The Courts and Political Controversy

POLI 104I

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; reversed.
- 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.
  - Majority (Miller): [S]uch a construction [of the Privileges or Immunities Clause] followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. ...We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

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): decided 5-4; affirmed.
- Majority (Reed): **Selective incorporation** (following *Palko*).
  - "It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship."
- Concurrence (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.

Incorporation

- Adamson v. California (1947): decided 5-4; affirmed.
- Dissent (Black): We should be doing **total incorporation** based on the privileges and immunities clause of the 14th Amendment. This selective incorporation gives the court unbridled power by empowering it to search for "natural" law.
  - "I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights."
- Dissent (Murphy and Rutledge): Total incorporation **plus** any other fundamental rights not in the Bill of Rights.

Incorporation

- Rochin v. California (1952): decided 8-0; reversed.
- Majority (Frankfurter): Police practices violate the Due Process clause when they "**shock the conscience**," which is case-by-case rather than a general rule.
- "…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

- Rochin v. California (1952): decided 8-0; reversed.
- “Due process of law thus conceived is not to be derided as resort to a revival of “natural law.” To believe that this judicial exercise of judgment could be avoided by freezing “due process of law” at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges, for whom the independence safeguarded by Article III of the Constitution was designed and who are presumably guided by established standards of judicial behavior…”
- “To practice the requisite **detachment** and to achieve sufficient **objectivity** no doubt demands of judges the habit of **self-discipline** and **self-criticism**, incertitude that one's own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.”

Incorporation

- Rochin v. California (1952): decided 8-0; reversed.
- Concurrence (Black, Douglas): the California rule of evidence is unconstitutional because it violates the 5th amendment right against self-incrimination, which applies to the states via the 14th amendment. It is *not* unconstitutional because it shocks the conscience of Supreme Court justices.
  - "…one may well ask what avenues of investigation are open to discover "canons" of conduct so universally favored that this Court should write them into the Constitution? All we are told is that the discovery must be made by an "evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts."" [Black]
  - "I long ago concluded that the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights"
- Irvine v. California (1954): bugging a house for a month without a warrant does *not* shock the conscience.

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.

■ THE DEVELOPMENT OF LAW

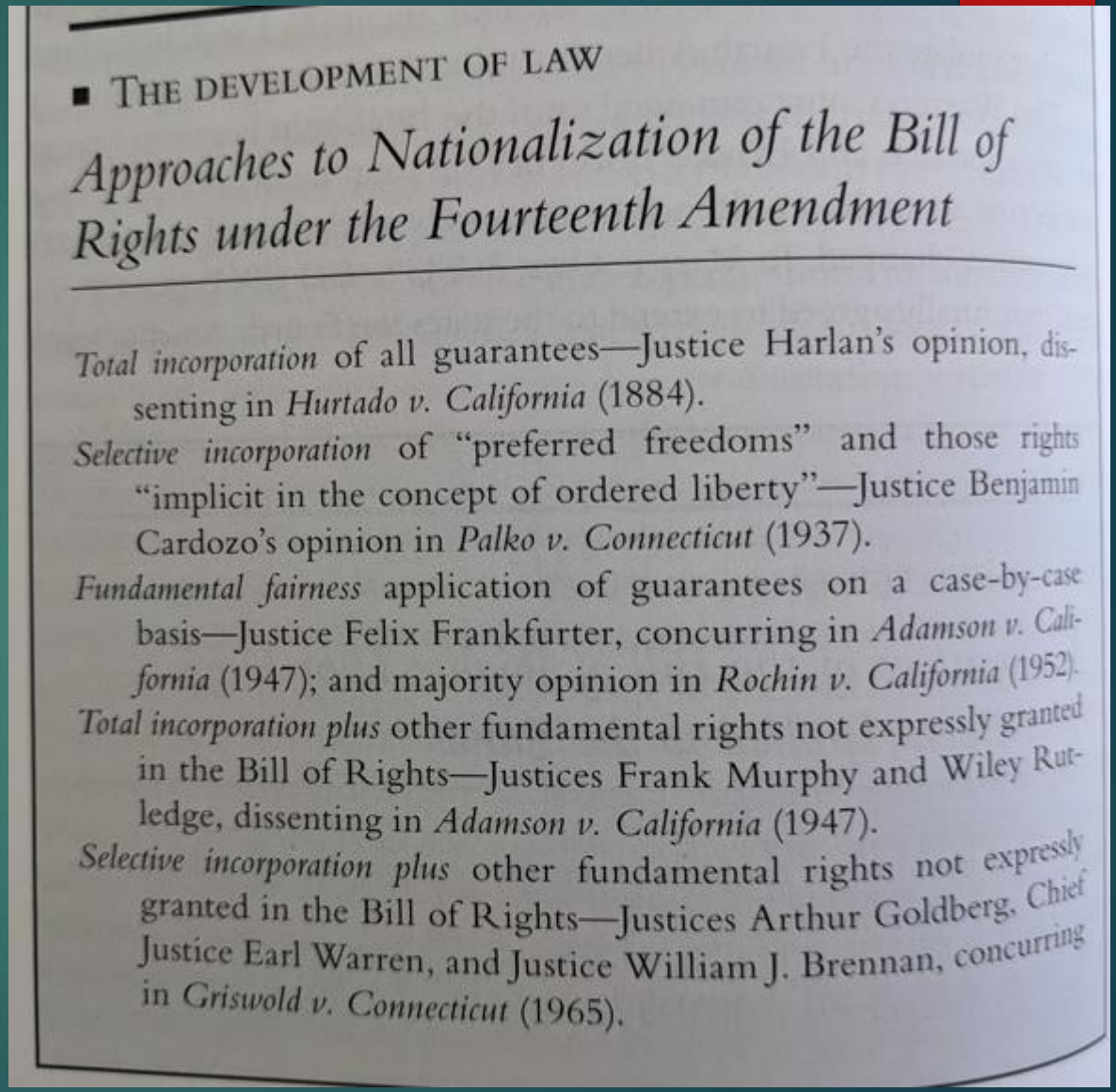
The Selective Nationalization of the Bill of Rights plus Other Fundamental Rights

GUARANTEE/RIGHT	AMENDMENT	YEAR	CASE
Public use and just compensation provisions condition the taking of private property by the government	5	1896	*Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403
		1897	*Chicago, Burlington & Quincy Railway Co. v. Chicago*, 166 U.S. 226
Freedom of speech	1	1927	*Fiske v. Kansas*, 274 U.S. 380 (also earlier in *dictum*: *Gitlow v. New York*, 268 U.S. 652 (1925); and *Gilbert v. Minnesota*, 254 U.S. 325 (1920)
Freedom of the press	1	1931	*Near v. Minnesota*, 283 U.S. 697
Fair trial and right to counsel in capital cases	6	1932	*Powell v. Alabama*, 287 U.S. 45
Freedom of religion	1	1934	*Hamilton v. Regents of the University of California*, 293 U.S. 245 (in *dictum*)
Freedom of assembly (and implicitly freedom to petition for redress of grievances)	1	1937	*De Jonge v. Oregon*, 299 U.S. 353
Free exercise of religion	1	1940	*Cantwell v. Connecticut*, 310 U.S. 296
Separation of church and state	1	1947	*Everson v. Board of Education*, 330 U.S. 1
Right to a public trial	6	1948	*In re Oliver*, 333 U.S. 257
Right against unreasonable searches and seizures	4	1949	*Wolf v. Colorado*, 338 U.S. 25
Freedom of association	1	1958	*NAACP v. Alabama*, 357 U.S. 449
Exclusionary rule	4	1961	*Mapp v. Ohio*, 367 U.S. 643
Ban against cruel and unusual punishments	8	1962	*Robinson v. California*, 370 U.S. 660
Right to counsel in all felony cases	6	1963	*Gideon v. Wainwright*, 372 U.S. 335
Right against self-incrimination	5	1964	*Malloy v. Hogan*, 378 U.S. 1
Right to confront witness (and by implication the right to be informed of the nature and cause of the accusation)	6	1965	*Pointer v. Texas*, 380 U.S. 400
Right to privacy	penumbra of 1, 3, 4, 5, and 14	1965	*Griswold v. Connecticut*, 381 U.S. 479
Right to impartial jury	6	1966	*Parker v. Gladden*, 385 U.S. 363
Right to speedy trial	6	1967	*Klopfer v. North Carolina*, 386 U.S. 213
Right to compulsory process for obtaining witnesses	6	1967	*Washington v. Texas*, 388 U.S. 14
Right to jury trial in nonpetty cases	6	1968	*Duncan v. Louisiana*, 391 U.S. 145

(continues)

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).