SEARCH, SEIZURE, AND ORDERED LIBERTY

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INTRODUCTION

The Fourteenth Amendment of the United States Constitution is a staple of political and legal order in the United States.[1] Section One of the Amendment prohibits the states from, *inter alia*, depriving "any person of life, liberty, or property, without due process of law."[2] The United States Supreme Court has interpreted the term "liberty" in Section One to embrace nearly all of the protections enumerated in the federal Bill of Rights (as well as a number of unenumerated rights).[3] Over the decades, the Court has stabilized the related doctrinal inquiry, asking—most of the time, and one way or another—whether a given liberty interest is "implicit in the concept of ordered liberty."[4] Despite the Due Process Clause's unique role in resolving many of the nation's most pressing

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[1] U.S. CONST. amend. XIV.

[2] *Id*. at § 1.

[3] *See, e.g.,* Timbs v. Indiana, 586 U.S. 146 (2019); McDonald v. City of Chicago, 561 U.S. 742 (2010); Meyer v. Nebraska, 262 U.S. 390 (1923).

[4] Palko v. Connecticut, 302 U.S. 319, 325 (1937); *see infra* discussion Part I.

social and political questions,[5] the "ordered liberty" test remains a mystifying, under-theorized aspect of constitutional law.

First recognized in 1937 in *Palko v. Connecticut*,[6] the "ordered liberty" inquiry was given one of its fullest, early-era analyses in the 1949 decision of *Wolf v. Colorado*.[7] Four of the opinions in *Wolf* address the concept of "ordered liberty," offering a breadth of interpretation that would not be matched until the twenty-first century.[8] The majority opinion was authored by Justice Felix Frankfurter, the Stone and Vinson Courts' leading champion of the "ordered liberty" test. The first justice to address the "ordered liberty" inquiry after *Palko*,[9] Frankfurter applied the test in ten opinions during his career.[10] As a result, *Wolf* sheds much light on the "ordered liberty" inquiry and provides an opportune starting

[5] *See, e.g.,* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237 (2022); Obergefell v. Hodges, 576 U.S. 644, 698 (2015); *McDonald*, 561 U.S. at 778; Lawrence v. Texas, 539 U.S. 558, 562 (2003); Washington v. Glucksberg, 521 U.S. 702, 721 (1997); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992), *overruled by Dobbs*, 597 U.S. at 237; Bowers v. Hardwick, 478 U.S. 186, 191 (1986), *overruled by Lawrence*, 539 U.S. at 562 ; Roe v. Wade, 410 U.S. 113, 152 (1973), *overruled by Dobbs*, 597 U.S. at 237; Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[6] 302 U.S. 319 (1937).

[7] 338 U.S. 25 (1949), *overruled in part by* Mapp v. Ohio, 367 U.S. 643 (1961).

[8] *See McDonald*, 561 U.S. 742.

[9] *See* Bridges v. California, 314 U.S. 252, 280 (1941) (Frankfurter, J., dissenting). As a formal matter, *Bridges* is the second United States Supreme Court case after *Palko* to reference "ordered liberty." *Lisenba v. California*, 314 U.S. 219 (1941), was issued the same day as *Bridges*, and comes before it in the U.S. Reports, yet it uses the term only in passing and with no mention of *Palko*.

[10] Monroe v. Pape, 365 U.S. 167, 202 (1960) (Frankfurter, J., dissenting); Elkins v. United States, 364 U.S. 206, 233 (1960) (Frankfurter, J., dissenting); Bartkus v. Illinois, 359 U.S. 121 (1959); Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957) (Frankfurter, J., concurring); Rochin v. California, 342 U.S. 165 (1952); Stefanelli v. Minard, 342 U.S. 117 (1951); *Wolf*, 338 U.S. 25; Adamson v. California, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring); Louisiana v. Resweber, 329 U.S. 459, 466 (1947) (Frankfurter, J., dissenting); *Bridges*, 314 U.S. at 280 (Frankfurter, J., dissenting). Justice Frankfurter was a member of the United States Supreme Court from 1939 to 1962. The justices with ten or more authored opinions referencing "ordered liberty" are as follows: Harlan II (14); Scalia (11); Stevens (11); Frankfurter (10); O'Connor (10); and Thomas (10).

point to better understand and assess conceptual variations in its more recent applications.[11]

I. ORIGINS OF "ORDERED LIBERTY"

In the centuries leading up to *Palko v. Connecticut*,[12] the term "ordered liberty" appeared in political decrees, speeches, and tracts, most frequently in England (and later, Great Britain), as well as in the United States.[13] After the turn of the twentieth century, "ordered liberty" took on a larger, more visible role in public life, emerging as a recurring theme in the speeches of prominent officials. President Woodrow Wilson's third Secretary of State, Bainbridge Colby, explained in a 1920 speech that "individual liberty" in the United States "means an *ordered liberty*"—one subjected "to law and subordinate to the common welfare."[14] In 1924, President Calvin Coolidge delivered an entire speech on the

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[11] As a general matter, Frankfurter believed the meanings of judicial writings, and more generally constitutional doctrines, could be understood only through "penetrating studies" over the course of time. *See* FELIX FRANKFURTER, FELIX FRANKFURTER REMINISCES 9 (1960) (explaining that judicial opinions "convey accents and nuances which the ear misses on a single reading, and [they] reveal meanings in silences," and as a result "a hint here, a phrase there, an occasional letter appearing sixty years later, an innuendo in a public address, a revealing characterization of a departed colleague—these are aids to understanding that may impart meaning, if not always validity, to a seemingly wooden doctrine").

[12] 302 U.S. 319 (1937).

[13] King Charles I, *Charles I's Declaration on the Dissolution of Parliament, in* I HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE Appx. 1 (1721) ("And at the same time, many other misinterpretations were raised of that Petition and Answer, by men, not well distinguishing between well-ordered liberty, and licentiousness."); Pope John Paul II, *To the New Ambassador of the United States of America to the Holy See* (Dec. 16, 1997), https://www.vatican.va/content/john-paul-ii/en/speeches/1997/december/documents/hf_jp-ii_spe_19971216_ambassador-usa.html [https://perma.cc/KW5M-R65R] (explaining that the founding generation of the United States "meant to bring into being, not just an independent territory, but a great experiment in what George Washington called 'ordered liberty': an experiment in which men and women would enjoy equality of rights and opportunities in the pursuit of happiness and in service of the common good"); John Ashcroft, *Prepared Remarks of Attorney General John Ashcroft, Federalist Society National Convention* (Nov. 15, 2003), https://www.justice.gov/archive/ag/speeches/2003/111503ag.htm [https://perma.cc/L23E-KMMW]("The notion that the law can enhance, not diminish, freedom is an old one . . . . George Washington called this 'ordered liberty.'").

[14] Bainbridge Colby, *Loyalty* (Mar. 1920), https://www.loc.gov/item/2016655165 [https://perma.cc/7BRM-F9K4] (emphasis added).

subject of "ordered liberty."[15] And five years later, President Herbert Hoover elaborated on "ordered liberty" in his inaugural address:

> Rigid and expeditious justice is the first safeguard of freedom, the basis of all *ordered liberty*, the vital force of progress. It must not come to be in our Republic that it can be defeated by the indifference of the citizen, by exploitation of the delays and entanglements of the law, or by combinations of criminals. Justice must not fail because the agencies of enforcement are either delinquent or inefficiently organized. To consider these evils, to find their remedy, is the most sore necessity of our times.[16]

The term "ordered liberty" did not appear in a United States Supreme Court opinion until 1937.[17] The Court in *Palko v. Connecticut* addressed whether the Due Process Clause of the Fourteenth Amendment requires the states to abide by the double jeopardy protections found in the Fifth Amendment.[18] In opposing petitioner's claim, Connecticut's brief appealed to the "spirit of ordered liberty":

> The decision in [*State v. Lee*, 65 Conn. 265 (1894),] is a sound exposition of the common law. It contains no disparagement of the spirit of *ordered liberty* which ennobled the law of England, nor of the judges who placed their own lives in jeopardy to invoke it against the threat of Stuart despotism. But this is another day and another generation; and as in those days the problem was to secure justice against political autocracy, so in this day a very pressing problem is how better to secure decent, law-abiding citizens against the growing threat of daring and defiant crime. We respectfully submit that the statute

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[15] Calvin Coolidge, *Ordered Liberty and World Peace, in* FOUNDATIONS OF THE REPUBLIC 89 (1926) (emphasis added).

[16] Herbert Hoover, *Inaugural Address of Herbert Hoover* (Mar. 4, 1929), https://avalon.law.yale.edu/20th_century/hoover.asp[https://perma.cc/8H8R-PPFR] (emphasis added).

[17] Palko v. Connecticut, 302 U.S. 319 (1937).

[18] *Id.* at 322 (noting that Palko framed his argument as "whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also").

> condemned by this accused is an intelligent effort toward a solution of that problem.[19]

In an 8-1 decision, the Court sided with Connecticut.[20] Writing for the majority, Justice Cardozo explained that "particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, became valid as against the states."[21] Cardozo clarified elsewhere that an interest is enforceable against the states when it is "of the very essence of a scheme of ordered liberty."[22] The "ordered liberty" test, he observed, is not easily satisfied. Interests of "value and importance" are not "implicit in the concept of ordered liberty" unless their abolishment would "violate a 'principle of justice so rooted in the traditions and conscious of our people as to be ranked as fundamental[]'" or, alternatively, "a fair and enlightened system of justice would be impossible without them."[23]

> The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence.[24]

The essence of "ordered liberty" is not discerned through "arbitrary or casual" consideration, but "dictated by a study and appreciation of the meaning, the essential implications, of liberty itself."[25]

II. *WOLF V. COLORADO*

In the early 1940s, Dr. Julius Wolf was suspected of providing unlawful abortions in Colorado. Without a warrant, state police entered Wolf's medical office and seized "his day books of 1944 and 1943."[26] In his subsequent prosecution for conspiracy to provide

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[19] Brief for the State of Connecticut at 35, Palko v. Connecticut, 302 U.S. 319 (1937) (emphasis added).

[20] *Palko*, 302 U.S. 319.

[21] *Id.* at 324-25.

[22] *Id.* at 325.

[23] *Id.* at 329 (quoting Brown v. Mississippi, 297 U.S. 278, 285 (1936); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

[24] *Id.* at 325.

[25] *Id.*

[26] Wolf v. People, 187 P.2d 926, 927 (Colo. 1947).

unlawful abortions, the trial court admitted into evidence the seized day books (as well as testimony of persons identified through the records).[27] Upon conviction in Colorado, Wolf appealed, claiming that evidence gained as a result of the warrantless search of his office should have been suppressed at his trial.[28] Wolf's conviction was ultimately affirmed by the Colorado Supreme Court,[29] and a writ of certiorari was issued by the United States Supreme Court.[30]

The Court in *Wolf* faced two issues: Did the warrantless search and seizure of Wolf's property by state officials violate the Fourteenth Amendment of the United States Constitution, and, if so, does the Amendment require the suppression of the ill-gotten evidence?[31] The Fourth Amendment places restrictions on search and seizure authority, but was designed to limit only the federal government.[32] The text of the Fourteenth Amendment, on the other hand, regulates the states, prohibiting them from, *inter alia*, "depriv[ing] any person of . . . liberty . . . without due process of law."[33]

The majority opinion was authored by Justice Frankfurter—Justice Cardozo's successor on the Court—and drew heavily from *Palko v. Connecticut*, explaining that the Due Process Clause "exacts from the States for the lowliest and the most outcast all that is 'implicit in the concept of ordered liberty.'"[34] The "ordered liberty" standard, wrote Frankfurter, "conveys neither formal nor fixed nor narrow requirements."[35] Rather, "[i]t is the compendious expression for all those rights which the courts must enforce because they are

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[27] *Id.*

[28] *Id.*

[29] *Id.* at 928.

[30] Wolf v. Colorado, 333 U.S. 879 (1948).

[31] Wolf v. Colorado, 338 U.S. 25, 25-26 (1949) ("The precise question for consideration is this: Does a conviction by a State court for a State offense deny the 'due process of law' required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in *Weeks v. United States*, 232 U.S. 383 [(1914)].").

[32] U.S. CONST. amend. IV; Barron v. Baltimore, 32 U.S. 243, 250 (1833) (stating that the first eight Amendments "contain no expression indicating an intention to apply them to the state governments").

[33] U.S. CONST. amend. XIV, § 1.

[34] *Wolf*, 338 U.S. at 27 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[35] *Id.*

basic to our free society."[36] *Wolf* is clear that the interests "implicit in the concept of ordered liberty" are not unlimited.[37] But at the same time, they are not static,[38] as they reflect "living principle[s]."[39] And while *Wolf* acknowledges the difficulty of the judicial task (explaining that there is no "tidy formula for the easy determination of what is a fundamental right"[40]), it teaches that the exertion is imperative. A more rigid interpretative test would "ignore[] the movements of a free society" and "belittle[] the scale of the conception of due process."[41]

After describing the "ordered liberty" standard, the *Wolf* Court turned to consider whether the "security of one's privacy against arbitrary intrusion by the police" is made applicable to the states through the Fourteenth Amendment. The Court resolved the question unanimously:[42]

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without

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[36] *Id*.

[37] *Id*.

[38] *Id*. ("But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.").

[39] *Id*. The Court recently explained that "[t]he term 'liberty' alone provides little guidance," but "history and tradition . . . map the essential components of the Nation's concept of ordered liberty[.]" Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 239-40 (2022); *see generally* Robert E. Ranney, Note, *Enlightening the Enlightened: A Critique of Enlightenment Thinking and the Secular Religion and on the Need for a Return to Covenant*, 35 REGENT U. L. REV. 599, 633 n.248 (2023).

[40] Wolf v. Colorado, 338 U.S. 25, 27 (1949).

[41] *Id*.

[42] *See id*. at 47 (Rutledge, J., dissenting) ("I welcome the fact that the Court, in its slower progress toward this goal, today finds the substance of the Fourth Amendment 'to be implicitly in the concept of ordered liberty, and thus, through the Fourteenth Amendment, valid as against the states.'") (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)); *see also* Elkins v. United States, 364 U.S. 206, 213 (1960) ("[In *Wolf*] it was unequivocally determined by a unanimous Court that the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizure by state officers.").

> authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.[43]

The reasoning of *Wolf* on this point is straightforward. Because the security of one's privacy against arbitrary intrusion by the police is basic to a free society, it is therefore "implicit in the concept of ordered liberty," and, as such, enforceable against the states through the Due Process Clause.[44]

The *Wolf* Court then shifted to the question of remedy, considering whether the Fourth Amendment's exclusionary rule—recognized 35 years earlier in *Weeks v. United States*[45]—was also "implicit in the concept of ordered liberty." Here, the Court split six to three, resolving the question in the negative.[46] The majority reasoned that the exclusionary rule is not a right, but rather a remedy, and moreover only one of a handful of good, viable alternatives.[47]

> But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be

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[43] *Wolf*, 338 U.S. at 27-28.

[44] The Court has elaborated on these points over the decades. *See, e.g.*, Wilson v. Arkansas, 514 U.S. 927, 933 (1995); Minnesota v. Olson, 495 U.S. 91, 96 (1990).

[45] 232 U.S. 383 (1914).

[46] *Wolf*, 338 U.S. at 33 ("We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."); *id.* at 28 ("[T]he ways of enforcing such a basic right raise questions of a different order. How such arbitrary [police] conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution."); *see also* Larry Glasser, *The American Exclusionary Rule Debate: Looking to England and Canada for Guidance*, 35 GEO. WASH. INT'L L. REV. 159, 173 (2003) (observing that while the "Court unanimously agreed that the Fourth Amendment applied to the states," it "divided six to three on the application of the exclusionary rule to the states").

[47] *Wolf*, 338 U.S. at 30-31 ("Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found."); *see also* Albert Mayer, *The* Weeks *Exclusionary Rule: A Bizarre and Senseless Impediment to Judicial Integrity*, 62 N.Y. ST. B.J. 53, 55 (1990) ("Through it all, one constant has remained—only the criminal benefits. For although a criminal may be guilty this rule can be a loophole for him to escape well-deserved punishment.").

> checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.[48]

The *Wolf* majority did not view the exclusionary rule as "an essential ingredient of the right" to be secure from unreasonable searches and seizures.[49] It clarified that "[a]s a matter of inherent reason, one would suppose this to be an issue as to which men with complete devotion to the protection of the right of privacy might give different answers."[50] To substantiate this point, the *Wolf* majority surveyed state law, finding thirty-one states had rejected the exclusionary rule since *Weeks*.[51] Turning its gaze overseas, the majority observed that "[o]f 10 jurisdictions within the United Kingdom and the British Commonwealth of Nations which have passed on the question, none has held evidence obtained by illegal search and seizure inadmissible."[52] Central to the majority's reasoning is the conclusion that good alternative deterrents exist: "The jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection."[53]

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[48] *Wolf*, 338 U.S. at 28.

[49] *Id.* at 29; *see also* Mapp v. Ohio, 367 U.S. 643, 682 (1961) (Harlan, J., dissenting) (crediting "*Wolf*'s discriminating perception between the demands of 'ordered liberty' as respects the basic right of 'privacy' and the means of securing it among the States"); *id.* ("That perception, resting both on a sensitive regard for our federal system and a sound recognition of this Court's remoteness from particular state problems, is, for me, the strength of that decision.").

[50] *Wolf*, 338 U.S. at 28-29.

[51] *Id.*; *see also Mapp*, 367 U.S. at 680 (Harlan, J., dissenting) ("[T]he relevance of the disparity of views among the States on this point lies simply in the fact that the judgment involved is a debatable one.").

[52] *Wolf*, 338 U.S. at 30.

[53] *Id.* at 30-31 n.1 ("The common law provides actions for damages against the searching officer; against one who procures the issuance of a warrant maliciously and without probable cause; against a magistrate who has acted without jurisdiction in issuing a warrant; and against persons assisting in the execution of an illegal search. One may also without liability use force to resist an unlawful search. Statutory sanctions in the main provide for the punishment of one maliciously procuring a search warrant or willfully exceeding his authority in exercising it. Some statutes more broadly penalize unlawful searches. Virginia also makes punishable one who issues a general search warrant or a warrant unsupported by affidavit. A few States have provided statutory civil remedies. And in one State, misuse of a search warrant may be an abuse of process punishable as contempt of court.") (internal citations omitted).

Finding the exclusionary remedy to be outside of those interests "implicit in the concept of ordered liberty," Frankfurter wrote: "Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective."[54]

In concurrence, Justice Black wrote that a "country of 'ordered liberty'" will protect its people from "over-zealous or ruthless federal officers."[55] And as for state officers, their "knock at the door . . . as a prelude to a search" is "just as ominous to 'ordered liberty' as though the knock were made by a federal officer."[56] Yet the exclusionary remedy is not part of the Fourth Amendment and, as a result, the Fourteenth Amendment does not obligate state courts to exclude evidence gained by an unlawful search or seizure. Black demonstrated that the Court's holding on this point could be reached under either the "selective" or "total" incorporation interpretive methodology.[57]

Justice Murphy dissented, explaining that "[i]t is disheartening to find so much that is right in an opinion which seems to me so fundamentally wrong."[58] He agreed with the majority that restrictions on arbitrary searches and seizures are made applicable to the states through the Fourteenth Amendment.[59] A committed adherent of the idea of "total incorporation," he nonetheless endorsed the majority's conclusions about the application of the "ordered liberty" test: "Quite apart from the blanket application of the Bill of Rights to the States, a devotee of democracy would ill-suit his name were he to suggest that his home's protection against unlicensed governmental invasion was

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[54] *Id*. at 31. This holding of *Wolf* was overruled twelve years later. *Mapp*, 367 U.S. at 655 ("Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.").

[55] *Wolf*, 338 U.S. at 40 (Black, J., concurring).

[56] *Id*.

[57] *Id*. The theory of "total incorporation" provides that the first eight Amendments are applicable to the states, as a block, through the Fourteenth Amendment. *See, e.g.*, Adamson v. California, 332 U.S. 46, 124 (1947) (Murphy, J., dissenting).

[58] *Wolf*, 338 U.S. at 41 (Murphy, J., dissenting).

[59] *Id*.

not 'of the very essence of a scheme of ordered liberty.'"[60] But to protect that "scheme of ordered liberty," according to Murphy, an effective remedy must be available to citizens whose constitutional rights are violated.

In response to the majority's conclusion that "other remedies" exist to protect the right to be secure, Murphy wrote: "Alternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case, their statement is blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all."[61] He expressed a concern that *Wolf* would "do inestimable harm to the cause of fair police methods in our cities and states," and that it might "have tragic effect upon public respect for our judiciary."[62]

Justice Rutledge hit a similar note in his dissent.[63] Like Justices Black and Murphy (as well as Douglas), Rutledge endorsed "total incorporation," believing it best for "all 'the specific guarantees of the Bill of Rights [to] be carried over intact into the first section of the Fourteenth Amendment.'"[64] He agreed with the majority that "the substance of the Fourth Amendment" is "implicit in the concept of ordered liberty,"[65] but clarified "that the Amendment without the sanction is a dead letter"[66] and

> hardly rises to the dignity of a form of words;[67] at best, it is a pale and frayed carbon copy of the original, bearing little resemblance to the Amendment the fulfillment of whose

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[60] *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[61] *Id.* at 41 (Murphy, J., dissenting). The exclusionary remedy can be rooted in the "right to be secure" text of the Fourth Amendment. *See, e.g.*, Luke M. Milligan, *The Forgotten Right to Be Secure*, 65 HASTINGS L.J. 713, 756-59 (2014).

[62] *Wolf*, 338 U.S. at 46.

[63] *Id.* at 47 (Rutledge, J., dissenting).

[64] *Id.* (quoting Adamson v. California, 332 U.S. 46, 124 (1947) (Murphy, J., dissenting)).

[65] *Id.* (quoting *Palko*, 302 U.S. at 325).

[66] *Id.*

[67] *Id.* at 47-48; *see also* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920) (stating that a failure to exclude derivative evidence of constitutional violations—the fruits of poisonous trees—would reduce the Fourth Amendment to a "form of words").

> command I had heretofore thought to be "an indispensable need for a democratic society."[68]

The fifth opinion in *Wolf*—a three-sentence dissent by Justice Douglas—simply recites that the exclusionary sanction should apply to the states as a byproduct of "total incorporation."[69] It is the only opinion of the five in *Wolf* to not mention "ordered liberty."

III. LESSONS FROM *WOLF*

The "ordered liberty" inquiry drives judicial interpretations of the Fourteenth Amendment's Due Process Clause. But with pride of place comes considerable confusion, as justices over the decades have argued vehemently over the particularities of the inquiry. For instance:

- Does the inquiry recognize unenumerated interests?[70]
- Does the inquiry recognize each of the interests enumerated in the Bill of Rights?[71]
- When an interest is recognized, must the federal and state doctrinal configurations match?[72]

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[68] *Wolf*, 338 U.S. at 48 (Rutledge, J., dissenting) (quoting Harris v. United States, 331 U.S. 145, 161 (1947) (Frankfurter, J., dissenting)).

[69] *Id.* at 40 (Douglas, J., dissenting).

[70] *See, e.g.*, Louisiana v. Resweber, 329 U.S. 459, 466-67 (1947) (Frankfurter, J., concurring) (clarifying that the interests implicit in "ordered liberty" are not "contain[ed] in the particularities of the first eight amendments nor are they confined to them").

[71] *See, e.g.*, *Wolf*, 338 U.S. at 26 (stating that "ordered liberty" is "not defined by the specifically enumerated guarantees of the Bill of Rights").

[72] *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 765 (2010) (observing that the Court has "abandoned the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights").

- Is the inquiry an exclusive test?[73]
- How much weight is placed on history?[74]
- Does the inquiry have an extra-legal purpose? And if so, what is it?[75]
- Does the inquiry balance societal needs?[76]
- Does the inquiry recognize positive liberties?[77]

With these variances in mind, a close study of *Wolf v. Colorado* sheds good light on the immediate post-*Palko* understanding of the "ordered liberty" inquiry. *Wolf* is important in this sense because of its spectrum of "ordered liberty" analyses (two "ordered liberty"

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[73] *See, e.g.*, *id.* at 800 (Scalia, J., concurring) ("But the inquiry provides infinitely less scope for judicial invention when conducted under the Court's approach, since the field of candidates is immensely narrowed by the prior requirement that a right be rooted in this country's traditions. Justice STEVENS, on the other hand, is free to scan the universe for rights that he thinks 'implicit in the concept of ordered liberty.'"); Christopher R.J. Pace, *The Disorderly Origin of "Ordered Liberty,"* 86 TEX. B.J. 30, 31 (2023) ("Modern Supreme Court decisions have also struggled to define clearly the interplay between 'ordered liberty' and our nation's history and tradition in deciding whether a right is guaranteed under the due process clause. Some cases suggest that due process embraces a right if it is *either* 'deeply rooted in this Nation's history and tradition' *or* encompassed within the concept of 'ordered liberty'; others suggest the right needs to be *both* 'deeply rooted' *and* encompassed within the concept of 'ordered liberty'; and still others suggest that a right having deep roots in the nation's history and tradition is *essentially the same* as the right being a component of 'ordered liberty.'") (emphases in original).

[74] *See, e.g.*, *McDonald*, 561 U.S. at 764 (specifying that the historical analysis is trained on "our scheme" of "ordered liberty"); *id.* at 871 (Stevens, J., dissenting) (referencing "universal" interests).

[75] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 269 (2022) (emphasizing the role of democratic process in "ordered liberty"); Adamson v. California, 332 U.S. 46, 55 (1947) (Frankfurter, J., concurring) (clarifying that the standard is not about principles of justice and human flourishing); *Resweber*, 329 U.S. at 468 (Frankfurter, J., concurring) ("In an impressive body of decisions this Court has decided that the Due Process Clause of the Fourteenth Amendment expresses a demand for civilized standards . . . .").

[76] *See, e.g.*, *Dobbs*, 597 U.S. at 256 ("Ordered liberty sets limits and defines the boundary between competing interests.").

[77] *See, e.g.*, *McDonald*, 561 U.S. at 891 (Stevens, J., dissenting) (recognizing positive liberties are interests "implicit in the concept of ordered liberty"); *id.* ("In evaluating an asserted right to be free from particular gun-control restrictions, liberty is on both sides of the equation. Guns may be useful for self-defense, as well as for hunting and sport, but they also have a unique potential to facilitate death and destruction and thereby to destabilize ordered liberty. *Your* interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling safe from armed violence.") (emphases in original).

applications, analyzed across four opinions) and the particular justices involved (most notably, Justice Frankfurter).[78]

There are no fewer than eight aspects of the *Wolf* majority opinion worthy of emphasis in this regard. First and most importantly, the opinion goes to extraordinary lengths to elevate the authority of *Palko* and fix the "ordered liberty" inquiry as the governing doctrinal standard. It explains that *Palko* "speaks to us with the great weight of the authority, particularly in matters of civil liberty, of a court that included Mr. Chief Justice Hughes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo, to name only the dead."[79] *Wolf* continues, clarifying that "[f]or purposes of ascertaining the restrictions which the Due Process Clause imposed upon the States in the enforcement of their criminal law, we adhere to the views expressed in *Palko v. Connecticut*,"[80] and, that as a result, the term "liberty" in the Due Process Clause "exacts from the States . . . all that is 'implicit in the concept of ordered liberty.'"[81]

A second aspect of *Wolf* worth highlighting is the absoluteness with which it dismisses "total incorporation," calling the question "closed."[82]

> The notion that the "due process of law" guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution, and thereby incorporates them, has been rejected by this Court again and again, after impressive consideration. Only the other day, the Court

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[78] Justice Frankfurter discussed "ordered liberty" in ten opinions. *See supra* note 10. Additionally, he was the first justice to address the "ordered liberty" test after *Palko*. *See* Bridges v. California, 314 U.S. 252, 281-82 (1941) (Frankfurter, J., dissenting).

[79] Wolf v. Colorado, 338 U.S. 25, 26 (1949).

[80] *Id.*

[81] *Id*. at 27 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)); *see also Resweber*, 329 U.S. at 468-69 (Frankfurter, J., concurring) ("Insofar as due process under the Fourteenth Amendment requires the States to observe any of the immunities 'that are valid as against the federal government by force of the specific pledges of particular amendments' it does so because they 'have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.'") (quoting *Palko*, 302 U.S. at 324-25).

[82] *Wolf*, 338 U.S. at 26; *see also* Adamson v. California, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring) ("As judges charged with the delicate task of subjecting the government of a continent to the Rule of Law we must be particularly mindful that it is 'a constitution we are expounding,' so that it should not be imprisoned in what are merely legal forms even though they have the sanction of the Eighteenth Century.").

> reaffirmed this rejection after thorough reexamination of the scope and function of the Due Process Clause of the Fourteenth Amendment. The issue is closed.[83]

While four justices (Black, Douglas, Murphy, and Rutledge) in *Wolf* disagreed on this point, arguing instead for "total incorporation," three of the four affirmed that the best fallback inquiry centers on "ordered liberty."[84] Justice Rutledge, for example, wrote:

> [A]lthough I think that all "the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment," I welcome the fact that the Court, in its slower progress toward this goal, today finds the substance of the Fourth Amendment "to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, . . . valid as against the states."[85]

Third, *Wolf* clarifies that, even when an asserted interest is "implicit in the concept of ordered liberty," and thereby made applicable to the states, the doctrinal configurations at the state level will not necessarily match those at the federal level. This point was central to *Wolf*'s second holding (that the exclusionary remedy is not "implicit in the concept of ordered liberty") and was articulated in even finer detail in Justice Harlan's dissent in *Mapp v. Ohio*, which Frankfurter joined.[86] In *Mapp*, Justice Harlan wrote:

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[83] *Wolf*, 338 U.S. at 26; *see also Resweber*, 329 U.S. at 468 (Frankfurter, J., concurring) ("The Fourteenth Amendment did not mean to imprison the States into the limited experience of the eighteenth century."); *id*. (stating that the Due Process Clause expresses a demand for standards "which are not defined by the specifically enumerated guarantees of the Bill of Rights").

[84] *Wolf*, 338 U.S. at 39 (Black, J., concurring); *id*. at 41 (Murphy, J., dissenting); *id*. at 47 (Rutledge, J., dissenting). Justice Douglas's dissent offers no similar affirmation. *Id*. at 40 (Douglas, J., dissenting).

[85] *Id*. at 47 (Rutledge, J., dissenting) (quoting *Adamson*, 332 U.S. at 124 (Murphy, J., dissenting); *Palko*, 302 U.S. at 325)).

[86] *Id*. at 33; Mapp v. Ohio, 367 U.S. 643, 678 (1961) (Harlan, J., dissenting).

> This reasoning [of the majority] ultimately rests on the unsound premise that, because *Wolf* carried into the States, as part of "the concept of ordered liberty" embodied in the Fourteenth Amendment, the principle of "privacy" underlying the Fourth Amendment, it must follow that whatever configurations of the Fourth Amendment have been developed in the particularizing federal precedents are likewise to be deemed a part of "ordered liberty," and as such are enforceable against the States. For me, this does not follow at all.[87]
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> . . .
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> It cannot be too much emphasized that what was recognized in *Wolf* was not that the Fourth Amendment, as such, is enforceable against the States as a facet of due process, a view of the Fourteenth Amendment which, as *Wolf* itself pointed out has long since been discredited, but the principle of privacy "which is at the core of the Fourth Amendment."[88]

Fourth, *Wolf* emphasizes that the "ordered liberty" inquiry is protective of minority interests, realizing "deeper" and "more pervasive" conceptions of the Due Process Clause than offered by alternative standards.[89] Unlike the "total incorporation" framework, the "ordered liberty" test captures interests beyond those enumerated in the Bill of Rights, thereby serving to protect "the lowliest and the most outcast" and providing them with "all" that is "implicit in the concept of ordered liberty."[90]

Fifth, *Wolf* does not deny the challenges presented by the "ordered liberty" inquiry. The majority opinion acknowledges that the test is not a "tidy formula"[91] allowing for "easy

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[87] *Id.* at 678-79.

[88] *Id.* at 679 (quoting *Wolf*, 338 U.S. at 27).

[89] *Wolf*, 338 U.S. at 27.

[90] *Id.*

[91] *Id.; see also* Louisiana v. Resweber, 329 U.S. 459, 466 (1947) (Frankfurter, J., concurring) ("These are very broad terms by which to accommodate freedom and authority.").

determination[s]" and satisfying the "longing for certainty."[92] Rather, the "ordered liberty" inquiry requires judges to consider context and balance societal needs—needs, of course, in the broader sense of justice, order, and freedom. *Wolf* insists on judicial reflection and patience, calling upon "the gradual and empiric process of 'inclusion and exclusion.'"[93] *Wolf* continues:

> Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.[94]

Sixth, *Wolf* is clear that judges may not abdicate their interpretive duties in the face of uncertainty, but must apply the "ordered liberty" inquiry as best they can. It is a standard which "the courts *must* enforce,"[95] and, ultimately, the line "is for the court to draw[.]"[96]

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[92] *Wolf*, 338 U.S. at 27; *see also* Bridges v. California, 314 U.S. 252, 282 (1941) (Frankfurter, J., dissenting) ("'The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of a court to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process.'") (quoting Clark v. United States, 289 U.S. 1, 13 (1933)).

[93] *Wolf*, 338 U.S. at 27 (quoting Davidson v. New Orleans, 96 U.S. 97, 104 (1878)); *see also Bridges*, 314 U.S. at 284 (Frankfurter, J., dissenting) (observing that "the system of administering justice evolved" over centuries).

[94] *Wolf*, 338 U.S. at 27.

[95] *Id.* (emphasis added); *see also Resweber*, 329 U.S. at 468 (Frankfurter, J., concurring) ("As has been suggested from time to time, they may be too large to serve as the basis for adjudication, in that they allow much room for individual notions of policy. That is not our concern. The fact is that the duty of such adjudication on a basis no less narrow has been committed to this Court."); *id.* at 470 ("They are not the application of merely personal standards but the impersonal standards of society which alone judges, as the organs of Law, are empowered to enforce.").

[96] *Wolf*, 338 U.S. at 27; *see also Bridges*, 314 U.S. at 282 (Frankfurter, J., dissenting) ("It is then the function of a court to mediate . . . .").

Seventh, *Wolf* is agnostic in regards to any extra-legal purposes of the inquiry. *Wolf* does not dwell upon metaphysical truths or political theory. The majority explains that interests "implicit in the concept of ordered liberty" are simply those that are "basic to our free society."[97]

Finally, *Wolf* is clear that the teachings of history, particularly concerning the Commonwealth of Nations, are essential to the "ordered liberty" inquiry. *Wolf* highlights the "human rights enshrined in the history and the basic constitutional documents of English-speaking peoples."[98]

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[97] *Wolf*, 338 U.S. at 27; *see also* Adamson v. California, 332 U.S. 46, 65 (1947) (Frankfurter, J., concurring) ("If the basis of selection is merely that those provisions of the first eight Amendments are incorporated which commend themselves to individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test."); *Bridges*, 314 U.S. at 284 (Frankfurter, J., dissenting) (providing that the states may not "read out age-old means employed by states for securing the calm course of justice"). *But see Adamson*, 332 U.S. at 69 (Black, J., dissenting) ("This decision reasserts a constitutional theory . . . that this Court is endowed by the Constitution with boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what, at a particular time, constitutes 'civilized decency' and 'fundamental liberty and justice.'"); *Resweber*, 329 U.S. at 468 (Frankfurter, J., concurring) (stating that the Due Process Clause of the Fourteenth Amendment "did mean to withdraw from the States the right to act in ways that are offensive to a decent respect for the dignity of man, and heedless of his freedom"); *id.* ("In an impressive body of decisions this Court has decided that the Due Process Clause of the Fourteenth Amendment expresses a demand for civilized standards . . . ."); *id*. at 470 ("Once we are explicit in stating the problem before us in terms defined by an unbroken series of decisions, we cannot escape acknowledging that it involves the applications of standards of fairness and justice very broadly conceived."); *id*. at 471-72 ("Since I cannot say that it would be 'repugnant to the conscience of mankind' . . . for Louisiana to exercise the power on which she here stands, I cannot say that the Constitution withholds it.") (quoting Palko v. Connecticut, 302 U.S. 319, 323 (1937)).

[98] *Wolf*, 338 U.S. at 28; *see also Adamson*, 332 U.S. at 65-66 (Frankfurter, J., concurring) ("This guidance bids us to be duly mindful of the heritage of the past, with its great lessons of how liberties are won and how they are lost."); *Bridges*, 314 U.S. at 284 (Frankfurter, J., dissenting) ("The 'liberty' secured by the Fourteenth Amendment summarizes the experience of history. And the power exerted by the courts of California is deeply rooted in the system of administering justice evolved by liberty-loving English-speaking peoples."); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 277 (1856) (stating that the "due process" language of the Fifth Amendment embraces "those settled usages and modes of proceeding existing in the common and 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 this country").

CONCLUSION

The "ordered liberty" test is regularly called upon to resolve some of the most important constitutional issues in the United States. A close study of *Wolf v. Colorado* reminds us how "ordered liberty" was understood by the United States Supreme Court in the years immediately following *Palko v. Connecticut,* and consequently, provides an important baseline from which to assess the Court's more recent applications of the "ordered liberty" inquiry.