The Courts and Political Controversy

POLI 104I

Texts

- *O'Brien and Silverstein - Constitutional Law and Politics Volume One [UCSD Bookstore (Links to an external site.)] [Amazon (Links to an external site.)]*
- *O'Brien and Silverstein - Constitutional Law and Politics Volume Two [UCSD Bookstore (Links to an external site.)] [Amazon (Links to an external site.)]*

Where are we going?

- 6/27 - the relationship between law and politics.
- 6/29 - incorporation (OB2 – 4a)
- 7/4 - incitement (OB2 – 5a)
- 7/6 - obscenity (OB2 – 5b (first half))
- 7/11 - executive power (OB1 – 4a, d)
- 7/13 - election law (OB1 - 8c)
- 7/18 - threats (OB2 – 5b (second half))
- 7/20 - guns (OB2 365-387 + Bruen)
- 7/25 - privacy (OB2 – 11 + Dobbs)
- 7/27 - review

How to Succeed

- Attend the lectures or watch asynchronously
- Do the assigned reading
- Plan ahead for the response memos
  - These will be take-home essay format
  - Responses uploaded to Canvas
  - Prompts distributed in advance

Here's how your final grade will be calculated:

- Response Memo #1 - 25%
- Response Memo #2 - 35%
- Response Memo #3 - 40%

- This is a **writing-intensive course**. The assignments are all take-home essay format, and I'll circulate the prompts several days prior to the due date.
  The UCSD Writing Hub is an excellent resource for help with academic writing.

How to Succeed

- The **response memos** will ask you to make a legal recommendation to a client who is not familiar with the cases we will be studying.
- In the course of making this recommendation, you'll need to consider the points of law favorable to your client, as well as anticipate the argument that opposing counsel will be making.
- If this sounds difficult at the moment, don't worry. Once we've started reading cases, everything will be more clear.

Law and Politics

- We can think of law as a system of social ordering.
  - It's distinct from other systems of social ordering (e.g. custom, religion).
  - But all of them are types of social norms
    - Public
    - Impartial
    - Common knowledge
- We can think of politics as the activity that occurs in the absence of a higher authority.
  - Compare a pickup game of basketball to one with referees.

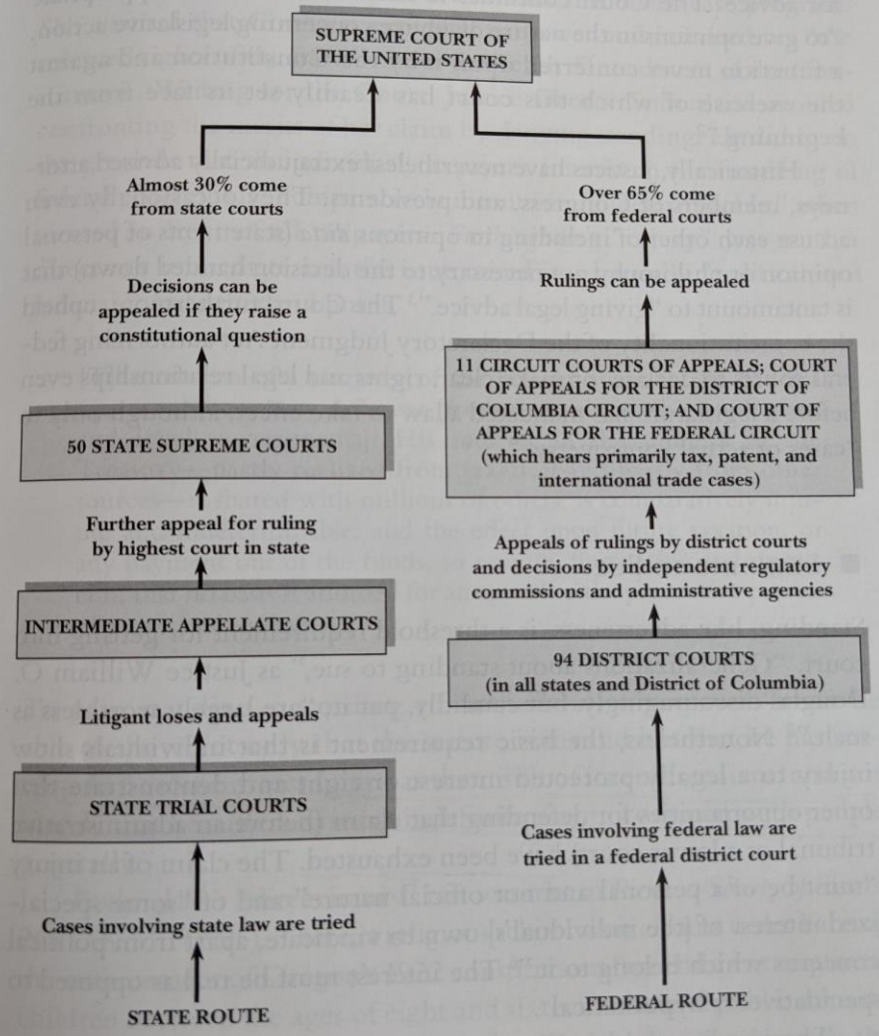
Law and Politics

- We can imagine a group of players deciding to institute rules, referees and enforcement mechanisms to improve the quality of their game.
  - Why would they do this?
  - Would the addition of rules and officials eliminate the “political” aspects of the game?
- And we can imagine the players giving justifications for their decision:
  - Legal naturalism: we chose these rules because they’re the right ones.
    - Self-evident (revelation, nature, reason).
    - A challenge to existing power structures?
  - Legal positivism: we chose these rules because they seem best to us.
    - Law depends on social facts.
    - Its strengths and weaknesses don’t matter as much as its existence.

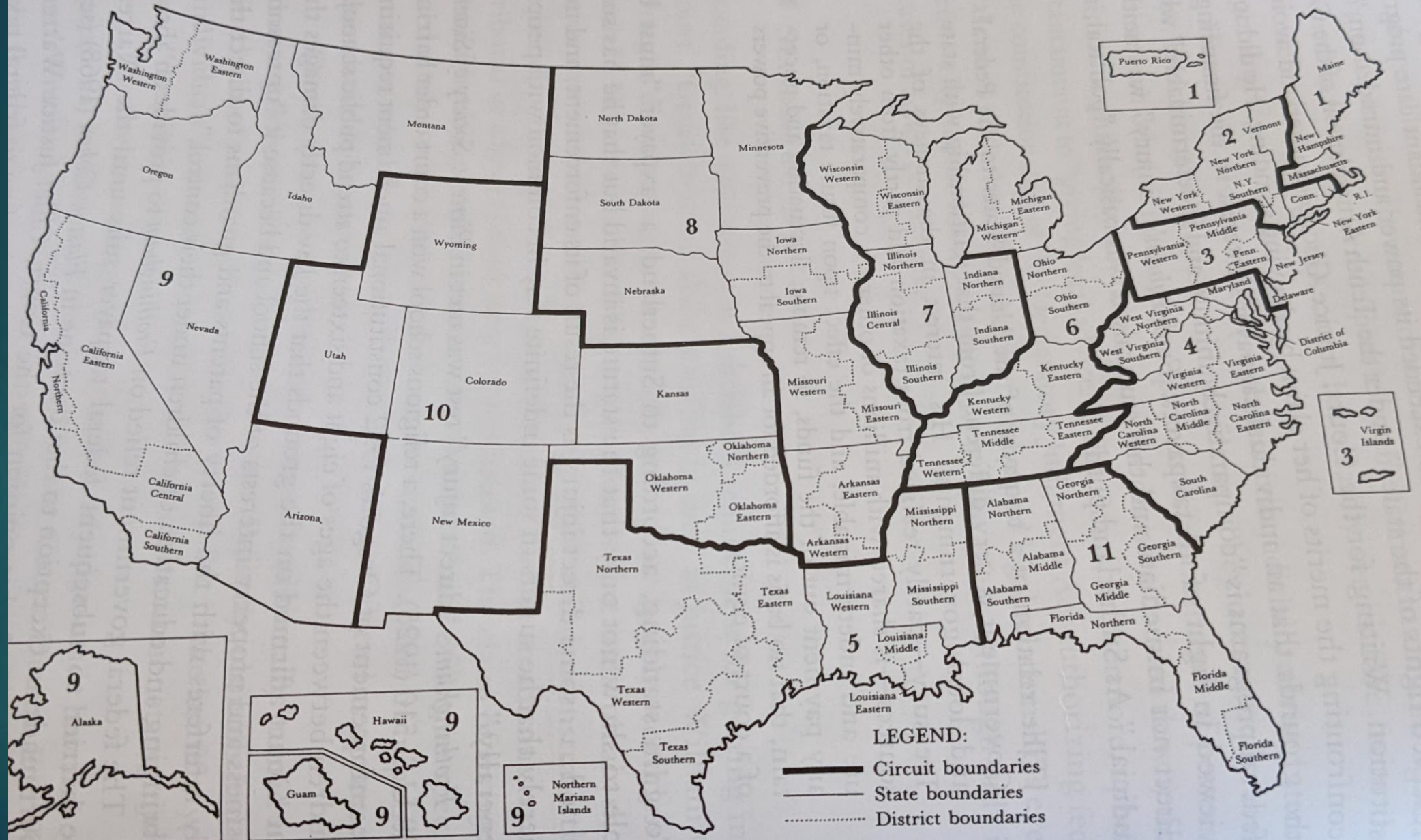
Preliminaries

- **Jurisdiction:** The Supreme Court's jurisdiction derives from two main sources:
  - Original Jurisdiction: Article III of the Constitution: "all Federal questions" [1%].
  - Appellate Jurisdiction: Congressional legislation providing a basis for hearing appeals of lower courts' decisions. Direct appeals gradually replaced by petitions for certiorari [99%].

Avenues of Appeal:
The Two Main Routes to the Supreme Court



Note: In addition, some cases come directly to the Supreme Court from trial courts when they involve reapportionment or civil rights disputes. Appeals from the Court of Military Appeals also go directly to the Supreme Court. A few cases come on "original jurisdiction" and involve disputes between state governments.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Maine
1
2
Vermont
New Hampshire
New York Northern
N.Y. Southern
New York Western
Massachusetts
Conn.
R.I.
New York Eastern
Pennsylvania Middle
Pennsylvania Western
3
Penn. Eastern
New Jersey
Maryland
Delaware
District of Columbia
West Virginia Northern
West Virginia Southern
4
Virginia Western
Virginia Eastern
North Carolina Middle
North Carolina Western
North Carolina Eastern
Virgin Islands
3
South Carolina
Georgia Northern
Georgia Southern
11
Georgia Middle
Alabama Northern
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Florida Northern
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Northern
California Central
California Southern
Utah
Colorado
10
Arizona
New Mexico
9
Alaska
Hawaii
9
Guam
9
9
Northern Mariana Islands
LEGEND:
Circuit boundaries
State boundaries
District boundaries

Preliminaries

- Even where the Supreme Court has jurisdiction, the case must be "**justiciable**."
  - Justiciable: "capable of judicial resolution."
- Justices may deny a petition for certiorari if the case lacks 1) **adverseness**, 2) is brought by parties who lack **standing** to sue, 3) poses issues that are not **ripe**, or 4) have become **moot**, or 5) involve a **political question**.

- **Adverseness:** The parties to a case must be "real and adverse" (no friendly suits or advisory opinions).

Preliminaries

- **Standing:** The parties to a case must show:
  - 1) Injury to a legally protected interest or right;
  - 2) Exhaustion of all other opportunities for defending that claim.
    - Via a lower court (or sometimes an administrative tribunal).
- Politics of standing: the Warren court (1953-1969) substantially lowered the threshold for standing, permitting more litigation of public policy issues.
  - Flast v. Cohen (1968): taxpayers have standing to challenge government expenditures if they can show 1) a logical relationship between their status as taxpayers and the challenged statue; 2) a connection between that status (as a taxpayer) and the "precise nature of the constitutional infringement." [Limited by the Roberts court in Hein v. Freedom from Religion Foundation (2007)].

Preliminaries

- **Standing** (post-Flast): Plaintiffs must still claim a personal injury, but now this can be as a surrogate for a public interest group [the personal injuries "embrace" a public injury.
- O'Brien: "The Roberts Court…invokes standing doctrines and demands for concrete personal injuries in order to avoid or delay deciding major controversies" (OB1:124).
  - Example: denying standing because plaintiffs have a "generalized grievance" rather than a "direct stake" (Hollingsworth v. Perry (2015)).

Preliminaries

- **Ripeness:** A case is not yet ripe (and thus not justiciable) if the injury claimed has not yet been realized, or if other avenues of appeal have not yet been exhausted.
  - Example: plaintiffs raising a federal claim when appealing a state court ruling must exhaust all appeals in the state courts (obtain a "final judgment").
- **Mootness:** A case is moot (and thus not justiciable) if pertinent facts or laws change so that there is no longer real adverseness or an actual case or controversy.
  - Example: plaintiff alleging discrimination in college admissions, but graduates before the case goes to trial (DeFunis v. Odegaard (1976)). [But see Roe v. Wade on pregnancy].
- O'Brien: the court uses both ripeness and mootness to "avoid, if not escape, deciding controversial political issues" (OB1:125).

Preliminaries

- **Political Questions:** Even when the court finds it has jurisdiction over a justiciable case, it may decline to rule because it decides that a case raises a "political question" that should be resolved by other political branches.
  - Alexis de Tocqueville: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." [Democracy in America; 1833].
  - O'Brien: "Litigation that reaches the court is political, and the justices for political reasons decide what and how to decide cases on their docket (OB1:133)."
- Examples: Justices have declined to rule on the apportionment of legislators [Baker v. Carr (1962)], the construction of voting districts [Davis v. Bandemer (1986)], disputes between members of Congress [Goldwater v. Carter (1979)], and challenges to Senate procedures [Nixon v. United States (1993)].

Preliminaries

- **Political Questions:** "…this controversy concerns matters which bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. **It is hostile to the democratic system to involve the judiciary in the politics of the people**. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of law." Justice Frankfurter, writing in the majority in Colegrove v. Green (1946).

Preliminaries

- ***Stare Decisis*:** the policy of letting prior decisions stand.
  - "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." Justice Brandeis writing in Burnet v. Coronado Oil (1932).
- Two kinds of *stare decisis*:
  - Statutory interpretation: the Court tends to be deferential because Congress can redraft.
  - Constitutional interpretation: the Court is the final arbiter of constitutional meaning.
- Competing considerations: stability in the law vs. "getting it right."
- "…elimination of constitutional *stare decisis* would represent explicit endorsement of the idea that the Constitution is **nothing more than what five Justices say it is**. This would undermine the rule of law." Justice Powell, 1989 lecture.

Preliminaries

- O'Brien: "…of the thousands of decisions handed down, only a small number of precedents are reversed…But of those overruled…half did not survive more than twenty years" (OB1:138).
- Justice Alito: "*Stare decisis* is like wine. If it's really new, you don't want to drink it…if it's really old it is very valuable or it has possibly turned to vinegar. There's this magical period in between. It [is] not difficult for a judge to make the stare decisis inquiry come out however the judge wants it [to] come out" (Speech to the Federalist Society, 2015).

■ CONSTITUTIONAL HISTORY
The Supreme Court's Reversal of Precedent (continued)

The following table places the Court's explicit reversals of precedents in historical perspective.

COURT	NUMBER OF PRECEDENTS OVERTURNED
Marshall Court (1801–1836)	3
Taney Court (1836–1864)	4
Chase Court (1864–1873)	7
Waite Court (1874–1888)	11
Fuller Court (1888–1910)	4
White Court (1910–1921)	5
Taft Court (1921–1930)	5
Hughes Court (1930–1941)	14
Stone Court (1941–1946)	12
Vinson Court (1946–1953)	12
Warren Court (1953–1969)	56
Burger Court (1969–1986)	55
Rehnquist Court (1986–2005)	42
Roberts Court (2005–)	16
Total	246

Based on Leon Friedman and Fred Israel, eds., *Justices of the United States Supreme Court*, vol. 4, 4th ed. (New York: Facts on File, 2013), 573–600, and as updated by the authors through the 2018 term, as of July, 1, 2019.

Civil Liberties Protected in the Constitution

- Article 1, Section 9: “No Bill of Attainder or ex post facto Law shall be passed.”
- Article 1, Section 9: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”
- Article 1, Section 10: “No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”
- Article 4, Section 2: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”

Constitutional Amendments

- *Amendments #1-#10 are known as the Bill of Rights (ratified 1791).*

- 1st: Congress shall make no law respecting an **establishment of religion**, or prohibiting the free exercise thereof; or abridging the **freedom of speech**, or of the **press**; or the right of the people peaceably to **assemble**, and to petition the Government for a redress of grievances.

- 2nd: A well regulated Militia, being necessary to the security of a free State, **the right of the people to keep and bear Arms, shall not be infringed.**

- 3rd: No Soldier shall, in time of peace be **quartered in any house**, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Constitutional Amendments

- 4th: The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable searches and seizures**, shall not be violated, and no Warrants shall issue, but upon **probable cause**, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

- 5th: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a **presentment or indictment of a Grand Jury**, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to **be twice put in jeopardy** of life or limb; nor shall be compelled in any criminal case to be a **witness against himself**, nor be deprived of life, liberty, or property, without **due process of law**; nor shall private property be taken for public use, without just compensation.

Constitutional Amendments

- 6th: In all criminal prosecutions, the accused shall enjoy the right to a **speedy and public trial**, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be **informed of the nature and cause of the accusation**; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
- 7th: In Suits at common law, where the value in controversy shall exceed twenty dollars, **the right of trial by jury shall be preserved**, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.
- 8th: **Excessive bail** shall not be required, nor **excessive fines** imposed, nor **cruel and unusual punishments** inflicted.

Constitutional Amendments

- 9th: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others **retained by the people**.
- 10th: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are **reserved to the States** respectively, or to the people.
- *Hamilton: A bill of rights may prove dangerous because it "would contain various exceptions to powers which are not granted, and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?" [1788]*
- 11th: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State [1795].

Constitutional Amendments

- 12th: The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; -- the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; -- The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. [And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President. --]* The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States [1804].

Constitutional Amendments

- 13th:
- Section 1.
  Neither **slavery** nor **involuntary servitude**, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
- Section 2.
  Congress shall have power to **enforce** this article by appropriate legislation.

Constitutional Amendments

- 14th: [1868]
- Ratification: evidence that some (but not all) of the proponents of the 14th amendment wanted to use it to apply the bill of rights top the states (OB2:320).
  - Scholars (and Supreme Court Justices) are still divided about the intent.
- Section 1.
  All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are **citizens** of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the **privileges or immunities** of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without **due process of law**; nor deny to any person within its jurisdiction the **equal protection of the laws**.

Constitutional Amendments

- 14th: [1868]
- Section 2.
  Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Constitutional Amendments

- 14th:
- Section 3.
  No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having **previously taken an oath**, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in **insurrection** or **rebellion** against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Constitutional Amendments

- 14th:
- Section 4.
  The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay **any debt or obligation incurred in aid of insurrection or rebellion against the United States**, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.
- Section 5.
  The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Constitutional Amendments

- 15th: [1870]
- Section 1.
  The right of citizens of the United States to vote **shall not be denied** or abridged by the United States or by any State on account of race, color, or previous condition of servitude--
- Section 2.
  The Congress shall have the power to enforce this article by appropriate legislation.

Reading for 6/29

- Incorporation (Section 4a of O'Brien, Volume 2)
  - Barron v. The Mayor and City of Baltimore
  - Butcher's Benevolent Association v. Crescent City Livestock Landing & Slaughterhouse Co.
  - Hurtado v. California
  - Palko v. Connecticut
  - Adamson v. California
  - Rochin v. California

Incorporation

- Barron v. The Mayor and City of Baltimore [1833].
  - There is “no expression indicating an intention to apply the Bill of Rights to the State governments…This court cannot so apply them.”
  - Dual sovereignty – citizens of the US and of states at the same time.
- Majority (Marshall): “If the original constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the state; if, in every inhibition intended to act on state power, words are employed, which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course, in framing the amendments, before that departure can be assumed. We search in vain for that reason.”
- Upheld in Permoli v. New Orleans (1845) and Mattox v. US (1895). Barron has never been expressly overturned.

Incorporation

- Butcher's Benevolent Association v. Crescent City Livestock Landing & Slaughterhouse Co. [1873].
  - Decided 5-4.
- The so-called **"Slaughterhouse Cases"** are important because the Court closed off the Privileges & Immunities clause of the 14th amendment as a possible basis for applying the Bill of Rights to the states.
- But this raised a question: what *does* the due process clause mean?
  - If it's not anchored in some text, then the Court will have to define it.

Incorporation

- Majority (Miller): 97 “It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.”
- 98 “We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.”
- 99 “The language is, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of *the United States*.' It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.”

Incorporation

- 100 “Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.”
- 101 “If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.”
- 121 “The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law.”

Incorporation

- Dissent (Field): 163 The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation.
- If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.
- 166 The privileges and immunities designated are those *which of right belong to the citizens of all free governments*. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons.

Incorporation

- Murray's Lessee v. Hoboken Land & Imp. Co (1856):
- Majority (Curtis): due process of law must mean something more then the actual existing law of the land, for otherwise it would be no restraint upon legislative power
- "To what principle, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to 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."

Incorporation

- Hurtado v. California [1884].
  - no incorporation of the 5th Amendment, states may experiment.
  - Dissent: Justice Harlan argued for **total incorporation** of the Bill of Rights via the 14th Amendment's Due Process clause.
- Majority (Matthews): "it is maintained on behalf of the plaintiff in error that the phrase 'due process of law' is equivalent to 'law of the land,'…that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which…crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the state; that, having been originally introduced into the constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the states themselves…"

Incorporation

- Dissent (Harlan): 'Due process of law,' within the meaning of the national constitution, does not import one thing with reference to the powers of the states and another with reference to the powers of the general government. If particular proceedings, conducted under the authority of the general government, and involving life, are prohibited because not constituting that due process of law required by the fifth amendment of the constitution of the United States, similar proceedings, conducted under the authority of a state, must be deemed illegal, as not being due process of law within the meaning of the fourteenth amendment. The words 'due process of law,' in the latter amendment, must receive the same interpretation they had at the common law from which they were derived, and which was given to them at the formation of the general government.
- Hurtado led to a number of cases where state practices falling short of the standard set by the Bill of Rights were upheld (OB2:322).
  - Maxwell v. Dow (1900): states need not provide jury trials at the Federal standard.
  - Twining v. New Jersey (1908): the 5th Amendment does not apply to the states.

Incorporation

- However, by the 1920s, the Court decided that the First Amendment's guarantees of freedom of speech and of the press *did* apply to the states via the 14th Amendment's due process clause.
  - Gilbert v. Minnesota (1920): state laws making it a crime to criticize the government violate the 14th amendment's due process clause.
  - Gitlow v. New York(1925): freedom of speech and of the press protected from impairment by the states via the due process clause.
- But the Court was reluctant to apply the criminal procedure guarantees found in the 4th-8th amendments.
  - Powell v. Alabama (1932): 5th and 6th amendments do not apply to the states.

Incorporation

- Palko v. Connecticut (1937):
  - Decided 8-1
- Majority (Cardozo): **Selective incorporation**
  - Some rights are **"so rooted in the traditions and conscience of our people as to be ranked as fundamental"** and **"implicit in the concept of ordered liberty."**
  - These include the 1st amendment freedoms, the 5th amendment's eminent domain provision, and the 6th amendment's right to counsel in capital cases.
  - Most other guarantees are simply formal rights not inherent in the concept of ordered liberty, and thus not binding on the states.

Incorporation

- Palko v. Connecticut (1937):
- Majority (Cardozo): “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. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”
- “On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our policy will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'? Hebert v. Louisiana, supra. The answer surely must be 'no.’”

Incorporation

- Adamson v. California (1947):
- Majority (Frankfurter): The 5th Amendment's due process clause and the 14th Amendment's due process clause are distinct and independent.
  - The 14th Amendment's due process clause requires balancing the rights of the accused against the state's interest in prosecuting crime. Ask what "**fundamental fairness**" requires.
- Dissent (Douglas): Standard is no better than selective incorporation, vague and ambiguous, natural law foundation criticized.
- Dissent (Black): We should be doing total incorporation based on the privileges and immunities clause of the 14th Amendment.
- Dissent (Murphy and Rutledge): Total incorporation **plus** any other fundamental rights not in the Bill of Rights.

Incorporation

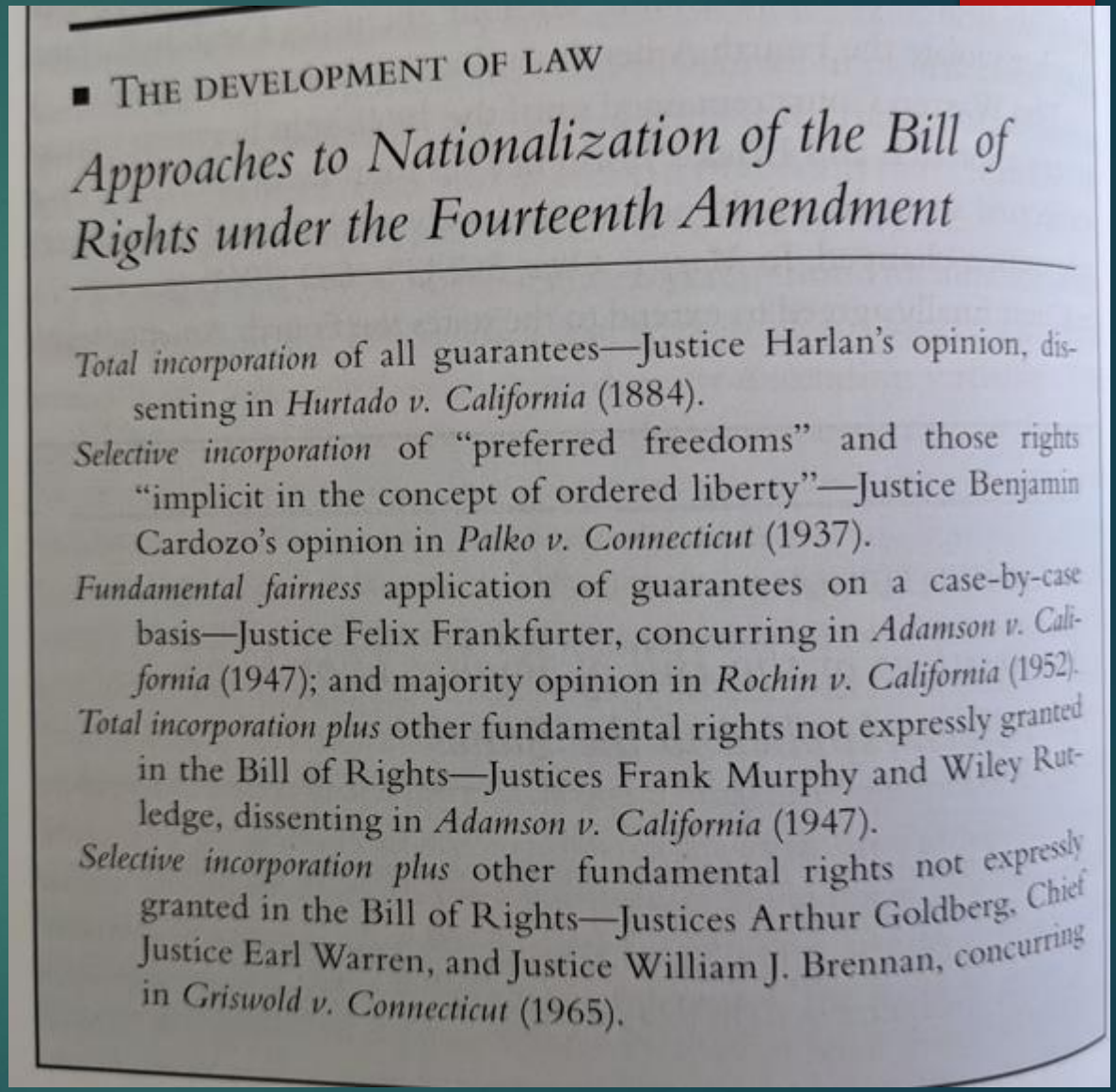
- Rochin v. California
- Majority (Frankfurter): Police practices violate the Due Process clause when they "shock the conscience," which is case-by-case rather than a general rule.
- "Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents - this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation."

Incorporation

- Mapp v. Ohio (1961)
  - Majority: the exclusionary rule (4th amendment) applies to the states.
- Griswold v. Connecticut (1965):
  - Majority: a right of privacy exists in the "penumbra" of the Bill of Rights.
  - Dissent [Black]: total incorporation plus makes the court a day-to-day constitutional convention.
- McDonald v. City of Chicago (2010):
  - Majority: states may not infringe the 2nd amendment's right to "keep and bear arms."
- Times v. Indiana (2019):
  - The 8th Amendment's ban on excessive fines applies to the states.

Incorporation

- As of 2022, the only guarantees in the Bill of Rights that the Court hasn't (yet) applied to the states are:
- the **3rd amendment's** limitation on quartering soldiers
- the 5th amendment's right to indictment by a grand jury,
- the 7th amendment's right to a grand jury in civil cases (OB2:327).



■ THE DEVELOPMENT OF LAW

Approaches to Nationalization of the Bill of Rights under the Fourteenth Amendment

Total incorporation of all guarantees—Justice Harlan's opinion, dissenting in *Hurtado v. California* (1884).

Selective incorporation of "preferred freedoms" and those rights "implicit in the concept of ordered liberty"—Justice Benjamin Cardozo's opinion in *Palko v. Connecticut* (1937).

Fundamental fairness application of guarantees on a case-by-case basis—Justice Felix Frankfurter, concurring in *Adamson v. California* (1947); and majority opinion in *Rochin v. California* (1952).

Total incorporation plus other fundamental rights not expressly granted in the Bill of Rights—Justices Frank Murphy and Wiley Rutledge, dissenting in *Adamson v. California* (1947).

Selective incorporation plus other fundamental rights not expressly granted in the Bill of Rights—Justices Arthur Goldberg, Chief Justice Earl Warren, and Justice William J. Brennan, concurring in *Griswold v. Connecticut* (1965).