BYU Law Review

Volume 48 | Issue 1 Article 5

Winter 11-29-2022

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Recommended Citation

Jay S. Bybee, *The Congruent Constitution (Part One): Incorporation*, 48 BYU L. Rev. 1 (2022).
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The Congruent Constitution (Part One): Incorporation

Jay S. Bybee[*]

In Barron v. Mayor of Baltimore (1833)*, the Supreme Court held that the Bill of Rights applied to the federal government alone. Following the adoption of the Fourteenth Amendment in 1868, the Supreme Court reconsidered the rule of* Barron*. The Court first reaffirmed the rule of* Barron *and held that neither the Privileges or Immunities Clause nor the Due Process Clause made the Bill of Rights applicable to the states. It then entered a period of "absorption," where the Court held that the Due Process Clause guaranteed some minimal rights found in the Bill of Rights, but not necessarily the same rights. Ultimately, the Court announced a congruence principle: incorporated rights would be identical to textual rights, jot-for-jot. The congruence principle came with a limitation, however: only select provisions of the Bill of Rights would apply to the states. Nevertheless, selective incorporation is ongoing, as the Court has declared three provisions of the Bill of Rights incorporated in the last decade, and there are other provisions in the Bill of Rights and elsewhere in the Constitution that the Court may yet declared incorporated.*

Incorporation may be the most consequential development in the Constitution's history. But the Court's record on incorporation is not a flattering one. This Article reviews the troubled history of incorporation and considers the arguments for incorporating the remainder of the Bill of Rights and provisions of

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the Constitution beyond the Bill of Rights. The Article concludes with three points. First, the Court's current theory based on the Due Process Clause is textually incoherent. Selective incorporation is descriptive of what the Court has done, but it is not a theory of interpretation. There are better theories available, but so far, the Court has resisted any additional changes in its approach. Second, in adopting the congruence principle, the Court has over-enforced some constitutional provisions and under-enforced others. The Court's congruence principle skews the choice of the substantive rule because it forces the Court to find a single rule applicable to all levels of government. Indeed, the Court's congruence principle may have deterred it from completing the incorporation of the Bill of Rights. Third, the Article concludes that the congruence principle may be convenient for the Court, but congruence cannot justify the Court's choices. Incorporation has vastly expanded the Court's authority to regulate the states, without the sanction of legislation or amendment under Article V. Incorporation has also constrained Congress's power under Section 5 of the Fourteenth Amendment. Through incorporation the Court has altered both our federalism and our separation of powers.

This is the first part of a two-part study of the Court's congruence principle. The second part will appear in the next issue of the Brigham Young University Law Review as Jay S. Bybee, The Congruent Constitution (Part Two): Reverse Incorporation, 48 BYU L. REV. 2 (2022).

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INTRODUCTION

Each year when I interview prospective law clerks, I ask this question: "If you could only retain either the even or the odd amendments, which would you keep?" The answers have varied widely. Some candidates zero in on a single amendment: "The Second Amendment, because, well, guns." (Not hired.) Or: "The Twelfth Amendment, because, with the advent of political parties, it cured a structural defect in the relationship between the president and vice-president." (Hired.) Put to the Hobson's choice, most candidates work through a bevy of considerations: "Do I retain the odd amendments because of the First, Thirteenth, Fifteenth, and Nineteenth Amendments, to facilitate speech and voting? Or do I keep the even, so we have the Fourth and the Fourteenth to guarantee the sanctity of the home, equal protection, and due process?"[1] Over the years there has been no consensus. Curiously, the question forces the candidates to choose between identical clauses—the Due Process Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. One of those clauses has proven far more consequential than the other in our

1. Each path has consequences most candidates do not anticipate. If we do away with the odd, we get senators selected by state legislatures and the return of prohibition. If we keep the odd, we eliminate federal income tax and allow presidents to serve an unlimited number of terms.

constitutional history: the Due Process Clause of the Fourteenth Amendment. The reason is simple: through the Due Process Clause of the Fourteenth Amendment, the Supreme Court has declared most of the Bill of Rights applicable to the states.

The path to incorporation has been anything but straight. In *Barron v. Mayor of Baltimore*, the Court held that the Bill of Rights applied to the federal government alone.[2] Following the adoption of the Fourteenth Amendment, the Supreme Court reaffirmed the rule of *Barron*, denying that the Fourteenth Amendment had made the Bill of Rights applicable to the states. But as we moved into the twentieth century, the Court took a more capacious reading of the Due Process Clause, one that recognized substantive due process rights, many of which were found in the Bill of Rights. Although the Court continued to deny that the Bill of Rights itself applied to the states, it said that many of those rights were "absorbed" in the Due Process Clause. But the Court made clear that absorbed rights were "less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights."[3] Finally, mid-century, the Court simply declared that the Bill of Rights itself bound the states the same as it did the federal government because "[i]t would be incongruous to have different standards determine the validity of a claim."[4] The Court called its new theory "selective incorporation" because not all provisions of the Bill of Rights were applicable to the states. We may yet see the end of *selective* incorporation. In the past decade the Court has declared the Second Amendment and clauses in the Sixth and Eighth Amendments incorporated as well.[5] And the Court has left open the possibility that other provisions of the Bill of Rights will be incorporated in the future if they are regarded as "fundamental" or "'deeply rooted in this Nation's history and tradition.'"[6]

The scholarship on incorporation, critical and supportive, is substantial.[7] This Article will not cover in detail the drafting history

2. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

3. Betts v. Brady, 316 U.S. 455, 462 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

4. Malloy v. Hogan, 378 U.S. 1, 11 (1964).

5. Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (Sixth Amendment guarantee of a unanimous jury); Timbs v. Indiana, 139 S. Ct. 682 (2019) (Eighth Amendment's Excessive Fines Clause); McDonald v. City of Chicago, 561 U.S. 742 (2010) (Second Amendment).

6. *McDonald*, 561 U.S. at 767 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

7. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989);

of the Fourteenth Amendment or the arguments for incorporation through the Privileges or Immunities Clause. The focus for this Article is the Court's congruence principle—the assumption that incorporation means that the Bill of Rights embodies a single set of rules applicable to the states and the federal government. This Article takes a broader approach to incorporation than the prior literature. The Article challenges two assumptions we have long held about incorporation: first, that incorporation is exclusively about the Bill of Rights and, second, that the congruence principle is—as a matter of constitutional text, structure, and policy—inevitable. Once we reassess those assumptions, we should be skeptical of what the Court has done. The Constitution gave us two sets of rules, some of which applied to the federal government alone, some of which applied to the states alone, and some of which applied to both the federal government and the states. Through

MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION 1049–82 (1953); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 290–95 (2014); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 117–19 (1988); Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 HARV. J.L. & PUB. POL'Y 443 (1996); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981); Robert Fairchild Cushman, *Incorporation: Due Process and the Bill of Rights*, 51 CORNELL L.Q. 467, 479 (1966); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); John Raeburn Green, *The Bill of Rights, the Fourteenth Amendment and the Supreme Court*, 46 MICH. L. REV. 869 (1948); Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963); Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253 (1982); Gerard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?*, 94 MINN. L. REV. 102 (2009); Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949); Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643 (2000); James Y. Stern, *First Amendment Lochnerism & the Origins of the Incorporation Doctrine*, 2020 UNIV. ILL. L. REV. 1501; Symposium, *The Fourteenth Amendment and the Bill of Rights*, 18 J. CONTEMP. LEGAL ISSUES 1 (2009); Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509 (2007); Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051 (2000) [hereinafter Wildenthal, *The Lost Compromise*]; Bryan H. Wildenthal, *The Road to* Twining*: Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457 (2000) [hereinafter Wildenthal, *The Road to* Twining]. The debate, with citations to additional sources, is reviewed in Wildenthal, *The Lost Compromise, supra* at 1067–78.

We could multiply these citations by including the scholarship devoted to the subject of incorporation of particular provisions of the Bill of Rights, especially the Religion Clauses of the First Amendment. *See*, *e.g.*, *infra* note 48.

incorporation and the congruence principle, the Court has leveled the differences the Framers embedded in the Constitution, altering both our federalism and our separation of powers.

The Article proceeds as follows. In Part II, this Article offers a brief history of the evolution of the Court's explanations for incorporation. Part III tests the Court's explanation for its current position on selective incorporation. It begins with a discussion of the remaining provisions of the Bill of Rights that have not been incorporated and assesses the challenges to their incorporation. It continues with provisions beyond the Bill of Rights that have effectively been incorporated or that may be incorporated in the future.

In Part IV, this Article answers a series of questions about the implications of the congruent Constitution.[8] First, the Article asks questions about text and mechanics: In a Constitution in which language matters, is the incorporation doctrine textually coherent? The Article argues that the Court's current theory is not a sound one. There are better theories, but they come with their own interpretive challenges. Second, the Article asks questions about structure and federalism. As the Court declared multiple provisions of the Constitution congruent with respect to protections secured under the Due Process Clauses of the Fifth and Fourteenth Amendments, Justice Robert Jackson warned that the process "would lead to the dilemma of either confining the States as closely as the Congress or giving the Federal Government the latitude appropriate to state governments."[9] Incorporation did not simply apply an existing, fixed understanding of the Bill of Rights to the states. In most cases, those rights were developed in the context of state cases, and the Court adapted the rules governing those rights accordingly. This Article suggests that incorporation

8. A word (or two) about terms: "Congruence" in this article takes two forms. First, rights are congruent when the Court applies the same rule to the states and the federal government, irrespective of its textual source. The Article will refer to this as "substantive congruence." By "textual congruence," this Article means that the textual sources of a right are identical for both the states and the federal government. A rule that derives from a single provision in the Constitution—the Thirteenth Amendment's prohibition on slavery, for example—is substantively congruent. It is not textually congruent, however, because we are not comparing two different rules. We are applying the same rule.

9. Beauharnais v. Illinois, 343 U.S. 250, 294 (1952) (Jackson, J., dissenting). *See Malloy*, 378 U.S. at 16–17 (Harlan, J., dissenting) ("[C]ompelled uniformity . . . 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.").

has skewed the development of those rules in such a way that we are over-enforcing some rules and under-enforcing others. Third, the Article asks some policy questions. Setting constitutional text and structure aside, what impels the Court to congruence? Congruence is convenient for the Court, but is there more than convenience at stake? At every juncture the Court has changed directions, it has done so in a way that has enlarged its own power at the expense of the states and Congress.

The march of the Court has been, inexorably, to a unified set of rules. The result might be a congruent Constitution, one easily understood and administered from afar, but it is not a textually or structurally coherent Constitution. That fact should prompt us to reflect, if the text is so malleable, why have a written constitution at all? This Article is the first of a two-part study of the Court's drive to create a congruent Constitution—a set of unified rules to govern both the federal government and the states. The second part will appear in the next issue of the *Brigham Young University Law Review* as *The Congruent Constitution (Part Two): Reverse Incorporation*. When we consider the breadth of incorporation together with reverse incorporation, the Constitution that emerges is one that is very different from that adopted in 1789 and amended in 1868.

I. A BRIEF HISTORY OF INCORPORATION

This part begins with a brief reprisal of the history of the incorporation of the Bill of Rights, with special emphasis on how the Court got to the congruence principle and the concerns raised by various members of the Court.

A. The Creation of the Bill of Rights

It was August 1789, and Congress was prepared to send twelve amendments to the states in fulfillment of a promise to create a bill of rights. Under James Madison's proposal, what we know as the First, Second, Third, Fourth, Sixth and Ninth Amendments, and part of the Fifth, would be inserted in Article I, Section 9. The remainder of the Fifth Amendment, plus the Seventh Amendment, would be folded into Article III. The Tenth Amendment would

become Article VII.[10] Shortly before the vote, Roger Sherman of Connecticut objected to amending the Constitution in this way because it treated the Constitution as ordinary legislation, to be amended at will. Madison answered that there was "a neatness and propriety in incorporating the amendments into the Constitution itself; in the case the system will remain uniform and entire."[11] He warned that if the amendments were "supplementary," it would be "difficult to ascertain to what parts of the instrument the amendments particularly refer."[12] With those excellent, prescient points made, the debate devolved into "ill-humour & rudeness,"[13] and Madison, fearful of losing a bill of rights altogether, made the "unavoidable sacrifice."[14]

We might not be here if we had followed Madison's proposed course of conduct. Like the clauses in Article I, Section 9, most of the new amendments were phrased in passive voice,[15] and they would have fit seamlessly there. Locating most of the clauses of the Fifth Amendment in Article III would have left no room for doubt that the amendment bound the judiciary. Placing the Ninth Amendment at the end of Article I, Section 9 and making the Tenth Amendment a separate article would have emphasized that they were rules of construction, the Ninth constraining enumerated federal powers in order to protect other, unenumerated rights, and the Tenth reserving nondelegated powers to the states.

But Sherman prevailed, and the new amendments were added at the end of the Constitution, raising legitimate questions as to whether they also applied to the states, and justifying Madison's concerns.[16]

10. 1 ANNALS OF CONG. 451–53 (June 8, 1789) (Joseph Gales & William Seaton eds., 1834). The story is aptly told in Edward Hartnett, *A "Uniform and Entire" Constitution; or, What if Madison had Won?*, 15 CONST. COMMENT. 251–53, 289 (1998).
Two amendments—the first and second on the list—were not ratified, although one was subsequently ratified as the Twenty-Seventh Amendment. For convenience this Article will refer to the proposed amendments by their number as ratified, not proposed.

11. 1 ANNALS OF CONG., *supra* note 10, at 735–36 (June 8, 1789).

12. *Id.* at 735.

13. Hartnett, *supra* note 10, at 257 (quoting Letter from William L. Smith to Edward Rutledge, Aug. 15, 1789, *reprinted in* HELEN E. VEIT, KENNETH R. BOWLING, & CHARLENE BANGS BICKFORD, EDS., CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 278 (1991) [hereinafter DOCUMENTARY RECORD]).

14. *Id.* at 258 (quoting Letter from James Madison to Alexander White, Aug. 24, 1789, *reprinted in* DOCUMENTARY RECORD, *supra* note 13, at 287).

15. *See* Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1053 (2011) (considering the use of passive voice in the Constitution).

16. *See*, *e.g.*, WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 120–21, 127–28 (2d ed. 1829) (arguing that most of the Bill of Rights, except the Sixth

The matter was finally resolved in *Barron v. Mayor of Baltimore*.[17] Chief Justice Marshall's opinion appealed to history—the amendments were a promise made as a condition to the adoption of the Constitution—and held that the Bill of Rights applied to the federal government alone. The states, he reminded us, had their own constitutions and "[h]ad Congress engaged in the extraordinary occupation of improving the constitutions of the several states . . . they would have declared this purpose in plain and intelligible language."[18] *Barron* was broadly accepted, and the Court resisted efforts to enforce the Bill of Rights against the states.[19]

B. The Fourteenth Amendment and Incorporation

Barron ended the debate over whether the Bill of Rights applied to the states but not the debate over whether it *should* apply. During the 1866 debates over the Fourteenth Amendment, various members of Congress suggested that those amendments were among the "privileges or immunities" of citizenship in the United States and would become applicable through the Privileges or Immunities Clause.[20] When the Court's disastrous decision in the *Slaughter-House Cases*[21] limited the scope of the Privileges or Immunities

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and Seventh Amendments, applied to the states). *See also* Henkin, *supra* note 7, at 77 ("[M]ost of the Bill of Rights is addressed at large, not expressly to the federal government alone."). The main defender of the view that the Bill of Rights bound the states was Professor Crosskey. *See* 2 CROSSKEY, *supra* note 7, at 1066–76.

17. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

18. *Id.* at 249–50. *Barron* involved a claim under the Takings Clause of the Fifth Amendment.

19. *See, e.g.*, Withers v. Buckley, 61 U.S. (20 How.) 84, 90 (1858) (Fifth Amendment); Lessee of Livingston v. Moore, 32 U.S. (7 Pet.) 469, 551–52 (1833) (Ninth Amendment). *See also* Permoli v. First Municipality, 44 (3 How.) 589, 609–10 (1845) (rejecting a First Amendment claim against the City of New Orleans for failure to state a claim under the U.S. Constitution).

20. The two most prominent advocates were Representative John Bingham, sometimes referred to as "the Father of the Fourteenth Amendment," and Senator Jacob Howard, the chairman of the Senate Judiciary Committee. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard). Representative Bingham's most articulate defense of incorporation of the Bill of Rights was offered during the civil rights enforcement debates in 1871. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871) (statement of Rep. Bingham). Nevertheless, during the debates over the Fourteenth Amendment, other members of Congress made statements supporting the position that the amendment would make the Bill of Rights applicable to the states. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1072, 1075 (statement of Sen. Nye); *id.* at 1629 (statement of Rep. Hart).

21. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). The Court held that the Privileges or Immunities Clause prevented the states from abridging the rights of citizenship in the United States, suggesting that the states could not interfere with the exercise of those rights *against the federal government*. *See id.* at 78–80. The Court did not refer to the Bill of

Clause, the Court held fast to the rule from *Barron*.[22] Eventually, the Court began the slow march to incorporation, not through the Privileges or Immunities Clause, but through the Due Process Clause. The move occurred in two steps. First, the Court began recognizing substantive due process rights that had analogous provisions in the Bill of Rights. Drawing lessons from the same history that moved the Framers to enumerate such rights in the Constitution, the Court recognized that similar, but not necessarily identical, rights applied to the states. The second step involved formal incorporation of the text of the various clauses in the Bill of Rights. In other words, the Court moved from asking what *rights*, *privileges*, or *immunities* inhered in "a concept of ordered liberty,"[23] to asking whether the *amendment* itself was "fundamental to *our* scheme of ordered liberty and system of justice."[24]

The prelude to incorporation came in *Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago*.[25] In retrospect, it was an odd

Rights as such rights of citizenship, although it did mention the right to peaceably assemble and the right to petition for a redress of grievances. *Id.* at 79. In dissent, Justice Bradley argued that the privileges and immunities included rights found in the Bill of Rights. *Id.* at 118–19 (Bradley, J., dissenting).

For views that challenge the traditional reading of *Slaughter-House*, *see* Newsom, *supra* note 7, at 650 (there is nothing in *Slaughter-House* "that *negates* a role for the Privileges or Immunities Clause in the incorporation of Bill of Rights freedoms against the states, and that, in fact, a more plausible reading of [Justice] Miller's opinion specifically *preserves* such a role for the Clause."); Wildenthal, *The Lost Compromise*, *supra* note 7, at 1055 ("[P]ropos[ing] a fundamental reassessment of [*Slaughter-House*'s] misunderstood history, with potentially far-reaching implications for the Court's future constitutional case law.").

22. *See, e.g.*, Ohio *ex rel.* Lloyd v. Dollison, 194 U.S. 445, 447 (1904) (citing Eilenbecker v. Dist. Ct. of Plymouth Cnty., 134 U.S. 31, 34 (1890) ("It is well established that the first eight articles of the amendments to the Constitution . . . have reference to powers exercised by the government of the United States, and not to those of the States."); Maxwell v. Dow, 176 U.S. 581, 584–85 (1900); Spies v. Illinois, 123 U.S. 131, 166 (1887) ("[T]he first ten Articles of Amendment were not intended to limit the powers of the state governments in respect to their own people, but to operate on the National Government . . . . [T]hat decision has been steadily adhered to since [*Barron*]."); Justices v. Murray, 76 U.S. (9 Wall.) 274, 278 (1869) (citing Barron v. Mayor of Baltimore 32 U.S. (7 Pet.) 243 (1833)) (accepting that the first ten amendments do not apply to the states); Twitchell v. Pennsylvania, 74 (7 Wall.) 321, 325–26 (1868) (citing *Barron*, 32 U.S. (7 Pet.) 243) (rejecting the claim that the Fifth and Sixth Amendments applied to the states).

23. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

24. McDonald v. City of Chicago, 561 U.S. 742, 764 (2010).

25. Chicago, Burlington, & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897). *See* Wildenthal, *The Road to* Twining, *supra* note 7, at 1501–04. The case is broadly assumed to be the first instance in which the Court enforced a right found in the Bill of Rights against the states. But a strong argument can be made that the first case was earlier in the term, where the Court stated that "the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority

place to start. The city of Chicago planned to extend a street that required condemning part of the railroad's right of way. The city filed a condemnation petition in which it asked that the jury ascertain the just compensation; the jury fixed the compensation at one dollar. When the railroad sought review in the U.S. Supreme Court, the Court had to decide if the case involved any federal interest. The Illinois Constitution contained both a due process clause and a takings clause, and its municipal law provided procedures for seeking a jury award of just compensation, all of which the city had scrupulously observed.[26] Acknowledging that the Court could neither review the Illinois's court's determination of Illinois law nor overturn the jury's finding,[27] the Court held that the Due Process Clause of the Fourteenth Amendment provided an independent check on the state's actions. The clause, the Court said, "gr[e]w out of the essential nature of all free governments" and a just compensation provision was "a principle of natural equity, recognized by all temperate and civilized governments[.]"[28] That, of course, was presumably what Illinois had in mind when it codified its own takings clause. The Court concluded that although it would not review the decision as a matter of Illinois law, the Court could review the judgment for anything inconsistent with the Fourteenth Amendment.[29] So what standard was it to use? Nowhere did the Court make explicit reference to the Takings Clause of the Fifth Amendment, but the Court's reference to "[t]he requirement that the property shall not be taken for public use without just compensation" was unmistakable.[30] Were there standards universal

of the State instead of the Federal government." Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158 (1896).

26. *Chicago, Burlington*, 166 U.S. at 228–29. The Illinois Constitution of 1870 provided:

> Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without the consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken.

ILL. CONST. art. II, § 13 (1870).

27. *Chicago, Burlington*, 166 U.S. at 242–46. *See* U.S. CONST. amend. VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

28. *Chicago, Burlington*, 166 U.S. at 237–38. *See also id.* at 259 (Brewer, J., dissenting) ("I approve that which is said in the first part of the opinion as to the potency of the Fourteenth Amendment to restrain action by a State through either its legislative, executive or judicial departments, which deprives a party of his property without due compensation[.]").

29. *Id.* at 246.

30. *Id.* at 236.

to questions of just compensation so that they could be used in a federal case? The Court did not say and, relying largely on Illinois cases, affirmed the judgment.

Chicago, Burlington was authored by the first Justice Harlan, who had articulated a strong position on the incorporation of the Bill of Rights through both the Privileges or Immunities Clause and the Due Process Clause.[31] Harlan's opinion for the Court clearly sounded in vested rights—which he called "natural equity" and we might call vested rights or substantive due process[32]—and it expanded the Court's appellate jurisdiction immeasurably. Henceforth, once the Court decided that "natural equity" was implicated in a case, nothing was beyond the Court's review because it could be appealed as a "federal question" in violation of the Fourteenth Amendment.[33] What appeared to be mere error correction had been elevated to constitutional status.

Over time the Court surmised that other rights, "the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law."[34] *Chicago, Burlington* was followed by substantive due process cases requiring states to observe principles of free exercise, freedom of speech and of the press, the right of petition, and the sanctity of persons, houses, papers, and effects with respect to searches and seizures.[35]

31. *See* Twining v. New Jersey, 211 U.S. 78, 117–18 (1908) (Harlan, J., dissenting); Patterson v. Colorado, 205 U.S. 454, 464–65 (1907) (Harlan, J., dissenting); Maxwell v. Dow, 176 U.S. 581, 608, 612–13 (1900) (Harlan, J., dissenting).

32. *Chicago, Burlington*, 166 U.S. at 236. That same term the Court decided Allgeyer v. Louisiana, 165 U.S. 578 (1897), inaugurating economic substantive due process. *See* Wildenthal, *The Road to* Twining, *supra* note 7, at 1503.

Justice Harlan tried to build on his opinion in *Chicago, Burlington* but was unsuccessful. In *Maxwell v. Dow*, he cited *Chicago, Burlington* as evidence that, like the Takings Clause of the Fifth Amendment (which he had not cited in *Chicago, Burlington*), the Fifth Amendment right to indictment by grand jury and a Sixth Amendment right to a jury of twelve also applied to the states through the Fourteenth Amendment; otherwise "it would seem that the protection of private property is of more consequence than the protection of the life and liberty of the citizen." *Maxwell*, 176 U.S. at 614 (Harlan, J., dissenting).

33. *See* Malloy v. Hogan, 378 U.S. 1, 15 n.1 (1964) (Harlan, J., dissenting).

34. Twining v. New Jersey, 211 U.S. 78, 99 (1908), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964).

35. *See*, *e.g.*, Wolf v. Colorado, 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961) (freedom from unreasonable searches and seizures); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise of religion); De Jonge v. Oregon, 299 U.S. 353 (1937) (right 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) (freedom of speech).

Incorporation had formally begun. Congruence would follow, in two steps.

1. Absorption and the Two-Track Approach

The Court referred to the first step as "absorption."[36] Absorption, the Court explained, "does not incorporate, as such, the specific guarantees found in the [Bill of Rights]" but only that which is a "denial of fundamental fairness shocking to the universal sense of justice."[37] For the most part that meant that the Court would pursue a "two-track" theory: the due process rights imposed on the states would not be deemed identical to the restrictions on the federal government found in the Bill of Rights.[38] So, for example, the Court held that under the Due Process Clause, states must provide for appointment of counsel in capital cases, but not in other cases,[39] although the Sixth Amendment required appointment in all federal cases.[40] And the Court decided that although the states were bound to respect privacy rights in one's person, home, and property, "the ways of enforcing such a basic right raise questions of a different order[,]" and the exclusionary rule was not required by the Due Process Clause.[41] The two-track approach recognized that any incongruity in the treatment of rights held against the states and the federal government was a consequence of the Constitution's own federalist principles. "Due process" might have overlapped with other guarantees in the Bill of Rights, but the two things were not identical. Justice Holmes explained that "in view of the scope that has been given to the word

36. Palko v. Connecticut, 302 U.S. 319, 326 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

37. Betts v. Brady, 316 U.S. 455, 461–62 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963) ("Due Process . . . formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights."); *see Twining*, 211 U.S. at 99 ("[S]ome of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action . . . not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.").

38. *Palko*, 302 U.S. at 323 (rejecting appellant's argument that "[w]hatever would be a violation of the original bill of rights . . . if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.").

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

40. *Betts*, 287 U.S. at 471–73.

41. Wolf v. Colorado, 338 U.S. 25, 28 (1949). The Court stated that it would present a "different question" if Congress were, under its Section 5 power, to "attempt[] to make [the exclusionary rule] binding upon the States." *Id.* at 33.

'liberty' [in the Fourteenth Amendment,] . . . it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States."[42] The temptation to equate the rights applicable to the federal government and the states was difficult to resist, however, as Justice Jackson wrote in *West Virginia v. Barnette*: "The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard."[43]

2. Selective and Jot-for-Jot Incorporation

The final step to congruence came as the Court began hinting that substantive due process rights might turn on the "explicit language" of the Bill of Rights.[44] Justice Black powerfully advocated for outright "incorporation" of the Bill of Rights, but in a key case, *Adamson v. California*, he failed to secure a fifth vote.[45] The following

42. Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

43. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943). *See also* Murdock v. Pennsylvania, 319 U.S. 105, 128 (1943) (Reed, J., dissenting).

44. Bridges v. California, 314 U.S. 252, 263 (1941). *See also* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress[.]"); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

45. Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting). *See also* Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, J., concurring). Justice Black advanced the theory that the Framers of the Fourteenth Amendment had intended for the Amendment to incorporate the Bill of Rights, but he advocated for incorporation through "the fourteenth amendment's first section, separately, and as a whole." *Adamson*, 332 U.S. at 71. He attached a lengthy appendix to his opinion with historical materials. *Id.* at 92–123. Justice Murphy argued that "the specific guarantees of the Bill of Rights should be carried over intact" but resisted the conclusion that the Fourteenth Amendment was "entirely and necessarily limited by the Bill of Rights." *Id.* at 124 (Murphy, J., dissenting). But Justice Murphy was concerned that jot-for-jot incorporation was too limiting, because there might be "[o]ccasions . . . where a proceeding falls so far short of conforming the fundamental standards of procedure as to warrant constitutional condemnation . . . despite the absence of a specific provision in the Bill of Rights." *Id.*

Black's dissent so frustrated Justice Frankfurter that he recruited his former student, Professor Charles Fairman, to respond to it, which he did. NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 315 (2010). *See* Fairman, *supra* note 7, at 5. Black's dissent and Fairman's response triggered a broad

Term the Court commented, in an opinion by Justice Frankfurter, that "[t]he notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration. . . . The issue is closed."[46] That same Term, however, the Court took the next step towards full, textual incorporation. Justice Black, writing for the Court in *Everson v. Board of Education*, declared that "The First Amendment, as made applicable to the states by the Fourteenth, commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'"[47] Under the new approach, the Court would insist that the Due Process Clause incorporated more than general principles, but the text of the Bill of Rights itself. In the years that followed, Justice Brennan emerged as the principal defender of "selective incorporation" of the Bill of Rights. For Justice Brennan, absorbed rights were just a "watered-down, subjective version of

academic debate over the historical bona fides of incorporation. *See*, *e.g.*, William W. Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); Charles Fairman, *The Supreme Court and the Constitutional Limitations on State Governmental Authority*, 21 U. CHI. L. REV. 40 (1953). *See also* Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1 (1968). That debate has not abated. *See* Wildenthal, *The Lost Compromise*, *supra* note 7, at 1058–59, 1067–78 (recapping the modern developments in the debate).

46. Wolf v. Colorado, 338 U.S. 25, 26 (1949).

47. Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947). *Everson* was an important symbol for the new incorporation, because the First Amendment, unlike the remaining amendments, which were phrased in passive voice, began with the words "Congress shall make no law." U.S. CONST. amend. I. The Establishment Clause, in particular, had a significant history, and it was generally accepted that it was a guarantee that the United States would not establish a church *and* a promise to the states of non-interference with state-established churches. Incorporation of the Establishment Clause has thus generated its own controversy and, in particular, its own body of academic commentary. *See*, *e.g.*, STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 49–54 (1995); Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669 (2013); Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 24 OHIO N.U. L. REV. 1 (1998); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191 (1990); Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585 (2006); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U.L.Q. 371; Rupal M. Doshi, Note, *Nonincorporation of the Establishment Clause: Satisfying the Demands of Equality, Pluralism, and Originalism*, 98 GEO. L.J. 459 (2010); Russell A. Hilton, Note, *The Case for the Selective Disincorporation of the Establishment Clause: Is* Everson *a Super-Precedent?*, 56 EMORY L.J. 1701 (2007); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700 (1992).

the individual guarantees of the Bill of Rights," and the Court "in fact if not in terms[] applied the [same standards]."[48] He ultimately persuaded the Court that "[i]t would be incongruous to have different standards determine the validity of a claim."[49]

In some ways Justice Brennan's version of selective incorporation combined the best of absorption and Justice Black's full incorporation. It was the marriage of natural law and positive law. Under selective incorporation, not every provision in the Bill of Rights was incorporated—like substantive due process, the Court could pick and choose those provisions that secured "ordered liberty."[50] But, like Justice Black's full incorporation, once incorporated, it brought with it the text of the corresponding amendment and the same meaning: "protections against the states [were] exactly congruent with those against the federal government."[51]

The movement from absorption to selective incorporation was not painless. In order to square up federal and state standards, the Court had to overrule dozens of cases decided under the old substantive due process regime.[52] Justice John Marshall Harlan resisted the new incorporation and vigorously defended the two-track regime.[53] Harlan argued that "'incongruity' . . . is at the heart

48. Cohen v. Hurley, 366 U.S. 117, 155, 158 (1961) (Brennan, J., dissenting); Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 274–76 (1960) (opinion of Brennan, J.). *See also* William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 (1961).

49. Malloy v. Hogan, 378 U.S. 1, 11 (1964). *See also* Washington v. Texas, 388 U.S. 14, 18 (1967) ("[The Court has] increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law.").

50. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

51. Henkin, *supra* note 7, at 74.

52. *See*, *e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (Fifth Amendment Double Jeopardy Clause), *overruling* Palko v. Connecticut, 302 U.S. 319 (1937); Spevack v. Klein, 385 U.S. 511, 516 (1967) (plurality opinion) (Fifth Amendment Self-Incrimination Clause); *id.* at 519 (Fortas, J., concurring in the judgment), *overruling* Cohen v. Hurley, 366 U.S. 117 (1961); Malloy v. Hogan, 378 U.S. 1 (1964) (Fifth Amendment Self-Incrimination Clause), *overruling* Twining v. New Jersey, 211 U.S. 78 (1908); Pointer v. Texas, 380 U.S. 400 (1965) (Sixth Amendment Confrontation Clause), *overruling* West v. Louisiana, 194 U.S. 258 (1904); Gideon v. Wainwright, 372 U.S. 335 (1963) (Sixth Amendment Right to Counsel), *overruling* Betts v. Brady, 316 U.S. 455 (1942); Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment Exclusionary Rule), *overruling* Wolf v. Colorado, 338 U.S. 25 (1949).

The process continues. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1397, 1404 (2020), *disapproving* Apodaca v. Oregon, 406 U.S. 404 (1972) *and* Johnson v. Louisiana, 406 U.S. 356 (1972).

53. Justices Frankfurter and Jackson had previously objected as well. *See* Adamson v. California, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring); Beauharnais v. Illinois, 343 U.S. 250, 288–95 (1952) (Jackson, J., dissenting). Then-retired Justice Frankfurter aired his differences with incorporation in the *Harvard Law Review*. Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965). Chief Justice Burger and Justice Powell expressed similar

of our federal system. The powers and responsibilities of the state and federal governments are not congruent; under our Constitution, they are not intended to be."[54] In dissent in *Roth v. United States*, for example, he explained that Congress has power to punish seditious speech, but has "no substantive power over sexual morality."[55] The states, however, had "direct responsibility for the protection of the local moral fabric."[56] The difference in function between the two systems of government was also reflected in the dangers of censorship: if the federal government acts, the censorship is uniform nationwide, whereas censorship in one state leaves other states "free to experiment with the same or bolder books."[57] A congruent rule brooked another, more subtle danger, one identified by Justice Jackson: "Adoption of the incorporation theory today would lead to the dilemma of either confining the States as closely as the Congress or giving the Federal Government the latitude appropriate to state governments."[58] Justice Harlan predicted that one "likely consequence" of demanding congruence between state and federal governments in the area of criminal enforcement was

> a shift of responsibility in this area to the Federal Government, with its vastly greater resources. Such a shift [of responsibility] . . . may in the end serve to weaken the very liberties which the Fourteenth Amendment safeguards by bringing us closer to the monolithic society which our federalism rejects.[59]

That accretion of power was most evident in the newly discovered "enveloping federal judicial authority."[60]

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reservations. *See* Crist v. Bretz, 437 U.S. 28, 39–40 (1978) (Burger, C.J., dissenting); *id.* at 52–53 (Powell, J., dissenting).

54. *Malloy*, 378 U.S. at 27 (Harlan, J., dissenting).

55. Roth v. United States, 354 U.S. 476, 504 (1957) (Harlan, J., dissenting and concurring in the judgment in part).

56. *Id.*

57. *Id.* at 506. *See also* Memoirs v. Massachusetts, 383 U.S. 413, 457–58 (1966) (Harlan, J., dissenting).

58. *Beauharnais*, 343 U.S. at 294 (Jackson, J., dissenting). *See* Williams v. Florida, 399 U.S. 78, 118 (1970) (Harlan, J., dissenting and concurring in the judgment in part) (pointing out that under the Court's approach, approving Florida's six-person jury meant that a twelve-member jury was not constitutionally required in federal trials, objecting to "diluting constitutional protections within the federal system").

59. *Malloy*, 378 U.S. at 28 (Harlan, J., dissenting).

60. Pointer v. Texas, 380 U.S. 400, 409 (Harlan, J., concurring in the result); *see also Memoirs*, 383 U.S. at 459–60 (stating that by adopting a national standard, the Court could not "escape the task of reviewing obscenity decisions on a case-by-case basis."); *Malloy*, 378

C. Concluding Observations

In the end, congruence prevailed. The Court abandoned its two-track theory in favor of a unified theory of incorporation. The unified theory came with a compromise, however: jot-for-jot incorporation would be selective. The Court overruled many of its prior two-track cases,[61] but not all. Vestiges of the prior two-track regime remained,[62] at least for now. Remarkably, in the past ten years, the Court has deemed three more provisions of the Bill of Rights applicable to the states.[63] And it has doubled down on selective incorporation. Justice Alito's majority opinion in *McDonald v. City of Chicago*, declaring the Second Amendment applicable to the states, reviewed the development of selective incorporation and emphatically reaffirmed it.[64] Justice Stevens, who had dissented in *Heller*, again dissented, but channeled the second Justice Harlan[65]: "The rights protected against state infringement by the Fourteenth Amendment's Due Process Clause need not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights."[66] Incorporation "does not, in itself, mean the provision must have precisely the same meaning in both contexts"; it does not require "perfect state/federal congruence."[67] Both Justices Alito and Scalia wrote opinions dismissing Justice Stevens's embrace of the two-track theory.[68] Following *McDonald*, the Court held that the Eighth Amendment's Excessive Fines Clause applies to the states and again rejected a two-track theory: "If a Bill of Rights protection is incorporated, there is no daylight

U.S. at 15 n.1 (noting that as the Due Process Clause encompasses more rights, it broadens "federal questions" to be decided by federal courts).

61. *See supra* note 52.

62. *E.g.*, Hurtado v. California, 110 U.S. 516 (1884) (declining to incorporate the Grand Jury Clause of the Fifth Amendment); Walker v. Sauvinet, 92 U.S. (11 Otto) 90 (1875) (declining to incorporate the Civil Jury Clause of the Seventh Amendment). These clauses are discussed *infra* in Part II.A.2–3.

63. Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (Sixth Amendment guarantee of a unanimous jury); Timbs v. Indiana, 139 S. Ct. 682 (2019) (Eighth Amendment's Excessive Fines Clause); McDonald v. City of Chicago, 561 U.S. 742 (2010) (Second Amendment).

64. *McDonald*, 561 U.S. at 759–66.

65. *Id.* at 867 n.11 (Stevens, J., dissenting) ("I can hardly improve upon the many passionate defenses of this position that Justice Harlan penned during his tenure on the Court.").

66. *Id.* at 866 (Stevens, J., dissenting).

67. *Id.* at 868 (Stevens, J., dissenting).

68. *Id.* at 787–88 (opinion of Alito, J.); *id.* at 791–94 (Scalia, J., concurring).

between the federal and state conduct it prohibits or requires."[69] In the 2019–20 Term, the Court held that the Sixth Amendment requires a unanimous jury verdict.[70] Again the Court emphatically rejected "'dual-track' incorporation—the idea that a single right can mean two different things depending on whether it is being invoked against the federal or a state government."[71] In all of this, as the Court declared various provisions of the Bill of Rights incorporated, the Court has paid little attention to any embedded federalism concerns.

II. THE FUTURE OF INCORPORATION

Incorporation has long been synonymous with the Bill of Rights, but are there other provisions that might be applied to the states? It seems clear that the separation of powers principles found in Articles I, II, and III are structural and will not be incorporated against the states.[72] And in the "one person, one vote" cases, the Court refused to allow the states to have geographical representation in the state senates as we do in the U.S. Senate.[73] Nevertheless, there are other provisions, within and outside of the Bill of Rights, that may be subject to incorporation. This Part considers below the remaining provisions of the Bill of Rights and their suitability for incorporation and then examines other constitutional provisions that might feasibly be incorporated.[74] Some of the clauses outside the Bill of Rights have a history in the Court, while others are the subject of academic commentary. But there are a surprising number of provisions of the Constitution that have been or may yet be subject to incorporation of the Court's current framework.

69. *Timbs*, 139 S. Ct. at 687.

70. *Ramos*, 140 S. Ct. at 1397.

71. *Id.* at 1398.

72. *See*, *e.g.*, Elrod v. Burns, 427 U.S. 347, 351 (1976); Mayor of Phila. v. Educ. Equal. League, 415 U.S. 605, 615 (1974); Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957) (plurality opinion); Dreyer v. Illinois, 187 U.S. 71, 84 (1902). *See* Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WMS. U. L. REV. 51, 52 (1998) (acknowledging that separation of powers provisions do not incorporate, but suggesting that some provisions might apply to the states through the Guarantee Clause).

73. Reynolds v. Sims, 377 U.S. 533, 571–77 (1964). *See also* Sixty-Seventh Minn. State Senate v. Beens, 406 U.S. 187, 198–200 (1972).

74. *See* Wildenthal, *The Road to* Twining, *supra* note 7, at 1523–24 n.387.

A. The Remaining Provisions in the Bill of Rights

1. The Third Amendment

The Third Amendment need not detain us long. Among the charges against the king in the bill of particulars section of the Declaration of Independence was the claim that the king had "quarter[ed] large bodies of armed troops among us."[75] The Third Amendment, which followed from state constitutional provisions,[76] provides that "No Soldier shall, in time of peace be quartered in any house, without consent of the Owner, nor in time of war, but in a manner to be prescribed by law."[77] The amendment reinforced Congress's power "[t]o raise and support Armies,"[78] and the bar on the states to, "without the Consent of Congress, . . . keep Troops."[79] Although the Third Amendment seems most applicable to Congress, the term "Soldier" may be broader than the "Troops" of a standing army and might include national guardsmen and perhaps other officers of the state.[80]

The Court has never addressed the Third Amendment, but the Second Circuit has held that "the Third Amendment is incorporated into the Fourteenth Amendment for application to the states."[81] There is renewed, and creative, interest in the Third Amendment in the academy.[82] One does not have to consult the

75. THE DECLARATION OF INDEPENDENCE para. 16 (U.S. 1776).

76. *See, e.g.*, DEL. DECLARATION OF RIGHTS § 21 (1776) ("[N]o soldier ought to be quartered in any house in time of peace without the consent of the owner; and in time of war in such manner only as the Legislature shall direct.").

77. U.S. CONST. amend. III.

78. *Id.* art. I, § 8, cl. 12.

79. *Id.* art. I, § 10, cl. 3.

80. *Compare id.* art. I, § 8, cl. 12 (granting Congress the power "[t]o raise and support armies") *with id.* art. I, § 8, 15 (granting Congress the power "[t]o provide for calling forth the Militia).

81. Engblom v. Carey, 677 F.2d 957, 961 (2d Cir. 1982). *See* McDonald v. City of Chicago, 561 U.S. 742, 765 (2010) (citing *Engblom*).

82. *See, e.g.*, Tom. W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WM. & MARY BILL RTS. J. 117 (1993); Alan Butler, *When Cyberweapons End Up on Private Networks: Third Amendment Implications for Cybersecurity Policy*, 62 AM. U. L. REV. 1203 (2013); Stephen I. Friedland, *The Third Amendment, Privacy, and Mass Surveillance*, WAKE FOREST L. REV. ONLINE (2014); John Gamble, Note, *The Third Artefact: Beyond Fear of Standing Armies and Military Occupation, Does the Third Amendment Have Relevance in Modern American Law?*, 6 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 205 (2015); Josh Dugan, Note, *When Is a Search Not a Search? When It's a Quarter: The Third Amendment, Originalism, and NSA Wiretapping*, 97 GEO. L.J. 555 (2009); James P. Rogers, Note, *Third Amendment Protections in Domestic Disasters*, 17 CORNELL J.L. & PUB. POL'Y 747 (2008).

Oracle at Delphi to see that if an appropriate case should come before the Court, it would declare the Third Amendment incorporated through the Due Process Clause. The Court could do so directly or incorporate Third Amendment principles as a special case of the Fourth Amendment right to be secure in our homes.

2. The Fifth Amendment (Grand Jury Clause)

The Grand Jury Clause of the Fifth Amendment provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[83] By its terms, the Clause "confer[s] a right not to be tried . . . when there is no grand jury indictment."[84] Aside from that, the Clause presupposes much about the common law history of the grand jury, because it was adopted as part of the Bill of Rights nearly without debate or discussion.[85] The Clause, for example, does not provide for the size of the jury and assumes an established understanding of the difference between "presentment" and "indictment."[86] The Supreme Court has taken that tack and assumed that the grand jury "was intended to operate substantially like its English progenitor,"[87] but that has required both the Court

83. U.S. CONST. amend. V.

84. Midland Asphalt Corp. v. United States, 489 U.S. 794, 802 (1989). Under Madison's proposal, the Grand Jury Clause would have been added to Article III, Section 2, Clause 3. Hartnett, *supra* note 10, at 260–61, 296.

85. *Cf.* Ramos v. Louisiana, 140 S. Ct. 1390, 1395–97 (2020) (drawing from common law, state practices, and early treatises to conclude that the Sixth Amendment requires a unanimous jury verdict; "the promise of a jury trial surely meant *something*").

There was little mention of the grand jury in the debates leading to the Constitution's ratification. In the debates in Massachusetts, one delegate characterized the proposed constitution as "dark and gloomy" and pointed, among other things, that "there is no provision made in the Constitution to prevent the attorney-general from filing information against any person, whether he is indicted by the grand jury or not." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 110 (J. Elliot, 2d ed. 1891) (reprint 1996) ("ELLIOT'S DEBATES") (argument of Mr. Holmes). The objection was met with the argument that the Massachusetts Constitution similarly did not provide for indictment by grand jury "yet no difficulty or danger has arisen to the people of this commonwealth." *Id*. at 113 (argument of Mr. Gore).

86. According to Blackstone, a prosecutor proposed the indictment and put it before the grand jury for ratification. A presentment was the grand jury's own charge, based on its "own knowledge or observation." 4 WILLIAM BLACKSTONE, COMMENTARIES 298 (1769). *See* Renee B. Lettow, Note, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1334 (1994).

87. Costello v. United States, 350 U.S. 359, 362 (1956). *See* Blair v. United States, 250 U.S. 273, 282 (1919) ("The Fifth Amendment . . . recognize[s the grand jury] as being possessed of the same powers that pertained to its British prototype.").

and Congress to fill in a lot of blanks.[88] Despite the history of the grand jury as a fixture of the common law, only a handful of the first states provided for one prior to the adoption of the Bill of Rights, although other states assumed its existence.[89] Following the adoption of the Bill of Rights, many more states adopted grand jury provisions, and yet a majority of states do not require indictment by grand jury for all "capital or otherwise infamous crime[s]."[90]

The Court first rejected incorporation of the Grand Jury Clause in *Hurtado v. California*.[91] The defendant, Hurtado, had been charged with capital murder through an information filed by the district attorney. Hurtado argued that the judgment could not be enforced in light of the Fifth and Fourteenth Amendments. The Court began with an extensive discussion of the origins of due process and the grand jury, including consideration of *Magna Carta*, Lord Coke, English cases, and conflicting conclusions from state supreme courts.[92] While acknowledging the lengthy history of the grand jury in English and American law, the Court concluded that "due process of law" was not fixed, but must include "the best ideas of all systems and of every age . . . to draw its inspiration from every fountain of justice."[93] The Court reasoned that because the federal requirement of presentment or indictment by a grand jury was found separate from the guarantee of due process in the Fifth Amendment, the Due Process Clause did not demand a proceeding by grand jury: Had the Fourteenth Amendment been intended "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."[94] For the Court, then, the promise of protection through a grand jury in the Fifth Amendment was a positive law guarantee only. The Court would read nothing more

88. *See* United States v. Calandra, 414 U.S. 338, 343–46 (1974) (discussing the principles); 28 U.S.C. §§ 1861–69, 1871, 1875, 1877; FED. R. CRIM. P. 6.

89. *See* United States v. Navarro-Vargas, 408 F.3d 1184, 1193 & n.12 (9th Cir. 2005) (en banc) (recounting the history); Suja A. Thomas, *Nonincorporation: The Bill of Rights after* McDonald v. Chicago, 88 NOTRE DAME L. REV. 159, 187 (2012) (same). *See also id.* at 188 (stating that at the time of the adoption of the Fourteenth Amendment, twenty-six of thirty-seven states guaranteed a right to indictment by grand jury for felonies).

90. *Ramos*, 140 S. Ct. at 1435 & n.28 (Alito, J., dissenting) (citing "the 28 States that allow a defendant to be prosecuted for a felony without a grand jury indictment").

91. Hurtado v. California, 110 U.S. 516 (1884).

92. *Id.* at 520–38.

93. *Id.* at 531.

94. *Id.* at 535. Justice Harlan filed a lengthy dissent, drawing from a broad array of English, American, and state sources. *Id.* at 538–58 (Harlan, J., dissenting).

into the promise of due process in the Fourteenth Amendment. Although the Court has reaffirmed the "high place [the grand jury] held as an instrument of justice,"[95] it has shown no inclination to re-examine *Hurtado* since then.[96] The logic of *Hurtado* may appear textual and formalistic. In another sense, however, *Hurtado* showed some flexibility—the concept of due process was not fixed, but malleable, and could be informed by further thinking by legislators and constitution-framers; hence, the states were not bound by the same grand jury requirements as the federal government. *Hurtado*'s logic is surely inconsistent with any theory of incorporation based on the Due Process Clause: Why wouldn't the same principle apply to the other provisions of the Bill of Rights, such as the Unreasonable Search and Seizure and Warrants Clauses of the Fourth Amendment; the Double Jeopardy, Self-Incrimination, and Takings Clauses of the Fifth Amendment; and the Speedy Trial and Confrontation Clauses of the Sixth Amendment? Following the logic of *Hurtado*, by reducing those clauses to positive law the Framers understood that they were related to, but not comprehended precisely within, the Due Process Clause of the Fifth and Fourteenth Amendments.

The absorption theory was at least sympathetic to *Hurtado* insofar as it offered some flexibility in the idea of due process. Effectively it put the grand jury on a two-track plan—the states, for the most part, recognized some role for the grand jury, but the right did not have to be the same as the federal right; moreover, if a state's "inspiration from every fountain of justice,"[97] leads it down a different path, the state may "dispens[e] entirely with the grand jury in state prosecutions."[98] Of course, under the absorption theory the Court could have overruled *Hurtado* in part—requiring that the states observe some role for a grand jury—without insisting that

95. Costello v. United States, 350 U.S. 359, 362 (1956).

96. *See* Rose v. Mitchell, 443 U.S. 545, 557 n.7 (1979); Branzburg v. Hayes, 408 U.S. 665, 687–88, 688 n.25 (1972); Alexander v. Louisiana, 405 U.S. 625, 633 (1972); Beck v. Washington, 369 U.S. 541, 545 (1962); *Costello*, 350 U.S. at 362; Lem Woon v. Oregon, 229 U.S. 586, 589–90 (1913). *See also* Picard v. Connor, 404 U.S. 270 (1971) (rejecting a challenge to *Hurtado* under the Equal Protection Clause in a habeas proceeding because it was not exhausted in state court); *id.* at 279–80 (Douglas, J., dissenting) (arguing that exhaustion was a "nicety" but irrelevant after *Bolling v. Sharpe*, 347 U.S. 497 (1954), because there was substantial overlap between the Due Process and Equal Protection Clauses).

97. *Hurtado*, 110 U.S. at 531.

98. *Beck*, 369 U.S. at 545. *See* Cassell v. Texas, 339 U.S. 282, 302 (1950) (Jackson, J., dissenting) ("The States are not required to use [a grand jury] at all.").

the states follow precisely the rules applicable to federal prosecutions. In contrast, *Hurtado* is, broadly speaking, consistent with selective incorporation, but only because the Court called its method "selective incorporation" to excuse itself from having to revisit *Hurtado* and other cases.[99] Selective incorporation is itself not a theory that can explain why some clauses in the Bill of Rights are incorporated and others are not; it is simply a description of whatever the Court decides to do. If the Court were to revisit *Hurtado*, "selective incorporation" would become "nearly complete incorporation" and its Procrustean jot-for-jot principle would offer the states none of the flexibility in the Due Process Clause that the *Hurtado* Court promised.

Are there impediments to overruling *Hurtado* and declaring the Grand Jury Clause incorporated? Akhil Amar thinks not and has ventured that the Grand Jury Clause should be incorporated under the Court's own due process standards and independent of Amar's own carefully crafted theory of "refined incorporation," which depends on the Privileges or Immunities Clause.[100] On the other hand, Andrew Hessick and Elizabeth Fisher have argued that the grand jury is not just a fundamental right of persons, but a structural right related to the organization of state government because it "dictate[s] which bodies of government can exercise particular powers[,]" and as a structural right, should not be incorporated.[101] There is some support for this idea in the Court's own historical reconstruction of the grand jury. The Court has said that the grand jury "serv[es] as a kind of buffer or referee

99. *See* McDonald v. City of Chicago, 561 U.S. 742, 784 n.30 (2010) (explaining that *Hurtado* "predate[s] the era of selective incorporation"). *See also* Adamson v. California, 332 U.S. 46, 64–65 (1947) (Frankfurter, J., concurring) (referring to the Grand Jury Clause and criticizing selective incorporation as "le[aving us] in the dark as to which [amendments] are in and which are out"); AMAR, *supra* note 7, at 220.

100. *See* AMAR, *supra* note 7, at 220 ("[A]s to grand juries, it does seem hard to see why this . . . English liberty is not embraced—doubly—by the privileges–or–immunities and due–process clauses."). *See also* Ramos v. Louisiana, 140 S. Ct. 1390, 1421 (2020) (Thomas, J., concurring in the judgment) ("I would resolve this case based on the Court's longstanding view that the Sixth Amendment includes a protection against nonunanimous felony guilty verdicts . . . [and] that this right applies against the States through the Privileges or Immunities Clause of the Fourteenth Amendment, not the Due Process Clause."); Thomas, *supra* note 89, at 204 (concluding that no theories of nonincorporation of the Grand Jury Clause are defensible).

101. F. Andrew Hessick & Elizabeth Fisher, *Structural Rights and Incorporation*, 71 ALA. L. REV. 163, 167 (2019).

between the Government and the people[,]"[102] operates as a "constitutional fixture in its own right[,]" and thus is not within the exclusive control of any of the three branches.[103] In general, the Court has not imposed separation of powers principles on the states through incorporation.[104] Whether the grand jury is a sufficient "constitutional fixture" to merit such deference remains to be seen.

3. The Seventh Amendment (Civil Jury and Re-Examination Clauses)

The Seventh Amendment contains two clauses, a Civil Jury Clause guaranteeing a jury trial in "[s]uits at common law" whose value exceeds twenty dollars and a Re-Examination Clause prohibiting courts from re-examining facts tried to a jury,[105]

102. United States v. Williams, 504 U.S. 36, 47 (1992). *See also* AMAR, *supra* note 7, at 85 (observing that the grand jury has been regarded as "a roving commission to ferret out official malfeasance or self-dealing of any sort and bring it to the attention of the public at large.").

103. *Williams*, 504 U.S. at 47 (quotation marks and citation omitted); *see also* Stirone v. United States, 361 U.S. 212, 218 (1960). Although the grand jury is "accorded wide latitude to inquire into violations of criminal law[,]" United States v. Calandra, 414 U.S. 338, 343 (1974), each branch is accorded some check on it: The grand jury shares investigative duties with the executive, Butz v. Economou, 438 U.S. 478, 510 (1978), which helps direct its activities, United States v. Batchelder, 442 U.S. 114, 124 (1979). The jury is "subject to the supervision of a judge," Branzburg v. Hayes, 408 U.S. 665, 688 (1972), and dependent upon it to compel witnesses, Brown v. United States, 359 U.S. 41, 49 (1959), *overruled in part by* Harris v. United States, 382 U.S. 162 (1965). Congress has supplied rules for grand jury proceedings, *see*, *e.g.*, 28 U.S.C. §§ 1861–63, 1870.

104. *See supra* note 72 and accompanying text. The Court's Fourteenth Amendment jurisprudence may affect the states' structural choices when, for example, the form of government has an impact on fundamental due process matters, such as an impartial magistrate, *see*, *e.g.*, Ward v. Village of Monroeville, 409 U.S. 57 (1972) (holding that the mayor could not serve as judge where traffic fines and fees funded the city budget); Tumey v. Ohio, 273 U.S. 510 (1927) (same), or voting rights, *see*, *e.g.*, Whitcomb v. Chavis, 403 U.S. 124, 142–44 (1971) (suggesting that in an appropriate case a multi-member district might violate the Equal Protection Clause).

105. The amendment provides in full:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

Adjusted for inflation, twenty dollars in 1791 would be equivalent to more than $630 today. See Ian Webster, *Inflation calculator*, officialdata.org/us/inflation/1791?amount=20, (last visited Oct. 18, 2022). Arguably the Seventh Amendment would have allowed Congress to create federal small claims courts for claims under twenty dollars. English practice recognized the power of Parliament to create small claims courts, in which judgments could be issued without a jury. *Margreth Barrett, The Constitutional Right to Jury Trial: A Historical Exception for Small Monetary Claims*, 39 HASTINGS L.J. 125, 138 (1987) (recounting the history of the "Court of Requests" or small

although the Court has sometimes treated the clauses as a single right.[106] Article III of the Constitution provided for trial by jury in criminal cases,[107] but made no mention of civil jury trials. The omission of any reference of trial in civil cases was raised briefly towards the end of the Philadelphia convention[108] and more emphatically in anti-federalist editorials and state ratifying conventions as an argument for the addition of a bill of rights.[109] When what is now the Seventh Amendment was presented there was little opposition and almost no discussion.[110]

Adopting the Seventh Amendment turned out to be easy enough, but what did it mean? The Court has said that "the historical setting in which the Seventh Amendment was adopted highlighted a controversy that was generated, not by concern for preservation of jury characteristics at common law, but by fear that the civil jury itself would be abolished unless protected in express words."[111] So what "right of trial by jury" did the amendment "preserve[]"? Broadly speaking, there were two approaches. The first, discussed (but not favored) by Alexander Hamilton in *Federalist No. 83*, was that "causes in the federal courts should be

debtors' court beginning in the sixteenth century). For an interesting discussion of the "twenty dollars" provision, see *The Twenty Dollars Clause*, 118 HARV. L. REV. 1665 (2005).

106. *See*, *e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 784 n.30 (2010). *But see* Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1200 (2021) (discussing the Re-Examination Clause); Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 432 (1996) (distinguishing "the allocation of trial functions between judge and jury" from "the allocation of authority to review verdicts"); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830) ("[T]he [Re-Examination Clause] of the amendment is still more important; and we read it as a substantial and independent clause.") (footnote omitted).

107. U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury[.]").

108. *See* James Madison, Report *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 585, 587 (Max Farrand ed. 1966) (August 28, 1787) [hereinafter FARRAND] (comments of Mssrs. Williamson and Gorham and Col. Mason); *id.* at 640 (additional comments of Col. Mason).

109. The standard history is Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

110. *See* Wolfram, *supra* note 109, at 730 ("[T]he seventh amendment did not attract attention."). Under James Madison's original proposal for a bill of rights, the Seventh Amendment would have been folded into Article III, Section 2, as Clause 4, thus making clear that the rule applied in federal courts only. Hartnett, *supra* note 10, at 259, 296. Note, also, that the Re-Examination Clause specifies that it applies in "any Court of the United States[.]" U.S. CONST. amend. VII.

111. Colgrove v. Battin, 413 U.S. 149, 152 (1973). *See also* Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 243 (1897) (observing that the Seventh Amendment was to "deprive the courts of the United States" of authority to re-examine facts tried by a jury).

tried by jury . . . [according to] that mode of trial [that] would obtain in a similar case in the state courts[.]"[112] That would "preserve[]" whatever right to trial by jury the states had carried from English practices, although it would mean, as Hamilton noted, that "admiralty causes should be tried in Connecticut by a jury, and in New York without one."[113] Hamilton thought such a proposal "capricious" and dependent on "the accidental situation of the court and parties."[114] A second approach was that the Seventh Amendment "preserved" a historical right to jury trial "[i]n [s]uits at common law," to be determined either by the Court or by Congress.[115] The first approach would have precluded any possibility of incorporation by decentralizing control over civil jury trials in federal court. The second approach guaranteed a uniform rule for all federal courts.

The Supreme Court opted for the second approach, although without much discussion. Justice Story, riding circuit, did not think the Seventh Amendment presented any ambiguity: "Beyond all question, the common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence."[116] In subsequent cases, the Court clarified that what

112. THE FEDERALIST NO. 83, at 567 (A. Hamilton) (Jacob E. Cooke, ed. 1961).

113. *Id. See* AMAR, *supra* note 7, at 89 (favoring this approach as "enjoy[ing] considerable historical support").

114. THE FEDERALIST NO. 83, *supra* note 112, at 567–68. *See* Wolfram, *supra* note 109, at 712–18. Hamilton may have considered such a proposal unmanageable, but during the same week Congress transmitted the first amendments to the states for ratification, it adopted the Judiciary Act. Section 34 of the act (also referred to as the Rules of Decision Act) provided: "That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Judiciary Act, ch. 20, § 34, 1 Stat. 73 (1789) (codified as amended at 28 U.S.C. § 1652). Days later, Congress enacted the Process Act, which provided that in federal courts, the "writs and executions . . . , in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same." Process Act, ch. 21, § 2, 1 Stat. 93 (1789). The Process Act expired by its own terms at the end of the next session of Congress. *Id.* § 3. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825); CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 423–24 (5th ed. 1994). Today, "it is now wholly clear that the right of jury trial in federal court is governed entirely by federal law, and that state law may be disregarded." *Id.* at 651.

115. *See* Wolfram, *supra* note 109, at 720–22.

116. United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750). *See also* Parsons v. Bedford, 28 U.S. (3 Pet.) 432, 446 (1830) (Story, J.) (acknowledging that the right to a jury was "secured in every state constitution in the Union," but the Seventh Amendment was "a fundamental guarantee of the rights and liberties of the people.").

the Seventh Amendment preserved was "the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791."[117]

Given the complexity of state jury rules and the Framers' refusal to adopt a particular rule of decision, it not surprising that the Court has thus far declined to declare the Seventh Amendment applicable to the states through the Due Process Clause of the Fourteenth Amendment. It first so stated shortly after its decision in the *Slaughter–House Cases*.[118] In *Walker v. Sauvinet*, the Court held that "trial by jury in suits at common law . . . [was] not . . . a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge[,]" nor did the Due Process Clause require trial by jury under the same conditions as the Seventh Amendment.[119] The states, the Court declared, "so far as [the Seventh Amendment] is concerned, are left to regulate trials in their own courts in their own way."[120] Although the Court once signaled that it might be willing to revisit *Walker*,[121]

The full Court had an opportunity to clarify the rule in its first case under any provision of the Bill of Rights, a case that arose out of the District of Columbia. Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235 (1819). Okely had signed a bank note, ostensibly knowing that Maryland law—made applicable in the District of Columbia by congressional statute—allowed for summary collection without trial. Okely claimed that he was entitled to a jury under the Seventh Amendment. The Court held that Okely had effectively waived his right to a jury trial when he signed the note. The Court failed to address whether the Seventh Amendment applied in the District of Columbia, whether Congress could make Maryland law applicable in the land it had seceded to the United States, and whether Maryland law contravened the Seventh Amendment. *Id.* at 240. *See* DAVID CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, 112–13 n.143 (1985).

117. Dimick v. Schiedt, 293 U.S. 474, 476 (1935). For the 1791 date, the Court relied on two criminal cases addressing the Sixth Amendment. *See* Patton v. United States, 281 U.S. 276, 288–89 (1930); Thompson v. Utah, 170 U.S. 343, 350 (1898). The Court has reaffirmed that 1791 is the relevant date in later cases. *See*, *e.g.*, Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989); Curtis v. Loether, 415 U.S. 189, 193 (1974); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935).

California has a similar date-fixed rule regarding the right to a jury trial, but the right is pegged to 1850, when the California Constitution was adopted. C&K Eng'g Contractors v. Amber Steel Co., 587 P.2d 1136, 1139 (Cal. 1978).

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

119. Walker v. Sauvinet, 92 U.S. (11 Otto) 90, 92 (1875). *See also* Edwards v. Elliott, 88 U.S. (21 Wall.) 532, 557 (1874) (holding that the Seventh Amendment does not apply to the states); *id.* at 544 (argument of counsel; claiming that New Jersey's failure to afford his client a jury trial violated the Privileges or Immunities, Equal Protection, and Due Process Clauses of the Fourteenth Amendment).

120. *Walker*, 92 U.S. (11 Otto) at 92.

121. During the era when the Court was transitioning from the absorption theory of incorporation to the jot-for-jot theory, the Court took a step towards incorporating the Civil

the Court has reaffirmed that that principle has been "completely and conclusively . . . settled[.]"[122]

Like the Grand Jury Clause, the Civil Jury Clause presumes much about the nature of a jury. In this regard, the Civil Jury Clause is not self-executing, and the Court and Congress have filled in the details.[123] Incorporating the Civil Jury Clause would not be impossible, but it would be messy, because it would require the Court to sort out what is required by the Constitution and what has been provided for by statute, rule, or practice. If the Court were to declare the Civil Jury Clause incorporated, state practices would be affected in several important ways. First, the states would have to conform to the Supreme Court's judgments about what the common law required in 1791. This would mean that parties would be entitled to a jury trial in any case in which they would be entitled to a jury trial in federal court, which might work a substantial change in state trial procedures.[124] Second, the states would have to

Jury Clause of the Seventh Amendment. The Federal Employers Liability Act, 45 U.S.C. §§ 51–60, creates an action in tort for railroad employees. Damages must be determined by a jury, and suits may be brought in state or federal court. *Id.* §§ 53, 56. In *Minneapolis & St. Louis Railroad Co. v. Bombolis*, 241 U.S. 211, 220–21 (1916), the Court had held that a FELA action brought in Minnesota state court could be tried according to state procedures. *See id.* at 220–21. But in a subsequent FELA case, *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359, 363 (1952), the Court required Ohio to conduct a jury trial as to issues of fraud arising in a FELA action. Ohio provided that a jury could determine issues of negligence; a judge, questions of fraud, including both law and fact. In a 5–4 decision, the Court wrote that "the right to trial by jury is too substantial a part of the rights accorded by [FELA] to permit it to be classified as a mere 'local rule of procedure[.]'" Concurring in the judgment only, Justice Frankfurter objected that "simply because there is concurrent jurisdiction . . . , a State is under no duty to treat actions arising under [FELA] differently from the way it adjudicates local actions for negligence[.]" *Id.* at 365 (Frankfurter, J., concurring for reversal but dissenting from the Court's opinion). FELA, Justice Frankfurter wrote, "does not impose the jury requirements of the Seventh Amendment on the States[.]" *Id.* at 367. Otherwise, "the *Bombolis* case should be overruled explicitly[.]" *Id.* at 368. *Bombolis* was the Supreme Court's evidence that "the Seventh Amendment's civil jury requirement do[es] not apply to the States." McDonald v. City of Chicago, 561 U.S. 742, 784 n.30 (2010).

122. *Bombolis*, 241 U.S. at 217. *See*, *e.g.*, Osborn v. Haley, 549 U.S. 225, 252 n.17 (2007); Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 432 (1996); Wagner Co. v. Lyndon, 262 U.S. 226, 232 (1923).

123. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42, 42 n.4, 51–55, 55 n.10 (discussing the principles); Atlas Roofing Co. v. OSHA, 430 U.S. 442, 449–61 (1977) (same); 28 U.S.C. §§ 1861–78; FED. R. CIV. P. 38–39.

124. A state could still provide for a right to jury trial in cases not required by the Seventh Amendment. *See* Herron v. S. Pac. Co., 283 U.S. 91 (1931) (federal court could decide issue of contributory negligence, even though state law required that such a defense be determined by a jury).

provide for unanimous verdicts in civil cases.[125] Third, the states would have to provide for juries in any civil case valued at more than twenty dollars—which would mean small claims. This would be a substantial change in practice and additional expense for states and localities[126]—expense the federal courts are not put to (at least in diversity cases) because Congress has required a minimum amount in controversy, leaving small claims to state courts.[127]

The Re-Examination Clause raises fewer issues for incorporation. It is a narrower rule than the Civil Jury Clause and may be self-executing. That said, a number of state courts have observed that their constitutions do not have Re-Examination Clauses and that adopting such a rule would significantly alter state practices, including rules regarding additur and remittitur.[128] All told, the Seventh Amendment could be applied to the states, but it would come at some cost to the states, and without much practical benefit, except to give the

Court greater control over state proceedings. The Court's failure to incorporate the Seventh Amendment may be the best evidence of the awkwardness of its congruence principle.

125. *See* Am. Publ'g Co. v. Fisher, 166 U.S. 464, 468 (1897). *See also* FED. R. CIV. P. 48(b). This would require the Court to overrule *Minneapolis & St. Louis Railroad Co. v. Bombolis*, 241 U.S. 211, 217 (1916).

126. *See*, *e.g.*, Cheung v. Eighth Jud. Dist. Ct. *ex rel.* Cnty. of Clark, 124 P.3d 550, 553–54 (Nev. 2005); Wings of the World, Inc. v. Small Claims Ct., 987 P.2d 642, 644–45 (Wash. Ct. App. 1999). *See also* Barrett, *supra* note 105, at 126–27 ("When a jury is demanded it adds tremendously to the cost, time, and complexity of trial, and can easily boost litigation costs beyond the amount of the claim. Wealthy defendants have learned that merely demanding a jury as a strategic measure may deter less wealthy small claims plaintiffs from proceeding with their claims.") (footnotes omitted).

127. 28 U.S.C. § 1332(a). There is no constitutional impediment to Congress creating a small claims court, and, as of 1791, English common law recognized the power of Parliament to create such courts, where small debts could be recovered without the time and expense of a jury. *See generally*, Barrett, *supra* note 105. Like state legislatures, Parliament could limit the jurisdiction of small claims courts by imposing a ceiling on the amount of the claims. The Seventh Amendment appears to have fixed that ceiling at twenty dollars, which, as a practical matter, would render federal small claims courts useless. One workaround for Congress would be to provide for small claims courts but permit an appeal to a court in which a jury trial could be had. Cap. Traction Co. v. Hof, 174 U.S. 1, 18–19 (1899) (approving of such a scheme in the District of Columbia). If the Court were to declare the Seventh Amendment incorporated, the states would have to follow the same model.

128. *See*, *e.g.*, Evans *ex rel.* Kutch v. State, 56 P.3d 1046, 1071 (Alaska 2002) (Bryner, J., dissenting in part); Drummond v. Mid-West Growers Coop. Corp., 542 P.2d 198, 206 (Nev. 1975); Jehl v. S. Pac. Co. 427 P.2d 988, 997 (Cal. 1967); Bowden v. Caldor, Inc., 710 A.2d 267, 287 (Md. 1998); Freedman v. Wood, 401 N.E.2d 108, 112 (Mass. 1980); Bunch v. King Cnty. Dept. of Youth Servs., 116 P.3d 381, 388 n.7 (Wash. 2005).

4. The Ninth Amendment

The Ninth Amendment is one of the most vexing, least understood, provisions of the Constitution. Its origins lie in the deep theory behind the Constitution. The Anti-Federalists (nominally) opposed the Constitution because it did not have a bill of rights. The Federalists contended that a bill of rights was not necessary because the Constitution only granted to the federal government certain enumerated powers but accepted a bill of rights as the price of securing ratification. But the idea of a bill of rights brought fresh concerns to the Federalists—that the enumeration of some rights might suggest that the people lacked any claim to other rights not on the list, or, even worse, that the need for an enumeration of rights implied that the federal government otherwise had power to restrict those rights.[129] Madison explained the problem:

> by enumerating particular exceptions to the grant of power [to Congress], it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure.[130]

To prevent such "disparagement," the Framers proposed what is now the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[131]

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129. *See* Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229, 1230–31.

130. 1 ANNALS OF CONG., *supra* note 10, at 456. Madison's original proposal captured the tenor of his concerns:

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

Id. at 452.

131. U.S. CONST. amend. IX. The Ninth Amendment also figured in the debates over the Fourteenth Amendment. Senator Nye, for example, argued that the framers of the Bill of Rights "specified everything they could think of[,]" and then added the Ninth Amendment to ensure that "no personal or natural right [could] be invaded or impaired by construction." CONG. GLOBE, 39th Cong., 1st Sess. 1072 (1866) (statement of Sen. Nye). But both Representative John Bingham and Senator Jacob Howard omitted the Ninth and Tenth Amendments from their lists of the federal privileges and immunities that the states would be forbidden from abridging under the new Fourteenth Amendment. CONG. GLOBE, 42d

By its own terms, the Ninth Amendment is a rule of construction ("shall not be construed"), but beyond that, its meaning remains a source of debate. Were the "certain rights" common law rights?[132] natural rights?[133] state constitutional rights?[134] or something else?[135] As a rule of construction, did the Ninth Amendment constrain the delegated powers?[136] or an expansive reading of the Necessary and Proper Clause?[137] Were the "people" individuals or collective bodies?[138] Assuming the Ninth Amendment has something to tell us about unenumerated rights, are such rights judicially enforceable?[139] Through the middle of the twentieth century, the Ninth Amendment was cited by the Supreme Court in only a handful of cases, almost always in tandem with the Tenth Amendment, and never as the basis for a decision.[140] The Court treated both

Cong., 1st Sess. app. 84 (1871) (statement of Rep. Bingham); CONG. GLOBE, 39th Cong. 1st Sess. 2765 (1866) (statement of Sen. Howard).

132. *See* Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983).

133. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006).

134. *See* Massey, *supra* note 129, at 1232–33 ("[T]he ninth amendment prevents Congress from using its delegated powers to contravene an unenumerated federal right contained within a state constitution.")

135. *See*, *e.g.*, Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 762 (1994) ("The Ninth Amendment protects the right to engage in, and prevents governmental encroachment into, any activity or practice which entails no possibility of harm to either the actor or other people.").

136. *See* Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2009 CATO SUP. CT. REV. 13, 18 ("[U]nenumerated natural rights are protected through some combination of political self-control on the part of the political branches (reinforced by the separation of powers) and equitable interpretation by the courts, which entails the narrow construction of statutes so as to avoid violations of natural rights."); Thomas McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990).

137. Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 921 (2008) [hereinafter Lash, *A Textual-Historical Theory*].

138. *See* District of Columbia v. Heller, 554 U.S. 570, 579 (2008); United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

139. *See* Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 503 (2011) [hereinafter Williams, *The Ninth Amendment*] (concluding that "the Ninth Amendment itself provides an insufficient textual basis for judicial enforcement of [unenumerated] rights").

140. *See*, *e.g.*, Roth v. United States, 354 U.S. 476, 492–93 (1957); Woods v. Cloyd W. Miller Co., 333 U.S. 138, 143–44 (1948); United Pub. Workers v. Mitchell, 330 U.S. 75, 94–96 (1947); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 330–31 (1936); Scott v. Sandford, 60 U.S. (19 How.) 393, 511 (1857) (Campbell, J., concurring).

The Supreme Court may have said little, but as Kurt Lash has impressively documented, the Ninth Amendment influenced other actors during this period, including commentators and state courts. Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005) [hereinafter Lash, *The Lost Jurisprudence*].

amendments as largely a "truism."[141] All of the cases involved challenges to federal law, with only a sniff of incorporation.[142]

Debate over the meaning of the Ninth Amendment shifted with the Court's decision in *Griswold v. Connecticut*.[143] Justice Douglas's opinion for the Court, striking down Connecticut's ban on contraceptives, famously referred to the First, Third, Fourth, Fifth, and Ninth Amendments before holding that "specific guarantees in the Bill of Rights have penumbras, formed by emanations," that "create zones of privacy."[144] He quoted the Ninth Amendment, but without further comment. Concurring, Justice Goldberg developed the Ninth Amendment theme "to emphasize the relevance of that Amendment to the Court's holding."[145] Goldberg read the Amendment to imply "that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."[146] Although "the right of privacy in marriage" was not guaranteed in the Bill of Rights, to permit a state to infringe it "is to ignore the Ninth Amendment."[147] Confusingly, Justice Goldberg denied both that "the Ninth Amendment is applied against the States by the Fourteenth" and that "the Ninth Amendment constitutes an independent source of

141. Griswold v. Connecticut, 381 U.S. 479, 529 (1965) (Stewart, J., dissenting) (quoting United States v. Darby, 312 U.S. 100, 124 (1941)); *see Mitchell*, 330 U.S. at 96 ("If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.").

142. The Court dropped a tease in *United Pub. Workers v. Mitchell*. That case involved a constitutional challenge by federal employees to the Hatch Act. The Court "accept[ed the] contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments are involved," and "if we look upon due process as a guarantee of freedom in those fields, there is a corresponding impairment of that right under the Fifth Amendment." 330 U.S. at 94–95. *See also* Bute v. Illinois, 333 U.S. 640, 650–53 (1948) (discussing the Ninth and Tenth Amendments).

143. *Griswold*, 381 U.S. 479 (1965).

144. *Id.* at 484.

145. *Id.* at 487 (Goldberg, J., concurring).

146. *Id.* at 488 (Goldberg, J., concurring).

147. *Id.* at 491 (Goldberg, J., concurring). Both Justice Douglas's majority opinion and Justice Goldberg's concurrence cited several examples of unenumerated rights the Court had recognized. Two that were prominently mentioned were *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923). *See Griswold*, 381 U.S. at 492; *id.* at 495 (Goldberg, J., concurring). These are the two substantive due process cases that survived the end of the *Lochner* era, as Justice Black noted. *Id.* at 515–16 (Black, J., dissenting) ("the reasoning stated in *Meyer* and *Pierce* was the same natural law due process philosophy which many later opinions repudiated"). *See* Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion:* Meyer, Pierce *and the Origins of* Wisconsin v. Yoder, 25 CAP. U. L. REV. 887, 910–18 (1996).

rights."[148] He reasoned, however, that the Ninth Amendment was "surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement."[149] Justice Goldberg, and likely Justice Douglas, had made two important assumptions about the Ninth Amendment: First, that whatever rights were "retained by the people" were judicially cognizable and enforceable; and second, that such rights were held against federal and state governments. Neither assumption was obvious from the Ninth Amendment itself. And although he denied that the Ninth Amendment was incorporated against the states, Justice Goldberg's opinion broadly assumed that the sense of the Ninth Amendment, and perhaps the amendment itself, applied to the states.

Justice Black dissented and contested both assumptions. He argued that the Ninth Amendment, "as every student of history knows," was "to assure the people that the Constitution in all its provisions was intended to limit the Federal Government."[150]

> If any broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be the '[collective] conscience of our people' is vested in this Court . . . it was not given by the Framers, but rather has been bestowed on the Court by the Court. . . . Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention.[151]

148. *Id.* at 492 (Goldberg, J., concurring).

149. *Id.* at 493 (Goldberg, J., concurring). In a footnote, *id.* at 490–91 n.6, Justice Goldberg cited to a book and two law review articles. Two of the three advocated incorporation of the Ninth Amendment. *See* BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT 36 (1955) ("[I]t is fallacious and illogical to insist that by expressly protecting our liberties from the force of the Federal Government, the same liberties would not be protected from the force of State governments."); Norman Redlich, *Are There "Certain Rights . . . Retained By the People"?* 37 N.Y.U. L. REV. 787, 808 (1962) ("The adoption of the Fourteenth Amendment in 1868 provides the constitutional basis for judicial enforcement of [the Ninth and Tenth] Amendments against the states."). The third was ambiguous. Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 323 (1936) ("[The Ninth Amendment] must be a positive declaration of existing, though unnamed rights, which may be vindicated under the authority of the Amendment whenever and if ever any governmental authority shall aspire to ungranted power in contravention of 'unenumerated rights.'"). For background on the history of the debates over the Ninth Amendment prior to *Griswold*, see Ryan C. Williams, *The Paths to* Griswold, 89 NOTRE DAME L. REV. 2155, 2172–76 (2014).

150. *Griswold*, 381 U.S. at 520 (Black, J., dissenting).

151. *Id.* Justice Stewart also dissented, accusing the majority of "turn[ing] somersaults with history." *Id.* at 529 (Stewart, J., dissenting).

In the years since *Griswold*, the Court has shown little interest in expanding the Ninth Amendment canon. The Court did cite the Ninth Amendment in cases involving unenumerated rights, notably *Roe v. Wade*.[152] More recently, various justices have referred to the Ninth Amendment, in the main to question whether the Court has the power to enforce any rights recognized therein.[153]

Yet, even as the Court has shown less interest, academic interest in the Ninth Amendment has soared in the past generation.[154] I will not address here the various theories of the Ninth Amendment, except to say that most commentators do not believe that Ninth Amendment can be sensibly incorporated.[155] Randy Barnett is one scholar prominent in the current debate who believes that it can

152. Roe v. Wade, 410 U.S. 113, 152–53 (1973). *See*, *e.g.*, Hodgson v. Minnesota, 497 U.S. 417, 447–48 (1990); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579–80 & nn. 15–16 (1980); *see also* Bowers v. Hardwick, 478 U.S. 186, 201 (1986) (Blackmun, J., dissenting); Lubin v. Panish, 415 U.S. 709, 721 n.* (1974) (Douglas, J., concurring); *Roe*, 410 U.S. at 210–11 (Douglas, J., concurring).

153. *See*, *e.g.*, Troxel v. Granville, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting); Alden v. Maine, 527 U.S. 706, 763 n.2 (1999) (Souter, J., dissenting); Planned Parenthood v. Casey, 505 U.S. 833, 999 (1992) (Scalia, J., concurring in part and dissenting in part); *Richmond Newspapers, Inc.*, 448 U.S. at 605 (Rehnquist, J., dissenting).

154. The works are too numerous to list here. Among the books are RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE (2007); KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT (2009); CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS (1995); THOMAS B. MCAFFEE, INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY: THE FOUNDER'S UNDERSTANDING (2000). Useful histories of the debates may be found in Williams, *The Ninth Amendment*, *supra* note 139, at 504–08; Barnett, *supra* note 133, at 10–21 (describing five "originalist models" for the Ninth Amendment); Seth Rokosky, Comment, *Denied and Disparaged: Applying the "Federalist" Ninth Amendment*, 159 U. PA. L. REV. 275, 280–94 (2010) (describing the history, but focusing on the Barnett-Lash debates).

155. *See*, *e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 37–38 (1980); Williams, *The Ninth Amendment*, *supra* note 139, at 501 ("the Ninth Amendment's literal command has nothing to say about either the existence or enforceability of claimed rights"); Caplan, *supra* note 132, at 261–62 ("Nor is it logically possible to 'incorporate' the ninth amendment through the fourteenth to apply as a prohibition against the states, because the ninth amendment was designed not to circumscribe but to protect the enactments of the states."); Earl M. Maltz, *Unenumerated Rights and Originalist Methodology: A Comment on the Ninth Amendment Symposium*, 64 CHI.-KENT L. REV. 981, 985 (1988). Akhil Amar argues that "the Ninth does not sensibly incorporate in any refined way," but it doesn't matter because any rights prohibited by the Ninth Amendment against federal encroachment are protected against state encroachment by the Privileges or Immunities Clause. AMAR, *supra* note 7, at 280.

(although his argument is carefully nuanced),[156] and Kurt Lash has taken the position that it depends:

> If the rule of construction of the Ninth Amendment was understood as a personal rights guarantee at the time of the adoption of the Fourteenth Amendment, then the new understanding of the Clause is as capable of being incorporated against the states as is freedom of speech or any other personal freedom listed in the Bill of Rights.[157]

The most we can say at this time is that the Court has cited the Ninth Amendment in support of unenumerated rights held against the states and the federal government; those rights are congruent. If the Court chooses to go down that path again, it may have to explain how the Ninth Amendment applies to the states, incorporation being one open theory.

B. Beyond the Bill of Rights

1. The Suspension Clause

In August 1787, the Constitutional Convention considered the following proposition: "The privileges and benefit of the Writ of Habeas corpus shall be enjoyed in this Government in the most expeditious and ample manner; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding [ ] months."[158] The proposal

156. Professor Barnett does not argue that the Ninth Amendment is incorporated in any formal sense but advocates that the Privileges or Immunities Clause granted the federal government "jurisdiction to protect the unenumerated retained natural rights of the people for infringement by state governments." Barnett, *supra* note 133, at 15; *see* Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 41–42 (1988); *see also* Thomas K. Landry, *Unenumerated Federal Rights: Avenues for Application Against the States*, 44 FLA. L. REV. 219 (1992) (suggesting unenumerated rights are protected against the states through incorporation of the Ninth Amendment through the Privileges or Immunities Clause); Massey, *supra* note 129, at 1251; Sanders, *supra* note 135, at 777; Eugene M. Van Loan III, *Natural Rights and the Ninth Amendment*, 48 B.U. L. REV. 1, 23–24 (1968).

157. Lash, *The Lost Jurisprudence*, *supra* note 140, at 645; *see* Lash, *A Textual-Historical Theory*, *supra* note 137, at 922–23. *See also* MASSEY, *supra* note 154, at 133–34 (discussing implications of incorporation of the Ninth Amendment).

158. 2 FARRAND, *supra* note 108, at 341. The proposal was, nearly word-for-word, taken from the Massachusetts Constitution. MASS. CONST. OF 1780 pt. 2, ch. VI, art. VII. Article II of the Northwest Ordinance, adopted in July 1787, provided that "[t]he inhabitants of the said territory shall always be entitled to the benefits of *habeas corpus* . . . ." An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, art. II, (July 17, 1787), *reprinted in* 1 Stat. 50, 52 (1789).

was amended to its present form in Article I, Section 9: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[159]

The Suspension Clause was adopted against a background of English experience with suspension of the privilege, a common law right to habeas, and guarantees secured by state constitutions. In 1787, four states—North Carolina, Georgia, Massachusetts, and New Hampshire—affirmatively guaranteed the right to seek habeas.[160] As new states entered the union, all adopted a provision similar, if not identical, to the Suspension Clause, and by 1868 all the states had some kind of constitutional provision securing the writ.[161]

Despite the broad consensus over the importance of the Great Writ, the Suspension Clause has spawned an extraordinary amount of debate.[162] To begin, we remain unsure of the most fundamental question—whether the Suspension Clause recognizes a pre-existing common-law right to seek habeas relief, or whether Congress must create such a remedy.[163] We are not entirely clear whether the Framers contemplated that *state* courts might issue the writ on behalf of *federal* prisoners,[164] whether *federal* courts (in the

159. U.S. CONST. art. I, § 9, cl. 2. *See* 2 FARRAND, *supra* note 108, at 435; 2 ELLIOT'S DEBATES, *supra* note 85, at 484.

160. Dallin H. Oaks, *Habeas Corpus in the States – 1776–1865*, 32 U. CHI. L. REV. 243, 247 (1965); *see also* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1971 n.15 (2020) ("'There is widespread agreement that the common-law writ of *habeas corpus* was in operation in all thirteen of the British colonies that rebelled in 1776.'") (quoting James Oldham & Michael J. Wishnie, *The Historical Scope of Habeas Corpus and* INS v. St. Cyr, 16 GEO. IMMIGR. L.J. 485, 496 (2002)).

161. Oaks, *supra* note 160, at 248–49.

162. *See Thuraissigiam*, 140 S. Ct. at 1969 n.12 ("The original meaning of the Suspension Clause is the subject of controversy.").

163. *See Ex Parte* Bollman, 8 U.S. (4 Cranch) 75, 94–95 (1807) (suggesting that without legislation, "the privilege itself would be lost, although no law for its suspension should be enacted"). In *INS v. St. Cyr*, Justice Scalia argued that "[a] straightforward reading of [the Suspension Clause] discloses that it does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended." 533 U.S. 289, 337 (2001) (Scalia, J., dissenting). Most recently, the Court refused to "revisit that question." *Thuraissigiam*, 140 S. Ct. at 1969 n.12; *see also id.* at 1997 n.1 (Sotomayor, J., dissenting) ("The Court wisely declines to explore whether the Suspension Clause independently guarantees the availability of the writ or simply restricts the temporary withholding of its operation, a point of disagreement between the majority and dissent in [*St. Cyr*] . . . . [N]o majority of this Court, at any time, has adopted that theory.").

164. In *Tarble's Case*, the Court answered "no." 80 U.S. (13 Wall.) 397 (1872). *See also* Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).

absence of legislation) could issue the writ on behalf of *state* prisoners,[165] or even whether *federal* courts could issue the writ on behalf of *federal* prisoners. And once we get over the question of whether the writ is implied in the Constitution, we are not even clear as to *who* has the right to declare an emergency and suspend the right.[166] And once we know who can suspend the writ, the question remains, is the suspension only effective against *federal* habeas, or does it act to suspend *state* habeas as well.[167]

These questions are interesting and consequential, but they are largely beyond this Article's present purposes. To the extent these questions might touch the question of incorporation, the larger questions surrounding habeas corpus have been mooted by broad congressional legislation guaranteeing a federal forum for state prisoners seeking habeas.[168] Nevertheless, for our purposes, we should consider one narrow question remaining in these debates: Given that the states have secured a habeas remedy in their own constitutions, may they suspend it on terms different from those provided in the Suspension Clause—only "when in Cases of Rebellion or Invasion the public Safety may require it"? Indeed, most of the states now have a provision *identical* to the Suspension Clause. What would be the purpose of declaring the

165. The issues on this question are well laid out in Lee Kovarsky, *Prisoners and Habeas Privileges Under the Fourteenth Amendment*, 67 VAND. L. REV. 609 (2014), and Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862 (1994). *See also* Eric M. Freedman, *Milestones in Habeas Corpus, Part I—Just Because John Marshall Said It, Doesn't Make It So:* Ex Part Bollman *and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531 (2000).

166. The question of *who* had the right to suspend the writ was the subject of the great debate between Chief Justice Roger Taney and President Abraham Lincoln over *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487). *See* Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Interpretation*, 15 CARDOZO L. REV. 81 (1993).

167. *See* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 COLUM. HUM. RTS. L. REV. 555, 596–604 (2002).

168. Most notably, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See* 28 U.S.C. § 2254(a) (1996) (authorizing "The Supreme Court, a Justice thereof, a circuit judge, or a district court [to] entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."). The post-Civil War Habeas Corpus Act of 1867 previously granted courts of the United States "power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

Suspension Clause incorporated against the states?[169] In two words, federal review. If the federal Suspension Clause applies to the states, then the federal courts may decide whether there are sufficient grounds for its suspension, irrespective of a state supreme court's decision under the suspension clause in the state constitution.

Although there is an argument to be made for incorporation of the Suspension Clause,[170] there is some history here, albeit mercifully short. The Court has held that the Suspension Clause " is not restrictive of state, but only of national, action."[171] That declaration has been generally accepted, except by Justice Douglas, who as Circuit Justice was "incline[d] to the view that this prohibition applies to the States as well as to the Federal Government."[172] Thus, while there is room for congruence here, the need is not evident and the Court, so far, has not been inclined to declare the Suspension Clause incorporated against the states. So long as we have a comprehensive habeas review through laws such as AEDPA, it seems unlikely the Court will extend the incorporation doctrine to the states.[173]

169. Professor, later Judge, Pollack observed years ago that the availability of *statutory* federal review of state confinement makes it "[un]likely that the Court would presently accept the rather elaborate argument that the Fourteenth Amendment retroactively inflated the scope of the constitutional privilege to include the newly created federal rights to protection against state action." Louis H. Pollack, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 64 (1956).

170. *See, e.g.*, AMAR, *supra* note 7, at 175–77; 2 CROSSKEY, *supra* note 7, at 1129; Michael Kent Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89, 120 (1982); Wildenthal, *The Road to* Twining, *supra* note 7, at 1526.

171. Gasquet v. Lapeyre, 242 U.S. 367, 369 (1917).

172. California v. Alorcha, 86 S. Ct. 1359, 1361 (1966) (Douglas, J., sitting as Circuit Justice).

173. If the Court were to take it up, the Court would have to confront the question whether the Due Process Clause or the Privileges or Immunities Clause would be the appropriate vehicle for incorporation. *See* McDonald v. Chicago, 561 U.S. 742, 851 n.20 (2010) (Thomas, J., concurring in part and concurring in the judgment) ("I see no reason to assume that the constitutionally enumerated rights protected by the Privileges or Immunities Clause should consist of all the rights recognized in the Bill of Rights and no others. Constitutional provisions outside the Bill of Rights protect individual rights, see, *e.g.*, Art. I, § 9, cl. 2 (granting the 'Privilege of the Writ of Habeas Corpus'), and there is no obvious evidence that the Framers of the Privileges or Immunities Clause meant to exclude them."*); compare also* Kovarsky, *supra* note 165 (arguing that state prisoners have a right to federal habeas review under the Privileges or Immunities Clause) *with* Steiker, *supra* note 165 (arguing that state prisoners have a right to federal habeas review under the Due Process Clause).

2. The Ports Preference Clause

The Ports Preference Clause forbids preference "by any Regulation of Commerce or Revenue to the Ports of one State over those of another."[174] Under the rule of *Barron*, the location of the Ports Preference Clause in Article I, Section 9, clearly signaled that the restriction bound the federal government, principally Congress and the Executive; the only branches who could adopt a "regulation of Commerce or Revenue."[175]

Nevertheless, at the first opportunity, the Supreme Court applied the Ports Preference Clause to the states. In the *Passenger Cases*,[176] the Court, in a 5-4 decision that produced eight opinions, invalidated laws from New York and Massachusetts. The New York statutes authorized the health commissioner to collect $1.50 for each person arriving from a foreign port and $0.25 for each person arriving from within the United States. With certain exceptions for vessels arriving from New Jersey, Connecticut, and Rhode Island, the monies were collected to go to a marine hospital.[177] The Massachusetts statute required the collection of $2.00 for each alien arriving on a vessel, to be collected "for the support of foreign paupers."[178] Justice McLean cited the Ports Preference Clause together with the Duties and Imposts Clause of Article I, Section 8, which requires that any "Duties, Imposts and Excises" enacted by Congress "be uniform throughout the United States."[179] The justice observed that it was "contended, these provisions of the Constitution operate only on the Federal government," but pointed out that if equality and uniformity of treatment at the ports was the goal, so long as "the States are free to regulate commerce by taxing its operations in all cases where they are not expressly prohibited, the Constitution has failed to accomplish the great object of those who adopted it."[180]

174. U.S. CONST. art. I, § 9, cl. 6.

175. The original proposal, which was lengthy, referred repeatedly to prohibitions on "the Legislature of the United States." 2 FARRAND, *supra* note 108, at 410 (August 25, 1787).

176. The Passenger Cases, 48 U.S. (7 How.) 283 (1849).

177. *Id.* at 392–93.

178. *Id.* at 409.

179. U.S. CONST. art. I, § 8, cl. 1.

180. The Passenger Cases, 48 U.S. (7 How.) at 405–06 (opinion. of McLean, J.).

Justice Wayne concurred. He declared the Ports Preference Clause

> a limitation upon the power of Congress to regulate commerce for the purpose of producing entire commercial equality within the United States, and also a prohibition upon the States to destroy such equality by any legislation prescribing a condition upon which vessels bound from one State shall enter the ports of another State.[181]

McLean's and Wayne's arguments did not read the Ports Preference Clause as a *direct* regulation on the states, because that would have required them to concede that the states had the power to regulate such commerce arriving in their ports. Their arguments today would be better characterized as sounding in the dormant commerce clause.

Two years later, in *Cooley v. Board of Wardens*,[182] the Court upheld a Pennsylvania statute that collected a pilotage fee for vessels failing to employ a local pilot. This time a majority held that the provision did not violate the Ports Preference Clause, because "Pennsylvania does not give a preference to the port of Philadelphia, by requiring [the pilotage fee]."[183] The Ports Preference Clause was cited in *Crandall v. Nevada* in support of a right to interstate travel.[184]

Neither the *Passenger Cases*, *Cooley*, nor *Crandall* gave careful consideration to the Ports Preference Clause argument, although opinions in all three cases assumed that it applied to the states.[185] The Court corrected course nine years after *Crandall*, without comment on its previous position. The argument that the Ports Preference Clause bound the states was "disposed of by the single

181. *Id.* at 414 (opinion of Wayne, J.). *See also id.* at 420 ("[The Ports Preference Clause] was intended to establish among [the states] a perfect equality in commerce and navigation. That all should be alike, in respect to commerce and navigation, is an enjoined constitutional equality, which can neither be interrupted by Congress nor by the States."); Williams v. The Lizzie Henderson, 29 F. Cas. 1373, 1374 (S.D. Fla. 1880) ("[The Ports Preference Clause] has been frequently commented upon in judicial decisions, and held to be not a limitation upon the power of congress alone in regulating commerce, for the purpose of producing entire commercial equality between states, but also a prohibition upon each state to destroy such equality.").

182. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1852).

183. *Id.* at 314–15.

184. Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 43–44 (1868). *See also id.* at 48 (citing the *Passenger Cases*).

185. *See* CURRIE, *supra* note 116, at 229 (characterizing the argument in the *Passenger Cases* as "transparently flimsy").

remark that this provision operates only as a limitation of the powers of Congress, and in no respect affects the States in the regulation of their domestic affairs."[186] The Court regards the clause as reinforcing the requirement that duties, imposts and excises be uniform,[187] and the clause is sparingly cited today.[188] The Ports Preference Clause is thus, despite its history, an unlikely candidate for future incorporation.

3. The Treason Clauses

The Treason Clauses consist of three distinct provisions. First, Article III, Section 3 defines treason against the United States as "levying War . . . adhering to their Enemies, giving them Aid and Comfort"; second, it supplies a burden of proof: "two Witnesses to the same overt Act"; and third, Article III grants Congress the "Power to declare the Punishment of Treason," but limits the punishment so that "no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."[189] The path to the Treason Clauses was an interesting one. In June 1776, the Continental Congress, in anticipation of a declaration of independence, urged the colonies to enact treason laws, which all but Georgia did.[190] The Articles of Confederation did not contain a treason provision, but provided that fugitives "guilty of, or charged with, treason . . . in any state" could be extradited.[191] Once the Framers convened in Philadelphia in 1787, Charles Pinckney proposed that Congress be granted "the Power to declare the Punishment of Treason."[192] An early draft from the Committee of Detail proposed that Congress be granted

186. Munn v. Illinois, 94 U.S. 113, 135 (1877). *See also* Johnson v. Chi. & Pac. Elevator Co., 119 U.S. 388, 400 (1886); Morgan's Steamship Co. v. La. Bd. of Health, 118 U.S. 455, 467 (1886).

187. Knowlton v. Moore, 178 U.S. 41, 106 (1900).

188. *See*, *e.g.*, United States v. Lopez, 514 U.S. 549, 587 (1995) (Thomas, J., concurring); Ala. Great S. R.R. Co., v. United States, 340 U.S. 216, 229 (1951); Thompson Multimedia, Inc. v. United States, 340 F.3d 1355, 1364–66 (Fed. Cir. 2003); Nevada v. Watkins, 914 F.2d 1545, 1557–58 (9th Cir. 1990).

189. U.S. CONST. art. III, § 3, cls. 1–2. Congress is granted express power to punish two other crimes. Unlike the Treason Clauses, Congress can "provide for the Punishment of counterfeiting" and "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." *Id.* art. I, § 8, cls. 6, 10.

190. *See* JAMES WILLARD HURST, THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS 83–84, 116–17 n.35 (1971).

191. ARTICLES OF CONFEDERATION of 1781, art. IV, para. 2.

192. 3 FARRAND, *supra* note 108, at 598.

"the exclusive Power of declaring what shall be Treason."[193] Later drafts produced a proposal similar to our Treason Clauses, omitting the term "exclusive" and making treason against any state punishable by the United States.[194] Nevertheless, the Framers divided over whether there "could be no Treason agst a particular State."[195] Others granted that the United States as a whole had a greater interest in punishing treason, but argued that there might "resistence agst the laws of a particular State."[196] In the end, the Framers agreed not to give Congress the sole power to punish treason, but defined "Treason against the United States" as "levying war against them,"[197] thus making clear that "resistance agst. The laws of the U- States as distinguished from resistance agst the laws of a particular State, forms the line."[198] Over time, every state except Hawaii has enacted some form of treason clause, although only forty-three currently have such a provision; many have provisions identical or nearly identical to the Federal Treason Clauses.[199] There have, however, been relatively few prosecutions under the state provisions.[200]

Post-Civil War, treason is rarely charged, although there has been some renewed interest after 9/11.[201] In part, Congress has supplanted the Treasons Clause by enacting statutes that punish disloyal acts against the United States, such as espionage.[202] Convictions under these statutes are easier because the prosecution

193. 2 FARRAND, *supra* note 108, at 136.

194. *Id.* at 182 ("Treason against the United States shall consist only in levying war against the United States, or any of them.").

195. *Id.* at 347 (statement of William Samuel Johnson). *Compare id.* at 345 (statement of Gouverneur Morris) (favoring "giving to the Union an exclusive right to declare what shd. be treason"), *with id.* at 346 (statement of James Madison) (observing that under the proposal "the individual States wd. be left in possession of a concurrent power to far as to define & punish treason particularly agst. Themselves.").

196. *Id.* at 349 (statement of Roger Sherman).

197. *Id.* at 349 (describing the votes). When the amended proposal went to the Committee of Style, it was paired with restrictions on bills of attainder and ex post facto laws. *See id.* at 571. The Committee of Style separated the two, placing the Bill of Attainder and Ex Post Facto Clauses in Article I, § 9, and the Treason Clauses in Article III. *Id.* at 596, 601.

198. *Id.* at 349 (statement of Roger Sherman).

199. *See* J. Taylor McConkie, *State Treason: The History and Validity of Treason Against Individual States*, 101 KY. L.J. 281, 292–94 (2012) (listing state provisions).

200. *See id.* at 300–14 (discussing the history of state treason prosecutions); Alexander Gouzoules, *Dual Allegiance: Federal and State Treason Prosecutions, the Treason Clause, and the Fourteenth Amendment*, 53 IND. L. REV. 593, 603–09, 622–23 (2020).

201. *See generally* Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863 (2006).

202. *See*, *e.g.*, 18 U.S.C. §§ 793–94.

is not bound by the two-witnesses provision and can charge conspiracies, not just overt acts.[203]

Given the rarity of federal or state treason prosecutions, the opportunity for the Supreme Court to confront the incorporation of the Treason Clauses appears remote. The English origins of the treason provisions, however, are deep,[204] and if the Court were disposed, it should have little difficulty finding that Article III's provisions are "fundamental."[205] There has been renewed academic interest in the Treason Clauses and a call for them to be incorporated so as to bind state prosecutions for treason.[206] What kind of case would serve as the vehicle for such a move? There are two likely scenarios. First, if the state's own treason clause departs in any material way from the Constitution's Treason Clauses.[207] So, for example, if the state did not require two witnesses or defined treason to permit a treason charge based on conspiracy.[208] Second, even if a state had an identical treason clause, the Court's incorporation principles allow it to second-guess state courts in their construction of identical provisions.[209] Incorporation would give the Court the last word over all treason convictions.

4. The Test Oath Clause

Article VI, Clause 3 provides that executive, judicial, and legislative officers "both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[210] The first part of the Clause thus requires an oath or affirmation from U.S. and state officials, but the second part of the Clause—the No Religious Test provision—only restricts qualifications on persons holding office or

203. *See Ex Parte* Bollman, 8 U.S. (4 Cranch) 75, 127 (1807).
204. *See* HURST, *supra* note 190, at 14–67.
205. McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).
206. *See* Gouzoules, *supra* note 200, at 629–32.
207. *See* McConkie, *supra* note 199, at 293–96 (noting differences).
208. *See* Gouzoules, *supra* note 200, at 631–32.
209. There may be a broader application of portions of the Treason Clause to reinforce equal protection principles applied to illegitimacy. *See generally* Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727 (1992).
210. U.S. CONST. art. VI, cl. 3.

public trust under the United States.[211] At the time the Constitution was drafted, most American states imposed some kind of religious test, requiring state officials to be Protestants, to swear their belief in the Holy Trinity or the New Testament, or to disavow their allegiance to Rome.[212] In a constitution that did not contain an Establishment Clause or a Free Exercise Clause, the No Religious Test Clause was the only clause in the Constitution expressly referring to "religion."[213]

The No Religious Test Clause has been cited by the Court several times,[214] but it has never been the basis for a decision. It came close in *Torcaso v. Watkins*,[215] when the Court considered a no religious test clause in the Maryland Constitution, but one that required "a declaration of belief in the existence of God."[216] The Court declined to decide whether the No Religious Test Clause applied.[217] Instead, the Court found the test oath "abhorrent to our tradition" and cited the First Amendment as breaking "new constitutional ground in the protection it sought to afford to freedom of religion."[218] The Court concluded that "neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.'"[219] The Court was not entirely clear whether the Maryland clause violated one or more of

211. Justice Thomas has argued that "The Framers' prohibition on state-imposed religious disqualifications for Members of Congress suggests that other types of state-imposed disqualifications are permissible." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 903–04 (1995) (Thomas, J., dissenting). *See also Ex Parte* Garland, 71 U.S. (4 Wall.) 333, 355 (1867).

212. *See* Note, *An Originalist Analysis of the No Religious Test Clause*, 120 HARV. L. REV. 1649, 1651–52 & n.16 (2007). *See also U.S. Term Limits*, 514 U.S. at 825 n.35; Gerard v. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 681–83 (1986).

213. Two other sections of the original Constitution implicitly invoke religion. The presidential oath, like the oath required of other state and federal officials, permits the president to swear an oath or affirm, affirmation being an accommodation to Quakers. U.S. CONST. art. II, § 1, cl. 8. Following Article VII there is a recitation that the Constitution was "Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven . . . ."

214. *E.g.*, Cole v. Richardson, 405 U.S. 676, 681 (1972); Girouard v. United States, 328 U.S. 61, 65 (1946).

215. Torcaso v. Watkins, 367 U.S. 488 (1961).

216. *Id.* at 489.

217. *Id.* at 489 n.1 ("Because we are reversing the judgment on other grounds, we find it unnecessary to consider appellant's contention that this provision applies to state as well as federal offices.").

218. *Id.* at 491–92.

219. *Id.* at 495 (citing Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947)).

the religion clauses, and it might easily have rested its decision on the Free Speech Clause (as compelled speech)[220] or even the constitutional conditions doctrine.[221]

No matter, Gerard Bradley argues that "*Torcaso*, if it is to be grasped at all, affects an 'incorporation' of article VI as much as if the Court expressly said so."[222] Bradley surely is correct and, unless the Court reverses course in its religion jurisprudence, the question whether the No Religious Test Clause is incorporated will be subsumed in other First Amendment provisions, which have already been incorporated against the states through the Due Process Clause.[223] Nevertheless, at least one federal court has found the question of incorporation of Article VI to be an open one,[224] and others have assumed *sub silentio* that the No Religious Test Clause applies to the states.[225] If an appropriate case presented itself, the Court would surely declare the No Religious Test Clause incorporated.

III. SKEPTICISM ABOUT INCORPORATION

In this Part, this Article evaluates the Court's current theory of incorporation from three perspectives. First, in Part III.A, it considers the textual basis for the Court's selective incorporation doctrine. Second, in Part III.B, it examines the challenge of the Court's congruence principles. The Article analyzes several examples where the Court's choice of a unitary rule results in under- or over-enforcement of the Constitution and suggests that the congruence principle has influenced the Court's choice of rules. Finally, in Part III.C, the Article asks what policies drive the Court's incorporation theory. It concludes that, although a unitary set of

220. *See* Wooley v. Maynard, 430 U.S. 705 (1977); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

221. *See* Speiser v. Randall, 357 U.S. 513 (1958).

222. Bradley, *supra* note 212, at 718. *See also* Wildenthal, *The Road to* Twining, *supra* note 7, at 1526 (arguing that "[f]or most practical purposes" the Test Oath Clause was incorporated through *Torcaso*).

223. *See* McDaniel v. Paty, 435 U.S. 618 (1978). In *McDaniel*, the Court struck down a Tennessee statute prohibiting ministers from serving as legislators. There is no majority opinion for the Court. Four justices thought that the restriction violated the Free Exercise Clause. *Id.* at 626–27 (plurality opinion of Burger, C.J.). Three justices thought that *Torcaso* supplied the rule. *Id.* at 632 (Brennan, J., concurring); *id.* at 642–43 (Stewart, J., concurring).

224. Habecker v. Town of Estes Park, 452 F. Supp. 2d 1113, 1129 (D. Colo. 2006) ("[W]hether Article VI applies to the states through the Fourteenth Amendment is an unsettled question under the law."), *aff'd*, 518 F.3d 1217 (10th Cir. 2008).

225. *See* Cochran v. City of Atlanta, 289 F. Supp. 3d 1276, 1303 (N.D. Ga. 2017); Martinez v. Clark County, 846 F. Supp. 2d 1131, 1144 (D. Nev. 2012).

rules is convenient for the Court, the history of due process incorporation strongly suggests that, with each change, the Court acquires power over state and federal actors. Incorporation has altered both our federalism and our separation of powers.

A. Text: The Failure of Theory

One hundred and fifty-five years after the end of the Civil War, we are still trying to figure out whether the Fourteenth Amendment incorporates the Bill of Rights and, if so, which provisions. That is both surprising and troubling. And the prospects for coherence are not good, as the Court does not have a theory of incorporation that will withstand even modest scrutiny.

The Court's absorption theory survived for half a century, in part because it demanded so little of the text. Absorption had its roots in substantive due process—an "ordered liberty"[226]—but unlike the Court's "liberty of contract,"[227] the absorption of the Bill of Rights was more disciplined because incorporation was at least loosely tied to the constitutional text. It was also federalism-friendly. Although it required the states to conform to a broad set of norms, it gave the states room to maneuver; it respected the states' own constitutions and statutes—what the Court in *Hurtado* called "the best ideas of all systems and of every age."[228] States were free to experiment, for example, with non-unanimous juries, jury size, and an exclusionary rule, or not, so long as they observed the broad traditions of the common law. The Court understood that a written Bill of Rights was a stricter set of rules for the federal government than the Due Process Clause was for the states.

When the Supreme Court moved to jot-for-jot incorporation, the Court assumed responsibility for a more rigorous theory of incorporation. We did not get one. The Court's current theory, which saw its most careful exposition in *McDonald*, is that if the Court determines the *right* is fundamental, then the *provision* in the Bill of Rights, jot-for-jot, is applicable to the states.[229] That is not a theory of interpretation; it is a description of what the Court has called "selective incorporation." It may feel like a cleaner result than the Court's fifty-year dance with the two-track theory of

226. Palko v. Connecticut, 302 U.S. 319, 325 (1937).
227. Adair v. United States, 208 U.S. 161, 174 (1908).
228. Hurtado v. California, 110 U.S. 516, 531 (1884).
229. McDonald v. City of Chicago, 561 U.S. 742, 765 (2010).

absorption, but it is much less intellectually satisfying. The rigor with which the Court now enforces the Bill of Rights demands from the Court an explanation for how, precisely, the Fourteenth Amendment incorporates the Bill of Rights, word-for-word. No explanation has been forthcoming, and the congruence principle may be convenient for the Court, but it is not itself a theory of how the Bill of Rights and the Fourteenth Amendment fit together.

The Court has yet to articulate why some provisions of the Bill of Rights apply word-for-word and why other provisions do not apply at all. It cannot be true that the Grand Jury Clause, the Civil Jury Clause, and the Re-Examination Clause are not "fundamental." Their English bona fides cannot be disputed. And we should not accept the Court's explanation that those clauses are not incorporated because those decisions "predate the era of selective incorporation."[230] That fact did not save any other provisions in the Bill of Rights from incorporation. The Court overruled dozens of cases to get to its current position on incorporation of the Bill of Rights; and, in the last decade, it has decided that three additional provisions of the Bill of Rights are incorporated.[231] That is a serious investment of the Court's capital. The Grand Jury and Civil Jury Clauses may be costly and inconvenient for the states to adopt, but inconvenience to the states was never a rule of decision for the Due Process Clause. Moreover, if the Due Process Clause of the Fourteenth Amendment requires incorporation of fundamental rights, the Court may have to confront provisions found outside the Bill of Rights—notably, the Suspension Clause, the Treason Clauses and maybe even the lowly Ports Preference Clause.

Incorporation through the Due Process Clause resists a plausible explanation. There are far more sensible means for making the Bill of Rights and other provisions applicable to the states. Incorporation by reference is common in statutes, contracts, pleadings, and briefs. It is shorthand for acknowledging that things previously covered are incorporated as if repeated verbatim. Incorporating the Bill of Rights would have been mechanically simple and would have given us the precision we should expect

230. *McDonald*, 561 U.S. at 765 n.13.

231. *See supra* note 52, and accompanying text; Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (Sixth Amendment guarantee of a unanimous jury); Timbs v. Indiana, 139 S. Ct. 682 (2019) (Eighth Amendment's Excessive Fines Clause); *McDonald*, 561 U.S. 742 (Second Amendment).

from a written document. The Fourteenth Amendment might have provided, for example, that "amendments III through VII shall apply to the states."[232] The Constitution is self-referential when it has to be and that would have been an easy way to indicate which amendments were incorporated and which were not.[233] Or, mimicking Article I, Section 10, the Fourteenth Amendment might have stated "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens set forth in amendments I through VIII." Or, to be perfectly didactic, the Fourteenth Amendment could have repeated verbatim the amendments of the Bill of Rights the states were to observe—just as the Framers of the original Constitution did when they duplicated the Bill of Attainder, Ex Post Facto, and Title of Nobility Clauses in Article I, Sections 9 and 10.[234] Such simple mechanisms would have avoided much confusion. The Framers of the Fourteenth Amendment could have clarified whether qualifications to common law rights, such as the twenty-dollar provision in the Civil Jury Clause, were to apply to the states as well. Such attention to technical detail is not too much to expect from the Framers of the Fourteenth Amendment, who consciously copied the phrase "Privileges and Immunities" from the Comity Clause of Article IV and the Due Process Clause from the Fifth Amendment[235] and decided against making the nondiscrimination principle

232. The Eleventh Amendment, for example, leaves no doubt that it was amending Article III. *Compare* U.S. CONST. art. III, § 2, cl. 1 ("The Judicial Power shall extend to all Cases, in law and Equity . . . ."), *with id.* amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). Similarly, Section 2 of the Fourteenth Amendment repeals the three-fifths compromise by mimicking its language in such a way that no one could mistake. *Compare* U.S. CONST. art. I, § 2 ("Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . three fifths of all other Persons"), *with id.* amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . .").

233. U.S. CONST. amend. XXI ("The eighteenth article of amendment of the Constitution of the United States is hereby repealed.").

234. An early proposal by Representative John Bingham would have added a Takings Clause to the Fourteenth Amendment. Bingham proposed adding "nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation." BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 85 (1914).

235. *See* CONG. GLOBE, 42d Cong., 1st Sess. 107 (1871) (statement of Rep. Bingham).

applicable to the United States.[236] Instead, we have been left to speculate over incorporation from a high-level of abstraction. For such a dramatic change in our constitutional structure, we have the right to demand more.

We can readily identify anomalies in the Due Process Clause theory. First, for reasons discussed, it is very difficult to draw a line from the Due Process Clause to jot-for-jot incorporation. No amount of interpretive handwringing can connect those points. Incorporation through absorption was an enterprising but plausible theory; jot-for-jot incorporation was audacious, justified by nothing more than the Court's own sense of what would be "incongruous."[237] Second, if the theory of selective incorporation is correct, we did not need a Bill of Rights, only a Due Process Clause. If the Due Process Clause is so capacious, then why was the federal Due Process Clause buried deep in the Fifth Amendment, and why does the states' Due Process Clause follow the Privileges or Immunities Clause? If everything is substantive due process, we might have just led off with two Due Process Clauses and saved everyone a lot of trouble. Whatever other criticism we might level at such substantive due process, it would at least bring us both substantive and textual congruence.

There are better theories available. Certainly, the Privileges or Immunities Clause offers a more coherent, plausible explanation for incorporation of the Bill of Rights, one that finds some support in the text and history of the Fourteenth Amendment.[238] But it comes with its own challenges. First, is the Privileges and Immunities Clause even about the Bill of Rights? The phrase "Privileges and Immunities" is a clear nod to the Privileges or Immunities Clause in Article IV, which, as a rule of comity, referred to rights conferred by state laws, not the federal Bill of Rights.[239]

236. The proposed section read "No discrimination shall be made by any State, or by the United States, as to the civil rights of persons, because of race, color or previous condition of servitude." KENDRICK, *supra* note 234, at 106.

237. Malloy v. Hogan, 378 U.S. 1, 11 (1964).

238. *See* McDonald v. City of Chicago, 561 U.S. 742, 805–58 (2010) (Thomas, J., concurring in part and concurring in the judgment) (advocating for incorporation through the Privileges or Immunities Clause).

239. *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868) ("It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. . . . [T]he privileges and immunities secured . . . are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws.").

If so, the Privileges or Immunities Clause is an equality provision, requiring the states to provide equal privileges and immunities to all citizens.[240] On the other hand, in the best Hohfeldian sense, our Bill of Rights can be accurately described as a "Bill of Privileges and Immunities,"[241] in which case the Privileges and Immunities Clause might be an appropriate vehicle for incorporating the Bill of Rights.[242] Assuming that this reading is plausible, a second question is whether we are prepared to acknowledge that the Privileges or Immunities Clause only applies to citizens, and not to persons generally?[243] Third, is all of the Bill of Rights incorporated, just the first eight amendments, or something less than the first eight amendments?[244] Fourth, if some or all of the Bill of Rights are incorporated, are they incorporated verbatim? Switching from a due process theory to a Privileges or Immunities Clause theory does not necessarily solve the jot-for-jot dilemma. As John Harrison has explained:

> Incorporation under the Privileges or Immunities Clause turns on whether the definition of a right of distinctively national citizenship includes its label. If we read it with the label on, the First Amendment creates a right to be free from congressional abridgments of freedom of speech. If we read it without the label, the First Amendment protects the freedom of speech.[245]

Fifth, is incorporation limited to the Bill of Rights, or are there other privileges and immunities in the Constitution, such as the Suspension Clause, encompassed as well?[246] What of other rights that the Court might identify as "fundamental," but were not reduced

240. *See generally* NELSON, *supra* note 7; John Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 YALE L.J. 1385 (1992). *See also* CURRIE, *supra* note 116, at 347–48; Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61 (2011).

241. *See* Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1552–55, 1606–10 (1995). *See also* Rosenkranz, *supra* note 15, at 1018–23.

242. *See* AMAR, *supra* note 7, at 32–34, 41–42; CURTIS, *supra* note 7.

243. *See* Hamburger, *supra* note 240, at 2 & n.4.

244. *See* AMAR, *supra* note 7, at 41–42, 219–23, 274–76 (proposing "refined incorporation" and suggesting that the Establishment Clause of the First Amendment, the Second Amendment, and the Seventh Amendment might not be incorporated).

245. Harrison, *supra* note 240, at 1466. Others have argued for a different kind of two-track theory, one that recognizes, for example, different views of the First Amendment as of 1789 as opposed to 1868. *See*, *e.g.*, LASH, *supra* note 7, at 299–303; Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729 (2008).

246. *See supra* note 165 (citing several leading articles on the Suspension Clause).

to text in the Constitution?[247] And finally, what is the date for determining our privileges and immunities? Is it 1791 when the Bill of Rights became effective, or 1868, when the Fourteenth Amendment was adopted, or some other date?[248]

These are difficult questions, and the academic debates are sophisticated and detailed—and could have been avoided by more careful drafting of the Fourteenth Amendment. And although the weight of modern scholarship now leans heavily in the direction of the Privileges or Immunities Clause as the mechanism for incorporation, the Court has shown little inclination to engage. On the current Court, Justices Thomas and Gorsuch have indicated they would re-examine the incorporation doctrine under the Privileges or Immunities Clause,[249] but they join a short list of justices who have been willing to explore it. Perhaps a coherent theory of incorporation is one more casualty of the *Slaughter-House Cases*.[250]

Resolving these intriguing and complicated questions is beyond the scope of the Article's present purpose. They are raised here only to emphasize that there are serious technical questions to be addressed with respect to incorporation. Regrettably, the Court has adopted a rote, mechanical formula for incorporation that no self-respecting lawyer would urge in the construction of a statute or an ordinary contract.

247. *See generally* Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499 (2019). *See also* Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 435–46 (2009).

248. *See* AMAR, *supra* note 7, at 223; Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1441 (2022) [hereinafter Lash, *Respeaking the Bill of Rights*] (proposing "[r]econceptualizing the doctrine of incorporation as involving a respeaking of the Bill of Rights" as of 1868). *See also* N.Y. St. Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2138 (2022) (declining to address the relevant date because "the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry."); *id.* at 2163 (Barrett, J., concurring) (similar).

249. *See*, *e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1423–24 (2020) (Thomas, J., concurring in the judgment) ("Due process incorporation is a demonstrably erroneous interpretation of the Fourteenth Amendment."); Timbs v. Indiana, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring).

250. *See* Newsom, *supra* note 7, at 650 (advocating for a "concededly unorthodox . . . understanding of *Slaughter-House*," one that "would permit courts to lay aside the historically confused and semantically untenable doctrine of 'substantive due process,' a doctrine that has for years visited suspicion and disrepute on the judiciary's attempt to protect even textually specified constitutional freedoms, such as those set out in the Bill of Rights, against state interference.").

B. Structure: The Over– and Under–Enforcement Problem

Notwithstanding the lack of a credible theory of incorporation, for the most part we have enthusiastically embraced it, acquiesced in it, or not noticed it. It is not too late to ask, aside from textual coherence, what has incorporation cost us? What might we have relinquished as we embraced congruence and blurred the lines between the powers of the federal government and the powers of the states?

For many of the incorporated provisions of the Constitution, congruence may or may not be textually coherent, but substantive congruence is harmless enough. The criminal procedure provisions of the Bill of Rights are broadly accepted.[251] Although incorporation cost us whatever innovation might come from "a single courageous State . . . serv[ing] as a laboratory [to] try novel social and economic experiments without risk to the rest of the country,"[252] we have made our accommodation with congruence. The republic neither flourished nor failed because we tolerated Louisiana and Oregon maintaining non-unanimous jury verdicts,[253] and it will probably flourish or fail in spite of the Court's decision in *Ramos*.[254] If, at some future date, the Court were to overrule its prior decisions and declare the Fifth Amendment's Grand Jury Clause[255] or the Seventh Amendment's Civil Jury Clause[256] incorporated as well, the states would have to make changes in their procedures, but the states as states would survive. There are other incorporated provisions of the Constitution, however, where there are embedded values where congruence may have undermined federalism in more significant ways.

251. *But see* Renee Lettow Lerner, *The Resilience of Substantive Rights and the False Hope of Procedural Rights: The Case of the Second Amendment and the Seventh Amendment*, 116 NW. U. L. REV. 275, 302 (2021) (arguing that incorporation has contributed to the demise of the jury trial and the increase in plea bargaining).

252. New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *But see* Williams v. Florida, 399 U.S. 78, 138 (1970) (Harlan, J., dissenting in part and concurring in the result in part) ("It is time, I submit, for this Court to face up to the reality implicit in today's holdings and reconsider the 'incorporation' doctrine before its leveling tendencies further retard development in the field of criminal procedure by stifling flexibility in the states and by discarding the possibility of federal leadership by example.").

253. Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).

254. Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

255. *See* Hurtado v. California, 110 U.S. 516 (1884).

256. *See* Walker v. Sauvinet, 92 U.S. 90 (1875).

The general theory of incorporation posits that the rights held against the federal government in the Bill of Rights were made applicable to the states through the Fourteenth Amendment. That is, the theory is that there is a body of known, existing rights that may be profitably applied to the states. The Bill of Rights proves the existence of the rights, but what is their substance? As of 1868, no clause of the First Amendment had been construed by the Supreme Court.[257] Nor had the Second Amendment.[258] Indeed, the body of Supreme Court law attributable to the Bill of Rights was quite modest in 1868.[259] What did the Framers of the Fourteenth Amendment think they were making applicable to the states? A body of existing law, or whatever rules the Supreme Court ultimately devised? What of provisions in the Bill of Rights that have embedded federalism values? Do the provisions of the Bill of Rights incorporate fully, in modified form, or not at all? These questions, of course, are core to the textual questions raised in the prior section.

More significantly, if at the adoption of the Fourteenth Amendment the Supreme Court did not have a body of developed law for any particular clause in the Bill of Rights, might the doctrine of incorporation affect the choice of the substantive rule?[260] Or, to phrase the question differently, might incorporation skew the choice of the substantive rule if the Court knows that the rule must apply equally to federal and state governments, and not just to the federal government alone under the rule of *Barron*? The problem was well framed by Justice Jackson: finding a congruent rule "would lead to the dilemma of either confining the States as closely as the Congress or giving the Federal Government the latitude

257. The Court's first case of any substance addressing any provision of the First Amendment was *Reynolds v. United States*, 98 U.S. 145 (1878). The Supreme Court did not hold any federal law unconstitutional under the First Amendment until *Lamont v. Postmaster General*, 381 U.S. 301 (1965), and by that time the Court had a well-established body of cases involving the states. *See* Stern, *supra* note 7, at 1516 & n.95.

258. The Court's first case dealing with federal firearms regulations was *United States v. Miller*, 307 U.S. 174 (1939).

259. *See* CURRIE, *supra* note 116, at 439 ("[A]part from an occasional due-process objection, very few federal actions were challenged in the Supreme Court as offending provisions of the first eight amendments during the first hundred years.").

260. There are some scholars, prominently Kurt Lash, who argue that was precisely the purpose of the Privileges or Immunities Clause—to recreate the Bill of Rights as of 1868 and make it applicable to the states and the federal government. *See* Lash, *Respeaking the Bill of Rights*, *supra* note 248.

appropriate to state governments."[261] Jackson was speaking from a position within the absorption tradition—one that avoided the problem by giving the states greater leeway under the Due Process Clause than the federal government under the particulars of any given clause in the Bill of Rights.

For many of the clauses within the Bill of Rights, the substance of the right was developed first in state cases and later applied to the federal government. That should prompt an important question: Is the substantive rule path-dependent? Did rights develop differently in state cases than they would have in federal cases? Jot-for-jot incorporation guaranteed that rights held against the states and rights held against the federal government would be *congruent* rights, but did we end up with the right set of rules? It is going to be difficult to answer that counterfactual with any certainty, but we have several examples to tease us.

Our first example is the Establishment Clause. The First Amendment developed almost exclusively in the context of states and, in general, the Court's First Amendment "approach toward states [has been] more searching, not less."[262] At the framing of the First Amendment, there were well-developed, different visions of what was the proper relationship between government and religion.[263] The Framers made no attempt to reconcile those views or to enshrine substantive law in the Establishment Clause. Rather, the Framers punted the question, by getting Congress—and, derivatively, the federal courts—out of the

261. Beauharnais v. Illinois, 343 U.S. 250, 294 (1952) (Jackson, J., dissenting). *See also* Johnson v. Louisiana, 406 U.S. 356, 375 (1972) (Powell, J., concurring) ("In the name of uniform application of high standards of due process, the Court has embarked upon a course of constitutional interpretation that deprives the States of freedom to experiment . . . [and] has culminated in the dilution of federal rights"); Williams v. Florida, 399 U.S. 78, 136 (1970) (Harlan, J., dissenting in part and concurring in the result in part) (criticizing "a constitutional schizophrenia born of the need to cope with national diversity under the constraints of the incorporation doctrine"); Malloy v. Hogan, 378 U.S. 1, 16–17 (1964) (Harlan, J., dissenting) ("[jot–for–jot incorporation would result in] compelled uniformity . . . 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"). *See also* Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867–1873*, 18 J. CONTEMP. LEGAL ISSUES 153, 273–74 n.393 (2009).

262. Stern, *supra* note 7, at 1516.

263. *See generally* John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371 (1996) (contrasting puritanical and evangelical views with those of Enlightenment thinkers and civic republicans).

business of establishing or disestablishing religion.[264] Incorporation changed all of that. Instead of deciding that the Establishment Clause could not be incorporated against the states because it was a promise to the states,[265] the Court set about to create the law of the Establishment Clause, and it did so in the context of state cases, beginning in 1947 with *Everson v. Board of Education*.[266] Did we get the right rule? Or, as Justice Jackson warned us, has the Court over-enforced the Establishment Clause against the states and under-enforced the Establishment Clause against the federal government?[267] In light of the original purpose of the Establishment Clause as a promise to the states, the answer to Justice Jackson's question is "absolutely." If we only think of the Establishment Clause as a personal right, it is very difficult for us to know,[268] but the record of enforcement strongly suggests the possibility that the Court's rule has inverted the original purpose for the Establishment Clause. In the years following *Everson*, the Supreme Court has held a number of state laws unconstitutional under the Establishment

264. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring) ("Quite simply, the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right.").

265. *See* SMITH, *supra* note 47, at 49 ("By undertaking to review and regulate church-state relations at both the national and state levels, the federal judiciary necessarily committed itself to developing a substantive constitutional law for the subject. It would therefore be more accurate to say that this decision, far from 'incorporating' the religion clauses, effectively repudiated—and hence repealed—those clauses." (footnote omitted)). Indeed, Justice Brennan dismissed the origins of the Establishment Clause as "historical anachronism by 1868." Abington Sch. Dist. v. Schempp, 374 U.S. 203, 255 (1963) (Brennan, J., concurring).

There is quite a bit of scholarship dealing with the incorporation of the Establishment Clause. *See supra* note 47.

266. Everson v. Bd. of Educ., 330 U.S. 1 (1947). *See*, *e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971); Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970); Bd. of Educ. v. Allen, 392 U.S. 236 (1968); Sch. Dist. of Abington Twp., 374 U.S.; Engel v. Vitale, 370 U.S. 421 (1962); McGowan v. Maryland, 366 U.S. 420 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Zorach v. Clauson, 343 U.S. 306 (1952); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

267. In some of these cases, the Court invoked its obligation to defer to Congress. *E.g.*, Salazar v. Buono, 559 U.S. 700, 717 (2010); Bd. of Educ. of Westside Cmty. Schs. v. Mergens *ex rel.* Mergens, 496 U.S. 226, 250–51 (1990). It does not appear that there is any similar obligation with respect to the states.

268. The problem is compounded because the Court's own approach to the Establishment Clause has evolved, and dramatically so. *See*, *e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2002), *disapproving, in part*, Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Mitchell v. Helms, 530 U.S. 793, 835 (2000) (plurality opinion), *overruling* Wolman v. Walter, 433 U.S. 229 (1977), *and* Meek v. Pittenger, 421 U.S. 349 (1975); Agostini v. Felton, 521 U.S. 203, 235 (1997), *overruling* Aguilar v. Felton, 473 U.S. 402 (1985), *and* Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985).

Clause, but it has only held federal laws unconstitutional in two cases. In the first case, the unconstitutional provision was a minor one;[269] the second case was later overruled.[270] The Court has rejected Establishment Clause challenges in all other federal cases.[271] The Court has likely afforded more flexibility to the federal government than the states.

Our second example suggests that the over-enforcement problem may not be the states' burden alone. Linking the states and the federal government to a single standard may work against the federal government as well. In *Malloy v. Hogan*, the Court held that the states were bound by the Self-Incrimination Clause of the Fifth Amendment to "the same standard applied in federal prosecutions."[272] At the time that standard was "whether a confession is incompetent because not voluntary."[273] *Miranda* followed two years later. No longer would the Court consider whether the confession was voluntary; it would not be considered voluntary unless the police had affirmatively given the suspect notice of his constitutional rights and verified that he understood those rights.[274] The Court admitted that it "might not find the defendants' statements to have been involuntary in traditional terms,"[275] but that the Court's experience with the "inherently compelling pressures" of in-custody interrogation required formal notice to suspects.[276] The Court also admitted, however, that it had "had little occasion in the past quarter century to reach the

269. Tilton v. Richardson, 403 U.S. 672, 682–84 (1971) (severing as unconstitutional a provision that would have allowed a religious institution to use a government-subsidized facility for religious instruction after twenty years).

270. Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

271. *See*, *e.g.*, *Salazar*, 559 U.S. at 700; Cutter v. Wilkinson, 544 U.S. 709 (2005); Mitchell v. Helms, 530 U.S. 793 (2000); *Mergens*, 496 at 226; Bowen v. Kendrick, 487 U.S. 589 (1988); Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987); Gillette v. United States, 401 U.S. 437 (1971); Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965). *See also* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587 (2007); Flast v. Cohen, 392 U.S. 83 (1968).

There were brief references to the Establishment Clause in federal cases prior to Everson. See Quick Bear v. Leupp, 210 U.S. 50, 81–82 (1908); Bradfield v. Roberts, 175 U.S. 291, 297 (1899); Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States, 136 U.S. 1, 65–66 (1890). In none of these cases did the Court hold the federal laws unconstitutional.

272. Malloy v. Hogan, 378 U.S. 1, 7 (1964).

273. *Id.* (quoting Bram v. United States, 168 U.S. 532, 542 (1897)).

274. Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

275. *Id.* at 457.

276. *Id.* at 467.

constitutional issues in dealing with federal interrogations."[277] Its experience had come from some thirty-plus state cases on voluntariness it had decided pre-*Malloy*.[278] In other words, the Court was largely drawing from state cases decided not under the Fifth Amendment, but the Due Process Clause of the Fourteenth. The Court's "reliance on the Fifth Amendment," Justice Harlan said in dissent, was "*trompe l'oeil*."[279] *Miranda* had changed the substantive rule for the Self-Incrimination Clause in response to state cases, and then made the rule applicable to the federal government as well.[280]

Congress responded to *Miranda* two years later in the Omnibus Crime Control and Safe Streets Act of 1968 by enacting 18 U.S.C. § 3501, entitled "Admissibility of confessions." Section 3501 attempted to re-establish the voluntariness standard as the rule of decision in federal courts.[281] The statute was enforced inconsistently for thirty years,[282] until the Fourth Circuit resurrected it.[283] The Fourth Circuit held that *Miranda* was not a constitutional rule compelled by the Fifth Amendment, but a prophylactic rule subject to revision by Congress.[284] The Supreme Court reversed the Fourth

277. *Id.* at 463. In *McNabb v. United States*, federal officers had failed to take McNabb for prompt arraignment, as required by federal law. 318 U.S. 332, 344–45 (1943). *See* 18 U.S.C. § 595 (former version), current version re-promulgated as FED. R. CRIM. P. 5(a). *See* George H. Dession, *The New Federal Rules of Criminal Procedure: I*, 55 YALE L.J. 694, 706–14 (1946). The Court decided not to ascertain the Constitutional validity of McNabb's confession, but to treat it as an evidentiary matter. The Court said it had the authority to supervise the federal courts and "maintain[] civilized standards of procedure and evidence." *McNabb*, 318 U.S. at 340. It ordered the confessions excluded. *See also* Mallory v. United States, 354 U.S. 449, 452 (1957) (excluding confession obtained after "unnecessary delay" in presenting the defendant before a magistrate).

278. *Id.* at 507 (Harlan, J., dissenting). The cases started with *Brown v. Mississippi*, in the which the Court first held that it could review confessions obtained through torture (mock lynching and whipping), which were "clear denial[s] of due process." 297 U.S. 278, 286 (1936). *See id.* at 285–86 ("Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand.").

279. *Miranda*, 384 U.S. at 510 (Harlan, J., dissenting).

280. *Miranda* consolidated four cases. Three of the four were state cases (Arizona, California, and New York). The fourth was a federal case. *See Miranda*, 384 U.S. at 491–99.

281. *See* 18 U.S.C. § 3501(a) ("In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given.").

282. *See* Daniel Gandara, *Admissibility of Confessions in Federal Prosecutions: Implementation of Section 3501 by Law Enforcement Officials and the Courts*, 63 GEO. L.J. 305 (1974). *See also* United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975) (enforcing 18 U.S.C. § 3501).

283. United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000).

284. *See id.* at 680–93.

Circuit in *Dickerson v. United States*.[285] Notwithstanding various pronouncements that *Miranda* was not a constitutional rule,[286] the Court held that *Miranda* was a constitutional rule and declined to overrule it.[287] Accordingly, § 3501 was unconstitutional.[288]

Incorporation had put the Court in a bind.[289] The Court has the power to supervise proceedings in federal courts. But that power is subject to revision by Congress.[290] If *Miranda* was prophylactic, the Court had the power to impose *Miranda* as an evidentiary rule on the federal courts, but Congress could displace it with § 3501. But if the Court upheld § 3501, it would have conceded that *Miranda* was a rule of supervision, an evidentiary rule, not a constitutional rule. At a minimum, it would also admit that the states could also revise their procedures, because the Supreme Court has no parallel supervisory authority over state courts.[291] The Court could not allow that, so it simply worked backwards in a *reductio ad absurdum*: since the Court had consistently applied *Miranda* to state proceedings, where the Court does not have supervisory power, *Miranda* must have been a constitutional decision.[292] The Court's longstanding congruence principle had long meant that whatever rule it applied to the federal government must apply to the states; in *Dickerson* it also meant that the same rule it applied to the states applied to the federal government. *Dickerson* is a good example of how incorporation shapes the substance of the Bill of Rights. Under other circumstances, the Court might have adopted a rule more deferential to Congress's judgment, but it refused to do so when it would undermine the Court's new-found authority over the states.

The last example comes from the Free Speech Clause and introduces a different kind of problem: Court-embedded

285. Dickerson v. United States, 530 U.S. 428 (2000).

286. *See*, *e.g.*, Oregon v. Elstad, 470 U.S. 298, 306 (1985) ("The *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation."); New York v. Quarles, 467 U.S. 649, 653–54 (1984); Michigan v. Tucker, 417 U.S. 433, 444 (1974).

287. *Dickerson*, 530 U.S. at 438–40, 443.

288. *Id.* at 442–43. *See also* Corley v. United States, 556 U.S. 303 (2009).

289. *See Dickerson*, 530 U.S. at 434 ("[O]ur decisions in [*Malloy* and *Miranda*] changed the focus of much of the inquiry in determining the admissibility of suspects' incriminating statements.").

290. *Id.* at 437.

291. *Id.* at 438.

292. *Id. But see* Vega v. Tekoh, 142 S. Ct. 2095, 2106 (2022) ("[A] violation of *Miranda* does not necessarily constitute a violation of the Constitution.").

federalism. Early in the development of the First Amendment, the Court assumed that obscenity was outside of the freedom of expression protected by the Free Speech Clause.[293] The Court first addressed the question squarely in two cases, one federal and one state, which were consolidated for argument in *Roth v. United States*.[294] Although the Court recognized that the federal prosecution was challenged under the First Amendment and the California prosecution was challenged under the Fourteenth Amendment, the Court did not consider the possibility that obscenity might be treated differently under those provisions.[295] Moreover, the Court cited federal and state sources generously, suggesting that the First Amendment protected neither more nor less speech than the states themselves would under their constitutions and statutes.[296] Justice Harlan concurred in the California case and dissented in the federal case because there were "different factors . . . involved in the constitutional adjudication of state and federal obscenity cases," and it does not follow that "just because the State may suppress a particular utterance, it is automatically permissible for the Federal Government to do the same."[297] Harlan thought the Free Speech Clause required stricter enforcement against the federal government than the Due Process Clause.

In *Miller v. California*, the Court developed its current three-part test, which includes "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,"[298] a standard it borrowed from *Roth*.[299] On the other hand, the Court in *Miller* also provided that courts must determine "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value,"[300] which appears to be a national standard.[301] The schizophrenia was apparent. The Court wrote:

293. *See*, *e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); Robertson v. Baldwin, 165 U.S. 275, 281 (1897); *Ex parte* Jackson, 96 U.S. 727, 736–37 (1878).

294. Roth v. United States, 354 U.S. 476 (1957).

295. *Id.* at 480 n.3, 481.

296. *Id.* at 482–85.

297. *Id.* at 496, 503 (Harlan, J., concurring in part in the judgment and dissenting in part).

298. Miller v. California, 413 U.S. 15, 24 (1973).

299. *Roth*, 354 U.S. at 489. *See* Ashcroft v. ACLU, 535 U.S. 564, 574–75 (2002) (discussing the history).

300. *Miller*, 413 U.S. at 39.

301. Pope v. Illinois, 481 U.S. 497, 500–01 (1987).

> Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards. . . . It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.[302]

Accordingly, the Court held "that obscenity is to be determined by applying 'contemporary community standards' not 'national standards.'"[303] The Court had previously considered using "a national standard of decency" in federal cases.[304] But following *Miller*, the Court announced that the "contemporary community standards" test was applicable to federal legislation as well,[305] but, confusingly, added that "a district court would . . . be at liberty to admit evidence of standards existing in some place outside of this particular district."[306]

The *Miller* test seems to incorporate both a community standard and some unitary "reasonable person" standard. Had the obscenity rule developed exclusively in the context of federal cases, the Court surely would not have chosen "community standards" as a test, because it would have made federal rules inconsistent nationally. The nod to community standards is a nod to federalism—and thus inconsistent with the idea that the Free Speech Clause was originally a rule for the national government, and not the states. By contrast, had the Court crafted an obscenity rule for the states, it probably would have found its way to community standards, but perhaps not to a national-based "reasonable person" standard. The result is that *Miller* is a compromised standard; the Court arrived at a substantive rule for obscenity that would not have been developed if the Court had been devising a rule for either the federal government or the states, but not both. Under the

302. *Miller*, 413 U.S. at 30, 32.

303. *Id.* at 37 (citations omitted) (quoting Roth v. United States, 354 U.S. 476, 489 (1957)). The Court has reaffirmed that the community standards test from *Miller* applies to the internet. *ACLU*, 535 U.S. at 583.

304. Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488 (1962) (plurality opinion of Harlan, J.).

305. United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 129–30 (1973).

306. Hamling v. United States, 418 U.S. 87, 106 (1974). Justice Brennan warned that such "variegated standards are impossible to discern," and that national publishers will "retreat to debilitating self-censorship." *Id.* at 144 (Brennan, J., dissenting).

community standards test, the First Amendment may be under-enforced against federal legislation; under the reasonable person standard, the First Amendment may be over-enforced against state legislation. Incorporation skewed the development of the rule, as Justice Jackson predicted.

These examples should trouble us. This Article takes no position on the merits of any particular rule for the Establishment Clause, police interrogation subject to the Self-Incrimination Clause, or obscenity subject to the Free Speech Clause. The point is that some arguments are foreclosed by the congruence principle, because from the outset we understand that the Supreme Court demands a single rule and will apply it to both the states and the federal government. The congruence principle cannot tell us what the rule will be; it only tells us that whatever rule the Court chooses, it will be a unitary rule for all levels of government. And that fact skews the debate over the substantive rule.[307] The congruence principle has shoe-horned us into a single, national debate moderated by the Supreme Court, resulting in a unitary and fixed rule, when we might have had fifty-one such debates, presided over by Congress and state legislatures and moderated by the courts, and adjustable as necessary.[308]

Finally, the Court's current approach to incorporation may have affected the fact of incorporation itself. Because the Court has announced that it will apply a single principle to states and the federal government, the Court may be reluctant to incorporate provisions that lend themselves to a more pluralistic solution. Two obvious choices: the Grand Jury Clause of the Fifth Amendment and the Civil Jury Clause of the Seventh Amendment. It is difficult to maintain that these rights are not "fundamental to *our* scheme of ordered liberty and system of justice,"[309] but the Court's own dogged insistence on a congruence principle may have deterred the

307. *See* N.Y Times Co. v. Sullivan, 376 U.S. 254, 276–77 (1964) ("There is no force in respondent's argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States. . . . [T]his distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment's restrictions.").

308. *See* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323 (2011) (arguing that state constitutional law should influence similar provisions of the federal constitution).

309. McDonald v. City of Chicago, 561 U.S. 742, 764 (2010).

Court from revisiting their incorporation.[310] In some sense incorporation has proven the enemy of . . . incorporation.

C. Policy: The Value of Congruence

So why have we done this to ourselves? What moves the Court to right-margin justify the lines of federalism? There are two broad reasons: convenience and power.

1. The Allure of Convenience

Congruence is an appealing principle, even if it is not a principle of interpretation. For the Court, congruence—with or without a well-wrought theory of incorporation[311]—brought important advantages. Congruence is convenient for the Court. The two-track approach of absorption of the Bill of Rights was free-form; it left too much play in the constitutional joints. So long as the Court thought the states were obligated to ensure some kind of rudimentary freedom of religion or speech or minimal respect for the security of our persons, homes, papers and effects, the Court was drawing two sets of lines: one for the states under the Due Process Clause and another for the federal government under the more specific charge of the Bill of Rights. Over time it was simply easier for the Court to draw one line. It "satisf[ied] a longing for certainty."[312] The convenience of congruence was not lost on the Court or the commentators.[313] Congruence assured that the Court would not have to decide if there were two rules and then parse the differences.

More importantly, even though selective incorporation is ahistorical, once the Court announced that it would move to jot-for-jot incorporation, the Court acquired, ironically, text and legislative

310. *Id.* at 765 n.13 ("Our governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement long predate the era of selective incorporation.").

311. AMAR, *supra* note 7, at 139 ("[D]espite the importance of the topic and all the attention devoted to it, we still lack a fully satisfying account of the relation between the first ten amendments and the Fourteenth."); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 934 (1965) ("Whatever one's views about the historical support for Mr. Justice Black's wholesale incorporation theory, it appears undisputed that the selective incorporation theory has none.") (footnotes omitted).

312. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

313. *See, e.g.*, Henkin, *supra* note 7, at 77 (congruence "simplif[ied] constitutional jurisprudence, the administration of justice, and cooperation between state and federal agencies.").

history. It was much easier to speak in terms of First Amendment rights to freedom of speech than it was to the pedantic, but technically correct "free speech component of the Due Process Clause of the Fourteenth Amendment."[314] Congruence brought with it *The Federalist*, other statements from the Framers of the Constitution, and whatever drafting history there was for the clause or amendment. Congruence brought additional legitimacy to the Court's decisions as it anchored the Court in the familiar tools of interpretation. In the years since it moved to selective incorporation, the Court has not hesitated to invoke the drafting history or the context for the Bill of Rights as an aid to determining the right as applied to the states, without the need to look to the history or context for the Fourteenth Amendment.[315]

The Court's own convenience, however, is a high price to pay for the discordant textual analysis incorporation has brought. Perhaps the Court has the convenience of the people in mind as well. Federalism is complicated and, like trying to explain the relationship between general relativity and quantum mechanics, it is hard to explain to a public that is not steeped in constitutional theory why one rule for freedom of speech applies to the federal government, but another applies to the states.[316] Congruence is the path of least resistance.

2. The Will to Power

The move to congruence is fundamentally rooted in the will to power. As the Court, clause by clause, declared the Constitution congruent, it also expanded its own jurisdiction, without the need of constitutional amendment or facilitating legislation. Incorporation does not just give the Court control over subject matter; it gives the Court power over a different level of government. For example, the Court's first case incorporating a provision of the Bill of Rights,

314. *Cf.* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973) (referring to "the equal protection component of the Due Process Clause").

315. *See*, *e.g.*, District of Columbia v. Heller, 554 U.S. 570, 603–05 (2008) (Second Amendment); Crawford v. Washington, 541 U.S. 36, 42–50 (2004) (Sixth Amendment); Atwater v. City of Lago Vista, 532 U.S. 318, 336–40 (2001) (Fourth Amendment); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal Inc., 492 U.S. 257, 264–68 (1989) (Eighth Amendment); Marsh v. Chambers, 463 U.S. 783, 786–92 (1983) (Establishment Clause); Faretta v. California, 422 U.S. 806, 819–21, 827–32 (1975) (Sixth Amendment).

316. *Cf.* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (in federalism, "[t]he Framers split the atom of sovereignty.").

Chicago, Burlington & Quincy Railroad Co. v. City of Chicago,[317] declared just compensation claims to be within the Due Process Clause of the Fourteenth Amendment and signaled the end of *Barron*. Yet, as we have seen, the Court had nothing to contribute on the subject of takings, and it affirmed the Illinois court's judgment, finding no fault with the grounds on which that court had decided the case. *Chicago, Burlington*, as a takings precedent, was trivial, but when considered in terms of the Court's jurisdiction, it is of enormous consequence. It established the principle that all takings cases, whether federal or state, are reviewable in the Supreme Court.

Additionally, at every turn in the evolution of the modern incorporation doctrine, the Court has pushed in the direction of reserving greater power for itself. The Court began by denying that it had the power to impose the Bill of Rights on the states. In the absorption era it discovered that it had such authority, but it was constrained by the general nature of due process, not by the strictures of the particular provisions in the Bill of Rights. Finally, the Court declared an end to the two-track theory and awarded itself the power to make a single rule applicable to the states and the federal government, a rule convenient for the Court and more restrictive for the states. It overruled dozens of cases to get to that point. Furthermore, the Court's power-awarding stance is not over. The Court continues to uncover provisions that come within its incorporation umbrella. At some point, we likely will see the end of the selective incorporation era and the beginning of full incorporation of the Bill of Rights—and perhaps provisions beyond the Bill of Rights.

Incorporation has profoundly affected our federalism. As discussed in the prior section, the Court may have over-enforced the Bill of Rights against the states, depriving them of the compromises at the founding. There is a second, important effect. The states had their own constitutions. Some of those constitutions had served as models for the U.S. Constitution, including the Bill of Rights;[318] many constitutions that post-dated the U.S. Constitution

317. Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897). The case is discussed in *supra* Section III.B.1.

318. *See* THOMAS B. MCAFFEE, JAY S. BYBEE & A. CHRISTOPHER BRYANT, POWERS RESERVED FOR THE PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS 14–15 (2006).

had imitated it in their own bills of rights. Through incorporation the Court has preempted state constitutions and, by extension, state courts. It renders state constitutions nearly irrelevant, except to the extent that state courts construe their constitutions to be more protective than the corresponding federal right. With each successive incorporated clause, the Court expands its own jurisdiction over the states without the possibility of check from the political branches.[319] Congruence comes at the expense of state constitutionalism, which after incorporation either operates as a one-way ratchet or not at all.[320]

Incorporation has profoundly affected separation of powers as well. First, as explained, in some instances the Court has over-enforced certain clauses against the federal government and under-enforced others. Even more importantly, the congruence principle has undermined Congress's power to enforce the Fourteenth Amendment under Section 5. In *Katzenbach v. Morgan*,[321] the Court upheld a provision of the Voting Rights Act of 1965 that nullified state English literacy requirements. Just seven years earlier, the Court had held that such requirements violated neither the Fourteenth nor the Fifteenth Amendments.[322] Whether the *judiciary* would find the state literacy provisions constitutional, *Congress* could "prohibit the enforcement of the state law" under its Section 5 authority.[323] The so-called *Morgan* power presumably meant that Congress was free to take its own view what the Fourteenth Amendment meant, so long as its view was more state-restrictive or prophylactic. This held out the possibility that Congress could start down its own dual-track reading of the Bill of Rights.

The Court pretermitted that theory in *City of Boerne v. Flores*.[324] In the Religious Freedom Restoration Act (RFRA),[325] Congress

319. *See also* David A. Strauss, Commentary, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV.1457, 1459 (2001) ("[A] case can be made that, subject to only a few qualifications, our system would look the same today if Article V of the Constitution had never been adopted and the Constitution contained no provision for formal amendment . . . . [C]onstitutional amendments have not been an important means of changing the constitutional order.").

320. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

321. Katzenbach v. Morgan, 384 U.S. 641 (1966).

322. Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 53–54 (1959).

323. *Morgan*, 384 U.S. at 649.

324. City of Boerne v. Flores, 521 U.S. 507 (1997).

325. 42 U.S.C. § 2000bb (2020).

provided that the federal government and the states "shall not substantially burden" a person's exercise of religion unless the state could demonstrate that the burden was "in furtherance of a compelling governmental interest" and was "the least restrictive means of furthering that compelling governmental interest."[326] The Court had rejected that test in *Employment Division v. Smith*.[327] In *City of Boerne*, the Court struck down RFRA insofar as it applied to the states, in the process limiting Congress's *Morgan* power: Section 5 does not empower Congress to "make a substantive change in the governing law," but "extends only to 'enforcing' the provisions of the Fourteenth Amendment."[328] While Congress must have "wide latitude" in determining remedies, it is not free to change the substantive law. "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[329] As RFRA was inconsistent with *Employment Division v. Smith*, it was not an appropriate remedy for free exercise violations by the states and was, accordingly, "beyond congressional authority."[330]

Congruence was complete: Just as the states could not deviate from whatever restrictions the Court read into the Bill of Rights, Congress too had to conform its own enforcement to how the Court defined "liberty" in the Due Process Clause. Incorporation treated the Due Process Clause of the Fourteenth Amendment as if it were self-executing. That gave the Court great leeway to decide what to pour into the Clause. At the same time, as the Court insisted on a congruent rule for federal and state governments, it restricted Congress's power under Section 5 of the Fourteenth Amendment. Congress could define the means for enforcing the strictures of the Due Process Clause, but by treating the Clause as self-executing, the Court gets to determine what Congress can enforce.[331]

326. *Id.* § 2000bb-1(a), (b) (2020).

327. Emp. Div., Dep't of Hum. Res. of Or. V. Smith, 494 U.S. 872, 886–88 (1990).

328. *City of Boerne*, 521 U.S. at 508, 519. *See also* Allen v. Cooper, 140 S. Ct. 994 (2020); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

329. *City of Boerne*, 521 U.S. at 520.

330. *Id.* at 536.

331. *See* Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 STAN. L. REV. 1237, 1256–57 (2017) (criticizing the Court).

CONCLUSION

Incorporation may be the most important development in constitutional law since the adoption of the Bill of Rights itself. It has vastly expanded the coverage of the U.S. Constitution and diminished the need for state constitutions and the role of state supreme courts. In *Marbury*, Chief Justice Marshall wrote that it was the province of the judiciary "to say what the law is."[332] But the *Marbury* power included the power to say what "is not law,"[333] and incorporation has placed in the hands of the Supreme Court control over nearly every important question of public policy. In a nation devoted to a written constitution—*Marbury* called it our "greatest improvement on political institutions"[334]—that is an enormous power to have hung on the seventeen words of the Due Process Clause.

We have the right to expect more from the Court. The Court's two-track, absorption theory gave it some flexibility with respect to both due process and federalism. But the Court's mid-Twentieth Century shift to the congruence principle confounded our federalism and stifled any due process innovation. It puts the Court in the role of Procrustes, forcing the states and the federal government into a single mold. The Court's current theory of incorporation remains selective only because it is an ad hoc rule in search of a theory.

The Court may yet again modify its theory of incorporation. The pressure from the academy to abandon the Due Process Clause as the vehicle of incorporation and to embrace the Privileges or Immunities Clause has increased enormously in recent years. Reforming incorporation around the Privileges or Immunities Clause may or may not result in substantive changes in our approach to the Bill of Rights, but it would at least force the Court to confront serious questions about the Constitution that it has thus far, skillfully and embarrassingly, avoided.

332. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

333. *Id.*

334. *Id.* at 178. *See* Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397 (2019).