

ESSAY

Justices Black and Douglas and the “Natural-Law-Due-Process Formula”: Some Fragments of Intellectual History

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*C. Wendell and Edith M. Carlsmith Professor of Law, Stanford University. Much of my hypothesis seems to have been lifted from my former colleague, Kenneth L. Karst. Karst, *Invidious Discrimination: Justice Douglas and the Return of the “Natural-Law-Due-Process Formula,”* 16 UCLA L. REV. 716 (1969). *But see id.*, 716 at n.*. My current colleagues, Paul Brest and Gerald Gunther, offered useful suggestions.

I first met Ed Barrett a long time ago. During the 1960's, when I was a member of the University of California, Los Angeles, (UCLA) law faculty, Ed was a respected senior member of the University of California, Berkeley, law school and then became the founding dean of the University's law school at Davis. Contacts among the three law schools of the University of California were a little more frequent then than they are now. My important relationship with him goes back only ten years, when we began our collaboration on our constitutional law casebook. A law school casebook publisher had called me, asking whether I would be interested in taking over a casebook whose author had recently died. I turned down that invitation, but it led me to contact Foundation Press to sound out Ed, who was, single-handedly, putting out a major casebook that he had originally coauthored with Paul Bruton and John Honnold. I had used that casebook in 1960, the first time I had taught the course, when it was fresh off the presses. My UCLA colleague, Arvo Van Alstyne, and I had reviewed it in the *California Law Review* and had concluded that it was head and shoulders above any competing book. Indeed, *Barrett, Bruton and Honnold* was the first of the truly modern post World War II constitutional law casebooks. To my delight, Ed was interested in the collaboration. In the preface to the sixth edition, the first on which my name appeared, we said: “We can report that it has been a true collaboration.” That greatly understates my own view of our work together during the last ten years. Not long ago, Ed informed me that he plans that our next edition of the casebook, in 1989, will be his last. When I couldn't talk him out of that, I began to realize how much I will miss the most satisfying collaborative effort I have ever engaged in. I could not resist the invitation to submit an essay in his honor to this issue of the *U.C. Davis Law Review*.

Forty years ago, the four dissenters in Adamson v. California debated among themselves an issue now central in constitutional law. Justice Black's dissent, joined by Justice Douglas, argued that it was inappropriate for judges to read subjective, unenumerated values into the due process clause of the fourteenth amendment. On that point, Justice Murphy's dissent, joined by Justice Rutledge, briefly disagreed. Justice Douglas conceded that in later years he moved toward the Murphy-Rutledge position. This Essay discusses how the historical record, including cases decided in the same year as Adamson, suggests that Douglas never agreed with Black on this point.

INTRODUCTION

The *Adamson v. California*¹ opinions made a major contribution to constitutional law dialogue. By a 5-4 vote, the Court affirmed a state court conviction despite the prosecutor's adverse comment on the defendant's failure to testify. Most of the academic discussion concentrated on the sharp debate between Justice Frankfurter² and Justices Black and Douglas³ over whether the fourteenth amendment incorporated the Bill of Rights as state power limitations. However, in a contemporary constitutional law class part of that debate has an air of ancient history. The Court has overruled *Adamson's* narrow holding⁴— that the fifth amendment's privilege against self-incrimination is inapplicable to the states. Much of Justice Black's position that the fourteenth amendment applies the Bill of Rights to the states has triumphed in practice, if not in theory, through "selective incorporation."⁵

¹ 332 U.S. 46 (1947).

² *Id.* at 59.

³ *Id.* at 68. The term "natural-law-due-process formula" appears *id.* at 90. The historical appendix to the dissent appears in *id.* at 92-123. Black's historical hypothesis has produced a flood of academic commentary. The earliest, and most influential, attack was Fairman & Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 140 (1949); the latest defense is M. CURTIS, *NO STATE SHALL ABRIDGE* (1986).

⁴ *Griffin v. California*, 380 U.S. 609 (1965), overruled *Adamson's* specific holding that a state prosecutor could comment on the accused's failure to take the stand, after the Court held, a year earlier in *Malloy v. Hogan*, 378 U.S. 1 (1964), that the privilege against self-incrimination applied to the states.

⁵ For the relevant cases, see E. BARRETT & W. COHEN, *CONSTITUTIONAL LAW CASES & MATERIALS* 518-19 (7th ed. 1985). The seventh amendment's guarantee of civil jury trial and the fifth amendment's guarantee of grand jury indictment have not been incorporated, but Justice Frankfurter's concurrence, with cause, argued that Black's dissent was ambiguous with reference to incorporation of these guarantees. See *Adamson*, 332 U.S. at 64-65.

I. THE NATURAL LAW DEBATE IN *Adamson*

One part of Justice Black's *Adamson* dissent still touches a contemporary issue. Beyond his historical argument that the fourteenth amendment's intent was to apply the Bill of Rights to the states, he criticized the "'natural law' theory of the Constitution" on two grounds. First, Justice Black said that the "natural law" theory "degrade[s] the constitutional safeguards of the Bill of Rights and simultaneously appropriate[s] for this Court a broad power which we are not authorized by the Constitution to exercise."⁶ Justice Black was equally insistent on his second criticism — that the "natural law" formula gives courts too much power to protect personal liberties not enumerated in the Constitution. He complained that the formula "conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power."⁷ Moreover, "this formula also has been used in the past and can be used in the future, to license this Court in considering regulatory legislation to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the states as well as the Federal Government."⁸

Justice Black's forecast was correct — at least in identifying the issues the Court later faced. The contemporary debate concerns the validity of "regulatory legislation" applied to abortion⁹ and private sexual behavior.¹⁰ Questions of that sort, however, were peripheral to the issues actually involved in *Adamson*. Not surprisingly, since the *Adamson* majority refused to apply the fifth amendment's privilege against self-incrimination to a state criminal trial, Justice Frankfurter's lengthy concurrence was limited to addressing Justice Black's complaint that the Court's "natural law" formula insufficiently protected important constitutional liberties.

The only other *Adamson* opinion that touched on the propriety of protecting unenumerated constitutional rights was Justice Murphy's dissent, joined by Justice Rutledge.¹¹ The Murphy dissent was summary — a reservation that he was "not prepared to say" that only the specific Bill of Rights guarantees were "carried over into the Four-

⁶ *Adamson*, 332 U.S. at 70.

⁷ *Id.* at 75.

⁸ *Id.* at 90.

⁹ *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169 (1986).

¹⁰ *See Bowers v. Hardwick*, 106 S. Ct. 2841 (1986).

¹¹ *Adamson*, 332 U.S. at 124.

teenth Amendment.”¹² Moreover, the dissent did not discuss *substantive* due process problems. *Adamson* involved constitutional criminal procedure and Murphy’s opinion concerned the possibility that unfair procedures might not pass muster under the due process clause¹³ — hardly a controversial question today.

On the other hand, *Adamson* involved the application of a specific Bill of Rights guarantee. Justices Murphy and Rutledge agreed with Justices Black and Douglas on that issue. Why, then, did Justice Black make the unenumerated constitutional rights issue so central?¹⁴ And why did Justices Murphy and Rutledge disassociate themselves from Justice Black’s conclusion about protecting unenumerated rights under the fourteenth amendment? Justices Murphy and Rutledge could have joined a more forceful four vote dissent that avoided a problem not presented by the case.¹⁵ The debate among the four dissenters appears to be attached to the wrong case.

II. THE UNREPORTED NATURAL LAW DEBATE IN THE *Francis* CASE

I had long suspected that *Francis v. Resweber*,¹⁶ decided two days before *Adamson* was argued,¹⁷ triggered the debate among the *Adamson* dissents. *Francis* presented the difficult, emotionally charged issue

¹² *Id.*

¹³ *Id.*

¹⁴ Of course, looking back at Black’s mature jurisprudence, each argument — vigorous, literal enforcement of the Bill of Rights, and limitation of constitutional protection of liberty to the Bill of Rights’ specific provisions — was inseparable from the other. But his historical argument in *Adamson* made only the point that the fourteenth amendment incorporated the Bill of Rights, and did not support his proposition about the limited nature of due process. For example, Congressman Bingham, on whose abolitionist Republican legal theories Black relies, in addition to believing that the Bill of Rights applied to the states, also believed that the due process clause outlawed slavery. See M. CURTIS, *supra* note 3, at 47. For his latter point, Black relied primarily on the Supreme Court’s previous excesses in developing the doctrine of economic due process. *Adamson*, 332 U.S. at 79-81.

¹⁵ There were a number of dissents in constitutional criminal procedure cases that were decided on the same day as *Adamson*, in which all four Justices joined. See *Fay v. New York*, 332 U.S. 261, 296 (1947) (Murphy, J., dissenting, joined by Black, Douglas, and Rutledge, JJ.) (approving “blue ribbon” jury panel); *Gayes v. New York*, 332 U.S. 145, 149 (1947) (upholding guilty plea by criminal defendant not represented by counsel); *Foster v. Illinois*, 332 U.S. 134, 141 (1947) (Rutledge, J., dissenting, joined by Black, Douglas, and Murphy, JJ.) (same).

¹⁶ 329 U.S. 459 (1947).

¹⁷ *Francis* was decided January 13, 1947; *Adamson* was argued on January 15 and 16, 1947.

of whether Louisiana could execute a young, black convicted murderer after an initial execution attempt had failed.¹⁸ Justice Black was in the Court's 5-4 majority finding no constitutional violation; Justices Murphy and Rutledge joined the dissent.

Francis' principal opinions finesse the *Adamson* debate. Justice Reed's plurality opinion stated both that no due process violation occurred and that a second execution attempt was neither double jeopardy nor cruel and unusual punishment.¹⁹ Justice Burton's dissent found both a due process violation and cruel and unusual punishment.²⁰ However, Justice Frankfurter's concurrence defends the proposition that the fourteenth amendment did not incorporate the specific Bill of Rights guarantees, and concludes that the fourteenth amendment's due process clause "expresses a demand for civilized standards which are not defined by the specifically enumerated guarantees of the Bill of Rights."²¹ Justice Frankfurter was responding to arguments unarticulated in *Francis'* printed opinions.

Francis is the perfect vehicle for the *Adamson* intradissent dispute about unenumerated constitutional rights. The plurality and dissenting opinions focused on whether "civilized standards" were followed.²² Unlike his *Adamson* concurrence, Justice Frankfurter's *Francis* concurrence directly addresses Justice Black's *Adamson* argument that the fourteenth amendment is limited to the Bill of Rights' specific guarantees. Justice Frankfurter argued that due process contained neither "the particularities of the first eight amendments" nor was it "confined to

¹⁸ The fullest account of the *Francis* case is E. PRETTYMAN, JR., *DEATH AND THE SUPREME COURT* 90-128 (1961).

¹⁹ *Francis*, 329 U.S. at 462-63. Justice Reed concluded that the second execution try was not double jeopardy, making it unnecessary to say whether — if it was double jeopardy — it was also a violation of due process. As for cruel and unusual punishment, Reed stated that unnecessary pain in execution of the death sentence would violate due process, and that the same concept was included in the prohibition against cruel and unusual punishment.

²⁰ Justice Burton's first sentence posed the issue as whether the second execution "will violate the due process of law." *Id.* at 472. Later, his dissent spoke of "cruel, unusual and unconstitutional punishment." *Id.* at 476.

²¹ *Id.* at 466, 468.

²² The issue, posed by Justice Reed's plurality opinion, was whether the "unforeseeable accident" added "an element of cruelty to the subsequent execution" that went beyond the "necessary suffering" in carrying out an execution. *Id.* at 464. Justice Burton's dissent posed the question as whether human life would be taken "by unnecessarily cruel means" that shock "the most fundamental instincts of civilized man." *Id.* at 473.

them.”²³ Due process of law “has its own independent function.” Whether the outcome was setting standards higher or lower than those imposed by the Bill of Rights, the decision process involved “the application of standards of fairness and justice very broadly conceived.”²⁴

Since *Adamson* had not been argued when *Francis* was decided, Justice Black must have made his *Adamson* dissent arguments in *Francis* before joining Justice Reed’s opinion. Later publication of the Justices’ papers and *Francis* draft opinions confirms this.²⁵ As indicated, in *Adamson* Justice Black was dissenting from the Court’s refusal to apply the fifth amendment’s privilege against self-incrimination. His argument that the fourteenth amendment did not protect unenumerated rights was peripheral. However, his unpublished concurring opinion in *Francis*²⁶ joined the Court’s refusal to halt Francis’ second execution, and the point was central. Justice Black argued that he was not

willing to read into such procedural words as due process of law a meaning which has in the past and will inevitably in the future result in leaving courts free to substitute their ideas of natural justice for the considered policies of state and federal legislatures. To pass upon the constitutionality of statutes by looking to the particular standards enumerated in the bill of rights is one thing; to invalidate statutes because of ‘natural law,’ deemed to be above and undefined by the Constitution is another.²⁷

If Justice Black’s unpublished concurrence in *Francis* solves one mystery about his *Adamson* dissent, it creates another. *Francis* was indeed the setting for the issue that divided the *Adamson* dissenters. But the votes do not line up in the same way. In *Francis*, Justice Douglas joined Justices Murphy and Rutledge in Justice Burton’s dissent. In *Adamson*, Justice Douglas joined Justice Black’s dissent criticizing “natural law” adjudication, rather than joining the doubts expressed by Justices Murphy and Rutledge. Justice Black saw the argument for halting Francis’ execution as forbidden subjective constitutional adjudication, while Justice Douglas was prepared to accept the forbidden argument.

²³ *Id.* at 468.

²⁴ *Id.* at 470.

²⁵ The unpublished opinions are contained in appendices to Miller & Bowman, “*Slow Dance on the Killing Ground*”: *The Willie Francis Case Revisited*, 32 DE PAUL L. REV. 1, 51-70 (1983).

²⁶ *Id.* at 65-70.

²⁷ *Id.* at 69.

III. NATURAL LAW, EQUALITY, AND THE *River Pilots* CASE

Justice Douglas may have voted in *Francis* without considering the jurisprudential issue of applying natural law standards in constitutional interpretation.²⁸ On the other hand, he might not have viewed *Francis* as raising the issue of whether due process contained limitations beyond the Bill of Rights' guarantees.

The *Francis* opinions did not sharply distinguish whether *Francis*' issue rested on the eighth amendment or on an open ended concept of due process.²⁹ Justice Black's draft concurrence did not address whether defining cruel and unusual punishment would raise the same natural law problems as defining due process. He merely concluded that the failure of *Francis*' execution was accidental and not the "wanton infliction of pain,"³⁰ and therefore was not cruel and unusual punishment. However, he saw the *Francis* case as involving the possible imposition of judges' strongly held subjective views as constitutional law:

I share most of the sentiments of those members of the court who have so feelingly argued that a defendant who has once been compelled to suffer the imminence of death by electrocution should not be put through them again. But I cannot agree with them that any provision of the Federal Constitution authorizes us to rule that an accidental failure fairly to carry out a valid sentence of death on the first attempt bars execution of that sentence.³¹

Subjective judgment is required whether the issue is posed as a due process problem or as a cruel and unusual punishment issue. Later, Justice Black insisted that defining the "specific" guarantees of the Bill of Rights by an ahistorical determination of "transitory notions of fairness" was as objectionable as determining constitutional rights by an open ended definition of due process.³² In his last Term, he insisted

²⁸ The opinions of Justices Reed, for the plurality, and Burton, for the dissent, in *Francis*, did not focus on the question of incorporation of the Bill of Rights. See *supra* notes 19-20. Douglas had voted to deny certiorari in *Francis*, and in the conference vote following argument had voted to affirm. Douglas changed his vote on December 20, 1946. Miller & Bowman, *supra* note 25, at 23. Frankfurter circulated his concurrence on January 2, 1947, *id.* at 26, and Black did not circulate his unpublished concurrence until January 3, 1947, *id.* at 19. The decision was announced January 13. Thus, it is quite possible that Douglas first considered the issue after the *Adamson* argument on January 15 and 16, 1947.

²⁹ See *supra* note 22.

³⁰ Miller & Bowman, *supra* note 25, at 65-66.

³¹ *Id.* at 69.

³² *United States v. Wade*, 388 U.S. 218, 247 (1967) (Black, J., dissenting in part).

that whether the death penalty constituted cruel and unusual punishment under the eighth amendment turned on whether the penalty was in common use at the time of the amendment's adoption.³³

However, neither Justice Black's *Adamson* dissent nor his unpublished *Francis* concurrence discussed whether differences existed between using "natural law" standards to interpret the specific guarantees of the Bill of Rights or other constitutional provisions, and using those standards to interpret the due process clause. Justice Black never fully resolved the distinction between permissible constitutional interpretation and impermissible natural law adjudication in working out the contours of his constitutional jurisprudence.³⁴

³³ *McGautha v. California*, 402 U.S. 183, 225 (1971) (Black, J., concurring). Earlier, Black had joined Chief Justice Warren's plurality opinion in *Trop v. Dulles*, 356 U.S. 86, 101 (1958), which explained that the words of the eighth amendment are "not static," and draw their meaning "from the evolving standards of decency that mark the progress of a maturing society." However, this is not reliable evidence that Black would have voted to overturn a criminal sentence in 1958 because he judged it inconsistent with "evolving standards of decency." The definition of cruel and unusual punishment was part of a fall-back argument for the Warren plurality opinion in *Trop*. *Trop* involved involuntary loss of citizenship for wartime desertion. Warren's opinion continued to adhere to his dissenting position, in the companion case of *Perez v. Brownell*, 356 U.S. 44 (1958), that citizenship could not be withdrawn for any misbehavior. He turned to the cruel and unusual punishment rationale only because his major point was rejected in *Perez*. *Trop*, 356 U.S. at 93. Black's separate concurrence, joined by Douglas, also emphasized his belief that the Constitution prohibited any involuntary expatriation. *Id.* at 104. *Perez* was overruled in *Afroyim v. Rusk*, 387 U.S. 253 (1967). Black wrote for the Court and, relying on text and history, held that section one of the fourteenth amendment defined citizenship that one could only relinquish voluntarily. When the Court in *Rogers v. Bellei*, 401 U.S. 815, 844 (1971), held that the citizenship clause did not apply to a person born abroad of citizen parents, Black's dissent complained that the majority had substituted its "own vague notions of 'fairness'" for the Constitution.

³⁴ One can see Black's difficulty in maintaining his theory that text and history limit constitutional interpretation from two cases, widely separated in time. In his first Term, Black wrote for the Court in *Johnson v. Zerbst*, 304 U.S. 458 (1938), holding that the sixth amendment required courts to appoint counsel for indigent federal criminal defendants. Black purported to rely on history for the proposition that criminal defendants did not have the competence to represent themselves, *id.* at 462-63, but on the "humane policy of the modern criminal law" for the proposition that indigents should have appointed counsel, *id.* at 463 (quoting *Patton v. United States*, 281 U.S. 276, 308 (1930)).

In a partial dissent in *Gilbert v. California*, 388 U.S. 263, 277 (1967), Black insisted, contrary to the Court, that the privilege against self-incrimination precluded requiring the accused to furnish handwriting exemplars. He also dissented from the Court's conclusion that compelled handwriting exemplars were not a "critical stage" of a criminal case, and thus did not require counsel's presence. He complained that these

The tension is best seen in Justice Black's handling of equal protection issues. Almost any constitutional argument can be transformed into an issue of equality.³⁶ Justice Black joined Justice Douglas' opinion in *Skinner v. Oklahoma*,³⁶ striking down, on equal protection grounds, Oklahoma's statute sterilizing habitual criminals. Only a year before *Adamson*, he dissented from the Court's refusal to invalidate unequal legislative apportionments under the equal protection clause.³⁷ In 1964, he joined Chief Justice Warren's opinion in *Reynolds v. Sims*,³⁸ which vindicated his earlier dissent. But two years later, when the same rationale enlarged the right to vote,³⁹ he dissented angrily that the Court was using a "natural-law-due-process" formula.⁴⁰ For Justice Black, the equal protection clause was sufficiently "specific" to support some broad equality rights outside the core historical case of racial discrimination, but not others. He said that the equal protection clause only reached "irrational," "unreasonable," "arbitrary," or "invidious"⁴¹ classifications. He did not explain why the judgments required by those standards involved no natural law conceptions.⁴²

holdings reduced the Bill of Rights' specific guarantees to an open ended determination of whether the accused was given a fair trial. *Id.* at 279. Black agreed with the Court that it was unconstitutional to require the accused to participate in a lineup without counsel. On the other hand, in both *Gilbert* and *United States v. Wade*, 388 U.S. 218, 243 (1967), he dissented from the Court's conclusion that in-court identification by witnesses who viewed the invalid lineup were inadmissible unless the identification was independent. *Wade*, 388 U.S. at 248-50. For Black, the fifth and sixth amendments clearly required the exclusion of evidence that an unrepresented defendant was identified by a witness at a lineup. But the Constitution was silent about whether a witness' in-court identification could also be excluded, and the Court's extended exclusionary rule was the exercise of a subjective due process technique. *Id.* at 249-50. Black's argument was that exclusion of an otherwise reliable lineup identification was mandated by the Constitution, but exclusion of a tainted in-court identification was merely the result of a Court written constitutional rule of evidence. In *Wade* and *Gilbert*, Black's dividing line between the constitutional command and judicial invention was hard to understand.

³⁶ Cohen, *Is Equal Protection Like Oakland? Equality as a Surrogate for Other Rights*, 59 TUL. L. REV. 884, 886 (1985); Westin, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

³⁶ 316 U.S. 535 (1942).

³⁷ *Colegrove v. Green*, 328 U.S. 549, 566 (1946).

³⁸ 377 U.S. 533 (1964).

³⁹ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

⁴⁰ *Id.* at 675.

⁴¹ *Id.* at 676-77.

⁴² He did concede that these standards were "vague and indefinite." *Id.* at 674. To the extent that Black would, at times, permit himself more room for subjective decision-making under the equal protection clause than under the due process clause, his views

Although Justice Black never worked out a theory of constitutional interpretation that avoided subjective judicial judgment, he was reluctant to accept constitutional arguments that echoed substantive due process claims.⁴³ *Kotch v. Board of River Port Pilot Commissioners*,⁴⁴ a third case decided during the 1946 Term,⁴⁵ illustrates this. *Kotch* involved an equal protection claim stemming from Louisiana's practice of limiting grants of river pilot licenses to existing pilots' relatives and friends. Justice Rutledge's dissent argued that discrimination "founded on blood relationship" was indistinguishable from discrimination "racial in character."⁴⁶ However, Justice Black's opinion for the Court concluded that while nepotism in appointments was "a subject of controversy,"⁴⁷ it was not "the kind of discrimination which violates the equal protection clause."⁴⁸ What is particularly interesting about *Kotch* is that it reflects the voting divisions in both *Adamson* and *Francis*, with Justice Black voting to reject an open ended, subjective constitutional argument, and Justices Murphy and Rutledge in disagreement. Even more interesting, when the result was on the line in *Kotch*, as it was in *Francis*, Justice Douglas again voted with Justices Murphy and Rutledge.⁴⁹

IV. JUSTICE DOUGLAS CONFRONTS DUE PROCESS

Justice Douglas' votes in *Francis* and *Kotch* suggest that he agreed with Justices Murphy and Rutledge rather than with Justice Black. More than a quarter century later, referring to the Murphy-Rutledge *Adamson* dissent, Justice Douglas said "[p]erhaps they were right."⁵⁰ Still, he insisted that in the intervening years, he had not been required

are the mirror image of Justice Harlan's. Harlan was quite comfortable in protecting fundamental rights under the due process rubric. *See, e.g., Poe v. Ullman*, 367 U.S. 497, 522, 541-45 (1961) (Harlan, J., dissenting). He consistently dissented from expansive application of the equal protection doctrine. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 655, 677 (1969) (Harlan, J., dissenting).

⁴³ *See infra* note 75. *But see* *Martin v. Walton*, 368 U.S. 25 (1961) (upholding court rule requiring attorney practicing in other states to associate with local counsel; Black joined Douglas' equal protection dissent).

⁴⁴ 330 U.S. 552 (1947).

⁴⁵ *Kotch* was argued on February 5 and 6, after the decision in *Francis* and the argument in *Adamson*. It was decided on March 31, before the *Adamson* decision.

⁴⁶ *Kotch*, 330 U.S. at 566.

⁴⁷ *Id.* at 563.

⁴⁸ *Id.* at 564.

⁴⁹ Ironically, the fourth dissenter in *Kotch* was Justice Reed, who wrote the *Francis* plurality opinion and was to write the Court's *Adamson* opinion.

⁵⁰ *Doe v. Bolton*, 410 U.S. 179, 208, 212 n.4 (1973) (Douglas, J., concurring).

to reconsider the scope of substantive due process.

The intervening decision that most tested the negative side of Justice Black's *Adamson* dissent was *Griswold v. Connecticut*,⁵¹ in which the Court held that prohibiting married persons' use of birth control devices was unconstitutional. Predictably, Justice Black's dissent attacked the natural law foundation of the Court's decision.⁵² The vote of Justice Douglas, who wrote the Court's opinion, was also predictable. Four years earlier, in *Poe v. Ullman*,⁵³ Justice Douglas' dissent concluded that the Connecticut law was unconstitutional.⁵⁴ Moreover, without advertng to the debate among the *Adamson* dissenters,⁵⁵ he clearly recanted his earlier agreement with Justice Black's position:

Though I believe that "due process" as used in the Fourteenth Amendment includes all of the first eight amendments, I do not think it is restricted and confined to them. . . .

[T]o say that a legislature may do anything not within a specific guarantee of the Constitution may be as crippling to a free society as to allow it to override specific guarantees so long as what it does fails to shock the sensibilities of a majority of the Court.⁵⁶

However, Justice Douglas' *Griswold* opinion did not rest upon the right to use contraceptives as an unenumerated right protected only by the due process clause.⁵⁷ The opinion began with the proposition that "the range of questions that implicate the Due Process Clause of the Fourteenth Amendment" were irrelevant.⁵⁸ Rather, the case rested on a right of marital privacy stemming from "penumbras" and "emanations" of specific Bill of Rights guarantees.⁵⁹ Justice Douglas' rationale that *Griswold* did not involve an unenumerated right stemming from substantive due process was unconvincing, particularly since the opinion recognized that the right of marital association was "older than the Bill of Rights."⁶⁰ Further, Justice Stewart's dissent demonstrated that this right did not emanate from the Bill of Rights, arguing that it was a

⁵¹ 381 U.S. 479 (1965).

⁵² *Id.* at 507, 511-12. Justices Stewart and Black also joined the dissent. *Id.* at 527.

⁵³ 367 U.S. 497 (1961).

⁵⁴ *Id.* at 509.

⁵⁵ Douglas did rely on the *Adamson* dissents for the proposition that the fourteenth amendment's due process clause incorporated the first eight amendments. *Id.* at 516 n.8.

⁵⁶ *Id.* at 516, 518.

⁵⁷ That was the position taken in two concurring opinions, by Justice Harlan, *Griswold*, 381 U.S. at 499, and by Justice White, *id.* at 502.

⁵⁸ *Id.* at 481-82.

⁵⁹ *Id.* at 484.

⁶⁰ *Id.* at 486.

“play on words” to find an abridgment of any of the Bill of Rights’ guarantees.⁶¹ The difference between Justice Douglas’ rationale and Justice Harlan’s concurrence, rejecting any requirement that rights protected by the due process clause must be found in “the letter or penumbra of the Bill of Rights,”⁶² is more cosmetic than substantive.

Still, even if the attempt was unpersuasive, Justice Douglas had tried to maintain the veneer of his agreement with Justice Black’s *Adamson* dissent. Indeed, Justice Douglas’ earlier *Griswold* draft tried to tie the right of marital association to the first amendment, rather than to a patchwork collection of the second through fifth amendments.⁶³ Had that premise been sound, the *Griswold* opinion would have been less schizophrenic. But one cannot coherently extend first amendment association rights to an unlimited variety of associations.⁶⁴ Once the constitutional right to association was tied to a loose confederation of four of the first five amendments, Justice Douglas was arguing for the very kind of subjective constitutional adjudication that Justice Black’s *Adamson* dissent deplored.⁶⁵

The puzzling question remains why, after squarely rejecting the *Adamson* dissent in *Ullman*, Justice Douglas attempted to maintain its form, without its substance, in *Griswold*.⁶⁶ One possibility is that Jus-

⁶¹ *Id.* at 529.

⁶² *Id.* at 499-500.

⁶³ The unpublished draft opinion appears in B. SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* 231 (1985).

⁶⁴ According to Bernard Schwartz, Douglas revised the opinion after Justice Brennan objected that association protected by the first amendment was limited to association for advocacy. B. SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT — A JUDICIAL BIOGRAPHY* 579 (1983). More recently, Justice Brennan’s opinion for the Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), elaborated the distinction between association for expressive purposes protected by the first amendment and the broader range of personal relationships protected by the *Griswold* line of cases.

⁶⁵ The first amendment draft opinion contained no reference to the ninth amendment. The published opinion quotes the ninth amendment, after listing the first, third, fourth, and fifth. *Griswold*, 381 U.S. at 484. Justice Goldberg’s concurrence, *id.* at 486, joined by Chief Justice Warren and Justice Brennan, argued that the ninth amendment demonstrated that the Constitution was not limited to rights specifically enumerated. He began with the proposition that the concept of liberty in the due process clause “protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights.” *Id.* (Goldberg, Warren, and Brennan were three of the four Justices who joined the Douglas opinion.)

⁶⁶ Karst, *supra* note *, points out that Black’s and Douglas’ opinions habitually minimized their intellectual differences. *Id.* at 729 n.60. He concludes that Douglas may have joined Black’s *Adamson* dissent, rather than the Murphy-Rutledge dissent,

tice Douglas spoke for himself in his *Ullman* dissent, and wrote a compromise opinion for the Court in *Griswold*. However, that possibility is belied by his explanation of the *Griswold* rationale in his concurrence in the abortion cases, in which he again spoke only for himself.⁶⁷

There are, of course, those who have believed that the reach of due process in the Fourteenth Amendment included all of the Bill of Rights but went further. Such was the view of Mr. Justice Murphy and Mr. Justice Rutledge.

. . . Perhaps they were right; but it is a bridge that neither I nor those who joined the Court's opinion in *Griswold* crossed.⁶⁸

Still, if Justice Douglas did not cross the bridge, he somehow had come to stand on the other side of the river. In the same concurring opinion, he explained that the Constitution protected "customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of 'the Blessings of Liberty' mentioned in the preamble of the Constitution."⁶⁹ These were not limited to rights tied to the penumbra of the first amendment,⁷⁰ nor rights concerning marriage, divorce, procreation, contraception, and the education and upbringing of children recognized in *Griswold* and its progeny.⁷¹ They included, as a distinct category, "the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf."⁷²

more from ties of comradeship to Black than from intellectual assent to Black's ideology. *Id.* at 729.

⁶⁷ See *Doe v. Bolton*, 410 U.S. 179, 209 (1973) (opinion concurring in *Bolton*'s result and in the companion case of *Roe v. Wade*, 410 U.S. 113 (1973)).

⁶⁸ *Bolton*, 410 U.S. at 212 n.4. The statement that the bridge was not crossed by others who joined his *Griswold* opinion is demonstrably not true. See *supra* note 65.

⁶⁹ *Bolton*, 410 U.S. at 210.

⁷⁰ Douglas defined the penumbral first amendment right broadly to include "the autonomous control over the development and expression of one's intellect, interests, tastes, and personality." *Id.* at 211.

⁷¹ *Id.*

⁷² *Id.* at 213. Douglas relied on his opinion in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Douglas wrote for a unanimous Court, holding a municipal vagrancy law void for vagueness. The narrow holding was buttressed by a much broader rationale. Referring to works by Charles Reich, Walt Whitman, and Vachel Lindsay, Douglas argued that strolling and wandering were more than innocent activities. They were: "[H]istorically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence." *Id.*

CONCLUSION

In the second volume of his autobiography, published after his death, Justice Douglas conceded that he had indeed crossed the bridge from Justice Black's *Adamson* dissent. Referring to the *Adamson* dissents, he said:

Murphy and Rutledge . . . filed a separate opinion that said that they thought that the guarantees of due process were not necessarily limited to the provisions of the Bill of Rights, but included other privileges and immunities — a decision with which I, in the years to come, was inclined to agree.⁷³

In isolated cases after the *Adamson* decision, Justice Douglas may have denied a claim of constitutional right because of the negative side of Justice Black's *Adamson* position. I have not found any.⁷⁴ In many cases, Justice Black denied a claim of constitutional right, seeing it as asserting a right not enumerated by the Constitution, and Justice Douglas disagreed.⁷⁵ The *Francis* and *Kotch* cases demonstrate that,

at 164.

⁷³ W. DOUGLAS, *THE COURT YEARS 1937-1975*, at 54-55 (1980).

⁷⁴ I had thought that *Solesbee v. Balkcom*, 339 U.S. 9 (1950), was such a case. Justice Black's opinion for the Court held that procedural due process did not require a formal hearing as to the postconviction sanity of a person sentenced to death. Justice Frankfurter dissented at length. *Id.* at 14. However, the record is to the contrary. Douglas did not participate in the *Solesbee* decision. Later, a summary per curiam opinion reaffirmed *Solesbee*. *Caritativo v. California*, 357 U.S. 549 (1958). Justice Frankfurter, who had dissented alone in *Solesbee*, dissented again. *Id.* at 552. This time, Douglas joined Justice Frankfurter's dissent, along with Justice Brennan. *Solesbee* was effectively overruled in *Ford v. Wainwright*, 106 S. Ct. 2595 (1986).

⁷⁵ For a summary of cases in which Douglas joined in using the "natural law due process formula" in equal protection cases, coupled with Black's dissents, see Karst, *supra* note *. Among the examples Karst cites are: *Shapiro v. Thompson*, 394 U.S. 618 (1969) (striking down durational residency requirements for welfare; Douglas joined Court's opinion, Black joined dissent); *Hunter v. Erickson*, 393 U.S. 385 (1969) (striking down popular referendum as condition for enacting fair housing ordinance; Douglas joined Court's opinion, Black dissented); *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968) (striking down law barring mother from recovery for nonmarital child's death); *Levy v. Louisiana*, 391 U.S. 68 (1968) (striking down law barring nonmarital children from recovery for mother's death; Douglas wrote Court's opinion in both cases, Black joined dissent); *Anders v. California*, 386 U.S. 738 (1967) (reversing conviction when appointed appellate counsel filed no brief; Douglas joined Court's opinion, Black joined dissent); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (holding poll tax unconstitutional; Douglas wrote Court's opinion, Black wrote dissent); and *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding state law prohibiting licensing of women as bartenders; Black joined Court's opinion, Douglas joined dissent); *see also Labine v. Vincent*, 401 U.S. 532 (1971) (upholding denial of inheritance rights to nonmarital children; Black wrote Court's opinion, Douglas joined

from the very beginning, Justice Douglas was “inclined to agree” with the positions of Justices Murphy and Rutledge that individual liberty guarantees were not confined to the Constitution’s specific clauses.⁷⁶ Justice Douglas continued, to the end, to struggle with Justice Black’s argument that the Bill of Rights marked the outer limits of constitutional protections of liberty. Except as the argument was limited to an abstract verbal formula, his heart was never in it.

dissent); *Bell v. Maryland*, 378 U.S. 226 (1964) (reversing conviction of sit-in protesters; Douglas wrote a concurring opinion, Black wrote a dissent).

There are a number of other examples outside the equal protection field. They include cases involving an assertion of denial of fair procedures not mandated by the specific provisions of the Bill of Rights. *See, e.g.*, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (invalidating statute permitting public posting of name of person who drinks to excess; Douglas wrote Court’s opinion, Black wrote a dissent); *In re Winship*, 397 U.S. 358 (1970) (applying reasonable doubt standard to juvenile delinquency proceedings; Douglas joined Court’s opinion, Black wrote a dissent); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (requiring hearing before termination of welfare; Douglas joined Court’s opinion, Black wrote a dissent); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (invalidating law authorizing prejudgment attachment of wages; Douglas wrote Court’s opinion, Black dissented). However, all of these cases are from Black’s last years of service, when his views concerning constitutional protection of unenumerated rights, under any theory, had hardened. *But see Caritativo*, 357 U.S. at 549.

⁷⁶ Karst concluded that Douglas’ positions over his first thirty years showed “remarkable consistency” and that the differences between Douglas and Black were not the result of a shift in Douglas’ position. The appearance of inconsistency stemmed from Douglas’ “relative unconcern for doctrinal explanation and his willingness to let tactical considerations shape his doctrinal pronouncements.” Karst, *supra* note *, at 717-18.

