convicted of a minor offense and the ten guilty were homicidal maniacs, we might feel comfortable tolerating the injustice. The point of criminal prosecution, then, is not only holding government to account. Rather, there are multiple goals, which necessitate trade-offs and compromises, not solely the narrow end targeted by the Court. “The true picture is not the solid sheet of black,” Friendly wrote, “but a spectrum.”⁶⁷ His is a powerful argument. His adherents, doubtless more likely to see themselves

⁶² *Malloy v. Hogan*, 378 U.S. 1, 15 (1964). Later, Harlan would reject the claim that the Fourteenth Amendment’s Due Process Clause “impose[s] or encourage[s] nationwide uniformity.” *Adamson v. California*, 332 U.S. 46, 172 (1947).

⁶³ 413 U.S. 15, 30-34 (1973).

⁶⁴ *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

⁶⁵ *Williams v. Florida*, 399 U.S. 78 (1970); *Colgrove v. Battin*, 413 U.S. 149 (1973); *Ballew v. Georgia*, 435 U.S. 223 (1978).

⁶⁶ WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 352 (1765-70); Alexander Volokh asks, why ten? Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997).

⁶⁷ FRIENDLY, *supra* note 58, at 274.

the potential victims of predators than those charged with crimes, will find the protection he offers hard for them to reject.

After pausing for reflection, however, we might notice Friendly's apparent lack of interest in the plight of the suspect. Imagine (with Blackstone) that he is *not* guilty. Intimidated, confused, exhausted, perhaps inexperienced and not very bright, he might inadvertently seal his own doom. The police, after all, are not bound (nor should they be bound) by rules of conventional fairness. They may deceive or frighten or manipulate a suspect. And notwithstanding the suspect's formal, legal advantages, the state ordinarily possesses vastly greater resources, including more and better lawyers and more money to spend. Together, the vulnerability of the suspect and the resources of the state give the state substantial potential advantages.

As to the agents of the state, even if their motives are pure, they are human and therefore radically imperfect and prone to error, and may simply be mistaken. But as fallible humans, their motives may not always be pure. Perhaps, for instance, they are pressured by superiors to solve a case; perhaps, their judgment is bent by prejudice, ideology, greed, ambition or other extraneous factors. In these situations, a vulnerable suspect will require a lawyer even at an early stage, if he is to avoid disaster. And arguably the only way to ensure this protection is through rigid rules that defense attorneys can exploit. If the rules are flexible – in Friendly's terms, "reasonable" – the police or state's attorneys might twist them, and courts might cave in and give them their imprimatur. But if they are rigid, it is harder for them to be warped, bent or ignored; also, rigid rules provide an opportunity for courts to avoid responsibility for unpopular decisions by blaming them on the law makers, making it easier for them to do the right thing. Friendly is concerned with practicalities, but not with *these* practicalities.⁶⁸

In this light, consider the venerable debate over policy versus rights. The policy side, as expressed by the distinguished English philosopher, H.L.A. Hart, holds that when the law is unclear, appellate courts are free to take policy consequences into account;⁶⁹ the rights side, as expressed by the distinguished American philosopher, Ronald Dworkin, holds that in such cases the court "respects or secures some individual or group right."⁷⁰ In the controversy, Friendly seems clearly to come down on the side of policy. He does so reluctantly, acknowledging that judges are not democratically accountable, that they lack relevant expertise, that they are not well suited at crafting political compromises, and that the "adversary system, even at its best, is poorly calculated to arrive at the truth."⁷¹ Yet, tellingly, he observes, courts have openly made policy in the law of contracts and torts, and "few people today are concerned";⁷² there may be a right for parties to reach an agreement for their mutual benefit, but if the purpose is to rob a liquor store, the law insists that their rights are trumped by the community interest in preventing and punishing theft.

⁶⁸ Friendly was by no means blind to the interests of the vulnerable. For example, he supported *Goldberg v. Kelly* (1970), a controversial ruling that required pre-termination hearings for welfare recipients threatened with denial of payments. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

⁶⁹ H.L.A. HART, *THE CONCEPT OF LAW* 124-32 (1961).

⁷⁰ Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1059 (1975).

⁷¹ Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 22-23 (1978).

⁷² *Id.* at 27. The same cannot always be said of constitutional decisions. *Id.* at 27-35.

And where Dworkin believes that a clash of rights makes for more sophisticated analysis, Friendly would say that it often leads to aggressive sloganeering that can erode civility and impede efforts at compromise.⁷³ Still, Friendly is more comfortable with courts overruling courts than overruling legislatures or executive agencies.⁷⁴

As to courts creating rights, he is more emphatically negative. Viewing recent decisions on so-called victimless crimes, he wonders, “is there any end short of holding that the Due Process Clause enacted John Stuart Mill’s *On Liberty*? As a citizen, I might agree . . . , but where do the courts get the power to decide this?”⁷⁵ Where law for Dworkin is a means to the end of individual fulfillment, for Friendly it is much less ambitious, perhaps simply an arrangement of rules and institutions that permit strangers to live together in relative peace and security, the alternative being Hobbes’ intolerable chaos. Put differently, where Dworkin would choose justice over democracy, Friendly would choose democracy, perhaps partly because he is much less certain as to what justice is and why imposing his views is a good thing. He is not sure democracy will produce the best results, and he believes that few laws will benefit everyone equally, but he sees no better alternative and is consoled by the fact that it can usually correct its mistakes. Perhaps he would agree with Nietzsche, who thought that “Justice originates among those who are approximately equally powerful,” as they resolve their differences in the “character of a trade.”⁷⁶ The political process, so often denigrated and ridiculed, is what Friendly would rely on.⁷⁷

In this sense, Friendly was compelled to face what Daniel Bell famously called “the cultural contradictions of capitalism.”⁷⁸ According to Bell, capitalism, built on thrift, hard work, self discipline, and efficiency, has given birth to a modernism characterized by self gratification, hedonistic consumption, unrestrained individualism, and contempt for bourgeois virtues. In his own habits and beliefs, Friendly certainly exemplified the traditional values, and yet he understood that his society was in the process of taking a newer path. His belief in democracy, however, limited what he thought he could do to turn things around, and in the end he seems to have adopted Holmes’ view that “if my fellow citizens want to go to Hell I will help them. It’s my job.”⁷⁹

⁷³ In this, he predated Mary Ann Glendon, who critiqued rights talk as hostile to compromise, deaf to nuance and complexity, and indifferent to social responsibility. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

⁷⁴ FRIENDLY, *supra* note 71, at 39.

⁷⁵ *Id.* 36.

⁷⁶ FREDERICH NIETZSCHE, *BASIC WRITINGS* 148 (Walter Kaufmann ed. 1968).

⁷⁷ Similarly, Isaiah Berlin believed that individuals naturally pursued ends that were incompatible and incommensurable (that is, could not be measured) with those pursued by others. Therefore, pluralism ought to be preferred not only out of expedience, but also out of principle. ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* (Henry Hardy ed. 1990) and *LIBERTY* (Henry Hardy ed. 2002).

⁷⁸ DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* (1976).

⁷⁹ OLIVER WENDELL HOLMES, 1 *HOLMES-LASKI LETTERS* 249 (Mark DeWolfe Howe ed. 1953).

It is hard to deny that incorporation “has, in general, dramatically strengthened the Bill [of Rights],”⁸⁰ which for over a century after its adoption had little practical effect. Incorporation enabled courts first to target states and having done so, address the more potent central government. Friendly might not have predicted this; indeed, he feared that applying the amendments to heterogeneous states might weaken the guarantees with the development of multiple qualifications and exceptions. But he clearly would still have maintained that the desirable end did not justify the improper means.

Friendly, like Harlan,⁸¹ did not agree with Black that the entire Bill of Rights should be incorporated, but he understood and respected the rationale.⁸² But if courts incorporate only some of its provisions, how to decide which ought to be selected? The Constitution, after all, does not rank them in importance, and nowhere does it authorize judges to do so. We may count the prohibition against quartering soldiers in the third amendment as unimportant,⁸³ but the Framers evidently disagreed. Should we honor their intent, on the theory that it helps us understand the purpose of the provision? Or should we adopt a living Constitution approach, maintaining that a Constitution needs to fit the times? When parsing the words of the Constitution, Holmes instructs us, “we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.”⁸⁴ But do we want unelected, unaccountable justices to arrogate to themselves the authority in effect to update the Constitution as they see fit? The results, after all, need not always benefit the weak and vulnerable; indeed, for decades, the Court honored liberty of contract, a right of its own devising, which inhibited the ability of government to protect workers.⁸⁵ Efforts to develop a rationale for selecting the rights to be incorporated, like Cardozo’s, always turn out to be little more than invitations to subjective declarations; he believed that the ban on double jeopardy was not essential to a scheme of ordered liberty; years later, the Court disagreed.⁸⁶

Which raises a pair of obvious questions. First, given the vagueness of most of the Bill of Rights, would total incorporation make much of a dent in judicial subjectivity? Terms like “unreasonable searches and seizures,” “assistance of counsel,” and “freedom of speech,” after all, are hardly clear in their application. If

⁸⁰ AMAR, *supra* note 14, at 290.

⁸¹ *Duncan v. Louisiana*, 391 U.S. 145, 174 (1968).

⁸² Though they approached the Constitution very differently, Friendly admired Black’s integrity and fought successfully for Harvard to award him an honorary degree. Boudin, *supra* note 3, at 995.

⁸³ Morton J. Horwitz, *Is the Third Amendment Obsolete?* 26 VAL. U. L. REV. 209 (1991).

⁸⁴ *Missouri v. Holland*, 252 U.S. 416, 433 (1920). Earlier, however, Holmes had warned against the view “that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon a conception of morality with which they disagree.” *Otis v. Parker*, 167 U.S. 606, 608 (1903).

⁸⁵ *Lochner v. New York*, 198 U.S. 45 (1905).

⁸⁶ *Benton v. Maryland*, 395 U.S. 784 (1969). Arguably, Cardozo did not target double jeopardy *per se*, but, as he put it, “that kind of double jeopardy [that subjects appellant to] a hardship so acute and shocking that our polity will not endure it.” The Court’s position in *Adamson* that the self incrimination privilege applied only to the central government was reversed in *Malloy v. Hogan*. *Malloy v. Hogan*, 378 U.S. 1 (1964).

a state botches an execution, can it try again or will this be ruled out by the Eighth Amendment's ban on cruel and unusual punishment?⁸⁷ If police secretly secure a GPS tracking device to a car, have they violated the Fourth Amendment's ban on unreasonable searches and seizures?⁸⁸ May a state medical school reserve places for minority applicants or does this violate the Equal Protection Clause?⁸⁹ Reasonable judges will differ.

Second, why did the framers of the Fourteenth Amendment not spell out its impact on the Bill of Rights? Is the absence of evidence, evidence of absence? That is, would the framers have included an impact statement if they intended the Fourteenth Amendment to have such an impact? From this perspective, incorporation so greatly alters the federal relationship by effectively rewriting the Tenth Amendment that courts should be able to point to a specific warrant justifying this move. Berger argued that the purpose of the Fourteenth Amendment was to provide a constitutional rationale for the Civil Rights Act of 1866, which outlawed the notorious Black Codes, with the Due Process Clause intended to guarantee the judicial protection of these rights from state action.⁹⁰ Incorporation, he thought, was not in its framers' mind. Or is their leaving the question open a sign that they intended later courts to answer it?

As an appellate judge, Friendly was in a bind. He could not, like a Supreme Court justice, announce that precedents were wrongly decided and correct them. He was bound by the chain of command. And yet it is not hard to imagine him reading Berger and nodding in agreement. For Friendly's views seem to have anticipated Berger's, and pose the question as to how courts should identify and delimit rights. The answer, both seem to say, is that judges should examine the text and study the legislative history. If we cannot demonstrate incorporation (or at least selective incorporation) by text or history, it stands as merely another instance of judicial usurpation to be avoided. Here is the paradox: while Friendly was widely considered the preeminent practical judge, he was in fact guided by rather abstract notions: the role of the judge, the rule of law, the nature of federalism. His opponents, meanwhile, though often characterized as idealists,⁹¹ focused on the real world consequences of their decisions. It is their views that have prevailed.

⁸⁷ *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 472 (1947).

⁸⁸ *U.S. v. Jones*, 132 U.S. 945 (2012).

⁸⁹ *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 379, 387, 402, 408 (1978).

⁹⁰ RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 115-19 (1977). On the Bill of Rights not binding upon states, see 134-65. *See also* M. E. BRADFORD, *ORIGINAL INTENTIONS: ON THE MAKING AND RATIFICATION OF THE UNITED STATES CONSTITUTION* 103-31 (1993).

⁹¹ *E.g.*, Melvin I. Urofsky, *William O. Douglas as a Common Law Judge*, 41 *DUKE L. J.* 133 (1991); Jeffery Toobin, *A Fair Shake and a Square Deal*, in *REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE* 271, (Joshua Rosenkranz & Bernard Schwartz eds., 1997).