but in *Adamson v. California* [22] a minority of four Justices adopted it. Justice Black, joined by three others, contended that his researches into the history of the Fourteenth Amendment left him in no doubt "that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights." [23] Scholarly research stimulated by Justice Black's view tended to discount the validity of much of the history recited by him and to find in the debates in Congress and in the ratifying conventions no support for his contention.[24] Other scholars, going beyond the immediate debates, found in the pre- and post-Civil War period a substantial body of abolitionist constitutional thought which could be shown to have greatly influenced the principal architects, and observed that all three formulations of § 1, privileges and immunities, due process, and equal protection, had long been in use as shorthand descriptions for the principal provisions of the Bill of Rights.[25]

Unresolved perhaps in theory, the controversy in fact has been mostly mooted through the "selective incorporation" of a majority of the provisions of the Bill of Rights.[26] This process seems to have

---

[22] 332 U.S. 46 (1947).

[23] Id. at 74, Justice Black's contentions, id. at 68–123, were concurred in by Justice Douglas. Justices Murphy and Rutledge also joined this view but went further. "I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights." Id. at 124. Justice Black rejected this extension as an invocation of "natural law due process." For examples in which he and Justice Douglas split over the application of nonspecified due process limitations, *see*, *e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); *In re* Winship, 397 U.S. 358 (1970).

[24] The leading piece is Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949).

[25] Graham, *Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 WISC. L. REV. 479, 610; Graham, *Our 'Declaratory' Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954); J. TENBROEK, EQUAL UNDER LAW (1965 enlarged ed.). The argument of these scholars tends to support either a "selective incorporation" theory or a fundamental rights theory, but it emphasized the abolitionist stress on speech and press as well as on jury trials as included in either construction.

[26] Williams v. Florida, 399 U.S. 78, 130–32 (1970) (Justice Harlan concurring in part and dissenting in part). The language of this process is somewhat abstruse. Justice Frankfurter objected strongly to "incorporation" but accepted other terms. "The cases say the First [Amendment] is 'made applicable' by the Fourteenth or that it is taken up into the Fourteenth by 'absorption,' but not that the Fourteenth 'incorporates' the First. This is not a quibble. The phrase 'made applicable' is a neutral one. The concept of 'absorption' is a progressive one, i.e., over the course of time