The Incorporation of the Bill of Rights: After 1947

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Introduction

The issue of the incorporation of the Bill of Rights to the states has been a contested issue since the drafting of the Bill of Rights itself. At its ratification, the Fourteenth Amendment, beginning "no state shall," became a potential vehicle for incorporation and has since invited heated debate. At the core of the debate are issues of fundamental rights and the relationship of the federal government to the states. If there are rights that are so fundamental to our freedom that we've protected them from action by the federal government, should we protect them from state governments as well? The question of fundamental rights has a broad reach, extending to the contentious issues of privacy, civil rights, and criminal process. In many ways, these debates were rekindled when the first eight amendments came to be considered for incorporation. The decision to incorporate most of the provisions of the Bill of Rights to the states, "transformed the basic structure of constitutional safeguards for individual political and civil liberties in the nation and profoundly altered the character of our federal system"[1] by extending the protection of rights to the courts with which citizens most frequently interact.

One of James Madison's original amendments submitted for inclusion in the constitution stated""No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press."[2] From the outset, such an amendment would incorporate the protection of several specific rights to the states. However, the motion did not pass through the Senate, and the issue was left open for future legislation. The events of the Civil War "exposed a serious flaw in the notion that states could be trusted to nurture individual rights"[3] and led to the ratification of the Fourteenth Amendment which was clearly intended to limit state action and defend individual rights to "life liberty and property." However, as the debate over incorporation arose, the court dealt with questions of what constituted "liberty," or

was included in "privileges or immunities" and "due process of law."

In considering these issues, the court found it relatively easy to incorporate most of the rights contained in the First Amendment but refused to allow the incorporation of Fifth Amendment rights to the protection against double jeopardy and self incrimination.[4] In 1942, an opinion in Betts v Brady which denied the incorporation of the right to government provided counsel for indigent defendants stated that "the application of the due process clause to State criminal proceedings [was] not governed by hard and fast rule."[5] Five years later, the opinions in Adamson v California[6] sought to establish such a rule. In a 5-4 decision, the majority of the court declared that Fifth Amendment rights were not incorporated to the states. Concurring with the majority, Justice Felix Frankfurter expressed his view of "fundamental fairness" which allowed certain fundamental rights to be incorporated through the due process clause, though not in the way that they were protected by the federal government and not by simply by virtue of being included in the Bill of Rights. In an impassioned dissent, Justice Hugo Black argued for total incorporation based on the fact that the history of the Bill of Rights and the Fourteenth Amendment indicated that the rights in the first eight amendments were, in fact, fundamental and were intended to apply to the states. Justice Frank Murphy's dissent argued that the first eight amendments, because they are fundamental, should be fully incorporated through the due process clause along with many other equally fundamental rights.

It is well known that Black's doctrine of total incorporation never gained a majority of the court, and a handful of provisions in the Bill of Rights still remain unincorporated. However, after the Adamson case, the court began a rapid process of incorporating the majority of the provisions in the first eight amendments, resulting in near-total incorporation. At first it would "seem extraordinary that a theory going to the very nature of our Constitution and having such profound effects for all of us should be carrying the day without ever having been explicated in a majority opinion of the Court."[7] This paper seeks to explain how and why the Court pursued selective incorporation after the Adamson case in 1947.

There are several hypotheses that offer potential explanations of the phenomenon. The first of these is that changes in the court's composition led to a shift away from the majority that previously opposed incorporation. The second is that changes in the types of rights being incorporated invited new motivations and justifications for incorporation.

Thirdly, it is possible that strategic behavior[8] and compromise on the part of Justice Black and other incorporationists on the Court allowed incorporation to continue despite internal disagreements. The fourth claims that respect for stare decisis influenced the court's formation of incorporation doctrine, and after the first provisions were incorporated, respect for the doctrine of stare decisis and a desire for consistency led the court to solidify its doctrine, and continue incorporation of other provisions. The final hypothesis offers a state-based explanation, claiming that the court only incorporated provisions of the Bill of Rights when it was clear that the states had already done so in practice. This paper will apply data from votes, opinions and especially memoranda between justices in order to examine these hypotheses and conclude that while other factors contributed to incorporation, the second hypothesis attributing incorporation to changes in the "types of rights" being incorporated, and the third hypothesis following the strategic model of judicial behavior are the most explanatory of the court's behavior overall. According to these findings, the court built up to near-complete incorporation by 1969 using selective incorporation due to the court's response to a changing concept of fundamental rights and utilizing a process of negotiation and compromise.

Changes on the Court

The hypothesis that personnel changes on the court could have caused the shift towards selective incorporation would be a simple explanation for such a dramatic shift the court's position in such a short period of time. This hypothesis stems from a simple conception of justices as ideological actors. That is to say, if all justices were either pro- or anti- incorporation and voted consistently according to their ideological preference on the question of incorporation alone, then pro-incorporation justices replacing anti-incorporation justices on the court would be sufficient to explain the change. At first glance, this hypothesis is plausible. Between 1947 and 1961 when incorporation accelerated, Justices Reed, Vinson, Jackson and Burton, all members of the "anti-incorporation" majority, had left the court. Their places were eventually filled by Justices Brennan, Stewart, and Warren who were typically "pro-incorporation" justices. However, this simple analysis is flawed for many reasons.

Firstly, it cannot be assumed that justices vote simply based on ideology.[9] Other factors including the positions of other justices can

influence any Justice's vote. Secondly, in all of the cases concerning incorporation, the incorporation of the right itself was always a subtext to the primary consideration of the specific right in application to the facts of the case. Because of this, justices' votes were not always for or against incorporation, but rather depended on other issues at question in the case. For example, in Wolf v Colorado, Justices Black and Douglas each argued the incorporation issue based on the logic of Black's Adamson opinion. However, due to other factors of the case, Black submitted his opinion as a concurrence, and Douglas as a dissent. Cases like these demonstrate that an incorporation coalition can be split in votes because of other compelling issues at hand. As a result, the debate over incorporation was often played out in concurrences and dissents except for in a few major cases.[10] These factors together contribute to the fact that votes are unreliable both for determining ideology and for measuring positions specifically on the issue of incorporation. Furthermore, there were divisions even among pro-incorporationists of the method and extend of incorporation, which will be explained later. Because of this, an analysis of the balance of the court must be much more complex than a binary, pro- or anti- assessment. Such a nuanced analysis eliminates the possibility of determining a "balance" on the court and demands a deeper observation of the boundaries between views and how they may have shifted from concurrence to dissent in any particular case. This perspective is characteristic of the strategic view of behavior.

However, none of this is to say that the composition of the court had no influence on the course of incorporation. It simply determines that as a single element, change in the membership of the court cannot be the controlling explanatory factor. In fact, it is plain to see that the shift to an overall incorporationist stance began with the first years of the Warren court. This court continued incorporation to the last day of Warren's tenure on the court in which it handed down the last incorporation case, Benton v Maryland.[11] In general, the Warren court is characterized by a greater focus on individual and civil rights as well as a reinterpretation of criminal process rights. The incorporation of these rights to the states was a large part of the expansion of their defense overall.

One characteristic of the Warren court is that it was not deferential to precedent insofar as rights are limited by historically-bound ideals. Two quotes from members of the court epitomize this dichotomy. Frankfurter, in Wolf v Colorado, referred to precedent[12] and declared of incorporation: "The issue is closed." In contrast, Justice

Douglas, after highlighting the inability of previous interpretation of doctrine to account for fundamental rights remarked in Gideon v Wainwright, states, "happily, all constitutional questions are always open."[13] This view allowed the court to reassess issues of segregation, criminal procedure and privacy, overturning a significant amount of court precedent in the process. In terms of incorporation, the court appealed to a "change in facts"[14] or the "light of contemporary human knowledge"[15] in order to reinterpret the concept of fundamental rights within the Palko doctrine. Because of their willingness to reassess past doctrine in the light of expanding individual and civil rights, the portion of the court in favor of selective incorporation was about to appropriate elements of the fundamental fairness doctrine to support its position. In doing so, the court shifted the issue from whether fundamental rights should be incorporated, which became settled doctrine, to a debate over which rights are considered to be fundamental.

Change in Types of Rights Being Incorporated

Another possible explanation for selective incorporation is that there was a change in the types of rights being incorporated before and after the Adamson case. This means that the rights considered for incorporation fall into different categories which require different treatment over the course of the court's treatment of incorporation. The hypothesis is drawn from a general discrepancy in the amount of discussion in incorporation cases which dealt with First Amendment rights, criminal process rights, and especially the overturning of precedent. First Amendment rights seem to be incorporated with little debate, even in mere dicta, as in Gitlow v New York incorporating freedom of speech. Many more pages of opinions and a much greater volume of memoranda circulated in cases regarding the incorporation of the other types of rights.

Furthermore, the mere wording with which we refer to rights in the bill of rights show a marked distinction between different types of rights along the lines established by the court's treatment in opinions. First Amendment rights are referred to in substantive terms, for example, as the "freedom of speech" or "freedom of association." Fifth Amendment rights, on the other hand, are phrased as the "right to protection against double jeopardy" or the "right to protection against self-incrimination." This difference reveals itself as a contrast between positive and negative rights. First Amendment provisions restrain government action in

order not to infringe on rights whereas other rights contained in the Bill of Rights require a greater commitment of government energy and resources to upholding the right or privilege. This is even more apparent in the cases concerning rules like the "Miranda rules" and the "exclusionary rule" which, when incorporated, place a great burden on the states.

It is certainly true that the types of rights being considered for incorporation cause changes in the court's approach in selective incorporation, and this hypothesis serves to frame how the court followed selective incorporation by establishing categories in which it was required to reinterpret or extend existing doctrine to include different types of rights. Before Adamson, only First Amendment rights had been incorporated to the states. After Adamson the court began to incorporate criminal process rights, followed by rights that had previously been ruled not to be incorporated, and finally attendant provisions like the exclusionary rule that had been recognized as fundamental to the function of other incorporated rights at the federal level. The ease with which First Amendment rights were incorporated is remarkable in contrast with the debate over the incorporation of rights in the latter categories, but is explained by the differences in the view of the court on which rights were considered fundamental or "implicit in the concept of ordered liberty."[16] In fact, the opinions which denied the incorporation of 4th and 5th amendment rights in 1908 and 1937 left "open doors" through which rights considered to be fundamental could be "incorporated," "absorbed," or at least "applied" to the states. It was through these doors that the First Amendment rights were incorporated early on, and a changing concept of fundamental rights allowed for the latter rights to be incorporated later on.

"Open Doors" in Early Precedent

These "open doors," have their origins in Twining v New Jersey [17] and Palko v Connecticut which both originally denied the incorporation of specific criminal process rights.[18] The first, less important open door, found in Twining, was a lack of express prohibition of incorporation. The Twining opinion states that "the first eight amendments are restrictive only of National action, and while the Fourteenth Amendment restrained and limited state action, it did not take up and protect citizens of the states from action by the states as to all matters in the first eight amendments."[19] This open door implies that some of the rights contained within the Bill

of Rights are still applicable to the restriction of the states. Although this is not incorporation per se it does not expressly prohibit the possibility that certain rights can be incorporated to the states. Twining became a major part of Justice Frankfurter's Adamson concurrence and one of the bases for his conception of fundamental fairness and due process as the means by which fundamental rights are protected from the states. As will be explained later, this concept of the role of due process was combined with definitions of fundamentality beyond the Twining or Frankfurter conceptions in order to constitute part of the court's justification for selective incorporation.

The second "open door" came as a part of Palko v Connecticut[20] which clarified which rights could be considered fundamental by saying that those rights which have been incorporated and are eligible for incorporation are such because "neither liberty nor justice would exist if they were sacrificed," and because they are "implicit in the concept of ordered liberty and as such, enforceable to the states."[21] Through this open door came certain tests for fundamentality. The first of these is establishing a historical context for the fundamental nature of the law. Because the court had previously decided that the rights contained in the first amendment were fundamental to the function of the federal government, these justifications were the basis of the pre-1947 cases which incorporated the rights of the first amendment.[22] In post-1947 First Amendment cases, this allowed the court simply to confirm the incorporation of those rights, at times in a single line of the opinion.[23]

A second test was to consider whether the American system of government could function properly without the protection of the right in state courts. This creates a narrow conception of "liberty" by attempting to distinguish between essential and nonessential rights. For this reason, provisions in the bill of rights that are more procedural in nature were less likely to be incorporated than substantive rights thought to guide existing procedure. Although this conception of fundamental rights did not initially reach out to criminal process rights, these issues were the ones that appeared before the Warren court in the years after Adamson. The court utilized justifications from Palko in order to recognize rights in the latter categories through a changing conception of fundamentality. Once the court recognized the "fundamental nature" of the elements of fair trial rules and criminal procedure, they were less able to conceive of a system that could function without the protection of those rights.

Conceptual Changes to Fundamentality in Criminal Law Amendments

It is clear, then, that in order to incorporate criminal process rights, overturn precedent, or incorporate attendant procedural safeguards, it was necessary for the court to establish a new definition of "fundamental" under Palko. Palko, the source of the fundamentality tests, applied them to the protection against double jeopardy and found that it was a not fundamental right. Thereafter, the court was dealing with a different, more challenging type of rights. When the court faced questions over the subsequent amendments, starting with Betts v Brady in 1942, it began to recognize that the "application of the due process clause to State criminal proceedings is not governed by hard and fast rule" and could only be determined fundamental if its denial was "shocking to the universal sense of justice"[24] based on the facts of each individual case. In Justice Black's dissent in Adamson, whose majority had rejected the incorporation of 5th amendment protection against self-incrimination, he argued that "nothing in the Palko opinion recommends that the Court apply part of an amendment's established meaning, and discard that part which does not suit the current style of fundamentals."[25] Contained within his assertion of total incorporation was Black's broad view of fundamental rights as any of the rights contained within the Bill of Rights simply by virtue of their inclusion in the Constitution.

While, again, Black's total incorporation was never accepted, the court was willing to go as far as saying that several rights contained in the Bill of Rights could be incorporated to the states, especially in the realm of criminal process rights. As in the words of Harry Friendly in 1965, "the present Justices feel that if their predecessors could arrange for the absorption of some such pro- visions in the due process clause, they ought to possess similar absorptive capacity as to other provisions equally important [fundamental] in their eyes."[26] For example, In Wolf v Colorado, the court incorporated the Fourth Amendment protection against unreasonable searches and seizures (although it rejected incorporation of the procedural safeguard of the exclusionary rule for the time being) by establishing that such a right was considered to be "implicit in the concept of ordered liberty," and thus, was fundamental. Robinson v California[27] incorporated the Eighth Amendment prohibition of cruel and unusual punishment on similar grounds, citing "contemporary human knowledge" as the basis on which its fundamentality was recognized. These cases combined the justifications

set out in Palko with an evolving conception of fundamental rights in order to incorporate previously unconsidered criminal process rights.

"Mirror Cases:" Overturning Precedent for non-First Amendment Rights

When it came to overturning precedent in incorporation cases, the court faced a greater burden to justify its departure from prior rulings. These cases generated copious amounts of memoranda and long opinions focused on the issue of incorporation almost exclusively. In the "mirror cases" which reversed prior decisions, the court found its forum in which to clearly express divergent theories of incorporation. The first clear statement of these theories was in Adamson v California, which threatened to overturn the precedent of Twining v New Jersey. Although Adamson did not overturn Twining, it garnered a 5-4 decision and four separate opinions. Frankfurter expressed his theory of fundamental fairness as the recognition of fundamental rights separate from, but at times parallel to those in the Bill of Rights. This view was in keeping with the precedent of Twining and a strict interpretation of the doctrine in Palko. Black's and Murphy's dissents, however, were expressions of a reinterpretation of fundamental rights applied to the Palko doctrine according to a detailed historical analysis of the original intent of the Bill of Rights and the Fourteenth Amendments.

The next "mirror" case was Mapp v Ohio[28] which overturned the recent Wolf decision by incorporating the use of the exclusionary rule in Fourth Amendment cases to the states. The Mapp justification for departing with precedent was that there had been a change in the facts since Wolf and most states had put the exclusionary rule into practice, thus confirming its status as "implicit in the concept of ordered liberty" in that it is necessary to the application of the Fourth Amendment rights. Malloy v Hogan, which overturned Twining and Adamson, relied heavily on the logic of Mapp, arguing that a shift in state cases, and the Fifth Amendment's close relation to the Fourth allowed the right to protection against self-incrimination to be incorporated to the states when it had not been in the past. The majority opinion in Gideon v Wainwright stated that Betts, which it overturned to incorporate the right to government provided counsel, was simply wrong. Gideon argued that historical data, including especially the decision in Powell v Alabama[29], thoroughly established the right to government-provided counsel as a fundamental right, applicable to the states by the Palko doctrine. Justice Harlan's dissent adheres closely to Frankfurter's interpretation of parallel, but not incorporated rights. As such, he argues that the right is not fundamental because of the lack of "special circumstances" similar to the illiteracy

and low intelligence involved in the specific facts of Powell in all cases. According to this logic, government-provided counsel is a privilege incorporated to the states in its substantive form, which is restricted to the specific facts of the case which declared it to be "fundamental" in the circumstances.

Finally, in Benton v Maryland[30], the court reversed the ruling of Palko in order to incorporate the right to protection against double jeopardy. The majority opinion declared that the right was "fundamental to the American scheme of justice," and based reinforced this argument with historical legal examples, the constitutional text of Article III and existing state laws. The dissent again relied on fundamental fairness to refuse that this right was fundamental or applicable to the states.

While these cases generated explicit arguments for and against selective incorporation, they also illustrated the court's response to the extra demands placed on cases which overturn precedent. The court drew on historical facts, alternative precedents, and state behavior in order to establish the fundamental nature of the rights which were to be incorporated through the due process clause of the Fourteenth Amendment.

Applying Provisions to the States with "Full Force"

The final category of rights in the course of incorporation was constituted by those that were not rights at all, but rather procedural safeguards established by the court in support of rights enumerated in the Bill of Rights, sometimes referred to as ""The "fundamental liberty interest" or "unenumerated right" branch of substantive due process."[31] It would seem that these would be the most difficult to defend under any theory of selective incorporation since they are not rights and are not found anywhere in the text of the Constitution. However, the court relied on precedent in federal cases[32] in order to establish that these rules and procedures were fundamental to the protection of the fundamental rights already incorporated to the states. Miranda v Arizona, Ker v California, and Aguilar v Texas established, as stated in Miranda, that "the substantive standards underlying the privilege applied with full force to state court proceedings."[33] By doing so, the court established that selective incorporated translated the provisions of the bill of rights with full force and in the same way that they had been applied to the federal government. Furthermore, by incorporating these provisions, selective incorporation theory was clearly asserted over fundamental

fairness. Because fundamental fairness did not incorporate rights as they appeared in the Bill of Rights, proponents of fundamental fairness like Harlan and Frankfurter certainly would not have applied procedural safeguards to the states as well.

Strategic Behavior

The third hypothesis which seeks to explain why the court was able to pursue selective incorporation is that of selective behavior on the part of the justices, particularly Justice Black. This hypothesis is drawn directly from Lee Epstein and Jack Knight's book The Choices Justices Make.[34] The argument that this book presents is that justices are motivated to engage in strategic behavior during case selection, conference discussion, opinion circulation and voting.[35] These activities can include bargaining, forward thinking, manipulating the agenda, and strategic opinion writing.[36] Based on data drawn from voting patterns, opinions (especially concurring and dissenting), and memoranda it is clear that strategic behavior played a major role in the formation of opinions that advanced selective incorporation after Adamson.

This compromised is characterized in a line from Black's Adamson dissent in which he states, "If the choice must be between the selective process of the Palko decision, applying some of the Bill of Rights to the States, or the Twining rule, applying none of them, I would choose the Palko selective process."[37] Several correspondents praised this dissent and commented that his opinion "must eventually become the Law of the Court"[38] whether "Whether this evolutionary process be slow or fast."[39] Although Black's primary preference would be total incorporation exactly as stated in his Adamson opinion, he recognizes that such a position will never gain a majority in the court, and settles for supporting selective incorporation instead, since it is a position that can feasibly be executed in court decisions.

While Black's consistent compromise in recognizing selective incorporation is one example of strategic behavior at the opinion circulating and voting stages, it is not clear from the data that he or any other justices engaged in strategic behavior in the case selection stage, or using the method of manipulating the agenda.[40] This mainly can be attributed to the fact that many incorporation cases were not heard merely because of the incorporation question. In fact, many cases, especially those incorporating previously unincorporated rights, devoted a very small amount of attention to the issue of whether or not

the right was incorporated. In fact, in many of these cases there is no mention of incorporation at all in the memoranda circulated among the justices. Nevertheless, strategic behavior did in fact shape the opinions in the cases which centered on the incorporation debate. Considered individually, these cases were focused on constructing a wide majority through bargaining and strategic opinion writing. As a whole, it is clear that Black and other justices including Douglas were forward-thinking in their consideration of the overall arc of selective incorporation as a gradual process that would eventually achieve the basic goals of total incorporation, but using a different justification.

Bargaining and Strategic Opinion Writing

In individual cases, it was important for supporters of incorporation to gain as large of a majority as possible and build coalitions so that pro-incorporation arguments could be included in the majority opinion. In order to make this happen, the justices most often circulated draft opinions and requested advice or suggestions from other justices whose votes might be tenuous. Justices who did not feel that their opinions were being considered would also file separate concurrences or even dissents, indicating that the majority opinion did not do enough to incorporate their views. Because Black's opinion in Adamson v California was a dissent, he did not exhibit any obvious strategic behavior to get others to join. In fact, Douglas was the only Justice who did, and Murphy and Rutledge dissented separately. The first case in which this strategic behavior was clearly manifested was Mapp v Ohio. In memos circulated with drafts of Clark's majority opinion, Black remarked that he thought the opinion actually incorporated the Fifth Amendment in addition to the Fourth's attendant exclusionary rule. When Clark replied that it was not his intention to also include the Fifth, Black was cautious and stated,

> my agreement to your opinion depends upon my understanding that you read Wolf as having held, and that we are holding here, that the Fourth Amendment as a whole is applicable to the States…If I am wrong in this and your opinion means that the Fourth Amendment does not apply to the States as a whole, I am unwilling to agree to decide this crucial question in this case and prefer to wait for a case that directly and immediately involves application of the Fourth Amendment…[41]

Clark replied immediately that it was his intention so that Black would stay with his majority. Black concurred in the result but did not

agree that the exclusionary rule should also be incorporated since it was not part of the text of the Fourth Amendment. Clark's reassurance allowed Black to stay in the majority. As Douglas usually follows Black, and indeed both of their concurrences cited the Wolf precedent as controlling, there was a chance that both could have changed their votes, which would have reversed the majority to a 5-4 decision against the incorporation of the exclusionary rule. Aware of this, Clark was quick to accommodate Black's concerns. Thus, Black and Clark were able to serve their own interests through bargaining and compromise.

Gideon v Wainwright is another classic example of strategic behavior through negotiations between justices. Brennan, in agreement with Black's opinion incorporating the right to government counsel and overruling Betts, expresses that he has "doubts whether Potter shares the view" but feels that "Byron [White] and Arthur [Goldberg] will find it entirely acceptable."[42] However, Stewart only made one slight suggestion (which Black accommodated) then praised the opinion saying, "you have done an admirably skillful and fair job in accommodating a variety of views."[43] Brennan also made extensive suggestions which were all included in the final opinion. By responding to Brennan and Stewart's suggestions, Black was able to write an opinion that included a wide range of justifications for the incorporation of the right to government provided counsel. Evidently, Douglas's view on incorporation had also begun to diverge from the one Black expressed, but the moderate opinion kept him in agreement.[44] Although the vote in the case was unanimous, Clark and Harlan concurred in the result and opposed incorporation in their concurrences. Nevertheless, Black's bargaining and willingness to compromise allowed him to build a coalition of 6-2 in favor of the incorporation of the right.

This coalition building continued in the same manner throughout the 1960s cases. In Malloy v Hogan, Douglas wrote to Brennan with concern that his opinion was too weak and failed to overturn Twining. In his memo he used subtle bargaining language to indicate that he was not certain to agree with the opinion without the extensive changes he suggested:

> I had trouble enough with Gideon, although Hugo steered close enough to the line to make it possible for me to go along… Each of us travels his own path of necessity, and I really see no great urgency in getting a Court opinion. Perhaps the suggestions I have made reach beyond your ability to accommodate.[45]

Brennan responded the next day explaining his intent and noted "I'd be very hopeful that we could arrive at some kind of agreement in Malloy because otherwise I'll not have a court for the opinion."[46] Following Black's example in Gideon, Brennan included all of Douglas's suggestions; in fact, the "copy which was marked-up became the copy he sent to the printer."[47] Malloy was one of the mirror cases which overturned a significant precedent in both Twining and Adamson. Because of this, the case was decided mainly on the incorporation question and since it was ultimately a 5-4 decision, Douglas's agreement was crucially important to maintaining a majority.

Two-way strategic behavior like in Malloy became the norm in subsequent cases. With the exception of Harlan's constant dissents, no opinion contained a "pure" expression of incorporation doctrine. When Black attempted to include, "by the mere fact that this right appears in our Bill of Rights…"[48] in the opinion for Pointer v Texas, Justice Goldberg suggested that he could remove such a pure, absolute statement "without affecting the force of [his] opinion."[49] Instead, every opinion was a mash-up of several distinct but non-conflicting justifications contributed by each particular Justice as the means by which incorporation could be executed. This behavior resulted in opinions like that of Earl Warren, who was especially concerned with building large majorities, in Klopfer v North Carolina.[50] In this opinion, Warren cites the logic of Malloy, Pointer and Gideon, but also looks to such diverse sources as the Magna Carta, Sir Edward Coke, the Virginia Declaration of Rights of 1776 and contemporary state statutes to establish the fundamentality of the right to a speedy trial. Furthermore, Warren refers to both the due process clause and "life liberty or property"[51] from the Fourteenth Amendment.[52] In writing his opinion in such a way that other justices' opinions were already included, Warren was able to craft an opinion that drew very little discussion in memoranda, excepting statements of "I agree." This opinion stood as a single statement for the court except for Harlan's (expected) dissent.

Forward-looking Strategic Behavior

Over the course of selective incorporation, it is clear that Black was willing to sacrifice his first preference of total incorporation in favor of selective incorporation via the due process clause. After Adamson, at first Black continued to assert his dissenting position in concurrences, repeating that, "For reasons stated in my dissenting opinion in *Adamson*

v. California …I agree with the conclusion"[53] in each case. Douglas joined these concurrences and continued to use the Adamson reasons in separate concurrences from the more moderate opinions in which Black wrote or agreed with the majority opinion. However, Black abandoned explicit expression of this position from 1962-1967 both when he wrote the majority opinion[54], and joined in opinions that incorporated provisions of the Bill of Rights.[55]

Based on this information, it would seem that Black had abandoned his Adamson total incorporation position in favor of selective incorporation. Even in Duncan v Louisiana, Black's first draft of his concurrence only mentioned "the concept of ordered liberty," citing reasoning from Palko and Gideon in a one-paragraph opinion. However, when Harlan circulated his lengthy dissenting opinion which Frankfurter's Adamson majority, Black took the opportunity to restate his Adamson total incorporation argument in full. He had hinted that he still adhered to full incorporation "by the mere fact that [a] right appears in our Bill of Rights," in Pointer, and his concurrence in Duncan is proof that his silence was strategic rather than indicative of a shift in his position. Duncan came to be the definitive statement of the court's position on selective incorporation twenty-one years after the process began. The majority opinion exhibits the same type of mixed-justification reasoning as used in Klopfer, and Black's concurrence (joined by Douglas) repeated the Adamson defense, adapted to the facts of 1968. Black's return to the Adamson reasoning proves that his compromises were made with the expectation that, by choosing more moderate justifications and supporting selective incorporation, the court's behavior would eventually approximate his first preference.

The presence of strategic behavior in the crafting of incorporation doctrine further proves that incorporation is not a purely ideological issue. Nor is it one that demands an all-or-nothing approach. Ultimately, Black did not so strongly adhere to his total incorporation doctrine that he shunned due process and selective incorporation. Nor were any of the justices committed to any particular doctrine to the point that they could not accept the suggestions of the other justices. In Black's opinion, it did not necessarily matter how incorporation was carried out as long as it was carried out. It is also revealing to note that no right has ever been un-incorporated after being incorporated, and it is reasonable to assume that neither Black nor any of the selective incorporationists anticipated this ever happening. Because of this, incorporation doctrine was more malleable than other doctrines like privacy and the content

of the exclusionary rule, which could be, and were, gradually chipped away by subsequent exceptions and weakening decisions.

Stare Decisis

The idea that respect for the doctrine of stare decisis allowed the court to reach near-total incorporation by 1969 serves as the fourth hypothesis for explaining this phenomenon. The hypothesis is drawn from Epstein and Knight's argument that "norms of legitimacy…affect the ability of justices to influence the substantive content of the law."[56] According to this argument, one should expect that the norm of stare decisis either limits or encourages change justices are able to make. Evidence for this hypothesis would be found either in the content of opinions, which could either explicitly reference stare decisis, or rely heavily on precedent to come to a decision. It could also be found in memoranda discussing the court's legitimacy or use of stare decisis. In the incorporation cases, while evidence does exist in opinions, it does not appear in the memoranda circulated among the justices.

It was mentioned before that the Warren court did not show a significant amount of deference to precedent when it believed that the facts had changed, especially regarding the protection of individual rights. Furthermore, the important "mirror cases" were important due to the fact that they overturned precedents. This is not to say that the court ignored its own norms of legitimacy. However, it did find a compelling reason to abandon some precedents and reappropriate elements of others to support incorporation. In each case, this reason was that the court found each right to be fundamental, and thus applicable to the states under the formula in the Palko precedent.

The concept of stare decisis also influenced the court's vision of how its incorporation doctrine would be respected. As mentioned before, the court could reasonably expect that incorporation would not be overturned. Therefore, it constantly referred to recent precedent from opinion to opinion in order to solidify the court's commitment to selective incorporation. For example, the opinion in Pointer v Texas claims, "in the light of Gideon, Malloy, and other cases…the statements made in [earlier precedents]…can no longer be regarded as law. In doing so, the court simultaneously rejects old precedent and establishes respect for a new set of "correct" precedents.

While stare decisis is not necessarily explanatory of why selective incorporation was pursued after Adamson, it does inform the

methods in which it did so. Furthermore, stare decisis explains why total incorporation was never accepted as the rule of the court. Because an acceptance of Black's Adamson dissent would overturn several precedents at once, even his thorough evidence of original intent and the fundamental nature of the Bill of Rights as a whole would not be enough to establish a compelling interest to do so.

Imitating State Practice

The final hypothesis seeking to explain selective incorporation is that the court merely incorporated provisions in the Bill of Rights as a response to what states were already doing in practice. This hypothesis is drawn from the expectation that federalism concerns might influence the court to tread lightly when interfering with state practices. In order for this hypothesis to be true, state practice would have to play a major role in the court's opinions and the court would not incorporate rights that were not already applied in a wide majority of the states. According to the data, this cannot be proven to be true. When opinions do indeed refer to state practice, they do so briefly, and it is treated with equal or lesser attention than other justifications for incorporation. Furthermore, state practice is cited to defend both selective incorporation and fundamental fairness. Because of this, state practice cannot be the only factor, or even the central factor, explain the court's use of selective incorporation.

This is not to say that state practice serves no purpose in selective incorporation. It is helpful to observe the differences between how state practice is treated under selective incorporation and fundamental fairness views. Such an observation reveals that state practice was used in defense of selective incorporation as a test of fundamentality. One way to prove that a right was fundamental would be to illustrate that a wide majority of states had chosen to defend it in their state conventions. Chief Justice Warren did exactly that in his detailed citation of state practices in his Klopfer opinion. To Frankfurter and Harlan, the main proponents of the fundamental fairness position, state practice was simply proof that incorporation was unnecessary since state governments could be expected to protect these rights without excessive control of the federal government.

Perhaps the greatest challenge to this justification is the notion, expressed emphatically in both Malloy and Miranda that "the substantive standards underlying the privilege applied with full force to state court proceedings."[57] Without incorporation of fundamental rights, whether

states already respected them or not, incorporation vests the federal courts with the ability to apply federal standards to the protection of these fundamental rights. The states cannot be expected to independently regulate these standards in the same way the court has determined to be fundamental to their protection

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Conclusions

The process of selective incorporation of the provisions of the Bill of Rights resulted from the court's evolving concept of fundamental rights and was executed through strategic compromises between total incorporationists and selective incorporationists in order to ultimately achieve near-total incorporation. As the second amendment was incorporated in McDonald v Chicago (2010) the only provisions which remain unincorporated are the Third Amendment freedom from quartering soldiers, the Fifth Amendment right to grand jury indictment, the right to a jury trial in civil cases for amounts greater than $20, and Eighth Amendment protection from excessive bail or fines. However, unless the court decides that these rights are indeed fundamental, it is unlikely that they will be incorporated in the foreseeable future.

The incorporation of the provisions of the Bill of Rights paralleled the Warren court's expansion or the recognition and protection of civil rights. Previous to the Warren court's elaboration of civil rights as we know them today, the understanding was that "civil rights were not the rights to free speech, free press, and free exercise of religion; nor were they the procedural rights of criminal defendants. Rather, civil rights were" considered in terms of "economic rights that had their foundation in the common law," [58] and therefore were the kinds of rights regulated by state governments. When the Warren court began to assert the fundamentality of protecting the "civil rights" as rights to "life, liberty and property" in the terms of the Fifth Amendment, the concept of civil rights became inextricably linked to the criminal law amendments and due process. When the court was faced with the tests for fundamentality from Palko v Connecticut, it was inevitable that they would have to reconcile the federal conception of these rights with the due process clause of the Fourteenth Amendment in order to settle the incorporation question. In other words, as the "due process" clause of the Fifth Amendment came to include more individual and civil rights, so too did the "due process" clause of the Fourteenth through a conception of substantive due process. Ultimately the court decided to incorporate

the amendments that had been deemed "fundamental" in their federal application as well as those that it deemed to be fundamental using the Palko tests. In this way, the expansion of civil rights both provoked and perpetuated selective incorporation. This expansion of civil rights in other issues on the court's agenda influenced the way in which the court conceptualized an evolution of fundamental rights.

The nationalization of the Bill of Rights also had the same effect as many of the civil rights and criminal process cases had on state governments. There was a greater burden placed on states to adhere to federal standards. Selective incorporation fundamentally altered the way the states related with the federal government. In the same way that federal courts had been burdened with the provisions that protected individual and civil rights, so too were state courts. While some argue that this restricts the states' abilities to "experiment" with effective laws[59], others claim that they should not experiment at all with fundamental rights, which through incorporation, were shielded from the discretion of state legislatures and state courts.

A large part of Black's objection to both selective incorporation and fundamental fairness was that he did not believe it was the court's place to determine which rights were fundamental and which were not. Furthermore, denying that particular provisions of the Bill of Rights were fundamental, thus allowing the "Court [to] determine what, if any, provisions of the Bill of Rights will be enforced, and, if so, to what degree, is to frustrate the great design of a written Constitution."[60] Justice Souter would reply that the provisions of the Bill of Rights, especially those of the criminal law amendments cannot be so easily applied that incorporation of only the rights would be sufficient to protect civil rights. For this reason, the court's ability to uphold those fundamental rights included in the Bill of Rights, those rights must be incorporated in combination with "more elaborate reasoning to show why very general language applies in some specific cases but not in others."[61] This role of the court is the precise reason why the types of rights incorporated by the due process clause was expanded to include even attendant provisions that allowed for the proper protection of rights contained in the first eight amendments. The complex role of interpreting the meaning and application of constitutional provisions also allows Justices the discretion to determine which rights are fundamental based on the complex justifications which, in the case of incorporation, include the interpretations of the Fourteenth Amendment, the specific provisions in the Bill of Rights and the definition of what is "fundamental" in judicial

precedents.

This evolving concept of fundamental rights and the necessities of applying them reflect the court's development in civil rights and criminal process cases which were applied to its position on incorporation. The change in the types of rights the court decided to incorporate which followed allowed the concept of selective incorporation to develop from a minority position in an issue that was supposedly "closed" to a powerful doctrine which incorporated nearly all of the Bill of Rights. Future investigations of the issue of incorporation could delve deeper into the past of incorporation theories in order to explain what formed the Twining and Palko precedents. Such an investigation would shine a brighter light on the distinction between First Amendment rights and other provisions of the Bill of Rights and provide a clearer vision of the court's evolution in its concept of fundamental rights and how it influenced issues of federalism and individual rights.

END NOTES

1. Brennan, William J. "The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights." 61 N.Y.U.L. Rev. 535. New York: 1986. (p. 545)
2. Brennan 535
3. Brennan 537
4. *Twining v New Jersey*, 1908, rejected the incorporation of the protection against self incrimination and *Palko v Connecticut*, 1937, rejected protetion against double jeopardy.
5. 316 U.S. 455
6. 332 U.S. 46
7. Friendly, Henry J. "The Bill of Rights as a Code of Criminal Procedure" in *California Law Review* Vol. 53, No. 4 (Oct., 1965) pp. 929-956. (p. 934)
8. Epstein, Lee and Jack Knight. *The Choices Justices Make*. Congressional Quarterly Press, Washington, D.C.: 1998.
9. Epstein and Knight
10. These cases are the "mirror cases" which I will discuss later in which prec edents were overturned and incorporation became the central issue. These include *Mapp v Ohio*, *Gideon v Wainwright*, *Malloy v Hogan*, *Duncan v Louisiana*, and *Benton v Maryland*.
11. Brennan, 545
12. In *Twining*, *Palko*, *Betts* and *Adamson*
13. Douglas, William O. in *Gideon v Wainwright*
14. *Gideon v Wainwright*
15. *Robinson v California*
16. *Palko*
17. 211 U.S. 78
18. Self incrimination in *Twining*; double jeopardy in *Palko*
19. Emphasis added
20. 302 U.S. 319
21. *Palko v Connecticut*
22. These cases are as follows: 1925 *Gitlow v New York*- incorporates freedom of speech; 1931 *Near v Minnesota*- incorporates freedom of press; 1937 *DeJonge v Oregon* – incorporates freedom of assembly; 1940 *Cantwell v Connecticut*- incorporates free exercise.
23. These cases include *Everson v Board of Education* , *Engel v Vitale*, *Sher bert v Verner* ,and *Edwards v South Carolina*,
24. Betts p. 316 U. S. 462.
25. Adamson, p. 86
26. Friendly, Harry. "The Bill of Rights as a Code of Criminal Procedure" *California Law Review*, Vol. 53, No. 4 (Oct., 1965), pp. 929-956
27. 370 U.S. 660 (1962)
28. 367 U.S. 643
29. 287 U.S. 45 (1961)
30. 395 U.S 784 (1969)
31. Rubin, Peter J. "Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights." *Columbia Law Review*, Vol. 103, No. 4 (May, 2003): 833-892 (p. 836)
32. i.e. *Miranda v Arizona*
33. *Miranda v Arizona*
34. See 8.
35. Epstein and Knight, pp 22-36

36. Epstein, pp 56-99
37. *Adamson v California* pp.
38. Bush, Curtis. Correspondence with Hugo Black re: *Adamson v California*. Library of Congress. (undated)
39. Haines, Dr. Charles Grove. Correspondence with Hugo Black re: *Adamson v California*. Aug. 19, 1947. Library of Congress.
40. The two exceptions to this which was present in the papers were that Stewart, Harlan and Clark (all eventually in dissent from the majority) voted to deny certiorari in *Malloy*, and Clark voted to deny in *Gideon*. Douglas conference notes 5/28/63, and in *Malloy*)
41. Black, Hugo. Memorandum "Re: No. 236- Mapp v Ohio" 15 June 1961. Library of Congress
42. Brennan, William J. Memorandum to Hugo Black re: *Gideon v Wainwright*. 4 Feb 1963. Library of Congress
43. Stewart, Potter. Memorandum to Hugo Black "Re: No. 155-*Gideon v Cochran*" 12 Feb 1963. Library of Congress
44. Douglas Memo in *Malloy v Hogan* (see below)
45. Douglas, William O. Memorandum withdrawing concurrence in *Malloy v Hogan* 1 June 1964. Library of Congress
46. Brennan, William J. Memorandum to William O. Douglas "Re: No 110- *Malloy v Hogan*. 2 June 1964. Library of Congress
47. Memorandum from clerk to Douglas re: *Malloy v Hogan*. 3 June 1964. Library of Congress
48. *Malloy v Hogan*
49. Goldberg, Arthur J. Memorandum "Re: No. 577, *Pointer v State of Texas*. 24 March, 1965. Library of Congress
50. 386 US 213 (1967)
51. This may be an implicit reference to the privileges or immunities clause which, paired with "life , liberty or property" was never explicitly revived from Black's Adamson dissent until Justice Clarence Thomas's dissent in *McDonald v Chicago* (2010)
52. *Klopfer v North Carolina* pp. 221-226
53. *Wolf v Colorado* p 40
54. *Engel v Vitale* (1962), *Gideon v Wainwright* (1963) and *Pointer v Texas* (1965)
55. All others [see above]
56. Epstein and Knight, 157.
57. *Miranda v Arizona*
58. Newsom, Kevin Christopher. "Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases" *The Yale Law Journal*, Vol. 109, No. 4 (Jan., 2000), pp. 643-744
59. Friendly 940
60. *Adamson v California*
61, Souter, David. "Text of Justice David Souter's speech: Harvard Commencement remarks (as delivered)" 27 May, 2010.