
DODD HALL

# CASE STUDIES OF SELECTIVE INCORPORATION

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## Abstract

Selective incorporation played a role in adapting federalist principles to the constitutional standards of post-Reconstruction Era America. This project seeks to determine the extent of that role under Supreme Court Chief Justice Earl Warren by analyzing constitutional jurisprudence before, immediately following, and almost a century after the ratification of the Fourteenth Amendment by focusing on several key cases, including *Barron v. Baltimore* (1833), *Palko v. Connecticut* (1937), *Robinson v. California* (1962), and *Griswold v. Connecticut* (1965). My analysis indicates that the rulings and chronology of these cases demonstrate the principled, but not flawless, manner in which the Warren Court adapted Federalist ideals into compatibility with the Fourteenth Amendment through selective incorporation.

A topic of lengthy debate about the proper role of the Supreme Court is most often a question of authority, specifically, when is the Supreme Court's authority legitimate? I find this question most easily addressed using the Warren Court, not because the issue existed exclusively under Chief Justice Earl Warren or ceased immediately following his retirement, but because the Warren Court frequently grappled with this controversy (Marceau 1232). This issue arises when any judiciary exercises or declines to exercise its authority against an act by any other branch of government. The question of the legitimacy and permanency of the Supreme Court's authority is integral to understanding how America's federalist origins apply in the twenty-first century. This essay assesses how, when, and why selective incorporation became constitutional jurisprudence as well as incorporation doctrine's impact on federalism and, ultimately, the way the United States protects the liberties of its citizens.

Selective incorporation holds that the Fourteenth Amendment imposes most of the protections guaranteed by the Bill of Rights equally upon the states (Marceau 1232). Though the idea of applying the Bill of Rights to the states was originally rejected by the Supreme Court[1] as unconstitutional, even after the ratification of the Fourteenth Amendment, eventually the Warren Court[2] incorporated most of the Bill of Rights onto the Fourteenth Amendment through individual cases, or selectively. In doing so, it established a concrete definition for the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment. The Warren Court defined Due Process as the rights enumerated in the Bill of Rights, which set a legal precedent that has carried through *McDonald v. The City of Chicago* (2010).

Even before Chief Justice Warren stepped down in 1969, the Warren Court retreated from its own precedent, straying from the concrete Bill of Rights to the "penumbra" of the document (*Griswold* 484). In doing so, it circumvented the concrete nature of the Bill of Rights and blurred the lines between the expressly stated rights therein—such as the First Amendment right to freedom of speech—and the potential implications of such rights—in *Griswold v. Connecticut* (1965), the right to privacy in the marital bed ("The Bill;" *Griswold* 484.) By blurring these lines, the Warren Court increased the power of the Federal Government over the states to a level beyond what is written in the Constitution. If the Bill of Rights is interpreted with its penumbra, this power is entirely within the scope of the Constitution. If, however, one interprets the Bill of Rights in its most literal, explicit sense, this power over the states is extra-constitutional. For example, the literal, explicit interpretation of "due process of law" is a decision by an impartial judiciary after providing reason-

able notice to concerned parties and facilitating an opportunity for them to be heard (*Buck* 313). With its literal, explicit interpretation of the Bill of Rights, selective incorporation makes Federalist ideals applicable to post-Reconstruction Era America.

To understand why this is true, one must first understand Federalism. According to Justice Antonin Scalia, "[Federalism] is a form of government midway between two extremes. At one extreme, the autonomy, the disunity, the conflict of independent states; at the other, the uniformity, the inflexibility, the monotony of one centralized government. Federalism is meant to be a compromise between the two" (Scalia 19). An extreme Federalist might assert that incorporating any of the Bill of Rights onto the states is unconstitutional. A moderate Federalist might argue that incorporating the penumbra of the Bill of Rights is extra-constitutional. Regardless of the level of radicalism, some level of state sovereignty remains integral to Federalism (Scalia 20; Livingston 81).

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The Due Process Clause of the Fourteenth Amendment is the grounds on which specific parts of Amendments One through Eight are incorporated onto the states (Amar 445-446). The Civil War begot the Thirteenth, Fourteenth, and Fifteenth Amendments, which reconstructed the purposes and applications of the constitution. Prior to the ratification of the Fourteenth Amendment, there was no constitutional mandate nor legal precedent for incorporating any federal rights onto the states (Ghosh 95). Nevertheless, the question was brought to the Supreme Court during *Barron v. Baltimore* (1833), thirty-five years before the ratification of the Fourteenth Amendment. John Barron sued the mayor of Baltimore for depriving him of his property in violation of the Fifth Amendment, which states that no "private property be taken for public use, without just compensation," ("The Bill"). The State Court ruled in favor of Barron, but the ruling was later reversed by an appellate court. Barron appealed to the Supreme Court, but the Supreme Court sided with the appellate court on the grounds that "[t]he constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states," (*Barron* 251). This judgement, delivered by Chief Justice John Marshall, posits that a Federal constitution binds a variety of political bodies in such a way that it predicates the existence of a new body, both distinct and above those which have created it.

The ratification of the Fourteenth Amendment virtually negated *Barron v.*

*Baltimore* (1833) because Section One states in part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," ("The Bill"). The Fourteenth Amendment marked the change from the constitution applying exclusively to the federal government to the constitution applying at a state level, at least in part. This is because the language of the Fourteenth Amendment, which begins, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," indicates citizenship at both a state and federal level. The amendment clarifies the relationship between these citizenships by noting the existence of federal rights on which states may not infringe. These federal rights broadly identified in the Fourteenth Amendment are enumerated in the Bill of Rights, specifically in Amendments One through Eight. Therefore, the Fourteenth Amendment demands not only federal protection of those rights, but state protection as well to ensure due process of law.

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Still, Justice Marshall's definition of Federalism was echoed in *The Slaughterhouse Cases* (1873), a consolidation of three similar cases involving butchers and slaughterhouses. Justice Miller delivered the Court's opinion on April 14, 1873, just five years after the ratification of the Fourteenth Amendment ("The Bill"):

> [The Court's observation] is, that the distinction between citizenship of the United States and citizenship of a state is clearly recognized and established.... It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual. We think this distinction and its explicit recognition in [the Fourteenth] Amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states. (*Slaughterhouse* 74)

This was the first Supreme Court ruling regarding the Fourteenth Amendment. Just one year later, the Court reiterated this opinion in *United States vs. Cruikshank* (1867). Chief Justice Waite, who delivered the opinion of the Court, said:

> We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other." (*United States* 550)

Under this reasoning, a state could authorize slavery or re-segregate schools because, according to Chief Justice Waite, the rights protected by the states may differ from those protected by the federal government. This directly contrasts with the verbiage of the Fourteenth Amendment. Despite this, Justice Marshall's original view of state and federal rights held for nearly a century.

Because the Constitution and Bill of Rights were arranged in tandem, the Constitution had only been formally amended twice before the Civil War. The Eleventh Amendment clarified Article Three, Section Two of the Constitution, which gives diversity jurisdiction to the judiciary to hear cases "between a state and citizens of another state." The Twelfth Amendment replaced the procedures outlined in Article Two, Section One, Clause Three of the Constitution, under which the Electoral College originally functioned ("The Bill;" "The Constitution"). These amendments, though important, focus more on clarifying and improving previously existing procedures than granting rights or prohibiting action. The Reconstruction Amendments following the Civil War, however, made radical changes to not only the function of the Constitution, but to American life. As such, they took much longer to adopt domestically, as evidenced by the Civil Rights Act of 1964, which, in part, reiterated the rights granted to African Americans in the Thirteenth Amendment. Only ten years prior during the Warren Court did the Supreme Court fully recognize American citizens' Fourteenth Amendment rights, despite the fact that, by 1964, the Constitution had been amended twenty-four times ("The Constitution").

*Rochin v. California* (1952) began the jurisprudential birth pains of selective incorporation. The case concerned the arrest, stomach pumping, and trial of Richard Antonio Rochin. Police, having "some information that [Rochin] was selling narcotics," invaded his home, were physically abusive, and forced Rochin to have his stomach pumped against his will to see if he had consumed morphine tablets (*Rochin* 166). The tablets produced were submitted as evidence in a trial without a jury and Rochin was convicted of illegal possession of drugs. Rochin appealed his case on the grounds that his constitutional rights under the Fifth and Fourteenth Amendments of the

United States Constitution were violated and that Article I(1)(13)(19) of the California Constitution rendered forced stomach pumping unconstitutional self-incrimination (*People* 150). Though the appellate court found that "[the police] were guilty of unlawfully breaking into and entering defendant's room and were guilty of unlawfully assaulting and battering defendant while in the room," they upheld Rochin's conviction and the admissibility of the evidence. As the court wrote, "Illegally obtained evidence is admissible on a criminal charge in this state," (*People* 143, 146).

Two years later, in 1952, The Supreme Court voted to reverse the appellate court's decision. In his concurring opinion, Justice Hugo Black remarked on the violation of Rochin's constitutional rights—a claim to which appellate court gave no regard:

> The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims… [In this case,] this is conduct that shocks the conscience." (*Rochin* 172)

This statement by Justice Black added "conduct that shocks the conscience" to the definition of violation of the Due Process Clause of the Fourteenth Amendment. By this point in history, the qualifications for a violation of due process stipulated that the right infringed upon must be "of the very essence of a scheme of ordered liberty"[3] and in a manner "that shocks the conscience."[4] Under this definition, then, "due process" does not require a certain standard of conduct, but rather is a floor beneath which the government may not fall.

As evidenced by nearly a century of jurisprudence, the roots of Federalism were strong in the Supreme Court, despite not only the ratification of the Reconstruction Amendments but also the expansion and centralization of the federal government due mostly to the New Deal (Boone 8). This came to an end, however, during the Warren Court. The Warren Court—or the period between 1953 and 1969 when Chief Justice Earl Warren presided over the Supreme Court—superseded if it did not formally overturn *Barron v. Baltimore* (1833), *United States v. Cruikshank* (1876), and *Palko v. Connecticut* (1952) by consistently ruling that states must preserve the rights enumerated in the Amendments One through Eight by virtue of the Fourteenth Amendment's Due Process Clause (Kutchel 12).

Alexander Hamilton asserted that the chief function of Justices is to "guard the constitution and the rights of individuals," as well as preventing "serious oppressions of the minor party in the community" (Hamilton 361–362). Chief

Justice Warren understood that, asserting, "[L]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests," (*Reynolds* 562). Warren is accordingly remembered as a champion for minority rights in the Supreme Court. Though he was more liberal than his supporters anticipated,[5] under his leadership the Warren Court forged new ground inside an institution that had been dedicated to an outdated interpretation of the Fourteenth Amendment for the last century. It successfully incorporated most of the Bill of Rights onto the states on a case-by-case basis. These included several landmark cases such as *Brown v. Board of Education* (1954), *Miranda v. Arizona* (1966), *Gideon v. Wainwright* (1963), *Robinson v. California* (1962), and *Griswold v. Connecticut* (1965).

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These were landmark cases not only for their significance in American society, but because they created the first concrete definition of Due Process used by the Court. Rather than relying on vague and subjective criteria as before, the Warren Court defined Due Process as the rights enumerated in the Bill of Rights. This, combined with the Warren Court's generous manner of incorporating the Bill of Rights onto the states, set a legal precedent that carried until *McDonald v. The City of Chicago* (2010). In this case, the Court, under Chief Justice John Roberts, held that the Second Amendment right of an individual to "keep and bear arms" is incorporated by the Due Process Clause of the Fourteenth Amendment and applies to the states, clearing up previous confusion[6] ("The Bill"; *McDonald* 3025).

The Court incorporated most of Amendments One through Eight in a series of decisions such as *Brown v. Board of Education* (1954), holding that segregation denies equal protection under the law, which incorporated the Fourteenth Amendment's Equal Protection Clause onto the states (*Brown* 495). In *Miranda v. Arizona* (1966), the Court ruled that "the Fifth Amendment privilege…serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves," (*Miranda* 467). Not only did this ruling incorporate the Fifth Amendment onto the states through the Due Process Clause, but it demanded the creation of what are now known as "Miranda rights." The Warren Court's stance in *Gideon v. Wainwright* (1963) was that "[the] government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts

are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." This incorporated the right to a lawyer found in the Sixth Amendment onto the states by virtue of the Due Process Clause (*Gideon* 344.) In *Robinson v. California* (1962), the Court struck down a California law that criminalized addiction to narcotics, rather than one "which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration," (*Robinson* 666). In more colloquial language, the law forbade the state of being addicted to narcotics, rather than a form of behavior such as possession. *Robinson v. California* (1962) was the first time the Supreme Court ruled that the Eighth Amendment prohibits criminalization of specific acts or conduct, rather than prohibiting the use of a specific punishment for a crime.

The Warren Court recognized the Fourteenth Amendment's mandate that the states must protect citizens' right to "due process of law," ("The Bill"). The Warren Court also recognized that "the faculties of the Due Process Clause may be indefinite and vague," so the Court used the rights enumerated in the Bill of Rights to establish a definitive and concrete definition of due process (*Rochin* 172). Consequently, if a state violated a citizen's First through Eighth Amendment rights, the state violated that citizen's Fourteenth Amendment right to due process. Therefore, specific federal rights—those in Amendments One through Eight—must be protected by the state government as well as the federal government.

However, the Warren Court strayed from this concrete precedent in *Griswold v. Connecticut* (1965). The case involved a Connecticut "Comstock Law"—§§ 53-32 and 54-196 of the General Statutes of Connecticut (1958 rev.)—prohibiting the use of any "drug, medicinal article or instrument for the purpose of preventing conception" (*Griswold* 480). Appellants Griswold and Buxton provided couples with information and prescriptions for contraceptives in spite of the law (*Griswold* 480). Though the Court conceded that "[t]he association of people is not mentioned in the Constitution nor in the Bill of Rights," it echoed its ruling in *NAACP v. Alabama* (1964) that "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." This was determined on the grounds that "specific guarantees in the Bill of Rights have penumbras" (*Griswold* 484; *National* 307). In simpler language, the Court ruled that, though neither the Constitution nor the Bill of Rights mention a right to

privacy in the marital bed or a right to personal privacy, because the nature of the Bill of Rights was to protect personal liberties and privacies, the right to contraceptives was protected by the penumbra of the Bill of Rights, specifically the First and Ninth Amendments (*Griswold* 484).

This undermined concrete principles under which the Warren Court made groundbreaking strides toward the protection of civil liberties. Instead of relying on the Bill of Rights to provide a concrete definition of rights protected by the Fourteenth Amendment, the Court returned to the subjectivity of the previous definitions of due process (*Rochin* 172). It elected to extend the specifically enumerated rights—such as the right to a lawyer, incorporated in *Miranda v. Arizona* (1966)—into potentially implied rights—in this case, privacy in the marital bed.

The problem is not that the Constitution does not mention privacy in the marital bed, but that the Constitution does not mention a right to personal privacy at all. It could be argued that the right to privacy falls under the protections of the Ninth Amendment; however, the Court's opinion asserts that privacy in the marital bed is a right derived from express rights, and the Ninth Amendment contributes little to the reasoning of the Court (*Griswold* 487). One critic states, "It is unfortunate that Douglas does not explicitly describe the precise manner in which he uses the ninth amendment. In listing the amendments that create this zone of privacy, Douglas articulates substantive rights for each amendment *except the ninth*," (*Rhoades* 155). Then, the question becomes a matter of principle: If one lays claim to an implied, fundamental right that cannot be reasonably inferred from the Bill of Rights, even relying on the Ninth Amendment, how can the Court determine whether the claimed right is fundamental and whether and on what grounds it is protected from abridgment?

A right that is more specific than its justifying amendment—for example, the right to burn a flag, which was held to be protected by the First Amendment right to freedom of speech because flag burning was ruled to be "symbolic speech" in *Texas v. Johnson* (1989)—is not the same as an *implied right*. For the purposes of this discussion, an *implied right* is a right that is not encompassed by any amendment(s), but one that seems to fit within the precedents and patterns set by the Bill of Rights. Perhaps specific implied rights extrapolated from broad amendments—the right to be informed of your rights, for example, as a specific and uniform way to avoid self-incrimination or the right to educate one's children where they desire by virtue of the First Amendment—can be objectively and reasonably interpreted. The problem with *Griswold v.*

*Connecticut* (1965) is that the decision extrapolates a broad right from specific rights.

In the judgement, Justice Douglas asserts, "The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights," (*Griswold* 482). This changes the matter from a question of law to a question of precedent. In short form, must the Court adhere to the precedent it has set, even if that precedent is potentially flawed?

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In his reasoning, Justice Douglas references cases such as *Pierce v. Society of Sisters* (1925), *Meyer v. Nebraska* (1923), *Sweezy v. New Hampshire* (1957), *Barenblatt v. United States* (1959), and *Baggett v. Bullitt* (1964). The issue herein is the nature of these cases, which extrapolate specific rights from the First and Ninth Amendments. The precedent set by these cases is that the First Amendment right to freedom of speech, press, and assembly also includes the right to acquire the means necessary to fully exercise these rights. The discrepancy here is that while it may be argued that there is a moral right for parents to control how their child is raised under the Ninth Amendment, there are, in the case of *Pierce v. Society of Sisters* (1925), specific First Amendment grounds for protecting the parents' right to decide how their children are educated, because for the press to be free and for speech to be free, information must also be free. Though the majority opinion of *Griswold v. Connecticut* (1965) asserts that, "the First Amendment has a penumbra where privacy is protected from governmental intrusion," the problem with such reasoning, when it is put in the context of the judgment, is that the Warren Court itself created this penumbra.[7]

This calls into question the validity of *Griswold v. Connecticut* (1965). "A legitimate Court must be controlled by principles exterior to the will of Justices," and we have already raised the question of flawed precedent (Bork 7). The Court asserts that the principle of the case "concerns a relationship lying within the zone of privacy," (*Griswold* 485). Assuredly, the Court will not apply this principle neutrally—that is, "exterior to the will of Justices,"—because we can confidently assert that the Court will not provide constitutional protection for the use of illegal substances[8] or sexual activity with a consenting minor.[9]

If, however, we narrow the principle to a married couple's zone of privacy, we still face the question of neutrality. Does the principle apply to married couples with separate living arrangements? Does it apply to sexual partners living together? If not, why not? If we narrow the principle even further to the use of contraceptives between a married couple, then the question arises why, of all forms of behavior, are contraceptives singled out?

As one source states:

> If a neutral judge must demonstrate why principle X applies to cases A and B but not to case C… he must, by the same token, also explain why the principle is defined as X rather than X minus, which would cover A but not cases B and C, or as X plus, which would cover all cases A, B and C. Similarly, he must explain why X is a proper principle of limitation on majority power at all…If he may not choose lawlessly between cases in applying principle X, he may certainly not choose lawlessly in defining X or in choosing X, for principles are after all only organizations of cases into groups. (Bork 7-8)

It is not the ruling of *Griswold v. Connecticut* (1965) that has the potential to shift jurisprudence away from the Federalist roots of American government, but rather the reasoning behind the majority opinion and Justice Goldberg's concurring opinion. Scholars pose that privacy in the marital bed is the first substantive right recognized under the Ninth Amendment (Rhoades 155). This amendment was written by James Madison, in response to his own and other Federalists' fears that, if they named specific rights—the right to freedom of speech, to keep and bear arms, etc.—and forgot to name something important—like, perhaps, a right to privacy in the marital bed—that that right would become insecure in the hands of the government ("I Annals" 439). On what grounds, Federalists asked, can we expect the government to protect unlisted rights if we make a point to list several? The ratification of the Ninth Amendment, which reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," quelled these fears ("The Bill"). What rights the people may maintain and the grounds on which they maintain them, however, remain a mystery.

The verbiage and usage of this amendment create an opportunity for a heavy-handed handing out of rights by the Court. Though in his concurring opinion to *Griswold v. Connecticut* (1965), Justice Goldberg argues, "I do not see how this [interpretation of the Ninth Amendment] broadens the authority of the Court; rather it serves to support what this Court has been doing in protecting fundamental rights," he fails to mention what these fundamental rights are and on what grounds they are protected (*Griswold* 493.) While it would be easy to strike down an absurd claim—such as the freedom to only

recognize laws that fit one's personal agenda as being a fundamental right—the need for a concrete means of determining rights becomes evident when claims become more realistic and therefore nuanced.

In *Griswold v. Connecticut* (1965), Justices Black's and Stewart's dissents "look to the longstanding principles of Federalism," that is, the Bill of Rights, as a concrete means to determine and infer fundamental rights (Rhoades 158). Justice Stewart asserts, "The Ninth Amendment [was] adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States," (*Griswold* 529-530). Such reasoning is perhaps more concrete than that of the majority opinion, but does not negate the problems that strict Federalism, at its core, poses to twenty-first century America. Perhaps, when there were only thirteen newly united states, these isolated mini-republics could function well together as "social laboratories," where each state was left to decide matters such as pornography, segregation, and contraception on its own (*Roth* 505). It is, however, unlikely if not impossible that such a system is viable in twenty-first century America. As Justice Antonin Scalia writes, "[Federalism] is a form of government midway between two extremes," (Scalia 19). Achieving this balance, however, is more easily said than done.

The question, specifically, is which regression—the majority opinion, which returns to a subjective definition of due process, or the dissenting opinions, which return to an outdated application of Federalism—is more harmful to civil liberties? Cases such as *Palko v. Connecticut* (1837) and *Griswold v. California* (1965) demonstrate dangerously subjective definitions of due process, which, if re-adopted in full, supersede the nuance of many of the Warren Court's decisions. Decisions such as *Barron v. Baltimore* (1833) and *United States v. Cruikshank* (1867), however, demonstrate the dangers of adhering strongly to Federalist interpretations of the Bill of Rights in post-Reconstruction Era America.

The only conclusions that can be drawn, therefore, must be as nuanced as those of the Warren Court. Neither the extreme conservatism of Federalism nor extreme liberalism are conducive to a just and free nation. Though many argue that the Warren Court's incorporation doctrine decreased the power of the states, I argue that, prior to *Griswold v. Connecticut* (1965), it actually strengthened the rights of the states, the hallmark of Federalism, by protecting more of the rights of the citizens that made up those states. Selective incorporation adapted the states' rights-centric ideals of Federalism to the realities

of post-Reconstruction Era America. Selective incorporation was a necessary process, not only by virtue of the Fourteenth Amendment, but because it produced a more unified and subsequently more just nation, as evidenced by rulings such as *Rochin v. California* (1952) and *Brown v. The Board of Education* (1954). Incorporation of the penumbra, however, in its current unspecific and subjective state, could undermine the scheme of ordered liberty the Warren Court so thoroughly created by providing the Bill of Rights as a concrete means to define due process. Still, *Griswold v. Connecticut* (1965), though arguably bad law, is a small stain on an otherwise revolutionary legacy. By and large, the Warren Court represented the balance Justice Antonin Scalia said Federalism was meant to be (Scalia 19). By distributing to citizens the rights to which they were already entitled via the Fourteenth Amendment to the Constitution, the Warren Court not only made leaps and bounds for the state of Federalism in twenty-first century America, but for civil liberties and human rights.

## Endnotes

[1] See *Dred Scott vs. Sandford* (1957), *United States v. Cruikshank* (1867), *The Slaughterhouse Cases* (1873), *Palko v. Connecticut* (1937), and *Rochin v. California* (1952).

[2] Refers to the Supreme Court under Chief Justice Earl Warren (1953-1969.)

[3] *Palko v. Connecticut*. 302 U.S. 319 (1937)

[4] *Rochin v. California*. 342 U.S. 165 (1952)

[5] Eisenhower remarked several times that making Warren the Chief Justice was a mistake. These remarks were most likely in regards to Warren's rulings on criminal cases, not *Brown v. Board of Education* (1954). See David. A. Nichols, *Matter of Justice: Eisenhower and the Beginning of the Civil Rights Revolution* (2007) pp 91-93.

[6] *District of Columbia v. Heller* held that the Second Amendment protects an individual's right to possess a firearm for "traditionally lawful purposes," such as self-defense within the home. It did not address, however, whether these rights extend beyond Federal enclaves to the states. *McDonald v. Chicago* (2010) clarified this.

[7] See *Barenblatt v. United States*, 360 U. S. (1959), *Baggett v. Bullitt*, 377 U. S. (1964), and *NAACP v. Alabama*, 357 U. S. (1964).

[8] Though the Court struck down legislation in *Robinson v. California* criminalizing addiction to narcotics, it did so on the grounds that the law extended beyond regulation or possession of narcotics and stated, "All that the People must show is either that the defendant did use a narcotic in Los

Angeles County, or that while in the City of Los Angeles he was addicted to the use of narcotics."

[9] Some jurisdictions have passed "Romeo and Juliet Laws," which, while maintaining sex when one partner is under the age of consent as criminal, mitigate the severity of the charges depending on consent, the age difference, and other relevant factors. See the Texas Penal Code, Section 22.011(e).

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