had its beginnings in an 1897 case in which the Court, without mentioning the Just Compensation Clause of the Fifth Amendment, held that the Fourteenth Amendment's Due Process Clause forbade the taking of private property without just compensation.[27] Then, in *Twining v. New Jersey*[28] the Court observed that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law . . . . If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such nature that they are included in the conception of due process of law." And, in *Gitlow v. New York*,[29] the Court in dictum said: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." After quoting the language set out above from *Twining v. New Jersey*, the Court in 1932 said that "a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character."[30] The doctrine of this period was best formulated by Justice Cardozo, who observed that the Due Process Clause of the Fourteenth Amendment might proscribe a certain state procedure, not because the proscription was spelled out in one of the first eight amendments, but because the procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[31] because certain proscriptions were "implicit in the concept of ordered 'liberty.'"[32]

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something gets absorbed into something else. The sense of the word 'incorporate' implies simultaneity. One writes a document incorporating another by reference at the time of the writing. The Court has used the first two forms of language, but never the third." Frankfurter, *Memorandum on 'Incorporation' of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 747–48 (1965). It remains true that no opinion of the Court has used "incorporation" to describe what it is doing, cf. Washington v. Texas, 388 U.S. 14, 18 (1967); Benton v. Maryland, 395 U.S. 784, 794 (1969), though it has regularly been used by dissenters. *E.g.*, Pointer v. Texas, 380 U.S. 400, 408 (1965) (Justice Harlan); Williams v. Florida, 399 U.S. 78, 130 (1970) (Justice Harlan); Williams v. Florida, 399 U.S. at 143 (Justice Stewart).

[27] Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897).

[28] 211 U.S. 78, 99 (1908).

[29] 268 U.S. 652, 666 (1925).

[30] Powell v. Alabama, 287 U.S. 45, 68 (1932).

[31] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[32] Palko v. Connecticut, 302 U.S. 319, 325 (1937). Justice Frankfurter was a strong advocate of this approach to the Fourteenth Amendment's due process clause. *E.g.*, Rochin v. California, 342 U.S. 165 (1952); Adamson v. California, 332 U.S. 46, 59