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WHEN CONSTITUTIONAL WORLDS COLLIDE: RESURRECTING THE FRAMERS' BILL OF RIGHTS AND CRIMINAL PROCEDURE

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INTRODUCTION

Different Constitutional Worlds

For two hundred years, the Supreme Court has been interpreting the Bill of Rights. Imagine Chief Justice John Marshall sitting in the dim, narrow Supreme Court chambers,[1] pondering the interpretation of the Sixth Amendment right to compulsory process in *United States v. Burr*.[2] Aaron Burr was charged with treason for planning to invade the Louisiana Territory and create a separate government there.[3] To help prepare his defense, Burr wanted to see a letter written by General James Wilkinson to President Jefferson. In ruling on Burr's motion to compel disclosure, Marshall departed from the literal language of the Sixth Amendment — which guarantees only the right to compel the attendance of witnesses[4] — to hold that Burr was entitled to compel production of the letter. The distinction between compel-

* Professor of Law and Judge Alexander P. Waugh Sr. Distinguished Scholar, Rutgers, Newark. B.S. 1968, University of Tennessee; M.F.A. 1972, J.D. 1975, University of Iowa; LL.M. 1982, J.S.D. 1986, Washington University in St. Louis. — Ed. Many people provided helpful ideas and feedback — too many to name here. I should, however, acknowledge a few special debts. In various conversations, Donald Dripps put the idea squarely in my mind that incorporation was "the wrong road taken" in the criminal context and that it might not be too late to reverse course. Sherry Colb and Barbara Spillman Schweiger read earlier drafts and offered many detailed critiques and suggestions, as well as enthusiastic support. Michael Mulligan offered superior research assistance and more. He contributed ideas, phrasing, and an ongoing dialogue that sharpened every aspect of the Article. Dean Stuart Deutsch generously provided a research stipend to support this project. Finally, the editors at the *Michigan Law Review* engaged my ideas in ways that improved the substance and presentation of the Article. Though the end product is better because of help from these friends and others, I alone am responsible for the defects that remain.

1. By leave of Congress, the Court in those days met in a small room, twenty-four feet wide and thirty feet long, located on the first floor of the Capitol. LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 355-56 (1974).

2. 25 F. Cas. 30 (D. Va. 1807) (No. 14,692D) (Marshall, C.J., sitting as district court judge).

3. For more on the context and eventual resolution of *Burr*, see Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974).

4. U.S. CONST. amend. VI.

ling witnesses to attend and compelling witnesses to bring papers with them, Marshall wrote, "is too much attenuated to be countenanced in the tribunals of a just and humane nation."[5] Marshall's view is widely regarded as a "sweeping construction to the compulsory process clause."[6]

Fast forward just over 180 years and imagine Justice John Paul Stevens sitting at his desk pondering the interpretation of the right to compulsory process in *Taylor v. Illinois*.[7] Taylor subpoenaed two witnesses who would testify to his innocence of the charge of attempted murder, but his lawyer failed to include their names on the list of defense witnesses that Illinois law required him to turn over to the prosecutor. From a list of sanctions for the lawyer's failure, the state trial judge chose the most draconian — he forbade the witnesses from testifying. The Court held in an opinion by Stevens that the right to compulsory process, as applied to the States through the Fourteenth Amendment, did not forbid the judge from barring the testimony of witnesses that might have moved the jury to vote not guilty.

In 1807, Chief Justice Marshall interpreted the right to compulsory process broadly to protect the rights of someone charged with treason against our young republic. In 1988, Justice Stevens, one of the Rehnquist Court liberals, interpreted the right to compulsory process narrowly in a garden variety state felony case. What happened along the road between these two decisions?

One crucial cause of the change in the Court's interpretive theory is the doctrine of "incorporation." For almost all of our history, the federal government and each of the States operated independently in defining, investigating, and prosecuting crime. The Bill of Rights' limitations on government did not apply to the States,[8] which were free to protect — or not protect — individual liberties as they saw fit. Though all the criminal systems in this country drew from the colonial common law, the federal criminal process was doctrinally a world unto itself. It was separate from the worlds of the state processes.

Then came the Fourteenth Amendment, ratified in 1868 in response to the refusal of the Southern States to protect the rights of former slaves and Union loyalists. The Fourteenth Amendment gave the Court, for the first time, a constitutional device for reviewing state law. Its broad, vague language permitted the Court to insist that, at least in some limited circumstances,[9] the States must honor fundamen-

5. 25 F. Cas. at 35.

6. Westen, *supra* note 3, at 101.

7. 484 U.S. 400 (1988).

8. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

9. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936) (holding that due process forbids a state conviction based on a confession coerced by physical brutality); Powell v. Alabama, 287 U.S. 45 (1932) (holding that due process requires appointment of counsel in a state capital

tal rights. The States could no longer abridge the privileges and immunities of citizens, or deny any person due process or equal protection of the laws. But no one in the Congress or in the ratifying state legislatures attempted to present a comprehensive account of privileges and immunities, due process, or equal protection.[10]

For decades, the Court sought to articulate a Fourteenth Amendment theory of fundamental rights. Benjamin Cardozo, one of the Court's leading thinkers, defined Fourteenth Amendment protections to include the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[11] Felix Frankfurter and John Marshall Harlan II continued the effort.[12] Ultimately, however, the Court abandoned the attempt to build from scratch a comprehensive theory of the rights protected by the Fourteenth Amendment[13] and, instead, turned to the Bill of Rights for a model. By its own hand, the Court forced the world of the Fourteenth Amendment to collide with that of the Bill of Rights. Incorporation resulted.

The Court began the incorporation journey with the First Amendment, but it has now incorporated almost the entirety of the

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case where the defendants were ignorant and indigent, and the trial was conducted in a frenzy of racial hatred).

10. Senator Jacob Howard stated that the Fourteenth Amendment privileges or immunities included all the rights guaranteed in the first eight Bill of Rights amendments plus certain natural law rights. Howard offered examples of the latter but no definitive account. CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866).

11. Palko v. Connecticut, 302 U.S. 319, 328 (1937) (Cardozo, J., writing for eight members of the Court) (quoting Herbert v. Louisiana, 272 U.S. 312, 316 (1926)).

12. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 176 (1968) (Harlan, J., dissenting) (noting that due process includes "immutable principles . . . of free government which no member of the Union may disregard") (quoting Holden v. Hardy, 169 U.S. 366, 389 (1898)); Wolf v. Colorado, 338 U.S. 25, 27 (1949) (Frankfurter, J., writing for the Court) (due process is the "compendious expression for all those rights which the courts must enforce because they are basic to our free society" and which "may not too rhetorically be called eternal verities").

13. The reasons the Court gave up this effort are surely many and complex, and far beyond the scope of this Article. One cause worth noting is our heritage of having a written Constitution. Our federal government began with a written Constitution, and American judges have always been more reluctant than British judges to "uncover" natural law. In *Bram v. United States*, 168 U.S. 532 (1897), for example, the Supreme Court engaged in an exhaustive review of the cases dealing with involuntary confessions. Almost all of these cases were state and English cases based on common law, derived from the unwritten English "constitution" that has its origin in Lockean notions of natural law. When it came time to decide the case before it, however, the *Bram* Court was careful to note that it was interpreting the Fifth Amendment prohibition of compelling persons to be witnesses against themselves. The Court found that this Fifth Amendment provision included the common law prohibition against the use of involuntary confessions: "the generic language of the [Fifth] Amendment was but a crystallization of the doctrine as to confessions, well settled [in the common law] when the Amendment was adopted, and since expressed in the text writers and expounded by the adjudications. . . ." *Id.* at 543.

Bill of Rights into the Fourteenth Amendment.[14] Most of these rights limit the power of government to investigate and prosecute crime. Incorporation thus caused the world of federal criminal process to collide with the fifty different worlds of state criminal processes. In incorporating the criminal procedure guarantees,[15] the Court sought to provide the benefits of the broad federal protections to state criminal defendants. But the Court has never had the appetite to apply the provisions to the States as rigorously as it had applied them against the federal government.

Scholars agree that the Burger and Rehnquist Courts have limited the scope of criminal procedure guarantees.[16] What remains largely hidden is the role of incorporation in the steadily diminishing scope of the criminal procedure guarantees. And this shrinking scope is not the only problem. The Court also has demonstrated a willingness to bend precedents to accomplish its goal of facilitating more effective state policing. As Donald Dripps puts it, "In the criminal procedure context, the Court rather openly decides cases with minimal respect for doctrinal constraints. . . . [which] has generated an unprincipled and inconsistent body of law" filled with "arbitrary distinctions."[17] No satisfactory understanding of the constitutional implications of incorporation exists because almost everyone looks at the phenomenon "post-collision," ignoring or trivializing what those very different worlds looked like before the collision.[18] The key to understanding incorpora-

14. The exceptions are rights that might be considered exotic (the Second Amendment right to bear arms; the Third Amendment ban on quartering troops in private homes) or irrelevant to ascertaining criminal guilt (bail and grand jury indictment); the Seventh Amendment right to a civil jury; the Ninth Amendment reservation of rights to the people.

15. *See* Benton v. Maryland, 395 U.S. 784 (1969) (right against double jeopardy); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to speedy trial); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process to obtain witnesses subpoenaed by defendants); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront witnesses who testify for the prosecution); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against compelled self incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel for indigent defendants charged with felonies); Robinson v. California, 370 U.S. 660 (1962) (right against cruel and unusual punishments); Mapp v. Ohio, 367 U.S. 643 (1961) (right to exclude evidence found in violation of the Fourth Amendment); *In re* Oliver, 333 U.S. 257 (1948) (right to public trial).

16. *See, e.g.*, Craig Bradley, *The Court's "Two Model" Approach to the Fourth Amendment: Carpe Diem!*, 84 J. CRIM. L. & CRIMINOLOGY 429 (1993); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990); Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69 (1989); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

17. Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again"*, 74 N.C. L. REV. 1559, 1559-61 (1996).

18. Two notable exceptions are Akhil Reed Amar and Donald Dripps. *See* AKHIL REED AMAR, THE BILL OF RIGHTS (1998); Dripps, *supra* note 17. As will be clear in the balance of this Article, I think Amar gets the history mostly wrong and often draws unjustified inferences. I mostly agree with Dripps but offer a more comprehensive historical account.

tion is to look at the two doctrines before they collided. Only then do we have a proper background and framework against which to examine the world in which we find ourselves.

Return to the 1790s. The States eye the central government, to which they have just ceded much of their sovereignty, as a potential bully or, worse, as a tyrant. The States look upon the freshly minted central government as it looms above them, and it reminds them of King George III and Parliament. Evidence of this strong antigovernment attitude can be seen in the intense reaction of some of the States to the Alien and Sedition Laws, enacted in 1798. Thomas Jefferson predicted a quasi monarchy if those laws were accepted by the citizenry: "[W]e shall immediately see attempted another act of Congress, declaring that the President shall continue in office during life, reserving to another occasion the transfer of the succession to his heirs, and the establishment of the Senate for life!"[19]

Eight years earlier, in 1790, many feared precisely that abuse of power. The government was but three years old, and no one knew how it might exercise its powers. Because of this fear of the distant, unknown government, the Bill of Rights is added in 1791, and the States grow more comfortable. They view the Bill of Rights as a wall between themselves and the central government. It guarantees free expression, forbids a national religion, guarantees a criminal process that is difficult to manipulate, and, in the Ninth and Tenth Amendments, specifically reserves rights and powers to the people and the States.

The potential tyrant has been hobbled. The citizens of the States are free to criticize the central government, to petition it, and to close their doors against its agents. Moreover, the prosecutors and judges of the central government can reach the citizens of States only through a rigorous process that includes the right to nonexcessive bail, to trial by juries drawn from the community, to assistance of counsel, and to confront accusers who might not be telling the truth. The Supreme Court comprehends that the Bill of Rights was meant to limit severely the powers of the central government, erecting a formidable wall between the citizens and the government. The Court interprets these provisions to require federal prosecutors to walk through a narrow gate in the wall. The gate is hedged with a series of requirements designed to make convictions more difficult to obtain. In the meantime, the States remain sovereign, free to conduct their affairs in most criminal matters as if the federal government did not exist.

Time passes. The debate over slavery and state sovereignty erupts into the Civil War, wrecking the country's peace and prosperity. Most Americans come to realize that too much state sovereignty is as haz-

19. THE VIRGINIA REPORT OF 1799-1800, at xiii (J.W. Randolph ed., 1850).

ardous as too little. Many begin to view the States, which they once thought of as responsive and protective of rights, with suspicion, particularly in their treatment of the freed slaves. The Fourteenth Amendment arrives with its explicit, though vague, limitations on state power. It takes the Court many years, but eventually it turns to the Bill of Rights to understand what rights the Fourteenth Amendment should protect from state intrusion.

Now the Bill of Rights applies to the States, through the fundamental rights lens that is the Fourteenth Amendment, and the States struggle under this projection. Litigation explodes and the fundamental rights versions of the Bill of Rights evolve through thousands of interpretations. We have been living with incorporation so long that any other system seems unthinkable. Of course the States should have to provide the same right to counsel or the same freedom of speech as the federal government, shouldn't they?

But there is one flaw in the process. Once the worlds collide, once the Bill of Rights guarantees are incorporated into the Fourteenth Amendment, only one doctrine evolves — the doctrine expressing the fundamental rights that the Court "found" in the Fourteenth Amendment. Though the resulting unitary version of First Amendment rights seems to have worked well enough, an odd phenomenon has arisen in the interpretation of the criminal procedure guarantees. When the Court imposed the criminal procedure protections on the States in the 1960s,[20] the relevant concern was no longer the fear of a powerful central government but, rather, a concern with the accuracy or fairness of the state processes leading to a verdict. As long as the process seemed likely to produce accurate verdicts and met a minimal threshold of fairness, the Court had little interest in making it more difficult for States to obtain convictions of dangerous criminals. When the Court moved tentatively in that direction, the political costs were heavy.[21]

The momentous effect of incorporation of the Bill of Rights criminal procedure guarantees has passed under the radar screen of courts and scholars. The problem is not just that state criminal defendants get watered down versions of the Bill of Rights guarantees. Because of the fiction of incorporation — the notion that there is now one national standard for criminal procedure rights — the dilution of rights flowed

20. *See supra* note 15. Only one criminal procedure right was incorporated outside the decade of the 1960s. *In re* Oliver, 333 U.S. 257 (1948) (right to a public trial).

21. *See* LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS (1983) (discussing the political furor created by the requirement in *Miranda v. Arizona*, 384 U.S. 436 (1966) that suspects be warned of a right to remain silent); Yale Kamisar, *Can (Did) Congress "Overrule"* Miranda*?* 85 CORNELL L. REV. 883 (2000) (discussing the legal consequences of the political reaction to *Miranda*); George C. Thomas III, *The End of the Road for* Miranda v. Arizona*?: On the History and Future of Rules for Police Interrogation*, 37 AMER. CRIM. L. REV. 1 (2000) (discussing reaction of police and prosecutors to *Miranda* and speculating on impossibility of effectively regulating police interrogation practices).

backward to the Bill of Rights guarantees. In effect, the process of incorporation took a sledgehammer to the federal criminal procedure guarantees. *The Court has amended the Bill of Rights* not once, but eleven times — once for each criminal procedure guarantee incorporated into the Fourteenth Amendment and later diluted in its application to federal cases.[22] This amendment process is a fundamental historical mistake, one that Justice Harlan feared[23] but that, with his death, ceased to be mentioned by Court members or commentators. Even if the Framers of the Fourteenth Amendment intended it to mirror aspects of the Bill of Rights — even if they intended the doctrine of "total incorporation"[24] — no evidence exists that they intended the federal Bill of Rights to become a fresh lump of clay for the Court to refashion into a new, less protective body of doctrine.

The de facto amending of the Bill of Rights criminal procedure guarantees has been a gradual process, so gradual that no one has noticed that the Court is using the Fourteenth Amendment to rewrite the Bill of Rights rather than vice versa. First, the criminal procedure right is incorporated into the Fourteenth Amendment, accompanied by great fanfare about protecting the rights of state defendants. Second, the fact that States have exclusive jurisdiction over the crimes that most affect our daily lives — from auto theft and assault to rape, robbery, and murder — causes the right to be gradually diluted in order to permit States more latitude in investigating and prosecuting these crimes. The third step is subtle indeed. Having told us that it is interpreting the Bill of Rights in these state cases, the Court later follows the new and narrower precedents when the issue arises in federal court, often having to distinguish or overrule older, and broader, federal precedents. This is no way to amend the Constitution.

Think of the Fourteenth Amendment as a lens projecting the Bill of Rights upon the States. For the criminal procedure guarantees, the lens is also a mirror. As the lens projects fundamental rights versions of the criminal procedure guarantees onto the States, it also reflects back onto the Bill of Rights, distorting their purpose as a barrier against federal prosecutors and judges. The original Bill of Rights criminal procedure guarantees — intended to establish a high wall

22. *See supra* note 15.

23. *See, e.g.*, Williams v. Florida, 399 U.S. 78, 129 (1970) (Harlan, J., dissenting) (complaining that the majority's acceptance of a six-person jury in a state case was a "backlash" that "dilutes a federal guarantee in order to reconcile the logic of 'incorporation,' . . . with the reality of federalism").

24. A version of total incorporation was urged by Senator Howard when he reported a draft of the Fourteenth Amendment out of committee. *See infra* text accompanying notes 218-219. It reads all the rights created by the first eight amendments into the Fourteenth Amendment. On this view, States must provide a civil jury as guaranteed by the Seventh Amendment, must not abridge the Second Amendment right to "keep and bear arms," and must not quarter troops in homes in violation of the Third Amendment.

with a narrow gate — has been reduced to an annoying speed bump on a broad interstate that leads to a set of more or less accurate outcomes. The essence of the Bill of Rights criminal procedure guarantees has changed. Rather than a barrier designed to rein in powerful federal actors, the guarantees have become a framework for assessing the accuracy or fairness of the process. To take an example to which I will return, the Court has replaced the absolute right to a speedy trial, guaranteed by the Sixth Amendment, with a right to a trial that is timely enough to be more or less accurate. The difference in these conceptions of rights is that a trial more than five years after the defendant was arrested can be held, unanimously, to be "speedy."[25]

To understand the real effects of incorporation, we need to understand the worlds of criminal procedure before they collided. I will examine the history and interpretation of the Bill of Rights and of the Fourteenth Amendment during this premodern era to show how far we have strayed from the vision of the Framers of our constitutional protections. Part I summarizes the argument. Part II turns to the nineteenth and early twentieth century to show that, when first faced with the question of the permissible scope of federal investigation and prosecution of crime, the federal courts placed severe restrictions on the federal government. This discussion sets the stage for Part III, where I present the historical case that the Framers of the Bill of Rights intended them to be formidable barriers to the successful federal prosecution of criminal defendants, whether guilty or innocent. The Framers feared that the powerful federal government would seek to persecute its enemies through the use of federal law — that it would achieve persecution by prosecution. This is what the Bill of Rights criminal procedure provisions aimed to prevent. They were not designed with accuracy of outcome as the principal goal.

Part IV sketches an argument that the Framers of the Fourteenth Amendment did not intend the Amendment to make the criminal procedure guarantees of the Bill of Rights a routine part of state criminal processes, and that the ratifying state legislatures would have found federal limits on their criminal processes particularly repugnant.[26] States and their colonial antecedents had long prided themselves on their criminal law and criminal processes. It is highly unlikely that they would have quietly ceded all authority to mold their criminal procedure. Outside the South, little controversy attended the ratifica-

25. Barker v. Wingo, 407 U.S. 514 (1972).

26. One might wonder whether deference to the intent of the ratifying state legislatures dooms the modern Court's progressive doctrine on racial discrimination. The short answer is no. As I will develop in more detail throughout the Article, the legislatures knew they were ceding sovereignty in matters involving legal discrimination against the former slaves. That they did not know the details of the resulting doctrine is no ground to claim its illegitimacy. But if the States were not aware that they were accepting the Bill of Rights criminal procedure guarantees, then there are no details for later Courts to work out.

tion of the Fourteenth Amendment — a fact that casts doubt on the claim that the ratifying state legislatures intended to impose, in one fell swoop, a dozen new federal restrictions on their criminal processes. If Ohio, Michigan, Illinois, New York, and Pennsylvania, for example, had known that they were about to impose the federal model on themselves and deprive their legislatures forever of the option to have a criminal process different from the federal model, I believe that the issue would have been discussed. The historical record contains only silence.

In Part V, I argue that the traditional account of stare decisis permits the Court to "overrule" the criminal procedure incorporation cases. The rulings that incorporated particular rights into the Fourteenth Amendment are, on a traditional understanding of precedent, merely dicta. While disavowing dicta in these cases would be far from easy, stare decisis would not prevent the Court from refashioning strong Bill of Rights protections against the federal government, an interpretation that would honor the Framers' skepticism and suspicion of the central government. Part VI briefly surveys some ways this thought experiment might change the protections against the federal government. It sketches a new "road map" of the criminal procedure guarantees that resolves several interpretive tensions in current doctrine.

The net effect of my proposal would be to increase protection from federal agents and prosecutors while leaving suspects and defendants roughly where they are now when state actors investigate and prosecute. This two-tiered interpretation is consistent with a century of criminal procedure doctrine as well as the history surrounding the Bill of Rights and the Fourteenth Amendment. It is also good policy. The federal government has far more power to investigate, compel discovery, and generally manipulate our privacy and autonomy than the state governments. We should not forsake protection against the powerful federal government to facilitate a more flexible set of restrictions on state criminal processes. We can have both, as I hope to show in what follows.

I. AN OVERVIEW OF THE ARGUMENT

Fear of the Central Government and Fear of Criminals

In 1880, a federal court for the Territory of Montana held that a delay of barely six months violated the Sixth Amendment speedy trial guarantee.[27] The court viewed the rule as mechanical. It operated irrespective of the reason for the delay and without regard to whether the defendant's case was harmed. As that court put it, the "fact" of the

27. United States v. Fox, 3 Mont. 512 (1880).

delay "is sufficient for the purposes of this case."[28] The federal crime being prosecuted was making false entries in bank books. Compare that holding to *Barker v. Wingo*,[29] a state case in which the crime was the murder of an elderly couple with a tire tool. The modern Court held that a delay of five and one-half years did not violate the timeliness requirement embedded in the Fourteenth Amendment. The principal rationale in *Barker* was that the delay did not harm the defendant's case. In federal court, prior to incorporation at least, the rule was mechanical. The trial was speedy or not without regard to other criteria, such as whether the outcome was likely to be accurate. In state cases, by contrast, the value of speedy trial is subsumed within the larger value of accurate outcomes.

My project is a delicate one. First, I must persuade that, as a matter of text, history, and policy, the criminal procedure protections should receive a robust interpretation vis-à-vis the federal government — that the 1880 Montana decision is a better reading of "speedy trial" than *Barker*. If I achieve that goal, the reader would justifiably want to know why the same robust protections should not also be available against state power. Part of the answer is that States can, of course, have the same (or greater) limitations either by statute or through an interpretation of their constitutions. Indeed, as the United States Supreme Court has steadily reduced some of the protections, States have adopted more protective interpretations of state law, particularly in the area of search and seizure.[30]

To those who want the Supreme Court to force greater protections on the States, the answer, to be developed in more detail, is that States in our system are sovereign except to the extent they surrendered that sovereignty to the federal government in the Constitution and its amendments.[31] The Bill of Rights guarantees did not originally limit the States. Thus, if the States did not intend to ratify a Fourteenth Amendment that forced them to follow Bill of Rights criminal procedure — a reading of history that is at least plausible — then there is

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28. *Id.* at 520.

29. 407 U.S. 514 (1972).

30. *See, e.g.*, State v. Morris, 680 A.2d 90 (Vt. 1996) (rejecting Supreme Court's rule that no Fourth Amendment interest exists in garbage in opaque bag placed on curb and still on owner's property); State v. Hempele, 576 A.2d 793 (N.J. 1990) (same); State v. Boland, 800 P.2d 1112 (Wash. 1990) (same).

31. I have no full-blown account of sovereignty but do not need one to make the argument in this Article. I need an account only as it respects the right of the courts and legislatures to make and change criminal laws. Between the time English rule was thrown off and the Articles of Confederation adopted, no institution existed that could design a procedure for determining criminal guilt, or resolving civil cases for that matter, other than the courts and legislatures of each State. The States must necessarily have retained the right to develop court systems and processes to resolve cases except to the extent they ceded this sovereignty by ratifying the Constitution and its amendments. It is in this sense that I use "sovereign."

simply no basis to force the same kind of limits on the States that the Bill of Rights creates against the federal government.

Some might say that history is not important here — that what is important is the best set of policy outcomes. But that argument misses a fundamental point about the structure of our federal government. History performs a different function when the issue is state sovereignty than when courts seek the best substantive interpretation of particular guarantees. Suppose we found incontestable proof that the Fourth Amendment was intended only to forbid Congress from authorizing or the federal judiciary from issuing general warrants.[32] Would that compel the Court to tear down its elaborate Fourth Amendment jurisprudence, which is based on a completely different understanding? The answer, I suggest, is no. Intentionalism is one tool for interpreting the substantive contours of the Bill of Rights, but it is only one tool. There is nothing illegitimate, or even problematic, about the Court reading the Fourth Amendment to extend far beyond the original concern with general warrants.

But intentionalism creates boundaries within which interpretation can operate. Suppose we found incontestable proof that the ratifying state legislatures understood the Fourteenth Amendment to have no application to state criminal processes beyond ensuring that former slaves were treated the same way as everyone else. Here I think it much more difficult, and perhaps illegitimate, for the Court to ignore the historical evidence. It is not a question of how best to understand the substantive content of a right but, rather, who is required to provide that right. And, as my sovereignty argument makes plain, the intent of the state legislatures cannot be ignored. The intent of the Framers does not — indeed, cannot — trump that of the ratifying state legislatures. If the States considered and rejected the idea that the Fourteenth Amendment incorporated the criminal procedure guarantees of the Bill of Rights, it is difficult to imagine the Court nonetheless requiring the States to apply these guarantees.

One aspect of the Fourteenth Amendment that the States did recognize was that it protected fundamental civil rights and equality under the law.[33] Thus, the ratification of the Amendment leaves room for the Court to interpret what those protections mean in a modern world. On this account, *Brown v. Board of Education*[34] is a perfectly appropriate interpretation of the Fourteenth Amendment even though no one could demonstrate that the Framers or the States contemplated that particular application. The difference is between an emerging

32. Thomas Davies' recent proof of this historical understanding is a little less than incontestable, but for me it is utterly convincing. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999).

33. *See infra* Part IV.

34. 347 U.S. 483 (1954).

"common law" interpretation of a right that the States unquestionably agreed to provide and, if my reading of history is correct, the reality that the States never agreed to bind themselves to the Bill of Rights. In the latter case, there is no state obligation for the Court to interpret.

In construing the Bill of Rights, Akhil Amar has argued eloquently that the document should be read as a whole, and that it should be read in the context of the entire Constitution. Amar's actual reading of the document, however, is less helpful. He reads the Bill of Rights' guarantees to promote the goal of protecting innocent defendants against wrongful convictions.[35] Although one *can* read most of the guarantees that way, I think Amar is wrong as a historical matter that we *should* read the document in this way.[36]

Instead, the Bill of Rights is a profoundly antigovernment document that sought to impose restrictions on the federal government without regard to the innocence of particular defendants. As Louis Schwartz has suggested, the Framers almost surely intended the Bill of Rights to permit guilty defendants to go free.[37] After all, many of the Framers themselves had violated British law. Thus, "many of these [Bill of Rights] rules were written into the Constitution by real 'criminals,' fresh from experience as smugglers, tax evaders, seditionists and traitors to the regime of George III."[38] As the violent reaction to the Alien and Sedition Laws made clear, many of the Framers would have wanted the Bill of Rights to frustrate the prosecution or conviction of anyone charged with "publishing any false, scandalous and malicious writing . . . against the government of the United States."[39] The more a defendant criticized the government, the more the anti-Federalists would have wanted to protect him. Leonard Levy reports several instances of jury nullification producing acquittals of publishers and printers prosecuted for common law seditious libel.[40] Potential jury nullification must have been in the mind of the Framers when they insisted that the Sixth Amendment jury be drawn from the community. Though sedition was a crime that was particularly sympathetic to the anti-Federalists, they likely would have wanted to make the prosecution and conviction of smugglers and tax evaders difficult as well.

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35. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997).

36. George C. Thomas III, *Remapping the Criminal Procedure Universe*, 83 VA. L. REV. 1819 (1997) (reviewing AMAR, *supra* note 35).

37. Louis B. Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. PA. L. REV. 157, 158 (1954).

38. *Id.*

39. THE VIRGINIA REPORT OF 1799-1800, *supra* note 19, at 20 (reprinting Sedition Act of 1798) (quoting Section 2).

40. *See, e.g.*, LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 128, 157 (1985).

The anti-Federalists were also influential in writing the body of the Constitution. Fear of a powerful central government led the drafters to give the new government specific powers, with the idea that all other powers and functions remained with the States. The Tenth Amendment makes this point expressly: powers not delegated to the federal government were reserved to the States. To be sure, the twentieth-century Court read the specified powers so broadly that it obscured the vision of a government of limited powers. Recently, however, the Court has rediscovered these limitations, holding, for example, in *United States v. Morrison*[41] that the Commerce Clause does not bestow power on Congress to create a civil remedy for rape. Despite several cases putting limitations on the power of Congress to legislate,[42] the modern Court has yet to rediscover that the criminal procedure provisions in the Bill of Rights are profoundly antigovernment. The reason for this myopia, as Part IV hopes to make clear, is that the Court has been blinded by the mirror of incorporation.

The Constitution did not limit the central government only by implication. For example, in Article III we find this detailed, specific limitation on the power of the federal government: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[43] Also in Article III: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . . ."[44] Other sections prohibited Congress from suspending the writ of habeas corpus,[45] passing bills of attainder and ex post facto laws,[46] and providing for the "corruption of blood" in treason cases.[47] All of these provisions suggest an abiding concern with unjust federal laws and prosecutions.

When that was not enough to satisfy the anti-Federalists, the Bill of Rights was proposed, drafted, submitted to the States, and ratified

41. 529 U.S. 598 (2000)

42. *See* Bd. of Trs. v. Garrett, 531 U.S. 356 (2001) (holding that the Eleventh Amendment bars congressional creation of money damages in Americans with Disabilities Act); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (finding that the Age Discrimination in Employment Act did not validly abrogate States' Eleventh Amendment immunity from suits by private individuals); City of Boerne v. Flores, 521 U.S. 507 (1997) (explaining that Congress lacks authority to expand judicial interpretations of constitutional rights); United States v. Lopez, 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act exceeds Congress's Commerce Clause power).

43. U.S. CONST. art. III, § 3, cl. 1.

44. U.S. CONST. art. III, § 2, cl. 2.

45. U.S. CONST. art I, § 9, cl. 2.

46. U.S. CONST. art I, § 9, cl. 3.

47. U.S. CONST. art. III, § 3, cl. 2.

on December 15, 1791. Consider these limitations as a whole. The First Amendment granted freedom of thought and expression, as well as the political right to assemble and petition the federal government.[48] The Fifth Amendment guaranteed that private property would remain sacrosanct — the government could take it only if it provided "just compensation." Fearing a federal government gone berserk, the anti-Federalists included the Third Amendment to guarantee that its troops would not inhabit our homes. Even more important, the Second Amendment sought to keep state militias as a viable force in opposing the federal government: a state militia in that era depended on citizens providing the weapons, and the Second Amendment forbids Congress from infringing the "right to keep and bear Arms."

The Fourth, Fifth, Sixth, and Eighth Amendments mostly have to do with the power of the federal government to identify and punish criminals, who, given the experience with the British, might be guilty only of opposing the government. These provisions are rarely considered in their rich historical context. The Fourth Amendment proclamation of the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" today seems to protect only drug traffickers and violent criminals. The Fifth Amendment right not to be compelled to be a witness against oneself in a criminal trial might look to us like a clever way for politicians to avoid admitting their mistakes and violations of the law. The right not to be placed twice in jeopardy for the same offense could be a hypertechnical protection for powerful criminals whose clever lawyers can make one offense look the same as another.[49]

But consider the historical context. Imagine a powerful federal government that wanted to eradicate its enemies. The legislature might enact general search warrants that could be used to sweep buildings, neighborhoods, and whole towns, looking not for evidence of crimes of violence or theft but, instead, for evidence of opposition to the government. In addition, a grand jury could subpoena those suspected of harboring antigovernment sentiments and force them to answer questions about their activities and their friends under threat of contempt of court. We saw this use of the grand jury during the Red

48. U.S. CONST. amend. I. The right to petition, which sounds arcane to us, was in the eighteenth and early nineteenth centuries a vital part of the dialog between the citizens and the government. *See* Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153 (1998).

49. In the movie *Double Jeopardy*, for example, while the "criminal" seeking refuge in the Double Jeopardy Clause was not powerful, she and her defrocked lawyer ally certainly thought they were clever. DOUBLE JEOPARDY (Paramount Pictures 1999). They concluded that her conviction for murdering her husband, who had disappeared, gave her double jeopardy protection if she killed him after he later turned out to be alive. The screen writers were too clever by half here, asserting that a Washington state conviction provided double jeopardy protection if she killed him in New York or Louisiana. They obviously had not read, or understood, *Heath v. Alabama*, 474 U.S. 82 (1985).

Scare in the 1950s. Once federal officers executed the general warrants and compelled the testimony of "enemies," prosecutors could bring a criminal prosecution in a corner of the State far from where the alleged crime occurred; the defendant would be unknown and without friends and resources to assist in his defense. If the judge set bail impossibly high, the defendant could be held in jail for months or years waiting for the prosecution to proceed. When trial did finally begin, under the supervision of a lax federal judge, it could be done largely by affidavit, as England had permitted for hundreds of years, without a lawyer for the defendant and without access to subpoena power to compel attendance of the defense witnesses. And if the defendant somehow escaped with an acquittal, or with a sentence that the prosecutor found too lenient, the prosecutor could prosecute the same offense all over again.

State prosecutors and judges could do none of these things because of the common law limitations under which they had labored for over two centuries. But no one knew whether the common law would bind the new federal government. From this perspective, we can see that the villain in the Bill of Rights "drama" is not the criminal but the government. One reason the criminal was not the villain is that the contemplated federal criminal jurisdiction did not include the kind of crimes that affected the daily lives of most Americans. Federal crimes authorized in the Constitution are counterfeiting, piracy, felonies on the high seas, offenses against the law of nations, treason, and bribery.[50] The Constitution makes no provision for crimes of murder, robbery, or burglary; crimes of this type were the responsibility of the States.

The federal government could be brought under control only by a series of quite precise limitations on its power. Beyond the jury trial right and the guarantee of habeas corpus in the body of the Constitution, the Bill of Rights added a series of limitations on the federal criminal process. The Fourth Amendment forbids general warrants. The Fifth Amendment requires grand juries — an institution thought in those days to be friendly to defendants who were being persecuted. It also prohibits compelled self-incrimination and double jeopardy. The Eighth Amendment forbids excessive bail. The Sixth Amendment guarantees the right to a speedy trial, to confront witnesses, to compel the attendance of defense witnesses, and to the assistance of counsel.

The federal government had weapons in its arsenal beyond the criminal process. When the general warrants disclosed alleged evi-

50. Article I, section 8 grants Congress authority to punish counterfeiting, piracy, felonies on the high seas, and offenses against the law of nations. Article III, section 3 confers authority to punish treason. Treason and bribery are mentioned as grounds for impeachment in Article II, section 4, along with the much-debated "other high Crimes and Misdemeanors."

dence of unpaid taxes and duties, for example, the federal prosecutor could bring a civil proceeding asking for forfeiture or penalty. The defendant would have no right to a jury because Article III expressly limits the jury trial right to criminal cases. The lax, biased, or corrupt federal judge could therefore find for the government even when the defendant could show that he was not liable for the tax or duty. Enter the Seventh Amendment. The federal government is now forbidden to punish its enemies by means of civil forfeiture or penalty unless a jury agreed that the cause was just.

The principal concern in the Bill of Rights was not to protect innocent defendants. The Framers instead intended to create formidable obstacles to federal investigation and prosecution of crime. An expansive protection against prosecution means, of course, that guilty as well as innocent people go free, but the Framers expressed no concern about this effect of the Bill of Rights. The anti-Federalists simply distrusted prosecutors who would advance the federal government's interests and federal judges who might be corrupt or biased against those who did not pay proper obeisance to the federal government.

The odd historical twist on all of this is that the Framers can claim something approaching total success in achieving the goal they set for themselves: to keep Congress, the executive branch, and the federal judiciary from systematically depriving defendants of these rights. With only a few exceptions — the Alien and Sedition Laws, the internment of Japanese-American citizens during World War II, the McCarthy hearings during the 1950s — the federal government has respected the basic values manifested in the Bill of Rights. Indeed, it goes beyond respect. It seems clear (though difficult to prove) that the Congress and the federal judiciary (along with American citizens in general) have internalized the values manifested in the Bill of Rights.

Ironically, the very success of the Framers in instilling in the Congress and the courts the values that they held dear moved the debate from the macro stage (to prevent wholesale and blatant denials of Bill of Rights guarantees) to the micro stage (how the rights should limit police and prosecutors in individual cases). At the micro stage, of course, defendants often are guilty, and the temptation is to construe narrowly the guarantees as they manifest themselves in doctrine, particularly those rights that impair accuracy of the criminal process. But the micro issues play themselves out on two macro stages in our system — the state and federal judicial processes. To say that federal officers should routinely get warrants before opening packages that were properly seized is not to say that state officers should be required to

do more than possess probable cause that the package contains contraband or evidence of a crime.[51]

The eighteenth century fear and concern about the powerful central government did not extend to the States. The States and their colonial antecedents had been around for over 150 years. They had just concluded a successful war against England. The Framers of the Constitution were influential figures in state government. That the Bill of Rights did not apply to the States was confirmed in 1833 when Chief Justice John Marshall, a member of the Virginia ratifying convention, spoke for a unanimous Supreme Court in *Barron v. Baltimore*.[52] The States were bound by their own constitutions, of course, but nothing in the Bill of Rights limited their power to investigate and prosecute crime.

The next watershed event in American history was the Civil War. The attempt by the Confederate States to leave the Union caused a new concern in American political theory as the fear of balkanized governments largely replaced the fear of a strong central government. One concrete instantiation of this concern was a bill introduced in Congress a year after the Civil War ended to change the name of the country from the "United States of America" to "America." The bill failed in the Judiciary Committee,[53] but the Fourteenth Amendment did pass, with its explicit (if not altogether clear) limitations on state power.

Whatever the merits of the claim that the Fourteenth Amendment incorporated the Bill of Rights, Section 1 limits state criminal processes directly. Much about the intent of the Framers and ratifying state legislatures is murky,[54] but one aspect is clear. Everyone — proponents and opponents alike — understood Section 1 of the Fourteenth Amendment to intrude significantly into state sovereignty. For example, Cabinet Secretary Browning, an opponent of the Amendment, said in a widely printed letter that its object and purpose was "to subordinate the State judiciaries in all things to Federal supervision and control" under the heel of the "due process" requirement.[55] Even if no

51. *Compare* United States v. Chadwick 433 U.S. 1 (1977) (requiring a warrant in a federal case), *with* California v. Acevedo, 500 U.S. 565 (1991) (requiring only probable cause in a state case).

52. 32 U.S. (7 Pet.) 243 (1833).

53. *Proposed Change of the Name of the Government*, N.Y. TIMES, June 30, 1866, at A1. The *Times* commented: "No doubt the proposition will meet with more general favor at the next session of Congress, when there will be fewer questions of greater moment to absorb the attention of the national Legislature."

54. *See infra* Part IV.

55. CINCINNATI COM., Oct. 26, 1866, p. 2.

one had contemplated incorporation, the States were required to provide a criminal process that comported with due process.[56]

Determining the substantive content of "due process of law" in an acceptably precise way is far from easy. Indeed, Justice Hugo Black was a long-standing proponent of incorporation in part because he thought it provided relatively specific guidance for judges. Black feared that otherwise judges would roam at will through the vague contours of due process and substitute their personal judgments for those of democratically elected legislatures. He argued that if due process implicates "immutable principles of free government," as some had suggested,[57] the Fourteenth Amendment "might as well have been written that 'no person shall be deprived of life, liberty or property except by laws that the judges of the United States Supreme Court shall find to be consistent with the immutable principles of free government.' "[58]

Today, however, the very success of incorporation as an interpretive theory provides a relatively clear and stable benchmark for due process in state cases. Thus, the only reworking of criminal procedure doctrine required by my theory is to resurrect the robust protections that the Framers intended to be available against federal actors. Most of the current federal criminal procedure doctrine has been constructed from state cases over the last four decades. Oddly enough, most of what we know or think we know about the Bill of Rights guarantees has been produced by cases in which the Court is interpreting the Fourteenth Amendment. Incorporation has unintentionally blinded the Court to the existence of separate worlds of criminal procedure.

No one — Court or commentators — has noticed that criminal procedure doctrine in the last forty years has largely come from state cases. No one has noticed because everyone has taken at face value the Court's repeated insistence that after incorporating a particular Bill of Rights guarantee, it is then interpreting the language of the Bill of Rights rather than that of the Fourteenth Amendment. But I wish to challenge the assumption that the analytical methodology of incor-

56. For reasons having to do with the Court's unwillingness to overrule precedent, it has chosen to use the Due Process Clause as the principal device to review state criminal justice systems. *Compare* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) (asserting a very narrow reading of the Privileges or Immunities Clause in a civil context), *with* Hurtado v. California, 110 U.S. 516 (1884) (considering, but rejecting, the later claim that the lack of a grand jury indictment would violate the Due Process Clause).

57. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 328 (1937) (Cardozo, J., writing for eight members of the Court) (due process includes the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (quoting Herbert v. Louisiana, 272 U.S. 312, 316 (1926))).

58. Duncan v. Louisiana, 391 U.S. 145, 168 (1968) (Black, J., concurring).

poration leads to the conclusion that the Court is interpreting the Bill of Rights.

The assumption that the Court is "reading" the Bill of Rights in a state case ignores *Barron.* As long as *Barron* is still the law — and the Court has never suggested otherwise — the Bill of Rights' guarantees do not apply to the States, and the text the Court interprets in state cases is technically the Fourteenth Amendment. The Court is, of course, free to say that the Fourteenth Amendment entirely swallows up, for example, the Fifth Amendment Double Jeopardy Clause, and that every interpretation of the Fourteenth Amendment bearing on double jeopardy at the same time interprets the Fifth Amendment. Indeed, the Court has said precisely that.[59] But the text being interpreted in state cases is still the Fourteenth Amendment, and the narrow holding of those cases is limited to the state context, or at least that is my argument in Part V. My argument requires that we separate the analytic structure of the Court's opinions, which *claim* to be interpreting the language in the Bill of Rights, from the narrow holding of these cases, which is only that the Fourteenth Amendment either permits or denies the state the power to conduct its criminal process in a particular way. On this view of the Court's criminal procedure doctrine, the state cases are interpretations only of the Fourteenth Amendment Due Process Clause, *not the Bill of Rights guarantees themselves.*

This view implicates current doctrine in two ways. First, the Court now possesses a stable body of law defining "due process" — the state cases that purport to be defining the guarantees in the Bill of Rights. Due process requires, for example, that States provide trials within the period loosely defined by the Court in *Barker v. Wingo*,[60] the case in which the Court upheld a conviction despite a delay of five and one-half years from arrest to trial. The rationale for this unanimous holding was essentially that the delay had not prejudiced the defendant's case, a rationale that has as its goal accuracy rather than simply the provision of the "speedy trial" the Sixth Amendment guarantees.[61]

The second implication of my view is that *Barker v. Wingo* is not an interpretation of the speedy trial right in the Sixth Amendment. Federal trials might have to meet a more rigorous standard for timeliness because they are covered by the "speedy trial" language of the Sixth Amendment rather than the "due process" language of the

59. *See* Benton v. Maryland, 395 U.S. 784, 795 (1969).

60. 407 U.S. 514 (1972).

61. Justice Thomas noted this anomaly in his dissent in *Doggett v. United States*, 505 U.S. 647 (1992). Because *Doggett* was a federal case, Thomas is right to claim that prejudice to the case should have been irrelevant. The government's real problem in *Doggett* was that the delay between indictment and trial stretched past eight years, and that is difficult to square with any common-sense meaning of "speedy."

Fourteenth Amendment. One would hope that five and one-half years is not a good working definition of "speedy."

The value of my approach is that it permits the Court to keep its criminal procedure doctrine largely intact as a measure of due process in the Fourteenth Amendment, while also freeing the Court to return the Bill of Rights criminal procedure guarantees to their proper role as formidable barriers against the federal government. A careful examination of the state criminal procedure cases reveals that the Court has been using a sort of due process test all along. The cases, time and again, turn not on the interpretation of the language in the Bill of Rights as much as on the question of whether the process in question is likely to produce an accurate trial outcome or whether the investigation was fair. As my speedy trial example made clear, what satisfies due process in terms of accuracy or fairness would not necessarily, or even often, be the best reading of the language of the Bill of Rights.

My proposed analytic structure presumes a maintenance of the current level of protection in state cases. If freed from specific Bill of Rights protections, the Court might, consciously or unconsciously, weaken protection in state cases as a further accommodation of the interest in convicting state criminal actors. But I think this weakening is unlikely. The criminal procedure protections are already articulated in generalized, due process language. For better or worse, state suspects and defendants today face due process precedents that are "loose" enough to provide leeway for lower courts to seek fair and accurate outcomes in individual cases. Given this flexibility, and the institutional disincentive to overrule well-established precedents, it is unlikely that the Court would significantly weaken its due process cases if it adopted my analytical structure, or that lower courts would change their approach to the already loose guidelines that are in place. In any event, I proceed on the assumption that the Court will maintain the current criminal procedure doctrine developed in state cases as the due process benchmark.

Many have weighed in on the issue of how best to understand the Fourteenth Amendment.[62] My project will cast a new light on the incorporation debate. By starting at the beginning — prior to the collision of the worlds of criminal procedure — we can better appreciate what was at stake when the Court merged the two worlds. Only then can we perceive the real effects of incorporation.

Two models of the Fourteenth Amendment are possible. One creates a set of limitations on state actors that has no necessary connection to the Bill of Rights. Under this model, courts would interpret the Bill of Rights separately from the Fourteenth Amendment in every case. The other model is incorporation. It requires courts to interpret

62. *See infra* Part IV.

the Fourteenth Amendment as if it *were* the Bill of Rights. It requires courts to maintain the high barriers against prosecution and conviction that the Framers created. The Court has never had the political will to hamstring the States in that fashion, which is why I argue for a two-tier interpretation that I believe is closer to the historical understanding of both the Bill of Rights and the Fourteenth Amendment. My principal point, however, is that the mirror of the Fourteenth Amendment has distorted the picture of the Bill of Rights guarantees. We should readjust that picture.

My goal in the next two parts is to document the strong antigovernment premise of the original Bill of Rights criminal procedure guarantees. Part IV then seeks to demonstrate that incorporation was an interpretative and historical error. Part V provides a way out of this mistake with an account of stare decisis that permits the Court to change its mind without overruling any precedents. Part VI is a thought experiment exploring how the Court might rebuild the high barriers against the federal government. *Barker v. Wingo* might be a sound interpretation of due process timeliness without telling us anything about Sixth Amendment speedy trial.

II. SOME PRINCIPLES OF AUTONOMY AND PRIVACY

Barriers to Federal Investigations and Trials

Few cases involving the criminal procedure provisions of the Bill of Rights reached the Court prior to Prohibition, but the Court decided these cases consistently with the notion that the barriers to federal investigation, prosecution, and punishment should be high. In 1886, *Boyd v. United States*[63] reviewed a federal statute that permitted prosecutors to subpoena business records — hardly an outrageous idea by modern standards. The Court held that the Fourth Amendment and the Fifth Amendment privilege against self-incrimination deprived Congress of the power to enact that legislation. The records seized by subpoena could not be used in Boyd's civil forfeiture trial. In justifying this broad protection, the Court wrote:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They . . . apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property [that constitutes the harm].[64]

63. 116 U.S. 616 (1886).

64. *Id.* at 630.

According to the Supreme Court in 1886, the "indefeasible" right of personal security, personal liberty, and private property created a zone of privacy that Congress could not breach, even to permit a prosecutor to subpoena business records.

Morgan Cloud demonstrates that *Boyd* led inexorably to *Weeks v. United States*,[65] the first case to hold that a violation of the zone of privacy had evidentiary consequences in criminal cases.[66] Though *Weeks* is often carelessly described as the first case to apply the exclusionary rule, what it actually held was more fundamentally antigovernment. Weeks did not move to suppress the letters and private documents seized in his house in violation of the Fourth Amendment. Instead, true to the property-based understanding of the Fourth Amendment then prevailing, Weeks moved for the return of his private papers. Holding that the judge should have ordered the papers returned, the Court implicitly found that Weeks had a property interest in his papers superior to that of the government, a property interest that created a powerful zone of privacy.

Because the federal authorities had no search warrant in *Weeks*, the question left for a later case was whether a search warrant would permit federal agents to breach the Fourth Amendment zone of privacy. If *Boyd* held that a subpoena could not defeat a superior property interest that the Fourth Amendment protects, there was no reason to think that a search warrant would fare any better. Indeed, as between the two invasions of privacy, the search warrant is far more intrusive because the agents enter the premises and search wherever authorized by the warrant. The subpoena simply orders the recipient to locate and produce the items requested. The resolution of the search warrant issue was clouded, of course, by the *Boyd* Court's apparent reliance in part on the Fifth Amendment privilege. No one knew whether the Fourth Amendment by itself created a zone of privacy that a properly issued warrant could not breach.

The Court answered this question in *Gouled v. United States*.[67] There, a Court that included Holmes and Brandeis held unanimously that even a search warrant would not justify entry into a house or office to search for papers or other property rightfully in the possession of the owner of the premises. Citing *Boyd*, the Court wrote that the Fourth and Fifth Amendments "are to be regarded as of the very essence of constitutional liberty."[68] It then held that search warrants could authorize only searches for contraband, fruits of a crime, in-

65. Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555 (1996).

66. Weeks v. United States, 232 U.S. 383 (1914).

67. 255 U.S. 298 (1921).

68. *Id.* at 303-04.

strumentalities used in the commission of a crime, or items required by law to be kept (as in records relating to articles on which excises were due). The theory in *Gouled*, like *Boyd* and *Weeks*, was that the government could search for and seize property only if it asserted a property interest superior to that of the possessor of the property. *Boyd* and *Gouled*, read together, suggest that the zone of privacy created by a property interest *simply could not be breached by a federal prosecutor or agent.*[69]

In 1949, in *Wolf v. Colorado*,[70] the Court said that the "security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society. It is, therefore, implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."[71] The *Wolf* majority refused, however, to compel the States to exclude evidence seized in violation of this due process privacy interest. That doctrinal move occurred in 1961, when *Mapp v. Ohio*[72] incorporated the entire Fourth Amendment, including the exclusionary rule, into the Due Process Clause.

Mapp was an easy case for suppression. The state court ignored a series of severe infringements of Dollree Mapp's privacy interests. The police surrounded her house, ignored her refusal to let them in, broke down the door, and physically manhandled her when she demanded to see the search warrant they claimed to have. They offered no warrant at trial and sought to justify the admission of evidence on the ground that Ohio did not recognize the exclusionary rule. In effect, the prosecutor said, "It does not matter how egregiously the police invade the privacy of an Ohio citizen. No evidence can ever be suppressed." Because suppression looked like such a good idea in this case, the Court could have taken a smaller step. It could have held, as in did in *Rochin v. California*,[73] that suppression was required under the Due Process Clause because the circumstances in *Mapp* offended notions of justice and fair play inherent in due process.

Instead, the Court chose another path, undoubtedly in the belief that a more general threat of suppression would make state law as protective of privacy as federal law. But *Mapp* has had precisely the opposite effect, moving federal law in the direction of the pre-*Mapp* state law. An absolute zone of privacy for lawfully possessed property

69. Fourth Amendment privacy could be relinquished by its possessor through consent. *See* Amos v. United States, 255 U.S. 313, 317 (1921) (dicta). Moreover, it did not extend to all property. It did not, for example, protect "open fields." *See* Hester v. United States, 265 U.S. 57 (1924).

70. 338 U.S. 25 (1949).

71. *Id.* at 27-28.

72. Mapp v. Ohio, 367 U.S. 643 (1961).

73. 342 U.S. 165 (1952).

was the natural construction of the Fourth Amendment when federal agents were investigating customs violations (*Boyd*), the mailing of lottery tickets (*Weeks*), and the use of the mails to defraud the United States (*Gouled*). When faced with state police chasing a robbery suspect into a house, however, the most natural construction was to emphasize the State's interest in preventing and solving crime. *Gouled* was a casualty of incorporation.

As Justice Brennan said for eight members of the Court in rejecting the premise of *Gouled*, "The requirement that the Government assert . . . some property interest in material it seizes has long been a fiction, obscuring the reality that government has an interest in solving crime."[74] This of course ignores the pre-incorporation purpose and goal of the Bill of Rights criminal procedure guarantees. The Court's opinions in *Boyd*, *Weeks*, and *Gouled* do not once refer to the government's interest in solving crime. More importantly, the entire history of the debates surrounding the Bill of Rights contains not a single reference to the importance of enabling the crime-solving function of the federal government.

Many reasons explain this shift in the Court's attitude. One is that the fear of the central government had, by the 1960s, largely been replaced by a fear of criminals. In addition, solving the crime of mailing lottery tickets or not paying duties on a few pieces of glass simply pales in comparison to the interest in solving the crimes of rape, robbery, and murder. By broadening the Fourth Amendment in 1961 to protect those who committed violent state crimes, the Court truncated the very protections it attempted to impose on the States.

Whether or not *Boyd* sensibly interprets the Fourth and Fifth Amendments,[75] the Court today no longer holds in such high esteem the "indefeasible right of personal security, personal liberty, and private property" that the nineteenth century Court found in the Bill of Rights. Justice Brandeis said that *Boyd* was "a case that will be remembered as long as civil liberty lives in the United States."[76] It may be *remembered* today, but the modern Court has dismantled *Boyd*'s zone of privacy without acknowledging the reasons the Framers created a high barrier against federal intrusion.

The search warrant requirement is another Fourth Amendment protection that has all but evaporated since incorporation. As long as *Gouled* was the law, warrants were limited to items that the suspect had no right to possess. Even then, the Court insisted that search warrants should be obtained when possible. Two categorical exceptions to

74. Warden v. Hayden, 387 U.S. 294, 306 (1967). Only Justice Douglas dissented.

75. For an intriguing view that *Boyd* represents an admirable blend of formalism and pragmatism, see Cloud, *supra* note 65.

76. Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

this rule existed in the pre-1961 world: searches incident to arrest[77] and searches of vehicles if the agents had probable cause to stop and search the vehicle.[78] Today, roughly twenty-four exceptions to this "warrant requirement" exist, discovered by the Court largely in cases coming from state courts.[79] While other causes undoubtedly played a part in the decline of the warrant requirement, incorporation was a crucial cause, one that has not been acknowledged.

It is beyond the scope of this Article to detail all the ways in which federal criminal procedure rights have eroded in the modern era. We have already seen that compulsory process now receives a less robust interpretation than when Chief Justice Marshall was determining how it protected federal defendants accused of treason. We have seen that, in the federal courts in the nineteenth century, speedy trial meant a trial conducted in a prompt fashion, rather than a trial likely to have convicted a guilty defendant, as it is understood today.

Prior to incorporation, the Court interpreted broadly the Sixth Amendment right to confront the prosecution's witnesses. In 1900, the Court unanimously held inadmissible the preliminary hearing testimony of a witness who did not appear at trial.[80] The Court's opinion, by the first Justice Harlan, drew from Cooley's *Treatise on Constitutional Limitations* a rule that required sworn testimony in another proceeding, the chance to cross-examine, and proof that the witness is currently unavailable because he is "deceased, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party."[81] This rule had teeth. Since incorporation, by contrast, the rule is that witnesses need not appear to testify if their absence can be explained by any of the "firmly entrenched" exceptions to the hearsay rule.[82] This means, for example, that hearsay utterances of a co-conspirator can be admitted without offering the witness to testify even though he is available.[83] This is a much weaker rule than the Court applied in 1900. Incorporation is part of the cause.

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77. The Court went back and forth on the permissible scope of searches incident to arrest. For a good discussion of the Court's vacillating attitude toward this exception, see *Chimel v. California*, 395 U.S. 752 (1969).

78. *See* Carroll v. United States, 267 U.S. 132 (1925).

79. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473 nn.23-44 (1985) (mentioning twenty-two exceptions); California v. Acevedo, 500 U.S. 565, 582-83 (1991) (Scalia, J., concurring) (adding two exceptions). Of the twenty-four exceptions, eighteen were announced in cases coming to the Court from state courts.

80. Motes v. United States, 178 U.S. 458 (1900).

81. *Id.* at 472 (quoting THOMAS M. COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS *318).

82. White v. Illinois, 502 U.S. 346 (1992).

83. Dutton v. Evans, 400 U.S. 74 (1970) (plurality opinion).

Another demonstration of the unintended effect of incorporation is the plight of the jury of twelve. In *Thompson v. Utah*,[84] the Court established that when the Framers created a right to trial by jury in the Sixth Amendment, they meant a jury of twelve. Not eleven. Twelve. *Thompson* was emphatically reaffirmed in *Patton v. United States*:[85]

> A constitutional jury means twelve men as though that number had been specifically named; and it follows that when reduced to eleven it ceases to be such a jury quite as though the number had been reduced to a single person . . . . To uphold the voluntary reduction of a jury from twelve to eleven upon the ground that the reduction — though it destroys the jury of the Constitution — is only a slight reduction, is not to interpret that instrument but to disregard it.[86]

Patton was being tried by a panel of twelve jurors when one became severely ill. With the consent of the both sides, the requirement of a twelve-person jury was waived and a panel of eleven completed the trial, returning a guilty verdict. Due to dicta in *Thompson*, the lower court had been unsure whether a twelve-person jury was waivable with the parties' consent. The Court held that a federal jury, or any portion thereof, "is not to be discharged as a mere matter of rote."[87] Justice Sutherland emphasized:

> Not only must the right of the accused to a trial by a *constitutional* jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant.[88]

Unless this rigorous waiver standard was met, twelve jurors were required for a *constitutional* jury. And the twelve-vote verdict had to be unanimous.[89] These cases make clear that the federal jury requirement was not to be taken lightly. And it was not taken lightly for over fifty years. The principles of *Thompson* and *Patton* remained "jealously preserved" until June 22, 1970. On that day the Court sacrificed the twelve-person federal jury on the altar of incorporation in *Williams v. Florida*,[90] holding that a six-person jury is constitutional in

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84. 170 U.S. 343 (1898).

85. 281 U.S. 276 (1930).

86. *Id.* at 292.

87. *Id.* at 312.

88. *Id.* (emphasis added).

89. The Court held that the Seventh Amendment requires unanimous verdicts in federal civil cases. Springville v. Thomas, 166 U.S. 707 (1897). It follows from that holding that unanimous verdicts are required in federal criminal cases, but the issue has never been joined because the Federal Rules of Criminal Procedure have always required a unanimous verdict.

90. 399 U.S. 78 (1970).

a state case. I will later argue that the technical holding in *Williams* is limited to an interpretation of the Fourteenth Amendment because that is the relevant text the Court was interpreting. But the Court said the year before, in *Benton v. Maryland*,[91] that "[o]nce it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' . . . *the same constitutional standards apply against both the State and Federal Governments*."[92] Moreover, in *Williams*, the Court said it was interpreting the Sixth Amendment: "Our holding does no more than leave these [policy] considerations to Congress and the States, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury."[93]

In *Williams*, the Court first distilled the jury trial right to its "essential feature" of "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen."[94] The Court then explained:

> The performance of this role is not a function of the particular number of the body that makes up the jury. . . . We do not pretend to be able to divine precisely what the word 'jury' imported to the Framers, the First Congress, or the States in 1789.[95]

Perhaps *Williams* is correct that the Framers had no particular number in mind. If so, then *Thompson* and *Patton* were mistaken. But the point for this Article is that the twelve-person jury was the uncontroversial understanding of the Framers' intent for over seventy years. And when it was summarily rejected, it was in a state case arising under the Due Process Clause.

In his *Williams* concurrence, Justice Harlan argued — quite correctly, it seems to me — that the Bill of Rights was being "watered down" in its application to the States. Justice Black, as usual, disagreed with Harlan on the incorporation issue: "This assertion finds no support in today's decision or any other decision of this Court. We have emphatically 'rejected the notion that the Fourteenth Amendment applies to the States only a 'watered down, subjective version of the individual guarantees of the Bill of Rights.' "[96] Furthermore, "[t]he broad implications in early cases indicating that only a body of 12 members could satisfy the Sixth Amendment requirement arose in

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91. 395 U.S. 784 (1969).

92. *Id.* at 795 (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968)) (emphasis added).

93. *Williams*, 399 U.S. at 103.

94. *Id.* at 100.

95. *Id.* at 98, 100.

96. *Id.* at 106-07 (quoting Malloy v. Hogan, 378 U.S. 1, 10-11 (1964)). Justice Black may be right. Lowering the federal jury standard from twelve to six may not be watering down. It seems more like drowning in a flood.

situations where the issue was not squarely presented and were based, in my opinion, on an improper interpretation of that amendment."[97]

Black's attitude toward *Thompson* parallels that of Brennan toward *Gouled*. In both cases, the writer discredits the reasoning of the precedent and ignores the history that led to the holding. Moreover, both opinions undervalue the Framers' goal of having high barriers against federal prosecutors and judges. This leads to the historical mistake inherent in the notion of incorporation and thereby diminishes the Bill of Rights.

To be sure, it is not only incorporation that can explain the Court's increasingly hostile attitude toward the Bill of Rights' criminal procedure guarantees. The character and role of the federal government began to change in the twentieth century. By the time of Franklin Roosevelt's election, and certainly by the beginning of World War II, most Americans had a benevolent, or at least hopeful, view of the federal government. In addition, as I have indicated, most federal crimes in the nineteenth century were nonviolent and economic in nature. Strong Bill of Rights protections therefore did not noticeably affect the public safety. But the beginning of the twentieth century saw the rise of organized crime and the difficulty of enforcing Prohibition, which at least in the beginning was a popular law.[98] The need to control gangsters and enforce sobriety required a strong federal response and also acted as a hydraulic that led the Court to narrow the rights of privacy and autonomy that underlie the criminal procedure guarantees. The expansion of federal criminal jurisdiction continues to this day. It is, for example, a federal crime for a store to remove a mattress tag.[99] The Framers would have thought the entire country quite daft to permit such a law to stand.

But incorporation is related to the other causes and is at least as significant in reducing the scope of the protections. The Court began the full-scale process of incorporating the criminal procedure guarantees in 1961. By the time it finished in 1970, the nation had come through a social upheaval unlike anything since the Great Depression. Crime rates had risen dramatically. Many people, and thus many politicians, had grown increasingly unhappy with anything that could be characterized as a "right of criminals." Richard Nixon campaigned on a "law and order" theme during the 1968 election, offering a velvet

97. *Id.* at 107.

98. Note, for example, the Court's expansive construction of the rights to search under the Prohibition Act, and the language supporting the Act, in *Carroll v. United States*, 267 U.S. 132 (1925).

99. 15 U.S.C. §§ 1192, 1196 (1994); 16 C.F.R. §§ 1632.31(b)(1), 132.31(b)(5) (1997); *see* Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1610 & n.264 (1997).

glove alternative to George Wallace's mailed fist.[100] Wallace said the Supreme Court was a "sorry, lousy, no-account outfit," and he promised that if he were elected president "you wouldn't get raped or stabbed in the shadow of the White House even if we had to call out 30,000 troops and equip them with two-foot-long bayonets and station them every few feet apart."[101] Not even Democratic presidential candidate Hubert Humphrey defended the Supreme Court's criminal procedure decisions.

The crimes Americans fear most — everyday property crimes and crimes of violence — have always been the responsibility of local police and prosecutors. The modern Court's instinct has been to seek ways to make it easier for police and prosecutors to solve these kinds of crimes and convict the perpetrators. But the Framers were not concerned with the government's interest in solving crime. While we today fear criminals, the Framers feared the central government.

Recall *Barker v. Wingo*, the case unanimously holding that a trial was speedy even though held five and one-half years following arrest. The Court began its recitation of the facts with, "[o]n July 20, 1958, in Christian County, Kentucky, an elderly couple was beaten to death by intruders wielding an iron tire tool."[102] If the Court had found the delay to violate Barker's right to a speedy trial, the only remedy would have been to reverse the conviction without remand for a new trial. A speedy trial violation cannot be remedied by giving the defendant a second, later trial. The defendant, a convicted murderer, must walk free.

Given this extreme remedy, consider how much easier it was for a later Court to find a speedy trial violation in a federal case where the conviction was for conspiracy to import and distribute cocaine.[103] As serious as the distribution of drugs might be, setting free a man convicted of murdering elderly people in their homes with a tire tool is far more difficult. Faced with the prospect of releasing murderers, robbers, and rapists in the 1970s and 1980s, the Court "blinked" and began to shrink the criminal procedure protections available in state court.[104] But in a world with a one-size-fits-all incorporation doctrine, federal prosecutors also benefit from the lowered barriers, thus mak-

100. The characterization is Liva Baker's. LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 244 (1983).

101. *Id.* at 243.

102. 407 U.S. at 516.

103. Doggett v. United States, 505 U.S. 647 (1992). The delay in this case was eight years, but I don't see much difference in terms of "speedy" between a delay of five and one-half years and a delay of eight years.

104. Of course, Richard Nixon became President in 1969 and began to appoint lawyers with a more conservative philosophy to the Court, but I believe the Court was inevitably going to retreat from the expansive federal model as it faced the consequences of applying those doctrines to state criminal cases.

ing it easier for them to obtain convictions through the use of hearsay evidence, wiretapping, and questionable interrogation techniques. The Framers would have viewed this alien world and wondered why they bothered to write a Bill of Rights. What is striking about the Court's decision to force criminal procedure into a single track is that it occurred without any discussion of whether it was a good idea for a local cop and prosecutor to have to pass the same hurdles as their federal counterparts.

Identifying the precise cause that has produced a stunted set of criminal procedure guarantees is impossible. For example, as enforced sobriety became less popular and use of other recreational drugs increased, the government would increasingly be seen by some citizens as more, not less, hostile. Indeed, the federal war on drugs will sometimes be a counter-example to points I make in this Article. For example, when I argue that an expanded search warrant requirement would not unduly burden federal law enforcement, one rejoinder is, "What about the war on drugs?" In the wake of the September 11, 2001, attack, the same question can be asked, with more urgency, about the war on terrorism.

This is a fair question. It would, however, take another paper to work through in detail the implications of a more robust interpretation of the criminal procedure guarantees in the federal criminal process. To say that the Court should return to the original understanding of a more expansive Bill of Rights protection in the federal system is not necessarily to say that the Court should return to *Boyd* or *Gouled*. The world is different in 2001. The role of federal criminal law is far larger and is unlikely to retrench significantly. Though Part VI tentatively suggests some ways federal criminal procedure might be more protective than current doctrine, I make no effort to accommodate special federal law enforcement needs such as enforcing the drug laws, attempting to control organized crime, or combating terrorism.

III. VALUES UNDERLYING THE BILL OF RIGHTS

Hobbling the Powerful Federal Government

We have come to believe, because it has been repeated over and over, that the reason to have protections benefiting criminals is that these protections best deliver accurate verdicts that separate the guilty — the real criminals — from the innocent. This argument is reiterated endlessly because it is thought to be a good defense against the crime control adherents who would abolish or limit criminal procedure rights. Unfortunately, it poorly explains the Framers' insistence on the criminal procedure guarantees in the Bill of Rights.

The Framers did not focus on separating the guilty from the innocent because they were concerned with curtailing the power of federal

prosecutors and judges. I do not claim that innocence was irrelevant. I claim, instead, that when framing the Bill of Rights, the Framers understood "innocence" differently than we understand it in the context of today's property crimes and crimes of violence. Today we mean "factually innocent of the relevant wrongdoing." The Framers sought to protect the "innocence" of those against whom the central government might improperly seek criminal or civil penalties. Whether a particular citizen was factually guilty of evading duties or of seditious libel was less important to the Framers than restraining the ability of the federal government to obtain wholesale convictions for what seemed to them little more than antigovernment conduct.

Consider the Fourth Amendment. If protecting factual innocence were its principal goal, no particular reason compels us to ban general warrants. Innocent people have nothing to fear from warrants, general or otherwise. And general warrants are an efficient way to sort the factually guilty from the innocent. The Fourth Amendment bans general warrants because they manifest raw government power over our lives, because they subordinate the citizen to the government, and because they permit wholesale convictions for antigovernment conduct.

The criminal procedure provisions that best advance the goal of accurate verdicts are the Sixth Amendment rights to notice of the nature and cause of the accusation, to be confronted with adverse witnesses, and to have compulsory process for obtaining favorable witnesses. Yet the Framers said very little about these accuracy-enhancing rights. Leaving aside the special case of treason, the only two criminal procedure guarantees in the body of the Constitution are two that have little to do with factual innocence — the right to a jury trial and the writ of habeas corpus.

Habeas corpus, as understood in the eighteenth century, was not a mechanism to re-examine the accuracy of the outcome. Rather, it was a way to test whether the court that entered the conviction had jurisdiction. A court could lack jurisdiction because the offense was a "pretended" one — the Declaration of Independence accused King George III of trying colonists of "pretended offences"[105] — or because the prosecutor had brought the charge in the wrong court, presumably to obtain an advantage. In either case, a conviction would represent a highly arbitrary use of power that was objectionable not because the accused was factually innocent but simply because the crown should not obtain convictions in that manner.

Most of the debate that led to the Bill of Rights was over trial by jury, an odd historical fact if protecting innocence were uppermost in the minds of the Framers. No one claims now — indeed, no one claimed in the Magna Carta, the Petition of Right in 1627, or the

105. THE DECLARATION OF INDEPENDENCE para. 21 (U.S. 1776).

Massachusetts Body of Liberties in 1641 — that juries are uniquely qualified to deliver the truth about factual guilt.[106] Moreover, Article III already contained a right to trial by jury in criminal cases. A comparison of the relevant provisions is instructive. Article III requires that "[t]he Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed."[107] The Sixth Amendment requires that crimes be tried by a jury "of the State and district wherein the crime shall have been committed." The Seventh Amendment requires trial by jury in "Suits at common law" and forbids the reexamination of any fact found by a jury. What the Framers found missing in Article III was the right to a trial in civil cases, with the jury as ultimate factfinder, and the right to a criminal jury from the "district" rather than the state. Richard Henry Lee's proposed amendments of October 16, 1787 put the concern this way:

> That the trial by jury in criminal and civil cases, and the modes prescribed by the common law for safety of life in criminal prosecutions shall be held sacred — . . . . That such parts of the new constitution be amended as provide imperfectly for the trial of criminals by a jury of the vicinage, and to supply the omission of a jury trial in civil cases or disputes about property between individuals where by the common law is directed, and as generally it is secured by the several State constitutions.[108]

But why would these concerns cause the jury trial issue to dominate the debate on amending the Constitution? The Constitution in 1787 contained no right to counsel, no Fourth Amendment, no right to subpoena witnesses, no right to be informed of the nature and cause of the accusation. It did contain a right to trial by jury. Even if one thought the expression of the right imperfect, surely the complete lack of the other protections should be of more concern. But it was correcting the Article III jury right that was the passion of the anti-Federalists.

To understand this phenomenon, consider the role of the jury in the colonies. When rebels against the Crown were tried for evading customs duties, or for some offense made up by the Crown, the jury

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106. *See* Duncan v. Louisiana, 391 U.S. 145, 157-58 (1968) (noting that waivers of jury trials are acceptable and that States can refuse to provide jury trials for petty offenses).

107. U.S. CONST., art. III, § 2, cl. 3.

108. NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS 415 (1997) (quoting VIRGINIA GAZETTE, Dec. 22, 1787). Cogan's work is a genuine treasure. It includes many sources beyond the congressional debates on the Bill of Rights, including the debates in the state legislatures that proposed amendments to the Constitution and selections from pamphlets, newspapers, letters, and other sources that are difficult to locate. Cogan checked original sources in all cases, restoring the original spelling, capitalization, and use of italics that in some cases over the years had been modernized. Because of the quality of Cogan's work, I did not check original sources in most cases and simply cite to Cogan.

often acquitted even though the accused was guilty. The colonists wanted not truth as much as the voice and the law of the community. This can be seen in a resolution of the First Continental Congress: "*Resolved* . . . That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."[109] The law to be applied was local, and the judgment to be made by the peers of the vicinage.

Other than questions of convenience, why would it matter that the defendant was tried in a far corner of the state where he was not known by the jurors? The goal is not likely to be protecting the innocent. One could conjure up all sorts of theories about distant juries being easier for powerful federal prosecutors to manipulate, but any gain for the protection of innocence from local venue seems marginal at best. John Marshall sought to quell the concern about potential abuses of power by federal juries by asking what we would ask today: why would a jury of strangers be "the tools and officers of the government"? More fundamentally as to civil cases, "What is it to the government whether this man or that succeeds [in a civil suit]? It is all one thing."[110]

So what was different about local juries? One real difference is that local jurors would be more likely to know the witnesses and their character as well as the character of the defendant. Eighteenth-century rules of evidence and procedure permitted inquiry into the character of the defendant and also forbade the defendant from testifying under oath.[111] Thus, one way the jury could better "see" the defendant's side of the dispute from his personal vantage point was to know the defendant. In the words of Patrick Henry:

> Why do we love this trial by jury? Because it prevents the hand of oppression from cutting you off. They may call any thing rebellion, and deprive you of a fair trial by an impartial jury of your neighbors. Has not your mother country magnanimously preserved this noble privilege upwards of a thousand years? . . . This gives me comfort — that as long as I have existence, my neighbors will protect me. Old as I am, it is probable that I may yet have the appellation of *rebel*.[112]

Whatever the reason the Framers found the Article III jury trial right inadequate, they were determined to interpose the community between the citizens and the central government as a way to place stringent limitations on the federal government. Indeed, Luther Martin concluded that the inadequacy of the Article III jury right did

109. *Id.* at 414.

110. *Id.* at 439.

111. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *359-60.

112. COGAN, *supra* note 108, at 438.

not arise from "inattention" or "any real difficulty in establishing and securing jury trials by the proposed constitution" but because the Federalists did not trust state juries to decide disputes involving the federal government.[113] He argued that the right to a jury trial "is *most essential for our liberty*, to have it *sacredly guarded* and *preserved*" in "*every case* whether *civil* or *criminal* between *government* and *its officers* on the one part and the *subject* or *citizen* on the other."[114] Thus, answering John Marshall, the real difficulty with Article III's lack of the civil jury trial right was not so much when individual sued individual but when the government sought a fine, penalty, or forfeiture.

James Iredell noted that "the great instrument of arbitrary power is criminal prosecutions." There is, he continued, "no other safe mode to try these but by a jury," thus avoiding "the control of arbitrary judges."[115] Even more precise, and perceptive, was the observation by James Wilson: "There is another advantage annexed to the trial by jury; the jurors may indeed return a mistaken or ill-founded verdict, but their errors cannot be systematical."[116] Implicit in this observation, of course, is the fear that judges would make errors that favored the government. Unlike today, when federal judges are held in high regard, to the Framers they represented a potential return to the tyranny of British rule.

Many other, more general attacks were made on the new central government. Patrick Henry said that without a Bill of Rights, "[i]f [citizens] dare oppose the hands of tyrannical power, you will see what has been practised elsewhere. They may be tried by the most partial powers, by their most implacable enemies, and be sentenced and put to death, with all the forms of a fair trial."[117] "Philadelphiensis" wrote, "To such lengths have these bold conspirators [the Federalists] carried their scheme of despotism, that your most sacred rights and privileges are surrendered at discretion."[118] The political commentator, "An Old Whig," accused the Federalists of wishing "to enslave the people."[119]

Consider a list of the terms used to describe the central government or the new Constitution: "hand of oppression," "congressional oppression" and "tyrannical power";[120] "arbitrary power" and "arbi-

113. *Id.* at 465; *see also id.* at 472 (Martin argued that the same reason influenced the Federalists to provide an inadequate jury trial right as influenced them to create inferior federal courts: "they could not trust *State judges*, so they would not confide in *State juries.*").

114. *Id.* at 465.

115. *Id.* at 426.

116. *Id.* at 428.

117. *Id.* at 436.

118. *Id.* at 465.

119. *Id.* at 466.

120. *Id.* at 438, 436 (Patrick Henry).

trary judges";[121] "scheme of despotism";[122] "bad and arbitrary rulers";[123] "fangs of power"; "intolerable oppression";[124] "despots," "an infernal junto," and "absolute monarchy";[125] "wicked" judges and Star Chamber.[126] Perhaps the feelings are best summed up by Patrick Henry: "As this government stands, I despise and abhor it."[127]

These statements were, of course, made by the anti-Federalists, but the anti-Federalists were largely responsible for the Bill of Rights. Do these statements suggest a concern with enabling the federal government to solve crimes, to separate the guilty from the innocent? I think not. A fair reading of the text and history suggests that the writing and ratification of the Bill of Rights manifested a hatred and fear of the federal government. The point to the Bill of Rights, then, was to make it difficult for the federal government to deny bail, to convict anyone of a federal crime, or to subject anyone to forfeiture, fines, and civil penalties. The express concern was that the federal government would use its immense power to persecute its enemies. The memory of Parliament and King George III was still fresh in the minds of the Framers.

The "glue" that holds the Bill of Rights' criminal procedure guarantees together is the goal of making it as difficult as possible for the new federal government to pursue its enemies. This was why the right to a jury trial conducted *in the vicinage* was of paramount importance to the Framers. Implicit in much of the debate is the assumption that a jury who knows the defendant's character will nullify a prosecution that was viewed as overreaching on the part of the federal government, without regard to whether the defendant was factually guilty. Viewed in this light, it *was* important that the jury consist of twelve and that its verdict be unanimous, notwithstanding the modern protestations of the Court in cases coming from state courts.

Look at the other ways the central government was hobbled. It could not obtain search warrants unless it persuaded a magistrate that it had probable cause to look for specific evidence of a particular crime. It could not deprive the state militias of the weapons they would need to oppose a federal government that was threatening the liberty of state citizens. It could not appropriate private property for its own use without just compensation. It could not begin a prosecution without the judgment of a group of citizens, represented in an in-

121. *Id.* at 426 (Iredell).

122. *Id.* at 465 ("Philadelphiensis").

123. *Id.* at 450 ("Cincinnatus").

124. *Id.* at 468 ("Brutus").

125. *Id.* at 463 ("Philadelphiensis").

126. *Id.* at 422 (Tredwell).

127. *Id.* at 438.

dictment, that there was reason to proceed. It could not hold defendants prior to trial by demanding excessive bail or postpone trial indefinitely. It could not compel citizens to testify against themselves. It could not deny the assistance of counsel or any of the other accuracy-enhancing rights (notice of the charges, compulsory process, confrontation). It could not try a defendant a second time hoping for a different verdict or heavier penalty, nor could it impose cruel and unusual punishments. It could not seek to use civil fines and forfeiture to penalize defendants without persuading a jury of the justness of its cause.

As *Boyd* and *Gouled* make plain, the early Court understood the concerns of the Framers and interpreted the criminal procedure provisions in this context. Some of the barriers were so high that they were literally insurmountable — lawfully possessed property inside the house was immune from federal seizure. Trials had to be speedy. Compulsory process was interpreted broadly. The only exception recognized to the right of confrontation was when the witness was unavailable.

None of these high barriers applied to the States. The anti-Federalists who pressed the Bill of Rights to limit federal power saw state legislatures and state courts as the protectors of citizens and not as threats. Until the Fourteenth Amendment was ratified, the Constitution placed no limits on the power of the States to fashion their own criminal processes. That would change, of course, but not for almost one hundred years after the Fourteenth Amendment was ratified. One question worth mulling as we consider the Fourteenth Amendment is, what did the Warren Court know in the 1960s that no other Court knew from 1868 until 1961?

IV. VALUES UNDERLYING THE FOURTEENTH AMENDMENT

Paying Attention to History

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[128]

Lawyers love interpretational puzzles, and Section 1 provides four challenges. What are "privileges or immunities?" What is "due process of law?" "Equal protection of the laws?" Why does the privileges or

128. U.S. CONST. amend. XIV, § 1.

immunities guarantee extend only to citizens while all persons are guaranteed due process and equal protection?

Much ink has been spilled seeking to uncover the "intent" of the Framers of the Fourteenth Amendment. The issue in modern times is whether or to what extent the Fourteenth Amendment applied the Bill of Rights guarantees to the States. As the Article to this point has made clear, the Framers of the Bill of Rights intended to limit only the federal government. But fear of the federal government was supplemented, in the aftermath of the Civil War, by a fear of runaway States, and it would be natural for Congress to seek limits on States. The Fourteenth Amendment did this, without question. But did Congress intend to propose, and the States intend to ratify, the precise limits in the Bill of Rights? The classic debate was between Charles Fairman,[129] a supporter of Justice Frankfurter and his nonincorporation theory, and William Crosskey,[130] stating the incorporationist views of Justice Black. Later versions of the debate include Michael Curtis, Richard Aynes, Kevin Newsom, and Bryan Wildenthal,[131] who seem solidly in Crosskey's camp; and Raoul Berger and Donald Dripps, who roughly follow Fairman. Then there are the historical treatments that either report no substantial evidence of incorporation or treat that issue as not very important — books by James E. Bond, Joseph James, Earl Maltz, William Nelson, and Joseph Sneed.[132]

Two new theories of incorporation have appeared in the last few years. Akhil Amar introduced "refined incorporation" to the debate,[133] while William Nelson mentions almost in passing a new understanding of what the author of Section 1, John Bingham, might have

129. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

130. William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

131. MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE (1986); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993); Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of* the Slaughter-House Cases, 109 YALE L.J. 643 (2000); 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). Newsom goes so far as to claim that the Framers of the Fourteenth Amendment "clearly said" that it would incorporate the Bill of Rights. For my skeptical view of that claim, see the balance of this Part.

132. JAMES E. BOND, NO EASY WALK TO FREEDOM (1997); JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1984) [hereinafter JAMES, RATIFICATION]; JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956) [hereinafter JAMES, FRAMING]; EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 (1990); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT, FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988); JOSEPH T. SNEED III, FOOTPRINTS ON THE ROCKS OF THE MOUNTAIN (1997).

133. AMAR, *supra* note 18, at 215-94; *see also* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

meant by incorporation.[134] Canvassing in detail the relevant evidence about the various theories, and the huge body of scholarship, is beyond the scope of my project — indeed, merely summarizing the evidence and arguments takes fully half the length of this Article — but I will sketch the history as it is relevant to my arguments.

To put the issue in a conceptual context, consider how the Framers and ratifying state legislatures might have understood incorporation. If the point to the Fourteenth Amendment was, as Senator Jacob Howard of Michigan asserted when he introduced the amendment to the Senate,[135] to incorporate in one fell swoop the words of the Bill of Rights as "privileges or immunities of citizens of the United States," then the only coherent understanding of the relationship between the Bill of Rights and the Fourteenth Amendment is what is called "total incorporation."[136] No one in Congress, no state legislator, and no contemporary commentator noted any hierarchy or privileged list of the Bill of Rights guarantees that would allow some, but not all, to be read into the Fourteenth Amendment. If the States knew that total incorporation was the core meaning of "privileges or immunities," the ratifying legislatures intended to impose on themselves the Seventh Amendment right to a jury trial in civil cases, the Fifth Amendment right to a grand jury indictment, the Eighth Amendment prohibition of excessive bail, the Fifth Amendment prohibition of taking private property without just compensation, the Second Amendment right for militia members to keep and bear arms, and the Third Amendment prohibition of quartering troops in houses. Regardless of what the States might have thought about each of these rights on the merits, total incorporation required them to relinquish forever legislative control in all of these areas, effectively putting the state legislatures in an inferior position to Congress and the federal courts.

If, on the other hand, incorporation is not a mechanical process but, rather, one in which the Bill of Rights informs a judgment about what the Fourteenth Amendment protects, then no incorporation technically occurs. On this view, the Bill of Rights is simply a source that can illuminate the meaning of the Fourteenth Amendment; other sources would include the Magna Carta, Blackstone, Coke, the Petition of Right in 1627, the Massachusetts Body of Liberties in 1641, and the common law. For example, the ratifying state legislatures might have thought, as the Court said in *Wolf*, that the core notion of privacy underlying the Fourth Amendment is protected by the Fourteenth

134. NELSON, *supra* note 132, at 117-23.

135. *See infra* text accompanying notes 218-219.

136. The meaning of Section 1 would not have to be limited to the Bill of Rights guarantees, of course. Senator Howard in his message when introducing the amendment to the Senate clearly stated that it also included fundamental rights that were not protected by the Bill of Rights, such as the right to own property. *See infra* text accompanying notes 239-243.

Amendment. But unless the ratifiers thought the Bill of Rights was mechanically incorporated, that core notion is not automatically coextensive with the Fourth Amendment. It requires interpretation. It requires a kind of common law or natural law account of the scope and nature of privacy protected by due process or privileges and immunities. Using this analytical structure, one gets a different set of answers to privacy questions depending on whether one is reading the Fourteenth Amendment text or the Bill of Rights text.

The Court has refused to adopt either view of incorporation, instead hewing to a "selective incorporation" theory by which the Court decides, by some mystical process, that a particular right either is incorporated (most of them) or is not (grand jury; civil jury).[137] Once that is done, the Court treats the Fourteenth Amendment right and the Bill of Rights right as identical protections (or at least it claims to treat them this way). The Court has thus adopted an interpretive theory that features, in Justice Harlan's words, "the ease of the incorporationist position, without its internal logic."[138] Harlan is right on this point. Whatever the Framers might have thought,[139] it seems inconceivable that the ratifying state legislatures could have had selective incorporation in mind. Not knowing which rights would be selectively incorporated, the States would be signing a contract with its key provisions left blank. The States would be saying, in effect, we are hereby surrendering as much of our sovereignty as later Supreme Courts decide is a good idea.[140] To state the notion is to reject it. In our federal system, the States were completely sovereign before the Articles of Confederation and the Constitution. What sovereignty they did not surrender in those documents, as amended, the States retain.

My argument against incorporation as the preferred reading of history has four parts. Despite modern fascination with Section 1 of the Fourteenth Amendment, it was relatively uncontroversial and thus little explored in the debates in Congress. Most of the controversy was about Sections 2 and 3, and even more controversy centered on black suffrage and how or whether to admit the defeated Southern States back into the Union. Second, only two of about 230 members of

137. For an example of how this process "works" along with a stinging critique from Justice Harlan, see *Duncan v. Louisiana*, 391 U.S. 145 (1968).

138. *Id.* at 181 (Harlan, J., dissenting).

139. Wildenthal, who supports total incorporation, agrees that selective incorporation is an "uneasy compromise" that is "awkward and textually untenable." Wildenthal, *supra* note 131, at 1055.

140. In Nelson's theory of remedial incorporation, particular rights are enforced only against States that fail to provide that right equally to all citizens. But if the States knew this was the meaning of Section 1, they at least knew how much sovereignty they were surrendering — they were giving up the right to provide fundamental rights unequally.

Congress[141] took a position on incorporation during the drafting and debates on Section 1.[142] Senator Jacob Howard explicitly endorsed total incorporation as the core meaning of Section 1. Representative John Bingham was less clear but can be read the same way.[143] No one else engaged the idea, either pro or con. Third, in addition to this congressional silence on incorporation, no state legislator, governor, or newspaper editorial mentioned the concept of incorporation. Fourth, lawyers and judges were also silent on incorporation for four years after ratification even though at least one Supreme Court case cried out for that argument. When incorporation finally was mentioned in 1872, it was in the civil context and drew the support of a single Justice (Bradley). It was a full sixteen years after ratification before a criminal case reached the Supreme Court arguing incorporation, and the Court rejected the theory.[144]

Those who argue that the Framers meant to do more than assure the equality of the former slaves and Union loyalists in the unfriendly Southern States, that the Framers meant to incorporate the Bill of Rights, thus base their entire argument on the speeches of two (of about 230) members of Congress. They have almost no other evidence that anyone considered the Fourteenth Amendment to incorporate by reference the Bill of Rights. They do not explain why the debates in the state legislatures are silent, or why the newspapers did not take a position on incorporation,[145] or why the lawyers and judges who lived

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141. JOINT COMM ON PRINTING, 100TH CONG., BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-1989, S. Doc. No. 100-34, at 179-82 (1989). Although there were ultimately more than 240 members of the 39th Congress, the number at the time of the drafting and debates on section 1 of the Fourteenth Amendment was somewhat smaller, due in part to the fact that the contingent representing Tennessee was not seated until July 24, 1866. *Id.*

142. Amar claims that four members of Congress favored incorporation. To bring Representative James Wilson into the fold, Amar uses a speech Wilson gave two years before the drafting of the Fourteenth Amendment in which he claims that the First Amendment *already limited State power*, a reading that ignores *Barron*. Amar, *supra* note 133, at 1236. That is pretty thin evidence. To bring Representative Thaddeus Stevens into the fold, Amar relies on even shakier evidence. He reads Stevens's comment about "our DECLARATION or organic law" to be a possible misprint. Stevens might have said "*of* organic law," which, Amar asserts, would be a reference to the Constitution and Bill of Rights. *Id.* After all, Stevens noted that the Constitution did not apply to the States and that this "amendment supplies that defect." But Amar *fails to quote the rest of the Stevens' sentence*: "amendment supplies that defect and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all." CONG. GLOBE, 39th Cong. 1st Sess. 2459 (1866) (emphasis in original). Stevens then goes on to give several examples of how unjust laws would be corrected by ensuring that the law be applied equally to black and white. This is not incorporation that Stevens urges. It is, instead, the equality interpretation of Section 1.

143. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1090-91 (1866).

144. *See* Hurtado v. California, 110 U.S. 516 (1884) (rejecting the claim that the grand jury requirement was included in the Fourteenth Amendment).

145. Curtis offers one example of an editorial endorsement of incorporation — *The Dubuque Daily Times*, November 21, 1866. CURTIS, *supra* note 131, at 132. But the refer-

through the debate and ratification were silent. Lawyers read *The New York Times* in 1866. Senator Howard's speech setting out his view of total incorporation appeared on the front page of the *Times* on May 24, 1866.[146] The newspaper took no editorial stand on it.[147] No newspaper in the South even mentioned the theory during the contentious ratification process.[148]

The incorporationist explanation of silence is that it was all so obvious that no one needed to mention it again. We are to assume that politicians playing to their constituencies in New England and the Midwest would refrain from mentioning incorporation because it had already been mentioned twice. Moreover, how are we to explain the silence of the state legislators? To accept the argument that of course the Fourteenth Amendment incorporated the Bill of Rights, we have to accept that all the state ratifying legislatures intended to impose on themselves the federal Bill of Rights criminal procedure model — lock, stock, and barrel — as well as the Second, Third, and Seventh Amendments, *and that they did this without comment.* We must accept that incorporation was so obviously the intent of the Framers and the ratifying state legislatures that the newspaper editorial writers of the time saw no need to mention it even once.

Whether total incorporation is the best understanding of the Bill of Rights as a policy matter is one issue; whether it represented the intent of the Framers in Congress is another. That it manifested the will of the ratifying state legislatures is almost beyond belief. And, however the reader resolves these issues, I simply reject out of hand the long-standing view of the academy that incorporation is obviously the best historical understanding of what occurred between 1866 and 1868.[149] It is, at a minimum, open to serious challenge. And if it is open to serious challenge, the reader can proceed with Parts V and VI of the Article to consider the benefits of returning to a model in which the criminal procedure guarantees are given an historically accurate interpretation when applied to the federal criminal process.

Amar improves on selective incorporation by his notion of "refined incorporation," which reads Section 1 to incorporate only those parts of the Bill of Rights that, in his view, constitute privileges or im-

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ence to "privileges rightly conferred on every citizen by the federal constitution" could be clearer. Indeed, two sentences earlier the editorial had spoken of the "privileges and protections of law . . . which nature gives."

146. N.Y. TIMES, May 24, 1866, at 1.

147. No report of any *Times* editorial stand on incorporation appears in the books listed in note 132.

148. James canvasses newspaper response in the South during the ratification process, JAMES, RATIFICATION, *supra* note 132, at 80-155, and makes no mention of incorporation as a theory for interpreting Section 1.

149. *See supra* note 131.

munities that belong to individuals (for example, the freedom of speech) as opposed to rights that belong to the States or the public at large (for example, the Second Amendment right to bear arms).[150] If limited to freedom of speech, Amar's refined incorporation is a plausible understanding of history. Congress, and even some state officials, did express concern about protecting free speech through the Fourteenth Amendment. When Governor Jacob D. Cox introduced the Fourteenth Amendment to the Ohio Legislature on January 2, 1867, for example, he said that a limit on state power was

> necessary long before the war, when it was notorious that any attempt to exercise freedom of discussion in regard to the system which was then hurrying on the rebellion, was not tolerated in the Southern States; and the State laws gave no real protection to immunities of this kind, which are the very essence of free government.[151]

However this issue is best resolved, my project is only about the criminal procedure guarantees found in the Fourth, Fifth, and Sixth Amendments. These provisions create rights in individuals as against the government, and it seems likely that they would qualify for incorporation under Amar's theory. Amar implicitly asks his reader to believe that the Framers and state legislatures were clear that these rights were to be included in the Fourteenth Amendment. As we will see, that claim simply does not match the history.

William Nelson's theory[152] matches almost all of the history but has not received the attention that it deserves.[153] Because the effect of Nelson's reading of the history is to incorporate a right from the Bill of Rights only against States that fail to provide that particular right equally to all its citizens, I will refer to his theory as "remedial incorporation." I will reserve "incorporation" for the traditional theories of total and selective incorporation that apply to all States. The key to Nelson's theory is to recognize that even Bingham valued state sovereignty. In his most elaborate defense of Section 1 during the Thirty-Ninth Congress, Bingham seems to concede that States have the pri-

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150. AMAR, *supra* note 18, at 220-23.

151. JAMES, RATIFICATION, *supra* note 132, at 162 (quoting CINCINNATI COM., Jan. 3, 1867).

152. NELSON, *supra* note 132, at 117-23. Though the idea is Nelson's, most of the defense of it that follows is mine.

153. I suspect this is because Nelson's book is about much more than just the best reading of Section 1. Indeed, he offers his insight on incorporation in a short discussion buried deep within the book and does little to defend the theory. *See id.* at 117-23. Moreover, as a serious historian, Nelson offers his theory as a way of "resolv[ing] the contradiction in the evidence" rather than as a new historical discovery or an obvious plain meaning that others have missed. *Id.* at 118. Indeed, he ultimately concludes that the historical evidence is simply inadequate to know whether those who framed and ratified the Fourteenth Amendment intended it to create substantive rights or simply to ensure equality in distribution of preexisting rights. *Id.* at 123.

mary responsibility to enforce "the rights of life, liberty, and property."[154] And he seems to say that Section 1 would give Congress the power to impose the "immortal bill of rights" only when States treat citizens unequally with regard to these fundamental rights. His argument is premised crucially on the notion that state legislatures never had the authority to treat citizens unequally with regard to "life, liberty, and property." State officials and legislatures could treat citizens that way only if they disregarded their oaths to uphold the Constitution. He noted that those oaths "are disregarded to-day in Oregon; they are disregarded to-day, and have been disregarded for the last five, ten, or twenty years in every one of the eleven States recently in insurrection."[155]

Bingham seems to reject the notion that Section 1 would create new substantive rights. What was missing in the Constitution, what Section 1 would supply, was an enforcement mechanism. Indeed, just after the remark about States lately in insurrection, he said, "The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by their Constitution?" If that is, as he said, the "whole question," then "adoption of the proposed amendment" will not take rights "that belong to the States. They elect their Legislatures; they enact their laws for the punishment of crimes against life, liberty, or property . . . ."[156] But, Bingham cautioned, if legislators "conspire together to enact laws refusing equal protection to life, liberty, or property, Congress is thereby vested with power to hold them to answer before the bar of the national courts for the violation of their oaths and of the rights of their fellow-men."[157]

He repeats this theme near the end of the speech, noting that no one had ever claimed that States had the authority to deny "any free citizen" the protection of the "rights of life, liberty, and property." Thus, those who "oppose this amendment oppose the grant of power to enforce the bill of rights." Those who oppose the amendment "simply declare to these rebel States, go on with your confiscation statutes, your statutes of banishment, your statutes of unjust imprisonment, your statutes of murder and death against men because of their loyalty to the Constitution and Government of the United States."[158] The next sentence begins, "That is the issue that is before the American peo-

154. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).

155. *Id.* The reference to Oregon was to a state constitution adopted in 1857 that forbade blacks from "making contracts, holding property, or even entering the state." MALTZ, *supra* note 132, at 22.

156. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).

157. *Id.*

158. *Id.* at 1091.

ple" and ends with a typical rhetorical flourish that he would not "betray this great cause."

If statutes of the type Bingham mentioned were the issue that Section 1 was intended to address, and if its function was to "punish" States that failed to protect life, liberty, and property equally, Nelson's remedial incorporation theory seems right. If a State refused to provide freedom of speech to blacks or Union loyalists, the Fourteenth Amendment gave Congress the authority to enforce the First Amendment Free Speech Clause against that particular State.[159] Implicit in this argument is that if a State wished to ban free speech entirely, the Fourteenth Amendment would have nothing to say about it. But the debate in Congress makes clear that the Fourteenth Amendment was limited to fundamental rights. States were not very likely to deny fundamental rights to the rich white landowners.[160] On this view, the Fourteenth Amendment simply required the States to give the same fundamental rights to everyone that the privileged classes enjoyed.

There are, however, a few rights in the Bill of Rights that would not have been quite so important as the right of free speech. So, for example, California in 1879 adopted a constitution that permitted criminal cases to begin by information, thus rejecting the Bill of Rights requirement of a grand jury indictment. Under remedial incorporation, the question would be whether California treated all citizens equally with regard to how the criminal process began. If California required probable cause to begin a criminal case against whites but not when blacks were the defendant, Congress would have the authority to "incorporate" the grand jury requirement from the Fifth Amendment into the Fourteenth, but only as to California.

Remedial incorporation makes sense of all the Republican protestations that the Fourteenth Amendment "gave little new power to the federal government."[161] Indeed, five of the twelve Republican members of the Joint Committee expressed federalism concerns about Bingham's initial draft.[162] One line of Republican argument "was that the amendment left the states free to grant or deny whatever rights they wanted and gave the federal government power only to make certain that the states distributed the rights they granted equally."[163] On this view, the "only new power that the Fourteenth Amendment

159. That Congress had the power to enforce the Bill of Rights against miscreant States would not foreclose an appeal to the federal courts by citizens in States that were refusing to provide fundamental rights equally.

160. *See* NELSON, *supra* note 132, at 118 (noting that the States in 1866 provided by state law most of the rights contained in the Bill of Rights).

161. *Id* at 121.

162. MALTZ, *supra* note 132, at 94.

163. NELSON, *supra* note 132, at 121.

would give to Congress and the federal courts would be to ensure that states regulated rights reasonably, which, as Senator Edmunds explained, meant 'equally and fairly.' "[164] If the Framers instead intended to impose all the rights in the Bill of Rights on all the States, one must accept that these speakers were being disingenuous or dishonest when they protested that they were not substantially eroding state sovereignty.[165] How much more satisfying to be able to take the Framers at their word that they respected state sovereignty and still find a role for incorporation.[166]

Nelson is right that "[u]nderstanding section one as an instrument for the equal rather than absolute protection of rights resolves the contradiction in the evidence that has so puzzled historians."[167] This understanding does not, of course, explain everything. As I will demonstrate shortly,[168] it does not explain Senator Howard's position on incorporation. But I think the history, on balance, supports an equality-based understanding of Section 1. The debate in Congress makes clear that the Framers neither had nor needed an exact list of protected rights. They assumed Section 1 would protect fundamental rights, in much the same way as the Civil Rights Bill,[169] and thus provide Congress with an additional tool to prevent the Southern States from creating a second-class citizenship for freed slaves.[170]

To address the problem of discrimination against former slaves, Section 1 first makes all the former slaves citizens of the United States and the State in which they reside. This provision deprived States of the power to create a de jure second-class citizenship. Section 1 then provides three guarantees that can be read as limiting the authority of States to discriminate on the grounds of race or loyalty to the Union, or, presumably, any other classification for which the State lacked a reasonable basis. "No State shall make or enforce any law which shall

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164. *Id.* John Harrison offers a similar account. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

165. NELSON, *supra* note 132, at 121.

166. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (quoting Corfield v. Coryell, 6 F. Cas. 546 (E.D. Pa. 1823) (No. 3,230)). Remedial incorporation is only one mechanism for infusing Section 1 with meaning. As Howard pointed out in his remarks, "privileges or immunities" had a natural law meaning as well as a meaning drawn from the Bill of Rights. Thus, quoting Justice Bushrod Washington, Howard suggested that the right to sue; to buy, own, and sell property; and to the writ of habeas corpus were included in the meaning of "privileges or immunities."

167. NELSON, *supra* note 132, at 118.

168. *See infra* notes 218-219 and accompanying text.

169. *See infra* notes 205-208 and accompanying text.

170. Many speakers also expressed concern about the treatment of Union loyalists who returned to, or remained in, the South. In the text that follows, I will generally refer only to the discrimination against former slaves, because that was the overarching concern, but the reader should be aware that white Union loyalists were also the intended beneficiaries of the Fourteenth Amendment.

abridge the privileges or immunities of citizens of the United States" perhaps requires the legislature to "make" only facially neutral laws and the executive to "enforce" facially neutral laws fairly.[171] A State could not, for example, enact a law that excluded blacks from serving on juries.[172] Nor could a prosecutor use peremptory challenges in a way that achieved the same result.[173]

The equal protection provision might apply only to the judiciary, limiting its application of facially neutral laws. A judge could no more exclude blacks from serving on a jury than could the legislature.[174] Thus, no judge, legislature, or prosecutor could keep a black citizen from serving on a jury because of race. And the guarantee of due process assures that everyone has equal access to a fair court process governed by facially neutral laws applied by judges in a neutral way. When faced with a criminal charge, a black citizen had the same right to jury trial, counsel, and standard of proof as did white citizens. Section 1, read this way, is a remarkably "tight" document. It guarantees equal access to the courts and protects former slaves from discriminatory state laws creating privileges or immunities and arbitrary enforcement of all existing state laws. On this view, the Fourteenth Amendment *creates no substantive rights accruing to United States citizens.*

The Court saw the Fourteenth Amendment in this way when it began to hear cases raising issues of fair treatment.[175] In the most famous of these cases, the butchers in New Orleans claimed that a state statute deprived them of the "privilege" of practicing their profession without

171. By contrast, the modern Court finds very little work for privileges or immunities. *See* Saenz v. Roe, 526 U.S. 489 (1999).

172. *See* Strauder v. West Virginia, 100 U.S. 303 (1879) (finding unconstitutional under the Fourteenth Amendment state law excluding blacks from serving on grand and petit juries). One argument against the equality view of privileges or immunities is that it duplicates the guarantee of "equal protection of the laws." But equal protection of the laws might apply only to the *application* of existing laws and not to their substantive content. On this view, a state law that permits whites, but not blacks, to own property would violate the Privileges or Immunities Clause and not, as courts would say today, the Equal Protection Clause. The latter clause would be violated if a judge took a race-neutral law and applied it unevenly (if judges, for example, routinely granted counsel to indigent whites but not to indigent blacks). Thus, it is possible that the Framers and ratifiers of the Fourteenth Amendment meant the Equal Protection Clause to forbid unequal judicial application of existing laws, while the Privileges or Immunities Clause limits the legislative and executive branches in their ability to "make or enforce" laws creating fundamental privileges or immunities that discriminate on account of race.

173. In a series of cases decided within twenty years or so of *Strauder*, *id.*, the Court recognized this understanding of the Fourteenth Amendment, but the Court did not find a case that proved the requisite intent until 1986 when it changed the standard by which the intent must be proved. Batson v. Kentucky, 476 U.S. 79 (1986).

174. In *Ex parte Virginia*, 100 U.S. 339 (1880), a companion case to *Strauder*, 100 U.S. 303, the Court held that the Fourteenth Amendment prohibited state judges from striking blacks from a jury on account of their race.

175. For an excellent account of the early cases, see NELSON, *supra* note 132, at 148-96.

legislative interference. The Court rejected the claim.[176] But when a black defendant in West Virginia claimed, in *Strauder v. West Virginia*,[177] that a state statute forbidding blacks to serve on juries violated the Fourteenth Amendment, the Court agreed. In explaining the purpose of the Fourteenth Amendment, *Strauder* first paraphrased the three clauses of the second sentence in Section 1 and then explicitly adopted an equality-based understanding of Section 1:

> What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, — the right to exemption from unfriendly legislation against them distinctively as colored, — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.[178]

To assess the various positions on the Fourteenth Amendment, it is useful to look at all sections of the Fourteenth Amendment. As other historians have demonstrated,[179] this inquiry is more than just about historical completeness. When construing words that lack a plain meaning, context is everything. The history of the debates and discus-

176. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872). Both Newsom and Wildenthal have recently reinterpreted *Slaughter-House* to be consistent with the theory that the Fourteenth Amendment incorporated the Bill of Rights guarantees, though not the "privilege" of practicing the profession of being a butcher. *See* Newsom, *supra* note 131; Wildenthal, *supra* note 131. While a provocative, clever argument, it is beside the point for my project. The narrow holding of *Slaughter-House* sheds no meaning on the incorporation of specific provisions from the Bill of Rights given the Court's later holdings that the Fourteenth Amendment did not include the privilege against compelled self-incrimination, the right to trial by jury, or the right to a grand jury indictment (to list only criminal procedure provisions). *See* Twining v. New Jersey, 211 U.S. 78 (1908); Maxwell v. Dow, 176 U.S. 581, 601 (1900); Hurtado v. California, 110 U.S. 516 (1884). The relevance of early cases is to illuminate the contemporary understanding of the Fourteenth Amendment to help show that *Twining*, *Maxwell*, and *Hurtado* (among others) were incorrectly decided. Finding a narrow holding hidden amongst the analysis, however, does little to tell us what lawyers and judges of the time understood. If it was so clear, why not state it? Indeed, Wildenthal cites two cases, from the same year and same lower federal court, that do exactly that. In *United States v. Hall*, 26 F. Cas. 79, 82 (S.D. Ala. 1871), the court clearly stated that the first eight amendments are "privileges and immunities of citizens of the United States." *See also* United States v. Mall, 26 F. Cas. 1147 (S.D. Ala. 1871) (limited to rights of assembly and free speech). The existence of dozens of cases like these from different courts would be evidence of a contemporary understanding favoring incorporation. But two cases from the same court in the same year is hardly overwhelming.

177. 100 U.S. 303 (1879).

178. *Id.* at 307-08.

179. *See supra* note 132.

sions of the Fourteenth Amendment are clear about one facet, if not about the meaning, of Section 1. Section 1 was of "secondary importance" compared to questions of "political power, particularly the power of the rebellious southern states and of the leaders of the rebellion."[180] The real controversy stirred by the Amendment was about Section 2, a precursor to the Fifteenth Amendment's requirement of black suffrage. As James puts it, "[s]o much of the agitation and personal correspondence of Radicals [Radical Republicans] in 1865 is devoted to the suffrage issue that one cannot but believe it to have been the center of their desires" when they approached the drafting of the Fourteenth Amendment.[181]

What the country would achieve explicitly in the Fifteenth Amendment was preceded by the Fourteenth Amendment's incentive structure to encourage black suffrage. Section 2 subtracts from the number of citizens counted in apportioning the House of Representatives all male inhabitants whose right to vote is abridged. The net effect, of course, is to penalize States that did not permit blacks to vote by reducing their representation in Congress. It was the focus of most of the debates on the Fourteenth Amendment. Thaddeus Stevens, Republican leader in the House, told the Congress that the most important part of the Amendment was Section 2.[182] The debate on Section 2 manifested both irony and raw politics. Because former slaves would now count as whole persons, rather that three-fifths of a person as slaves had counted in the original Constitution, the South potentially would have even more political power once readmitted to the Union than it had prior to the war. Section 2 might have been a non-too-subtle attempt to reduce the number of House seats the Southern States would have, on the probably safe assumption that these States would not grant the right to vote to former slaves.[183]

Section 2 was controversial not only in the South but also in the Midwest. Only six States granted blacks the right to vote in 1866[184] and there was palpable concern in some that Section 2 portended a more direct requirement of black suffrage, as indeed it did in the Fifteenth Amendment. Representative Miller of Iowa expressed concern about the hypocrisy of forcing black suffrage on the Southern States when Iowa itself did not permit blacks to vote.[185]

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180. CURTIS, *supra* note 131, at 13.

181. JAMES, FRAMING, *supra* note 132, at 21.

182. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

183. *Id.* at 2798 (decrying Section 2 as "barter[ing] away human rights").

184. These States were Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont. *See* KIRK H. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 148-49, 166 (1918).

185. CONG. GLOBE, 39th Cong., 1st Sess. app. 305 (1866).

Section 3 prohibited Southern leaders who supported the Confederacy from holding federal *or* state office, though it permitted that disability to be removed by a vote of two-thirds of each house in Congress. Both sides criticized this provision. Radical Republicans opposed the provision permitting removal of the disability,[186] while the Southern and border States thought the penalty too harsh. In North Carolina, for example, it was considered "the strongest issue" and some said the State should stay out of the Union rather than "exclude [its leaders] from office."[187] A committee of the Maryland legislature declared the provision so "repugnant to the Constitution" that it "doubted the right of a state to ratify it."[188] A Florida committee rejected the section because "we will bear any ill before we pronounce our own dishonor."[189]

Section 4 declared valid the debts of the United States, but not those of the Confederacy. It stirred less controversy than Sections 2 and 3, though James concludes that "at least as much attention" was centered on it as on Section 1.[190] There were complaints about this provision in the South,[191] but even there it was ultimately accepted as the penalty for losing the war.[192] Section 5, like Section 2 of the Thirteenth Amendment, gave Congress the authority to enforce the other provisions by "appropriate legislation." Though this was unsurprising, given the precedent in the Thirteenth Amendment, it precipitated comments. The tenor of the comments, naturally, were directed at the substantive provisions that Section 5 gave Congress the right to implement. The Florida governor, for example, recommended rejection of the amendment on the ground that Section 5 together with Section 1 gave "Congress the power to legislate in all cases touching the citizenship, life, liberty or property of every individual in the Union, of whatever race or color, and leave no further use for the State governments."[193]

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186. *Id.* at 2544 (Stevens) ("Gentlemen tell us it is too strong — too strong for what? Too strong for their stomachs, but not for the people. Some say it is too lenient. It is too lenient for my hard heart. Not only to 1870 but to 18070, every rebel who shed the blood of loyal men should be prevented from exercising any power in this Government. That, even, would be too mild a punishment for them."); *see also id.* at 2536 (Eckley) ("Reject the amendment disenfranchising rebels and you must widen the asylum in the North for those southern people who have sympathy with the Government.").

187. JAMES, RATIFICATION, *supra* note 132, at 100-01.

188. *Id.* at 176 (paraphrasing the Maryland Senate Journal).

189. *Id.* at 111 (quoting the Florida House Journal).

190. JAMES, FRAMING, *supra* note 132, at 48.

191. *Id.* at 94 (Georgia); *id.* at 111 (Florida).

192. *Id.* at 111 (Florida); *id.* at 113 (Arkansas).

193. *Id.* at 110-11 (quoting the Florida Senate Journal).

Odd though it might seem to modern readers, even the most controversial parts of the Fourteenth Amendment had to compete with more fundamental concerns. Congress had for months been consumed with developing the right political theory of how to rebuild the Union. The Joint Committee on Reconstruction — the same Committee that drafted the Fourteenth Amendment — operated under a charge to "inquire into the condition of the States which formed the so-called Confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress."[194] Included in the notion of rebuilding the Union was the question of black suffrage. The suffrage issue proved intractable in 1866, raising as it did questions about female suffrage and whether to limit black suffrage to the Southern States. Referring to suffrage, the Report of the Joint Committee on Reconstruction stated that it was "doubtful . . . whether the States would consent to surrender a power they had always exercised, and to which they were attached."[195]

But the Reconstruction Committee could not so easily dodge the status of the defeated Southern States. Were these States still in the Union? That, after all, had been Lincoln's theory — once joined as a Union of States, no State could leave. But if the defeated Southern States were still States in the Union, by what right did Congress refuse to seat their senators and representatives? Perhaps the States of the former confederacy had relinquished statehood by the act of rebellion against the Union. If so, what were they? The Radical Republicans relied on international law norms to argue that the defeated Confederacy had become a territory that could be governed by Washington in the same way the Western territories were governed.[196] That theory explained why there were no senators and representatives from these "former States," but it did not appeal to moderate Republicans. Few relished the prospect of the indefinite governance of that "territory" by force of arms. Better, the moderates thought, to hobble these States as needed to achieve freedom for the slaves and protection for union loyalists and readmit them as States. But, on this theory, what were the defeated States in the meantime? Were they States that had temporarily lost their statehood, until such time that the Union States decided to restore it? All theories offered to explain the political situation of the country in 1866 were ultimately inadequate. And all raised the ire of one side or the other.

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194. BENJ. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 37 (Faculty of Political Sci. of Columbia Univ. ed., 1914); *see also* JAMES, FRAMING, *supra* note 132, at 39.

195. JOINT COMM. ON RECONSTRUCTION, 39TH CONG., REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION at XIII (1st Sess. 1866).

196. SNEED, *supra* note 132, at 49-83.

Some found the Fourteenth Amendment far too modest. The *Cincinnati Commercial* dismissed the Fourteenth Amendment as the "total abandonment of the two leading ideas upon which the Radicals started to make their fight last December: dead States and equal suffrage."[197] It is easy to forget, almost 150 years later, but the Fourteenth Amendment was a compromise brought about by the Civil War — an attempt, however modest, to change the political system to prevent another war and to keep the South from continuing slavery under another name. The Civil War had been about preserving the Union and the achievement of a unified, industrial, free labor economy. Freeing the slaves was essential to the latter goal. The Thirteenth Amendment freed the slaves, and the Fourteenth Amendment sought to protect the Union — by hobbling the Southern States politically — and to protect legal rights of freed slaves. Placing Section 1 in that context makes it look different than when it is examined by itself. Perhaps it, too, was only about equality in providing basic freedoms rather than creating specific new federal rights immune from state abridgement.

Many voiced a concern in the Thirty-Ninth Congress that the South was trying to reclaim a form of slavery by enacting new, and enforcing old, laws to treat freed slaves differently from whites. Senator Henderson put the matter this way:

> The South saw its opportunity and promptly collected together all the elements of prejudice and hatred against the negro for purposes of future party power. They denied him the right to hold real or personal property, excluded him from their courts as a witness, denied him the means of education, and forced upon him unequal burdens. . . . [The South] adopted a system of laws which doomed the negro to hopeless ignorance, degradation, and misery. They not only denied him the ballot, but denied him the commonest rights of human nature. . . . The only change made was in the name: he was once a slave, and men called him a slave; men now mocked his condition by calling him a freeman.[198]

A letter writer reported that while Southerners had accepted emancipation, they did not accept the indivisibility of the Union, preferring the motto "Patience, and shuffle the cards."[199] Representative at Large Sidney Clarke noted: "Every mail brings us the records of injustice and outrage. Every gathering of the defeated yet struggling and defiant rebels, shows conclusively that the only purpose entertained by them is to hold on to as much of slavery as possible."[200] Representative Sidney Perham of Maine said of the former rebels:

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197. JAMES, FRAMING, *supra* note 132, at 145 (quoting CINCINNATI COM., June 7, 1866).

198. CONG. GLOBE, 39th Cong., 1st Sess. 3034 (1866).

199. SNEED, *supra* note 132, at 57.

200. CONG. GLOBE, 39th Cong., 1st Sess. app. 1838 (1866) (commenting on the need for the Civil Rights Bill).

"Their policy is to render it so uncomfortable and hazardous for loyal men to live among them as to compel them to leave. . . . Others have been murdered in cold blood as a warning to all northern men who should attempt to settle in the South."[201] Senator Lot Myrick Morrill of Maine said that "the contest for chattel slavery is over, but the struggle for the possession of the negro as a forced laborer goes on . . . ."[202] Representative William Windom of Minnesota said that many in the South "have demonstrated to us" by the "reenactment of vagrant laws and slave codes for freedmen, with how much sincerity they agreed to the abolition of slavery, and how readily that institution, abolished in name, may be reestablished in fact and with increased cruelty."[203] The feeling about Southern intransigence was perhaps most cogently put by General Oliver Otis Howard, head of the Freedmen's Bureau, who said that Southerners "surrender slavery inch by inch and piece by piece."[204]

The manifest concern among the Framers was to compel the South to provide equal treatment for freed slaves and others who were not in favor in the war's aftermath. Prior to considering the Fourteenth Amendment, the Thirty-Ninth Congress had debated and passed a Civil Rights Bill, its protections specifically tailored to protect equality. It guaranteed citizens of the United States

> of every race and color . . . the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.[205]

Many in Congress expressed concern over whether the Civil Rights Bill was constitutional,[206] and President Johnson questioned its constitutionality when vetoing it.[207] That concern was sometimes offered as a reason to pass the Fourteenth Amendment despite the claim of some that it was unnecessary in light of the Thirteenth Amendment, the Civil Rights Bill, and the Privileges and Immunities Clause in Article IV.[208] To the extent there was doubt that Congress had the authority to legislate equality under the Civil Rights Bill, a Fourteenth Amendment that protected equality would be the easy solution. And, as we

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201. *Id.* at 2082.

202. CONG. GLOBE, 39th Cong., 1st Sess. app. 155 (1866).

203. *Id.* at 3170.

204. *Id.* at 1838 (quoted by Sidney Clarke).

205. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.

206. JAMES, FRAMING, *supra* note 132, at 89-90.

207. *Id.* at 97-99.

208. SNEED, *supra* note 132, at 173-81.

will see, both the proponents and opponents of the Fourteenth Amendment during the ratification process, at least in the South, used the Civil Rights Bill as a proxy for what Section 1 of the Fourteenth Amendment protected.[209]

The discussion of the Fourteenth Amendment in Congress was dominated by concern about creating equality under the law. Representative Henry Jarvis Raymond of New York noted his support for the Fourteenth Amendment as a way of "secur[ing] an equality of rights among all the citizens of the United States."[210] Windom of Maine complained that the Fourteenth Amendment did not go far enough because it did not include "political as well as civil equality among its guarantees."[211] Senator Henderson said, "Within the scope of State jurisdiction [in the South] there is no such thing as equality in law."[212] Thaddeus Stevens, the Republican leader noted when presenting the Fourteenth Amendment to the House that Section 1 "allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all."[213]

As an example of how the equality view of the Fourteenth Amendment would work, consider what the Framers had to say about freedom of speech and of the press.[214] The history is replete with references to the need to protect free speech and free assembly in the South.[215] A colorful example was Representative Price's observation that "if a citizen of a free State visiting a slave State expressed his opinion in reference to slavery he was treated without much ceremony to a coat of tar and feathers and a ride upon the rail."[216] Curtis concludes that "[d]enial of First Amendment rights [by the Southern States] was a recurring theme" of the election of 1866.[217] But all that was necessary to protect First Amendment rights was to ensure that the rights of the freed slaves and loyalists were protected the same

209. *See infra* notes 250-259 and accompanying text.

210. CONG. GLOBE, 39th Cong., 1st Sess. 2502 (1866).

211. *Id.* at 3169.

212. *Id.* at 3035.

213. *Id.* at 2459.

214. *See* Crosskey, *supra* note 130, at 33.

215. In Curtis's fascinating account of speeches, newspaper accounts, and reports from the election of 1866, covering fifteen pages, there is a single reference to problems in the criminal systems and dozens of references to deprivation of First Amendment freedoms. CURTIS, *supra* note 131, at 131-145.

216. CONG. GLOBE, 39th Cong., 1st Sess. 1066 (1866). The remarks referenced the time before slavery was abolished, but the speaker makes clear that nothing had changed in regard to free speech in the South.

217. CURTIS, *supra* note 131, at 138.

way as those of the white political majorities. Perhaps that is all that the Framers intended Section 1 to do.

There is one more piece of evidence that the Framers did not intend to incorporate the Bill of Rights so that it applied to all States. While it is true that Bingham and Jacob Howard articulated an incorporation theory when explaining Section 1, what escapes notice is the lack of effect these remarks had on the rest of the debate in Congress and among the States. As we saw, Bingham spoke at length in the House about the need to impose the Bill of Rights on States that enacted laws creating inequality in fundamental rights. Senator Jacob Howard's remarks on May 23, 1866, when he defined "privileges or immunities of citizens of the United States" were even clearer. These privileges and immunities include certain natural law rights, according to Howard, and also "the personal rights guarantied and secured by the first eight amendments of the Constitution."[218] Moreover, after noting that Congress lacked the authority to enforce the Bill of Rights against the States, Howard said, "[t]he great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[219]

It is difficult to be much clearer than that, though if application to all the States as a routine matter were the widely shared goal, one wonders why the clause was not drafted to say that — "No State shall make or enforce any law which shall abridge the rights created in the first eight Amendments to this Constitution, or any other privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[220] That phrasing is pretty easy to invent; it took me about five minutes. What seems at first glance odd about the debate after Howard's remarks, however, is that his clear-headed interpretation seems to have had no effect. At least two members of the Senate who

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218. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

219. *Id.* at 2766.

220. My proposed language is a rejoinder to Curtis, who argues that the drafters made no specific mention of the Bill of Rights because they wanted to protect a more inclusive set of liberties. CURTIS, *supra* note 131, at 125. My language does both. Amar argues that the language of the Amendment is "exactly what one would expect if incorporation were a goal of the Fourteenth Amendment." Amar, *supra* note 133, at 1220. But Dripps gets the better of Amar here, asserting that it

> would be equally fair to say that the text is exactly what one would expect if protecting sexual privacy, or freedom of contract, or the right to grow marijuana were a goal of the Fourteenth Amendment. To say that the text is consistent with incorporation is uninteresting, because the text is consistent with almost anything.

Dripps, *supra* note 17, at 1576. My proposed language in the text is, instead, "exactly what one would expect if incorporation were a goal of the Fourteenth Amendment."

spoke in later sessions expressed their lack of understanding of "privileges or immunities," one of them during a colloquy with Howard himself and one a moment later.[221] Yet *no one mentioned Howard's elegant theory* or offered an incorporationist response to the challenge to define "privileges or immunities." Howard himself did not reference his theory of incorporation when challenged to define privileges or immunities. It is not that there was argument about what Howard had said. *It was as if he had not said the words at all.*

Almost all of the debate that followed Howard's speech was about adding a new sentence to Section 1 — the current first sentence that defines citizenship. It caused great debate over whether it granted citizenship to Chinese persons and to Indians.[222] But no one engaged Senator Howard's theory of incorporation. Is this a "dog that didn't bark,"[223] suggesting that, at least in Congress, the idea of incorporation was so noncontroversial and so obvious that it simply did not need to be repeated? Curtis argues that everyone already understood that full incorporation was the Republican position, and it was unnecessary to say it more than twice. Amar claims that the clarity of Howard's and Bingham's remarks, combined with their prominent roles in the creation of the Fourteenth Amendment, makes the silence into evidence in favor of incorporation. In Amar's words: "Surely, if the words of Section 1 meant something different, here was the time to stand up and say so."[224] Perhaps. But it remains intriguing that when questions were raised about the meaning of "privileges or immunities," *no one* responded by citing the speeches of Howard or Bingham. One explanation is that those who raised the questions were opponents of the Amendment, and Republicans simply kept their counsel because they saw the question as political rhetoric. But missing here is why opponents of the Amendment did not adopt the incorporation theory and

221. In response to Senator Howard's attempt to explain why he used "abridge" in connection with "privileges or immunities," Senator Hendricks said "I have not heard any Senator accurately define, what are the rights and immunities of citizenship; and I do not know that any statesman has very accurately defined them." CONG. GLOBE, 39th Cong., 1st Sess. 3039 (1866). No one responded to the challenge. One speaker later, Senator Johnson said that the "privileges or immunities" clause was objectionable "simply because I do not understand what will be the effect of that." *Id.* at 3041. No one responded. In addition, Senator Yates complained about "tortuous and hard-to-be-understood propositions," presumably in reference to Section 1. *Id.* at 3037.

222. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (Woodbridge); *id.* at 1095 (Hotchkiss); *id.* at 2510 (Miller); *id.* at 2890 (Howard); *id.* at 2890-91 (Cowan); *id.* at 2892 (Doolittle); *id.* at 2893 (Fessenden); *id.* (Trumbull); *id.* (Johnson); *id.* (Wade); *id.* at 2894 (Van Winkle); *id.* at 2895 (Hendricks); *id.* (Clarke); *id.* (Clarke); *id.* at 2986 (Fessenden, Howard, Doolittle, Grimes); *id.* at 2897 (Williams, Saulsbury).

223. The reference is to a Sherlock Holmes story in which Holmes solved the mystery by noting that the dog didn't bark when he should have (and thus knew the person who committed the crime). A. CONAN DOYLE, *Silver Blaze*, *in* THE COMPLETE SHERLOCK HOLMES 383, 400 (1938).

224. Amar, *supra* note 133, at 1238.

use it against the Amendment. The more restrictions to be placed on state government, the stronger the argument that state sovereignty was being eroded too severely. But no one — no supporter, no opponent — said anything to engage Bingham's or Howard's incorporation theory.

One reason for the failure to engage the incorporation question is that, as we have seen, members of Congress were more concerned about other sections of the Amendment as well as more fundamental issues that had to do with the structure of government. Was there still time to amend the bill to provide for black suffrage? Should passage of the Amendment be a condition for readmission of the States of the former confederacy? If so, should these States be told that ratification guaranteed readmission? Perhaps passage was insufficient to secure readmission (this was the Radical position). These were weighty matters: the Union still literally hung in the balance.

Drawing on newspaper accounts, James reports that when Howard rose to speak, "Very little interest could be detected among the senators. As one observer wrote, 'A lethargy more alarming than high excitement is generally visible.' "[225] Howard had a speaking style that was "somewhat ponderous,"[226] and the speech lasted two hours.[227] His approach to issues in general "appealed to reason rather than to the emotions"[228] and perhaps the speech did not play well with the audience.[229] Though a member of the Reconstruction Committee, Howard had not been a major figure in the drafting of the Fourteenth Amendment, and he reported the Amendment to the Senate only because William Fessenden of Maine was ill that day.[230] Howard "was noted for his radicalism,"[231] and had repeatedly voted against Bingham's language protecting privileges and immunities, due process, and equal protection. A late draft in Committee had Bingham's language as Section 5 with a Section 1 that said, "No discrimination shall be made by any State nor by the United States as to the civil rights of persons because of race, color or previous condition of servitude."[232] On a motion in committee to strike Section 5, Howard voted yes and it

225. JAMES, FRAMING, *supra* note 132, at 135 (quoting THE N.Y. HERALD, May 24, 1866). James' citation is to the May 21, 1866, edition of the *Herald*, but this must be a misprint as Howard's speech did not occur until May 23.

226. 9 DICTIONARY OF AMERICAN BIOGRAPHY 278 (Dumas Malone, ed. 1932).

227. JAMES, FRAMING, *supra* note 132, at 135 (citing THE N.Y. HERALD, May 24, 1866).

228. DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 226, at 278.

229. Some of the newspapers, however, were paying attention. The part of Howard's speech discussing privileges and immunities was quoted verbatim on the front page of the next day's *New York Times*. N.Y. TIMES, May 24, 1866, at 1.

230. JAMES, FRAMING, *supra* note 132, at 135.

231. *Id.* at 45.

232. KENDRICK, *supra* note 194, at 90-91.

passed, seven to five.[233] This left only the civil rights provision. After much parliamentary maneuvering, and undoubtedly much off-stage politicking, Bingham moved a few days later to amend by substituting his language for Section 1, thus eliminating the civil rights provision.[234] This motion passed with Howard one of three members voting no.[235] Thus, rather than an Amendment with both a civil rights provision and Bingham's provision, the Committee reported an Amendment with only Bingham's language.

Perhaps Howard voted against Bingham's language as a substitute for the civil rights provision because Howard's goal was to prohibit racial discrimination and he doubted whether Bingham's vague language would achieve that goal.[236] When Howard lost that vote, he presumably sought to give a broad construction to Bingham's language to achieve as much protection as possible against racial discrimination. The goal of forbidding racial discrimination, so clearly held by almost all Republicans in Congress, provides the key for why the debate focused on equality rather than incorporation. This brings us back, of course, to Nelson's theory of remedial incorporation — permit Congress to enforce the Bill of Rights guarantees against any State that did not provide basic rights equally to blacks and all whites. The real prize was equality and that was what Congress intended Section 1 to achieve.[237]

Opponents viewed Section 1 as a guarantee of equality. Representative Andrew Rogers of New Jersey, speaking in opposition to the Amendment, summarized one natural law effect of Section 1. He pointed out that in Kentucky, the law proscribed the penalty of death for a black man, but not a white man, who raped a white woman; in Indiana, blacks were forbidden to own property; Pennsylvania had segregated schools. Rogers believed that the effect of the Fourteenth Amendment would be to compel Kentucky "to inflict the same punishment upon a white man for rape as a black man," to "abrogate and blot out" the Indiana law about property ownership, and to compel Pennsylvania "to provide for white children and black children to attend the same school"[238] Rogers thus understood the Amendment to require each State to give black citizens the same fundamental rights as it created for white citizens.

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233. *Id.* at 98.

234. *Id.* at 106.

235. *Id.*

236. MALTZ, *supra* note 132, at 91-92.

237. *See, e.g.*, SNEED, *supra* note 132, at 330-31 (quoting Stevens); *id.* at 350 (quoting Eliot); *id.* at 350 (noting that Miller "linked the spirit of Section 1 to the Declaration of Independence.")

238. CONG. GLOBE, 39th Cong., 1st Sess. app. 134 (1866).

As Howard made clear, these rights were broader than the rights in the Bill of Rights. They were the "principles lying at the very foundation of all republican government,"[239] including the right to hold land; the right to collect wages by legal process; the right to sue, the right to testify;[240] the right to hold real and personal property, to be confronted by witnesses, to have the process of the courts, to hold real or personal property, to testify, to have an education, and not to be given "unequal burdens";[241] to marry, to vote, to contract, to be a juror.[242] Historian Joseph James concludes that "judicial minds in the Senate understood as fundamental rights" those mentioned in the seventh section of the Freedman's Bureau Bill: "the right to make and enforce contracts; to sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property; and to have full and equal benefit of personal right guarantees in the laws and constitutions of the several states."[243] Incorporation was, of course, irrelevant to these concerns. Indeed, most of the Bill of Rights guarantees were quite beside the point in addressing the problems of the Black Codes and wholesale discrimination against blacks and Union loyalists.

Now we have a pretty good account of why no one spoke of incorporation other than Bingham and Howard. It was partly that Congress faced other, more fundamental problems that, being political in nature, they understood better than the delicate task of explaining Bingham's vague language in Section 1. It was partly that incorporation did not address most of the pressing problems in the States of the former confederacy. It was partly that Congress might have understood Section 1 to authorize enforcement of the Bill of Rights only against States that failed to provide those rights to all citizens equally. Those States would be largely, perhaps exclusively, the defeated Southern States that had no representatives in Congress. Even the Democrats from the border States were probably unwilling to argue that States should not provide freedom of speech and other fundamental rights equally to all.

If Nelson's reading of the history is correct, no one objected to incorporation as an erosion of state sovereignty because it did not erode the sovereignty of States that treated their citizens fairly. Moreover, there would be no reason for supporters of the Amendment to refer to incorporation when questions arose about the meaning of Section 1. Incorporation was simply one mechanism by which miscreant States

239. *Id.* at 2961.

240. *Id.* at app. 219.

241. *Id.* at 3034-35 (Henderson).

242. *Id.* at 2538 (Rogers).

243. JAMES, FRAMING, *supra* note 132, at 76.

could be brought into line. The goal was equality in the provision of fundamental rights and that was the tenor of the explanations the supporters offered the skeptics.

Even if Nelson's reading of the history is incorrect, we are still left with a pretty clear picture of why incorporation provoked silence rather than discussion among the Framers. Reading the entire debate in the Congressional Globe discloses that Howard's and Bingham's comments are lost in a sea of concern about ensuring that States treat blacks and Union loyalists fairly. Looming over everything was the *realpolitik* of how to deal with the Southern States and keep the Union intact. Moreover, there was an election coming up in the fall, and the Republicans wanted a campaign issue to use against President Johnson and the Democrats. It was critical to Republican hopes for achieving equality to maintain a veto-proof majority in both Houses of Congress.[244] Thus, they could not linger over nice judicial questions about privileges or immunities, due process, or equal protection.

That the Framers of the Fourteenth Amendment no longer trusted state legislatures and judges as completely as did the Framers of the Bill of Rights cannot be questioned. The whole point to the Thirteenth and Fourteenth Amendments was to restrict the power of States to abridge rights; the debate, of course, is to what extent state power was to be restricted. The Framers of the Fourteenth Amendment had lost confidence in at least the Southern legal processes to treat blacks and whites equally. Had the Framers also lost confidence in the ability of state legislatures to set fair rules to conduct criminal proceedings? Did the Framers of the Fourteenth Amendment have the same distrust of state legislatures and judges in the context of the criminal process that the earlier Framers had of Congress and the federal judiciary? In a word, the historical answer is no. Nelson provides a somewhat more nuanced answer: Congress was willing to enforce the Bill of Rights on States that proved they could not be trusted.

Though evidence shows that the South used the criminal process to provide unfair treatment to Union loyalists and freed slaves,[245] the problem was not that people lacked rights against the state (to jury trial, to counsel, to a fair process). Rather, the problem was that the state authorities were not giving the former slaves and loyalists the rights of other defendants. In some cases, according to Representative Sidney Perham of Maine, the state officers were "intimidated by threats of violence, and brutally murdered for a faithful discharge of duty."[246] But whether the problem was that the officers and prosecutors were complicit or intimidated, a sufficient remedy was to require

244. *See* MALTZ, *supra* note 132, at 79.

245. CURTIS, *supra* note 131, at 135-36.

246. CONG. GLOBE, 39th Cong., 1st Sess. 2082 (1866).

the States to provide the same fundamental rights to loyalists and freed slaves as to others. Again, this evidence is consistent with Nelson's notion that Section 1 simply sought to encourage States to protect the rights of blacks by threatening to impose the federal Bill of Rights on those that refused.

Whatever the intent of the Framers, most scholars focus excessively, sometimes exclusively, on that issue. They do not take sufficient account of the intent of the ratifying legislatures. If the state legislatures did not understand that the Fourteenth Amendment incorporated the Bill of Rights, then it is difficult to know how they could have ceded that sovereignty. As I sought to demonstrate earlier,[247] under the basic federalist structure of the Constitution, the States only ceded as much sovereignty to the federal government in the Fourteenth Amendment as they intended to cede. The incorporationists argue here that the States could infer limitations on their criminal processes from the language of Section 1. The contrary argument is that the generality of the language of Section 1, considered in light of the centuries-old tradition that States design their own criminal systems, did not put the States on notice that the Fourteenth Amendment would affect their criminal processes. Lacking textual notice of a limit on that category of state power, the only way the States could have intended to cede sovereignty in that category was by virtue of a general understanding that this is what Section 1 accomplished.

Deciding what was generally understood requires deciding how controversial it would have been for the States to adopt the criminal procedure guarantees by ratifying the Fourteenth Amendment. Crosskey and Amar assume that the States considered the Bill of Rights noncontroversial. Fairman makes the opposite assumption. The reason this matters, of course, is that there is no contemporary evidence (in the press or in the debates in the state legislatures) that anyone even talked about specific criminal procedure guarantees in the Bill of Rights.[248] If incorporation of the criminal procedure guarantees would not have been controversial, this might explain the total silence. But if the idea of changing all thirty-seven State criminal processes to conform to the federal model would have been controversial, the silence is deafening.

The silence during the ratification debates about incorporating the criminal procedure rights was total. Joseph James's study of the newspapers and state legislative proceedings of the period from 1866 to 1868 discloses not a single reference, either pro or con, to the notion that the Fourteenth Amendment would apply the criminal procedure

247. *See supra* notes 31-34 and accompanying text.

248. There is a bit of evidence relating to free speech. *See, e.g.*, JAMES, *supra* note 132, at 162. Of course, that evidence is also consistent with Nelson's remedial incorporation theory.

Bill of Rights guarantees to the States. In James Bond's similar study limited to the Southern States, the silence is equally total. Many objections were lodged against the Amendment, which initially failed to secure the necessary number of States for ratification, and many impassioned speeches and newspaper articles supported the idea that the Amendment drastically limited state power. But no one mentioned incorporation of the criminal procedure guarantees into the Fourteenth Amendment or discussed any of those guarantees as a potential limitation on state criminal processes.

After a study of all the original records in the eleven States that formed the confederacy, Bond concludes that "no one [in the South] believed that Section 1 incorporated the Bill of Rights."[249] Instead, Bond documents that in State after State, the provisions of Section 1 were understood as incorporating the equality-guaranteeing provisions of the Civil Rights Bill. In North Carolina, the proponents of the Fourteenth Amendment downplayed fears that it would change the organic character of our federal system. They assured North Carolinians that Section 1 "included only those rights enumerated in the Civil Rights Bill: the rights to contract, sue, and hold property."[250] Opponents in North Carolina used the same arguments against Section 1 that they had used against the Civil Rights Bill, "implicitly confirm[ing] the view that Section 1 merely transformed the statutory provisions of the Civil Rights Bill into constitutional law."[251] *The New Orleans Tribune*, "the only Radical Republican voice" in Louisiana during Reconstruction,[252] published on June 16, 1866, a long explanation of Section 1; it emphasized that the Amendment outlawed discrimination on the basis of race or origin and thus gave the Civil Rights Bill a constitutional footing.[253] A pro-suffrage paper published in Alabama lamented that the Fourteenth Amendment was too much like the Civil Rights Bill, concerned only with equality in the area of civil rights.[254]

A Virginia newspaper opposed to ratification said that Section 1 "*is* the 'Civil Rights Bill.' "[255] Georgia newspapers explained that the Fourteenth Amendment would make "the negro" the equal of the white man, would guarantee the "civil rights and privileges of the person in all parts of the Republic," and would reaffirm "the chief provi-

249. BOND, *supra* note 132, at 10.

250. *Id.* at 57.

251. *Id.* at 56.

252. *Id.* at 75.

253. *Id.* at 80-81.

254. *Id.* at 106.

255. *Id.* at 148 (emphasis added).

sions of the civil rights bill."[256] In an address to voters in Mississippi on October 13, 1869, A.R. Johnston "denounced" the Radical Republicans "and all their Reconstruction plans."[257] But in a gesture to pragmatism, Johnston told the voters he was prepared to accept Reconstruction. "He then promised the black members of the audience speedy ratification of the Fourteenth and Fifteenth Amendments. He pledged that blacks would 'be the equal before the law with the white race, the right to vote, serve on juries, give evidence in court, sue for and get all property rights.' "[258] The pro-ratification governor of Tennessee explained that Section 1 guaranteed "equal protection in the enjoyment of life, liberty, property . . . to all citizens. Practically, this affects mainly the negro . . . [making him] entitled to the civil rights of the citizen, and to the means of enforcing those rights."[259]

Governor Thomas C. Fletcher of Missouri said of Section 1, "[i]t prevents a State from depriving any citizen of the United States any of the rights conferred on him by the laws of Congress, and secures to all persons equality of protection in life, liberty, and property under the laws of the State."[260] Notice that Governor Fletcher saw the Fourteenth Amendment as protecting against state infringement rights bestowed by Congress but did not mention any other national rights. The second clause, of course, returns to the familiar theme that States had to provide equality of treatment under state law to all persons. We earlier saw Governor Cox's concern about freedom of speech,[261] which was echoed by others — most colorfully by Representative Mann of Pennsylvania who noted that whoever "went down South was obliged to put a padlock on his mouth."[262]

And what of the argument that "everyone knew" that the Fourteenth Amendment also incorporated the Bill of Rights guarantees? That universal knowledge failed to make it as far as Mississippi. Mississippi did not ratify the Fourteenth and Fifteenth Amendments until 1870. Thus, the debate over the Fourteenth Amendment that took place during 1869 had the advantage of the debates in the other States. During this period Governor James Alcorn blamed the soaring crime rates on the "barbarous practice" of carrying guns and knives,

256. *Id.* at 234.

257. *Id.* at 44.

258. *Id.*

259. *Id.* at 21.

260. CURTIS, *supra* note 131, at 146.

261. *See supra* text accompanying note 151.

262. CURTIS, *supra* note 131, at 148; *see also id.* at 148-49 (quoting Representative M'Camant, also of Pennsylvania).

"which was almost universal among both races in the South."[263] Bond writes:

> [Alcorn] therefore asked the legislature to adopt laws that restricted the right to carry arms. It never occurred to the governor to explain why the Fourteenth Amendment did not prevent such laws, as it arguably might have, had the Second Amendment been incorporated in Section 1. After all, the Second Amendment guarantees the right to bear arms. Opponents of the proposed laws never relied on the Fourteenth Amendment's "incorporated" right to bear arms either. All seemed blissfully ignorant of an argument that certainly would be made by incorporationists today.[264]

We can learn something from the opponents of the Fourteenth Amendment in the South. They "repeatedly stressed the dangers of giving Congress" the "power to define and therefore expand the privileges and immunities of citizenship, which states were obliged to respect."[265] The opponents "routinely paraded the horrid possibilities": the "right of blacks to vote, followed by miscegenation, mixed schools, and integrated saloons and railway cars." Bond concludes: "Alert as the opponents were to the danger of federal power, they never once mentioned that it included the power to enforce the Bill of Rights against the states."[266] Based on his study of the contemporary record in the Southern States, Bond concludes, "The evidence that Section 1 was understood to protect natural rights is overwhelming. . . . The evidence is equally overwhelming that the privileges and immunities clause was also understood to include those civil rights which persons needed in order to protect and exercise their natural rights."[267]

To be sure, there was a concern about federal intrusion into state criminal processes, but it was not articulated in terms of incorporation. Consider a letter from Orville H. Browning, President Johnson's Secretary of the Interior, that was widely circulated during the elections of 1866. Browning said in part:

> If the proposed amendments of the Constitution be adopted, new and enormous power will be claimed and exercised by Congress, as warranted by such amendments, and the whole structure of our Government will perhaps gradually but yet surely be revolutionized. And so with the Judiciary. . . . The object and purpose [of the Amendment] are manifest. It is to subordinate the State judiciaries in all things to Federal supervision and control; to totally annihilate the independence and sovereignty of State judiciaries in the administration of State laws, and the authority

263. BOND, *supra* note 132, at 45.

264. *Id.*

265. *Id.* at 255.

266. *Id.*

267. *Id.* at 256-57.

> and control of the States over matters of purely domestic and legal concern.[268]

Browning clearly thought that subjugation of state judiciaries to the federal courts was an issue that would draw votes away from the Radical Republicans. One of Browning's examples of how the federal judiciary would "annihilate" the state judiciaries involves criminal law:

> [I]f a murderer be arrested, tried, convicted and sentenced to be hung, he may claim the protection of the new constitutional provision, allege that a State is about to deprive him of life without due process of law, and arrest all further proceedings until the Federal Government shall have inquired [into the case].[269]

This concern about federal power, limited to how the courts might use the vague Due Process Clause to insist on the right to review state criminal proceedings, would likely be multiplied if anyone thought that the specific provisions of the Bill of Rights would be imposed forever on state legislatures and courts.

Browning's parade of horribles, including his example about the annihilation of state criminal processes, did not mention incorporation. The entire lengthy letter, written after Bingham and Howard endorsed incorporation in Congress, contains no reference to the Bill of Rights as a whole or to any specific right that might be carried into the Fourteenth Amendment. Nor does it mention any example that might imply incorporation of any part of the Bill of Rights. This omission is even more significant when one recalls that Browning opposed the Fourteenth Amendment. If Browning had thought incorporation was a theory to be taken seriously, or perhaps had he and President Johnson even thought about it at all, he would surely have raised that as an even more draconian invasion of "the authority and control of the States over matters of purely domestic and legal concern."

Moreover, as Maltz points out, the proponents of the Fourteenth Amendment failed to make *any* reference to incorporation. Calling this the "most puzzling anomaly for incorporationists," Maltz notes that "Republicans were not shy in pointing to the Civil Rights Act as a primary source for section one; presumably, an added appeal to the Bill of Rights would have had an even stronger, visceral impact."[270] The absolute silence of proponents and opponents during the ratification process severely undermines the argument that the state legislatures intended to ratify a Fourteenth Amendment that incorporated the Bill of Rights in any way other than as a penalty for failing to provide fundamental rights to all citizens.

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268. CINCINNATI COM., October 26, 1866, at 2.

269. *Id.*

270. MALTZ, *supra* note 132, at 117.

If equality was thought the principal goal of the Fourteenth Amendment, and if Nelson is right that the federal Bill of Rights would be applied only to States that misbehaved, it explains how ten of the ratifying States could vote to impose the Fourteenth Amendment on themselves even though they already had or were considering grand jury rules that were less comprehensive than the one in the Fifth Amendment.[271] If the States thought that the Fourteenth Amendment required a fair criminal process applied equally to blacks and whites, then we can understand how those ten States might vote for the Amendment without concern. Otherwise, we have to believe that those States agreed to reform their criminal processes by voting to impose the Fifth Amendment grand jury indictment requirement on themselves through the Fourteenth Amendment *without any discussion of whether this was a good idea.*[272]

Curtis argues that the ratifying state legislatures, controlled by Republicans, had their eye on the bigger prize — equality to freed slaves and the threat of reduced representation for States that did not permit former slaves to vote.[273] Although they did not see the inconsistency with their own laws and the Bill of Rights' guarantees, Curtis dismisses that failure as simply the product of inattention at a time when the stakes were high and the very Union was still unstable. Amar agrees, concluding that "many informed men simply were not thinking carefully about the words of Section One at all."[274] I agree so far. But the next step is shaky indeed: because the legislatures were inattentive to the meaning of Section 1, Amar argues that their silence "is a dubious key to unlocking the meaning of Section One."[275] This is positively perverse. Unless the text on its face incorporates the Bill of Rights, how can the inattention of the legislatures be anything other than evidence against incorporation? How can a State ratify something without knowing that it is doing so? As Curtis correctly notes, "The great controversy is how to take the absence of evidence."[276] To me, inattention as to the meaning of Section 1 suggests that one should reject more elaborate interpretations — privileges or immunities as a silent mechanism to overrule *Barron* — in favor of the simpler interpretation that Fourteenth Amendment means what it says — that it guaranteed that all citizens had equal access to natural law privileges and

271. AMAR, *supra* note 18, at 198.

272. Maltz claims that a concern with conflicting state grand jury procedures would have been lost in Congress amidst the larger Reconstruction concerns. MALTZ, *supra* note 132, at 116-17. That seems right. But it is less clear to me that the States would have found the prospect of being forced into the federal model of criminal procedure a trivial prospect.

273. CURTIS, *supra* note 131, at 105.

274. Amar, *supra* note 133, at 1250.

275. *Id.*

276. CURTIS, *supra* note 131, at 217.

immunities and to fair court procedures, and that the laws be applied equally.

The suggestion that the States intended to forfeit their right to conduct criminal trials the way they and their colonial antecedents had been doing for over 200 years ignores human nature and the still strong (though diminished) sense of state sovereignty that existed in 1868. It was not that the States found the Bill of Rights guarantees abhorrent. The States provided most of these rights, in one form or another, as a matter of state law.[277] The sea change would be making the state criminal processes both uniform and subject to federal control. Criminal law, with very few exceptions in 1868, was thought to be exclusively the province of the States, and the state systems differed from one another to some degree. The state systems and their colonial antecedents pre-dated the Bill of Rights by more than 150 years. The Bill of Rights was largely copied from pre-existing state law to control the feared central government. To have those limitations turned back against the States to create a uniform criminal process in all the States would have been viewed as ironic at best and perverse at worst.

The silence on this issue continued in the aftermath of ratification. States continued to adopt rules that were inconsistent with the Bill of Rights. The California Constitution, adopted in 1879, permitted a prosecutor's information to be substituted for an indictment. If it had been generally believed that the Fourteenth Amendment made the Fifth Amendment grand jury rule applicable to all States, what was California thinking when it adopted its Constitution? Moreover, neither the Supreme Court of that era, nor the litigants who appeared before the Court, were aware that the Fourteenth Amendment had overruled *Barron v. Baltimore*'s holding that the Bill of Rights did not bind the States. Despite the clarity of Senator Howard's remarks, the lawyers who represented criminal defendants before the Court did not make incorporation arguments, and the Court did not contemplate the availability of the criminal procedure guarantees in state cases. Given the duty of criminal defense lawyers to raise every conceivable argument on behalf of their clients, this silence speaks volumes about the general understanding of the Fourteenth Amendment.

Twitchell v. Commonwealth[278] was decided a year after the Fourteenth Amendment's ratification. The Supreme Court heard an emergency writ of habeas corpus from a condemned state prisoner, scheduled to hang six days later, who claimed that the state indictment did not provide sufficient notice of the charge. He claimed a violation of the Fifth Amendment Due Process Clause and, more particularly, a violation of the Sixth Amendment right to be "informed of the nature

277. NELSON, *supra* note 132, at 118.

278. 74 U.S. (7 Wall.) 321 (1869).

and cause of the accusation." If the Fourteenth Amendment incorporated the Sixth Amendment, the Court should have reached the merits of the claim. Instead, the Court unanimously reaffirmed *Barron* and rejected the writ without reaching the merits.

If Senator Howard's view of the Fourteenth Amendment was generally thought to express the view of Congress and of the ratifying state legislatures, it is puzzling that it escaped the attention of all nine Supreme Court justices who decided *Twitchell*. Amar attempts to explain *Twitchell* as incompetent lawyering and judging. He notes that Twitchell's lawyer raised the Fifth Amendment Due Process Clause and Sixth Amendment right to notice without arguing that these rights were applicable against the States through the Fourteenth Amendment. Without the Fourteenth Amendment before the Court, Amar argues, there was no ground on which to overrule *Barron*.[279] Thus, the Court reaffirmed *Barron*, and Twitchell was off to the gallows.

Amar's explanation suffers several problems.[280] I will mention only one. All members of the *Twitchell* Court were on the Court during the debates, congressional passage, and state ratification of the Fourteenth Amendment[281] — events which attracted much publicity nationwide and surely even more in Washington, D.C.[282] Amar's view requires that we believe either that the Court simply did not know what was clear to Congress and the ratifying state legislatures, or that the Court knew that the Fourteenth Amendment incorporated the Bill of Rights but chose not to raise this constitutional objection to Twitchell's execution. The first possibility requires us to accept that not a single Supreme Court justice of the time comprehended what is now patently clear. That level of incompetence is too profound to be accepted.

Alternatively, if the Court was aware of the argument, it would be extremely casuistic to refuse to reach the merits of the Fifth and Sixth Amendment rights contained in the Fourteenth Amendment simply because the lawyer asked for the rights directly rather than as incorporated in the Fourteenth Amendment. This was a case, after all, in which the Court had granted an emergency hearing and full oral argument to a defendant sentenced to hang a few days later. It makes no sense for the Court to hide the ball from the defense lawyer in that kind of case. One imagines the members of the Court smirking to each other behind a copy of the Constitution while sending a man to be

279. Amar, *supra* note 133, at 1255.

280. Dripps presents a more detailed rebuttal. Dripps, *supra* note 17, at 1579-82.

281. Chief Justice Salmon P. Chase took the oath on December 15, 1864, and the next new Justice, Justice William Strong, did not take his oath until March 14, 1870.

282. Most major newspapers carried a "Washington News" kind of summary of the congressional debates on the Fourteenth Amendment as well as other subjects. *See, e.g.*, N.Y. TIMES, June 30, 1866.

hanged. If everyone knew that the Fourteenth Amendment had incorporated the Bill of Rights, the Court might as well engage that understanding in *Twitchell* and be done with it. But the Court said nothing except that *Barron* was still good law in the wake of the Fourteenth Amendment.[283]

A convenient way to assess how the Court applied the Fourteenth Amendment in the early years is a study done by Charles Collins, a 1912 historian, that purports to include every Supreme Court case on the Fourteenth Amendment through the 1910-11 term, a total of 604 cases.[284] Collins cites a litany of natural law rights that litigants urged on the Supreme Court. I quote part of a list he provided (these are all Supreme Court cases):

> Suit to recover the value of a dog in Louisiana on which no tax had been paid; . . . the sale of cigarettes in Tennessee; . . . the question whether a convicted murderer in Idaho should be hanged by the sheriff or by the warden; . . . the compelling of railroads in Texas to cut the Johnson grass off from their rights of way before it goes to seed; . . . the segregation of houses of ill fame in New Orleans; the question whether running a barber shop on Sunday in Minnesota is a work of necessity or the practice of a handicraft for gain . . . .[285]

Of the 604 cases in the study, only fifty-five were decided against the state.[286] In twenty-one of the fifty-five cases, the claimant also invoked another provision in the Constitution, often the Commerce Clause.[287] Many of the cases in which the Supreme Court found a violation of the Fourteenth Amendment involved regulation of business activities or taxation issues.[288]

A State lost only one criminal procedure case. The Court held in 1879 that a West Virginia statute that explicitly excluded blacks from serving on grand and petit juries violated the Fourteenth Amendment.[289] This, of course, is precisely the interpretation of Section 1 of the Fourteenth Amendment that I proposed earlier: leaving incorpo-

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283. Three years later, the Court rejected the idea that the Fourteenth Amendment protected the right of butchers to carry on their trade free of legislative limitations on what slaughter-houses they could use. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872). Though the vote was five to four, only one opinion (Justice Bradley's dissent) clearly raises incorporation as a theory of interpretation for the Fourteenth Amendment. Though *Slaughter-House Cases* has generated an enormous literature, it seems beside the point to me if limited to its narrow holding. Whatever the best approach to the right to carry on a trade, it tells us nothing about whether the specific Bill of Rights guarantees were incorporated.

284. CHARLES WALLACE COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES at vii, 38 (1912).

285. *Id.* at 31-33 (footnotes omitted).

286. *Id.* at 81.

287. *Id.* at 83 (eight of the twenty-one involved the Commerce Clause).

288. *Id.* at 84-108.

289. Strauder v. West Virginia, 100 U.S. 303 (1879).

ration out of the picture, Section 1 would forbid a State from adopting substantive laws that denied blacks equality with whites in fundamental rights. The next issue, litigated in almost twenty cases from 1879 through 1909,[290] was whether the Fourteenth Amendment also prohibited the application of a facially race-neutral jury selection law to produce grand and petit juries that did not include blacks. This is the second part of my interpretation of the Privileges or Immunities Clause — that the executive branch could not "enforce" facially neutral laws in a way that violates privileges or immunities. These claims are, of course, more difficult to prove and the Court treaded more cautiously, insisting that the defendant had to show that the exclusion under a race-neutral law was based on race alone. As no defendant ever made that showing, no defendant won (though some won the right to a remand in cases where the state courts refused even to permit evidence on the point).[291]

There were, to be sure, a smattering of Bill of Rights criminal procedure claims urged on the Court during this period. The two most famous were *Hurtado v. California*[292] and *Twining v. New Jersey*,[293] in which defendants asserted that the Fourteenth Amendment granted them, respectively, a right to a grand jury indictment and the right not to be compelled to be a witness against oneself. The Court rejected both claims. Defendants made a few other claims: that execution by electrocution was cruel and unusual punishment, forbidden the States by the Fourteenth Amendment;[294] that a jury of eight violated the Sixth Amendment right to jury trial that the Fourteenth Amendment imposed on the States;[295] and that a coerced confession was forbidden by the privilege against compelled self-incrimination that was now part of the Fourteenth Amendment.[296] The Court rejected all these claims, usually noting something like the following:

> The Fourteenth Amendment did not radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a State. Protection to life, liberty, and property rests, primarily, with the States, and the amendment furnishes an additional guaranty against any encroachment

290. COLLINS, *supra* note 284, at 84-108.

291. These cases are summarized, along with a few others involving racial discrimination, in COLLINS, *supra* note 284, at 48-62.

292. 110 U.S. 516 (1884).

293. 211 U.S. 78 (1908).

294. *In re* Kemmler, 136 U.S. 436 (1890).

295. Maxwell v. Dow, 176 U.S. 581 (1900).

296. Barrington v. Missouri, 205 U.S. 483 (1907).

> by the States upon those fundamental rights which belong to citizenship, and which the state governments were created to secure.[297]

Consider the analytical structure of *Maxwell v. Dow*.[298] The issue was whether a jury of eight, as required in the Utah Constitution, violated the Fourteenth Amendment. The Court held that it did not.

> It appears to us that the questions whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors . . . do[es] not come within the clause of the [fourteenth] amendment under consideration, so long as all persons within the jurisdiction of the State are made liable to be proceeded against by the same kind of procedure and to have the same kind of trial, and the equal protection of the laws is secured to them.[299]

This neatly fits the equality reading of the Fourteenth Amendment: the basic source of privileges and immunities under the Amendment is state positive law; the real force of the Amendment is to make certain that the state positive law is enforced in an even-handed manner.

The number of claims in the Supreme Court during this era that the criminal procedure rights were part of the Fourteenth Amendment is insignificant compared to the number of natural law claims. Six hundred and four cases involved Section 1 of the Fourteenth Amendment, and the only criminal procedure right asserted repeatedly on behalf of defendants was the exclusion of blacks from grand and petit juries, a right that exists independently of incorporation because it is at the heart of an equality-based Fourteenth Amendment. If barbers in Minnesota were claiming a Fourteenth Amendment right to barber on Sunday,[300] why were state defendants not claiming violations of the Bill of Rights criminal procedure guarantees?

Another oddity exists in the incorporationist story. The first claim that one of the criminal procedure guarantees was incorporated into the Fourteenth Amendment was not made until 1884 (*Hurtado*), sixteen years after ratification. During those sixteen years, twenty-five other Fourteenth Amendment cases reached the Supreme Court, dealing with issues from eminent domain and the fairness of state taxation systems to whether women had a Fourteenth Amendment right to vote and to practice law.[301] Why so long before a lawyer raised

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297. Kemmler, 136 U.S. at 448.

298. 176 U.S. 581 (1900).

299. *Id.* at 604.

300. COLLINS, *supra* note 284, at 31-33.

301. *See* Fox v. Cincinnati, 104 U.S. 783 (1881) (denying that Fifth Amendment just compensation in eminent domain cases is a privilege or immunity); McMillen v. Anderson, 95 U.S. 37 (1877) (denying that state tax assessment system violated due process); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (denying that female suffrage is a privilege or immunity); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (denying that the practice of law is a privilege or immunity that would entitle women to be admitted to practice).

an incorporation claim in the Supreme Court on behalf of a criminal client?

Perhaps the States were jealously guarding the rights of criminal defendants. Perhaps. A more likely explanation is the lack of lawyers for indigent defendants. But lawyers were busily raising the claims of black defendants when blacks were excluded from juries. Why not other claims for black defendants, if not for white ones?

It is no response to say that earlier cases had chilled the fervor. Criminal defense lawyers are supposed to raise plausible claims, and the early cases involving natural law claims did not hold that the criminal procedure rights were not part of the Fourteenth Amendment. Notice again the perseverance of lawyers arguing for inclusive juries under race-neutral selection statutes. The first case was in 1880, four years before the first claim that criminal procedure rights were incorporated into the Amendment. Fifteen more claims for inclusive juries were spread out over the next twenty-eight years; the last one mentioned in the 1912 study was in 1908.[302] Defendants never won yet the cases kept coming. Why? The answer, I believe, is because the country and its lawyers assumed that the Fourteenth Amendment guaranteed equality of treatment, and lawyers kept raising the lack of equality in jury selection even though the Court repeatedly rejected their claims. The paucity of criminal procedure claims not involving equality suggests that there was no similar understanding that the Fourteenth Amendment fastened those rights onto the States.

So far I have argued that it is plausible to understand the Fourteenth Amendment to require States to provide a fair process for deciding criminal cases, laws that treat people equally, and the even-handed application of the substantive privileges and immunities created by state law. On this view, the point to the Fourteenth Amendment was to ensure that former slaves were given the same jury trial right as other citizens, the same right to counsel, the same criminal process in general. Viewed that way, it was a powerful tool to ensure equal treatment but was never intended to be a tool to reshape the state criminal processes. A State could have a law, as Pennsylvania did in *Twitchell*, that the prosecutor need not specify the manner in which the defendant killed the victim even if that law was inconsistent with Sixth Amendment notice requirements, as long as the State provided notice consistent with due process standards. The Fourteenth Amendment had nothing to say about that. What no State could do is have a statute that required additional specificity for white defendants but not for black ones.

To see how the argument works as a whole, begin again with the Bill of Rights. Established to restrain the central government, it had its

302. COLLINS, *supra* note 284, at 65.

own body of constitutional doctrine for more than a century. Section 1 of the Fourteenth Amendment can be read as a device specifically framed to eliminate inequality and discrimination, a reading supported by the history of the time and the debates in Congress and in the state legislatures. Most of the debate about the Fourteenth Amendment is about Section 2, Section 3, and the citizenship sentence in Section 1. Bingham and Howard mention the Bill of Rights in connection with the Fourteenth Amendment, but each seems to have a somewhat different conception of the relationship between the Bill of Rights and Section 1. The rest of Congress and the ratifying state legislatures neither endorse nor oppose the perhaps inconsistent comments of Bingham and Howard. After the amendment is ratified, the Supreme Court first ignores, then rejects incorporation as an interpretation of the Fourteenth Amendment. The Court continues to cite *Barron v. Baltimore* when incorporation challenges are made to state power. Finally, just under one hundred years later, after a great deal of fighting over whether the *First Amendment* was incorporated, nearly every criminal procedure guarantee in the Bill of Rights is incorporated with little debate.[303] The worlds have collided.

Before we can justify collapsing federal and state criminal procedure doctrine into one, however, we must conclude that the mention by Howard and Bingham of the Bill of Rights, without any clear indication that they had the same idea about what incorporation meant, plus the almost magical background consensus that Curtis and Amar claim to have found, is more salient, more probative on the incorporation question, than the collective weight of all the other historical facts noted in this Part. It is quite an interpretative feat. The remarkable historical fact, in my judgment, is how serenely the academy has accepted this argument.

If I am right, the Court's most grievous error in criminal procedure matters in the last century was not the exclusionary rule or the expansive rules set down to limit the federal government in *Boyd* and *Gouled*. Rather, the biggest mistake was to impose on the States the procedures designed to make federal convictions difficult to obtain. But can the Court go back? Is there an account of stare decisis that permits the Court to disavow the reasoning in a dozen or so cases? That is the subject of the next Part.

V. THE ROLE OF STARE DECISIS

Recovering Robust Bill of Rights Protections

I suspect even readers sympathetic to my project will, by this stage, worry about the effect of my proposal on precedent. Will my notion of

303. *See supra* note 15.

a free-standing Fourteenth Amendment not require the slaughter of many Warren Court precedents? If so, is that not in itself reason enough to stay with the Court's doctrine of selective incorporation? And if the reader accepts my historical critique of selective incorporation — the States could not have realistically agreed to cede as much sovereignty as later Courts would decide was justified — perhaps that argues for total incorporation.

Oddly enough, total incorporation, but not my proposal, requires overruling precedents. Total incorporation would require the Court to overrule *Hurtado*, refusing to require the States to provide grand juries; *Walker v. Sauvinet*,[304] refusing to impose the Seventh Amendment civil jury requirement on the States; and *Presser v. Illinois*,[305] refusing to apply the Second Amendment to the States. By comparison, my proposal to interpret the Fourteenth Amendment separately from the Bill of Rights criminal procedure guarantees makes few waves. It would require the Court to disavow its incorporationist dicta but, on a standard account of stare decisis, no holdings would have to be overruled. The narrow holding in every case that incorporated a Bill of Rights guarantee into the Fourteenth Amendment is that the Fourteenth Amendment forbids, or requires, particular state action. The incorporation mantra is an analytic device, not part of the holding.

In *Gideon v. Wainwright*,[306] for example, the Court overruled *Betts v. Brady*[307] and held that Gideon's constitutional rights were violated when his request for a court-appointed lawyer was not granted. Justice Black, writing for a unanimous Court, spoke expansively about what the Court was doing. "We think the Court in *Betts* was wrong . . . in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights [included in the Fourteenth Amendment]." The Court phrased the issue as whether "the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court." The Court said that it does, thus "incorporating" the Sixth Amendment right to a jury trial into the Fourteenth Amendment Due Process Clause.

But the actual holding in *Gideon* is more narrow — that when an indigent state defendant is accused of a felony in state court, and requests counsel, the Fourteenth Amendment Due Process Clause requires that counsel be appointed. Stare decisis would not stop the Court from later deciding that *Gideon* is limited to felonies while the Sixth Amendment also applies to misdemeanors. In effect, my argument is that the Court can *say* it is incorporating the right to *X* into the

304. 92 U.S. 90 (1875).

305. 116 U.S. 252 (1886).

306. 372 U.S. 335 (1963).

307. 316 U.S. 455 (1942).

Fourteenth Amendment, but the holding in the case does not bind future Courts who are interpreting *X* in federal cases. All that binds future Courts is the holding in the case, and the holding inevitably is based on the Fourteenth Amendment because that is the text the Court is interpreting. Until the Court overrules *Barron*, the only text the Court can interpret in cases coming from state courts is the Fourteenth Amendment. The state "incorporation" case is thus not binding precedent on a similar question from federal court that requires interpretation of the text of the Bill of Rights provision itself.

This traditional view of stare decisis means that the incorporation cases did not overrule the prior robust federal precedents. Nor did they necessarily overrule the narrow holdings of earlier cases refusing to apply Bill of Rights guarantees to the States. For example, recall *Maxwell v. Dow*,[308] where the Court refused to incorporate the Sixth Amendment into the Fourteenth and held that a jury of eight did not violate the Fourteenth Amendment. *Duncan v. Louisiana*[309] repudiated the analytical structure of *Maxwell* and held that States had to provide jury trials when prosecuting serious crimes. Two years after *Duncan*, the Court held in *Williams v. Florida*[310] that a jury of six does not violate the Fourteenth Amendment. Even though *Duncan* changed the analytical structure, nothing changed about the size of a jury that the Fourteenth Amendment permits. *Maxwell* held that juries of eight satisfy due process. *Williams* held that juries of six satisfy due process. The narrow holdings, if not the analytical structures, of *Maxwell* and *Williams* are consistent. In that sense, it is fair to say that *Maxwell* has not been overruled.

Nor, for that matter, has the Court overruled *Thompson v. Utah*[311] and *Patton v. United States*,[312] holding that the Sixth Amendment requires a jury of twelve. To be sure, the *Williams* Court *said* it was holding that the Sixth Amendment permits as few as six jurors, but the narrow holding was that the Fourteenth Amendment permits juries of six. Thus, as Justice Powell remarked in a later case, it is still open to argue that the Sixth Amendment requires twelve jurors, and a unanimous verdict, even though States are permitted to use juries of six and to authorize verdicts on votes of 9-3.[313] This is a nice, clean example of my two-tiered approach to the criminal procedure guarantees. Under *Duncan* and later cases, the States have imposed on them a due process version of the Sixth Amendment jury trial right. Though the issue

308. 176 U.S. 581 (1900).

309. 391 U.S. 145 (1968).

310. 399 U.S. 78 (1970).

311. 170 US 343 (1898).

312. 281 U.S. 276 (1930).

313. Johnson v. Louisiana, 406 U.S. 356, 367-77 (1972) (Powell, J., concurring).

has never arisen because the Federal Rules of Criminal Procedure require twelve jurors and a unanimous verdict,[314] it might be that defendants in federal court are still *constitutionally* entitled to twelve jurors.

I do not wish to suggest that the Court could easily "overrule" the analytic structure of its seminal incorporation cases in the criminal procedure area. My two-tier approach, while faithful to history, would essentially require the Court to rework a dozen or more cases. While this would not be, in my view, a dagger to the heart of stare decisis, it would ruffle the feathers of important precedents from the Warren Court era. It would require the Court to say that it was wrong to conclude in *Gideon* that the Sixth Amendment applies to the States, that it was wrong in *Malloy v. Hogan*[315] about the Self-Incrimination Clause applying to the States, that it was wrong in *Mapp v. Ohio*[316] to say that the Fourth Amendment requires the States to apply the exclusionary rule.

Such mea culpas do not come easily to anyone, particularly courts, and most particularly the Supreme Court. But I seek to ease the pain by arguing that the holdings in these cases represent a reasonable understanding of due process of law. Thus, the Court could say in a future Fourth Amendment case in federal court that, while it would continue to adhere to a particular doctrine from a state case as an interpretation of the Due Process Clause, it was going to apply a broader protection in cases where the Fourth Amendment is the relevant text. That does not tear a hole in the fabric of American constitutional law.

To see why it might be a good idea to apply broader Fourth Amendment protection in federal court, recall *Gouled*'s holding that police may not search for or seize lawfully possessed objects even with a warrant based on probable cause. As noted in Part II, *Gouled's* analytical structure was explicitly rejected in a Warren Court case from state court. Compare *Gouled* to the scope of the Fourth Amendment as it now applies to the States. If I set out my garbage for the trash collector, I have no Fourth Amendment interest in it even if it is still on my property.[317] Unlike Gouled, whose property could not be seized with a warrant based on probable cause, the police can go through my garbage, on my property, without even the slightest suspicion. Or if I make a telephone call from inside my home, the police can record the phone numbers called, without a warrant or any suspi-

314. FED. R. CRIM. P. 23, 31.

315. 378 U.S. 1 (1964).

316. 367 U.S. 643 (1961).

317. California v. Greenwood, 486 U.S. 35 (1988).

cion.[318] Or if I open a skylight in my roof, police can hover overhead in a helicopter and observe what I am doing in my home.[319]

The common law permitted constables to arrest individuals in public without a warrant, but only if they had specific grounds to suspect that the arrestee had committed a crime.[320] Today, I can be stopped and frisked if I am in a high-crime neighborhood and appear nervous and evasive.[321] All of these cases came to the Court from state courts. Not only are *Gouled* and *Boyd* dead, but their spirit is also gone, sacrificed on the altar of incorporation.

Boyd noted, "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property."[322] In contrast, the Court's language today is more likely to note the valid societal interest in preventing crime. Consider, for example, language in *New York v. Burger*, a case upholding a statute that authorized warrantless and suspicionless searches of junk yards.[323]

> New York, like many states, faces a serious social problem in automobile theft and has a substantial interest in regulating the vehicle-dismantling industry because of this problem. . . . In accordance with its interest in regulating the automobile-junkyard industry, the State also has devised a regulatory manner of dealing with this problem. Section 415-a, as a whole, serves the regulatory goals of seeking to ensure that vehicle dismantlers are legitimate businesspersons and that stolen vehicles and vehicle parts passing through automobile junkyards can be identified.[324]

The nineteenth century Court stressed the importance of security, liberty, and private property; the modern Court stresses the crime problem. One Court assumed that security, liberty, and private property are sometimes immune from government infringement even by subpoena or warrant; the other defers to statutes that advance "substantial" interests. To be sure, the rising crime rate in the twentieth century contributed to the shift in emphasis. But part of the change had to do with the crimes under investigation: in *Boyd*, Congress was seeking tools to help it uncover violations of the customs laws; in *Gouled*, the federal agents were investigating mail fraud; in *Burger*, the state legislation targeted auto theft. I suspect that Americans are much more concerned about auto theft than customs violations or

318. Smith v. Maryland, 442 U.S. 735 (1979).

319. California v. Ciraolo, 476 U.S. 207 (1986).

320. United States v. Watson, 423 U.S. 411 (1976).

321. Illinois v. Wardlow, 528 U.S. 119 (2000).

322. 116 U.S. at 630.

323. 482 U.S. 691, 713-14 (1987).

324. *Id.*

mail fraud. Thus, extending the Fourth Amendment to the States invites its reduction in scope to meet the "law and order" demands of citizens.

There are only two possibilities when comparing the *Gouled* Fourth Amendment with the current version, or when comparing the discourse in *Boyd* with that in *Burger*: either the principles underlying *Gouled* and *Boyd* have, somewhere along the line, been abandoned, or the modern cases draw from a different constitutional source. The Court takes the first approach. In this Article, I argue for the second. Because *Boyd* and *Gouled* interpreted the Fourth Amendment and *Burger* the Fourteenth, it is possible that all three cases were correctly decided. My argument is that the robust protections of the Bill of Rights guarantees are still there, cloaked by the Court's state cases that say they are interpreting the Bill of Rights.[325] When interpretations of due process in state cases are forced back onto the Bill of Rights criminal procedure guarantees, only mischief can result. The Framers' criminal procedure is, like Sleeping Beauty, peacefully awaiting the time that a Court discovers the historical error of the distorting mirror that is the Fourteenth Amendment.

VI. A NEW ROAD MAP TO INTERPRETING CRIMINAL PROCEDURE GUARANTEES

The High Wall Between Citizens and the Federal Government

The first five Parts suggest the following "road map" to the criminal procedure guarantees. As to the federal government, the Bill of Rights criminal procedure guarantees should be robustly interpreted as a way to maintain a high barrier against federal manipulation of criminal investigations and trials. This is simply true to the anti-government attitude and intent of the Framers. But in recognition of the federal system that, even after the Fourteenth Amendment, still vests considerable sovereignty in States, I would not require States to meet those robust guarantees as a part of due process. Instead, I would use as a due process baseline the criminal procedure doctrine that the Court has created for state courts under its incorporation rhetoric. The Court has, in effect, defined due process in its current

325. *See e.g.*, United States v. Place, 462 U.S. 696 (1983) (announcing that a dog sniff is not a Fourth Amendment search) (dicta); United States v. White, 401 U.S. 745 (1971) (plurality) (Fourth Amendment not implicated when an agent hears words of narcotics dealer from radio transmitter on government informant); Hoffa v. United States 385 U.S. 293 (1966) (Fourth Amendment permits use of evidence provided by government informant who was posing as a colleague of Jimmy Hoffa's). The current war on drugs and the intensified effort to give law enforcement tools with which to attack organized crime both occurred after the Fourth Amendment had been incorporated into the Fourteenth, and the distorting mirror of the Fourteenth Amendment makes the Court see the criminal procedure protections in a more narrow light whether the issue arises in state or federal court.

criminal procedure doctrine, albeit while claiming to be interpreting the Bill of Rights guarantees. These cases basically ask whether the procedures and mechanisms are fair and likely to produce an accurate result.

To specify precisely how my theory might work in the context of the Fourth Amendment would take an article unto itself, but I will sketch a few thoughts here. Much of the "mess" that is Fourth Amendment jurisprudence results from the Court's lack of a conceptual model of the Amendment. We can argue about exactly what constitutes a jury, or when counsel must be appointed, or when someone is being compelled to incriminate herself. But in each of these examples, we have a core idea of what the right protects. Other than the historical residue that searches of homes require a warrant, nothing else is paradigmatic about the Fourth Amendment. The first clause appears to forbid unreasonable searches and seizures, hardly a self-defining concept. For a couple of decades, the Court sought conceptual clarity by reading the Warrant Clause together with the Reasonableness Clause to create a sort of presumption that searches be conducted pursuant to a warrant. The Court referred to this presumption as a warrant requirement, subject to a "few well-delineated exceptions."

One difficulty with the warrant requirement was the rapid growth of the "few" exceptions; "few" had turned into more than twenty at last count.[326] Moreover, the probable cause requirement that accompanied the warrant requirement has also been seriously eroded. Police today can detain and frisk on reasonable suspicion, can set up drunk driving roadblocks and stop cars with no suspicion at all, and can obtain "consent" to search even if the person giving consent does not know of her right to refuse. It is easy to see why the Court would not want to fasten a meaningful warrant or probable cause requirement on state and local police officers as they try to solve serious, violent crimes. It is less clear that a serious warrant and probable cause requirement would be burdensome or out of place when federal law enforcement officials are investigating crime — except for the war on drugs, which is perhaps *sui generis*.[327]

The Fourth Amendment, on this understanding, would require federal agents to obtain a search warrant whenever they have time to

326. California v. Acevedo, 500 U.S. 565, 582-83 (1991) (Scalia, J., concurring in the judgment).

327. Even the effort to control organized crime would not, I think, be significantly affected by a meaningful warrant requirement because most of those investigations involve careful planning and cover long periods of time. If the war on drugs is the only federal criminal enterprise that is inconsistent with an historically indicated robust warrant requirement, perhaps this suggests rethinking the role of the federal government in creating and policing drug crimes. Only time will tell whether the war on terrorism will significantly erode Fourth Amendment protections and, if so, whether the erosion is justified by lives saved.

get one, except when searching incident to a valid arrest. This would in great measure simplify and clarify Fourth Amendment law and would distinguish the Fourth Amendment from the Due Process Clause, with all of its twenty-odd exceptions to the warrant requirement. The Fourth Amendment warrant requirement would permit searches of vehicles stopped on the highway when it is not feasible to seize the car and wait for a warrant to be issued, but not, as in the state case of *Chambers v. Maroney*,[328] when the police have already towed the car back to the station before searching.

A revived warrant requirement would categorically reject the "inventory" vehicle search exception — a paradigmatic case in which officers have time to obtain a warrant. It might also reinstate the *United States v. Chadwick*[329] doctrine requiring police to get a warrant to open a closed container once it has been reduced to their possession. Interestingly, *Chadwick* is a federal case, and the decision essentially overruling *Chadwick* is a state case.[330] Under my theory, both cases can coexist. State officers need not obtain a warrant to search a container found in a car even after they have taken it into their possession, because the question is one of fairness of the investigative practice. If they can seize the object and hold it to get a warrant, how is it unfair to search it on the spot? But federal agents must get a warrant because they must comply with a warrant requirement rooted in the Fourth Amendment itself.

Why would a warrant requirement be central to the Fourth Amendment but peripheral in interpreting the Due Process Clause? Recall that the Framers were concerned with arbitrary use of executive and legislative power. A search warrant requires the police to show ex ante probable cause to believe that specific evidence is in a particular place. If a magistrate agrees that the police have probable cause, he issues the warrant. The warrant, on its face, shows to the world that the use of power by the police is not arbitrary. And, as a substantive matter, the invasion of our homes and offices is less arbitrary if the police must show probable cause to a magistrate ex ante rather than to a judge in a suppression hearing after the evidence is found. But due process is about fairness in the investigation process, not arbitrary use of power. Viewed as a question of fairness, the twenty-odd exceptions to the warrant requirement might make good sense, for in every case the police either have particularized suspicion (probable cause or reasonable suspicion) or the suspect has done something to undermine his right of privacy (e.g., left the evidence in plain view or consented to the search).

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328. 399 U.S. 42 (1970).

329. 433 U.S. 1 (1977).

330. *Acevedo*, 500 U.S. 565.

Fourth Amendment law could be made more protective than the due process version of Fourth Amendment law in other ways. If one takes the Fourth Amendment seriously, federal agents would not be able to obtain consent to search unless they warned the suspect of her right to refuse. They could not, as the Court permits state officers, rely on acquiescence as consent.[331] In a federal case,[332] the Court held that the Fourth Amendment protected a telephone caller's expectation that a pay phone not be bugged. But in a series of state cases, the Court has found few other places outside the home protected by the Fourth Amendment. For example, a passenger in a car has no Fourth Amendment interest in the car's locked glove compartment;[333] one person has no Fourth Amendment interest in the purse of another;[334] and a person who makes telephone calls from his home has no Fourth Amendment interest in the numbers he dials.[335] Because the Fourth Amendment does not protect these areas, the Court does not require that police act reasonably in searching or seizing.

These holdings might make perfect sense if the issue is due process fairness. Is the state acting unfairly when it seizes evidence that someone places in an area that she neither owns nor controls? Perhaps not. The person has, after all, acted in a way that increases the risk of his activities being disclosed to others. My narcotics are without doubt less likely to be disclosed to others if I keep them in my pocket, where I have control, than if I put them in your purse or your glove compartment.

But understood as a "pure" Fourth Amendment issue, why should the risk of disclosure be the key factor? The Fourth Amendment by its terms protects "effects," as well as "persons," "houses," and "papers." Perhaps all the Fourth Amendment should require is that I manifest an expectation that my effects are shielded from the eyes of everyone except the person to whom I entrust my effects. As long as I have restricted access in a way that would prevent the general public from seeing my effects, why not grant Fourth Amendment protection? This distinction can be seen in *California v. Greenwood*.[336] If I put my garbage in an opaque plastic bag and set it on the curb on my property,

331. *Compare* United States v. Mendenhall, 446 U.S. 544 (1980) (upholding, without a majority opinion, a search based on consent when the federal agents told the suspect "that she had the right to decline the search if she desired"), *with* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (refusing in a state case to require officers to warn the suspect that he has a right to refuse consent).

332. Katz v. United States, 389 U.S. 347 (1967).

333. Rakas v. Illinois, 439 U.S. 128 (1978).

334. Rawlings v. Kentucky, 448 U.S. 98 (1980).

335. Smith v. Maryland, 442 U.S. 735 (1979).

336. 486 U.S. 35 (1988).

Greenwood said that I have forsaken Fourth Amendment protection. According to the Court:

> It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so.[337]

This casuistic reasoning might be appropriate when we ask whether it was *fair* for the police to see what the trash collector, a snoop, or a raccoon could have seen. But it seems out of place if one asks the Fourth Amendment question of whether my right to be secure in my effects is violated. I perhaps assume the risk that the trash collector will look through my garbage. But as long as my garbage, contained in an opaque bag, is on my property, I do not expect federal agents to rummage through it. *Greenwood* stretched pretty thin the assumption of the risk argument, as shown by the contrary rulings of some state courts when interpreting their own constitutions.[338]

In sum, a "pure" Fourth Amendment doctrine might protect what I seek to protect. It might have a serious search warrant requirement that requires a warrant for all searches, other than incident to arrest, whenever the federal agents have time to obtain a warrant. It might condemn detentions and frisks based on reasonable suspicion and consent obtained through implicit coercion.

Looking at the Sixth Amendment, the defendant's right to be confronted with the witnesses against him should, in a federal trial, include the right always to be in the same room when the witness testifies. Due process does not include that right in a state trial, as the Court held in *Maryland v. Craig*.[339] Indeed, *Craig* is an excellent example of how applying the Bill of Rights differently to the state and federal governments would provide a more coherent interpretational outcome.

The Court phrased the issue in *Craig* as whether the Sixth Amendment Confrontation Clause rendered unconstitutional the application of a state law that permitted the victim to testify in a different room from the defendant. The defendant's lawyer was in the room with the victim, and the defendant could view the proceedings and communicate with his lawyer via a closed-circuit television arrangement. Justice O'Connor wrote a tortured opinion for the Court that was an easy target for Justice Scalia's sarcastic dissent. Noting that the

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337. *Id.* at 40.

338. *See, e.g.*, State v. Morris, 680 A.2d 90 (Vt. 1996); State v. Hempele, 576 A.2d 793 (N.J. 1990); State v. Boland, 800 P.2d 1112 (Wash. 1990).

339. 497 U.S. 836 (1990).

charge was child sexual abuse, the Court found that the State had a valid and important interest in "avoiding, or at least minimizing, the emotional trauma produced by testifying" and, more broadly, in "safeguard[ing] the physical and psychological well-being of child victims."[340]

The Court then read its prior Confrontation Clause cases to guarantee the right to challenge in-court testimony as a way of discouraging witnesses from lying. The Court found that the Maryland system contained protections designed to ensure that the defendant's lawyer could test the witness's testimony for reliability. Balancing the interest of the State in the psychological well-being of child abuse victims against the (perhaps) slight diminution in the goal of advancing reliable testimony, the Court said that the Maryland procedure did not, on its face, violate the Confrontation Clause. It sent the case back for a determination of whether the balance in the particular case tipped for or against the defendant.

The Court in effect read the requirement of confrontation to be coextensive with its rationale — to permit the defendant to challenge the testimony of prosecution witnesses. Since Maryland had a procedure guaranteeing that defendants could challenge prosecution witnesses, it was likely to produce an accurate outcome. Thus, Craig could have received due process even though he did not confront the witness against him. And of course it was a state case, so the majority was interpreting the Fourteenth Amendment with its requirement that state processes seem likely to produce an accurate outcome.

But there was one problem. The Court based its ruling on the Sixth Amendment Confrontation Clause, assuming that it applies against the States precisely as it does against the federal government, and the Sixth Amendment promises the defendant the right to be confronted with the witnesses against him. The most natural reading of "to be confronted" is for the defendant to be in the same room while the witness is testifying.[341] The Sixth Amendment does not talk about due process, or fairness, or reliable outcomes. It talks about confrontation. To substitute policy goals for the literal language of the Sixth Amendment troubled Justice Scalia, writing also for Justices Brennan, Marshall, and Stevens.

> The Court today has applied "interest-balancing" where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then

340. *Id.* at 854 (quoting Wildermuth v. State, 530 A.2d 275, 286 (Md. 1987)).

341. One could argue that the passive voice of the guarantee ("to be confronted with") suggests only that the defendant see and hear the testimony. That was accomplished in *Craig* by means of closed-circuit television. But it strains credulity to think that the Framers meant, by use of a passive verb, to permit the defendant to be in a different room from the witness. The weakness of this argument is confirmed by the majority's failure even to mention it.

> to adjust their meaning to comport with our findings. The Court has convincingly proved that the Maryland procedure serves a valid interest and gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional, I would affirm the judgment of the Maryland Court of Appeals reversing the judgment of conviction.[342]

My road map recognizes both the common sense view of the majority and the power of Justice Scalia's plain meaning argument. When due process is the issue, why not rely on the procedural regularity of Maryland's system and its likelihood of producing reliable outcomes? But when reading the language of the Sixth Amendment, why not give the words their natural meaning and require the federal government to have all witnesses testify in the same room with the defendant? Indeed, a Court applying the Confrontation Clause only to federal trials might be inclined to rethink its willingness to admit all hearsay evidence that qualifies under a "firmly rooted" exception to the hearsay rule (an exception explained in a morass of conflicting cases and rationales beyond the scope of this Article).[343] Perhaps the federal government should have to produce all witnesses who are available and not be able to rely on the co-conspirator exception to the hearsay rule or any of the many other exceptions. This division makes sense as a policy matter. Federal crimes should be matters of national, not local, concern. The stakes should be higher. To require all available witnesses to testify in court does not seem particularly outrageous as an interpretation of the right "to be confronted with the witnesses against him."

Another example of how the Court got the outcome right in a state case but failed to understand that the right should be broader against the federal government is the seminal speedy trial case that we saw in the Introduction — *Barker v. Wingo*.[344] This habeas case arose in Kentucky and, under my proposed interpretation of the Fourteenth Amendment, should be tested by accuracy concerns rather than by the specific guarantees of the Sixth Amendment speedy trial right. The facts of *Barker* disclose a five and one-half year delay between arrest and prosecution. Most of the delay was because of the prosecution's strategy: the State felt it had a stronger case against the other participant in a brutal murder of an elderly couple, and it wanted to convict the other participant so it could force him to testify against Barker. Apparently recognizing the difficulty in classifying as "speedy" a trial that occurs five and one-half years after Barker was arrested, the

342. 497 U.S. at 870 (Scalia, J., dissenting).

343. *See, e.g.*, White v. Illinois, 502 U.S. 346 (1992). As *White* is a state case, the equation of "firmly rooted" hearsay exceptions and due process makes good sense.

344. 407 U.S. 514 (1972).

unanimous Court spoke mostly in terms of whether the delay caused doubt about the accuracy of the outcome, about whether the defendant's case was prejudiced by the delay.

But as Justice Thomas pointed out in dissent in a later case, why should prejudice have anything to do with whether a trial is speedy?[345] The issue of timeliness is independent of whether the defendant was harmed. The likelihood of prejudice to the defendant's case, Justice Thomas argued, is a due process inquiry. Precisely right, on my account. When the speedy trial concept is applied to the States, it should not be applied as a Sixth Amendment concept, for which the length of the delay is the most important parameter. Instead, the speedy trial right in state court would be simply whether the trial, despite the delay, was likely to produce an accurate outcome. For that question, of course, the right avenue of inquiry is whether the defendant's case was prejudiced by the delay.

Congress has filled the void left by *Barker v. Wingo*. In the best tradition of American constitutionalism, where all branches of the federal government, and all States, have an obligation to enforce the federal Constitution, Congress rendered *Barker* largely irrelevant for defendants in federal court. The federal Speedy Trial Act,[346] passed two years after *Barker*, is complicated and cannot be easily summarized. But the essence of the Act is that defendants have a right to a trial within approximately six months of arrest or indictment. Thus, five and one-half years would not qualify as speedy. This is a good example of a two-tier interpretation of criminal procedure rights — strict guidelines (speedy trial within six months or so) should apply to the federal government while the issue in state court is whether the defendant received a trial likely to produce an accurate outcome (the answer to which could be "yes" even though the delay was five and one-half years). *Barker* was correctly analyzed once we adjust for the state court context and acknowledge its due process focus. Then we do not face the embarrassing linguistic challenge of having to say that five and one-half years is speedy.

If *Barker* had arisen in federal court under the Sixth Amendment, the result should have been different. The Framers would not have thought that a five and one-half year delay was speedy, nor should we think so today. We have a "test" of that theory in the 1880 Montana case holding that even six months can violate the speedy trial right. Consider also the modern federal case of *Doggett v. United States*,[347] in which the trial was delayed for eight years while Doggett was blissfully

345. Doggett v. United States, 505 U.S. 647 (1992).

346. 18 U.S.C. §§ 3161-3174 (2000).

347. 505 U.S. 647 (1992).

unaware of the federal indictment.[348] The Court held that the Sixth Amendment was violated even though there was no ascertainable harm to Doggett's case. To make *Doggett* appear consistent with *Barker*, the Court invented a presumptive prejudice arising from a delay of that length. I think the majority got it right in *Doggett*, but for the wrong reasons. Doggett was denied his right to a speedy trial not because there was a presumptive prejudice arising from the delay but because the federal government, the executive and judicial branches, have an obligation to bring an indicted defendant to trial in fewer than eight years. It is more satisfying to say that eight and one-half years is simply not speedy, rather than having to invent a new presumption to make *Doggett* fit the *Barker* state mold.

One of the problems with the right to counsel is figuring out when the defendant has had effective counsel, an issue that has divided the Court between the poles of whether the result was accurate or the process fair. *Strickland v. Washington*[349] tried to bridge the gap by defining a "fair" trial as one that produced a "just" or "accurate" outcome. From this premise, the Court developed a flaccid test that requires reviewing courts to decide whether the lawyer provided assistance that was "reasonable considering all the circumstances" and, if not, whether the unreasonable performance prejudiced the defense. To answer the latter question, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[350] In effect, *Strickland* requires a case-by-case inquiry into whether the lawyer's failures deprived the defendant of a reasonable chance at an acquittal.

But, as Justice Marshall's dissent in *Strickland* makes plain, one need not view "assistance of counsel" through the lens of whether the outcome would have been different. One could view assistance of counsel as a protection guaranteed in all cases, without regard to whether the outcome would have been different. Justice Marshall, adhering to this view of the right to counsel, rejected *Strickland*'s requirement of prejudice. This seems more in line with the language of the Sixth Amendment, which, after all, guarantees the "Assistance of

348. These are the facts that the Court accepts, though the failure of Doggett's mother, with whom he was living when indicted, to tell her son that federal marshals had come looking for him with a warrant has always seemed a bit suspect to me. To be sure, he had by that time left to go to Colombia; perhaps he and his mother had had a parting of the ways. That Doggett had no notice of the indictment explains why the Speedy Trial Act did not protect him. *See* 18 U.S.C. § 3161(b) (2000) (computing time period from arrest or service of summons).

349. 466 U.S. 668 (1984).

350. *Id.* at 694.

Counsel for the defence" in all cases, not just in those cases in which a competent lawyer could produce an acquittal.[351]

But in state cases, where the question is whether the trial produced an outcome likely to be accurate (and *Strickland* was a state case), much can be said for the *Strickland* majority's position. A trial *can* be both fair and accurate with a lousy lawyer if a good lawyer would have made no difference.[352] Once again, my road map explains and justifies tensions long thought to be inherent in the Bill of Rights criminal procedure guarantees, but that turn out to be inherent in forcing these guarantees into the Fourteenth Amendment and then having to live with a distorted reflection of the Bill of Rights guarantees.

Look at what I have sketched: a Bill of Rights that actually provides speedy trials, requires juries of twelve and unanimous verdicts, guarantees effective assistance of counsel, requires the prosecution to produce the witnesses against the defendant, gives the accused the unlimited right to subpoena witnesses who might prove his innocence, and protects our right to be "secure in our persons, houses, papers, and effects." Is this a fantasy? No, it is what the Framers intended, and we can have it again if we separate the federal crime fighting machinery from that of the States. Why should the investigation of a robbery or murder be burdened with the same privacy-protecting barriers as an investigation into tax fraud or conspiracy? Or consider that Congress has created about 100 statutes criminalizing false statements in a wide variety of contexts.[353] However courts feel about the culpability of making false statements, they might be more willing to dismiss an indictment, for failure to prosecute in a timely manner, under one of those statutes[354] than they would be willing to dismiss an indictment for the brutal murder of two helpless victims. Similarly, courts might want to read more expansively the right to discover the prosecution's case, to confront witnesses, and to present defense witness who would testify to the truthfulness of the statement or the defendant's lack of mens rea. The right to a unanimous verdict from a jury of twelve

351. I assume in the text that a lawyer who performs unreasonably, and thus fails the first part of the *Strickland* test, is not providing assistance of counsel. While that is a contestable assumption, it is more likely as an interpretation of the Sixth Amendment than the Due Process Clause.

352. One way to divide the right to counsel doctrine between state and federal systems is to permit federal defendants to prove a Sixth Amendment violation if either the representation was unreasonable or the outcome potentially inaccurate, while state defendants could show a Fourteenth Amendment violation only if they show a potentially inaccurate outcome.

353. *See* United States v. Gaudin, 28 F.3d 943, 959-61 (9th Cir. 1994) (Kozinski, J., dissenting).

354. The federal Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (2000), usually provides far stricter time limits than the Court has discovered in the Sixth Amendment right to a speedy trial, but I deal in this Article with the constitutional question. Congress could, after all, abolish the Speedy Trial Act.

might be more appropriate in a false statement case. I do not claim here, of course, that all federal crimes are on a low order of culpability, but with one notable and troubling exception, federal criminal law is largely devoted to compliance matters — including tax law, perjury, false claims, obstruction of justice, and bribery — as well as public welfare offenses, computer crime, and various types of fraud.

The exception to this role for federal criminal law are the crimes against consensual behavior, largely the many criminal offenses designed to deter drug use but also including gambling and prostitution. These crimes require aggressive investigation and put federal agents in a position similar to local and state law officers trying to solve murder or rape cases. The federal crimes punishing consensual behavior are, for me, a troubling exception to the more traditional federal role because they raise policy arguments against my theory that we can "afford" more expansive criminal procedure protections in the federal criminal process.

Perhaps in a concession to the modern role of federal criminal law, it is no longer possible to recover fully the robust antigovernment interpretation of the Bill of Rights' criminal procedure guarantees. But as we saw when discussing *Barker v. Wingo* and *Maryland v. Craig*, it still makes sense to decouple the specific criminal procedure guarantees from the fairness and accuracy concerns underlying due process of law in the Fourteenth Amendment. The discourse, and even the outcomes, should improve if we can speak more precisely about speedy trials and the right to confront witnesses in federal cases while limiting our concern in state cases to achieving a fair process likely to produce a reliable outcome.

CONCLUSION

Where We Have Been, Where We Might Be Going

Prior to the Warren Court's incorporation of the criminal procedure guarantees, the federal criminal procedure world was very different from the world of each state's criminal procedure. When the worlds collided, the damage was far more severe than anyone has yet documented. As expected, the States lost some of their autonomy. An unexpected, and still poorly understood, effect is the damage done to the federal Bill of Rights. The barriers to federal investigation and prosecution, once mighty protections, are now eroded, stunted, and easily breached. The Court has "amended" them, one by one, through the process of incorporation.

If one were designing from scratch a mechanism to oversee federal and state criminal proceedings, one might come up with the model I described in Part VI. One could plausibly expect federal authorities to develop their cases against suspects without resort to the short cuts

that the Court has approved in the state cases.[355] Most federal investigations involve large-scale criminal activity or complicated financial crimes and require sophisticated law enforcement strategies to ferret out the evidence. On the other hand, the state criminal law largely protects us from murder, rape, robbery, burglary, and larceny. Because the welfare of the citizens is more directly harmed when these crimes occur, and because solving these crimes is a very different enterprise from examining bank records or looking for evidence of a multistate conspiracy, one could conclude that state and local police and prosecutors should be permitted to engage in methods that are fair but not countenanced by the Bill of Rights.

The Court can recover the Bill of Rights' criminal procedure guarantees that the Framers intended and that the early courts applied. The precedents still exist. They have not been overruled — just forgotten in the rush to apply the criminal procedure guarantees to the States. The high wall between the federal government and its citizens stands today. We cannot see it because the Fourteenth Amendment mirror shines in our eyes, blinding us to the original purpose of the Bill of Rights. That document was fundamentally antigovernment. It was not designed to produce fair outcomes or reasonable accommodations to permit more effective crime control. It was designed to hobble federal prosecution of crime. Perhaps we do not wish to return to thoroughly hobbled federal investigators and prosecutors. But to the extent the critics of the last twenty years of criminal procedure doctrine are correct, we need to return part of the way to that castle.

On my account of the passage and ratification of the Fourteenth Amendment, no barrier exists to keep the Court from retracing its steps and recovering greater protections against federal investigators and prosecutors. One can of course reach different conclusions from the history I have presented in this Article. The modern consensus, however, does not stand on a foundation as firm as its supporters assert. Indeed, in light of the scant historical support for incorporation, the Court's initial approach seems better than that currently in fashion. When faced with the comments of Senator Howard favoring incorporation, the Court in 1900 remarked: "It is clear that what is said in Congress upon such an occasion may or may not express the views of the majority of those who favor the adoption of the measure which may be before that body . . . ."[356] The Court decided in that case not to incorporate a Bill of Rights provision, rejecting the theory of incorporation as an extreme interpretation of the Fourteenth Amendment. In today's world, incorporation does not seem extreme. But the historical case for incorporation consists only of the remarks of Senator Howard

355. At least one could so expect if drug crimes are taken out of the federal mix.

356. Maxwell v. Dow, 176 U.S. 581, 601 (1900).

and Representative Bingham — remarks that were met by the silence of the rest of Congress, the silence of the ratifying legislatures, and years of silence from judges and lawyers.

The modern understanding of incorporation, it turns out, is built on a consensus of silence.