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## Exile on Main Street: Competing Traditions and Due Process Dissent

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# EXILE ON MAIN STREET: COMPETING TRADITIONS AND DUE PROCESS DISSENT

COLIN STARGER\*

*Everybody loves great dissents. Professors teach them, students learn from them, and journalists quote them. Yet legal scholars have long puzzled over how dissents actually impact the development of doctrine. Recent work by notable empirical scholars proposes to measure the influence of dissents by reference to their subsequent citation in case law. This Article challenges the theoretical basis for this empirical approach and argues that it fails to account for the profound influence that uncited dissents have exerted in law. To overcome this gap in the empirical approach, this Article proposes an alternative method that permits analysis of contextual and inter-textual aspects of doctrinal development. This method proceeds by dividing doctrinal territories into rival schools of thought and then constructing opinion genealogies for each competing school. Connections between opinions—majority, concurring, and dissenting—are justified using both citation and more nuanced hermeneutic analyses. Through systematic tracking of debate between rival schools over generations, the impact of dissents is revealed in the turns taken during unfolding doctrinal argument.*

*Using this method, this Article examines two key Due Process territories—economic liberty and “incorporation”—and demonstrates how uncited Supreme Court dissents dramatically changed the course of these doctrines. First, it is demonstrated that uncited dissents by Joseph Bradley in the Slaughter-House Cases and by Oliver Wendell Holmes in *Lochner v. New York* directly contributed to the well-known rise and fall*

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of economic liberty. Second, the momentous battle over incorporation is proven to have dramatically turned under the influence of uncited dissents by John Marshall Harlan in *Hurtado v. California* and Hugo Black in *Adamson v. California*. The incorporation story features analysis of John Paul Stevens' final, passionate dissent after thirty-five years on the Court, which came in the 2010 blockbuster Second Amendment incorporation case, *McDonald v. City of Chicago*. Apparent contradictions in this critical opinion are resolved by connecting Stevens' dissent to the tradition of uncited great dissents that forever changed substantive due process doctrine.

To illustrate the results of its method, this Article introduces an innovative series of "opinion maps" that graphically represent the competing due process genealogies in economic liberty and incorporation doctrine. Rendered using custom software designed by the author, the opinion maps present information-rich, epic-scale historical portraits of these key constitutional doctrines. The maps have practical and theoretical use. Practically, they offer accessible guides to the place of and relationships between major opinions in two crucial substantive due process debates. Theoretically, the figures rendered collectively suggest deep metaphors for the interpretative space we call doctrine and for the vital role dissents play in drawing lines of authority that define the shape and boundaries of this interpretative space.

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## I. INTRODUCTION

*I wish a lawyer would measure the development of law by dissents,—which are worth more study than is usually accorded them. In a court not subject to sudden change, able and continued dissent delimits and accentuates decision; it reveals far more than does the majority opinion the intellectual differences of the council table; and the present status of police power is to me more clearly revealed by the dissents of Justice Holmes than by the syllabi of digests.*

Judge Charles Merrill Hough<sup>1</sup>

When Judge Hough made these remarks in an annual lecture at Cornell University in the spring of 1918, Oliver Wendell Holmes' now celebrated *Lochner v. New York* dissent—decrying the Court's striking down of maximum-hours legislation for bakers in New York—had been on the books for thirteen years.<sup>2</sup> Despite this passage of time, Judge Hough emphasized Justice Holmes' contemporary influence over due process debates and liberally quoted aphorisms from his *Lochner* dissent.<sup>3</sup> Hough's enthusiasm is understandable. By 1918, Holmes' dissents appeared to have persuaded some justices seated at the council table to change course. Just one year prior to Hough's lecture, the Court had handed down *Bunting v. Oregon*, which upheld against a due process challenge maximum-hours legislation regulating millers.<sup>4</sup> This result flatly contradicted *Lochner*'s vision of due process protecting individual economic liberty and appeared to embrace a Holmesian jurisprudence authorizing health and welfare regulations as legitimate exercises of police power.

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1. Charles M. Hough, *Due Process of Law—To-day*, 32 HARV. L. REV. 218, 231 (1919).

2. See *Lochner v. New York*, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting). In this Article, I introduce Supreme Court justices by their first names. Since Supreme Court opinions do not specify Christian names, I have located this information using the remarkable *A Visual History of the Supreme Court of the United States*, published by Timeplots [hereinafter SCOTUS VISUAL HISTORY]. For a fully searchable electronic version of this document, see A VISUAL HISTORY OF THE SUPREME COURT OF THE UNITED STATES (2010), <http://timeplots.com/scotus/>.

3. See Hough, *supra* note 1, at 232 (quoting *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting)). Among Holmes' now legendary aphorisms cited by Hough were “a ‘constitution is not intended to embody a particular economic theory,’” and “the ‘Fourteenth Amendment does not enact Mr. Herbert Spencer’s social statics.’” *Id.*

4. See *Bunting v. Oregon*, 243 U.S. 426 (1917).

Yet this happy tale of a righteous dissenter's redemption is deceptive. Although Holmes' view did eventually prevail, charting the actual path of triumph reveals the difficulty inherent in any Houghian project aspiring to "measure the development of law by dissents."<sup>5</sup> Consider the approach of notable empirical scholars who advocate measuring the influence of dissents over doctrine by reference to their subsequent citation.<sup>6</sup> An exclusively citation-based approach would apparently conclude that Holmes' dissent played no role in *Lochner's* famous and definitive overruling by *West Coast Hotel v. Parrish* in 1937.<sup>7</sup> This is because Holmes' *Lochner* dissent was cited exactly zero times in the *West Coast Hotel* majority opinion and zero times in the authorities relied upon by the majority.<sup>8</sup> However, I regard this absence of citation more as evidence of a methodological limitation in this empirical approach than as proof that Holmes' dissent failed to contribute to the demise of *Lochnerism*. Despite the absence of citation, a direct line unquestionably connects the *West Coast Hotel* majority opinion to Holmes' *Lochner* dissent twenty-two years earlier. The trick is figuring out just how to draw this line.

In this Article, I attempt to measure how dissents shape the development of doctrine while attending to vexing line-drawing problems like connecting Holmes' dissent to the ultimate repudiation of *Lochner*. My specific focus is on dissents in the realm of due process, and my approach draws on a hermeneutic understanding of the interplay between text and tradition.<sup>9</sup> I posit Supreme Court opinions—

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5. Hough, *supra* note 1, at 231.

6. See, e.g., Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis* 17 (U. Chi. L. Sch., John M. Olin Law & Econ. Working Paper No. 510 (2d series), Jan. 2010) (citing James H. Fowler et al., *Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court*, 15 POL. ANALYSIS 324 (2007)), available at <http://ssrn.com/abstract=1542834> ("We assume that the more citations to an opinion, the greater its influence is likely to be in shaping the law . . .").

7. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923)). Although *West Coast Hotel* only explicitly overruled *Adkins*, the Court has recognized that "*West Coast Hotel* . . . signaled the demise of *Lochner* by overruling *Adkins*." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 861 (1992) (internal citations omitted).

8. Holmes' dissent was not cited in a Supreme Court opinion until a 1948 free speech case. See *Winters v. New York*, 333 U.S. 507, 527 (1948) (Frankfurter, J., dissenting) ("If 'the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics,' neither does it enact the psychological dogmas of the Spencerian era." (internal citations omitted)).

9. Hermeneutics refers to the theory and practice of interpretation, particularly the

majority, concurring, or dissenting—as specific textual instantiations of competing traditions within due process doctrine. These competing traditions express and advance the teachings of rival schools of thought regarding the constitutional meaning of the Due Process Clause of the Fourteenth Amendment. I argue that dissents can keep particular traditions of constitutional interpretation alive when forced into exile by shifting majorities on the Court.

My argument finds visual representation through a series of “opinion maps” that trace lineages of certain antagonistic schools of due process tradition. *Figure 1* below<sup>10</sup> demonstrates the concept behind the opinion map by charting our introductory example. It presents Holmes’ *Lochner* dissent as one opinion point in a bloodline that extends from Justice Samuel Miller’s majority opinion in the *Slaughter-House Cases*<sup>11</sup> all the way forward to Chief Justice Charles Evan Hughes’ majority opinion in *West Coast Hotel*. Each triangle represents an opinion; the case name appears above the opinion and the opinion author appears below. The map’s X-axis shows the year an opinion issued while the Y-axis supplies the number of votes cast in support of the opinion—all points above the dashed line are thus majority opinions. Solid arrows joining opinions indicate that the latter opinion directly cited the earlier one. Dotted arrows indicate a hermeneutic connection that I argue exists in tradition notwithstanding the absence of formal citation.

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interpretation of texts. Originally concerned with the interpretation of ancient and sacred texts in light of classical and religious tradition, hermeneutics now extends well beyond its original theological and legal confines to embrace larger philosophical problems of understanding and meaning. *See generally* HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 2004) (seminal work on philosophical hermeneutics). The legal academy has an established tradition of viewing jurisprudence and doctrine through a hermeneutic lens. *See, e.g.*, Brian Bix, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory*, 52 SMU L. REV. 167 (1999). For an excellent recent collection of law review articles concerning hermeneutics, see GADAMER AND LAW (Francis J. Mootz III ed., 2007).

10. The remaining Figures in the text of the article are in black and white. The Appendix contains color images of all Figures save for *Figure 4.1*.

11. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

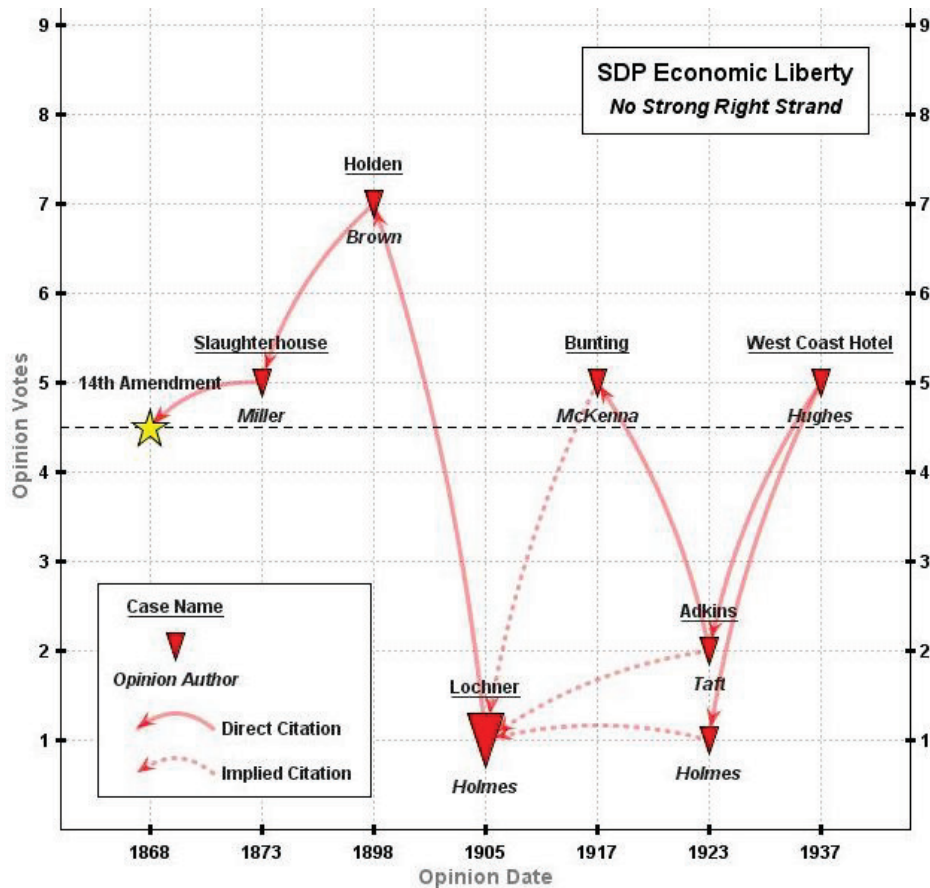


Figure 1.

The genealogical metaphor suggested by the maps in this Article echoes the familiar practice of referring to “lines” of cases or to a leading case “and its progeny.” However, I refine the usual metaphor by mapping the relationships between *opinions* rather than between *cases*. Opinions have authors, which unlike faceless attribution to “the Court,” directly imply personal agency and the ideological commitments of individuals. Opinions in these maps are represented as triangles that either point up or down. All of the triangles in *Figure 1* thus point down since the opinions in this line did not find an economic right (or, if written in dissent, would not have found an economic right).<sup>12</sup>

12. Conversely, the triangles in *Figure 2*—representing the competing tradition supporting economic liberty—all point up because they represent opinions favoring the

Although I critique empiricists' over-reliance on citation as a means of measuring a dissent's influence, I recognize the primacy of direct citation in establishing connections between lines of opinions. As *Figure 1* demonstrates, my method leans heavily on solid arrows—indicating direct citation—to establish essential links between opinions such as *Slaughter-House* and *Holden*, or *Holden* and Holmes' dissent in *Lochner*. However, I also argue that citation is not the only way to “connect the dots” when measuring a dissent's influence. I thus draw dotted arrows between opinions that are hermeneutically connected despite the absence of formal citation. I call these connections hermeneutic because they require interpretation of surrounding doctrinal context and tradition. *Figure 1* thus posits that Holmes' *Lochner* dissent was relied upon, but not cited by, the majority in *Bunting* and the dissents in *Adkins*.<sup>13</sup>

My original theoretical claim is that dissents can profoundly affect the development of doctrinal tradition without ever being cited. To prove this claim, I examine two specific areas of due process doctrine—economic liberty and “incorporation”—where uncited dissents exercised profound influence over doctrinal development. Though uncited, these dissents did not go unread. Dissents provided context for majority text. The first four featured dissents in this Article—by Oliver Wendell Holmes in *Lochner*,<sup>14</sup> Joseph Bradley in the *Slaughter-House Cases*,<sup>15</sup> Hugo Black in *Adamson v. California*,<sup>16</sup> and John Marshall Harlan in *Hurtado v. California*<sup>17</sup>—all provided alternate readings of authority that ultimately changed the course of substantive due process doctrine. The last dissent featured—also the final dissent by John Paul Stevens after thirty-five years on the Court, in *McDonald v. City of Chicago*<sup>18</sup>—seeks to replicate the remarkable success of such great dissents in steering substantive due process. Exiled on the main street of Supreme Court

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existence of economic due process rights. See Fig.2, *infra* p.1273.

13. Proof of this proposition is offered below. See *infra* Part II.A.

14. *Lochner v. New York*, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting).

15. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 111–24 (Bradley, J., dissenting). See *infra* Part II.B.

16. *Adamson v. California*, 332 U.S. 46, 68–92 (1947) (Black, J., dissenting). See *infra* Part III.A.

17. *Hurtado v. California*, 110 U.S. 516, 538–58 (1884) (Harlan, J., dissenting). See *infra* Part III.B.

18. *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3088 (2010) (Stevens, J., dissenting). See *infra* Part III.C.



reporters, great dissents create interpretative spaces for future generations. The opinion maps rendered in this Article suggest a visual metaphor for these interpretative spaces and for the competing lines of opinions charting paths through them.

My methodological contribution is a new technique for studying doctrinal development. This technique fills a gap in the empirical approach that fails to account for the profoundly inter-textual nature of doctrine and consequently overlooks the influence of uncited dissents.<sup>19</sup> My technique derives from a traditional understanding of doctrine as territory usefully divided into competing schools of thought. By constructing opinion genealogies and carefully recording the votes secured by each opinion, I suggest a systematic way to track the changing fortunes of rival schools. By tracing debates between competing schools over generations, I conceptualize doctrinal evolution as an unfolding argument. Dissents define the boundaries of the debate; they push and pull the argument in new directions. To measure the development of law by dissents is to note precisely when and how the argument turned because of dissent. This demands close reading of opinion texts and a hermeneutic method that is more multi-layered and less mechanical than empirical techniques. Ultimately though, this method is equally rigorous and analytical, and facilitates deeper insight into the text and context of discrete doctrinal territories.

Using this method, I conduct thorough inquiries into two vital areas of substantive due process doctrine—economic liberty and incorporation. The genealogies produced and mapped offer epic-scale historical portraits of the development of these key constitutional doctrines. In addition to contributing to substantive due process scholarship, the portraits also enrich understanding of the history of dissent. Legal scholars have previously observed that Supreme Court dissents were rare from the time Chief Justice John Marshall introduced the “opinion of the Court” in 1801 up until the 1930s–1940s.<sup>20</sup> They have described this early period as embracing a “norm of consensus” and have hotly debated the precise cause of the norm’s demise<sup>21</sup> and its

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19. The critique of the empirical approach is developed in Part II *infra*.

20. See Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 20 (2008) (citing Robert Post, *The Supreme Court as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1356–59 (2001)); M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 321–23.

21. Compare Guinier, *supra* note 20, at 20–21 (“The 1925 Judiciary Act consolidated the

normative implications.<sup>22</sup> The maps and genealogies presented in this Article present an important refinement to the understanding of the consensus norm. Specifically, the unflagging persistence of dissents in due process doctrine since the passage of the Fourteenth Amendment in 1868 show that competing due process traditions were not silenced by any norm of consensus. As explained, the fight over due process is literally a fight over the past and future of tradition.<sup>23</sup> This is the great genius of the concept of due process—its doctrinal connection to tradition.

The Article proceeds in four Parts. In Part II, I consider the existing literature on dissents and describe my place within it. Here I develop my critique of the empirical method of citation counting as a means to measure the influence of dissents, and I offer a defense of traditional doctrinal inquiry. While legal scholarship has and will continue to be profoundly enriched by techniques and theories drawn from other academic disciplines, I argue that advancing the understanding of law will always require careful reading of its primary texts and attention to the context of its competing traditions. This justifies a hermeneutic approach.

After this theoretical development, I turn to my concrete examples. In Part III, I examine the economic due process doctrine introduced above. Here I argue that two sets of largely uncited dissents greatly influenced the rise and fall of economic liberty. From the Court's first

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practice of petitioning for certiorari, which drastically *reduced* the Court's caseload and *heightened* its discretion. These changes unlocked the restraints on dissent, and the unanimity norm buckled under the new conditions of judicial review." (footnote omitted)), with Henderson, *supra* note 20, at 325–26 (citing Thomas Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361, 362, 364–65 (1988) (attributing the sudden decline in the "consensus norm" to the Chief Justiceship of Harlan Fiske Stone and specifically rejecting the Judiciary Act of 1925 thesis)).

22. There was once a flourishing debate and academic literature on whether dissents improperly undermined or properly advanced the rule of law. See generally Laura Krugman Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMP. L. REV. 307, 308–10 (1988) (describing the debate and collecting articles from late-Nineteenth through the mid-Twentieth century). This normative debate largely subsided, or at least narrowed, over the past decades as commentators have grown accustomed to high rates of dissent on the Court. See, e.g., Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 468–71 (2008) (making normative argument against practice of dissenters clinging to losing views in "perpetual dissents"). However, current-Chief Justice John Roberts's stated goal of decreasing the number of dissenting opinions may have rekindled this controversy. See, e.g., Guinier, *supra* note 20, at 15 (citing Roberts's push for fewer dissenting opinions as raising normative questions about the conflict between unanimity and democratic accountability).

23. See *infra* Part II.

occasion to interpret the new Fourteenth Amendment's Due Process Clause in the 1873 *Slaughter-House Cases*, authority divided into two schools seeking to control the Clause's doctrinal meaning. I maintain that the school favoring a strong due process right, which largely dominated the Court from the turn of the century until *West Coast Hotel* in 1937, derived from the tradition established by the uncited dissent of Justice Joseph Bradley in *Slaughter-House*. For the opposing school, I suggest that Holmes' *Lochner* dissent played an instrumental role in the ultimate demise of liberty of contract despite its formal absence in *West Coast Hotel*. Since *Lochner*'s rise and fall is familiar territory, the doctrinal tour in Part III is relatively brief and focused on illustrating the essential contours of my hermeneutic model of dissent through a well-known example.

In Part IV, I take an in-depth look at a lesser-known due process debate that burned hot in the 1940s–1960s but seemed all ashes until the 2010 blockbuster, *McDonald v. City of Chicago*, rekindled former flames.<sup>24</sup> The debate turns on the question of “incorporation”—whether the substantive protections of the federal Bill of Rights can be applied against the states via the Due Process Clause. By the time of the Civil War, it was settled that the Bill of Rights only protected individuals against the Federal Government.<sup>25</sup> After the adoption of the Fourteenth Amendment, however, a new school favoring incorporation of the Bill of Rights against the States recognized potential textual ammunition in that amendment's Due Process Clause.

Part IV begins by examining the genealogy of the school favoring incorporation in detail. I show how Justice Samuel Alito's plurality opinion in *McDonald*, which applied the Second Amendment right to keep and bear handguns against the States, as recognized in 2008's controversial *District of Columbia v. Heller* decision,<sup>26</sup> relied on an incorporation tradition that stretches all the way back to Justice John Marshall Harlan (I)'s dissent in an 1884 case called *Hurtado v. California*.<sup>27</sup> Justice Hugo Black later reinvigorated the tradition initiated by Harlan in a series of remarkable dissents from the 1940s that

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24. See *McDonald v. City of Chicago*, Ill., 130 S. Ct. 3020, 3032–36 (2010) (recounting earlier debate over incorporation).

25. See *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833).

26. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

27. See *Hurtado v. California*, 110 U.S. 516, 538–58 (1884) (Harlan, J., dissenting); see also *Twining v. New Jersey*, 211 U.S. 78, 114–27 (1908) (Harlan, J., dissenting); *Maxwell v. Dow*, 176 U.S. 581, 605–17 (1900) (Harlan, J., dissenting).

prevailed two decades later.<sup>28</sup> The essential claim here is Harlan and Black's dissents exerted influence over the pro-incorporation school in a manner that far exceeded their limited citation by opinions in this line.

This Part then turns to a competing doctrinal tradition that generally opposed incorporation. Justice John Paul Stevens ostensibly embraced this anti-incorporation tradition in his final passionate dissent on the Court in *McDonald*.<sup>29</sup> At first blush, Stevens' embrace seems strange because this anti-incorporation tradition explicitly rejected expansion of criminal procedure rights that Stevens himself undoubtedly welcomed. However, a hermeneutic analysis helps resolve this tension. I argue that Stevens' dissent should not be read literally as defense of the anti-incorporation school but rather should be understood instead as a stirring final lecture for future generations on the proper meaning of substantive due process doctrine writ large.

In the concluding Part, I consider how dissents, in addition to shaping internal development of doctrine, also seek to construct external borders between rival due process territories. Here, I reflect on how lessons learned about the impact of dissents on due process doctrine might apply more broadly and explore the implications of this study on general theories of dissent.

## II. DISSENT, CITATION, AND TRADITION

Legal scholars who advocate a citation-based approach to measuring the influence of legal opinions upon doctrine proceed from solid premises.<sup>30</sup> After all, legal arguments turn on authority and citation provides the formal mechanism to introduce authority into legal texts. Every first-year law student quickly learns that it is tantamount to a

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28. See *Adamson v. California*, 332 U.S. 46, 68–92 (1947) (Black, J., dissenting); *Betts v. Brady*, 316 U.S. 455, 474–77 (1942) (Black, J., dissenting).

29. See *McDonald*, 130 S. Ct. at 3088 (Stevens, J., dissenting).

30. Drawing on political science work in this area, empirical legal scholars are the most prominent advocates of a strong citation-based approach in the legal academy. See, e.g., Epstein et al., *supra* note 6, at 17 (citing Fowler, *supra* note 6, at 324); Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 534 (1994) (book review) (advocating counting citations as method for measuring influence based on use of such method to measure scholarly influence). Non-empirical scholars have also embraced the approach. See Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 784 n.11 (2000) (positing a minimum of ten subsequent citations “as a baseline for canonical status”). I have previously advocated counting citations to make “a prima facie case” about an opinion’s influence. See Colin Starger, *The DNA of an Argument: A Case Study in Legal Logos*, 99 J. CRIM. L. & CRIMINOLOGY 1045, 1072 n.129 (2009).

cardinal sin in legal writing to assert that a legal rule applies without citing authority. Initiation into the *Bluebook*'s esoteric and dreaded maze of citation forms is an infamous rite of passage into the legal fraternity. Citation clearly matters enormously. On the surface of things, measuring an opinion's influence by the number of times it has been cited seems entirely sensible.

Yet this citation-counting heuristic suffers from shortcomings that become especially acute when undertaking to measure the influence of dissents. Consider first that counting citations is potentially both over-inclusive and under-inclusive as a measure of an opinion's influence over doctrine. Inclusivity problems initially stem from the premium placed in our system of precedent on recent cases. Supreme Court opinions may garner citations not because they contain particularly insightful discussions of a legal proposition, but simply because they mark the latest affirmation of that proposition developed in a longer line of opinions. That older opinions get cited less than newer ones does not automatically mean that the newer cases exert more sway over current doctrine. In addition to complications caused by preference for "fresh precedent," an under-inclusivity problem potentially plagues dissents because dissents lack formal precedential value. While citation generally builds the authority of a legal argument, citation to dissents risks undermining the authority of the argument. The incentive not to cite dissents is strong, and a dissent may influence doctrine far more than its number of citations would indicate.

Beyond inclusivity problems, a problem we might call "loss of context" presents the deeper theoretical obstacle to the citation-counting method. In legal texts like Supreme Court opinions, every citation does not have equal weight or value in the larger argument. Some citations may provide the only authority for discrete but hotly-contested propositions. Other citations may come in strings and stand for abstract and entirely uncontroversial principles. The plethora of introductory signals (*see*, *accord*, etc.) available to characterize the relationships between propositions and their supporting authority signify a range of meanings in citation not captured by any flat counting technique.<sup>31</sup> Context matters when reading text. Not all cites share an

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31. See generally THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2, at 54-55 (Colum. L. Rev. Ass'n et al. eds., 19th ed. 2010).

equal influence value. Citation quantity alone therefore cannot measure the quality of influence.<sup>32</sup>

This critique is not offered to suggest that citation is unimportant. Rather, the argument is ultimately against an *exclusively* citation-based approach to measuring the influence of dissents upon doctrine. Here, it is worth recalling that the English word “doctrine” literally derives from the Latin *doctrina* meaning teaching and corresponds to the word *disciplina* meaning learning.<sup>33</sup> Just because Supreme Court Justices do not cite an opinion frequently (or at all) does not mean that they have not read it, learned from it, or become convinced to follow its teaching. Similarly, an opinion that has not been cited by the Court in over fifty years may still provide the canonical understanding of an area of law. That understanding is simply transmitted through other venues—textbooks, treatises, law review articles, etc. Rather than rely exclusively on citations in Supreme Court opinions, a more sensitive approach admits evidence of influence from the diverse texts and contexts that constitute doctrinal tradition.

The mapping method explored in this Article explores one such more sensitive approach. My approach initially borrows from an older line of scholarship that highlighted the vital role dissents play in

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32. Some scholars have devised deeply sophisticated quantitative systems that offer considerably more nuance than a simple “add ‘em up” counting approach. For example, drawing on both network and Internet search theories, Professor Fowler and his colleagues measure the “legal importance” of Supreme Court cases based on number of times that an individual case is cited by other cases (inward citations) and by the number of citations the individual case makes to other cases (outward citations). See Fowler et al., *supra* note 6, at 328–30. The method is dynamic and iterative because inward and outward relevance scores depend on the relevance scores of the other cases in the network, which change over time. *Id.* at 328. While ingenious quantitatively, this technique remains hermeneutically flat. The authors simply use Shepard’s Citations to “identif[y] each instance in which one of the Court’s majority opinions referenced a previously decided Court majority opinion.” *Id.* at 328. They do not distinguish between citation signals, do not track the proposition a case is cited for, and do not score how important the citation is to the larger argument. While these omissions are entirely understandable (it would be well-nigh impossible to code a 26,681 case network at this level of detail), it does render the technique less than useful for tracking the influence of a case upon specific doctrine. Moreover, the Fowler et al. study actually omits all dissenting opinions from its network analysis, which renders it incapable of speaking to the influence of dissent on doctrine.

33. PETER GOODRICH, *READING THE LAW: A CRITICAL INTRODUCTION TO LEGAL METHOD AND TECHNIQUES* 136 (1986). As Professor Goodrich observes, “Doctrine consists of the truths handed down by educators—by priests, judges, politicians, scholars and so on—all of whom are experts in the classics, custodians of ancient truths which are preserved for and presented to their contemporary audiences.” *Id.*

sustaining competing constitutional traditions.<sup>34</sup> I therefore assume that doctrine can be usefully divided into competing schools. This assumption is historically justified as scholars have long recognized that the federalist and anti-federalist debates that led to the adoption of the Bill of Rights were carried on by successive generations of doctrinal antagonists who still fundamentally differed over the limits of state and national power.<sup>35</sup> Of course, the various and competing schools of doctrinal thought evolved and mutated as our turbulent history unfolded—but every generation nonetheless inherited allegiances and insights from prior traditions taught, learned, and handed down.<sup>36</sup> Dissents have long served both to transmit the teachings of exiled traditions and also to steer old traditions in new directions.

The centrality of competing traditions in my understanding of doctrinal dialectics justifies a specific focus on due process dissents. Due process provides an advantageous point of departure because of the doctrine's self-conscious concern with the very concept of tradition. The Court has variously explained due process as protecting “the ‘traditions and conscience of our people,’”<sup>37</sup> “‘traditional notions of fair play and

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34. In a wonderful article published in 1894, Hampton Carson vaunted dissenting opinions as “the best exposition to be found in the books of the views of two contending schools of constitutional interpretation” and as interesting “because of the importance of the doctrines contended for, and the way they have been woven into the warp and woof of our jurisprudence, to become in time of controlling importance in determining the pattern of the texture.” Hampton L. Carson, *Great Dissenting Opinions*, 50 ALB. L.J. 120, 121 (1894–1895). In more recent years, scholars have by and large neglected this well-pedigreed approach to dissent.

35. See, e.g., Matthew P. Harrington, *Regulatory Takings and the Original Understanding of the Takings Clause*, 45 WM. & MARY L. REV. 2053, 2063–66 (2004) (describing Federalist and anti-Federalist debates that led to Bill of Rights); Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261, 1261–62 (1989) (“[T]he historical record reminds us that it was the *opponents* rather than the supporters of the Constitution who fought hardest for the addition of a bill of rights . . .”). Given this history, one might imagine the Bill of Rights as a kind of “dissent” to the original “majority opinion” of the Constitution.

36. Evolutions and mutations in schools of thought occur in politics as well as doctrine. Though they bear the same names, today's Democrats and Republicans are markedly different from the Democrats and Republicans of 1960 or of 1860. Just as the poles defining the political landscape have changed since the founding, so too have the poles of legal doctrine. Nonetheless, Hampton Carson's description in 1894 of “two contending schools of constitutional interpretation” battling over “the expanding empire of national Federalism and the shrinking reservation of State sovereignty” continues to capture an essential dynamic in modern constitutional debates. See Carson, *supra* note 34, at 121.

37. *Dist. Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2320–21 (2009) (quoting Medina

substantial justice,”<sup>38</sup> and rights “‘deeply rooted in this Nation’s history and *tradition*.”<sup>39</sup> Invoking tradition in this context is no accident—the very phrase “due process of law” has an ancient origin tracing to Latin in the Magna Carta of 1215, influentially translated by Sir Edward Coke in the 17th Century.<sup>40</sup> The rich legal history behind “due process” fundamentally implicates “those canons of decency and fairness which express the notions of justice of English-speaking peoples.”<sup>41</sup> Debates over due process contest the soul of our legal tradition.

Yet these debates also reveal that our legal tradition is not monolithic. We no more share a single inherited tradition than we do a single morality.<sup>42</sup> Due process majorities and due process dissents have always responded to the same Clause of the Fourteenth Amendment, but they have staked competing claims to the interpretation of its

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v. California, 505 U.S. 437, 446 (1992)) (emphasis added).

38. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)) (emphasis added).

39. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)) (emphasis added).

40. See WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 375 (2d ed. 1914) (stating original Latin text from Chapter 39 of the 1215 Magna Carta translated as “[n]o freeman shall be taken or [and] imprisoned or disseised or outlawed or exiled or in any way destroyed . . . except by the lawful judgment of his peers or [and] by the law of the land”). While modern scholars tend to refer to *the* Magna Carta, see generally *id.*, early commentators generally referred to “Magna Charta” (with no definite article). See, e.g., *Hurtado v. California*, 110 U.S. 516, 521–28 (1884) (analyzing interpretations of the Latin phrase “*per legem terræ*” in “Magna Charta”). In this Article, I employ the modern usage. Though Sir Edmond Coke was not the first to interpret the key phrase “*per legem terræ*” (by the law of the land) to mean “due process of law,” his translation directly influenced early American understandings of the phrase. See Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 958–59; see also, e.g., *Hurtado*, 110 U.S. at 521–28.

41. *Malinski v. New York*, 324 U.S. 401, 417 (1945) (Frankfurter, J., concurring).

42. The connection between tradition and morality is fundamental. Tradition provides the ultimate authority and justification for morality. As Hans-Georg Gadamer argues in his classic study of hermeneutics:

That which has been sanctioned by tradition and custom has an authority that is nameless, and our finite historical being is marked by the fact that the authority of what has been handed down to us—and not just what is clearly grounded—always has power over our attitudes and behavior. . . . The real force of morals, for example, is based on tradition. They are freely taken over but by no means created by a free insight or grounded on reasons. This is precisely what we call tradition: the ground of their validity.

GADAMER, *supra* note 9, at 281–82.



tradition. Writing in dissent, Justice John Marshall Harlan (II) once described due process as a balance:

[T]he balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.<sup>43</sup>

Harlan's definition of due process is certainly contested,<sup>44</sup> but his description of the dynamic between past and present perfectly captures a hermeneutic understanding of tradition.

Hermeneutics generally concerns the relationship between parts and whole in discourse. This relationship is mutually constitutive and creates meaning. Take a simple example. The meaning of a sentence depends on the sense of its component words. Yet the meanings of individual words themselves depend on the sentence in which they appear.<sup>45</sup> Text informs context and context informs text. Scholars call

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43. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Harlan's specific target in *Poe* was a Connecticut law that prohibited the use of contraceptives, which Harlan argued violated a right to "privacy of the home" protected by the Due Process Clause. *See generally id.* at 548–55 (Harlan, J., dissenting). Four years after *Poe*, the Court struck down Connecticut's law banning the use of contraceptives. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (finding statute violated a "right of privacy older than the Bill of Rights—older than our political parties, older than our school system"). Notably, Harlan concurred in *Griswold*'s judgment but did not join the majority opinion because of objections to its "incorporation" approach. *See id.* at 499–500 (Harlan, J., concurring in judgment). Harlan's views on incorporation are explored *infra* Part III.C.

44. Harlan's analysis in his *Poe* dissent fairly defines the "living tradition" school of substantive due process methodology. *See, e.g., McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3090, 3096 (2010) (Stevens, J., dissenting) (declaring allegiance to this approach). The competing school employs a more strictly historical approach to understanding substantive due process. *See id.* at 3057 (Scalia, J., concurring) (disputing living tradition approach). The Court has long debated whether Harlan's approach states the current doctrine. *Compare Washington v. Glucksberg*, 521 U.S. 702, 756 n.4 (1997) (Souter, J., concurring) (explaining how the Court has adopted Harlan's *Poe* result and reasoning), *with id.* at 721 n.17 (Chief Justice William Rehnquist conceding that Harlan's dissent had influence, but denying that its reasoning exclusively controls substantive due process doctrine). This debate continued in *McDonald*. *See generally infra* Part III.

45. *See GADAMER, supra* note 9, at 291 ("We know this from learning ancient languages. We learn that we must 'construe' a sentence before we attempt to understand the linguistic meaning of the individual parts of the sentence. But the process of construal is itself already governed by an expectation of meaning that follows from the context of what has gone before. . . . [T]he movement of understanding is constantly from the whole to the part

this back-and-forth between parts/whole, words/sentence, and text/context a hermeneutic circle.<sup>46</sup> The concept of a hermeneutic circle applies well in legal discourse as it describes the relationship between individual opinions and the collective doctrine they form.<sup>47</sup> The meaning of an opinion depends on the doctrinal context from which it emerges. Yet an opinion also reads past doctrine, interprets its meaning, and advances its understanding. Opinions thus modify the doctrine they interpret. Successful opinions—including dissents—change the course of living tradition and liberate it from dead custom.<sup>48</sup>

The due process opinion maps in this Article reflect this hermeneutic dynamic. After identifying competing traditions within the due process arenas of economic liberty and incorporation, the genealogy for each rival school is rendered separately. Though I have selected which members of the doctrinal family appear in each genealogy, solid arrows linking opinions derive from the opinions' own genealogical account—their citations. Note that arrows between opinions point backwards from “child” to “parent.” This both reverses the traditional direction of arrows seen in human genealogies and points toward the limits of the genealogical metaphor. Quite obviously, legal opinions do not have two biological parents and they are not born as helpless infants that must grow and mature before they can reproduce. Rather, opinions appear in discourse fully formed and intelligent—much like Athena leaping from the head of Zeus.

Yet unlike even mighty Athena, legal opinions actually choose their own ancestry. Opinions literally define their place in doctrine by

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and back to the whole.”).

46. For a thorough discussion of the hermeneutic circle, see *id.* at 291–94.

47. Cf. Larry A. DiMatteo & Blake D. Morant, *Contracts in Context and Contracts as Context*, 45 WAKE FOREST L. REV. 549, 560 (2010) (arguing that “contract law can be understood as a thick texture of rules and doctrines that form a hermeneutic circle—one that poses the paradox that the whole cannot be understood without understanding the parts and the parts cannot be understood without comprehension of the whole.”).

48. Professor Berman has described a similar dynamic as endorsing historicity over historicism, and tradition over traditionalism. See Harold J. Berman, *The Historical Foundations of Law*, 54 EMORY L.J. 13, 18–19 (2005). Berman writes:

Historicism is the return to the past; historicity emphasizes the element of continuity from past to future in the development of the culture of a society, including its legal culture. In the words of a distinguished contemporary historian, “Tradition is the living faith of the dead; traditionalism is the dead faith of the living.”

*Id.* (quoting JAROSLAV PELIKAN, *THE VINDICATION OF TRADITION* 65 (1984)).

including or excluding ancestral opinions when reciting their own genealogy. An opinion may cite dozens of cases for various propositions contained within it. The pool of potential parents is large. Singling out the pertinent ancestral lines requires close reading of text and, where an opinion keeps mum about its true parentage, of surrounding context and tradition. It is in the realm of uncited ancestry—dotted arrows in the opinion maps—that dissents often quietly exert their influence.

Before turning to our first concrete study, I want to emphasize that the opinion maps presented here do not purport to depict the whole doctrine in question. The maps are not the territory. A vast universe of texts has affected each of the territories of due process doctrine explored. The point of the maps is not to provide exhaustive detail, but rather to sketch the main lines of the competing doctrinal schools. To deploy another analogy, the maps presented are like maps of constellations. From a sparkling universe of opinions, I draw lines between the best and brightest stars. Like constellations, the real power in the connections drawn lies less in the raw images than in the stories it allows the observer to tell.

### III. DUE PROCESS AND ECONOMIC LIBERTY

The debate over a due process right to economic liberty implicates one of the most infamous constitutional crises in American history. During the early days of Franklin Delano Roosevelt's New Deal, the Supreme Court blocked economic legislation on due process grounds, relying on *Lochner* and its progeny.<sup>49</sup> The oft-repeated tale of FDR's infamous court-packing plan launched in response to the Court's perceived intransigence and of Justice Owen Roberts' fabled "switch in time that saved nine" in 1937's *West Coast Hotel* decision need not be revisited here.<sup>50</sup> Rather, the story I want to tell is of two dissents and their powerful impact upon the competing "substantive due process" (hereafter "SDP") lines of economic liberty doctrine. These two dissents—by Justice Bradley in 1873's *Slaughter-House* and by Justice Holmes in 1905's *Lochner*—respectively, contributed to this doctrine's

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49. See David E. Bernstein, *The Story of Lochner v. New York: Impediment to the Growth of the Regulatory State*, in CONSTITUTIONAL LAW STORIES 299, 299–302 (Michael C. Dorf ed., 2d ed. 2009).

50. For an excellent recent account, see NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 103–21 (2010).

rise and fall, and yet went uncited within Supreme Court opinions in the line. This Part argues for their proper places in the genealogy.

The battles in this territory generally pitted health and welfare regulations enacted pursuant to state police power against individuals who opposed these regulations as interfering with their economic liberty. Supreme Court opinions in the tradition favoring police power and opposed to a strong right to economic liberty are represented in *Figure 1*. *Figure 2* below shows opinions from the rival tradition that advocated for a strong right to economic liberty to curb state police power. Justice Holmes' *Lochner* dissent appears in the middle of *Figure 1* while Justice Bradley's *Slaughter-House* dissent appears on the left side of *Figure 2*. Both dissents have only dotted arrows pointing to them. After presenting the raw genealogical data underlying *Figures 1* and 2, this Part first examines Holmes' dissent in *Lochner* and then Bradley's dissent in *Slaughter-House* and justifies their asserted connection to the traditions within which they are pictured.

All SDP opinions theoretically interpret the Due Process Clause of the Fourteenth Amendment, ratified in 1868. In practice, SDP opinions usually interpret SDP precedent to judge whether a state has "deprive[d] any person of life, liberty, or property without due process of law."<sup>51</sup> Unlike the incorporation doctrine considered in the next Part, the debate over a SDP right to economic right to liberty, or at least the narrower "liberty of contract" debate, is largely defunct.<sup>52</sup> For that reason, the opinion maps here have relatively few data points.

*Figure 1* depicts opinions that found no protected "liberty" interest "deprive[d]" by state regulations at issue. In chronological order, the opinions in this line are: the *Slaughter-House Cases* (Justice Samuel Miller for the Court, 1873);<sup>53</sup> *Holden v. Hardy* (Justice Henry Brown for the Court, 1898);<sup>54</sup> *Lochner v. New York* (Justice Oliver Wendell

51. U.S. CONST. amend. XIV, § 1.

52. Although some scholars have suggested that economic substantive due process has been born again, see, e.g., Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397, 397–98 & nn.1–2 (1993–1994), the fact remains that that precedent set by *West Coast Hotel* has not been challenged in any meaningful way. Westlaw's *KeyCite* records no negative authority at all regarding *West Coast Hotel*.

53. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). *Slaughter-House* was a 5–4 decision. Justice Samuel Miller wrote the majority opinion. See *id.* at 57. Justice Stephen Field dissented, with Chief Justice Salmon Chase, Justice Noah Swayne, and Justice Joseph Bradley joining. See *id.* at 83, 111 (Field, J., dissenting). Justice Bradley also wrote a separate, solo dissent. See *id.* at 111 (Bradley, J., dissenting).

54. *Holden v. Hardy*, 169 U.S. 366 (1898). *Holden* was a 7–2 decision. Justice Henry Brown delivered the opinion of the Court. See *id.* at 380. Justice David Brewer and Justice

Holmes dissenting, 1905);<sup>55</sup> *Bunting v. Oregon* (Justice Joseph McKenna for the Court, 1917);<sup>56</sup> *Adkins v. Children's Hospital of the District of Columbia* (Justice William Howard Taft dissenting, 1923);<sup>57</sup> *Adkins* (Justice Holmes dissenting, 1923);<sup>58</sup> and *West Coast Hotel v. Parrish* (Chief Justice Charles Evans Hughes for the Court, 1937).<sup>59</sup> In genealogical order, the direct citations in this line are: *West Coast Hotel* (Hughes)→ *Adkins* (Taft) + *Adkins* (Holmes);<sup>60</sup> *Adkins* (Taft)→ *Bunting* (McKenna);<sup>61</sup> *Lochner* (Holmes)→ *Holden* (Brown);<sup>62</sup> *Holden* (Brown)→ *Slaughter-House* (Miller).<sup>63</sup> The gaps in direct citation of this

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Rufus Peckham dissented without opinion. *See id.* at 398.

55. *Lochner v. New York*, 198 U.S. 45 (1905). *Lochner* was a 5–4 decision with Justice Rufus Peckham writing for the majority. *Id.* at 52. Holmes authored a solo dissent. *Id.* at 74–76 (Holmes, J., dissenting). Justice John Marshall Harlan (the first) wrote a dissent in which Justices Edward White and William Day concurred. *See id.* at 65 (Harlan, J., dissenting).

56. *Bunting v. Oregon*, 243 U.S. 426 (1917). *Bunting* was a 5–3 decision with Justice Joseph McKenna writing for the majority. *Id.* Chief Justice Edward White and Justices Willis Van Devanter and James McReynolds dissented without opinion. *Id.* at 439. Justice Louis Brandeis took no part in the decision. *See id.*

57. *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923). *Adkins* was a 5–3 decision. Justice George Sutherland penned the majority opinion. *Id.* at 539. Chief Justice William Howard Taft wrote a dissent in which Justice Edward Sanford concurred. *Id.* at 562, 567 (Taft, C.J., dissenting). Justice Holmes wrote a separate solo dissent. *Id.* at 567 (Holmes, J., dissenting). Justice Brandeis took no part in the decision. *Id.* at 562.

58. *Id.* at 567 (Holmes, J., dissenting). For *Adkins'* vote break-down, *see supra* note 57.

59. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). *West Coast Hotel* was a 5–4 decision with Chief Justice Charles Evans Hughes writing for the majority. *Id.* at 386. Justice Sutherland wrote a dissent on behalf of himself and Justices Van Devanter, McReynolds, and Pierce Butler. *Id.* at 400–01 (Sutherland, J., dissenting).

60. *See id.* at 390–91 (citing fact of *Adkins* dissents); *id.* at 395–96 (quoting from Taft and Holmes dissents); *id.* at 396–97 (same); *id.* at 397 (“We think that the views thus expressed [by Taft and Holmes] are sound and that the decision in the *Adkins* case was a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed.”).

61. *Adkins*, 261 U.S. at 563 (Taft, C.J., dissenting) (“The right of the Legislature under the Fifth and Fourteenth Amendments to limit the hours of employment on the score of the health of the employee . . . has been firmly established.”); *id.* at 563–64 (discussing *Bunting* as evidence of this principle and stating that *Bunting* overruled *Lochner sub silentio*).

62. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious . . . and which . . . interfere with the liberty to contract.”); *id.* (“The decision sustaining an eight-hour law for miners is still recent.” (citing *Holden v. Hardy*, 169 U.S. 366, 398 (1898))).

63. *Holden*, 169 U.S. at 398 (“We are of opinion that the act in question [i.e., an eight-hour day for miners] was a valid exercise of the police power of the State . . . .”); *id.* at 382 (citing *Slaughter-House* as upholding validity of monopoly “as a proper police regulation for the health and comfort of the people”).

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## EXILE ON MAIN STREET

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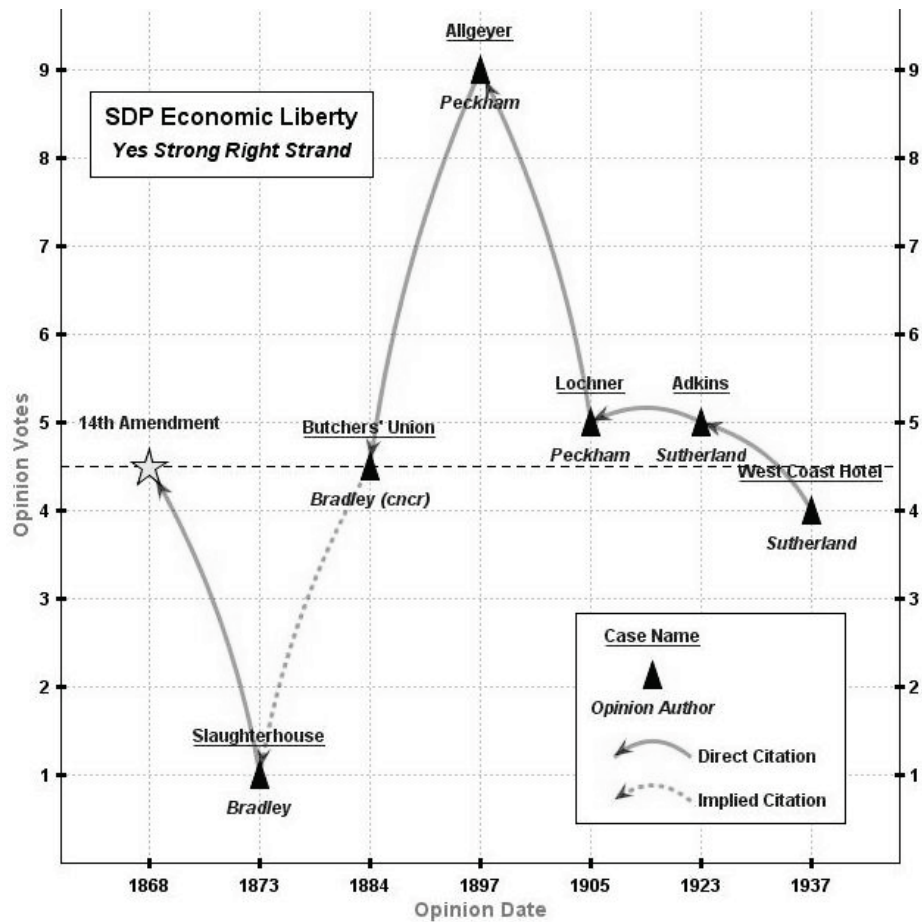


Figure 2.

genealogy that require arguments are therefore: *Adkins* (Taft) + *Adkins* (Holmes) + *Bunting* (McKenna) → *Lochner* (Holmes).

Figure 2 depicts opinions that favored an individual's economic rights over state police power. In chronological order, the opinions in this line are: *Slaughter-House* (Justice Joseph Bradley dissenting, 1873);<sup>64</sup> *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.* (Justice Bradley concurring, 1884);<sup>65</sup> *Allgeyer v. Louisiana* (Justice Rufus

64. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 111 (1873) (Bradley, J., dissenting). For *Slaughter-House*'s vote break-down, see *supra* note 53.

65. *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-*

Peckham for the Court, 1897);<sup>66</sup> *Lochner* (Justice Peckham for the Court, 1905);<sup>67</sup> *Adkins* (Justice George Sutherland for the Court, 1923);<sup>68</sup> *West Coast Hotel* (Justice Sutherland dissenting, 1937).<sup>69</sup> In genealogical order, the direct citations in this line are: *West Coast Hotel* (Sutherland)→*Adkins* (Sutherland);<sup>70</sup> *Adkins* (Sutherland)→*Lochner* (Peckham);<sup>71</sup> *Lochner* (Peckham)→*Allgeyer* (Peckham);<sup>72</sup> *Allgeyer* (Peckham)→*Butchers' Union* (Bradley).<sup>73</sup> The direct citation gap in this genealogy that requires argument is therefore: *Butchers' Union* (Bradley)→*Slaughter-House* (Bradley).

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Stock Landing & Slaughter-House Co., 111 U.S. 746 (1884). This case was decided 9–0. Justice Miller delivered the opinion of the court. *Id.* at 746. Justice Bradley concurred separately, with Justice John Marshall Harlan and Justice William Woods concurring in this concurrence. *See id.* at 760 (Bradley, J., concurring in the judgment). Justice Field also separately concurred. *Id.* at 754 (Field, J., concurring).

66. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). *Allgeyer* was a 9–0 decision. Justice Peckham delivered the opinion of the court. *Id.* at 583.

67. *Lochner*, 198 U.S. at 52. For *Lochner*'s vote break-down, *see supra* note 55.

68. *Adkins v. Children's Hosp.*, 261 U.S. 525, 539 (1923). For *Adkins*' vote break-down, *see supra* note 57.

69. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (Sutherland, J., dissenting). For *West Coast Hotel*'s vote break-down, *see supra* note 59.

70. *Id.* at 401 (Sutherland, J., dissenting) (“The principles and authorities relied upon to sustain the [majority’s] judgment were considered in *Adkins* . . . and their lack of application to cases like the one in hand was pointed out. A sufficient answer to all that is now said will be found in [*Adkins*].” (citations omitted)). Here, Justice Sutherland also specifically cited to *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), to answer the *Adkins* majority. *W. Coast Hotel*, 300 U.S. at 401. For the reasons of economy, I have not included this case in the Figure 2 opinion map.

71. *Adkins*, 261 U.S. at 545 (citing *Lochner* among other cases standing for the proposition “[t]hat the right to contract about one’s affairs is a part of the liberty of the individual protected by [the Due Process] clause, is settled by the decisions of this Court and is no longer open to question”).

72. *Lochner*, 198 U.S. at 53 (citing *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) for the proposition that “[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution”).

73. *See Allgeyer*, 165 U.S. at 589 (“The liberty mentioned in [the Fourteenth Amendment] . . . is deemed to embrace the right of the citizen to . . . pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential . . . .”); *id.* at 589–90 (quoting Bradley’s concurring opinion in *Butchers' Union* for the proposition that “‘the liberty of pursuit—the right to follow any of the ordinary callings of life’” is a protected liberty under the Fourteenth Amendment).

*A. Justifying Implied Citation to Holmes' Lochner Dissent*

In 1992's *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court considered whether to overrule its landmark abortion decision, *Roe v. Wade*.<sup>74</sup> After a canonical exposition of stare decisis, the majority opinion concluded it was bound by its prior precedent.<sup>75</sup> The opinion then examined analogies between *Roe* and two "national controversies" of "comparable dimension" where the Court had overruled its own precedent:

The first example is that line of cases identified with *Lochner*, which imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation, adopting, in Justice Holmes's view, the theory of laissez-faire. The *Lochner* decisions were exemplified by *Adkins*, in which this Court held it to be an infringement of constitutionally protected liberty of contract to require the employers of adult women to satisfy minimum wage standards. Fourteen years later, *West Coast Hotel* signaled the demise of *Lochner* by overruling *Adkins*.<sup>76</sup>

The majority then attributed *Lochner*'s demise to the failure of markets in the Depression, which made the Court realize that "[t]he older world of *laissez-faire* was . . . dead" and thus "required the new choice of constitutional principle."<sup>77</sup>

Three aspects of the *Casey* majority's neat genealogical account of *Lochner* warrant our attention.<sup>78</sup> First, consistent with the genealogy in *Figure 1*, the opinion acknowledges *West Coast Hotel* as the end of the *Lochner* line. Second, the opinion specifically cites to Holmes' *Lochner* dissent to characterize that case as embracing the theory of laissez-faire. Finally, the opinion explains the Court's subsequent reversal of its own precedent by reference to the failure of laissez-faire. Without directly

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74. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

75. *Id.* at 854–61.

76. *Id.* at 861 (internal citations omitted).

77. *Id.* at 861–62 (quoting ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 85 (1949)).

78. The majority's second example of a controversial case that was overruled was *Plessy v. Ferguson*. See *id.* at 862–63 (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896) and its repudiation by *Brown v. Board of Education*, 347 U.S. 483 (1954)). The *Casey* majority rejected any analogy between *Roe* and *Lochner* or *Plessy*. *Id.* at 861–64.



stating that his reasoning persuaded the *West Coast Hotel* majority, the narrative logic of the account nonetheless has Holmes playing a role in *Lochner*'s demise. Yet we know that this story told in 1992 is contestable since Chief Justice Hughes' majority opinion in *West Coast Hotel* did not cite to Holmes' dissent or to any other authority that previously cited to Holmes' dissent.<sup>79</sup> The real question is whether the Justices in 1937—the year of *West Coast Hotel*—were affected by Holmes' dissent. *Figure 1* asserts that the answer is “yes.”

To defend this answer, we first turn to *West Coast Hotel* itself. The case arose out of a chambermaid's civil suit against her hotel employer to recover the difference between the wages paid her and the minimum wage fixed pursuant to Washington state's minimum wage law for women.<sup>80</sup> The Court in *Adkins* had previously struck down a similar Washington, D.C. minimum wage law for women and children.<sup>81</sup> Of course, Chief Justice Hughes's majority opinion in *West Coast Hotel* overruled *Adkins*.<sup>82</sup> In so doing, Hughes explicitly cited and adopted the views of the two *Adkins* dissenters, Chief Justice Taft and Justice Holmes.<sup>83</sup> This invocation of dissent as authority is itself important as it signals the redemption of an exiled tradition. However, Hughes did not formally overrule *Lochner* nor did he separately invoke Holmes' dissent. The question remains whether the dissents in *Adkins* or the majority in *Bunting* can be linked to Holmes' dissent.

The first dotted arrow to consider is that from Holmes' own dissent in *Adkins* back to his prior effort in *Lochner*. First and foremost, the authority for connecting these two opinions derives from their common author. Holmes obviously believed his own prior argument from

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79. Writing in dissent in *Casey*, Chief Justice William Rehnquist disputed the Casey majority's suggestion that the Court's realization of the bankruptcy of laissez-faire led it to overrule *Lochner*. *Id.* at 960–61 (Rehnquist, C.J., dissenting). However, Rehnquist tellingly also included Holmes in his counter-narrative: “When the Court finally recognized its error in *West Coast Hotel* . . . it did not state that *Lochner* had been based on an economic view that had fallen into disfavor, and that it therefore should be overruled. Chief Justice Hughes in his opinion for the Court simply recognized what Justice Holmes had previously recognized in his *Lochner* dissent, that “[t]he Constitution does not speak of freedom of contract.” *Id.* at 961 (alteration in original).

80. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 388 (1937).

81. *Adkins v. Children's Hosp.*, 261 U.S. 525, 562 (1923). The underlying disputes in *Adkins* were civil; both cases essentially involved actions against the minimum wage board to prevent them from enforcing orders to pay minimum wages or suffer penalties. *Id.* at 542–43.

82. See *W. Coast Hotel*, 300 U.S. at 400 (overruling *Adkins*).

83. See *id.* at 395–96, 396–97; Fig.1, *supra* p.1258; see also *supra* note 60.

*Lochner* when making his case in *Adkins*. He also likely re-read his previous opinion before penning his *Adkins* dissent. In both opinions, Holmes stressed that the state has long had the power to interfere with liberty of contract and gave the same two “ancient examples” of “Sunday laws and usury laws.”<sup>84</sup> In both opinions, he preached deference to the legislature and the irrelevance of a judge’s private belief about the good of legislation.<sup>85</sup> With such clear parallels, the formal absence of citation between Holmes’ two opinions signifies nothing more than modest reticence.

The case for connecting Taft’s *Adkins* dissent back to Holmes’ *Lochner* dissent is also strong. Initially, Taft plainly echoed Holmes’ famous line “[t]his case is decided upon an economic theory which a large part of the country does not entertain”<sup>86</sup> when he wrote in *Adkins* that “it is not the function of this Court to hold congressional acts invalid simply because they are passed to carry out economic views which the Court believes to be unwise or unsound.”<sup>87</sup> Second, Taft cited the same precedent as Holmes had done to support his conclusion.<sup>88</sup> Even without this congruence of their arguments, it is almost inconceivable that Taft was unfamiliar with Holmes’ *Lochner* dissent. By 1923, the opinion had already found fame.

This Article opened with reference to a 1919 *Harvard Law Review* article by Judge Hough that praised Holmes’ dissent.<sup>89</sup> Two years later, in 1921, Benjamin Cardozo published his highly regarded book *The Nature of the Judicial Process*.<sup>90</sup> In it, Cardozo wrote of a new epoch in constitutional thought dawning in 1883:

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84. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). *But see Adkins*, 261 U.S. at 568 (Holmes, J., dissenting) (“Usury laws prohibit contracts by which a man receives more than so much interest for the money that he lends. . . . Some Sunday laws prohibit practically all contracts during one-seventh of our whole life.”).

85. *Compare Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (“I strongly believe that my agreement or disagreement [with a law] has nothing to do with the right of a majority to embody their opinions in law.”), *with Adkins*, 261 U.S. at 570 (Holmes, J., dissenting) (“The criterion of constitutionality is not whether we believe the law to be for the public good.”).

86. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

87. *Adkins*, 261 U.S. at 562 (Taft, C.J., dissenting).

88. In *Lochner*, Holmes had cited *Holden* as primary authority for permitting the maximum-hours law to stand as a legitimate exercise of police power. *See Lochner*, 198 U.S. at 75; Fig.1, *supra* p.1258; *see also supra* note 54 and accompanying text. In *Adkins*, Taft also used *Holden* as primary authority to support the same conclusion. *Adkins*, 261 U.S. at 563 (Taft, C.J., dissenting) (citing *Holden*).

89. *See Hough, supra* note 1.

90. *See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS* (1921). The

If the new epoch had then dawned, it was still obscured by fog and cloud. . . . Even as late as 1905, the decision in *Lochner* still spoke in terms untouched by the light of the new spirit. It is the dissenting opinion of Justice Holmes, which men will turn to in the future as the beginning of an era. In the instance, it was the voice of a minority. In principle, it has become the voice of a new dispensation, which has written itself into law . . . . That is the conception of liberty which is dominant today. It has its critics even yet, but its dominance is, I think, assured.<sup>91</sup>

Though Cardozo had not yet assumed his seat on the Supreme Court,<sup>92</sup> this passage shows that, in the eyes of serious jurists of the day, Holmes' dissent represented an ascendant school of thought in Supreme Court discourse. Taft—Chief Justice and former President of the United States—was one such serious jurist belonging to the ascendant school.

This brings us to the case for the dotted arrow connecting Justice McKenna's *Bunting* opinion back to Holmes' dissent. Decided six years prior to *Adkins* and twelve years after *Lochner*, *Bunting* upheld maximum-hours legislation regulating millers against a due process challenge raised by an employer convicted of violating the law.<sup>93</sup> Though this result flatly contradicted *Lochner*'s striking down of maximum-hours legislation regulating bakers, Justice McKenna's opinion for the Court did not mention *Lochner*—majority or dissent—at all.<sup>94</sup> The glaring incongruity of results between *Lochner* and *Bunting*

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book derived from Cardozo's delivery of the Storrs Lectures at Yale University. *Id.*

91. *Id.* at 79–80 (footnotes and citation omitted). The second set of ellipses in the block quote omits Cardozo's liberal quoting of the most famous lines from Holmes' opinion.

92. Cardozo joined the Supreme Court in 1932 and served until 1938. See SCOTUS VISUAL HISTORY, *supra* note 2. Unsurprisingly, Cardozo joined the *West Coast Hotel* majority that struck down *Adkins* and ended *Lochner*'s run. Providing neat citation for this proposition is tricky given the Court's usual practice of not listing justices who joined the majority opinion. However, since Cardozo was on the Court in 1937, and not among four *West Coast Hotel* dissenters, a process of elimination confirms he was in the majority. See *supra* note 59 and accompanying text.

93. *Bunting v. Oregon*, 243 U.S. 426, 434, 438 (1917). The case came to the Supreme Court on a writ of error from the Supreme Court of Oregon. *Id.* at 426.

94. See *id.* at 433–39. McKenna barely cited any authority at all in his opinion, emphasizing instead comparative statistics that showed Oregon's law was not unreasonable or arbitrary. See *id.* The narrowness of the decision appears to derive from the limited claims of the plaintiff-in-error. *Id.* at 438. The only relevant authority McKenna cited was *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 365 (1916), for the proposition that the Court must defer to the legislature. *Id.* at 437. The *Bunting* dissenters did not help the situation since they

led Chief Justice Taft to later declare in *Adkins*: “It is impossible for me to reconcile the *Bunting Case* and the *Lochner Case* and I have always supposed that the *Lochner Case* was thus overruled *sub silentio*.”<sup>95</sup> Taft’s sub silentio argument assumed that McKenna had read *Lochner* but deliberately ignored it. If this is credible, it is similarly credible to argue that McKenna had read Holmes’ dissent but not cited it.<sup>96</sup> This argument is made more plausible given the standing of Holmes’ dissent among jurists as described above.

Even if this argument extending Taft’s particular sub silentio reasoning is unpersuasive, it should be recognized that the general phenomenon of sub silentio overrulings challenges the empiricists’ exclusive reliance on citation to measure the influence of opinions over doctrine. Sometimes the Court is silent about what it is really doing.<sup>97</sup> In these instances, true understanding requires reading “between the lines” to catch the subtext. This suggests a kind of hermeneutic reading that looks to surrounding context and tradition instead of only the literal text to grasp an opinion’s meaning. In the case of *Bunting*, the surrounding tradition is the no-strong-right strand of economic liberty doctrine. Because it is connected to this tradition, *Bunting* ultimately belongs to the same line of cases as Holmes’ *Lochner* dissent, which has been read since at least 1918 to exemplify this school of thought.

In the end, whether Holmes’ *Lochner* dissent links into *Figure 1*’s genealogy from two or three opinions is unimportant. What matters is the soundness of the proposition that his dissent fits in the tradition leading up to *West Coast Hotel*. This, I submit, has been established. Contemporary evidence shows that scholars and jurists celebrated

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issued no opinion. See *supra* note 56 and accompanying text.

95. *Adkins v. Children’s Hosp.*, 261 U.S. 525, 564 (1923) (Taft, C.J., dissenting). Of course, *Adkins* technically differed from *Bunting* and *Lochner* in that it concerned minimum-wage legislation rather than maximum-hour legislation. However, Taft rejected “the distinction between a minimum of wages and a maximum of hours in limiting the liberty to contract. . . . In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to one is not any greater in essence than the other, and is of the same kind. One is the multiplier and the other the multiplicand.” *Id.*

96. Taft’s assumption does seem credible given his position on the Court. Even before the age of electronic databases, it seems unlikely that all of the Justices in the *Bunting* majority simply forgot or never read *Lochner*.

97. For insightful recent analyses of sub silentio overrulings, see Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010); and Christopher J. Peters, *Under-the-Table Overruling*, 54 WAYNE L. REV. 1067 (2008).

Holmes' opinion well before *West Coast Hotel*. Almost all modern law students encounter Holmes during their studies, and it seems reasonable to infer that his *Lochner* dissent entered the curriculum not long after it was written. The qualities that make the dissent amenable to teaching—its perfect brevity, trenchant analysis, and memorable aphorisms—were obvious from its first publication in the reporters. The continuity of tradition indicates that Holmes' *Lochner* dissent helped sway the constitutional conversation that led to *Lochner*'s overruling.

The emphasis here remains on tradition. I do not claim that Holmes' dissent exerted more influence than all other opinions or the social facts on the ground.<sup>98</sup> In fact, it bears emphasis that Holmes himself stood on the shoulders of those who came before him. Holmes did not found the school supporting the state's police power to enact health and welfare regulations. Indeed, as *Figure 1* shows, Holmes' opinion merely marked the first time the no-strong-right school had appeared in dissent. The story of Holmes' dissent is thus intertwined with the story of the opinions that came before it. It is to that earlier story—and the remarkable rise of economic liberty from a tradition initiated in an uncited dissent—that we now turn.

#### *B. Justifying Implied Citation to Bradley's Slaughter-House Dissent*

Although the constitutional conflict in *Lochner* flared before and after that case, Justice Peckham and Justice Holmes are now remembered as the most famous representatives of the clashing doctrines. This is for good reason. Peckham and Holmes made worthy adversaries. Holmes, for one, had a gift for turning phrases. His proposed due process test in *Lochner* has reverberated over the years:

[T]he word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant

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98. Some commentators, for example, have suggested that Justice Harlan's dissent actually exerted more influence over the course of doctrine. See, e.g., Jason A. Adkins, Note, *Meet Me at the (West Coast) Hotel: The Lochner Era and the Demise of Roe v. Wade*, 90 MINN. L. REV. 500, 507 (2005) ("While the majority opinion and Holmes's dissent represent the polar extremes in the debate over substantive due process, it was Justice Harlan's approach in *Lochner* that later provided the rationale for its eventual reversal in *West Coast Hotel*."). While there is undoubtedly merit to this position, I have chosen not to chart Harlan's *Lochner* dissent in this map or analyze its influence over the discourse. My modest goal in this Part is simply to establish that Holmes' dissent played some role in shaping the debate despite its lack of citation. Since Harlan's dissent also went uncited, the same essential point could be made of his dissent.

opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.<sup>99</sup>

While compellingly put, Holmes' conclusion that liberty of contract fell outside "the traditions of our people and our law" was certainly disputable at the time.<sup>100</sup> Indeed, as *Figure 2* proposes, Peckham built upon a tradition that stretched back at least as far as Justice Bradley's dissent in *Slaughter-House*.<sup>101</sup> Justice Peckham's remarkable success in restoring this exiled tradition to doctrinal supremacy in *Lochner*—even if ultimately reversed—deserves recognition.

The story of Peckham's success is also the story of the redemption of Bradley's *Slaughter-House* dissent. However, since the arrow to this Bradley's dissent in *Figure 2* is dotted, this means that connecting his dissent to subsequent tradition cannot be established through chains of citation alone. Yet the connection is quite simple to forge and has indeed been recognized by previous scholars.<sup>102</sup> The precise details and nature of the connection, on the other hand, are less known.<sup>103</sup> The key portion of the doctrinal narrative begins with the infamous *Slaughter-House Cases* and continues to its lesser known successor *Butchers' Union*.

Decided in 1873, the *Slaughter-House Cases* marked the first occasion the Supreme Court interpreted the Fourteenth Amendment,

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99. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

100. *Id.*

101. See Fig.2, *supra* p.1273; see also *supra* notes 72–73 and accompanying text. *Slaughter-House* marked the first time the Due Process Clause of the Fourteenth Amendment was interpreted by the Supreme Court. However, the phrase "due process of law" originates from the Magna Carta and the traditions of interpreting the meaning of due process extend back much farther than 1868. See *infra* notes 137–138 (citing pre-1868 sources that influenced the development of due process doctrine).

102. See, e.g., McCormack, *supra* note 52, at 403 ("The dissents from *Slaughterhouse*, however, would later become the majority in *Lochner*." (footnote omitted); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 279 (1998) ("[T]he decisions of the Supreme Court in the *Lochner* era, for example, made the nineteenth-century dissents of Justices Joseph Bradley and Stephen Field appear prophetic . . ." (footnote omitted)).

103. Justice Black's explanation of the connection remains one of the best. See *Adamson v. California*, 332 U.S. 46, 80–81 (1947) (Black, J., dissenting). Indeed, *Figure 2* tracks his genealogy from Bradley's dissent in *Slaughter-House* to Peckham's majority in *Lochner*. Black's account, however, was skeletal and requires elaboration.

which passed in 1868.<sup>104</sup> Today, the *Slaughter-House* majority decision suffers an atrocious reputation among academics and jurists.<sup>105</sup> The intensity of this criticism, however, tends to obscure the underlying factual context and specific *due process* legacy of the case. The underlying controversies were all civil challenges to the monopoly conferred by the City of New Orleans upon the Crescent City Live-Stock Landing and Slaughter-House Company.<sup>106</sup> The challenged Louisiana legislation responded to genuine public health concerns over outbreaks of yellow fever and cholera by confining all abattoir operations in New Orleans to a defined subsection of the city.<sup>107</sup> The law also conferred a monopoly to one company to run the city abattoir, but permitted any butcher to slaughter meat under the company's aegis upon payment of a fee.<sup>108</sup> Justice Samuel Miller's majority opinion upheld the scheme as a valid exercise of police power.<sup>109</sup> The enduring controversy over *Slaughter-House* centers not on this rather reasonable result, but rather over its doctrinal justification. The main problem pointed out by the dissenters in *Slaughter-House* and by modern commentators is that it effectively obliterated the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>110</sup>

While the overwhelming bulk of debate in the case turns on the Privileges or Immunities Clause, it is vital to recall that the Court also

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104. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70–71 (1873) (discussing context for ratification of the Fourteenth Amendment). *Slaughter-House* also involved interpretation of the Thirteenth Amendment outlawing slavery. *See id.* at 68–69.

105. *See, e.g., McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3029–30 (2010) (collecting sharp and broad-ranging criticism of *Slaughter-House*).

106. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 57.

107. *See id.* at 59; *see also* Jonathan Lurie, *Reflections on Justice Samuel F. Miller and the Slaughter-House Cases: Still a Meaty Subject*, 1 N.Y.U. J.L. & LIBERTY 355, 356 & n.10 (2005) (describing health epidemics that led to passage of legislation).

108. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 59–60.

109. *See id.* at 62–63 (discussing relationship between police power and public health implications of slaughtering animals).

110. The Court interpreted Privileges and Immunities to protect only exclusively federal rights from state intrusion and defined exclusively federal rights very narrowly. *See id.* at 96 (Field, J., dissenting) (“If this inhibition . . . 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.”); *see also* Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001) (“Virtually no serious modern scholar—left, right, and center—thinks that this [interpretation] is a plausible reading of the Amendment.”) (quoted in *McDonald*, 130 S. Ct. at 3030).

considered whether the monopoly conferred on one company deprived competing butchers of their liberty or property without due process of law.<sup>111</sup> The majority quickly dismissed the argument, stating that “under no construction [of the Due Process Clause] that we have ever seen, or any that we deem admissible” could the monopoly be deemed a deprivation.<sup>112</sup> In his dissent, however, Justice Bradley developed a due process argument based on an economic conception of “liberty.”<sup>113</sup> After invoking the Magna Carta and “traditional rights and privileges” Americans inherited from their ancestors,<sup>114</sup> Bradley concluded:

In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property.<sup>115</sup>

These words provided the textual roots for *Lochnerism*. However, no opinion in the strong economic-due-process school ever directly quoted these words or cited Bradley’s *Slaughter-House* dissent. Rather, Bradley’s concept of liberty passed to the next generation through his subsequent concurrence in *Butchers’ Union*, which I assert is connected hermeneutically to his *Slaughter-House* dissent.

Decided in 1884, *Butchers’ Union* basically cast the same characters from *Slaughter-House* in reversed roles.<sup>116</sup> Six years after *Slaughter-House*, the state of Louisiana adopted a new constitution which abolished its previously conferred abattoir monopoly.<sup>117</sup> The previous monopoly holders sued, but the Supreme Court unanimously upheld the

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111. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 66 (reciting counsel’s argument that the law deprived the butchers of property without due process of law).

112. *Id.* at 81.

113. See *id.* at 114–16 (Bradley, J., dissenting) (“This right to choose one’s calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man’s property and right.”).

114. *Id.* at 114–15 (Bradley, J., dissenting).

115. *Id.* at 122 (Bradley, J., dissenting).

116. See *Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 746 (1884).

117. *Id.* at 748.



state's right to take away what it had previously granted.<sup>118</sup> Justice Bradley wrote separately to repeat his view that the old monopoly had never been valid because, *inter alia*, the law had deprived butchers of their liberty to pursue a calling and occupation.<sup>119</sup> Since he wrote in concurrence, Bradley's *Butchers' Union* opinion is represented in *Figure 2* as lying precisely on the line that separates majority from dissent.<sup>120</sup>

The justification for the hermeneutic link between Bradley's two opinions thus derives from the common identity between author, litigants, subject-matter, and doctrinal themes. This connection seems hard to deny. As Justice Hugo Black later recognized, Bradley's due process analysis in *Butchers' Union* "closely followed one phase of the argument of his dissent in the original *Slaughter-House* cases."<sup>121</sup> Unfortunately, a pure citation-counting heuristic would not capture this connection between Bradley's *Slaughter-House* dissent and the rest of the economic due process doctrine.<sup>122</sup> The hermeneutic method does not suffer from this limitation. And with the connection to *Butchers' Union* established, we can now complete the story of Justice Peckham's victory and redemption of Bradley's dissent.

After *Butchers' Union* comes *Allgeyer*. Decided in 1897, the underlying case in *Allgeyer* concerned a civil fine issued against a company for violating a Louisiana law prohibiting individuals within the state from making contracts of insurance with corporations doing business in New York.<sup>123</sup> Writing for a unanimous majority, Peckham struck down the statute as violating the right of contract guaranteed by the Due Process Clause.<sup>124</sup> He accomplished this impressive feat by making two key moves that consolidated a due process tradition that had previously existed in exile. First, he directly quoted Justice

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118. *Id.* at 754.

119. *Id.* at 765 (Bradley, J., concurring).

120. I see this position as fairly tracking the precedential value of a concurrence relative to a majority or dissenting opinion. It lies somewhere in between in a way difficult to define.

121. *Adamson v. California*, 332 U.S. 46, 80–81 (1947) (Black, J., dissenting). The phase of the argument Black refers to, of course, is the due process analysis.

122. Close analysis of the text of *Butchers' Union* reveals that Bradley refers to his *Slaughter-House* dissent without actually citing it. See *Butchers' Union*, 111 U.S. at 764 (Bradley, J., concurring). After citing the *Slaughter-House* majority, Bradley states, "I then held, and still hold . . ." *Id.* This oblique reference demonstrates the importance of context to understanding the relationship between a text and its surrounding tradition. A naked citation-counting scheme could not account for this subtlety.

123. *Allgeyer v. Louisiana*, 165 U.S. 578, 583–84 (1897).

124. *Id.* at 592–93.

Bradley's concurring opinion in *Butchers' Union*.<sup>125</sup> Here Peckham explicitly extended remarks Bradley made in the monopoly context to "describe the rights which are covered by the word 'liberty' as contained in the Fourteenth Amendment."<sup>126</sup> Second, Peckham seized upon dicta from a case called *Powell v. Pennsylvania*, in which the Court stated that "'the privilege of pursuing an ordinary calling . . . is an essential part of [the] rights of liberty and property, as guaranteed by the Fourteenth Amendment.'"<sup>127</sup> Though neither Bradley's concurrence nor *Powell*'s dicta individually had the force of precedent, Peckham ingeniously combined the two authorities and established liberty of contract as Supreme Court doctrine in *Allgeyer*.

When *Lochner* came before the Court, Peckham simply grounded his majority opinion in the authority of his own words in *Allgeyer*, citing it for the proposition that "[t]he general right [of an employer] to make a contract in relation to his business is part of the liberty . . . protected by the Fourteenth Amendment of the Federal Constitution."<sup>128</sup> Here Peckham distilled his longer argument from *Allgeyer* into a concrete proposition that marked the ascendancy of the strong-right-to-economic-liberty school. Though the school did not forever grasp the reins of power, the dexterity of Peckham's argumentation certainly made a mark. In his *Lochner* dissent, Holmes patently ignored *Allgeyer*. Although Peckham likely delighted at this omission, the shortcoming in Holmes' legal argument mattered more in 1905 than it does today.<sup>129</sup>

125. *Id.* at 589–90 (quoting *Butchers' Union*, 111 U.S. at 762, 764, 765 (1884) (Bradley, J., concurring)).

126. *Id.*

127. *Id.* at 590 (quoting *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888)). *Powell* was an 8–1 decision. Justice Harlan wrote the opinion of the Court and Justice Stephen Field dissented. The case involved an appeal from a criminal conviction for selling oleomargarine butter in violation of law prohibiting non-dairy butter substitutes. See *Powell*, 127 U.S. at 685. The majority upheld the conviction, a result consistent with the no-strong-right school of economic due process. Thus, although Peckham in *Allgeyer* quoted language from Justice Harlan's majority opinion, his analysis was far more in line with Justice Stephen Field's *Powell* dissent. Compare *id.* at 683–87, with *id.* at 691–92 (Field, J., dissenting) (arguing that liberty under the Due Process Clause means freedom "to follow such pursuits as may be best adapted to [a person's] facilities"). The complexity of Peckham's direct cite to the majority of a rival school and implied cite to the dissent of an ally explains why *Powell* does not appear in Figure 2. Though intriguing, representing the crossed connections would unhelpfully obscure the essential picture of the strong-right school.

128. *Lochner v. New York*, 198 U.S. 45, 53 (1905) (citing *Allgeyer*, 165 U.S. at 589).

129. This is not to say that precedent mattered more in 1905 legal arguments than they do today. My point is rather that the subsequent redemption of Holmes' opinion makes the gaps in his authority seem less important to the modern legal reader. After all, Holmes has

Figure 3<sup>130</sup> depicts both strands of SDP economic liberty doctrine. As can be seen, the separate lines cross twice. These crossings represent junctures where one doctrinal school moved from exile in dissent into the majority. Here, the strong economic liberty strand moved from dissent in *Slaughterhouse* to majority in *Allgeyer*. The contra strand subsequently moved from dissent in *Lochner* to majority in *West Coast Hotel*. Right in the middle of the movement sits the one case not yet discussed—*Holden*. Holmes cited *Holden* in his *Lochner* dissent as a recent example of a decision “cutting down the liberty to contract.”<sup>131</sup> Decided in 1898, a year after *Allgeyer*, Justice Henry Brown’s majority opinion in *Holden* reveals the contemporary doctrinal uncertainty in conflicts between police power and the economic rights of individuals.<sup>132</sup> Brown candidly acknowledged both that *Allgeyer* upheld a right of contract<sup>133</sup> and that “many authorities . . . hold that state statutes restricting the hours of labor are unconstitutional.”<sup>134</sup> In the end, however, Justice Brown categorized a law imposing an eight-hour maximum workday for miners as falling on the “valid exercise of the police power” side of the debate.<sup>135</sup> This result was consistent with *Slaughterhouse*, a case Brown invoked as first establishing the inability of the Fourteenth Amendment to prohibit “a proper police regulation for the health and comfort of the people.”<sup>136</sup>

Justice Brown’s evident difficulty in *Holden* in reconciling conflicting cases hints at the dialectical role played by competing schools of due process thought in shaping due process doctrine. Opinions are arguments and they often respond to arguments made in other opinions. Sometimes the argument is between majority and dissent in the same

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become an authority in his own right. His then-unsupported assertions about the constitution’s meaning now command more respect than *Allgeyer*.

130. See *infra* App., at p.1327.

131. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (citing *Holden v. Hardy*, 169 U.S. 366 (1898), as one such example).

132. *Holden*, 169 U.S. at 380. The underlying action was a habeas action challenging the criminal prosecution initiated against Holden for employing a miner in violation of the eight-hour maximum day law. *Id.* at 366–67.

133. *Id.* at 391 (discussing *Allgeyer*, 165 U.S. at 591, but concluding that “[t]his right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers”).

134. *Id.* at 397–98.

135. *Id.* at 398 (“We are of the opinion that the act in question was a valid exercise of the police power of the State . . .”).

136. *Id.* at 382 (discussing *Slaughter-House*).

case. Sometimes the argument pits majority from one school against subsequent majority from the competing school. Doctrine ultimately emerges from this argument dialectic. Dividing doctrine into competing schools helps picture this dialectic but inevitably oversimplifies the underlying complexity.

It thus bears repeating that the opinion maps presented here do not purport to depict the whole of economic due process doctrine. A vast universe of texts has affected economic due process doctrine—this universe includes the Magna Carta,<sup>137</sup> English opinions from before the Revolutionary War,<sup>138</sup> state-court opinions,<sup>139</sup> advocates' briefs,<sup>140</sup> and even non-pictured Supreme Court opinions.<sup>141</sup> And yet, the absence of these other texts from *Figures 1–3* does not detract from the central claim that uncited dissents played a vital role in shaping economic due process doctrine. Bradley's dissent in *Slaughter-House* and Holmes' dissent in *Lochner* articulated the teachings of their rival schools. Even though neither opinion was cited within the majority opinions that formally changed the law, these dissents sustained the traditions that made formal change possible. The real use of *Figures 1–3* is to put these dissents on the maps, record their places in the genealogies, and draw

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137. See, e.g., *id.* at 387–89 (analyzing the discussion of Magna Charta in *Hurtado v. California*, 110 U.S. 516 (1884)); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 114–15 (1873) (Bradley, J., dissenting) (describing Magna Charta as source of “fundamental rights” protected by due process of law).

138. See, e.g., *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 101–04 (Field, J., dissenting) (dissecting the *Case of Monopolies*, decided in reign of Queen Elizabeth and reported by Coke).

139. See, e.g., *Lochner v. New York*, 198 U.S. 45, 63–64 (1905) (collecting state cases where “courts upheld the right of free contract and the right to purchase and sell labor upon such terms as the parties may agree to”).

140. In a wonderful article published in 1938, Walton Hamilton compellingly argued that former Supreme Court justice John Archibald Campbell single-handedly blazed the path for economic due process when he represented the butchers of New Orleans challenging the monopoly in *Slaughter-House*. See Walton H. Hamilton, *The Path of Due Process of Law*, 48 ETHICS 269, 273–83 (1938). Advocating before the Court where he used to sit, Campbell did not win *Slaughter-House*, but as Hamilton points out “the loss of a cause is not the loss of a doctrine.” *Id.* at 280. “[A]ll the justices who spoke for the court or in dissent [in *Slaughter-House*] addressed themselves to Mr. Campbell's argument,” *id.* at 279, and fourteen years later, the Court followed the path “Mr. Campbell had blazed . . . for a novel doctrine.” *Id.* at 283 (discussing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

141. See, e.g., *supra* note 127 and accompanying text (discussing influence of *Powell v. Pennsylvania*); *supra* note 98 and accompanying text (discussing influence of Harlan's dissent in *Lochner*).

them into the constellations. Whatever the metaphor, non-cited dissents forever changed economic due process doctrine.

#### IV. DUE PROCESS AND INCORPORATION

Substantive due process doctrine is an expansive family tree with many branches. Though the direct economic liberty line has largely died out, other branches of the SDP genealogy have survived and reproduced. Living and generally well-liked relatives to economic liberty include SDP protections for the rights of individuals to marry those of different races,<sup>142</sup> the rights of parents to direct the upbringing and education of their children,<sup>143</sup> and the rights of individuals to use contraception.<sup>144</sup> More controversial cousins include the right of women to obtain an abortion<sup>145</sup> and the right of same-sex couples to engage in consensual sex.<sup>146</sup> One lesser-known clan in the SDP genealogy is that family of cases that “incorporate”—to use the term of art<sup>147</sup>—rights in the Bill of Rights into the substantive protections of the Due Process Clause and apply them against the States. This Part examines the

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142. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (recognizing a due-process as well as an equal protection-based right to marry a person of another race).

143. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (vindicating right of parents to direct education of their children); *Meyer v. Nebraska*, 262 U.S. 390, 399–403 (1923) (striking down prohibition on teaching foreign languages). The specific connection between these cases and the Court’s *Lochner* jurisprudence is explored in Bernstein, *supra* note 49, at 301–02.

144. See *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (right of unmarried couples to use contraception); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (right of married couples to use contraception).

145. See generally *Roe v. Wade*, 410 U.S. 113 (1973).

146. *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)). It is noteworthy that Justice Anthony Kennedy’s opinion for the Court in *Lawrence* specifically cited and redeemed Justice John Paul Stevens’ dissent in *Bowers*. See *id.* at 578 (“Justice Stevens’ analysis, in our view, should have been controlling in *Bowers* and should control here.”). Though I do not undertake to examine the role of dissents in shaping this area of SDP doctrine, the case clearly could be made.

147. Use of “incorporation” to refer to the mechanism of applying an Amendment from the Bill of Rights against the states through the Due Process Clause emerged in the early 1940s. See, e.g., *Betts v. Brady*, 316 U.S. 455, 461–62 (1942) (“The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment . . .”). By the time Charles Fairman published his influential law review article on the topic in 1949, “incorporation” was a bona fide term of art. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949) (arguing against incorporation).

development of incorporation doctrine and shows how dissents shaped its competing lines of tradition.

Although incorporation doctrine unquestionably belongs in the SDP line,<sup>148</sup> it also possesses a peculiar trait that marks it as an unconventional relative. The distinguishing feature of incorporation doctrine is its direct connection to constitutional text. Mainline SDP rights such as those concerning the upbringing of children or sexual privacy find no specific mention in the Constitution, but derive rather from reading the Due Process Clause's guarantee of "liberty" to protect practices "essential to the orderly pursuit of happiness by free men [and women]."<sup>149</sup> On the other hand, those rights "incorporated" against the States through the Due Process Clause necessarily appear directly somewhere in the Bill of Rights. The apparent contradiction here is explained by the fact that it has been settled since 1833's *Barron ex rel. Tiernan v. Mayor of Baltimore* that that the array of liberties secured by the Bill of Rights applied only against the Federal Government.<sup>150</sup> Incorporation thus refers to the practice of reading the Due Process Clause's guarantee of "liberty" to protect against State infringement certain practices protected against Federal infringement by the Bill of Rights.<sup>151</sup>

Three decades after *Barron*, the wisdom of exempting the States from honoring federal rights became an issue again after the bloody Civil War and passage of the Fourteenth Amendment in 1868. At first blush, the best textual mechanism for applying the Bill of Rights against the States seemed to be the new amendment's Privileges or Immunities Clause, which provided that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

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148. Incorporation's status as a substantive due process doctrine was accepted by both sides of the most recent debate. Compare *McDonald v. City of Chicago*, Ill., 130 S. Ct. 3020, 3050 (2010) (Scalia, J., concurring) ("Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights."), with *id.* at 3090 (Stevens, J., dissenting) ("This is a substantive due process case."). The *McDonald* case is explored at length *infra*.

149. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). There are, of course, many other ways to formulate the substantive due process test. For an interesting (though disapproving) "collection of the catchwords and catch phrases" in this area, see *Griswold*, 381 U.S. at 511–12 n.4 (Black, J., dissenting).

150. See *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833).

151. Incorporation also protects rights to the "life" or "property" guaranteed in the Bill of Rights.

States.”<sup>152</sup> However, as discussed in the previous Part, the *Slaughter-House* majority promptly killed the Clause as a mechanism for enforcing all but the narrowest set of exclusively national rights against the States.<sup>153</sup> This doctrinal setback did not vanquish the school seeking to apply the Bill of Rights against the States. Rather, it changed the textual strategy. Focus soon shifted to the Due Process Clause just one semi-colon to the right of Privileges or Immunities.<sup>154</sup>

This strategy initially failed. In 1884’s *Hurtado v. California*, an eight Justice majority led by Justice Stanley Matthews rejected the idea that the Due Process Clause incorporated the Fifth Amendment’s requirement of indictment by Grand Jury in a capital case.<sup>155</sup> However, Matthews’ opinion conceded that the Clause protected “the very substance of individual rights to life, liberty, and property” and not just “particular forms of procedure.”<sup>156</sup> And writing in dissent, Justice John Marshall Harlan made a compelling case for finding that Due Process Clause should protect those “fundamental principles of liberty and justice” described in the Bill of Rights.<sup>157</sup> From these initial divergences of opinion were born the competing schools of incorporation doctrine.

The subsequent debate extended over a century and as of today, almost all of the rights in Bill of Rights apply against the States.<sup>158</sup> Recently, the Court incorporated the Second Amendment in the *McDonald* case.<sup>159</sup> The story of this remarkable turn-around of the pro-incorporation school is largely the story of two redeemed dissents—first of Justice Harlan’s *Hurtado* dissent and then of Justice Hugo Black’s epic dissent in *Adamson v. California*.<sup>160</sup> Though these dissents provided the intellectual ammunition for the cases that redeemed them—*Powell v. Alabama*<sup>161</sup> and *Gideon v. Wainwright*<sup>162</sup> respectively—neither dissent

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152. U.S. CONST. amend. XIV, § 1.

153. See *supra* note 110 and accompanying text.

154. See U.S. CONST. amend. XIV, § 1.

155. *Hurtado v. California*, 110 U.S. 516, 534–35 (1884).

156. See *id.* at 532. This statement may constitute the earliest reference to the substantive component of due process in Supreme Court jurisprudence.

157. *Id.* at 548 (Harlan, J., dissenting).

158. For a complete survey of all the rights that have and have not been incorporated, see *McDonald v. City of Chicago*, Ill., 130 S. Ct. 3020, 3034–35 nn.12–14 (2010).

159. *Id.*

160. *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

161. *Powell v. Alabama*, 287 U.S. 45 (1932).

was directly cited therein. Proving the hermeneutic connection of these dissents to the tradition embraced in *Powell* and *Gideon* is the primary task of subparts A and B below.

Subpart C examines the genealogy of the school generally opposing incorporation. This school largely, but not entirely, dominated the doctrine from *Hurtado* until the criminal procedure revolution of the Warren Court in the 1960s.<sup>163</sup> When it fell into dissent, the anti-incorporation school found a new champion in the second Justice John Marshall Harlan (grandson of the first). In his remarkable final dissent on the Court after a thirty-five year career, Justice Stevens ostensibly embraced Harlan's dissents in *McDonald*.<sup>164</sup> At first blush, Stevens' embrace seems strange because this anti-incorporation tradition explicitly rejected expansion of criminal procedure rights that Stevens himself undoubtedly welcomed. However, a hermeneutic analysis helps resolve this tension. I argue that Stevens' dissent should not be read literally as a defense of the anti-incorporation school but should be understood instead as a stirring final lecture for future generations on the proper meaning of substantive due process doctrine writ large.

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162. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

163. Given the centrality of criminal procedure cases to the incorporation debate of the 1960s, I have chosen to focus on criminal procedure opinions in my incorporation genealogies. This means omitting opinions from the 1920s–1940s that applied First Amendment rights against the states. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (freedom of assembly); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (freedom of the press); *Gitlow v. New York*, 268 U.S. 652 (1925) (free speech and press). Though relevant, the secondary importance of these cases to the story of modern incorporation's rise does not justify their inclusion in opinion maps designed to usefully simplify the picture of doctrine.

164. *See McDonald*, 130 S. Ct. at 3088 (Stevens, J., dissenting).



*A. Birth of Modern Incorporation: Redeeming Adamson in Gideon*

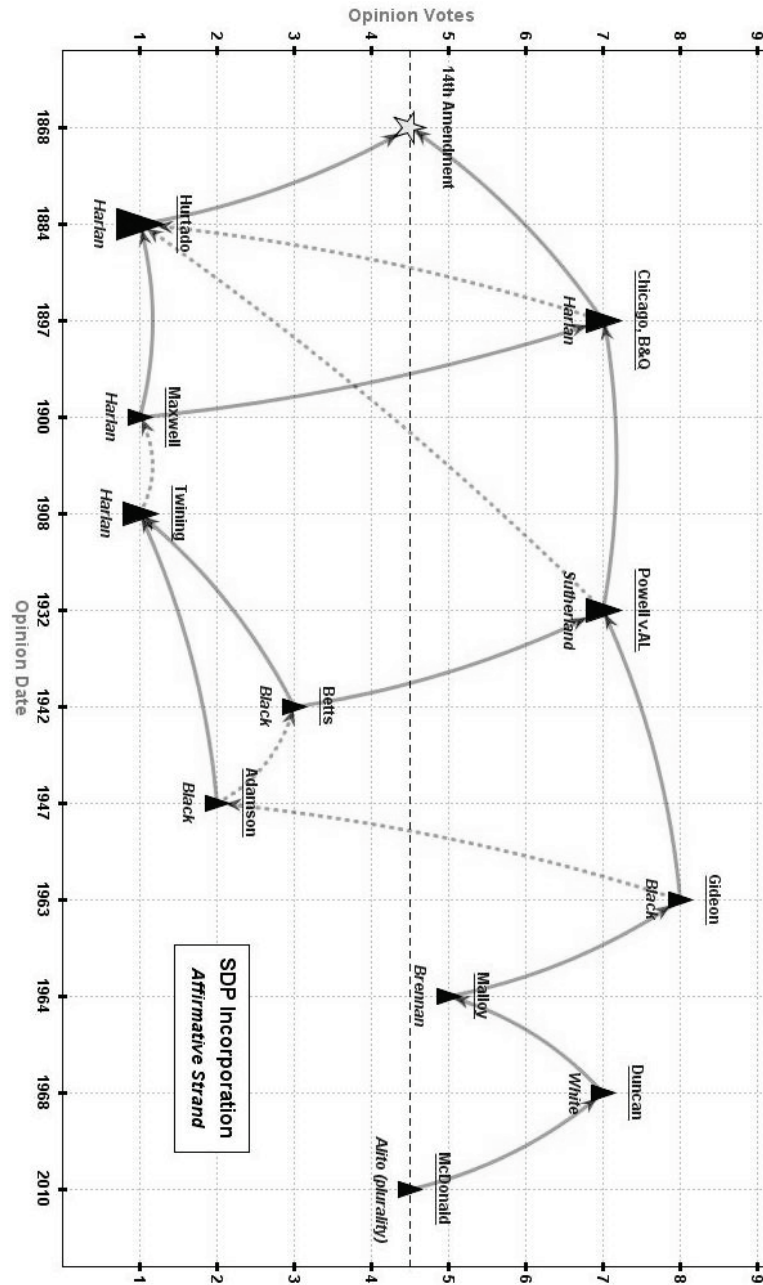


Figure 4.

Though the map of incorporation doctrine presented in *Figure 4* above is complex, the same principles of interpretation apply as in simpler economic liberty maps. Beyond the direct claims of citation, *Figure 4* suggests two main arguments: (1) that Justice Black's dissents in *Adamson* and *Betts* were redeemed by, but not cited in *Gideon*; and (2) that Justice Harlan's dissent in *Hurtado* was redeemed by, but not cited in *Powell v. Alabama*. After presenting the raw genealogical data for this *Figure*, I will first consider last Term's *McDonald* case to describe the current understanding of incorporation doctrine, and then turn to a defense of these two arguments.

*Figure 4* depicts the lines connecting opinions in the doctrinal school generally favoring incorporation of the Bill of Rights against the States. In chronological order, the opinions in the school are: Harlan in *Hurtado v. California* (Justice John Marshall Harlan, dissenting, 1884);<sup>165</sup> *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago* (Justice Harlan for the Court, 1897);<sup>166</sup> *Maxwell v. Dow* (Justice Harlan, dissenting, 1900);<sup>167</sup> *Twining v. New Jersey* (Justice Harlan, dissenting, 1908);<sup>168</sup> *Powell v. Alabama* (Justice George Sutherland for the Court, 1932);<sup>169</sup> *Betts v. Brady* (Justice Hugo Black dissenting, 1942);<sup>170</sup> *Adamson v. California* (Justice Black dissenting, 1947);<sup>171</sup> *Gideon v.*

165. *Hurtado v. California*, 110 U.S. 516, 538 (1884) (Harlan, J., dissenting). *Hurtado* was an 8–1 decision. Justice Stanley Matthews wrote the majority opinion. *Id.* at 519.

166. *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897). *Chicago, Burlington & Quincy* was a 7–1 decision. Justice Harlan delivered the opinion of the Court. *Id.* at 228. Chief Justice Melville Fuller took no part in the case. *Id.* at 263. Justice David Brewer wrote a solo dissent. *Id.* at 258.

167. *Maxwell v. Dow*, 176 U.S. 581, 605 (1900) (Harlan, J., dissenting). *Maxwell* was an 8–1 decision. Justice Rufus Peckham delivered the opinion of the Court. *Id.* at 582.

168. *Twining v. New Jersey*, 211 U.S. 78, 114 (1908) (Harlan, J., dissenting). *Twining* was an 8–1 decision. Justice William Moody delivered the opinion of the Court. *Id.* at 90.

169. *Powell v. Alabama*, 287 U.S. 45, 65–68 (1932). *Powell* was a 7–2 decision. Justice George Sutherland delivered the opinion of the Court. *Id.* at 49. Justice Pierce Butler dissented and Justice James McReynolds joined. *Id.* at 73, 77 (Butler, J., dissenting).

170. *Betts v. Brady*, 316 U.S. 465, 474 (1942) (Black, J., dissenting). *Betts* was a 6–3 decision. Justice Owen Roberts delivered the opinion of the Court. *Id.* at 456. Justice Black dissented with Justices William Douglas and Frank Murphy joining the dissent. *Id.* at 474 (Black, J., dissenting).

171. *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting). *Adamson* was a 5–4 decision. Justice Stanley Reed delivered the opinion of the Court. *Id.* at 47. Justice Felix Frankfurter wrote a separate concurring opinion. *Id.* at 59 (Frankfurter, J., concurring). Justice Frank Murphy wrote a dissent and Justice Wiley Rutledge joined. *Id.* at 123 (Murphy, J., dissenting). Justice Black wrote a separate dissenting opinion and Justice William Douglas joined in it. *Id.* at 68, 92 (Black, J., dissenting). Because only Douglas joined Black's dissent,

*Wainwright* (Justice Black for the Court, 1963);<sup>172</sup> *Malloy v. Hogan* (Justice William Brennan for the Court, 1964);<sup>173</sup> *Duncan v. Louisiana* (Justice Byron White for the Court, 1968);<sup>174</sup> and *McDonald v. City of Chicago* (Justice Samuel Alito for the plurality, 2010).<sup>175</sup> In genealogical order, the direct citations in this line are: *McDonald* (Alito)→*Duncan* (White);<sup>176</sup> *Duncan* (White)→*Malloy* (Brennan);<sup>177</sup> *Malloy* (Brennan)→*Gideon* (Black);<sup>178</sup> *Gideon* (Black)→*Powell v. Alabama* (Sutherland);<sup>179</sup>

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I record it as receiving two votes.

172. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). *Gideon* was a 9–0 decision. Justice Black delivered the opinion of the Court. *Id.* at 336. Justice Douglas wrote a separate concurring opinion. *Id.* at 345 (Douglas, J., concurring). Justice Tom Clark concurred in result and wrote a separate opinion. *Id.* at 347 (Clark, J., concurring in result). Justice John Marshall Harlan (II) concurred and wrote a separate opinion. *Id.* at 349. (Harlan, J., concurring). I record Black’s opinion for the Court as receiving only eight votes in terms of incorporation because of Justice Harlan’s clear opposition to this point. *See id.* at 352 (Harlan, J. concurring) (“In what is done today I do not understand the Court . . . to embrace the concept that the Fourteenth Amendment ‘incorporates’ the Sixth Amendment as such.”). Given Clark’s vote in *Malloy*, *see infra* note 173, it is arguable that the actual incorporation vote was seven. However, Clark’s *Gideon* opinion is equivocal enough on incorporation, *see id.* at 348 (Clark, J., concurring in result), that I give Black the benefit of his vote.

173. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). *Malloy* was a 5–4 opinion. Justice William Brennan delivered the opinion of the Court. *Id.* Justice Douglas joined the opinion of the Court but also expressed his adherence to his concurrence in *Gideon*. *Id.* at 14 (Douglas, J., concurring). Justice Harlan, joined by Justice Clark dissented. *Id.* (Harlan, J., dissenting). Justice Byron White, joined by Justice Potter Stewart, separately dissented. *Id.* at 33 (White, J., dissenting).

174. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). *Duncan* was a 7–2 decision. Justice White delivered the opinion of the Court. *Id.* Justice Harlan, joined by Justice Potter Stewart, dissented. *Id.* at 171 (Harlan, J., dissenting).

175. *McDonald v. City of Chicago*, Ill., 130 S. Ct. 3020, 3026 (2010) (plurality opinion). *McDonald* was a 5–4 decision. Justice Alito wrote the plurality opinion for Part II-C, which concerned incorporation. *Id.* at 3026 (Part II-C was joined by Chief Justice John Roberts, Justice Antonin Scalia, and Justice Anthony Kennedy). Justice Scalia wrote a separate concurrence. *Id.* at 3050 (Scalia, J., concurring). Justice Clarence Thomas also wrote a separate concurrence in which he rejected the plurality’s incorporation theory. *Id.* at 3058 (Thomas, J., concurring in part and concurring in the judgment). Justice John Paul Stevens wrote a solo dissent. *Id.* at 3088 (Stevens, J., dissenting). Justice Stephen Breyer wrote a separate dissent and was joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor. *Id.* at 3120 (Breyer, J., dissenting). Because only a plurality voted for incorporation, I categorize it as falling exactly on the line between majority and dissent. *See Fig.4, supra* p.1292.

176. *McDonald*, 130 S. Ct. at 3034–36 (repeatedly citing and quoting *Duncan*).

177. *See Duncan*, 391 U.S. at 149 (generally citing *Malloy*); *id.* at 155 (citing *Malloy* to justify overruling “prior dicta” regarding application of Sixth Amendment).

178. *Malloy*, 378 U.S. at 6 (citing *Gideon*).

179. *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963) (citing *Powell v. Alabama*, 287 U.S. 45 (1932)).

*Adamson* (Black)→ *Twining* (Harlan);<sup>180</sup> *Betts* (Black)→ *Twining* (Harlan);<sup>181</sup> *Powell v. Alabama* (Sutherland)→ *Chicago, Burlington & Quincy* (Harlan);<sup>182</sup> *Maxwell* (Harlan)→ *Chicago, Burlington & Quincy* (Harlan);<sup>183</sup> *Maxwell* (Harlan)→ *Hurtado* (Harlan).<sup>184</sup>

Analysis of Justice Samuel Alito's plurality decision in *McDonald* reveals the current self-understanding of the tradition affirming incorporation. *McDonald* concerned the reach of the Court's 2008 *District of Columbia v. Heller* decision, which held that a District of Columbia law banning possession of handguns violated the Second Amendment's right to keep and bear arms.<sup>185</sup> *McDonald* presented the question of whether the federal Second Amendment right recognized in *Heller* applied against the States.<sup>186</sup> The *McDonald* petitioners advanced two distinct arguments in favor of incorporation. Quite boldly, their primary gambit invited the Court to overrule *Slaughter-House* and find that the Second Amendment's right to keep and bear arms is one of the "privileges or immunities of citizens of the United States" under the Fourteenth Amendment.<sup>187</sup> Petitioners' fallback argument advocated that the Court incorporate the Second Amendment through the Due Process Clause.<sup>188</sup> In the end, a five justice majority sided with petitioners.<sup>189</sup> However, in a passionate concurrence, Justice Clarence Thomas explicitly rejected incorporation through the Due Process Clause and endorsed overruling *Slaughter-House*.<sup>190</sup> As a result, Alito's opinion favoring incorporation represented only a four-vote plurality.<sup>191</sup>

180. *Adamson v. California*, 332 U.S. 46, 87 (1947) (Black, J., dissenting) (citing "the powerful argument . . . of Mr. Justice Harlan" in his *Twining* dissent).

181. *Betts v. Brady*, 316 U.S. 455, 474–75 n.1 (1942) (Black, J., dissenting) (citing Harlan's dissent in *Twining*). Note that here Black does not single out Harlan by name though he does cite three of Harlan's dissents.

182. *Powell v. Alabama*, 287 U.S. 45, 66 (1932) (citing and discussing *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897)).

183. *Maxwell v. Dow*, 176 U.S. 581, 614 (1900) (Harlan, J., dissenting) (citing *Chi., Burlington & Quincy*, 166 U.S. at 233, 241).

184. *Id.* at 606 (Harlan, J., dissenting) (recalling his *Hurtado* dissent and adhering to views expressed therein).

185. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Like *McDonald*, *Heller* was a 5–4 decision.

186. *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3026 (2010).

187. *See id.* at 3028 (quoting petitioners).

188. *Id.*

189. *Id.* at 3026.

190. *Id.* at 3059 (Thomas, J., concurring) ("I cannot agree that [the Second Amendment]

Justice Alito's opinion presents an account of the genealogy of the pro-incorporation school. Justice Alito divided the history of the Court's incorporation jurisprudence into two distinct eras. In Alito's genealogy, the Court first considered "whether the Due Process Clause prohibits the States from infringing rights set out in the Bill of Rights" in the late 19th century.<sup>192</sup> This early era had three distinctive features:<sup>193</sup> (1) the Court sometimes evaluated whether protection was required of a State by asking "if a civilized system could be imagined that would not accord the particular protection";<sup>194</sup> (2) the Court frequently held "that a right set out in the Bill of Rights failed to meet the test for inclusion within the protection of the Due Process Clause";<sup>195</sup> and (3) even when the Court found a right from the Bill of Rights fell within due process, the protection provided against State infringement "sometimes differed from the protection . . . provided against abridgement by the Federal Government."<sup>196</sup> On Alito's telling, these three distinctive early features all changed in the modern era.

Before describing this modern era, Alito considered the "alternative theory regarding the relationship between the Bill of Rights and § 1 of

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is enforceable against the States through a clause that speak only to 'process.' Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause."); *see also id.* at 3086 (Thomas, J., concurring) (rejecting *Slaughter-House* "insofar as it precludes any overlap between the privileges and immunities of state and federal citizenship").

191. *See id.* at 3026 (Part II-C was joined by Chief Justice John Roberts, Justice Antonin Scalia, and Justice Anthony Kennedy).

192. *Id.* at 3031 (citing *Hurtado v. California*, 110 U.S. 516, 516 (1884); *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897)). Note that these first two cases match up precisely with the genealogy suggested in *Figure 4*.

193. Alito noted five total features of the era. *McDonald*, 130 S. Ct. at 3031–32. However, the first three of these features did change in subsequent eras and thus were not distinctive. *See id.* at 3034 (noting that decisions of modern era "abandoned three of the previously noted characteristics of the earlier period"). On Alito's account, the non-changing features were that: (1) the Court viewed the due process question as "entirely separate" from the privilege or immunity question, *id.* at 3031 (citing *Twining v. New Jersey*, 211 U.S. 78, 99 (1908)); and (2) the Court protected only those rights "included in the conception of due process" and "used different formulations in describing the boundaries of due process." *Id.* at 3031–32 (citations omitted) (quotation marks omitted).

194. *Id.* at 3032 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968)) (internal quotations omitted). Note that here Alito is quoting a modern case's summary of the earlier era in question. It is precisely because Alito is picking up interpretative thread of *Duncan* that *Figure 4* depicts *Duncan* as *McDonald*'s immediate ancestor.

195. *Id.* (collecting examples).

196. *Id.* (citing *Betts v. Brady*, 316 U.S. 455, 473 (1942); and *Wolf v. Colorado*, 338 U.S. 25 (1949)).

the Fourteenth Amendment . . . championed by Justice Black.”<sup>197</sup> Alito accurately portrays Black as supporting the theory of “total incorporation”—which held that § 1 made *all* of the Bill of Rights applicable to the States, effectively overruling *Tiernan*.<sup>198</sup> Although Alito points out that “the Court never has embraced Justice Black’s ‘total incorporation theory,’” he also tellingly observes that “the Court eventually moved in that direction by initiating what has been called a process of ‘selective incorporation.’”<sup>199</sup> Critically for our purposes, Alito’s observation directly acknowledges the role of Black’s dissents in shaping the change in incorporation doctrine between its early and modern eras.

Before separately analyzing the impact of Black’s dissents, we need to complete our account of Alito’s genealogy. After acknowledging Black, Alito turned to the modern era of “selective incorporation,” where the Court held that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments.<sup>200</sup> Selective incorporation, per Alito, rejected the three distinctive features of the early era. First, the Court “made it clear that the governing standard is not whether *any* ‘civilized system [can] be imagined’” without a particular Bill of Rights guarantee, but rather whether the right “is fundamental to *our* scheme of ordered liberty and system of justice.”<sup>201</sup> Second, the Court abandoned its earlier distinctive habit of finding that a right set out in the Bill of Rights failed to meet the test of inclusion and “eventually incorporated almost all of the provisions of the Bill of Rights.”<sup>202</sup> Finally, selective incorporation also “decisively held that incorporated Bill of Rights protections ‘are all to be enforced against

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197. *Id.* at 3032–33.

198. *Id.* at 3033 (citing *Adamson v. California*, 332 U.S. 46, 72 (1947) (Black, J., dissenting)). In consecutive footnotes, Justice Alito summarizes the evidence for and against Black’s total incorporation theory. *See id.* at 3033 nn.9–10. In the end, however, Alito “take[s] no position with respect to this academic debate.” *Id.* at 3033 n.10. Following the good Justice’s wise lead, neither will I venture into such perilous waters.

199. *Id.* at 3033–34 (collecting cases).

200. *Id.* at 3034.

201. *Id.* (citing *Duncan v. Louisiana*, 391 U.S. 145, 149–50 n.14 (1968)) (alteration in original) (internal quotation marks omitted).

202. *Id.* at 3034. In two useful footnotes, Alito describes all the rights that have been incorporated, *id.* at 3034 n.12, as well as those few Bill of Rights protections that remain unincorporated. *Id.* at 3035 n.13.

the States . . . according to the same standards that protect those personal rights against federal encroachment.”<sup>203</sup>

The touchstone case in Alito’s genealogy is *Duncan*. *Duncan* provides for Alito the ultimate standard for incorporation—whether a Bill of Right protection “is fundamental to *our* scheme of ordered liberty.”<sup>204</sup> In Alito’s view, this standard is synonymous with an inquiry into whether a Bill of Right is “‘deeply rooted in this Nation’s history and tradition.’”<sup>205</sup> Of course, Justice Alito subsequently concluded that the right to keep and bear arms was deeply rooted in the Nation’s history and tradition.<sup>206</sup> The Second Amendment right to keep and bear arms, as interpreted by *Heller*, was therefore incorporated against the States.<sup>207</sup> The particulars of the heated contest over competing traditions of firearm ownership and regulation need not detain us.<sup>208</sup> Rather, what is important to recognize is that Alito’s account of incorporation doctrine writ large itself grows out of a particular tradition—last articulated by Justice Byron White in *Duncan*.

Figure 4 therefore draws an arrow back from Alito’s opinion in *McDonald* to White’s opinion in *Duncan*.<sup>209</sup> *Duncan*, in turn, explicitly relied upon and extended the selective incorporation approach of *Malloy*.<sup>210</sup> Justice William Brennan, generally considered the primary

203. *Id.* at 3035 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1964)). In a footnote, Justice Alito recognized “one exception to this general rule” that “incorporated Bill of Rights protections apply identically to the States and the Federal Government”—the Sixth Amendment requires a unanimous jury verdict in federal criminal trials, but not in state criminal trials. *See id.* at 3035 n.14 (discussing *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972)). Alito characterizes this as an anomaly attributable to “an unusual division among the Justices.” *Id.*

204. *Id.* at 3036 (citing *Duncan*, 391 U.S. at 149).

205. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

206. *See id.* at 3036 (“*Heller* makes it clear that this [Second Amendment] right is ‘deeply rooted in this Nation’s history and tradition.’” (quoting *Glucksberg*, 521 U.S. at 721)).

207. *Id.* at 3050 (“We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”).

208. Justice Breyer highlighted the continuing academic debate over the historical right to keep and bear arms in his dissent. *See id.* at 3121 (Breyer, J., dissenting) (collecting law review articles and citing an amici brief filed by historians). Justice Alito quickly dismissed these arguments. *Id.* at 3048 (“[W]hile there is certainly room for disagreement about *Heller*’s analysis of the history of the right to keep and bear arms, nothing written since *Heller* persuades us to reopen the question there decided.”).

209. *See* Fig.4, *supra* p.1292; *supra* note 176 and accompanying text.

210. *See* Fig.4, *supra* p.1292; *supra* note 177. The specific proposition that *Duncan* represented a victory for selective incorporation (as opposed to total incorporation) was directly conceded by Justice Black. *See Duncan v. Louisiana*, 391 U.S. 145, 164 (1968) (Black,

architect of selective incorporation, wrote the majority opinion in *Malloy*.<sup>211</sup> In *Malloy*, Brennan cited back to *Gideon* as the most recent example of the Court's incorporation jurisprudence.<sup>212</sup> It is important to notice that the arrows connecting *McDonald* to *Gideon* only link opinions accepted by a majority of the Court. The modern incorporation doctrine described by Alito in *McDonald* was put on the doctrinal map by *Gideon*.<sup>213</sup> After *Gideon*, the Court handed down an incredible series of cases overruling established precedent that had denied state criminal defendants the same protections granted their federal counterparts.<sup>214</sup> These overrulings helped define the Warren Court revolution in criminal procedure. *Gideon* thus represents a critical turning point in modern incorporation doctrine.

Though Justice Black wrote the majority opinion in *Gideon*, he did not cite to his earlier dissents where he introduced his incorporation theory. One proposition asserted in *Figure 4* is that Black's *Gideon* opinion nonetheless redeemed his prior dissents in *Betts* and then *Adamson*. To prove this, consider first that *Betts* concerned an indigent defendant facing robbery charges who had requested the appointment

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J., concurring) ("I am very happy to support this selective process through which our Court has since the *Adamson* case held most of the specific Bill of Rights' protections applicable to the States to the same extent they are applicable to the Federal Government.").

211. See Fig.4, *supra* p.1292; see also *supra* note 173; Louis Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 YALE L.J. 74, 74 n.1 (1963) (describing selective incorporation as "the Brennan doctrine").

212. See Fig.4, *supra* p.1292; *supra* note 178 and accompanying text.

213. It could be argued that *Mapp v. Ohio*, a case that preceded *Gideon* by almost two years actually represented the first salvo in the incorporation revolution of the 1960s. See 367 U.S. 643 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949)). After all, Justice Brennan relied heavily on *Mapp* in *Malloy*. See *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (analyzing *Mapp*). However, the role of incorporation theory in *Mapp* is unclear. Certainly, Justice Clark did not allude to a theory of incorporation in his majority opinion, which applied the federal exclusionary rule to the states. By contrast, incorporation was front and center in *Gideon* both because of Black's fame as a proponent of that view and because of Douglas' concurrence. See *Gideon v. Wainwright*, 372 U.S. 335, 345-47 (Douglas, J., concurring). What's more, Clark later clearly sided with Harlan in the campaign against incorporation. See *supra* note 173 and accompanying text. Thus, despite Brennan's reading of *Mapp* in *Malloy*, I submit that *Mapp* did not establish the arrival of incorporation in the majority nearly as clearly as did *Gideon*.

214. See, e.g., *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1937)); *Duncan*, 391 U.S. at 154 (abrogating *Maxwell v. Dow*, 176 U.S. 581 (1900); and *Snyder v. Massachusetts*, 291 U.S. 97 (1934)); *Malloy*, 378 U.S. at 6 (1964) (overruling *Twining v. New Jersey*, 211 U.S. 78 (1908); and *Adamson v. California*, 332 U.S. 46 (1947)). Justice Black sided with the majority in all these cases.



of counsel.<sup>215</sup> After denial of this request, defendant was convicted and subsequently brought a federal habeas action.<sup>216</sup> In the *Betts* majority opinion, Justice Owen Roberts held that while the Sixth Amendment required appointment of counsel to indigents in federal court,<sup>217</sup> “the due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment.”<sup>218</sup> Justice Black dissented in *Betts*, briefly alluding to his concept of incorporation: “I believe that the Fourteenth Amendment made the Sixth applicable to the states. But this view, *although often urged in dissents*, has never been accepted by a majority of this Court . . . .”<sup>219</sup> Black urged that the “fundamental” due process right to counsel in capital cases recognized in *Powell v. Alabama* should extend to all proceedings involving poor people facing “charges of serious crime[s].”<sup>220</sup>

One the most important criminal procedure cases in Supreme Court history, *Gideon* expressly overruled *Betts*.<sup>221</sup> Now writing for the majority, Black held that “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”<sup>222</sup> As he had done in *Betts*, Black directly invoked *Powell v. Alabama* to support his argument that the indigent’s right to counsel was fundamental.<sup>223</sup> This parity of reasoning and authority in argument, as well as literal reversal of result, confirm that *Gideon* effectively redeemed Black’s *Betts* dissent. Black’s failure to cite his own previous dissent does not weaken this conclusion. Instead, the lack of citation provides more evidence that a pure citation-based method of evaluating influence is inadequate.

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215. *Betts v. Brady*, 316 U.S. 455, 456–57 (1942).

216. *Id.* at 457.

217. *Id.* at 465–66 & n.14 (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)).

218. *Id.* at 461–62 & n.10 (citing, *inter alia*, *Hurtado*, *Maxwell*, *Twining*, *Snyder*, and *Palko*). Compare *id.*, with Fig.5, *infra* p.1311.

219. *Id.* 316 U.S. at 474 (Black, J., dissenting) (emphasis added) (footnote omitted). In a footnote, Black cites to the first Justice Harlan’s dissents (although not using Harlan’s name) in *Twining* and *Maxwell* to support his incorporation proposition. *Id.* at 474–75 n.1.

220. *Id.* at 475–76 (citing *Powell v. Alabama*, 287 U.S. 45 (1932)).

221. *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963) (overruling *Betts*). The enduring importance of *Gideon* is that its recognition of a fundamental right to counsel led directly to the creation and proliferation of public defender systems across the nation.

222. *Id.* at 344.

223. *Id.* at 344–45 (quoting the “moving words of Justice Sutherland in *Powell v. Alabama*”).

Yet our non-citation based account of the development of incorporation doctrine would be similarly inadequate if it rested solely on the connection between *Betts* and *Gideon*. As seen in *Figure 4*, in between *Betts* and *Gideon* came *Adamson*. It was in his magisterial *Adamson* dissent that Justice Black offered his full-throated defense of incorporation that later proved so influential. Decided in 1947, *Adamson* concerned a death-sentenced defendant who had declined to testify at his murder trial.<sup>224</sup> The prosecutor commented negatively upon this silence, which the defendant argued violated the privilege against self-incrimination.<sup>225</sup> Writing for the majority, Justice Stanley Reed held that the Fifth Amendment's privilege against self-incrimination did not apply to the states, affirming the line of cases beginning with *Hurtado* in 1884 and including 1905's *Twining*.<sup>226</sup> Black famously dissented, filling the reporters with 24 pages of historical analysis and a 31 page appendix.<sup>227</sup> In so doing, Black declared his allegiance to a prior tradition of "vigorous dissents that have been written in almost every case where the *Twining* and *Hurtado* doctrines have been applied."<sup>228</sup>

As Justice Alito later recognized in *McDonald*, the theory of "total incorporation" advanced by Black in his *Adamson* dissent never quite prevailed in the Court's jurisprudence.<sup>229</sup> However, Black sparked an intense debate and defended a radical position that created space for an eventual compromise.<sup>230</sup> The incorporation discourse after *Adamson* certainly took twists and turns before Black's particular dream of total incorporation succumbed to the reality of selective incorporation. By the time of *Gideon* in 1963, the vibrant constitutional conversation featured many voices and *Figure 4* could just as easily show other

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224. *Adamson v. California*, 332 U.S. 46, 48–49 (1947).

225. *See id.*

226. *See id.* at 54 (citing *Twining v. New Jersey*, 211 U.S. 78 (1908)). Although Justice Reed's opinion for the Court did not specifically invoke *Hurtado*, Justice Frankfurter's concurrence did. *See id.* at 65 (Frankfurter, J., concurring) (citing *Hurtado v. California*, 110 U.S. 516 (1884), as a "great opinion[]" part of the "heritage of the past").

227. *See generally id.* at 68–123 (1947) (Black, J., dissenting).

228. *Id.* at 84 (Black, J., dissenting). In this passage, Black is specifically referring to cases where the *Twining* and *Hurtado* doctrines were employed to strike down state regulatory laws. *Id.* The dissents cited here include many of those featured in *Figure 1*. Compare *id.* at 83 n.12, with *Fig.1, supra* p.1258.

229. *See supra* note 199 and accompanying text.

230. For a useful summary of the debate sparked by Black, see *McDonald v. City of Chicago*, Ill., 130 S. Ct. 3020, 3033 nn.9–10 (2010).

opinions to the path from *Adamson* to *Gideon*.<sup>231</sup> Yet additional data points would not undermine the basic picture of Black's impressive doctrinal influence over the modern era. The essential tradition of strong incorporation championed by Black in *Betts* and *Adamson* fairly well prevailed in *Gideon*, was followed in *Malloy* and *Duncan*, and was adhered to in *McDonald*.

*B. Early Era Triumph: Redeeming Harlan (I) in Powell v. Alabama*

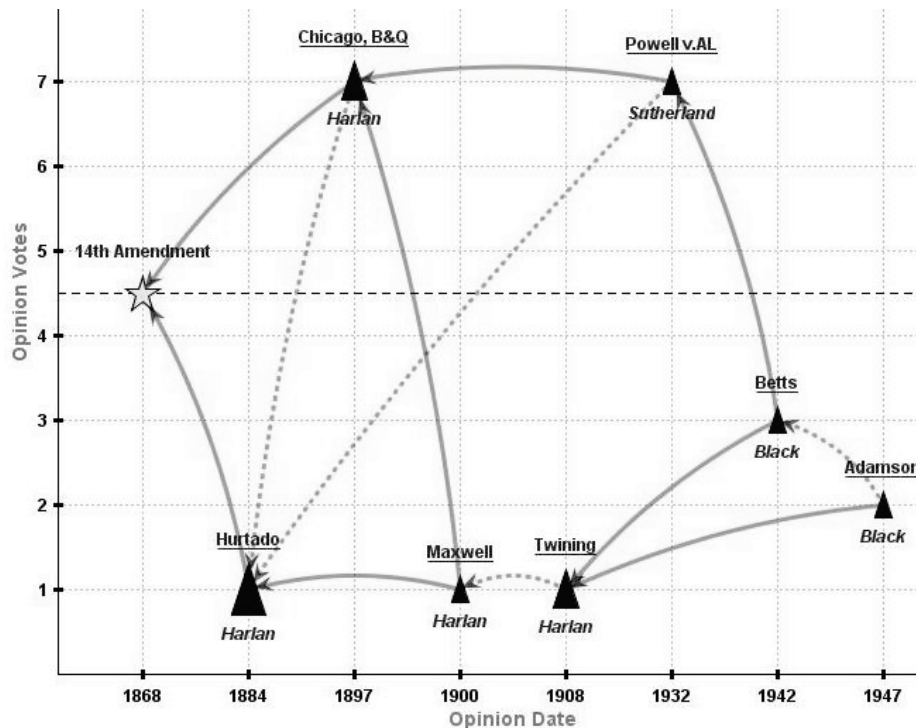


Figure 4.1.

When Black advanced his theory of incorporation in *Betts* and *Adamson*, he relied on two seemingly distinct lines of authority. First, he invoked a line where Court majorities had found due process protection for rights contained in the Bill of Rights—most pertinently 1932's *Powell v. Alabama* and 1897's *Chicago, Burlington & Quincy*.

231. For example, an even more detailed map would include earlier dissents by Justice Brennan that articulated his selective incorporation theory. See, e.g., *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 263 (1960) (Brennan, J., dissenting); *Cohen v. Hurley*, 366 U.S. 117, 154 (1961) (Brennan, J., dissenting); see also *supra* note 213 and accompanying text.

This particular majority line, however, did not stand alone and had been limited and restricted by anti-incorporation majority opinions in criminal procedure cases in the *Hurtado–Twining* line.<sup>232</sup> Thus, Black also invoked a second line of authority—though not precedential—to support his incorporation argument. That second line was constituted by “vigorous dissents” in the *Hurtado–Twining* line, most especially the “powerful argument in the dissent of Mr. Justice Harlan.”<sup>233</sup>

Singling out Justice Harlan for praise made perfect sense since his dissenting opinions in *Hurtado*, *Maxwell*, and *Twining* constitute the earliest defenses of incorporation under the Due Process Clause. What most commentators overlook, however, is that Justice Harlan also wrote the majority opinion in *Chicago, Burlington & Quincy*, the Court’s earliest incorporation case.<sup>234</sup> Harlan’s under-the-radar achievement in *Chicago, Burlington & Quincy* gave the pro-incorporation school an invaluable toehold in legitimate precedent. Remarkably, this toehold helped justify the historic decision in *Powell v. Alabama*, which recognized a due process right to counsel in capital cases enforceable against the states.<sup>235</sup> *Powell* marked the first time a criminal procedure right was incorporated and signaled the redemption of Harlan’s *Hurtado* dissent. Thus, both of Black’s ostensibly distinct lines of supporting authority in *Adamson* ultimately derived from the same tradition initiated by Justice Harlan in dissent.

Once again, establishing the genealogical connections to prove this claim requires more than attention to citation. To grasp the full story, we must begin with the majority opinion in *Hurtado* and show how it set up an interpretative paradigm that would have made incorporation impossible. Then we turn to Harlan’s attack on this paradigm, its

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232. See *supra* note 226. The *Hurtado–Twining* line effectively limited *Chicago, Burlington & Quincy*. As explored *infra* pp. 1315–17, the reach of *Powell v. Alabama* was limited by *Snyder* and *Palko*.

233. *Adamson v. California*, 332 U.S. 47, 84, 87 (1947) (Black, J., dissenting). Here Black is specifically referring to Harlan’s *Twining* dissent. In his Appendix, however, Black also cited the “vigorous dissenting opinions of Mr. Justice Harlan” in *Hurtado*, *Maxwell*, and *Twining*. *Id.* at 123.

234. That *Chicago, Burlington & Quincy* qualifies as the Court’s first due process incorporation case is uncontroversial. See, e.g., *McDonald*, 130 S. Ct at 3035 n.12 (noting that *Chicago, Burlington & Quincy* is the earliest incorporation case listed in footnote cataloging all incorporation decisions); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 653 (1989). Of course, not all scholars overlook Harlan’s role in *Chicago, Burlington & Quincy*. See, e.g., Bryan H. Wildenthal, *The Road to Twining: Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457, 1503 (2000).

235. *Powell v. Alabama*, 287 U.S. 45, 64–65 (1932).

apparent success in *Chicago, Burlington & Quincy*, and its partial redemption in *Powell v. Alabama*.

Decided in 1884, *Hurtado* concerned the prosecution of a capital murder case based solely upon an information filed by the district attorney without presentment or indictment before a grand jury.<sup>236</sup> The Fifth Amendment clearly prohibited this practice federally and so the question became whether the prohibition would apply against the States through the due process clause of the Fourteenth Amendment.<sup>237</sup> Justice Stanley Matthews' majority opinion is a classic exposition of due process. After a scholarly survey of the concept from the Magna Carta to the current day, Matthews posited due process as an evolving understanding responsive to "new and various experiences of our own situation."<sup>238</sup> In what became an enduring formulation, Matthews finally described due process as "th[e] law of the land in each State . . . exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."<sup>239</sup> Though Matthews' rhetoric promoted vigorous protection of individual rights, he nonetheless concluded that indictment by grand jury was not a necessary requirement of due process.<sup>240</sup> *Hurtado* lost; his death sentence was affirmed.

Matthews justified this result without reference to the extensive precedent or history he had surveyed.<sup>241</sup> Instead, he reasoned by a painfully simple syllogism. For his major premise, Matthews stated, "According to a recognized canon of interpretation . . . we are forbidden to assume, without clear reason to the contrary, that any part of [the Fifth] amendment is superfluous."<sup>242</sup> For his minor premise, Matthews pointed out that the phrase "due process of law" appears alongside the

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236. *Hurtado v. California*, 110 U.S. 516, 520 (1884).

237. *Id.*

238. *Id.* at 531. For Matthews' survey of the historical meanings of due process, see *id.* at 521–30.

239. *Id.* at 535. The Court immediately picked up on this formulation and continues to use it to this day. See, e.g., *McDonald*, 130 S. Ct. at 3034; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 32 (1991) (Scalia, J., concurring) (noting that *Hurtado* introduced "'fundamental justice' [to] the due process lexicon"); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Powell v. Alabama*, 287 U.S. 45, 66 (1932); *Twining v. New Jersey*, 211 U.S. 78, 102 (1908).

240. *Hurtado*, 110 U.S. at 534–35, 538.

241. Matthews' historical survey and analysis of precedent unfolds over thirteen pages of the U.S. Reporter. See *id.* at 521–34. His syllogism occurs over a single page and cites no authority whatsoever. See *id.* at 534.

242. *Id.*

Fifth's Amendment's "specific and express provision for perpetuating the institution of the grand jury."<sup>243</sup> From these premises, the "natural and obvious inference is, that in the sense of the Constitution, 'due process of law' was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury."<sup>244</sup> Finally, Matthews added that if it had been part of the purpose of the Fourteenth Amendment "to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect."<sup>245</sup>

In dissent, Justice Harlan bristled at Matthews' deduction. "This line of argument," stated Harlan, "would lead to results which are inconsistent with the vital principles of republican government."<sup>246</sup> Harlan reasoned that if the presence of "due process" along-side a specific provision for grand juries in capital cases in the Fifth Amendment necessarily meant that grand juries were excluded from due process, then

inexorable logic would require it to be, likewise, held that the right not to be put twice in jeopardy of life and limb for the same offence, nor compelled in a criminal case to testify against one's self—rights and immunities also specifically recognized in the Fifth Amendment—were not protected by that due process of law . . . .<sup>247</sup>

Harlan further argued that the same "inexorable logic" would also exclude from due process "the right of persons to just compensation for private property taken for public use," the rights of the accused secured under the Sixth Amendment, and even the right to a petit jury.<sup>248</sup> In other words, the majority's logic would prevent all incorporation claims.

According to Harlan, this unjust implication of Matthews' syllogism both invalidated the logic and contradicted the idea that due process protected "fundamental principles of liberty and justice."<sup>249</sup> Instead of employing the canon assuming no superfluous language, Harlan urged

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243. *Id.*

244. *Id.*

245. *Id.* at 535.

246. *Id.* at 547 (Harlan, J., dissenting).

247. *Id.* (Harlan, J., dissenting).

248. *Id.* at 548 (Harlan, J., dissenting).

249. *Id.* (Harlan, J., dissenting).

that the provision of due process of law constituted an additional layer of protection for liberty and property.<sup>250</sup> On his reading, this additional protection included the right to a grand jury indictment in capital cases.<sup>251</sup>

Thirteen years later, the Court confronted a question that Harlan had specifically identified as one answered by the *Hurtado* majority's "inexorable logic." Decided in 1897, *Chicago, Burlington & Quincy* concerned whether a railroad company was entitled under the Due Process Clause to "just compensation" for private property taken for public use.<sup>252</sup> Justice Harlan delivered the opinion of the Court, which held that due process prohibits States from taking private property for public use without just compensation.<sup>253</sup> This result flew in the face of the no-superfluous-language reasoning in *Hurtado* since the Takings Clause also appears along-side the Fifth Amendment's Due Process Clause.<sup>254</sup> Given this, and despite its obvious relevance, it perhaps comes as no surprise that Harlan in *Chicago, Burlington & Quincy* utterly failed to cite to *Hurtado*.<sup>255</sup>

Yet Harlan's *Chicago, Burlington & Quincy* opinion evidently attacked the *Hurtado* majority sub silentio. Harlan argued for an expansive, substantive conception of due process, emphasizing that "[i]n determining what is due process of law regard must be had to substance, not to form."<sup>256</sup> Just as his prior dissent had described grand jury indictment in capital cases as a fundamental principle of liberty,<sup>257</sup>

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250. *Id.* at 550 (Harlan, J., dissenting).

251. *Id.* at 550–51 (Harlan, J., dissenting) (citing *Jones v. Robbins*, 74 Mass. (8 Gray) 329 (1857)). In *Robbins*, Chief Justice Shaw of the Supreme Judicial Court of Massachusetts confronted whether due process of law included indictment by grand jury and concluded that it did. *See id.*

252. *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 233 (1897).

253. *Id.* at 241 ("In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment . . ."). Although Harlan vindicated the due process principle, his opinion nonetheless held that the one dollar nominal compensation paid the railroad company was "just compensation." *See id.* at 257–58. Writing in dissent, Justice Brewer agreed with the general due process principle, but opined that the nominal compensation did not meet due process standards. *Id.* at 259 (Brewer, J., dissenting).

254. *See* U.S. CONST. amend. V.

255. *See Chi., Burlington & Quincy*, 166 U.S. at 228–58.

256. *Id.* at 235.

257. *See Hurtado v. California*, 110 U.S. 516, 558 (1884) (Harlan, J., dissenting).

Harlan's later opinion characterized protection of property rights as "a vital principle of republican institutions."<sup>258</sup> In both cases, Harlan found the justification for due process protection under the Fourteenth Amendment in longstanding traditions honoring the practice at issue.<sup>259</sup> This analytical resonance as well as the obvious identity of author and doctrinal result explains the hermeneutic connection between the two opinions posited in *Figure 4*.

Harlan's success in *Chicago, Burlington & Quincy* in quietly pushing his *Hurtado* analysis in the takings realm did not extend to criminal procedure cases. In 1900, the Court held in *Maxwell* that a petit jury composed of eight people did not violate due process despite the Sixth Amendment's requirement of twelve jurors.<sup>260</sup> The majority primarily relied on *Hurtado* to justify its decision.<sup>261</sup> Harlan dissented, relying on *Chicago, Burlington & Quincy* as authority and also citing his own *Hurtado* dissent.<sup>262</sup> Eight years later in *Twining*, the Court ruled that the privilege against self-incrimination did not apply in state prosecutions and again relied, in part, on *Hurtado*.<sup>263</sup> Harlan again dissented.<sup>264</sup> Although this time Harlan did not directly cite to his own prior opinions, he nonetheless advanced his traditional arguments in favor of incorporation.<sup>265</sup>

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258. *Chi., Burlington & Quincy*, 166 U.S. at 235–36.

259. *Compare id.* at 235–41, with *Hurtado*, 110 U.S. at 550–57 (Harlan, J., dissenting). The tradition of grand jury indictments in capital cases extends back to the Magna Charta and appears older than the tradition of just compensation for takings.

260. *See Maxwell v. Dow*, 176 U.S. 581, 602–03 (1900).

261. *Id.* at 603 ("Trial by jury has never been affirmed to be a necessary requisite of due process of law. In not one of the cases cited and commented upon in the *Hurtado* case is a trial by jury mentioned as a necessary part of such process.").

262. *See id.* at 614 (Harlan, J., dissenting) (citing *Chicago, Burlington & Quincy*, 166 U.S. at 233); *id.* at 606 (Harlan, J., dissenting) (recalling his *Hurtado* dissent and adhering to views expressed therein).

263. *See Twining v. New Jersey*, 211 U.S. 78, 101 (1908) (citing *Hurtado*, 110 U.S. at 528); *see also id.* at 106 ("The power of the people of the States to make and alter their laws at pleasure is the greatest security for liberty and justice, this court has said in *Hurtado*." (citation omitted)).

264. *See id.* at 114 (Harlan, J., dissenting).

265. The absence of direct citation explains why the arrow in *Figure 4* connecting Harlan's *Twining* dissent to his prior *Maxwell* dissent is dotted. In *Twining*, Harlan emphasized self-incrimination as a privilege or immunity of national citizenship. *See, e.g., id.* at 122 (Harlan, J., dissenting). However, he nonetheless adopted the essential position that the Fourteenth Amendment, by due process or privileges and immunities, incorporated the Bill of Rights against the states:



This brings us at last to *Powell v. Alabama*, the Supreme Court's 1932 decision in the infamous Scottsboro Boys case.<sup>266</sup> The young black defendants in *Powell* stood convicted of raping two white girls and faced death sentences.<sup>267</sup> Before the Court, the defendants generally argued that the proceedings below suffered from profound prejudice and intimidation. Their legal claim was that they had been denied the assistance of counsel and that this violated due process of law.<sup>268</sup> This squarely presented the doctrinal question of "whether the denial of the assistance of counsel contravenes the due process clause of the Fourteenth Amendment to the Federal Constitution."<sup>269</sup>

Writing for a seven-justice majority, Justice George Sutherland first considered the facts. The trial court proceedings took place in "an atmosphere of tense, hostile and excited public sentiment," wrote Sutherland.<sup>270</sup> Although counsel was eventually assigned hours before trial, the appointment was "little more than an expansive gesture" such that "[u]nder the circumstances disclosed . . . defendants were not accorded the right of counsel in any substantial sense."<sup>271</sup> Turning to the Fourteenth Amendment question, Sutherland proposed to test "whether due process of law has been accorded in given instances" by looking to English "settled usages and modes of proceeding . . . before the Declaration of Independence" so long as those settled usages and modes suited "the civil and political conditions of our ancestors by having been followed in this country after it became a nation."<sup>272</sup> Under

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The privileges and immunities mentioned in the original Amendments, and universally regarded as our heritage of liberty and from the common law, were thus secured [by the Fourteenth Amendment] to every citizen of the United States . . . and due process of law, in all public proceedings affecting life, liberty or property, were enjoined equally upon the Nation and the States.

*Id.* (Harlan, J., dissenting).

266. *Powell v. Alabama*, 287 U.S. 45 (1932). Of course, the profound racial and regional divisions exposed by the Scottsboro Boys episode implicate discourses and institutions well beyond incorporation and the Supreme Court. See, e.g., N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1321–25, 1335 (2004).

267. See *Powell*, 287 U.S. at 49–50.

268. See *id.* at 50.

269. *Id.* at 60.

270. *Id.* at 51.

271. *Id.* at 56, 58.

272. *Id.* at 65 (citing *Lowe v. Kansas*, 163 U.S. 81, 85 (1896)).

this test, held Sutherland, due process “has not been met in the present case.”<sup>273</sup>

Critically, Sutherland did not end his analysis there. He continued: “We do not overlook . . . *Hurtado*, where this court determined that due process of law does not require an indictment by a grand jury as a prerequisite to prosecution by a state for murder.”<sup>274</sup> Sutherland then quoted Justice Matthews’ entire *Hurtado* syllogism that excluded grand-jury indictment from due process under the canon precluding superfluous language.<sup>275</sup> Since the Sixth Amendment explicitly provides for the assistance of counsel in criminal prosecutions, conceded Sutherland:

In the face of the reasoning of the *Hurtado* case, if it stood alone, it would be difficult to justify the conclusion that the right to counsel, being thus specifically granted by the Sixth Amendment, was also within the intendment of the due process of law clause. But the *Hurtado* case does not stand alone. In the later case of *Chicago, Burlington & Quincy R. Co. v. Chicago*, this court held that . . . private property . . . taken for public use without just compensation, was in violation of the due process of law required by the Fourteenth Amendment, notwithstanding that the Fifth Amendment explicitly declares that private property shall not be taken for public use without just compensation.<sup>276</sup>

After surveying cases that followed *Chicago, Burlington & Quincy*, Sutherland concluded that “[t]hese later cases establish that notwithstanding the sweeping character of the language in the *Hurtado* case, the rule laid down is not without exceptions.”<sup>277</sup> This conclusion signaled the redemption of Harlan’s *Hurtado* dissent as the *Hurtado*

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273. *Id.*

274. *Id.* (citation omitted).

275. *Id.* at 65–66 (citing *Hurtado v. California*, 110 U.S. 516, 534–35 (1884)). *See also supra* notes 242–245 and accompanying text.

276. *Id.* at 66 (citation omitted).

277. *Id.* at 67. The cases surveyed all essentially incorporated against the states via due process First Amendment speech and press liberties. *See id.* (citing *Stromberg v. California*, 283 U.S. 359 (1931); *Near v. Minnesota*, 283 U.S. 697 (1931); *Gitlow v. New York*, 268 U.S. 652 (1925)). The place of these cases in our incorporation story is discussed *supra* note 163.

majority's "inexorable logic" has since played no part in incorporation jurisprudence.<sup>278</sup>

It bears repeating that Harlan's redemption here occurred without citation to his dissent. And while Sutherland did plainly rely on *Chicago, Burlington & Quincy*, he followed the usual convention of referring to the holding of "the Court" and did not mention Harlan as the author of that critical opinion. Yet Harlan's authority undeniably plays a starring role in *Powell v. Alabama*'s doctrinal story. This demonstrates the profoundly inter-textual nature of doctrine: the meaning of a single opinion cannot be understood by parsing that single text alone. Thus Justice Black's subsequent citation to *Powell v. Alabama* in *Gideon* must also be understood as invoking an entire tradition of dissents beginning with Harlan in *Hurtado* and continuing through to Black's own dissents in *Betts* and *Adamson*. These dissents kept alive the dream of applying the Bill of Rights against the States and provided the intellectual ammunition for maintaining this dream. They helped construct the context for an evolving tradition supporting incorporation.

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278. The redemption is partial since the *Hurtado* holding that grand jury indictment is not required in state prosecutions has never been overruled. See *McDonald v. City of Chicago, Ill.*, 130 S. Ct 3020, 3035 n.13 (2010)).

*C. Fighting for the Future: Stevens' Strange McDonald Dissent*

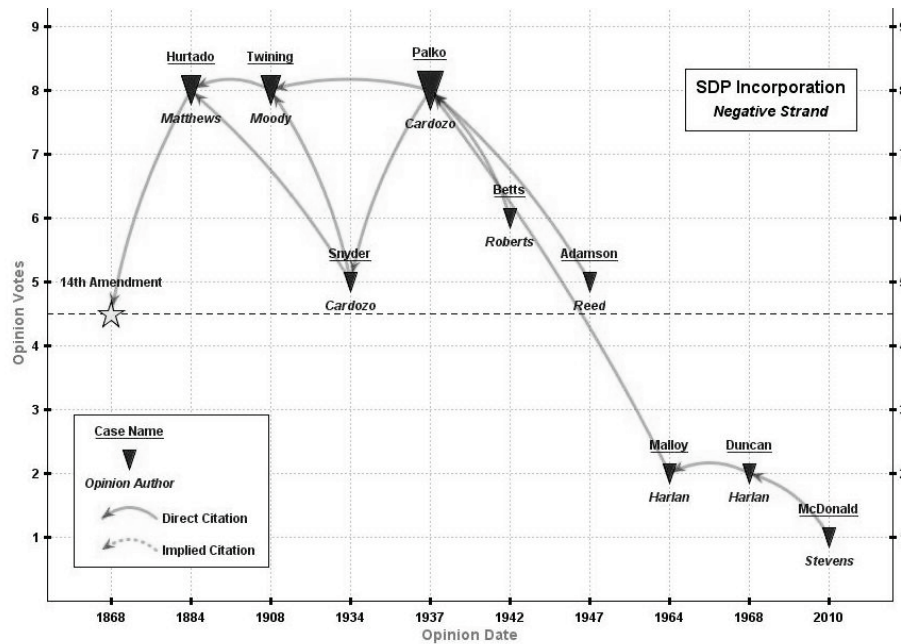


Figure 5.

The tradition generally opposed to incorporation is represented in Figure 5 above. Note that all the connections rendered are directly supported by citation. My thesis that uncited dissents influence doctrine, therefore, cannot be advanced through study of this map. However, a brief survey of the territory not yet explored is necessary to complete the doctrinal story of incorporation. In addition, analysis of Justice Stevens' final dissent for the Court in *McDonald* reveals the deeper connection between incorporation and SDP doctrine writ large. To these two tasks I turn after laying out the genealogical data behind Figure 5.

In chronological order, the opinions in Figure 5 are: *Hurtado v. California* (Justice Stanley Matthews for the Court, 1884);<sup>279</sup> *Twining v. New Jersey* (Justice William Moody for the Court, 1908);<sup>280</sup> *Snyder v.*

279. See *Hurtado v. California*, 110 U.S. 516. For vote break-down, see *supra* note 165 and accompanying text.

280. *Twining v. New Jersey*, 211 U.S. 78 (1908). For vote break-down, see *supra* note 168 and accompanying text.

*Massachusetts* (Justice Benjamin Cardozo for the Court, 1934);<sup>281</sup> *Palko v. Connecticut* (Justice Cardozo for the Court, 1937);<sup>282</sup> *Betts v. Brady* (Justice Owen Roberts for the Court, 1942);<sup>283</sup> *Adamson v. California* (Justice Stanley Reed for the Court, 1947);<sup>284</sup> *Malloy v. Hogan* (Justice John Marshall Harlan dissenting, 1964);<sup>285</sup> *Duncan v. Louisiana* (Justice Harlan dissenting, 1968);<sup>286</sup> *McDonald v. City of Chicago* (Justice John Paul Stevens dissenting, 2010).<sup>287</sup> In genealogical order, the direct citations in this line are: *McDonald* (Stevens)→*Duncan* (Harlan);<sup>288</sup> *Duncan* (Harlan)→*Malloy* (Harlan);<sup>289</sup> *Malloy* (Harlan)→*Palko* (Cardozo);<sup>290</sup> *Adamson* (Reed)→*Palko* (Cardozo);<sup>291</sup> *Betts* (Roberts)→*Palko* (Cardozo);<sup>292</sup> *Palko* (Cardozo)→*Snyder* (Cardozo);<sup>293</sup> *Snyder*

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281. *Snyder v. Massachusetts*, 291 U.S. 97 (1934). *Snyder* was a 5–4 decision. Justice Cardozo delivered the opinion of the Court. *Id.* at 102. Justice Owen Roberts dissented, and Justices Brandeis, Sutherland, and Butler concurred in his opinion. *Id.* at 123, 138 (Roberts, J., dissenting).

282. *Palko v. Connecticut*, 302 U.S. 319 (1937). *Palko* was an 8–1 decision. Justice Cardozo delivered the opinion of the Court. *Id.* at 320. Justice Butler dissented without opinion. *Id.* at 329.

283. *Betts v. Brady*, 316 U.S. 465 (1942). For vote break-down, see *supra* note 170 and accompanying text.

284. *Adamson v. California*, 332 U.S. 46 (1947). For vote break-down, see *supra* note 171 and accompanying text.

285. *Malloy v. Hogan*, 378 U.S. 1, 14 (1964) (Harlan, J., dissenting). For vote break-down, see *supra* note 173 and accompanying text.

286. *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968) (Harlan, J., dissenting). For vote break-down, see *supra* note 174 and accompanying text.

287. *McDonald v. City of Chicago*, Ill., 130 S. Ct. 3020, 3088 (2010) (Stevens, J., dissenting). For vote break-down, see *supra* note 175 and accompanying text.

288. *McDonald*, 130 S. Ct. at 3095, 3098 (Stevens, J., dissenting) (citing Harlan's dissent in *Duncan*). Stevens also repeatedly cites to other Harlan dissents that sound similar themes, including *Malloy*. *Id.* at 3092.

289. *Duncan*, 391 U.S. at 172, 173 & n.1 (Harlan, J., dissenting) (stating that “I have raised my voice many times before against the Court’s continuing indiscriminating insistence upon fastening on the States federal notions of criminal justice” and citing his own dissent in *Malloy*).

290. *Malloy*, 378 U.S. at 21 (Harlan, J., dissenting) (“[I]t is equally plain that the line of cases exemplified by *Palko* . . . furnishes no general theoretical framework for what the Court does today.” (citation omitted)).

291. *Adamson v. California*, 332 U.S. 46, 53 (1947) (“We reaffirm the conclusion of the *Twining* and *Palko* cases that protection against self-incrimination is not a privilege or immunity of national citizenship.”); see also *id.* at 62 (Frankfurter, J., concurring) (singling out Cardozo and *Palko* for praise).

292. *Betts v. Brady*, 316 U.S. 455, 461–62 & n.10 (1942) (“The due process clause of the Fourteenth Amendment does not incorporate . . . the Sixth Amendment . . .” (footnote

(Cardozo)→ *Twining* (Moody);<sup>294</sup> *Snyder* (Cardozo)→ *Hurtado* (Matthews);<sup>295</sup> *Twining* (Moody)→ *Hurtado* (Matthews).<sup>296</sup>

Recall the conclusions from the previous subsection that (a) *Powell v. Alabama* redeemed Harlan's dissent in *Hurtado*; and that (b) Black's subsequent invocation of *Powell* in *Gideon* was hermeneutically connected to the dissenting tradition that extended from Harlan to Black's own dissents in *Betts* and *Adamson*. These conclusions beg the question as to how the pro-incorporation school ended up in dissent in *Betts* and *Adamson* after its apparent victory in *Powell*. The answer to this question lies in an analysis of two highly influential opinions by Justice Benjamin Cardozo—1934's *Snyder* and 1937's *Palko*. In these tradition-defining opinions, Cardozo specifically sought to reclaim the doctrine of *Hurtado* and *Twining* that had been imperiled by *Powell*.

Decided in 1934, *Snyder* considered whether a due process confrontation right was violated by the denial of a criminal defendant's request to accompany the jury to a crime-scene visit initiated by the prosecution.<sup>297</sup> Over strong dissent, Cardozo classified the crime-scene visit as a "view," held that the absence of a defendant at a view did not contravene any "immutable principles of justice" required by the Fourteenth Amendment, and affirmed the death sentence.<sup>298</sup> Cardozo concluded his *Snyder* opinion with a stern warning against excessive liberalism in criminal procedure:

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omitted) (citing *Palko* among other cases)).

293. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder* for the proposition that due process protects "'principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'").

294. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (citing *Twining* for the proposition that due process only protects principles of justice deeply rooted in tradition).

295. *Id.* (citing *Hurtado* for proposition that due process only protects principles of justice deeply rooted in tradition).

296. *Twining v. New Jersey*, 211 U.S. 78, 101 (1908) (discussing Justice Matthews' opinion in *Hurtado*).

297. *Snyder*, 291 U.S. at 103–05.

298. *See id.* at 122. Cardozo somewhat fudged the Sixth Amendment incorporation issue presented in this case. On the one hand, he identified the Sixth Amendment privilege of confronting one's accusers and cross-examining them and "assume[d] that the privilege is reinforced by the Fourteenth Amendment." *Id.* at 106. On the other hand, he intimated that a federal court might find a Sixth Amendment violation on the facts presented, *id.* at 116, but found no due process violation. *Id.* at 117. Justice Roberts' dissenting opinion made clear the view that the Sixth Amendment privilege had been violated and that this privilege should inhere in the Fourteenth Amendment. *See id.* at 128–32 (Roberts, J., dissenting). For more on Roberts' important dissent, see *infra* Part V.

There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.<sup>299</sup>

With this call to respect local variations in state procedural practices, Cardozo explicitly sought to prevent the Court from “travel[ling] far away from the doctrine of *Hurtado v. California* and *Twining v. New Jersey*.”<sup>300</sup> Of course, it was precisely the *Hurtado* doctrine (if not also *Twining*) that Justice Sutherland’s majority opinion in *Powell v. Alabama* had undermined just two years prior to *Snyder*.<sup>301</sup>

Three years later, *Palko* picked up where *Snyder* left off. This time, instead of five votes, Justice Cardozo commanded eight. *Palko* affirmed a Connecticut man’s death sentence after he had twice been tried for murder.<sup>302</sup> After the first trial, the jury found the defendant guilty of murder in the second degree and imposed a life sentence.<sup>303</sup> The state appealed, won a reversal, tried the defendant a second time, and secured a death sentence.<sup>304</sup> Under federal law, this would have constituted double jeopardy prohibited by the Fifth Amendment.<sup>305</sup> Cardozo nonetheless held the practice afforded the defendant due process based on a simple principle of “symmetry”—since the defendant would be allowed an appeal of error, so too should the State.<sup>306</sup> Together with his opinion in *Snyder*, *Palko* took the wind out of *Powell*’s incorporation sails and set precedent against giving criminal defendants the rigorous procedural protections recognized in the Bill of Rights.<sup>307</sup>

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299. *Id.* at 122.

300. *Id.* at 118 (emphasis added).

301. On *Powell*’s abrogation of *Hurtado*, see *supra* notes 277–278 and accompanying text.

302. *Palko v. Connecticut*, 302 U.S. 319, 320–21, 329 (1937).

303. *Id.* at 321.

304. *Id.* at 321–22.

305. See *id.* at 322–23 (citing *Kepner v. United States*, 195 U.S. 100 (1904)).

306. *Id.* at 328.

307. Cardozo’s strategy did not go unnoticed by the *Snyder* dissents that quoted *Powell*’s analysis of *Hurtado* at length. See *Snyder v. Massachusetts*, 291 U.S. 97, 133–35 (1934) (Roberts, J., dissenting) (quoting *Powell*).

The story of how Justice Black subsequently overcame Cardozo's reaction through a pro-incorporation campaign initiated in his *Betts* and *Adamson* dissents has already been told. As emphasized, Black found authority and inspiration for his campaign in the opinions of the first Justice Harlan. It is a great genealogical irony then that the second Justice Harlan provided the staunchest resistance to Black's incorporation project. Though they both campaigned in dissent, Harlan the grandson championed the opposite cause of Harlan the grandfather. Importantly though, the contours of the incorporation debate had changed between generations. Harlan II did not flatly oppose all applications of the Bill of Rights against the States nor did he try to resurrect Matthews' logic from *Hurtado*. Rather, as Justice Alito put it in *McDonald*, Harlan "fought a determined rearguard action to preserve the two-track approach" to incorporation.<sup>308</sup> This two-track approach advocated variable protection between state rights protected by due process and federal rights protected by the first eight amendments to the Constitution. Harlan's approach presented an interesting blend of Cardozo-like skepticism towards criminal defendants and a progressive understanding of due process as an evolving concept.

The blend is first exemplified by Harlan's dissent in *Malloy*. Decided in 1964, *Malloy* examined whether a Connecticut man's imprisonment for refusal to answer questions in a state gambling violated due process.<sup>309</sup> In his opinion for the Court, Justice Brennan held that due process incorporated both the Fifth Amendment's privilege against self-incrimination and the applicable federal standard for finding a violation.<sup>310</sup> Harlan disagreed. Though the "development of the community's sense of justice may in time lead to expansion of the protection which due process affords," proper development is "short-circuited by the simple device of incorporating into due process . . . the whole body of law which surrounds a specific prohibition directed against the Federal Government."<sup>311</sup> This approach, Harlan argued, inevitably disregards

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308. *McDonald v. City of Chicago*, Ill., 130 S. Ct. 3020, 3046 (2010) (collecting Harlan concurrences and dissents).

309. *Malloy v. Hogan*, 378 U.S. 1, 3 (1964).

310. *Id.* This holding overruled *Twining* and *Adamson*. See *id.* at 6.

311. *Id.* at 15–16 (Harlan, J., dissenting).



all relevant differences which may exist between state and federal criminal law and its enforcement. The ultimate result is compelled uniformity, which is inconsistent with the purpose of our federal system and which is achieved either by encroachment on the States' sovereign powers or by dilution in federal law enforcement of the specific protections found in the Bill of Rights.<sup>312</sup>

Beyond attacking jot-for-jot incorporation, Harlan also opined in *Malloy* that Connecticut decision comported with fundamental fairness, and that “under any standard—state or federal—the commitment for contempt was proper.”<sup>313</sup>

Consider next Harlan's dissent in *Duncan*. Decided in 1968, *Duncan* concerned whether a young Louisiana man's conviction for simple assault, obtained before a judge despite a requested jury trial, violated due process of law.<sup>314</sup> By this time, the selective incorporation train had gathered a full head of steam and Justice White's majority opinion held that due process “guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.”<sup>315</sup> Harlan dissented, noting that “I have raised my voice many times before against the Court's continuing indiscriminating insistence upon fastening on the States federal notions of criminal justice.”<sup>316</sup> For Harlan, the Court's incorporation approach “put[s] the States in a constitutional straitjacket with respect to their own development in the administration of criminal or civil law.”<sup>317</sup> He advocated instead a “more discriminating process of adjudication” that exhibited “constitutional tolerance for state experimentation.”<sup>318</sup> On the

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312. *Id.* at 16–17 (Harlan, J., dissenting).

313. *Id.* at 32 (Harlan, J., dissenting).

314. *Duncan v. Louisiana*, 391 U.S. 145, 146–47 (1968).

315. *Id.* at 149. See also *supra* note 203 and accompanying text for discussion of the due process standard articulated by Justice White and later embraced by Justice Alito in *McDonald*.

316. *Id.* at 173 (Harlan, J., dissenting) (citing, *inter alia*, *Malloy*, 378 U.S. at 14 (Harlan, J., dissenting)). Harlan's citation to his *Malloy* dissent here is represented as a solid arrow in Figure 5.

317. *Id.* at 175–76 (Harlan, J., dissenting).

318. *Id.* at 176 (Harlan, J., dissenting). Harlan actually closes his dissent with an ode to the idea of state experimentation and quotes from Justice Brandeis' celebrated dictum: “It is, he said, ‘one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . . .’” *Id.* at 193 (Harlan, J., dissenting) (alteration

particular jury question, Harlan argued that the “jury trial is not a requisite of due process” because it is not “the only fair means of resolving issues of fact.”<sup>319</sup>

This brings us to Justice Stevens’ strange dissent in *McDonald*. After thirty-five years on the Court and more than his share of important dissents, this forty-two page opinion constituted Stevens’ final word in dissent.<sup>320</sup> As shown in *Figure 5*, Justice Stevens explicitly invoked Harlan’s incorporation dissents in this epic case.<sup>321</sup> Harlan directly supported Stevens’ argument that the Fourteenth Amendment “‘stands . . . on its own bottom’”<sup>322</sup> and that due process applies directly to the States “‘without intermediate reliance on any of the first eight Amendments.’”<sup>323</sup> Echoing Harlan, Stevens endorsed the “‘two-track approach’” as one promoting federalism and state experimentation.<sup>324</sup> Instead of selective incorporation, Stevens described the proper due process test in Cardozo’s terms: whether a challenged state practice “‘violates values ‘implicit in the concept of ordered liberty.’”<sup>325</sup> Under this test, Stevens concluded that petitioners opposing the handgun regulations ostensibly at issue had “‘failed to show why their asserted

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in original) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Here we see Harlan both invoking a proud prior dissenting tradition and attempting to tar the majority with charges of an inflexible conception of due process akin to *Lochnerism*.

319. *Id.* at 186–87.

320. Perhaps most impressive among Justice Stevens’ many dissents is his opinion in *Bowers v. Hardwick*, which was explicitly redeemed in *Lawrence v. Texas*. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (striking down Texas sodomy law: “Justice Stevens’ analysis, in our view, should have been controlling in *Bowers* and should control here. . . . *Bowers v. Hardwick* should be and now is overruled.”).

321. See *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3092 (2010) (Stevens, J., dissenting) (citing *Malloy*, 378 U.S. at 24 (Harlan, J., dissenting)); see also *id.* at 3093 n.11 (Stevens, J., dissenting) (“I can hardly improve upon the many passionate defenses of this position [holding state and federal governments to different standards] that Justice Harlan penned during his tenure on the Court.” (citation omitted)).

322. *Id.* at 3093 (Stevens, J., dissenting) (alteration in original) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring)).

323. *Id.* at 3092 (Stevens, J., dissenting) (quoting *Malloy*, 378 U.S. at 24 (Harlan, J., dissenting)).

324. See, e.g., *id.* at 3094–95 (Stevens, J., dissenting) (quoting the Court, *id.* at 3046, and citing *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Here Stevens cites to the same famous Brandeis dissent for the same rhetorical purposes that Harlan did in *Duncan*. See *supra* text accompanying note 318.

325. *McDonald*, 130 S. Ct. at 3096 (Stevens, J., dissenting) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Following Harlan again, Stevens locates himself in the incorporation tradition of Justice Cardozo.

interest is intrinsic to the concept of ordered liberty or vulnerable to maltreatment in the political arena.”<sup>326</sup>

The reason I call Stevens’ dissent strange is that he explicitly sided with conservative dissents in criminal procedure cases—*Malloy* and *Duncan*—where he most certainly agreed with the liberal results upholding strong double-jeopardy and jury-trial rights for criminal defendants. Indeed, the greater irony is that *McDonald* seemingly led Stevens to align himself with the conservative dissents of the Warren Court while Alito and the plurality embraced the Warren Court’s liberal majorities.<sup>327</sup> This tension perhaps explains Stevens’ odd combination in *McDonald* of both embracing Harlan’s dissents and attempting to distinguish the Warren Court incorporation cases. He thus suggested that selective incorporation only applied in criminal procedure cases where the “need for certainty and uniformity is more pressing, and the margin for error slimmer.”<sup>328</sup> Since the Second Amendment advances a non-procedural right, according to Stevens, its status under due process should not be governed by criminal procedural principles.<sup>329</sup> While this attempt at category distinction based on substantive versus procedural rights has natural appeal, Stevens’ argument makes no sense given that he proposed to adopt the “basic [due process] inquiry . . . described by Justice Cardozo more than 70 years ago [in *Palko*].”<sup>330</sup> As we have seen, Cardozo used this “basic inquiry” in *Palko* precisely to deny the expansion of criminal procedure rights—just as he had done in *Snyder* and just as Harlan advocated in *Malloy* and *Duncan*.

This apparent contradiction is best understood by not reading Stevens’ dissent literally. By this I mean that though Stevens ostensibly addressed the incorporation issues in *McDonald*, his clear concern was actually with broader substantive due process doctrine. In other words, Stevens’ dissent is best read not as a coherent argument against Second Amendment incorporation in particular but rather as a grand lesson on substantive due process analysis and constitutional interpretation writ

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326. *Id.* at 3116 (Stevens, J., dissenting).

327. Stevens himself apparently recognized this irony, though he understandably sought to emphasize the plurality’s doctrinal hypocrisy rather than his own: “[I]f some 1960’s opinions purported to establish a general method of incorporation, that hardly binds us in this case. The Court has not hesitated to cut back on perceived Warren Court excesses in more areas than I can count.” *Id.* at 3095 (Stevens, J., dissenting).

328. *Id.* at 3094 (Stevens, J., dissenting).

329. *Id.* (Stevens, J., dissenting).

330. *Id.* at 3096 (Stevens, J., dissenting) (citing *Palko*, 302 U.S. at 325).

large.<sup>331</sup> On this reading, the incorporation debate is secondary, if not entirely irrelevant, to Stevens' parting lecture on the "conceptual core" of substantive due process analysis, which primarily implicates questions of "[s]elf-determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity and respect."<sup>332</sup> In this broader arena, Stevens engages in a pitched battle with his conservative colleagues and their strict textualist and originalist methodologies.<sup>333</sup> Stevens' dissent thus constitutes a rallying cry for a competing due process school that promotes the idea of a "living Constitution."<sup>334</sup>

Given this context, Stevens' invocation of the second Justice Harlan and the anti-incorporation school makes perfect doctrinal sense. In *McDonald*, Stevens advocated for understanding due process as a "dynamic concept."<sup>335</sup> As far back as *Hurtado*, opinions in the anti-incorporation line have emphasized that due process cannot be strictly defined according to settled usage—to do so "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."<sup>336</sup>

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331. From the start, Stevens announces, "This is a substantive due process case." *Id.* at 3090 (Stevens, J., dissenting). He then argues why the Due Process Clause applies to matters of substantive law as well as to matters of procedure. *Id.* at 3090–91. From here, he argues that "selective incorporation" is a "subset" of substantive due process doctrine. *Id.* at 3093 (internal quotation marks omitted). After defending the "two-track" approach to incorporation, *id.* at 3093–95, Stevens then expounds his theory of substantive due process interpretation. *Id.* at 3096–103. Stevens' dissent spans over fourteen pages before devoting any sustained attention to the Second Amendment issue.

332. *Id.* at 3101 (Stevens, J., dissenting).

333. Stevens only briefly skirmishes with Justice Thomas when he describes Thomas' campaign for radical change in privileges and immunities doctrine as animated by a desire to displace major portions of the Court's equal protection and substantive due process jurisprudence. *Id.* at 3089 n.3 (Stevens, J., dissenting) (quoting *Saenz v. Roe*, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting)). The conflict with Justice Scalia, by contrast, is epic. Scalia wrote a separate concurrence specifically to counter Stevens' "broad condemnation of the theory of interpretation which underlies the Court's opinion, a theory that makes the traditions of our people paramount." *See id.* at 3050 (Scalia, J., concurring). The back and forth between Scalia and Stevens defines the current state of the competing due process schools.

334. *See id.* at 3057 (Scalia, J., concurring) (internal quotation marks omitted) (describing Stevens as a "living Constitution" advocate).

335. *Id.* at 3099 (Stevens, J., dissenting) (internal quotation marks omitted) (quoting John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 38 (1992)).

336. *Hurtado v. California*, 110 U.S. 516, 529; *see also Twining v. New Jersey*, 211 U.S. 78, 100 (1908) ("This court has always declined to give a comprehensive definition of [due

Stevens taps this traditional vein in his dissent and constructs a broader critique of a “wholly backward looking” or “rigid historical” approach to substantive due process that he argues characterizes the *McDonald* plurality’s approach.<sup>337</sup> While previous stalwarts in the anti-incorporation school used the idea of dynamism to oppose criminal procedure rights, Stevens used his dissent as a pulpit to preach a new direction for the old school.

In his attempt to influence future doctrine, Stevens’ final dissent falls in line with the tradition of great due process dissents examined in this Article. The proposition that a sophisticated understanding of Stevens’ dissent requires reading context more than text falls in line with the argument presented that doctrine unfolds through a dialectic that cannot be captured by citation alone. *Figure 6* below<sup>338</sup> illustrates the specific picture of the doctrinal push and pull between competing schools in the incorporation genealogy. Note that rival doctrinal lines cross three times. First, the anti-incorporation lines from *Snyder* to *Twining* and *Hurtado* cross the pro-incorporation school’s early line of majority presence connecting *Powell* to *Chicago Burlington & Quincy*. Second, as the strong incorporation school falls back into dissent, the line from Black’s *Betts* dissent back to *Powell* crosses the anti-incorporation school central axis between *Snyder* and *Palko*. Finally, the incorporation school’s eventual victory in *Gideon* creates two crossings. In majority territory, the *Gideon–Powell* line cuts across the *Snyder–Palko* axis. In the realm of dissent, the hermeneutic link between Black’s *Gideon* majority and his own *Adamson* dissent crosses the line from Harlan’s dissent in *Malloy* back to the deposed king, *Palko*.

Once again, it must be stressed that the doctrinal map here simplifies the territory represented.<sup>339</sup> Yet the picture here is still complex and the multiple crossed lines suggest that incorporation doctrine evolved through a dialectic exchange between competing due

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process], and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion . . . .”); *Duncan v. Louisiana*, 391 U.S. 145, 176–77 (1968) (Harlan, J., dissenting) (quoting *Hurtado*, 110 U.S. at 529).

337. *McDonald*, 130 S. Ct. at 3097–98 (Stevens, J., dissenting).

338. See *infra* App., at p.1328.

339. See, e.g., *supra* note 163 and accompanying text (discussing omitted First Amendment cases), note 213 and accompanying text (discussing omission of *Mapp v. Ohio* and *Wolf v. Colorado*), and note 231 and accompanying text (discussing omission of Brennan opinions in *Ohio ex rel. Eaton v. Price* and *Cohen v. Hurley*).

process traditions. Those rival traditions themselves mutated over time as they encountered new arguments and reacted to new teachings and opinions. Dissents played an integral role in this complex evolution. Besides challenging majority reasoning and sowing seeds for future overruling, dissents also pushed exiled traditions in new directions. Though not always cited, dissents more than held up their end of the constitutional conversation.

## V. CONCLUSION: DISSENT AND DUE PROCESS BORDERS

John Hart Ely once famously observed that “‘substantive due process’ is a contradiction in terms—sort of like ‘green pastel redness.’”<sup>340</sup> Ely’s quip took, and it is now a commonplace to call SDP an oxymoron.<sup>341</sup> Yet this SDP snub was never more than a clever play on words. As noted earlier, “due process of law” is a phrase translated from Latin in the Magna Carta.<sup>342</sup> The more literal translation of “*per legem terræ*” in the Magna Carta is “by the law of the land.”<sup>343</sup> The *substantive* “law of the land” is hardly an oxymoron. Neither is the *procedural* “law of the land” a redundancy. Despite the underlying emptiness of Ely’s enduring joke, it is certainly true that neither the phrase “substantive due process” nor the phrase “procedural due process” (PDP) appear in the Constitution. This then raises the question: where did SDP and PDP come from?

It should come as no surprise that the answer to this question is—dissents! As it turns out, the exact phrase “procedural due process” first entered the Supreme Court lexicon in a dissent from the incorporation line, specifically Justice Owen Roberts’s dissent in 1934’s *Snyder*.<sup>344</sup> Recall that *Snyder* concerned whether a criminal defendant had a due process right to confront witnesses against him like that guaranteed by

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340. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980).

341. See, e.g., *Mays v. City of East St. Louis*, 123 F.3d 999, 1001 (7th Cir. 1997) (opinion of Easterbrook, J.) (calling SDP an “oxymoron”); *Ill. Psychol. Ass’n v. Falk*, 818 F.2d 1337, 1342 (7th Cir. 1987) (opinion of Posner, J.) (calling SDP a “durable oxymoron”).

342. See *supra* note 40 and accompanying text.

343. See *supra* note 40 and accompanying text.

344. See *Snyder v. Massachusetts*, 291 U.S. 97, 137 (1937) (Roberts, J., dissenting). The proposition that this is the first use of the phrase “procedural due process” is confirmed through searching for that precise phrase on Westlaw or Lexis in the Supreme Court database. *Snyder* is the earliest case retrieved where the phrase is used in the actual text of the opinion (not the Keycite or Headnote text).

the Sixth Amendment. Cardozo held that due process did not imply such a right. Roberts objected:

A distinction has always been observed in the meaning of due process as affecting property rights, and as applying to procedure in the courts. In the former aspect the requirement is satisfied if no actual injury is inflicted and the substantial rights of the citizen are not infringed; the result rather than the means of reaching it is the important consideration. But where the conduct of a trial is involved, the guarantee of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way. *Procedural due process* has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules, and is not satisfied, though the result is just, if the hearing was unfair.<sup>345</sup>

According to Roberts, the practice at issue in *Snyder* precisely violated this procedural due process.<sup>346</sup> It is important to recognize that in this first reference to PDP, Roberts uses the phrase to argue for importing the right to confront witnesses through the Due Process Clause. Today this would be thought of as an argument for SDP incorporation. However, for Roberts, the key distinction is that between conduct-of-trial due process and “due process affecting property rights.” In essence, Roberts is trying to distinguish the procedural protections found in the Sixth Amendment from the substantive protections for rights found in cases like *Lochner* and its progeny.

*Snyder* was decided three years before *West Coast Hotel* ended *Lochner*’s reign. The Court-packing crisis was not yet on the horizon and Roberts had yet to be cast as the “switch in time that saved nine.” But already we see the germs of a strategy for using *Lochner* as a foil when defining “good” due process from “bad.” This strategy later flowered in the dissenting opinion of Justice Wiley Rutledge in 1948’s *Republic Natural Gas Co. v. Oklahoma*, which marked the first time the phrase “substantive due process” was used in the text of a Court opinion.<sup>347</sup>

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345. *Id.* (emphasis added).

346. *Id.* at 138.

347. See *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 90 (1948) (Rutledge, J.,

*Republic Natural Gas* concerned an appeal from an Oklahoma State Commission ordering Republic to pay money to another natural gas company for draining gas from a common pool.<sup>348</sup> Republic argued it had a property right, protected by due process, to drain the gas.<sup>349</sup> The Court majority, per Justice Frankfurter, held that there was no final judgment and dismissed the appeal without reaching the merits.<sup>350</sup> In dissent, Justice Rutledge argued that the merits were properly before the Court and that Republic actually had no protectable property interest.<sup>351</sup> Rutledge denied that Republic had any right protected by “substantive due process” and observed that the Fourteenth Amendment “was not a strait jacket immobilizing state power to change or alter institutions of property in the public interest.”<sup>352</sup> To support this proposition, Rutledge stated that previous cases that had given the Amendment expansive property protections “have failed to withstand the test of time” and specifically cited *Lochner*, *Adkins*, and then *West Coast Hotel*.<sup>353</sup> By associating “substantive due process” with a renounced line of cases, Rutledge sought to divide due process into legitimate and illegitimate territories.

Rutledge’s categorization highlights another important role dissents play in doctrinal development. Beyond influencing the internal shape of SDP doctrines like economic liberty or incorporation, dissents also help construct external borders between rival due process territories. Dissents have introduced vocabulary and lines of argument that have distinguished PDP from SDP. In *McDonald*, we observed Justice Stevens’ dissent contest the border between incorporation and other SDP doctrines. Drawing lines between doctrines potentially limits the applicable scope of legal rules laid down by the majority. This is simply another way that dissents offer rival interpretations of constitutional traditions and create a context in which majority text is read. Whether

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dissenting). As with “procedural due process,” the proposition that *Republic Natural Gas* produced the first use of the phrase “substantive due process” is confirmed through a Westlaw or Lexis search on “substantive due process” in the Supreme Court database. *Republic Natural Gas* is the earliest case retrieved where the phrase is used in the actual text of the opinion (not the Keycite or Headnote text).

348. *Id.* at 63–67.

349. *Id.* at 67.

350. *Id.* at 72.

351. *Id.* at 87–93 (Rutledge, J., dissenting).

352. *Id.* at 90 (Rutledge, J., dissenting).

353. *Id.* at 90 & n.23 (Rutledge, J., dissenting).



contested lines are between doctrines or within them, dissents advance the conversation about how best to draw them. It is this complex and ever-evolving line-drawing conversation that ultimately gives shape to doctrine.

In this Article, I have looked at the lines drawn by and through dissents in the economic liberty and incorporation territories of SDP doctrine. As I have shown, drawing these lines cannot depend solely on the citations contained within opinion texts. Dissents form doctrinal context, which is missed by an overly narrow reading of authority. I have suggested a hermeneutic technique that allows links to be made between opinions when citation is not available. This technique proceeds by dividing an area of doctrine into competing schools of thought and then constructing an opinion genealogy for each rival school. These rival genealogies may be mapped—and maps give visual representation to the shape of doctrine.

The technique was implemented to map economic liberty and incorporation doctrine. Analysis of the genealogies of these competing schools confirmed that dissents played a vital role in the evolution of SDP bloodlines. Without Bradley's dissent in *Slaughter-House*, the SDP economic liberty school might never have risen. Without Holmes' *Lochner* dissent, the economic liberty line might not have fallen so quickly or so hard. Similarly, incorporation could not have become a SDP doctrine without the efforts of Harlan (I) and his dissent in *Hurtado*, which initiated a tradition later rescued from exile by Justice Black after the redemption of his *Adamson* dissent. The insight about the role of dissents in shaping the direction of schools of due process thoughts invites us to read Justice Stevens' final dissent in *McDonald* not as a vigorous assault on incorporation, but rather as an attempt to shape the future of SDP doctrine more broadly conceived.

In the end, I hope that the maps and genealogies presented have usefully complicated the foundational concept of tradition that lies at the heart of due process analysis. The constant contest and debate over the existence and proper interpretation of our inherited customs and modes of legal proceeding demonstrate that no single doctrinal school can legitimately claim all of constitutional tradition. The traditions and conscience of our society are not monolithic. Whether conceived of as a living thing or strictly grounded in history, debates over the true meaning of tradition are inevitable in constitutional law. And in this inevitable debate, due process dissents will always play a vital role in shaping the contours, vocabulary, and direction of argument.

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## APPENDIX

Figure 1.

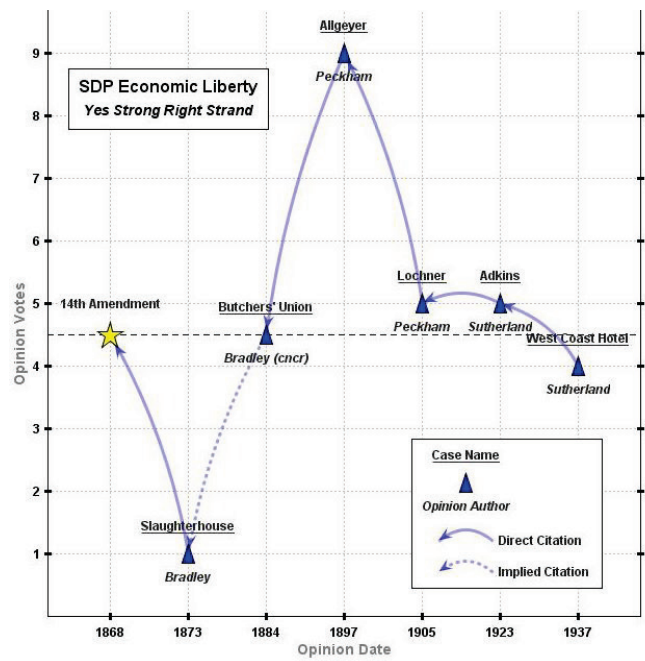
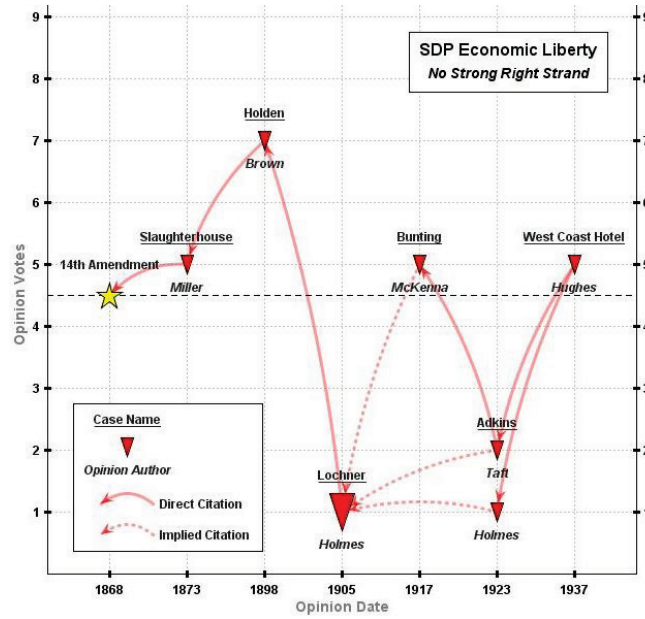


Figure 2.

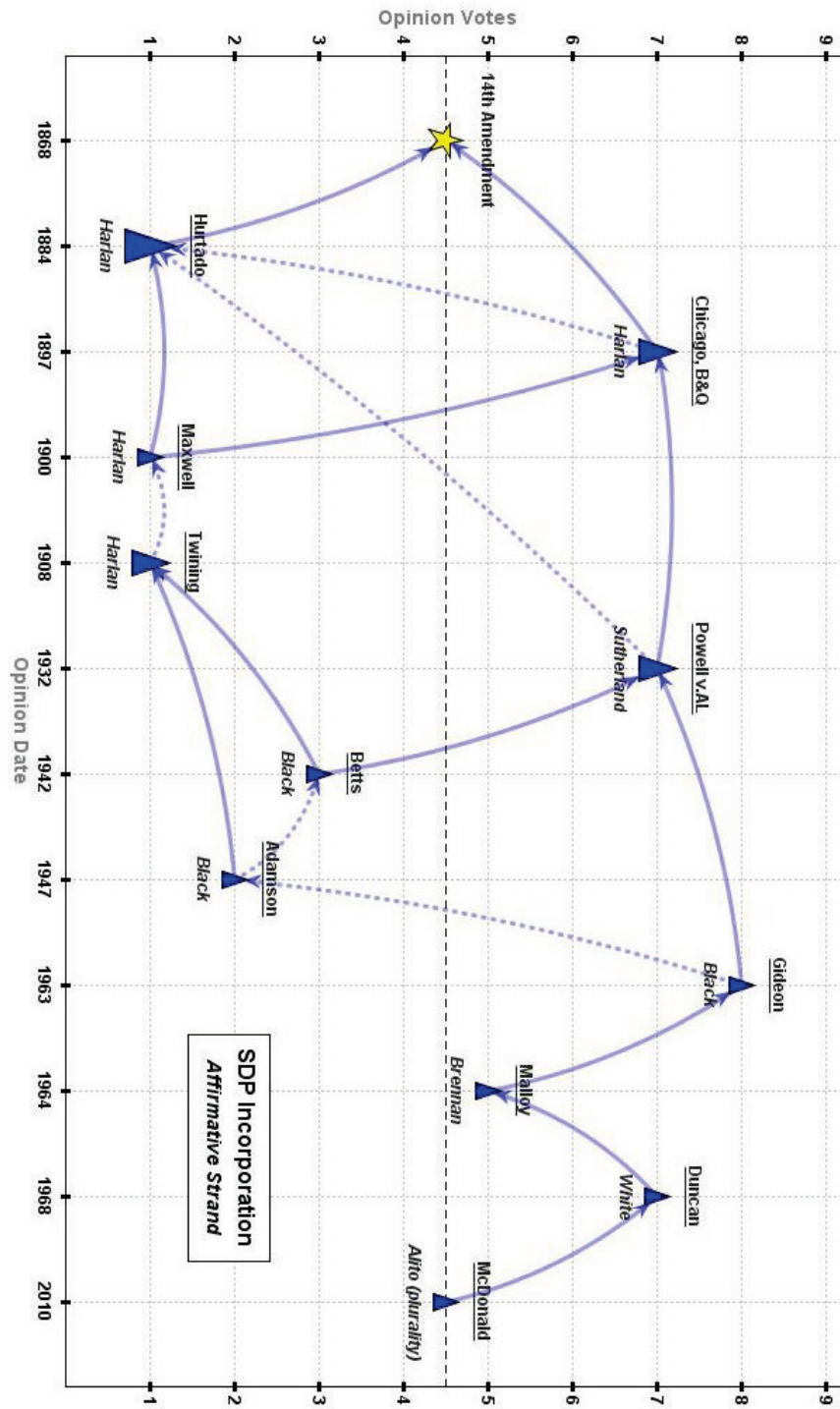


Figure 4.

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Figure 3.

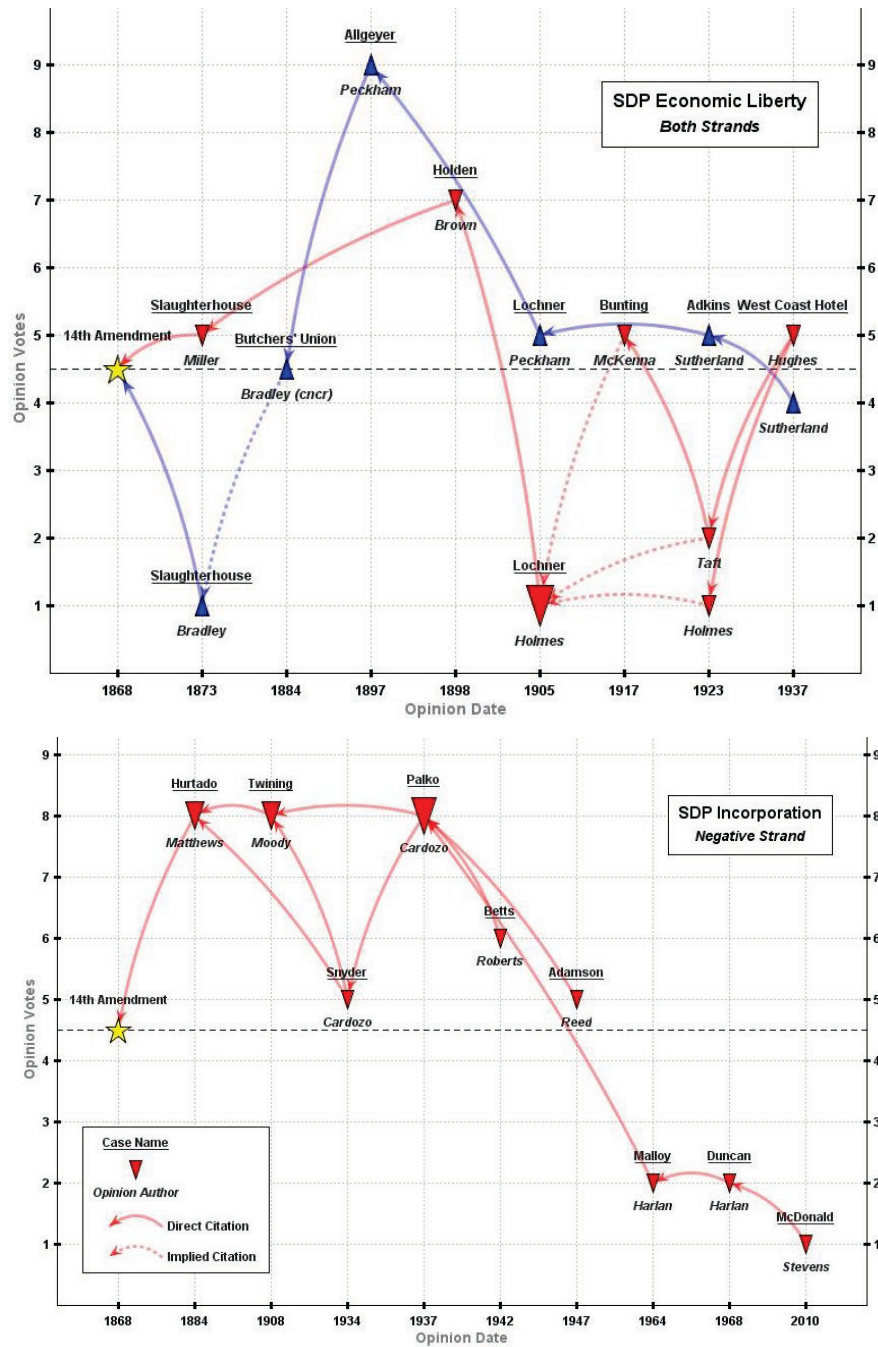


Figure 5.

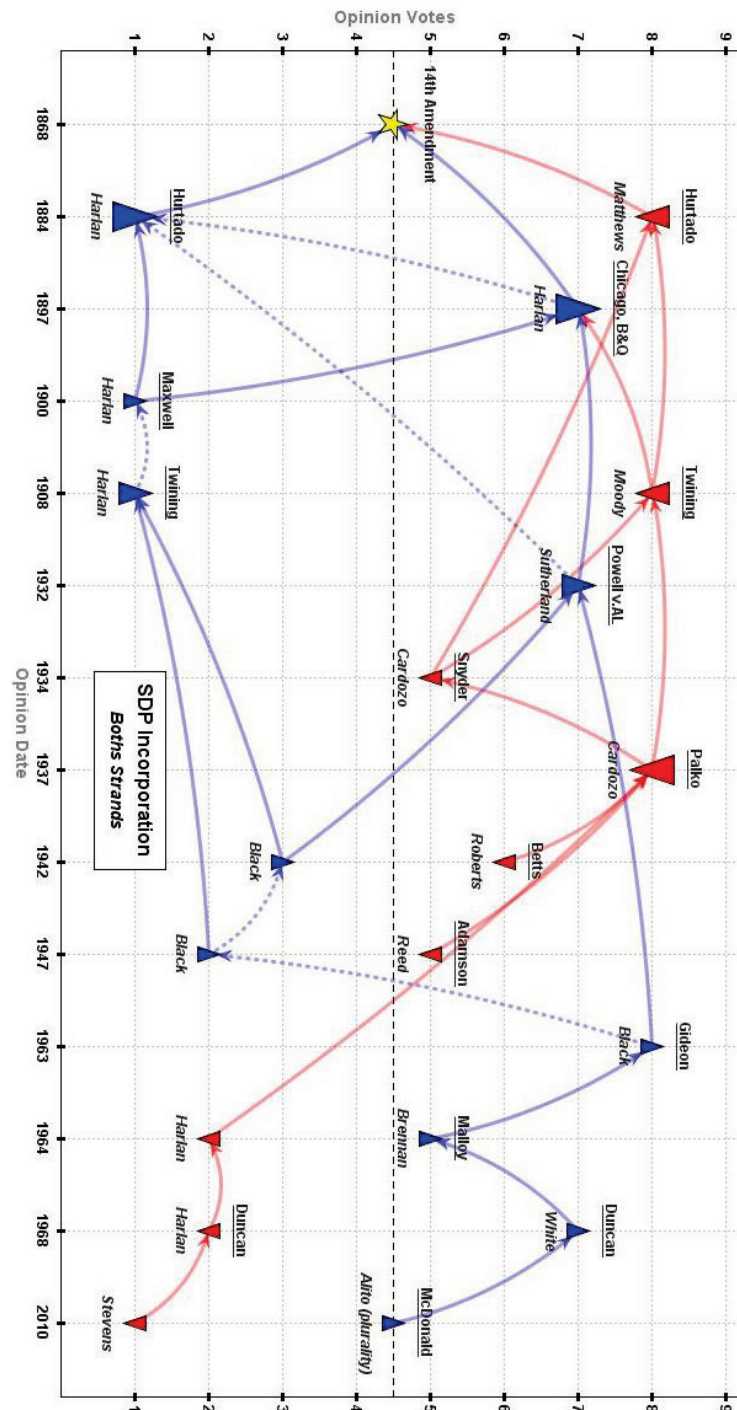


Figure 6.