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"Incorporation" of the Criminal Procedure Amendments: The View from the States

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“Incorporation” of the Criminal Procedure Amendments: The View from the States

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I. INTRODUCTION

From 1932 to 1969, the United States Supreme Court “incorporated” most of the criminal procedure provisions of the Bill of Rights

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into the Due Process Clause of the Fourteenth Amendment,¹ thereby rendering those provisions binding on state and local governments.² Before and during that time, jurists and legal scholars vigorously debated the constitutional legitimacy of the Fourteenth Amendment “doctrine of incorporation.”³ Despite the apparent stability of the post-1969 standoff in the Supreme Court,⁴ the controversy over “incorporation” has continued to rage.⁵ Whether considering the status of the few remaining “unincorporated” rights, evaluating “total incorporation” theories, or defending or criticizing the status quo, “incorpora-

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1. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”).
 2. Of the eleven specific criminal procedure provisions enumerated in the Fourth, Fifth, and Sixth Amendments, all but the right to grand jury indictment have been “incorporated” against the states. See *Duncan v. Louisiana*, 391 U.S. 145, 148–49 & nn.4–14 (1968) (summarizing “incorporation” cases); *but cf. Hurtado v. California*, 110 U.S. 516, 538 (1884) (refusing to “incorporate” Fifth Amendment’s grand jury indictment requirement); *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972) (reaffirming that “the Court [still] has never held that federal concepts of a ‘grand jury,’ binding on the federal courts under the Fifth Amendment, are obligatory for the States”).
 3. See, e.g., 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, 1067–78 (2000) (recounting history of scholarly and judicial debate over this subject); see also Michael Kent Curtis, *John A. Bingham and the Story of American Liberty: The Lost Cause Meets the “Lost Clause,”* 36 AKRON L. REV. 617, 621, 623–25 & n.30 (2003) (same). The scholarly and judicial debate over “incorporation” goes beyond the criminal procedure provisions set forth in the Fourth, Fifth, and Sixth Amendments. It also encompasses the important substantive personal liberties guaranteed by the First and, arguably, Second, Eighth, and even Ninth Amendments. However, discussion of protection of substantive personal liberties against state interference (as opposed to protection of procedural rights of criminal defendants and suspects in state criminal process) is beyond the scope of this Article.
 4. See, e.g., Wildenthal, *supra* note 3, at 1055 (“The incorporation debate, at a superficial level, seems settled today as a matter of black-letter law. Not since 1969 has the Court either included or excluded from the scope of the Fourteenth Amendment any provision of the Bill of Rights.”).
 5. In 1999, for example, California Supreme Court Justice Janice Rogers Brown asserted that “[t]he historical evidence supporting [the doctrine of incorporation] is pretty sketchy. [The Supreme Court] relied on some historical materials which are not overwhelming. The argument on the other side is pretty overwhelming, and it is probably not incorporated.” *Confirmation Hearing on the Nomination of Janice R. Brown, of California, to be Circuit Judge for the District of Columbia Circuit: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. S. Hrg. No. 108-463, at 62 (2003) (statement of Sen. Patrick J. Leahy, Member, S. Comm. on the Judiciary). When public opposition later threatened that justice’s appointment to the United States Court of Appeals, the nominee distanced herself from her 1999 statement. See *id.* (statement of J. Janice R. Brown) (“I have since actually found a lot of other things going the other way in dealing with the debates at the time of the post-Civil War amendments, which suggests that some of that might have been there [T]here certainly may be . . . argument on both sides.”).

tion" opponents⁶ and proponents⁷ alike have agreed that the ultimate resolution of the "incorporation" debate will have meaningful, practical effects on the legal rights of people throughout the United States.

Despite such widespread agreement, however, no systematic attempt has been made to measure the extent to which "incorporation" of the Fourth, Fifth, and Sixth Amendments has shaped the contours of state criminal procedure as it is practiced. At first glance, it is not clear why "incorporation" should exert significant impact. After all, every state constitution contains a bill of rights that significantly overlaps the United States Bill of Rights.⁸ Moreover, state court interpretations of state bills of rights have long been influenced by federal court interpretations of the United States Bill of Rights.⁹ For this reason, even if "incorporation" had never occurred, most state cases decided under the "incorporated" Fourth, Fifth, and Sixth Amendments seemingly should be expected to come out the same way under analogous state constitutional provisions.¹⁰

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6. See, e.g., RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 5 (1989) ("Whether the Bill of Rights applies to the States by virtue of the Fourteenth Amendment presents a momentous question. For if it does not, many modern decisions of the Supreme Court—e.g., respecting . . . Fourth Amendment search and seizure, Fifth Amendment criminal procedure, issues the Founders left to the States—are without constitutional warrant.")
 7. See, e.g., MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE 3* (1986) ("The idea that protection of human liberty under the Bill of Rights against state action is the result of judicial whim or judicial usurpation eats like acid at the legitimacy of federal protection of civil liberty.")
 8. Cf. *In re Oliver*, 333 U.S. 257, 282 (1948) (Rutledge, J., concurring) ("The states have survived with the nation through great vicissitudes, for the greater part of our history, without wide departures or numerous ones from the plan of the Bill of Rights. They accepted that plan for the nation when they ratified those amendments."). The principle that state government power may be limited by state constitutions is reflected in the Tenth Amendment to the United States Constitution. See U.S. CONST. amend. X ("The powers not delegated to the United States . . . , nor prohibited . . . to the States, are reserved to the States respectively, or to the People.") (emphasis added). By including the qualifying language "or to the People," the Framers recognized that, within each state, not all powers would necessarily be delegated to the state government. *Id.*
 9. See *infra* Part III; see also Barry Latzer, *The Hidden Conservatism of the State Court "Revolution,"* 74 JUDICATURE 190, 190-91 (1991) (finding that state courts of last resort adopted United States Supreme Court reasoning and result in two-thirds of all criminal procedure cases decided under state constitutions during the 1970s and 1980s).
 10. Cf. *Massachusetts v. Upton*, 466 U.S. 727, 738-39 (1984) (Stevens, J., concurring) ("It must be remembered that for the first century of this Nation's history, the Bill of Rights of the Constitution of the United States was solely a protection for the individual in relation to federal authorities. State Constitutions protected the liberties of the people of the several States from abuse by state authorities. The Bill of Rights is now largely applicable to state authorities and is the ultimate guardian of individual rights. The States in our federal system, however, remain the primary guardian of the liberty of the people.").

Undoubtedly, the "doctrine of incorporation" would have tremendous practical significance if the specification of constitutional rights varied from state to state. In theory, the texts of the separate state bills of rights could recite different rights from one another. In addition, judicial interpretations of textually similar guarantees in separate state constitutions could diverge over time. States also could repeal existing state bills of rights provisions.¹¹ They could add new rights not protected by the United States Constitution.¹² Experimentation by the states in all these respects could lead to innovation, and perhaps to productive competition among the states.¹³ If so, then "incorporation" of the United States Bill of Rights would constrain each state by requiring maintenance of a uniform national core of civil liberties protections.

In practice, however, with respect to criminal procedure, such diversity simply is not found. The criminal procedure provisions of most of the state bills of rights are nearly identical to one another and to the United States Bill of Rights.¹⁴ Variations in constitutional language have been interpreted by state courts as cosmetic and inadvertent. In particular, the absence of a particular textual guarantee from a given state constitution, more often than not, has not discouraged courts in the state at issue from protecting the right.¹⁵ Moreover, to the extent that there has been experimentation, the experiment seems to be all but over. Virtually every right enumerated in the United States Bill of Rights has been embraced widely in the fifty states.

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11. State constitutions are amended and replaced far more frequently than the Federal Constitution. See *infra* notes 67–69 and accompanying text.
 12. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding that denial of legal benefits of civil marriage to same-sex couples violates state constitutional principles). The "incorporation doctrine" does not prevent states from protecting new rights that are not protected under the United States Constitution.
 13. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); cf. Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 819 n.215 (1995) ("[T]he creation of a decentralized competitive market in criminal procedure rules would allow innocent citizens ultimately to shape the development of criminal procedure by voting with their feet.").
 14. See AKHIL REED AMAR, *THE BILL OF RIGHTS* 205 (1998) ("With a few exceptions, most notably the grand-jury rules . . . , the substance of the federal Bill's rights and freedoms did not greatly diverge from rights already formally protected under state laws and state constitutions."); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 118 (1988); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1465 (1992).
 15. See *infra* Part III.

Since 1791, state bills of rights have been amended overwhelmingly towards *greater* conformity with the United States Constitution, and almost never away from such conformity.¹⁶

For this reason, standard accounts of the “doctrine of incorporation” may overstate the extent to which the Fourth, Fifth, and Sixth Amendments to the United States Constitution protect the rights of criminal defendants more strongly than typical state law. This overstatement perhaps stems from the fact that the Supreme Court did, in fact, have occasion to “incorporate” ten substantive rights recited in the Fourth, Fifth, and Sixth Amendments—and to reverse state court decisions in so doing. If state courts have failed, at one time or another, to protect each of the ten rights that have been “incorporated” by the Supreme Court, then it might appear that the application of federal constitutional norms to state criminal processes necessarily effected significant substantive impositions on state criminal procedure law.

Closer examination, however, reveals a more complex, but less dramatic, story. In several “incorporation” cases, the United States Supreme Court reversed decisions in which state courts had labored earnestly to apply federal constitutional doctrine.¹⁷ State courts in these cases did not reject federal interpretations of the Bill of Rights, but rather simply failed to correctly predict the Supreme Court’s disposition of certain close legal questions. In other cases, the Supreme Court announced the “incorporation” of United States constitutional norms, but minimized the impact of these announcements by continuing to permit significant variation among the states in the implementation of such norms.¹⁸ Several “incorporation” cases did little more than to require one or two outlying states to modify relatively minor

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16. The sole exception to this generalization, in the criminal procedure context, concerns the only right set forth in the Fourth, Fifth, or Sixth Amendment that the Supreme Court has expressly declined to incorporate: the right to grand jury indictment. Most states have altered or abolished grand jury indictment. See Richard E. Shugrue, *The Grand Jury In Nebraska*, 33 CREIGHTON L. REV. 39, 45–54 (1999) (tracing state decisions to abolish right to grand jury indictment). Outside the criminal procedure context, many state constitutions also have been amended towards *greater* conformity with the United States Constitution by the ratification of state constitutional rights to bear arms. See Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions, by Date*, <http://www1.law.ucla.edu/~volokh/beararms/statedat.htm> (last visited Nov. 11, 2005) (listing 15 states in which “right to bear arms” provisions have been added to state constitutions since 1970). The Second Amendment right to bear arms has never been “incorporated” against the states. See *Presser v. Illinois*, 116 U.S. 252, 265 (1886). Discussion of the right to bear arms is beyond the scope of this Article.
 17. See, e.g., *Benton v. Maryland*, 395 U.S. 784 (1969); *Malloy v. Hogan*, 378 U.S. 1 (1964); *In re Oliver*, 333 U.S. 257 (1948). All of these cases are discussed *infra*.
 18. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 158 & n.30 (1968) (incorporating Sixth Amendment right to criminal jury trial, but declining to incorporate Sixth

details of their state criminal practice.¹⁹ A handful of "incorporation" cases did have potential to impose paradigm-shifting changes on criminal procedure in many states²⁰—until, as always happened, the Supreme Court retreated from the implications of its holdings.²¹

By closely examining the state court proceedings underlying the Supreme Court's "incorporation" decisions that fit into each of these categories, this Article demonstrates that "incorporation" of the Fourth, Fifth, and Sixth Amendments did not require modification of state criminal procedure to nearly the extent commonly supposed. Part I recounts the history of the "incorporation" debate. Part II explains why variation in the language set forth in various state bills of rights has rarely been reflected by corresponding differences in state criminal procedure. Finally, in order to determine the extent to which "incorporation" reshaped state criminal procedure, Part III reviews the facts and holdings of the state court decisions underlying the Supreme Court's "incorporation" cases, and also surveys the law of other states whose constitutions lacked express analogues to United States constitutional provisions.

II. THE INCORPORATION DEBATE

Since the ratification of the Fourteenth Amendment in 1868, courts and commentators have struggled with the question whether the Fourteenth Amendment "incorporates" the guarantees of the first eight or nine Amendments as limits on state power. Although the first federal court to face the question held that the Fourteenth Amendment's Privileges or Immunities Clause achieved such an effect,²² the Supreme Court apparently rejected this interpretation when it first construed the Clause.²³ Nineteenth century commenta-

Amendment doctrines concerning jury size, jury unanimity, or jury waiver). This case is discussed *infra*.

19. *See, e.g.*, *Doyle v. Ohio*, 426 U.S. 610 (1976); *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Oliver*, 333 U.S. 257; *Cole v. Arkansas*, 333 U.S. 196 (1948) (each affecting only one state); *see also* *Griffin v. California*, 380 U.S. 609 (1965) (affecting six states); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (affecting five states). All of these cases are discussed *infra* Part III.
20. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961). Both of these cases are discussed *infra*.
21. *See infra* Part III (discussing the Court's retreat from *Miranda* and *Mapp*).
22. *United States v. Hall*, 26 F. Cas. 79, 82 (C.C.S.D. Ala. 1871) (holding that "the right of freedom of speech, and the other rights enumerated in the first eight articles of amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States," secured by the Fourteenth Amendment against state action); *accord* *United States v. Mall*, 26 F. Cas. 1147 (C.C.S.D. Ala. 1871) (same).
23. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). Formally, the *Slaughter-House Cases* held the Privileges or Immunities Clause of the Fourteenth Amendment did not bar a state from awarding a butchering monopoly to a preferred

tors were nearly unanimous in criticizing this decision in the *Slaughter-House Cases* as a judicial abrogation of the Fourteenth Amendment.²⁴ Even the few commentators who *applauded* the *Slaughter-House Cases* decision agreed that neither the text of the Fourteenth Amendment, nor its ratifiers' intent, supported the Court's holding.²⁵

vendor, and prohibiting independent butchers from pursuing their trade. *Id.* at 78. However, certain dicta in the majority opinion was widely understood for more than a century to have effectively nullified the Privileges or Immunities Clause. *See, e.g.,* Wildenthal, *supra* note 3, at 1063–66 (describing nineteenth and twentieth century judicial interpretations of the *Slaughter-House Cases*). *But c.f.* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 *YALE L.J.* 643 (2000) (arguing that courts and commentators misconstrued the holding in the *Slaughter-House Cases*, and that all nine Justices in the *Slaughter-House Cases* actually accepted that the Fourteenth Amendment incorporated against states those rights enumerated in the Bill of Rights). Misconstrued or not, the *Slaughter-House Cases* stunted the development of the Privileges or Immunities Clause as a vehicle for implementing the “doctrine of incorporation.” Wildenthal, *supra* note 3, at 1064 & nn.46–47. Indeed, until 1999, the *Slaughter-House Cases* also stunted the development of the Privileges or Immunities Clause as a basis for federal protection of intrastate equality with respect to state law rights. *But see* Saenz v. Roe, 526 U.S. 489 (1999) (holding that Privileges or Immunities Clause conveys on all United States citizens a right to obtain state citizenship in any state in which residence is taken, with rights and privileges equal to that of incumbent citizens). Although both “selective” incorporation and protection of certain unenumerated rights have subsequently been achieved via the Due Process Clause, and intrastate equality has been achieved in certain contexts via the Equal Protection Clause, the Privileges or Immunities Clause still has never provided a significant basis for judicial protection of individual rights.

24. *See, e.g.,* JOHN NORTON POMEROY, INTRODUCTION TO CONSTITUTIONAL LAW §§ 765–67 (3d ed. 1868) (“I am of opinion that the fundamental position taken by the *minority* in the *Slaughter House Case*, the broad, general principle of interpretation adopted by them is correct, and that it will in time be universally accepted.”); *accord* 1 JOHN W. BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 228–30 (1890); WILLIAM D. GUTHRIE, LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 60–65 (1898); Charles R. Pence, *The Construction of the Fourteenth Amendment*, 25 *AM. L. REV.* 536 (1891); William L. Royall, *The Fourteenth Amendment: The Slaughter-House Cases*, 4 *S. L. REV. N.S.* 558 (1878).
25. *See, e.g.,* Walter D. Coles, *Politics and the Supreme Court of the United States*, 27 *AM. L. REV.* 182, 206 (1893) (“Never was the court truer to itself, and truer to the constitution, than when it passed upon the momentous question involved in the *Slaughter-House Cases*. A *literal interpretation* of the fourteenth amendment would have destroyed local self-government, reduced the States to the condition of mere provinces, and swept away that Federal fabric which our fathers had builded [sic] with such painful and loving care. *That such a result was contemplated by the political leaders who secured the adoption of the fourteenth amendment is certain.* But the high patriotism of the Supreme Court led it to construe this amendment in accordance with the traditions and true spirit of our constitution, and to preserve to our people the inestimable advantages of local self-government.”) (citations omitted and emphasis added).

Nonetheless, for the next quarter century, the Supreme Court considered and rejected a series of claims that specific guarantees of the Bill of Rights had been "incorporated" against the states by the Fourteenth Amendment.²⁶ Finally, in 1897, after repeatedly rejecting such claims, the Court construed the Due Process Clause of the Fourteenth Amendment as having implicitly "incorporated" the "just compensation" requirement of the Fifth Amendment's Takings Clause.²⁷ After this 1897 decision, however, the Court reverted for another quarter century to rejecting other "incorporation" claims.²⁸

Between 1925 and 1969, the Supreme Court reversed its earlier course, "incorporating" as limits on state power almost all of the enumerated rights expressly guaranteed by the First through Eighth Amendments.²⁹ Midway through that process, in 1947, Justice Hugo Black announced a theory of "total incorporation" of the Bill of Rights through the Privileges or Immunities Clause of the Fourteenth

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26. See *McElvaine v. Brush*, 142 U.S. 155, 158-60 (1891) (finding that the Fourteenth Amendment does not "incorporate" Eighth Amendment right against cruel and unusual punishment); *Spies v. Illinois (The Anarchists' Case)*, 123 U.S. 131 (1887) (finding that the Fourteenth Amendment does not "incorporate" Fourth Amendment right against unreasonable searches and seizures, Fifth Amendment right against self-incrimination, or Sixth Amendment right to an impartial jury); *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (finding that the Fourteenth Amendment does not "incorporate" Second Amendment right to bear arms); *Hurtado v. California*, 110 U.S. 516, 538 (1884) (finding that the Fourteenth Amendment does not "incorporate" Fifth Amendment right to grand jury indictment); *Missouri v. Lewis*, 101 U.S. 22, 31 (1879) (finding that the Fourteenth Amendment does not "incorporate" Sixth Amendment right to criminal jury trial); *United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876) (finding that the Fourteenth Amendment does not "incorporate" Second Amendment right to bear arms or First Amendment right to freely assemble); *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) (finding that the Fourteenth Amendment does not "incorporate" Seventh Amendment right to civil jury trial).
27. *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897) ("[T]he requirement of due process of law in [the Fourteenth] amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation.").
28. See *Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530, 538 (1922) (Fourteenth Amendment does not "incorporate" First Amendment right to freedom of speech), *overruled in pertinent part by Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Twining v. New Jersey*, 211 U.S. 78, 106-14 (1908) (Fourteenth Amendment does not "incorporate" Fifth Amendment right against self-incrimination), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964); *Maxwell v. Dow*, 176 U.S. 581, 594-96 (1900) (Fourteenth Amendment does not "incorporate" Sixth Amendment right to a criminal jury trial), *abrogated by Williams v. Florida*, 399 U.S. 78 (1970); *Brown v. New Jersey*, 175 U.S. 172, 174-77 (1899) (Fourteenth Amendment does not "incorporate" Sixth Amendment right to impartial jury), *overruled in pertinent part by Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).
29. See *infra* Part III.

Amendment.³⁰ While Justice Black's view never commanded a Court majority, the Court did embrace Justice Cardozo's earlier formulation of "absorption" (later called "selective incorporation"), via the Due Process Clause, of those particular enumerated rights that were elements "of the very essence of a scheme of ordered liberty."³¹ Applying this formulation since 1925, the Court has nominally "incorporated" against the states virtually every right enumerated in the first eight Amendments.³²

The application of United States constitutional principles to state criminal procedure proved tremendously controversial. Initially, debate focused on the historical legitimacy of the "incorporation" thesis.³³ While this historical debate continues,³⁴ attention soon was brought to bear on "incorporation's" practical effects. Without "incorporation," "incorporation" proponent Charles Black argued,

[W]e ought to stop saying, "One nation indivisible, with liberty and justice for all," and speak instead of, "One nation divisible and divided into fifty zones of political morality, with liberty and justice in such kind and measure as these good things may from time to time be granted by each of these fifty political subdivisions."³⁵

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30. *Adamson v. California*, 332 U.S. 46, 68–123 (1947) (Black, J. dissenting), *overruled in part by Malloy*, 378 U.S. 1.
 31. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969).
 32. See *Duncan*, 391 U.S. at 148–49 & nn.4–14 (surveying "incorporation" cases). To date, the Supreme Court has refused to "incorporate" only the Second Amendment right to bear arms, *Presser v. Illinois*, 116 U.S. 252, 265 (1886), the Fifth Amendment right to grand jury indictment, *Hurtado v. California*, 110 U.S. 516, 538 (1884), and the Seventh Amendment right to jury trial in civil cases, *Walker v. Sauvinet*, 92 U.S. 90, 92 (1876). The Court has never had occasion to decide whether the Third Amendment's guarantee against quartering soldiers is "incorporated" into the Fourteenth Amendment as a limit on state power, though one lower federal court has held that it is. See *Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982).
 33. For two famous challenges to the historical legitimacy of "incorporation," see Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949); Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Judicial Interpretation*, 2 STAN. L. REV. 140, 162–70 (1949). Five years after it was published, Fairman's historical analysis was refuted by William Crosskey. See William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954). But see Charles Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954) (defending anti-incorporationist thesis).
 34. See Pamela Brandwein, *Dueling Histories: Charles Fairman and William Crosskey Reconstruct "Original Understanding"*, 30 LAW & SOC'Y REV. 289, 291–92, 300–01 (1996) (surveying ongoing historical debate between successors of Fairman and Crosskey).
 35. Charles L. Black, Jr., "One Nation Indivisible": *Unnamed Human Rights in the States*, 65 ST. JOHN'S L. REV. 17, 55 (1991); accord William W. Van Alstyne, *Foreword to MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE*, at vii, ix (1986) ("[I]t is

"Incorporation," in contrast, would force "certain of our states . . . to mend their ways . . . [and] to observe all the provisions of this Bill of Rights that Americans have long been taught to revere."³⁶ To many, the "doctrine of incorporation" seemed necessary to ensure the maintenance of civil liberty in the United States.³⁷

Opponents of "incorporation" expressed different, though similarly emphatic, concerns about the doctrine's effects. To "apply the Bill of Rights to the states through the due process clause [is to] weaken the states tremendously by handing over control of large areas of public policy to the federal judges," remarked one federal judge.³⁸ At stake in the "incorporation" debate, argued Raoul Berger, was "the integrity of the Constitution, the right of the people to govern themselves, for instance, to require death penalties even though they offend the sensibilities of the Justices."³⁹ Seeking to demonstrate the detrimental practical effects of "incorporation," "incorporation" opponent Charles Rice posed (and answered) the following rhetorical question:

When a twelve-year-old girl was shot and killed not long ago in . . . Chicago's Cabrini-Green housing project, why could the police not respond to the demands of residents and columnists that they search the project, seize all the illegal weapons, and arrest their possessors?
 The answer . . . is that the states and communities are prevented from doing anything because of the incorporation doctrine.⁴⁰

Contrary to Berger's implication, however, the "doctrine of incorporation" has not forced states to abandon capital punishment.⁴¹ Moreo-

difficult to imagine a more consequential subject than [incorporation], short of pulling back the Bill of Rights even from the federal government itself.").

36. Crosskey, *supra* note 33, at 1.

37. See Curtis, *supra* note 3, at 623 ("Without application of free speech, press, petition, and assembly guarantees to the states, the Southern states [in the 1960s and 1970s] could have done more to suppress the Civil Rights Movement's dissent against their racial caste system.").

38. RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 195 (1985); accord Edwin Meese, U.S. Att'y Gen., Address to the American Bar Association (July 9, 1985), in MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE*, at viii (1986) ("No-where else . . . has the principle of federalism been dealt so politically violent and constitutionally suspect a blow as by the theory of incorporation.").

39. BERGER, *supra* note 6, at 147.

40. Charles Rice, *The Bill of Rights and the Doctrine of Incorporation*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 11, 11-12 (Eugene W. Hickock, Jr. ed., 1991).

41. See *Gregg v. Georgia*, 428 U.S. 153, 177-78 (1976) (holding that "capital punishment is not invalid *per se*" because, inter alia, "the Fourteenth Amendment . . . contemplates the existence of the capital sanction in providing that no State shall deprive any person of 'life, liberty, or property' without due process of law"). Under the "doctrine of incorporation," states now *are* barred from executing children, *Roper v. Simmons*, 125 S. Ct. 1183 (2005), or mentally retarded adults, *Atkins v. Virginia*, 536 U.S. 304 (2002). However, state executions of such persons had become extraordinarily rare by the time the Supreme Court held such executions constitutionally impermissible. See *Roper*, 125 S. Ct. at 1192-93 (discussing rarity); *Atkins*, 536 U.S. at 314-16 (same).

ver, contrary to Rice's claim, "incorporation" is not the only reason Chicago police could not forcibly enter private apartments without probable cause. Rather, the Illinois Constitution of 1970 contains a "search and seizure" provision textually similar to the one in the United States Constitution.⁴² In recent years, Illinois courts have construed this provision to provide *more* protection against such intrusions than has the United States Supreme Court.⁴³ Thus, contrary to Rice, federal "incorporation" of the Fourth Amendment as a limit on state power is not germane to the substantive legal questions posed by a comprehensive sweep of every apartment in a public housing project in Illinois.⁴⁴

By lamenting the police's inability to "respond to the demands of residents and columnists" by conducting such sweeps,⁴⁵ Rice actually

42. The Illinois provision states that:

The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

ILL. CONST. art. I, § 6.

43. *People v. Tisler*, 469 N.E.2d 147, 155–56 (Ill. 1984) ("The intent of the [1970 Illinois] constitutional convention was to extend the protection afforded by the fourth amendment of the Federal Constitution and of our 1870 State Constitution to cover eavesdropping and to protect against invasions of privacy." (citing 7 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 2683 (1970))). Members of the Illinois Supreme Court have expressed pride in the court's history of preceding the United States Supreme Court in recognizing certain rights as fundamental. One member of the court stated that:

During the era of the Warren court, this country saw a wave of judicial activism in the Federal judiciary largely because State courts, particularly in the Deep South, were unwilling to provide the most basic protections to citizens of their State. During the era of the Burger court, we have seen the role of the State and Federal judiciary reversed. Today, the United States Supreme Court has been cutting back on the individual liberties provided by the Warren court, while State supreme courts have attempted to protect civil liberties in State constitutions. This tradition of judicial independence has a long history in Illinois. This is a court that . . . adopted the exclusionary rule decades before the United States Supreme Court held this rule applicable to the States.

Id. at 164 (Clark, J., specially concurring) (citations omitted).

44. Indeed, when this issue was finally decided in federal district court in Chicago, the court noted that the proposed searches were illegal under both the Federal and Illinois Constitutions. *Pratt v. Chicago Housing Auth.*, 848 F. Supp. 792, 795 n.1 (N.D. Ill. 1994) (finding that the Illinois Constitution's search and seizure "provision has been held to be coextensive with the scope of the constitutional proscription of unreasonable searches and seizures contained in the Fourth Amendment to the United States Constitution . . . [Therefore,] the CHA's Search Policy also violates Article I, § 6 of the Illinois Constitution" (citing *People v. Reincke*, 405 N.E.2d 430 (Ill. App. Ct. 1980); *People v. Estrada*, 386 N.E.2d 128 (Ill. App. Ct. 1979))).

45. Rice, *supra* note 40.

finds fault with the *substance* of the “search and seizure” provisions in the United States and Illinois Constitutions. Implicitly, he also criticizes the very idea of limited constitutional government, which, by setting limits on government power, necessarily disables government from effectively responding to some perceived needs of its citizens.⁴⁶ Neither of these criticisms, however, would be addressed by repeal of the “incorporation” doctrine.⁴⁷ With or without “incorporation,” Chicago police would still need probable cause to believe that illegal weapons were present in a particular apartment in order to search that apartment.

This example is not atypical. Critics such as Rice may not agree with the Supreme Court’s decisions in certain constitutional cases. But if the same decisions would have been reached under state constitutional law, then “incorporation” is the wrong target.

III. STATE BILLS OF RIGHTS BEFORE AND AFTER THE CIVIL WAR

Most of the rights protected by the American State (and Federal) Constitutions have their origins in English common law.⁴⁸ Despite the lack of written guarantees, these rights were generally protected in the colonies even before independence from England was declared.⁴⁹ In 1776, after declaring independence, several states “adopted written constitutions to provide for permanent state governments and . . . secure the inherent rights of the people as the basis of

46. See, e.g., Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2103 n.34 (2002) (“Constitutions are supposed to incapacitate government in certain ways. For example, the First Amendment is intended to render Congress incapable of curtailing free speech, and the separation of powers is supposed to make the president less capable of engaging in foreign adventurism.”).

47. Perhaps Professor Rice means to imply that state constitutions would be more easily amended than the United States Constitution. In Illinois, a state constitutional amendment requires three-fifths votes in each legislative chamber, and then a three-fifths vote of the electorate. ILL. CONST. art. XIV, § 2. While this is somewhat less than what is required for a federal constitutional amendment, it is nonetheless significant that neither Illinois nor any other state has ever repealed a “search and seizure” provision from its bill of rights. In fact, the Illinois Constitution of 1970, ratified subsequent to all the pertinent Supreme Court decisions on “probable cause,” uses language *more* direct and specific than that of the Fourth Amendment to protect individuals from unreasonable searches and seizures by state officers. See *supra* note 42.

48. See generally LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* (1968); Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928).

49. LEVY, *supra* note 48, at 333–404.

government.”⁵⁰ That year, Virginia was the first state to ratify a “Declaration of Rights as a preface to [its] constitution.”⁵¹

The Virginia Declaration of Rights was both visionary⁵² and influential.⁵³ Nonetheless, it exhibited “a certain carelessness . . . , possibly the result of haste.”⁵⁴ For instance, the Declaration “inexplicably omitted the freedoms of speech, assembly, and petition; the right to the writ of habeas corpus; grand jury proceedings; the right to counsel; and freedom from double jeopardy as well as from attainders and ex post facto laws,”⁵⁵ despite the fact that all these rights were protected under English law and Virginia common law. Indeed, “[t]he rights omitted were as important and nearly as numerous as those included, making the great Virginia Declaration of Rights appear to be an erratic document compiled in slipshod fashion.”⁵⁶

This “slipshod” approach to drafting was imitated by the eleven other states that ratified state constitutions before the United States Bill of Rights was ratified in 1791.⁵⁷ Four of these states did not include separate bills of rights in their constitutions,⁵⁸ though the New York and New Jersey Constitutions contained “omnibus clauses” that

50. *Id.* at 405.

51. *Id.*

52. *See id.* at 407 (“The Declaration, taken as a whole, reflected stylistic elegance, a philosophic cast of mind, and a knowledge of English constitutional law and American experience. Mason’s draft of the Declaration, done entirely alone, was far more comprehensive than the British precedents, such as the Petition of Right and the [English] Bill of Rights.”).

53. As George Mason, the author of the Virginia Declaration of Rights, noted two years later: “This was the first thing of the kind upon the continent, and has been closely imitated by all the States.” Letter from George Mason to Colonel George Mercer (Oct. 2, 1778), in 1 KATE MASON ROWLAND, *THE LIFE OF GEORGE MASON 1725–1792*, at 237 (1892). The Declaration continued to be imitated by states drafting constitutions until 1791, when it influenced the Federal Bill of Rights, which was principally written by Virginian James Madison. *See* LEVY, *supra* note 48, at 409–10 (noting that the Virginia Declaration of Rights was imitated by Massachusetts, New Hampshire, Vermont, Pennsylvania, Delaware, Maryland, and North Carolina, and that its publication in the Philadelphia newspapers during the Second Continental Congress insured its availability to all the delegates in attendance).

54. LEVY, *supra* note 48, at 407.

55. *Id.* at 408.

56. *Id.*

57. Connecticut and Rhode Island did not ratify state constitutions until 1818 and 1842, respectively. *THE STATE CONSTITUTIONS* 237 n.*, 1203 n.* (Charles Kettleborough ed., 1918). These two states “stood pat with their old colonial charters” until well after the United States Constitution was ratified. LEVY, *supra* note 48, at 409. Vermont, however, which did not join the Union until 1791, did ratify a state constitution, which included a Virginia-inspired bill of rights, in 1776. *Id.*

58. These four states were New Jersey, New York, Georgia, and South Carolina. LEVY, *supra* note 48, at 410.

kept the common law of England in force.⁵⁹ Overall, there was no consistent relationship between enumeration of a particular right in state constitutions and protection of those rights under state law.⁶⁰ Legal historian Leonard Levy has described the situation:

The history of the writing of the first American bills of rights and constitutions simply does not bear out the presupposition that the process was a diligent or systematic one. Those documents, which we uncritically exalt, were imitative, deficient, and irrationally selective. In the glorious act of framing a social compact expressive of the supreme law, Americans tended simply to draw up a random catalogue of rights that seemed to satisfy their urge for a statement of first principles—or for some of them. That task was executed in a disordered fashion that verged on ineptness. The inclusion or exclusion of any particular right neither proved nor disproved its existence in a state's colonial history.⁶¹

By 1791, when the United States Bill of Rights was framed and ratified, only two rights were textually secured in the constitutions of all twelve⁶² state constitutions: trial by jury in criminal cases and free exercise of religion.⁶³ As for the other rights appearing in the text of the United States Bill of Rights:

Two states passed over a free press guarantee. Four neglected to ban excessive fines, excessive bail, compulsory self-incrimination, and general search warrants. Five ignored protections for the rights of assembly, petition, counsel, and trial by jury in civil cases. Seven omitted a prohibition on ex post facto laws, and eight skipped over the vital writ of habeas corpus. Nine failed to provide for grand jury proceedings and to condemn bills of attainder. Ten said nothing about freedom of speech, while eleven—all but New Hampshire—were silent on the matter of double jeopardy.⁶⁴

Between the Revolutionary War and the Civil War, the states did vary somewhat in the nature and degree of their protection of individual rights.⁶⁵ Similarly, there was variation between state and federal protections of such rights.⁶⁶ However, the differences, in practice,

59. *Id.* at 410. These "omnibus clauses" have also been termed "terse bill[s] of rights because so many constitutional rights were" protected in the common law. *Id.* New York ratified a "full" bill of rights as part of its constitution of 1821, and New Jersey did so as part of its constitution of 1844.

60. *Id.*

61. *Id.* at 411.

62. Rhode Island and Connecticut had not yet ratified state constitutions in 1791, though the newly admitted Vermont did have a constitution and bill of rights. *See supra* note 57.

63. LEVY, *supra* note 48, at 412.

64. *Id.*

65. For example, five states "constitutionally permitted or [approved] an establishment of religion in the form of tax supports for churches," while all the other states prohibited such establishments. *Id.*

66. *See, e.g.,* *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833). In *Barron*, municipal "improvements" to Baltimore's Inner Harbor substantially submerged Barron's waterfront property. Barron sued the city for compensation, citing the Takings Clause of the Fifth Amendment. In denying Barron's claim, the United States Supreme Court held that the protections of the Federal Bill of

were never as great as comparison of the texts of the various constitutions would suggest.

Further, state constitutions are amended or superseded far more frequently than the United States Constitution.⁶⁷ In the twenty-first century, only New Hampshire (1784) and Vermont (1793) continue to operate under eighteenth century constitutions, and both of those constitutions have been amended far more than the United States Constitution. Eight other states are operating under pre-Civil War constitutions,⁶⁸ and one state still operates under a constitution drafted and ratified *during* the Civil War.⁶⁹ Thirty-nine states operate under constitutions drafted and ratified *after* the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments. Those thirty-nine state constitutions, like the eleven pre-Fourteenth Amendment constitutions, have generally been amended more easily and more frequently than the United States Constitution.

Thus, the variation between the states regarding protection of individual rights: (1) should not be overstated; and (2) has generally diminished over time. As demonstrated in Part III, the Supreme Court has elected to “incorporate” only those rights which the states overwhelmingly agree should be protected, and only at such times when a universal trend toward recognition can be discerned.

IV. STATE ANALOGUES OF THE RIGHTS THAT HAVE BEEN INCORPORATED

In this Part, the facts and holdings of the state court cases that gave rise to the Supreme Court’s criminal procedure “incorporation” decisions are reviewed. To evaluate the practical impact of “incorporation” on criminal procedure in the states that were subject to “incorporation” decisions, specific points of disagreement between the state courts and the United States Supreme Court are identified. Contrary

Rights did not limit state power. In dicta, however, the Court suggested that, had it been the federal government rather than the state (acting through the city) that had destroyed Barron’s property, then Barron’s claim would have prevailed under the Fifth Amendment. *Id.* at 250.

67. See Robert K. Fitzpatrick, Note, *Neither Icarus Nor Ostrich: State Constitutions As An Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1852–54 (2004) (discussing frequency and relative ease of amending state constitutions).

68. These states are Indiana (1851), Iowa (1857), Kansas (1859), Maine (1819), Minnesota (1857), Ohio (1851), Oregon (1859), and Wisconsin (1848). Of these eight states, all but Maine were federal territories prior to achieving statehood. Thus, citizens of these states were accustomed to the protections of the Federal Bill of Rights, and, not surprisingly, largely echoed them when drafting and ratifying their own constitutions.

69. Nevada was organized as a United States Territory on March 2, 1861. Its constitution was drafted by a convention held at Carson City during July, 1864, and became effective when Nevada joined the Union as the thirty-sixth State on October 31, 1864.

to common expectations, these points of disagreement are often narrow and technical, and occasionally inadvertent. In none of these decisions did any state court declare that its state constitution did not protect a right enumerated in the Fourth, Fifth, or Sixth Amendment.

Immediately following the analysis of each “incorporation” case, the law of every state whose constitution lacks an express analogue to the “incorporated” United States constitutional provisions is surveyed. These surveys demonstrate that the failure of a state constitution to include particular constitutional language virtually never resulted in any substantive difference in the level of protection afforded to criminal suspects or defendants under state criminal processes.

In several “incorporation” cases involving African-American criminal defendants, southern state courts had seemingly departed from, or wholly ignored, the settled law of their own states.⁷⁰ Perhaps paradoxically, the United States Supreme Court’s decisions in such cases also did not alter the substantive contours of state criminal procedure law. Instead, by requiring states to extend the same criminal procedure protections to members of racial minorities as to the white majority, these “incorporation” cases were functionally equivalent to “equal protection” cases. In a companion article in which these cases are closely analyzed,⁷¹ the present Author hopes to explore the alignment between the “doctrine of incorporation” and the antidiscrimination principle that has been said to be the “core” Fourteenth Amendment value.⁷² Accordingly, discussion of these particular “incorporation” cases is beyond the scope of the present Article.

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70. See *Washington v. Texas*, 388 U.S. 14, 19 (1967) (incorporating Sixth Amendment right to compulsory process); *Klopfer v. North Carolina*, 386 U.S. 213, 222–23 (1967) (incorporating Sixth Amendment right to speedy trial); *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (incorporating Sixth Amendment right to confront hostile witnesses); *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (incorporating Sixth Amendment right to counsel in capital cases). The defendant in *Klopfer* was not African-American, but instead was a white college professor who had organized racially integrated lunch counter sit-ins in North Carolina in the early 1960s.
71. Kenneth D. Katkin, *Incorporation As Equal Protection*, —L. Rev. — (forthcoming 2006).
72. See generally Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48–49 (2000) (“[T]he linkage between the birth of modern criminal procedure and southern black defendants is no fortuity. For the Court to assume the function of superintending the state criminal process required a departure from a century and a half of tradition and legal precedent, both grounded in federalism concerns [T]he Court was willing to take this leap only when confronted with cases in which defendants were brutally tortured into confessing or the appointment of defense counsel in a capital case was a complete sham.”).

A. Searches and Seizures/Warrant Requirement

The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.⁷³ In the early twentieth century, these rights were also guaranteed by the constitution of every state, though the wording of the guarantee diverged in some states from that of the Fourth Amendment.⁷⁴ In general, the scope of state protection purported to be at least as broad as in the United States Constitution, although the Oklahoma Constitution expressly excepted corporations from the protection against searches and seizures guaranteed to individuals,⁷⁵ and Virginia courts had construed their state constitution to permit warrantless searches.⁷⁶

73. U.S. CONST. amend. IV.

74. See, e.g., ARIZ. CONST. art. II, § 8 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”); MD. CONST. dec. of rts. art. 26 (“That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.”); N.C. CONST. of 1876, art. I, § 15 (codified at N.C. CONST. art. I, § 20) (“General warrants, whereby any officer or messenger may be commanded to search suspected places, without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.”); accord VT. CONST. ch. I, art. 11; see also VA. CONST. of 1902, art. I, § 10 (codified at VA. CONST. art. I, § 10) (discussed *infra* note 76); WASH. CONST. art. I, § 7 (containing identical language to that of the Arizona Constitution).

75. Although article II, section 30 of the Oklahoma Constitution mirrors the language of the Fourth Amendment, article II, section 28 of that same constitution provides: “The records, books, and files of all corporations shall be, at all times, liable and subject to the full visitatorial and inquisitorial powers of the State, notwithstanding the immunities and privileges in this Bill of Rights secured to the persons, inhabitants, and citizens thereof.” OKLA. CONST. art. II, § 28.

76. The Virginia Constitution of 1902 provided: “That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.” VA. CONST. of 1902, art. I, § 10 (codified at VA. CONST. art. I, § 10). Virginia courts construed this provision only as a check against “general warrants,” but *not* as a check against warrantless searches. *McClannan v. Chaplain*, 116 S.E. 495, 498–99 (Va. 1923) (holding that article I, section 10 of the Virginia Constitution is not directly applicable to a search without any warrant). Even in so doing, however, Virginia courts purported to follow then-prevailing federal court interpretations of the Fourth Amendment. See *id.* at 499 (holding that a warrantless search is per se “reasonable” if contraband is discovered (citing *Elrod v. Moss*, 278 F. 123 (4th Cir. 1921))).

Though the Maryland, Vermont, and North Carolina guarantees against illegal searches and seizures were worded similarly to the Virginia provision, none of these states adopted interpretations as restrictive as Virginia’s. See, e.g., *Bass v. State*, 35 A.2d 155, 157, 159–60 (Md. 1943) (construing Maryland constitutional provision *in pari materia* with Fourth Amendment, and holding that warrantless

In 1949, when the Supreme Court "incorporated" the Fourth Amendment's search and seizure provisions against the states in *Wolf v. Colorado*,⁷⁷ the Colorado Constitution of 1876 contained a provision that was substantially similar to the Fourth Amendment. Then and today, Colorado's provision guaranteed

[t]hat the people shall be secure in their persons, papers, homes, and effects from unreasonable searches and seizures; and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation, reduced to writing.⁷⁸

At issue in *Wolf* was a warrantless seizure of medical records kept by a surgeon who was suspected of having performed criminal abortions.⁷⁹ Applying its state constitutional provision, the Colorado Supreme Court in *Wolf* assumed arguendo that the warrantless seizure of the medical records had been unreasonable and had violated the state constitution.⁸⁰ Nonetheless, the state court sustained the prosecution's introduction at trial of the unlawfully seized medical records, and, accordingly, affirmed the surgeon's criminal conviction.⁸¹

The Colorado Supreme Court's disposition in *Wolf* was not anomalous. While the fifty states have long been in virtually unanimous agreement that people should be protected against warrantless searches and seizures not based on probable cause, there was substantial disagreement throughout the first half of the twentieth century about what a court should do when it found that an unconstitutional search or seizure had occurred. In particular, the exclusionary rule, which requires exclusion from judicial proceedings of evidence obtained in violation of a criminal defendant's Fourth Amendment right against unreasonable searches and seizures, was highly controversial.⁸² In 1914, a unanimous Supreme Court in *Weeks v. United*

search is reasonable only when an officer witnesses a crime and makes a search incident to a lawful arrest and is lawfully present at the time); see also *Blum v. State*, 51 A. 26, 29 (Md. 1902) (holding the Fourth and Fifth Amendments *in pari material* with the Maryland constitutional provision and that the evidence gained as a result of an unreasonable search and seizure should not have been admitted); *State v. Slamon*, 50 A. 1097, 1098-99 (Vt. 1901) (holding that Vermont constitutional provision protected a person from the use of a letter found on the person when the warrant was for the recovery of stolen property).

77. 338 U.S. 25 (1949).

78. COLO. CONST. art. II, § 7.

79. *Wolf v. State*, 187 P.2d 926, 927 (Colo. 1947), *aff'd*, 338 U.S. 25 (1949).

80. *Id.*

81. *Id.* at 927-28.

82. See *Wolf*, 338 U.S. at 29 ("The contrariety of views of the States is particularly impressive . . ."). The leading opponent of the exclusionary rule was Justice Cardozo during his tenure on the *New York Court of Appeals*. See *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) ("There has been no blinking the consequences. The criminal is to go free because the constable has blundered."), *cert. denied*, 270 U.S. 657 (1926). Arguing vigorously for the exclusionary rule was the

States adopted the exclusionary rule as a "bright line" remedy for violation of the Fourth Amendment right against unreasonable searches and seizures.⁸³ Though the holding in *Weeks* applied only to federal courts, a few states had already adopted similar rules.⁸⁴ Following *Weeks*, seventeen more states joined the federal courts in adopting the exclusionary rule, while a narrow majority of states continued to reject it.⁸⁵

Michigan Supreme Court. See *People v. Marxhausen*, 171 N.W. 557, 559 (Mich. 1919) ("That 'the end justifies the means' is a doctrine which has not found lodgment in the archives of this court.").

83. *Weeks v. United States*, 232 U.S. 383, 393 (1914) ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures, is of no value, and . . . might as well be stricken from the Constitution."). The exclusionary rule was anticipated as early as *Boyd v. United States*, 116 U.S. 616 (1886), which held that compulsory production of business records violated the Fourth and Fifth Amendments, and such records were therefore inadmissible.
84. See, e.g., *Hammock v. State*, 58 S.E. 66, 67 (Ga. Ct. App. 1907), *overruled by Calhoun v. State*, 87 S.E. 893 (Ga. 1916); *State v. Height*, 91 N.W. 935, 940 (Iowa 1902); *Blum v. State*, 51 A. 26, 29-30 (Md. 1902); *State v. Slamon*, 50 A. 1097, 1099 (Vt. 1901). In *Wolf*, the Supreme Court stated that only Iowa had adopted the exclusionary rule prior to *Weeks*. *Wolf*, 338 U.S. at 29, 34 & tbl.B (citing *State v. Sheridan*, 96 N.W. 730 (Iowa 1903)). The Court in *Wolf* cited cases from Maryland and Vermont as part of a list of twenty-six states that had considered and rejected adopting the exclusionary rule before 1914. *Id.* at 29, 33-34 & tbl.A (citing *Lawrence v. State*, 63 A. 96, 103 (Md. 1906); *State v. Mathers*, 23 A. 590 (Vt. 1892)). In fact, Vermont courts appear to have pursued inconsistent courses with respect to the exclusionary rule. See *State v. Badger*, 450 A.2d 336, 348-50 (Vt. 1982) (reviewing long inconsistent history of exclusionary rule in Vermont, and reaffirming that Vermont Constitution requires exclusionary rule).
85. In 1923, Chief Justice John D. Carroll of the Kentucky Court of Appeals published an influential article urging more states to adopt the exclusionary rule. John D. Carroll, *The Search and Seizure Provisions of the State and Federal Constitutions*, 10 VA. L. REV. 124 (1923). At that time, the exclusionary rule had been adopted by the federal courts and the courts of eleven states including Indiana, Iowa, Kentucky, Maryland, Michigan, Mississippi, South Carolina, Vermont, Washington, West Virginia, and Wyoming. Note, *Evidence-Admissibility of Evidence Obtained by Illegal Search and Seizure*, 10 VA. L. REV. 154, 155 (1923) (citing cases). Pennsylvania, Rhode Island, and Delaware had not yet had occasion to consider adopting the exclusionary rule, while every other state had rejected it. *Id.* By the end of the 1920s, the exclusionary rule had been adopted by courts in ten additional states, beyond the eleven cited in the 1923 *Virginia Law Review* note. See *Atz v. Andrews*, 94 So. 329, 331-32 (Fla. 1922); *State v. Arregui*, 254 P. 788, 796 (Idaho 1927); *People v. Castree*, 143 N.E. 112, 117 (Ill. 1924); *State v. Owens*, 259 S.W. 100, 103 (Mo. 1924); *State ex rel. King v. Dist. Court*, 224 P. 862, 865 (Mont. 1924); *Gore v. State*, 218 P. 545, 550-51 (Okla. Crim. App. 1923); *State v. Gooder*, 234 N.W. 610, 613 (S.D. 1930); *Hughes v. State*, 238 S.W. 588, 594 (Tenn. 1922); *State v. Gibbons*, 203 P. 390, 396 (Wash. 1922); *Hoyer v. State*, 193 N.W. 89, 92 (Wis. 1923). One of these decisions, *Gooder*, was overturned by the state legislature. 1939 S.D. LAWS § 34.1102 (amending 1919 S.D. LAWS § 4606) (all evidence admissible under a valid search warrant is admissible notwithstanding defects in the issuance of the warrant).

Between 1930 and 1949, the states continued to refine, and sometimes reverse, their positions on the exclusionary rule. By 1949, when *Wolf* was decided, seventeen states had adopted and maintained the exclusionary rule,⁸⁶ twenty-seven states had consistently rejected it,⁸⁷ three states had adopted and later abandoned it,⁸⁸ and one state had yet to pass on it.⁸⁹

In *Wolf*, the United States Supreme Court purported to "incorporate" the search and seizure provisions of the Fourth Amendment, but expressly refrained from incorporating the exclusionary rule remedy.⁹⁰ Both the *Wolf* Court's analysis and its holding were identical to that of the Colorado Supreme Court, which it affirmed.⁹¹ Moreover, the United States Supreme Court's holding in *Wolf* was not inconsistent with the substantive search and seizure law of any state, as it then stood.

Following *Wolf*, four more states adopted the exclusionary rule,⁹² and Hawaii and Alaska, which achieved statehood in 1959, both pre-

As of 1930, twenty-five of the forty-eight states had not adopted the exclusionary rule.

86. These states were Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Michigan, Mississippi, Missouri, Montana, Oklahoma, South Dakota, Tennessee, Washington, West Virginia, Wisconsin, and Wyoming. *Wolf*, 338 U.S. at 29 & 38 tbl.I(b).
87. These states were Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Utah, and Virginia. *Id.* at 29 & 38 tbl.I(a).
88. These states were Maryland, South Carolina, and Vermont. See *Meisinger v. State*, 141 A. 536, 537-38 *with dissenting opinion* at 142 A. 190 (Md. 1928) (declining to adopt exclusionary rule), *overruled by* Bouse Act, ch. 194 (1929) (codified at MD. CODE ANN., art. 35, § 5 (1947 Supp.) (repealed 1973)) (in trial of misdemeanors, evidence obtained by illegal search and seizure is inadmissible). The history of the exclusionary rule in Maryland is discussed in *Chu v. Anne Arundel County*, 537 A.2d 250, 252 (Md. 1988); see also *Town of Blacksburg v. Beam*, 88 S.E. 441, 441 (S.C. 1916) (granting a motion to return illegally seized property); *but cf.* *State v. Green*, 114 S.E. 317, 319 (S.C. 1922) (rejecting exclusionary rule); *State v. Slamon*, 50 A. 1097, 1099 (Vt. 1901) (adopting exclusionary rule); *State v. Stacy*, 160 A. 257, 266 (Vt. 1932) (rejecting exclusionary rule).
89. This state was Rhode Island. *Wolf*, 338 U.S. at 34 tbl.C.
90. *Id.* at 33.
91. *Wolf v. State*, 187 P.2d 926 (Colo. 1947) (interpreting search and seizure provisions of article II, section 7 of the Colorado Constitution), *aff'd*, 338 U.S. 25 (1949) ("incorporating" substantive search and seizure requirements of Fourth Amendment, but not exclusionary rule remedy, against states).
92. Two state supreme courts adopted the exclusionary rule as a matter of state constitutional common law. *People v. Cahan*, 282 P.2d 905, 911-12 (Cal. 1955), *overruling* *People v. Mayen*, 205 P. 435 (Cal. 1922); *Rickards v. State*, 77 A.2d 199, 205 (Del. 1950), *overruling* *State v. Chuchola*, 120 A. 212 (Del. 1922). Two state legislatures enacted the exclusionary rule. See *State v. Mills*, 98 S.E.2d 329, 335 (N.C. 1957) (sustaining the newly enacted section 15-27 of the North Carolina General Statutes, which requires the exclusion of illegally obtained evidence),

served it.⁹³ By 1960, the United States Supreme Court counted twenty-six states favoring the exclusionary rule, versus twenty-four opposed.⁹⁴

overruling State v. Simmons, 110 S.E. 591 (N.C. 1922); R.I. GEN. LAWS § 9-19-25 (1956) (requiring the exclusion of illegally obtained evidence).

93. See *Elkins v. United States*, 364 U.S. 206, 224–25 tbl.I (1960) (“Alaska and Hawaii both hold illegally obtained evidence to be excludable, although it does not appear that either has passed anew on this question since attaining statehood.”). As United States Territories, both states had been bound by the federal Bill of Rights. After attaining statehood, both states retained the exclusionary rule under their own state constitutions. See *State v. Bonnell*, 856 P.2d 1265, 1273 (Haw. 1993) (“A search is not made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success [E]vidence obtained as a result [of an unconstitutional search] . . . must be suppressed as ‘fruits of the poisonous tree.’” (citing *State v. Phillips* 696 P.2d 346, 351 (1985)) (internal citations, punctuation marks omitted)); *Anchorage Police Dep’t Employees Ass’n v. Municipality of Anchorage*, 24 P.3d 547, 550 (Alaska 2001) (“Alaska’s search and seizure clause is stronger than the federal protection because [Alaska Const.] article I, section 14 is textually broader than the Fourth Amendment, and the clause draws added strength from Alaska’s express guarantee of privacy.”) (footnote omitted); see also *Ellison v. State*, 383 P.2d 716, 718 & n.6 (Alaska 1963) (“After statehood Alaska would have been free to retain the federal exclusionary rule or to [reject it] except for the fact that in 1961 the Supreme Court saw fit in *Mapp v. Ohio* to abandon the rule laid down in the *Wolf* case and to announce [the federal exclusionary] rule [Had Alaska remained free to choose,] [t]he reiteration in our state constitution of the principles expressed in the fourth amendment would undoubtedly have weighed heavily in favor of Alaska abiding by the federal exclusionary rule.” (discussing ALASKA CONST. art. I, § 14)).
94. See *Elkins*, 364 U.S. at 224–25 tbl.I. The court in *Elkins* may have exaggerated this total somewhat. It included Alabama, Maryland, Michigan, and South Dakota in its count, even though each of these states had only adopted the exclusionary rule for limited purposes. While an Alabama statute, ALA. CODE 29, § 210 (Supp. 1955), required the exclusion of illegally obtained evidence in the trial of certain alcohol control cases, the Alabama Supreme Court continued to reject the exclusionary rule in other contexts. See, e.g., *Oldham v. State*, 67 So. 2d 55, 55 (Ala. 1953). Similarly, while a Maryland statute, the Bouse Act, MD. CODE ANN. 35, § 5 (1951), required the exclusion of illegally obtained evidence in the trial of most misdemeanors, the Maryland Supreme Court continued to reject the exclusionary rule in the trials of narcotics cases. See, e.g., *Stevens v. State*, 95 A.2d 877, 878 (Md. 1953). While the Michigan Supreme Court had at one time adopted the exclusionary rule in full, *People v. Marxhausen*, 171 N.W. 557, 559 (Mich. 1919); *People v. Effelberg*, 190 N.W. 727, 729 (Mich. 1922), the voters of Michigan ratified a state constitutional amendment in 1952 stating that the state constitution “shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.” MICH. CONST. of 1908, art. II, § 10 (amended 1952); see also *People v. Gonzales*, 97 N.W.2d 16 (Mich. 1959) (discussing 1952 Amendment). After the exclusionary rule was “incorporated” against the states in *Mapp v. Ohio*, 367 U.S. 643 (1961), Michigan’s 1952 amendment was subsequently held to conflict with the United States Constitution. See *Lucas v. People*, 420 F.2d 259, 262–63 (6th Cir. 1970); *People v. Pennington*, 178 N.W.2d 460, 475–76 (Mich. 1970). Similarly, while the South Dakota Supreme Court had at one time adopted the exclusionary rule in full, *State v. Gooder*, 234 N.W. 610, 613 (S.D. 1930), the state legislature overrode

A year after compiling this count, and twelve years after deciding *Wolf*, the Supreme Court "incorporated" the exclusionary rule in *Mapp v. Ohio*.⁹⁵ The *Mapp* case concerned a state obscenity conviction that, in the words of the Ohio Supreme Court, "was based primarily upon the introduction in evidence of books and pictures unlawfully seized during an unlawful search of defendant's home."⁹⁶ Specifically, the Ohio Supreme Court held that the search and seizure of these items violated the Ohio Constitution of 1851, which, like the Fourth Amendment, guarantees that:

The right of the people to be secure in their persons, houses, papers and possessions against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.⁹⁷

Nonetheless, the Ohio Supreme Court affirmed the conviction, noting that Ohio had not adopted the exclusionary rule under its own constitution, and that the Supreme Court had not "incorporated" the rule against the states.⁹⁸

this decision. S.D. CODE § 34.1102 (1939); see also *State v. Lane*, 82 N.W.2d 286, 289 (S.D. 1957) (holding that the state legislature had the authority to override the judicially adopted exclusionary rule).

In a classic case of the glass being half-empty to some while half-full to others, *Wolf* in 1949 and *Elkins* in 1960 drew opposite conclusions about Maryland and South Dakota from identical information. For a survey of the conflicting state rules in the mid-1950s governing the admissibility, at the trial of a criminal case, of evidence obtained by unlawful search and seizure, see E.H. Schopler, Annotation, *Modern Status of Rule Governing Admissibility of Evidence Obtained by Unlawful Search and Seizure*, 50 A.L.R.2d 531 (1956).

95. 367 U.S. 643, 655 (1961).

96. *State v. Mapp*, 166 N.E.2d 387, 390 (Ohio 1960), *rev'd*, 367 U.S. 643 (1961).

97. OHIO CONST. art. I, § 14 (discussed in *Mapp*, 166 N.E.2d at 389). This "search and seizure" provision of the Ohio Constitution remains unamended to this day.

98. See *Mapp*, 166 N.E.2d at 389 ("[T]his court has held that evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution . . . and the Supreme Court of the United States has held that the Constitution of the United States does not usually prevent a state court from so holding." (citing *Wolf v. Colorado*, 338 U.S. 25 (1949); *Stefanelli v. Minard*, 342 U.S. 117 (1951); *State v. Lindway*, 2 N.E.2d 490 (Ohio 1936))). In addition, a majority of the Ohio Supreme Court in *Mapp* also opined that the Ohio obscenity statute at issue in the case violated federal First Amendment principles of freedom of speech and of the press, which had already been "incorporated" against the states through the Fourteenth Amendment. *Mapp*, 166 N.E.2d at 390-91. Nonetheless, while constituting a simple majority, those Ohio Supreme Court Justices who believed that the Ohio statute was unconstitutional were barred from so holding by a former supermajority requirement in the Ohio Constitution which then provided: "No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of the judgment of the court of appeals declaring a law unconstitutional and void." OHIO CONST. art. IV, § 2 (repealed 1968) (emphasis added); see also *City of Euclid v. Heaton*, 238 N.E.2d 790, 795-97 (Ohio 1968) (discussing 1968 repeal of former article IV, section 2 of the Ohio Constitution). On certiorari, the United States

On certiorari in *Mapp*, the United States Supreme Court “incorporated” the exclusionary rule and reversed the defendant’s underlying Ohio obscenity conviction.⁹⁹ In doing so, the *Mapp* Court cited the general trend among states since *Wolf* towards adopting the exclusionary rule in whole or in part.¹⁰⁰ In addition, the Court concluded, after reviewing state cases, that “other remedies [for vindicating Fourth Amendment rights] have been worthless and futile”¹⁰¹

The *Wolf* case, which “incorporated” the Fourth Amendment but not the exclusionary rule, was so well received that no state rebelled against it, several were sufficiently influenced by it to voluntarily adapt their law to conform with federal interpretations (including the exclusionary rule),¹⁰² and the Supreme Court was encouraged to extend its holding in a subsequent line of cases.¹⁰³ The *Mapp* decision, on the other hand, which required twenty-four to twenty-eight states to adopt the exclusionary rule against their wishes,¹⁰⁴ was one of the most poorly received of the “incorporation” cases. President Nixon ac-

Supreme Court addressed only the “search and seizure” issue, and did not take up the “free speech” issue. *Mapp*, 367 U.S. 643.

99. *Mapp*, 367 U.S. at 651 (holding that “the exclusionary rule is an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the States by the Due Process Clause”); The *Mapp* Court also stated:

Today we . . . close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.

Id. at 654–55.

100. *Id.* at 651 (“While in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule.” (citing *Elkins v. United States*, 364 U.S. 206, 224–32 (1960))).
101. *Id.* at 652.
102. See *supra* notes 92–94.
103. *Elkins*, 364 U.S. at 208 (discarding the ‘silver platter’ doctrine which allowed federal judicial use of evidence seized in violation of the Constitution by state agents); *Jones v. United States*, 362 U.S. 257, 266–67 (1960) (extending standing to invoke exclusionary rule to anyone legitimately on the premises unlawfully searched); *Rea v. United States*, 350 U.S. 214, 217–18 (1956) (disallowing state use of evidence unconstitutionally seized by federal agents); *Irvine v. California*, 347 U.S. 128, 137 (1954).
104. See *supra* note 94 and accompanying text.

tively campaigned against it,¹⁰⁵ and law enforcement officers and many lawyers and legal scholars were similarly critical.¹⁰⁶

In response to this wave of criticism, the Supreme Court in the years following *Mapp* has carved out a large number of “good faith exceptions” to the exclusionary rule, under which evidence that has been obtained in violation of Fourth Amendment requirements may nonetheless be introduced in evidence in state criminal trials.¹⁰⁷ At the same time, the Court has repeatedly refused to apply the exclusionary rule in state (or federal) judicial or administrative proceedings *other* than criminal trials.¹⁰⁸ Perhaps most significantly, the Supreme Court in 1976 ruled that “where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a

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105. In his acceptance speech at the 1968 Republican National Convention, candidate Richard Nixon said that the Warren Court had gone too far in strengthening the criminal forces against the “peace forces.” Richard M. Nixon, Acceptance Speech, in *CAMPAIGN SPEECHES OF AMERICAN PRESIDENTIAL CANDIDATES 1928–1972*, at 361 (Aaron Singer ed., 1976).
106. See Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1374 & nn.65–69 (2004) (discussing opposition to *Mapp* decision expressed by police nationwide, the President of the American Bar Association, and many legal scholars); see also Ronald J. Bacigal, *The Federalism Pendulum*, 98 W. VA. L. REV. 771, 782 (1996) (“*Mapp v. Ohio*, which extended the Fourth Amendment exclusionary rule to the states . . . must rank among the most unpopular decisions in Supreme Court history.”) (footnotes omitted). *But see* Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1392–96 (1983) (defending the *Mapp* decision).
107. See, e.g., *Arizona v. Evans*, 514 U.S. 1, 14 (1995) (holding that evidence seized in violation of Fourth Amendment as result of clerical errors of court employees is admissible); *Murray v. United States*, 487 U.S. 533, 536–44 (1988) (holding that as long as a lawful seizure is independent from any observations or facts stemming from an earlier, unlawful search and seizure, then the evidence gained from the lawful seizure is admissible); *Illinois v. Krull*, 480 U.S. 340, 349–55 (1987) (holding that evidence obtained by an officer in “good faith” reliance upon an unconstitutional state statute is admissible); *United States v. Leon*, 468 U.S. 897, 921–25 (1984) (holding that evidence obtained by an officer in “good faith” reliance upon a search warrant issued by a neutral magistrate, but not based on “probable cause,” is admissible); *Segura v. United States*, 468 U.S. 796, 813–14 (1984) (holding that illegally-obtained evidence need not be excluded unless illegal search and seizure is the “but for” cause of the discovery of the evidence).
108. See, e.g., *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364 (1998) (holding that exclusionary rule does not bar introduction of unconstitutionally obtained evidence in parole revocation hearing); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1051 (1984) (holding that exclusionary rule does not bar the introduction of unconstitutionally obtained evidence in civil deportation proceedings); *United States v. Janis*, 428 U.S. 433, 454 (1976) (holding that exclusionary rule does not bar the introduction of unconstitutionally obtained evidence in federal civil tax proceedings); *United States v. Calandra*, 414 U.S. 338, 347–52 (1974) (holding that exclusionary rule does not bar introduction of unconstitutionally obtained evidence in grand jury proceedings).

state prisoner may *not* be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.”¹⁰⁹ By announcing numerous exceptions to *Mapp*'s exclusionary rule while simultaneously cutting off federal habeas corpus review of *Mapp*'s application in state courts, the Supreme Court effectively has overruled *Mapp* sub silentio, and has reinstated the nonbinding framework of Fourth Amendment “incorporation” that had previously prevailed under *Wolf*.¹¹⁰ Under this framework, state courts are admonished to conform to federal interpretations of the Fourth Amendment, but, for all practical purposes, are no longer *required* to adhere to such interpretations.¹¹¹ Indeed, some state courts have openly announced that *Mapp* is no longer binding on them.¹¹²

109. *Stone v. Powell*, 428 U.S. 465, 494 (1976) (emphasis added).

110. *See Wolf v. Colorado*, 338 U.S. 25 (1949).

111. Formally, state courts today remain subject to *Mapp*. As a practical matter, however, if a state court chooses to disregard the exclusionary rule in a criminal trial, the only channel available through which an aggrieved defendant may seek relief is to pursue discretionary certiorari review in the United States Supreme Court. Such relief is rarely available, even in egregious cases of state court error. *See, e.g., Overton v. Ohio*, 534 U.S. 982, 985 (2001) (Mem.) (Breyer, J., joined by Stevens, J., O'Connor, J., and Souter, J., statement respecting the denial of the petition for writ of certiorari) (protesting, in vain, that “the city of Toledo clearly violated the Fourth Amendment warrant requirement. Because the Court already has answered directly the basic legal question presented in this case, I would not grant certiorari for the purpose of hearing that question argued once again. I would, however, summarily reverse the decision below.”).

In fact, in modern cases in which the United States Supreme Court has reviewed state court applications of the federal exclusionary rule, the Supreme Court has been more likely than the state courts under review to hold that exclusion of evidence was not required under *Mapp*. *See, e.g., Pa. Bd. of Prob. & Parole*, 524 U.S. at 369 (reversing a Pennsylvania Supreme Court decision that had excluded from a parole revocation hearing evidence seized in violation of Fourth Amendment); *Evans*, 514 U.S. at 14–16 (reversing Arizona Supreme Court decision that had excluded from a criminal trial certain evidence seized in violation of Fourth Amendment as result of clerical errors of court employees). Even in cases where the Supreme Court, on review, has found Fourth Amendment violations that state courts did not find, the Supreme Court has been hesitant to require exclusion of evidence as a remedy for such violations. *See, e.g., Wilson v. Arkansas*, 514 U.S. 927, 936–37 (1995) (reversing Arkansas Supreme Court in holding that Fourth Amendment requires officers to knock and announce their presence and authority before entering dwelling unless it is “reasonable” not to do so, but remanding to state court to consider whether evidence would have to be excluded if found to be unlawfully obtained); *Powell v. Nevada*, 511 U.S. 79, 83–85 (1994) (reversing Nevada Supreme Court in holding that judicial probable cause determination must be made within 48 hours of warrantless arrest, but remanding to state court to consider remedy while stating that defendant need not be set free).

112. *See, e.g., People v. Carter*, 655 N.W.2d 236, 239 n.1 (Mich. Ct. App. 2002) (“Contrary to the constitutional premise of *Mapp v. Ohio* (‘We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.’), the United States Supreme Court has

On the other hand, since *Mapp*, one state expressly constitutionalized the exclusionary rule,¹¹³ four states have amended the "search and seizure" provisions of their constitutions to provide protection against illegal wiretaps, electronic eavesdropping, or other innovations,¹¹⁴ and ten states have constitutionalized the more general "right to privacy" that Justice Brandeis originally argued was the basis of the exclusionary rule.¹¹⁵ These states, and a few others, have mandated use of the exclusionary rule in cases in which the United States Supreme Court would not have held that the Fourth Amendment so required.¹¹⁶

In sum, while *Mapp* had the potential to change the substantive law of a number of states in the 1960s, the Supreme Court retreated relatively quickly from its holding in that case. Today, the "incorporation" of the Fourth Amendment's "search and seizure" provisions against the states via the Fourteenth Amendment has little or no impact, in practice, on the substantive law of state criminal procedure in any of the fifty states. Rather, in virtually every situation in which Fourth Amendment "incorporation" is applicable, each state willingly protects the rights of its inhabitants at least as strongly as the Supreme Court has held that the "incorporated" Fourth Amendment would require.

now determined that the use of evidence seized in violation of the Fourth and Fourteenth Amendments does not violate the United States Constitution." (citing *Pa. Bd. of Prob. & Parole*, 524 U.S. at 362-63) (internal citations omitted).

113. FLA. CONST. art. I, § 12 ("Articles or information obtained in violation of this right shall not be admissible in evidence . . .") (ratified in 1968). Florida's 1968 constitution was subsequently amended in 1982 to state:

This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

Id. (amended 1982).

114. *See, e.g.*, ILL. CONST. art. I, § 6 ("The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means."); *accord* FLA. CONST. art. I, § 12; HAW. CONST. art. I, § 7; N.Y. CONST. art. I, § 12.
115. ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed."); *accord* ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, §§ 6-7; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7. The Alaska, California, Florida, and Montana privacy provisions are self-contained, while those of Arizona, Illinois, Louisiana, South Carolina, and Washington are interwoven with their constitutional search and seizure provisions. The Hawaii Constitution contains both types of provisions.
116. *See generally* Ken Gormley & Rhonda G. Hartman, *Privacy and the States*, 65 TEMP. L. REV. 1279 (1992) (providing numerous examples).

B. Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment provides that: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . ." ¹¹⁷ The Clause has been held to provide three separate constitutional protections. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."¹¹⁸ In 1937, the Supreme Court in *Palko v. Connecticut*¹¹⁹ initially declined to "incorporate" the Double Jeopardy Clause as a limit on state power under the Fourteenth Amendment.¹²⁰ In 1969, however, the Court reversed course, "incorporating" the Clause in *Benton v. Maryland*.¹²¹

Maryland, alone among the fifty states, never protected the right against double jeopardy under its constitution or by statute. Nonetheless, the right of an individual to be tried no more than once for the same crime was long recognized as a component of Maryland common law.¹²² As part of Maryland's common law, however, this right was

117. U.S. CONST. amend. V.

118. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted). The Double Jeopardy Clause does not bar prosecutors from appealing dismissals of criminal indictments, grants of new trials, or grants of defendants' motions to suppress evidence. See Criminal Appeals Act of 1971, 18 U.S.C. § 3731 (2000 & Supp. II 2002) (authorizing such appeals); see also *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980) ("[W]here the trial has been terminated prior to a jury verdict at the defendant's request on grounds unrelated to guilt or innocence, the Government may seek appellate review of that decision even though a second trial would be necessitated by a reversal."). For a survey of the history of federal Criminal Appeals Acts, see generally *United States v. Wilson*, 420 U.S. 332, 336-39 (1975).

119. 302 U.S. 319 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969).

120. *Id.* at 328.

121. 395 U.S. 784, 794 (1969).

122. See, e.g., *Bennington v. Warden of Md. House of Corr.*, 59 A.2d 779, 780 (Md. 1948) ("The rule against double jeopardy contained in the 5th Amendment . . . is not set out in the Maryland Constitution but is applied in this State as a doctrine of the common law." (citing *Hoffman v. State*, 20 Md. 425 (1863))); *Gilpin v. State*, 121 A. 354, 355 (Md. 1923) ("That no person shall for the same offense be twice put in jeopardy is both a provision of the Constitution of the United States (Amendment 5), and an established rule of the common law, and a plea of former jeopardy is good under either."); *State v. Shields*, 49 Md. 301 (1878). The court in *Shields* explained:

It has always been a settled rule of the common law that after an acquittal of a party upon a regular trial on an indictment for either a felony or a misdemeanor, the verdict of acquittal can never afterward, on the application of the prosecutor, in any form of proceeding, be set aside and a new trial granted, and it matters not whether such verdict be the result of a misdirection of the Judge on a question of law, or of a misconception of fact on the part of the jury.

Id. at 303-04.

subject to limitation by statute.¹²³ In 1945, Maryland enacted a statute that authorized state prosecutors to appeal from acquittals in certain non-jury criminal cases.¹²⁴ Shortly thereafter, Maryland's highest court held that this statute validly abrogated Maryland's common law rule against double jeopardy.¹²⁵

In upholding the 1945 statute against state and federal constitutional challenge, the Maryland court acknowledged that the statute would not pass muster under the federal courts' interpretation of the Double Jeopardy Clause.¹²⁶ Citing *Palko*, however, the Maryland court noted that federal interpretation of the Double Jeopardy Clause was not binding on Maryland courts via the Fourteenth Amendment.¹²⁷ Thus, state appeals from non-jury criminal acquittals continued in Maryland until 1969, when *Benton* became the last case ever to "incorporate" an enumerated right in the Bill of Rights as a limit on state power.

The *Benton* case involved a defendant who was convicted of burglary by a Maryland jury, but acquitted of a larceny charge brought in the same case.¹²⁸ Because avowed atheists had been unconstitutionally excluded from the grand jury that indicted the defendant, the indictment was subsequently declared invalid, and the defendant's burglary conviction was vacated.¹²⁹ Following the vacatur, the defendant was reindicted by a different grand jury on the same burglary and larceny charges, and retried before a different petit jury.¹³⁰ On retrial, the second jury convicted the defendant on both charges.¹³¹ The trial court then sentenced the defendant to fifteen years in prison

123. See *Robb v. State*, 60 A.2d 211, 215 (Md. 1948) ("[T]he provision against double jeopardy, being a common law rule, the Legislature . . . abrogated that rule so far as it [enacted a] statute [that] gave the state the right of appeal from the Trial Magistrate.").

124. Md. Acts of 1945, ch. 845, art. 52, § 13 ("If after a trial before the Trial Magistrate either party shall feel aggrieved by his judgment there shall be a right of appeal within ten days to the Circuit Court for the county in which the alleged offense is charged to have been committed . . ." (quoted in *Robb*, 60 A.2d at 212)); see also *Robb*, 60 A.2d at 215 (discussing predecessor statutes dating back to 1914). In practice, the Maryland statute at issue in *Robb* appears to have authorized the prosecution to appeal from an acquittal entered by a trial magistrate judge following a bench trial, and to obtain a trial de novo in the Maryland Circuit Court. *Id.* at 212.

125. *Robb*, 60 A.2d at 215.

126. See *id.* at 213.

127. *Id.* at 213 ("[G]iving the State the right to appeal from the Trial Magistrate to the Circuit Court is not a violation of the Federal Constitution . . ." (citing *Palko v. Connecticut*, 302 U.S. 319 (1937))).

128. *Benton v. State*, 232 A.2d 541, 542 (Md. Ct. Spec. App. 1967), *vacated*, 395 U.S. 784 (1969).

129. *Id.* Cf. *Schowgurow v. State*, 213 A.2d 475 (Md. Ct. Spec. App. 1965) (holding that religious requirements for jury service are unconstitutional).

130. *Benton*, 232 A.2d at 542.

131. *Id.*

on the burglary count, and five years on the larceny count, sentences to run concurrently.¹³²

The defendant challenged the constitutionality of his retrial on the larceny charge, of which he had earlier been acquitted.¹³³ The Maryland Court of Special Appeals rejected this challenge, holding that under Maryland law, “when a traverser has been tried on an indictment or information that is invalid, he is not in jeopardy and he may be indicted and tried again.”¹³⁴ In so holding, the Maryland court did not assert that double jeopardy principles were irrelevant in Maryland. To the contrary, in holding that reindictment following vacatur of an invalid indictment did not constitute double jeopardy, the Maryland court in *Benton* relied on—and purported to follow—two recent precedents of the United States Supreme Court in which reindictment of federal criminal defendants following vacatur of earlier indictments had been sustained.¹³⁵ Accordingly, the United States Supreme Court subsequently acknowledged that the Maryland court had addressed the defendant’s double jeopardy claim, but had rejected it “on the merits.”¹³⁶

On certiorari in *Benton*, the United States Supreme Court formally overruled *Palko*,¹³⁷ and held that “the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment.”¹³⁸ Applying federal double jeopardy standards, the Supreme Court concluded:

It is clear that petitioner’s larceny conviction cannot stand once federal double jeopardy standards are applied. Petitioner was acquitted of larceny in his

132. *Id.* In practice, the court’s decision to impose concurrent sentences meant that the conviction on the larceny count could not affect the amount of time in prison the defendant would actually serve, except in the unlikely event that the burglary count, but not the larceny count, was later vacated or reversed. See *Benton v. Maryland*, 395 U.S. 784, 787–91 (1969) (discussing whether there was a “live” case or controversy, given the unlikelihood that the defendant’s prison sentence would be affected if the larceny conviction were vacated).

133. *Benton*, 232 A.2d at 542.

134. *Id.* at 543 (quoting *Tate v. State*, 203 A.2d 882, 884 (Md. 1964)) (citations omitted).

135. *Id.* (upholding reindictment that contained additional charges, after earlier indictment that had led to guilty plea was found invalid and conviction was vacated) (citing *United States v. Ewell*, 383 U.S. 116, 124–25 (1966); *United States v. Tateo*, 377 U.S. 463, 466–67 (1964) (“If a case is reversed because of . . . a deficiency in the indictment . . . it is presumed that the accused did not have his case fairly put to the jury,” and that the defendant can be retried)). In neither of the federal cases cited by the Maryland Court of Special Appeals in *Benton*, however, did the subsequent indictments sustained by the United States Supreme Court contain any criminal charges of which the defendants at issue had already been acquitted at trial.

136. *Benton*, 395 U.S. at 786.

137. *Id.* at 794.

138. *Id.*

first trial. Because he decided to appeal his burglary conviction, he is forced to suffer retrial on the larceny count as well “[C]onditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy.”¹³⁹

In so holding, the Supreme Court did change the substantive law of Maryland. Notably, however, the Maryland Court of Special Appeals in *Benton* squarely affirmed that criminal defendants in Maryland possessed a right not to be placed in double jeopardy. Moreover, in specifying the scope of this right, the Maryland court apparently attempted to follow prevailing United States Supreme Court precedent, while expressing no disagreement with federal doctrine. Had the Maryland court known that the federal Double Jeopardy Clause would be construed to preclude reindictment of a defendant, following vacatur of an invalid indictment, on charges of which the defendant was acquitted, the Maryland court in *Benton* seemingly would have adopted this federal construction voluntarily. If so, then binding “incorporation” of the Double Jeopardy Clause in *Benton* may not have altered Maryland criminal procedure any more than a merely “persuasive” federal interpretation of the Double Jeopardy Clause would have done.

In addition to Maryland, the constitutions of Massachusetts, Vermont, Connecticut, and North Carolina have also never contained express double jeopardy clauses. However, Massachusetts¹⁴⁰ and

139. *Id.* at 796 (quoting *Green v. United States*, 355 U.S. 184, 193–94 (1957)). The *Benton* Court traced the lineage of the federal double jeopardy standard to *United States v. Ball*, 163 U.S. 662, 667–70 (1896), which held that the Government cannot rely on its own error in issuing a defective indictment as a ground for overcoming the defendant’s protection against double jeopardy following acquittal by a jury. See *Benton*, 395 U.S. at 797.

140. The Massachusetts Body of Liberties of 1641 contained the first colonial legislative protection from double jeopardy: “No man shall be twice sentenced by Civill Justice for one and the same Crime, offence, or Trespasse.” Mass. Body of Liberties ¶ 42. Some version of this statute has remained in effect in Massachusetts ever since. See MASS. GEN. LAWS ANN. ch. 263, § 7 (West 2000) (“A person shall not be held to answer on a second indictment or complaint for a crime of which he has been acquitted upon the facts and merits; but he may plead such acquittal in bar of any subsequent prosecution for the same crime, notwithstanding any defect in the form or substance of the indictment or complaint on which he was acquitted.”). Massachusetts courts also have long protected criminal defendants against retrial on charges of which the defendants have been previously convicted. See, e.g., *Commonwealth v. McCan*, 178 N.E. 633, 634 (Mass. 1931) (the principle “that, where one has been convicted and punished by a court of competent jurisdiction, all other proceedings for the same offence are barred to the end that the defendant shall not be punished again for the same matter . . . is jealously guarded as an important principle of individual safety and personal right” in Massachusetts); accord *Commonwealth v. Burke*, 172 N.E.2d 605, 606 (Mass. 1961); *Commonwealth v. Anthes*, 71 Mass. (5 Gray) 185, 207 (1855); *Commonwealth v. Roby*, 29 Mass. (12 Pick.) 496, 501 (1832).

Vermont¹⁴¹ have long protected individuals against double jeopardy by statute, while Connecticut¹⁴² and North Carolina¹⁴³ have interpreted their constitutional guarantees of due process to include a guarantee against double jeopardy. These four states, like Maryland, have also generally adhered to federal interpretations of the definition of double jeopardy.

141. Vermont's current double jeopardy statute provides:

A person shall not be held to answer on a second complaint, information or indictment for an offense of which he was acquitted by a jury upon the merits on a former trial. Such acquittal may be pleaded in bar of a subsequent prosecution for the same offense, notwithstanding defects in the form or substance of the complaint, information or indictment on which he was acquitted.

VT. STAT. ANN. tit. 13, § 6556 (1998). Predecessor statutes can be traced back to at least 1857. *See id.* (legislative history annotation). Vermont courts also have long protected criminal defendants against retrial on charges of which the defendants have been previously convicted. *See, e.g., State v. Locklin*, 10 A. 464 (Vt. 1887) (dismissing indictment charging a breach of the peace, because the elements of the offense were subsumed within another offense for which the defendant had already been convicted); *see also State v. Deso*, 1 A.2d 710, 715 (Vt. 1938) ("Where one offense is a necessary element in, and constitutes a part of, another, and both are in fact but one transaction, an acquittal or conviction of one is a bar to a prosecution for the other.") (citations omitted).

142. *Kohlfluss v. Warden of Conn. State Prison*, 183 A.2d 626, 627 (Conn. 1962) (although "[t]here is no specific provision against double jeopardy in the constitution of Connecticut," Connecticut courts "have in large part adopted the common-law rule against it as necessary to the due process guaranteed by article first, § 9, of [the Connecticut] constitution" (citing *State v. Lee*, 30 A. 1110 (Conn. 1894))), *cert. denied*, 371 U.S. 928 (1962); *accord State v. Laws*, 655 A.2d 1131, 1139 (Conn. App. Ct. 1995), *cert. denied*, 659 A.2d 1210 (Conn. 1995); *see also State v. Carabetta*, 137 A. 394 (Conn. 1927) (holding that after acquittal and discharge, defendant's reaprehension on decision of prosecutor to appeal constituted double jeopardy); *State v. Benham*, 7 Conn. 414, 418 (1829) (assuming that double jeopardy is unconstitutional in Connecticut); *State v. Garvey*, 42 Conn. 232, 233 (1875) (same).

143. The North Carolina Supreme Court has stated that:

It is a fundamental and sacred principle of the common law, deeply imbedded in our criminal jurisprudence, that no person can be twice put in jeopardy of life or limb for the same offense. It was incorporated in the Bill of Rights of the Federal Constitution. While the principle is not stated in express terms in the North Carolina Constitution, it has been regarded as an integral part of the "law of the land" within the meaning of [the North Carolina Constitution].

State v. Crocker, 80 S.E.2d 243, 245 (N.C. 1954) (citing *State v. Hicks*, 64 S.E.2d 871 (N.C. 1951), *cert. denied*, 342 U.S. 831 (1951); *State v. Mansfield*, 176 S.E. 761 (N.C. 1934); *State v. Prince*, 63 N.C. 529 (1869)); *see also State v. Battle*, 183 S.E.2d 641, 643 (N.C. 1971) ("The 'sacred principle of the common law' that no person can twice be put in jeopardy of life or limb for the same offense has always been an integral part of the law of North Carolina. Therefore, the decision in *Benton v. Maryland*, which made the double jeopardy provision of the Fifth Amendment applicable to the several states through the Fourteenth Amendment, added nothing to our law.") (citation omitted).

However, before the Double Jeopardy Clause was "incorporated," Vermont and Connecticut, like Maryland, departed from federal practice in certain respects. Prior to "incorporation," Vermont sometimes permitted prosecutors to reinstate criminal prosecutions they had previously instituted and then abandoned.¹⁴⁴ While Vermont courts apparently believed this practice to be inconsistent with federal double jeopardy standards,¹⁴⁵ in fact the federal constitutional doctrine of "manifest necessity" *also* authorizes reinstatement of criminal charges, in certain circumstances, following dismissal of a criminal case.¹⁴⁶ In that regard, Vermont's "discontinuance" law may be functionally equivalent, in many cases, to the federal doctrine of "manifest necessity."

Connecticut went farther than Vermont by allowing the state, with the permission of the trial judge, to appeal from acquittals following jury trials.¹⁴⁷ While acknowledging that the state constitution's due process clause protected criminal defendants against double jeopardy,

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144. *See Deso*, 1 A.2d at 715 (permitting reinstatement of charges after prosecutor's prior abandonment of case before judgment). Such reinstatement was prohibited in cases where it would likely prejudice the defendant. *See id.* ("The court, in granting permission [for dismissed charges to be reinstated], will exercise its judicial discretion. If the case appear a clear one for the [defendant], the court will not give the permission, as he is entitled to a verdict of acquittal. If the case appear against the accused, he can have no objection to a nolle prosequi." (quoting *State v. Roe*, 12 Vt. 93, 109 (1840))). Vermont's practice was shared by a few states whose constitutions did contain express double jeopardy provisions. *See, e.g., State v. Brunn*, 154 P.2d 826 (Wash. 1945).
145. *See State v. Felch*, 105 A. 23, 25-26 (Vt. 1918) (acknowledging that retrial following dismissal of a criminal case would constitute double jeopardy under the Fifth Amendment, but holding that "relief from the vexation of a second trial" is not a fundamental right of United States citizenship protected against state abridgment by the Fourteenth Amendment).
146. *See, e.g., Illinois v. Somerville*, 410 U.S. 458 (1973) (holding that charges may be reinstated after trial judge, over defendant's objection but before evidence is presented, declares mistrial based on defects in indictment); *Thompson v. United States*, 155 U.S. 271, 274 (1894) (holding that Double Jeopardy Clause not violated when jury is discharged after trial has begun and new trial is commenced before another jury, where there is a "manifest necessity" to order new trial, such that the ends of public justice would otherwise be defeated). The doctrine of "manifest necessity" is often traced to Justice Story's opinion for the Supreme Court in *United States v. Perez*, 22 U.S. 579 (1824), which held that a "hung" jury's failure to agree on a verdict creates a "manifest necessity" for a trial judge to declare a mistrial and order a new trial of the defendant, because "the ends of public justice would otherwise be defeated." *Id.* at 579.
147. 1886 Conn. Pub. Acts 560 ("Appeals from the rulings and decisions of the superior court or of any criminal court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused."), *set forth in Palko v. Connecticut*, 302 U.S. 319, 321 n.1 (1937) (currently codified as amended at CONN. GEN. STAT. ANN. § 54-96 (West 2001)).

Connecticut courts held that prosecution appeals did not necessarily constitute double jeopardy.¹⁴⁸ In *Palko*, the United States Supreme Court held that Connecticut's practice did not violate the Fourteenth Amendment, even though the Fifth Amendment by then had been held to bar prosecutors from appealing from acquittals in federal criminal cases.¹⁴⁹

In *Palko*, a Connecticut jury had convicted the defendant of second-degree murder in a state criminal trial, but acquitted him on a concurrent charge of first-degree murder.¹⁵⁰ Despite securing a second-degree murder conviction that carried with it a life sentence, the state prosecutors in *Palko* appealed the defendant's acquittal on the first-degree murder charges.¹⁵¹ On appeal, the Connecticut Supreme Court of Errors reversed the trial court's judgment of acquittal on the first-degree murder charge, and ordered a new trial.¹⁵² At the new trial, the defendant was convicted of first-degree murder, and sentenced to death.¹⁵³ The Connecticut Supreme Court of Errors affirmed the conviction and death sentence.¹⁵⁴ The defendant then sought review in the United States Supreme Court, where he argued that the Fourteenth Amendment "incorporated" the protections of the Double Jeopardy Clause, and therefore barred the state from appealing a judgment of acquittal and subsequently retrying the defendant on the same charge of which he had previously been acquitted.

148. *State v. Lee*, 30 A. 1110 (Conn. 1894). In *Lee*, The Connecticut Supreme Court of Errors followed then-current federal precedent, which held that the common law prohibited appeals by the government *absent express statutory authorization*. See *United States v. Sanges*, 144 U.S. 310, 312 (1892) ("[I]t is settled by an overwhelming weight of American authority, that the State has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, *except under and in accordance with express statutes . . .*") (emphasis added).

149. The Supreme Court first held that the Fifth Amendment's Double Jeopardy Clause barred the federal government from appealing an acquittal in a federal criminal case in *Kepner v. United States*, 195 U.S. 100, 126–33 (1904).

150. *Palko*, 302 U.S. at 321.

151. *Id.* On appeal, the state alleged that the trial judge had erred by excluding certain testimony from the trial, and by giving improper jury instructions as to the difference between first and second degree murder. *Id.*

152. *State v. Palko*, 186 A. 657 (Conn. 1936).

153. *Palko*, 302 U.S. at 321–22.

154. 191 A. 320, *aff'd*, 302 U.S. 319 (1937). In so holding, the Connecticut Supreme Court of Errors reaffirmed that double jeopardy was prohibited by the state constitution, notwithstanding the lack of any express clause so providing. *Id.* at 325. However, the court maintained that "permitting an appeal by the State" did not constitute double jeopardy because:

[T]here is but one jeopardy and one trial; that where material error is committed on a trial and a new trial is ordered by the appellate court upon the State's appeal, the second trial is not a new case but is a legal disposal of the same original case tried in the first instance.

Id. (citing *State v. Lee*, 30 A. 1110 (Conn. 1894)).

In a famous formulation of the doctrine of “selective incorporation,” Justice Cardozo rejected the defendant’s claim, writing for a unanimous Supreme Court in *Palko* that the Fourteenth Amendment does not “incorporate” all the rights enumerated in the Bill of Rights.¹⁵⁵ Instead, the Amendment “incorporates” only those rights that are “of the very essence of a scheme of ordered liberty,” such that “[t]o abolish them is . . . to violate a ‘principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”¹⁵⁶ Finding that no such fundamental principle barred retrial of a criminal case “until there shall be a trial free from the corrosion of substantial legal error,” the *Palko* court refused to “incorporate” the Double Jeopardy Clause as a limit on state power.¹⁵⁷

Thirty-two years later, in *Benton*¹⁵⁸ the United States Supreme Court overruled *Palko* and “incorporated” the Double Jeopardy Clause into the Due Process Clause of the Fourteenth Amendment.¹⁵⁹ Nonetheless, despite *Benton*’s overruling of *Palko*, the Connecticut statute that was upheld in *Palko* remains in effect today.¹⁶⁰ Furthermore, though modern Connecticut courts have held that this statute must be construed narrowly,¹⁶¹ none, even after *Benton*, have considered strik-

155. *Palko*, 302 U.S. at 325.

156. *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

157. *Id.* at 328. The *Palko* Court did, however, state in dicta that the Fourteenth Amendment would bar retrial of defendants who had been acquitted in state criminal cases where such retrial would subject such defendants to “a hardship so acute and shocking that our polity will not endure it.” *Id.*

158. See discussion *supra* notes 128–39.

159. See *Benton v. Maryland*, 395 U.S. 784, 795–96 (1969) (“The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation’s independence . . . Like the right to trial by jury, it is clearly ‘fundamental to the American scheme of justice.’”) (citations omitted).

160. The current version provides:

Appeals from the rulings and decisions of the superior court, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court or to the appellate court, in the same manner and to the same effect as if made by the accused.

CONN. GEN. STAT. ANN. § 54-96 (West 2001).

161. See, e.g., *State v. Morrissette*, 830 A.2d 704 (Conn. 2003) (construing statute not to authorize prosecution appeal of trial court’s grant of defendant’s motion for new trial); *State v. Paoletta*, 554 A.2d 702 (Conn. 1989) (construing statute not to authorize state appeals from acquittals in criminal cases, and holding that trial court’s dismissal of a sexual assault prosecution on ground that defendant was legally married to complainant at time of alleged offense constituted a nonappealable “acquittal”); *State v. Falzone*, 370 A.2d 988 (Conn. 1976) (holding right of state to appeal in criminal cases is granted only by statute, and there is no common-law right of such appeal by the state); *State v. Audet*, 365 A.2d 1082, 1085 (Conn. 1976) (holding state may not appeal in criminal case without first obtaining the permission of the trial judge).

ing it down as unconstitutional.¹⁶² Nor have any federal courts. Thus, it appears that, at least with respect to the limitation of the right of a state to appeal a criminal acquittal in Connecticut, the Fifth Amendment right against double jeopardy has *not* been fully “incorporated.”¹⁶³

By imposing federal double jeopardy standards on the states, the Supreme Court in *Benton* effected modest changes, in a handful of situations, to the substantive law of a few states. Even before *Benton*, however, every state purported to protect criminal defendants against double jeopardy. Moreover, other than some minor variation at the margins, every state’s definition of double jeopardy was substantially similar to the federal definition. Even in cases where state double jeopardy standards appear to have varied from federal standards (as in *Benton* itself), such variation was as likely to be attributable to state courts’ failure to fully apprehend the federal doctrine as to state courts’ active disagreement with federal doctrine. Accordingly, the “incorporation” of the Fifth Amendment’s double jeopardy protections against the states via the Fourteenth Amendment has exerted only a very modest impact, in practice, on the law of criminal procedure in a handful of the fifty states.

C. Compelled Self-Incrimination

The Fifth Amendment to the United States Constitution provides that “No person . . . shall be compelled in any criminal case to be a witness against himself.”¹⁶⁴ Since the earliest days of the Republic, the constitutions of all but two states have always expressly protected the right of individuals against compelled self-incrimination.¹⁶⁵

162. See *supra* note 161; see also *State v. Malcolm*, 778 A.2d 134 (Conn. 2001) (holding state could appeal trial court’s ruling vacating conviction for sale of a controlled substance and allowing defendant to withdraw guilty plea); *State v. Anonymous*, 739 A.2d 298 (Conn. App. Ct. 1999) (holding appellate court may review whether trial court abused discretion in denying state permission to appeal question of law in criminal cases); *State v. Fuessenich*, 717 A.2d 801 (Conn. App. Ct. 1998) (holding state could appeal adverse decision in probation revocation hearing pursuant to this statute), *cert. denied*, 723 A.2d 813 (Conn. 1999), *cert. denied*, 527 U.S. 1004 (1999).

163. See James A. Strazzella, *The Relationship of Double Jeopardy to Prosecution Appeals*, 73 NOTRE DAME L. REV. 1, 2 (1997) (asserting that an examination of case law reveals “that double jeopardy law does not itself bar prosecution appeals, despite frequent assertions to the contrary”); *id.* at 13–16 (surveying existing state statutes, including Connecticut’s, that permit prosecution appeals in state criminal cases); *cf. Crist v. Bretz*, 437 U.S. 28, 40 (1978) (Powell, J., dissenting) (noting that not every aspect of the Fifth Amendment double jeopardy law is applicable to the states).

164. U.S. CONST. amend. V.

165. See ERWIN N. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 2 (1955) (“Similar provisions [to the Fifth Amendment’s Compelled Self-Incrimination Clause] have long been included in the constitutions of nearly every state. We are not dealing with

Those two states, Iowa and New Jersey, both have long construed the due process clauses of their respective state constitutions to protect the privilege against self-incrimination.¹⁶⁶

The Supreme Court "incorporated" the privilege against self-incrimination in *Malloy v. Hogan*,¹⁶⁷ a case arising from Connecticut. In *Malloy*, the defendant, William Malloy, had been convicted on misdemeanor state gambling charges. While still on probation from that conviction, Malloy was subpoenaed to testify in a quasi-judicial special inquiry before a commission investigating gambling and other criminal activities in Hartford County.¹⁶⁸ There, Malloy was asked a number of questions related to persons and events surrounding his arrest and conviction.¹⁶⁹ When he refused to answer these questions "on the ground that an answer would tend to incriminate him," the Superior Court held him in contempt, and committed him to prison until he was willing to answer the questions.¹⁷⁰

On appeal from the denial of Malloy's petition for state habeas corpus relief, the Connecticut Supreme Court of Errors recognized that "[t]he law according the privilege against self-incrimination is not

either an alien or a novel doctrine."); see also *Counselman v. Hitchcock*, 142 U.S. 547, 586 (1892) (noting variations in state constitutional language, but concluding "there is really, in spirit and principle, no distinction arising out of such difference of language").

166. See, e.g., *State v. Height*, 91 N.W. 935, 936 (Iowa 1902) (holding that a defendant's privilege against self-incrimination is "one of the protections afforded him from time immemorial by rules of evidence so fully recognized and so fundamental with reference to criminal procedure that [to violate] it must be contrary to due process of law"); accord *State v. Sentner*, 298 N.W. 813 (Iowa 1941); *State v. Dickson*, 202 N.W. 225 (Iowa 1925); *Wragg v. Griffin*, 170 N.W. 400 (Iowa 1919); see also *State v. Fary*, 117 A.2d 499, 501 (N.J. 1955) (Brennan, J.) (reviewing 150 years of New Jersey law, and concluding that New Jersey law always protected the privilege against self-incrimination at least as vigorously as federal law). Justice William Brennan's opinion for the New Jersey Supreme Court in *Fary* greatly foreshadowed his later opinion for the United States Supreme Court "incorporating" the privilege against self-incrimination in *Malloy v. Hogan*, 378 U.S. 1 (1964).
167. 378 U.S. 1, 6 (1964).
168. *Malloy v. Hogan*, 187 A.2d 744, 745-46 (Conn. 1963), *rev'd*, 378 U.S. 1, 6 (1964). The inquiry was referred by a former Chief Justice of Connecticut appointed to his post by the Superior Court of Hartford County. *Id.* at 746.
169. The questions included the following:
- (1) For whom did Malloy work on September 11, 1959, the date he was arrested on the charge on which he was convicted?
 - (2) Who selected and paid his counsel in connection with that charge and his defense thereto?
 - (3) Who selected his bondsman and who paid him?
 - (4) Who paid Malloy's fine?
 - (5) What was the name of the tenant in the apartment in which he was apprehended?
 - (6) Did he know John Bergoti?

Id. at 746.

170. *Id.*

open to question.”¹⁷¹ It further noted that the language of the Connecticut Constitution concerning compelled self-incrimination “is very similar to that of the fifth amendment to the United States constitution, and cases interpreting the scope and application of the fifth amendment in federal proceedings are not without persuasive force in the interpretation of our own constitutional provision.”¹⁷² Accordingly, the Connecticut court concluded, “[i]t is clear that Malloy was clothed with this privilege when he went before the referee, so that the only question is whether his refusal to answer was justified under the rules governing the exercise of the privilege.”¹⁷³ Relying heavily on United States Supreme Court precedent interpreting the Fifth Amendment, the Connecticut Supreme Court of Errors in *Malloy* recited the pertinent “rules governing the exercise of the privilege” as follows:

A witness has the right to refuse to answer any question which would tend to incriminate him. But a mere claim on his part that the evidence will tend to incriminate him is not sufficient. [The question is] . . . whether, from the circumstances of the case and the nature of the evidence which the witness is called upon to give, there is reasonable ground to apprehend danger of criminal liability from his being compelled to answer. That danger must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.¹⁷⁴

Following recent federal precedent, the Connecticut court also stated that “[w]here the state opposes a claim of privilege from self-incrimination on the ground of immunity from possible punishment—whether the immunity arises from a prior conviction, from the bar of a statute of limitations, from a pardon, or from any other cause—the state has the burden of proving the adequacy of the protection afforded by the immunity claimed.”¹⁷⁵ On the facts before it, however, the Connecticut court found that the state had carried this burden. First, the court noted that Malloy faced no continuing jeopardy on the gam-

171. *Id.*; see also *id.* at 746–47 (“Our decisions from a time antedating the adoption of our constitution in 1818 have consistently recognized and upheld the privilege . . .” (citing *Grannis v. Branden*, 5 Day 260, 272 (Conn. 1812); *Town of Norfolk v. Gaylord*, 28 Conn. 309, 312 (1859))).

172. *Id.* at 747 (citing cases); see also CONN. CONST. art I, § 8 (“No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law . . .”) (codified at time of *Malloy* case at CONN. CONST. of 1818, art. I, § 9).

173. *Malloy*, 187 A.2d at 747.

174. *Id.* (internal citations and punctuation marks omitted) (citing *Brown v. Walker*, 161 U.S. 591, 599 (1896); *Mason v. United States*, 244 U.S. 362 (1917)).

175. *Id.* at 749 (citing *United States v. Goodman*, 289 F.2d 256, 262 (4th Cir. 1961), *vacated as moot*, 368 U.S. 14 (1961)) (emphasis added).

bling charge for which he had already been convicted.¹⁷⁶ Next, the court found that Malloy could not be prosecuted for certain related gambling charges because the one-year statute of limitations applicable to those charges had already expired before Malloy was subpoenaed.¹⁷⁷ Finally, the court noted that:

Malloy made no attempt even to suggest to the court how an answer to the question[s] . . . could possibly incriminate him On this state of the record . . . Malloy's claim of privilege, made without explanation, was correctly overruled. Malloy "chose to keep the door tightly closed and to deny the court the smallest glimpse of the danger he apprehended. He cannot then complain that we see none."¹⁷⁸

Although it noted that "[t]he fifth amendment does not apply, as such, to state courts,"¹⁷⁹ the Connecticut Supreme Court of Errors in *Malloy* nonetheless stated that the state standards that it had applied were identical to "the settled [federal] rules defining the right to assert a privilege against self-incrimination."¹⁸⁰ Indeed, when the United States Supreme Court on certiorari in *Malloy* subsequently "incorporated" the Fifth Amendment privilege against self-incrimination,¹⁸¹ Connecticut strenuously insisted that "incorporation" should not change the outcome in the instant case because its state courts already had applied federal standards in protecting Malloy's privilege against self-incrimination.¹⁸² Although the United States Supreme Court ultimately ruled that Connecticut's courts in *Malloy* had misapplied the prevailing federal standard, the point of substantive disagreement between the Supreme Court and the Connecticut state courts was quite narrow.¹⁸³ Indeed, both courts purported to follow the analysis of the scope of the privilege set forth in the same United States Supreme Court precedent.¹⁸⁴ *Malloy* thus illustrates the tru-

176. See *id.* at 748-49 (citing four federal cases).

177. See *id.* at 749-50 (citing state and federal cases).

178. *Id.* at 748 (quoting *In re Pillo*, 93 A.2d 176, 183 (N.J. 1952) (Brennan, J.); *Hoffman v. United States*, 341 U.S. 479, 489 (1951) (holding that a witness's explanation of why he believed his answers to questions asked of him might incriminate him is relevant to court's determination of whether privilege may be invoked)).

179. *Id.* at 750 (citing *Cohen v. Hurley*, 366 U.S. 117, 118 n.1 (1961)).

180. *Id.*

181. *Malloy v. Hagan*, 378 U.S. 1, 6 (1964) (reversing *Adamson v. California*, 332 U.S. 46 (1947)).

182. *Id.* at 12.

183. See *id.* at 12-14 (agreeing with the Connecticut court that Malloy faced no continuing jeopardy in connection with any of the 1959 events about which he was questioned, but holding that Malloy nonetheless should have been allowed to claim privilege against self-incrimination because Malloy's answers to questions about the 1959 events might furnish a link in a chain of evidence that might connect Malloy with a more recent crime for which he might still be prosecuted).

184. Compare *id.* at 11-12 (applying legal standard set forth in *Hoffman v. United States*, 341 U.S. 479 (1951)), with *Malloy*, 187 A.2d at 748-49 (same). The opinion of the Connecticut Supreme Court of Errors in *Malloy* also closely tracked the decision of the United States Supreme Court in *Mason v. United States*, 244 U.S.

ism that, in close cases, different courts can differ in their application of an agreed legal standard to the same set of facts. However, *Malloy* cannot fairly be said to have changed the substantive standard governing the privilege against self-incrimination in Connecticut or any other state.

Nonetheless, certain implications of the "incorporation" of the Fifth Amendment privilege against self-incrimination were not without consequence. Specifically, although the privilege against self-incrimination was long recognized in every state, before "incorporation" two key aspects of the privilege varied in scope from state to state. These two key aspects were: (1) the so-called "No Comment" Rule, which prevented the prosecutor from commenting on a defendant's failure to testify in his own defense; and (2) the scope of the right against self-incrimination during police interrogations.

Before the right against self-incrimination was "incorporated" against the states in 1964,¹⁸⁵ six states permitted prosecutors or judges to comment to the jury regarding a defendant's decision not to testify,¹⁸⁶ although forty-four states and the federal courts forbade this practice.¹⁸⁷ One year after deciding *Malloy*, the Supreme Court in *Griffin v. California*¹⁸⁸ held that a state prosecutor could not comment to the jury on a defendant's decision not to testify at trial without violating the defendant's "incorporated" privilege against self-incrimination.¹⁸⁹ After *Griffin*, Ohio courts continued to permit pros-

362, 367 (1917), which held that a witness had no Fifth Amendment privilege to refuse to answer questions about other men arrested for illegal gambling, where the witness failed to explain how answering questions could incriminate himself.

185. *Malloy*, 378 U.S. at 6.

186. The six states were California, Ohio, New Jersey, Iowa, Connecticut, and New Mexico. See *Griffin v. California*, 380 U.S. 609, 611 n.3 (1965) (surveying state cases and statutes).

187. See *id.* (enumerating forty-four states). The "No Comment Rule" has been in place in the federal courts since at least 1878, when Congress enacted it by statute. Act of March 16, 1878, ch. 37, 20 Stat. 30 (1878) (currently codified as amended at 18 U.S.C. § 3481 (2000)) ("In trial of all persons charged with the commission of offenses against the United States . . . the person charged shall, at his own request, be a competent witness. *His failure to make such request shall not create any presumption against him.*") (emphasis added). The Supreme Court quickly interpreted this statute to forbid prosecutors from commenting on a defendant's failure to testify. *Wilson v. United States*, 149 U.S. 60, 66 (1893). In *Griffin v. California*, 380 U.S. 609, 613 (1965), the Court held that the "No Comment Rule" in the federal courts was mandated not merely by federal statute, but also by the Fifth Amendment itself. That holding had been anticipated by dicta in *Adamson v. California*, 332 U.S. 46, 50 n.6 (1947), and *Bruno v. United States*, 308 U.S. 287, 294 (1939).

188. 380 U.S. 609 (1965), *rev'g Adamson v. California*, 332 U.S. 46 (1947).

189. For critical commentary, see Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 940 & n.63 (1965) ("Although it is now settled that the fourteenth amendment 'incorporates' the protection of the fifth against self-incrimination, the part of statesmanship would have been to recog-

ecutors to comment on a defendant's decision to remain silent during police interrogation. This practice, by that time unique to Ohio, was struck down in *Doyle v. Ohio*,¹⁹⁰ the last case in which the United States Supreme Court found a violation of the "No Comment Rule." Thus, "incorporation" of the right against self-incrimination did require six states to abandon the "No Comment Rule."

More significantly, "incorporation" of the right against self-incrimination directly led to the famous decision in *Miranda v. Arizona*,¹⁹¹ requiring police officers to inform a suspect subject to custodial interrogation of the suspect's rights to remain silent and to receive the assistance of counsel. Since at least the late nineteenth century, virtually every state had recognized that the right against self-incrimination applies during police interrogation as well as in court proceedings.¹⁹² Moreover, in adopting a warning requirement in *Miranda*, the United States Supreme Court expressly followed an approach to protecting the privilege against self-incrimination that had been developed in California state courts.¹⁹³ Prior to *Miranda*, however, no state other than California required police officers to warn criminal suspects of their rights.¹⁹⁴

The Court in *Miranda* denied that its decision would impose uniformity on the states, and expressly provided for deviation from the

nize that the amendment is not 'specific' with respect to comment on a defendant's failure to testify; that the 'federal rule' prohibiting this as to defendants rested on statute; and that on such a 'penumbral' issue there was room for reasonable experiment 'in the insulated chambers afforded by the several States.'" (quoting *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting)).

190. 426 U.S. 610, 613-14 (1976).

191. 384 U.S. 436 (1966).

192. See J. A. C. Grant, *Self-Incrimination in the Modern American Law*, 5 TEMP. L.Q. 368 (1931). In this article, Grant reviews state and federal cases and concludes that:

[T]he existence of the privilege is not dependent upon the nature of the proceeding in which the testimony is sought, it being equally applicable to any and all inquiries and investigations, civil as well as criminal, whether in or out of court, and including, therefore, the activities of grand juries, examining magistrates, administrative commissions, legislative committees, or any other governmental agency or officer

Id. at 371-72. (emphasis added).

193. *Miranda*, 384 U.S. at 471 (citing *People v. Dorado*, 398 P.2d 361 (Cal. 1965) (en banc), cert. denied, 381 U.S. 937 (1965)). In *Dorado*, the California Supreme Court held that a defendant's confession must be suppressed when, inter alia, "the suspect was in custody . . . [and] the authorities had not effectively informed defendant of his right to counsel or of his absolute right to remain silent, and no evidence establishes that he had waived these rights." *Dorado*, 398 P.2d at 371.

194. California had required warnings and waivers since at least the early twentieth century. See *People v. O'Bryan*, 130 P. 1042, 1044-45 (Cal. 1913) (en banc) (testimony of suspect who "was not informed of his constitutional right to decline to be a witness against himself, nor was he warned that his statements might be used against him . . . should not have been admitted" because it was obtained in violation of constitutional right against self-incrimination).

suggested *Miranda* warnings.¹⁹⁵ Nonetheless, the *Miranda* warning and waiver requirements undoubtedly changed the substantive law of many of the states. Though some states embraced this change,¹⁹⁶ other states¹⁹⁷ and some commentators,¹⁹⁸ have considered *Miranda* to be an illegitimate federal intrusion on state police procedure.

As with the exclusionary rule, public criticism of *Miranda* appears to have led to a weakening of its requirements by the Supreme Court. Since the early 1970s, the Supreme Court has carved out numerous

195. The Supreme Court in *Miranda* stated that:

[T]he Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.

Miranda, 384 U.S. at 490. In fact, Congress has attempted to overrule *Miranda*, albeit to no avail. See Crime Control Act of 1968, Title II, 18 U.S.C. § 3501 (2000) (purporting to repeal *Miranda* and impose in its place a return to the voluntariness standard), held unconstitutional in *Dickerson v. United States*, 530 U.S. 428 (2000). To date, however, no state appears to have accepted the *Miranda* Court's invitation to develop its own effective alternative safeguards as a substitute for *Miranda* warnings.

196. The Louisiana Constitution of 1974 fully "constitutionalized" the *Miranda* warnings. LA. CONST. art. 1, § 13 ("When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel."); see also LA. CONST. art. 1, § 16 ("No person shall be compelled to give evidence against himself.") (previously codified at LA. CONST. of 1921, art. 1, § 9).
197. The Pennsylvania Constitution was amended in 1984 to permit the admission of un-*Mirandized* statements to impeach a defendant's trial testimony, as had been allowed by the Supreme Court in *Harris v. New York*, 401 U.S. 222 (1971). See PA. CONST. art. 1, § 9 (amended 1984) ("In all criminal prosecutions the accused . . . cannot be compelled to give evidence against himself The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself."). Pennsylvania's haste to constitutionalize a *Miranda* exception appears to reflect hostility to the *Miranda* requirements.
198. During the Reagan Administration, a Justice Department Report asserted that: [A] challenge to *Miranda* [was] essential, not only in overcoming the detrimental impact caused directly by this decision, but also as a critical step in moving to repudiate a discredited criminal jurisprudence. Overturning *Miranda* would, accordingly, be among the most important achievements of this administration—indeed of any administration—in restoring the power of self-government to the people of the United States in the suppression of crime.

OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION 115 (1986) reprinted in Sheri Lynn Johnson, *Confessions, Criminals and Community*, 26 HARV. C.R.-C.L. L. REV. 327, 345 (1991); see also Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996); Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979).

exceptions to *Miranda's* warning and waiver requirements, allowing many "un-*Mirandized*" statements to be admitted into evidence in state criminal cases.¹⁹⁹ In fact, just eight years after deciding *Miranda*, the Court announced that the *Miranda* warnings and waivers are "not themselves rights protected by the constitution," but merely "prophylactic standards" designed to "safeguard" the constitutional privilege against compelled self-incrimination.²⁰⁰ Although the Supreme Court, on increasingly rare occasions, has continued to enforce *Miranda* requirements against state officials,²⁰¹ it has simultaneously

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199. See, e.g., *Duckworth v. Eagan*, 492 U.S. 195 (1989) (finding statements admissible even when suspect was incorrectly "warned" that he had no right to counsel until court appearance); *Colorado v. Spring*, 479 U.S. 564 (1987) (holding that police may deceive suspect about the purpose of the questioning in order to elicit *Miranda* waiver); *Colorado v. Connelly*, 479 U.S. 157 (1986) (holding that mentally ill suspect can waive *Miranda* rights); *Moran v. Burbine*, 475 U.S. 412 (1986) (finding *Mirandized* statement admissible when counsel had been retained on behalf of suspect, even though suspect did not know that counsel had been retained and had no contact with counsel until after making statement); *Oregon v. Elstad*, 470 U.S. 298, 316 (1985) (holding "fruit of the poisonous tree" doctrine inapplicable to *Miranda* violations, allowing admission of evidence derived from un-*Mirandized* statement); *New York v. Quarles*, 467 U.S. 649, 657-58 (1984) (creating "public safety" exception to *Miranda*, under which police may question suspect without giving warnings where necessary to avoid potential imminent danger); *North Carolina v. Butler*, 441 U.S. 369 (1979) (holding that "express" waiver of *Miranda* rights not required for statement to be admitted); *Oregon v. Hass*, 420 U.S. 714 (1975) (same, even where *Miranda* violation is deliberate rather than inadvertent); *Harris v. New York*, 401 U.S. 222, 226 (1971) (finding un-*Mirandized* statements may be used to impeach testimony of suspect); see also Ronald J. Allen, *Tribute to Fred Inbau*, 89 J. CRIM. L. & CRIMINOLOGY 1271, 1272 (1999) ("Immediately following [*Miranda*], the Supreme Court . . . began its retreat . . . [T]he Court refused to extend the case retroactively; it held it created only prophylactic rules, not constitutional commands; the rules could be flexibly administered; waiver could occur simply and directly without the need of a well defined script; the rule did not apply at all to on the scene questioning or when a serious question of public safety was at stake. And so on."); Mark A. Godsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 GEO. L.J. 851, 855 (2003) ("[T]he Supreme Court has carved numerous exceptions to *Miranda's* applicability within the United States.").
200. *Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974). In *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court subsequently reaffirmed that, notwithstanding any dicta to the contrary in *Tucker* and other opinions, "*Miranda* is a constitutional decision." *Dickerson*, 530 U.S. at 438. At the same time, the *Dickerson* court acknowledged that the adoption of numerous exceptions to *Miranda's* warning and waiver requirements illustrated "that no constitutional rule is immutable." *Id.* at 441.
201. *Stansbury v. California*, 511 U.S. 318 (1994) (per curiam) (finding that police officer's subjective and undisclosed view that witness was not yet "suspect" at time of custodial interrogation did not excuse officer's failure to provide *Miranda* warnings); see also *Minnick v. Mississippi*, 498 U.S. 146 (1990) (holding that after a suspect requests counsel and initial interrogation ends, officials may not reini-

unmoored those requirements from their doctrinal origins as an aspect of the “incorporation” of the Fifth Amendment privilege against compelled self-incrimination.²⁰² As a result of this unmooring, the Court’s analysis in cases involving claims by state criminal defendants that the defendants’ self-incriminatory statements were compelled, has tended increasingly to focus on “voluntariness”—the precise pre-*Miranda* standard that the Court applied under the Due Process Clause in the decades before the Fifth Amendment privilege against compelled self-incrimination was “incorporated” against the states.²⁰³

The *Miranda* decision, when it came down in 1966, clearly had the potential to change the substantive law of state criminal procedure in the majority of American states. It announced a rule requiring state law enforcement officers to provide express warnings to individuals in custodial interrogation that were not then required under the law of most states.²⁰⁴ It also imposed a significant remedy—exclusion of testimonial evidence—for violations of that rule.²⁰⁵ In the years since *Miranda*, however, the Supreme Court has retreated significantly from both the rule and the associated remedy announced in *Miranda*.

tiate interrogation without counsel present, whether or not the accused has consulted with his attorney); *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981) (holding that a suspect who has “expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication”).

202. See Godsey, *supra* note 199, at 864 (“*Quarles* and the other *Miranda*-exception cases have not completely overruled *Miranda* in the sense that the basic warning/waiver procedure has been retained in most scenarios as the initial inquiry in determining the admissibility of a confession. But the warnings have become detached from the privilege and the concept of compulsion.”).

203. See *id.* at 865 (“[W]here the *Miranda* doctrine is inapplicable [as it increasingly is], the “back-up” test for the admissibility of a confession is not whether it was compelled in violation of the privilege, but whether it was made voluntarily under the old due process involuntary confession rule. The *Miranda*-exception cases have continued to insist that the privilege and its prohibition of compelled confessions remain applicable to the pretrial interrogation context. Yet, for reasons left unstated, the Court has declined to provide clear guidance on the precise role of the privilege in police interrogations, and has continued instead to emphasize pre-*Miranda* notions of due process and voluntariness.”) (footnotes omitted).

204. The United States Supreme Court held in *Miranda* that:

[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning . . . [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

205. See *id.* at 479 (“[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.”).

At present, the Court's *Miranda* jurisprudence no longer significantly alters the self-incrimination law of any state. All fifty states exclude self-incriminatory statements that are the product of actual coercion, as they always have. *Miranda*, as presently interpreted, very rarely does anything more. The Supreme Court's promulgation of the *Miranda* rules arguably represented the most significant real-world consequence of Fourteenth Amendment "incorporation," as a limit on state power, of the Fifth Amendment's privilege against compelled self-incrimination. Yet even here, the Court's retreat from *Miranda* has dramatically limited the practical impact of "incorporation" of this privilege on the substantive law of state criminal procedure in the fifty states.

D. Public Trial

The Public Trial Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial."²⁰⁶ In so providing, the Clause reflects the fact that "[h]istorically, virtually all criminal trials in England and America have been trials open to the public."²⁰⁷ The right to a public criminal trial, to a great extent, overlaps many of the other rights in the Bill of Rights. The rights to a jury trial, to counsel, to confrontation of witnesses, and to compulsory process for summoning exculpatory witnesses, insure that a criminal defendant will not be left alone in a courtroom, to be convicted in secrecy by a "Star Chamber."²⁰⁸ In addition, the First Amendment right to freedom of the press, in many instances, entitles the media to have access to a criminal trial,

206. U.S. CONST. amend. VI.

207. AMAR, *supra* note 14, at 111; *accord In re Oliver*, 333 U.S. 257 (1948). The Court in *Oliver* noted that:

[W]e have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute.

Id. at 266 (footnotes omitted); *see also* Note, *The Right to a Public Trial in Criminal Cases*, 41 N.Y.U. L. REV. 1138, 1140 (1966) (concluding that all states recognize the right to public trial either by constitutional provision, statute or judicial interpretation).

208. *See generally Oliver*, 333 U.S. at 266-71 (chronicling common law origins of the right to a public trial); Max Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 389 (1932) (explaining history of the provision as a reaction against British "Star Chamber"); Note, *The Right to a Public Trial in Criminal Cases*, *supra* note 207 (examining relationship between right to public trial and other criminal procedure rights).

sometimes making the trial more public than the defendant would like!²⁰⁹

In 1948, when *In re Oliver*,²¹⁰ a case arising out of Michigan, “incorporated” the Sixth Amendment right to a public trial, the Michigan Constitution of 1908 guaranteed that: “In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury”²¹¹ Moreover, this state constitutional provision had not been forgotten or honored in the breach. To the contrary, even prior to 1948, the constitutional right of an accused person to demand a public trial had long been recognized and strongly protected by Michigan state courts.²¹² It had also long been reinforced by Michigan statute.²¹³

In *Oliver*, the defendant was subpoenaed to testify before a state judge who was “sitting as a one-man grand jury” to conduct an investigation into allegations of gambling and official corruption.²¹⁴ Consistent with ordinary grand jury procedure, the defendant’s testimony before the “one-man grand jury” was secret, with members of the public excluded from the proceeding.²¹⁵ At the conclusion of the defendant’s testimony, the judge sitting as the “one-man grand jury” concluded that the defendant had testified “evasively” and had given

209. *See, e.g.*, *Neb. Press Ass’n v. Stuart*, 427 U.S. 539 (1976) (holding that the media has a right to cover criminal trial over defendant’s objection).

210. 333 U.S. 257 (1948).

211. MICH. CONST. of 1908, art. II, § 19. For the current codification, see MICH. CONST. art. I, § 20.

212. *See, e.g.*, *People v. Micalizzi*, 194 N.W. 540, 541–42 (Mich. 1923) (reversing first-degree murder conviction on ground that defendant had been deprived of state constitutional right to public trial where court, during charge, ordered doors of courtroom locked and did not permit several of defendant’s attorneys and the public to enter, though the courtroom was not crowded); *People v. Yeager*, 71 N.W. 491, 492 (Mich. 1897) (striking down as unconstitutional a statute providing that when evidence of peculiarly immoral acts will probably be given on a trial, the judge may, in his discretion, require all persons except those necessarily in attendance to retire from the courtroom during the trial); *People v. Murray*, 50 N.W. 995, 997–98 (Mich. 1891) (“The right to a public trial is one of the most important safeguards in the prosecution of persons accused of crime It is not necessary to review the history of the administration of the criminal law in England, or to call attention to the abuses in its administration, to show the reason why [this] important provision [] [was] inserted in our constitution, which, in this respect, is but a reflection of similar provisions contained in all of the constitutions of the American states and of the United States. They are each . . . a constant memorial of the great abuses practiced in England at one time and another prior to the American Revolution, in conducting criminal prosecutions.”).

213. MICH. COMP. LAWS ANN. § 600.1420 (West 1996) (“The sittings of every court within this state shall be public.”). This statute was originally enacted in 1846. *See Micalizzi*, 194 N.W. at 541 (citing 1846 version of the statute).

214. *Oliver*, 333 U.S. at 260.

215. *Id.* at 259.

"contradictory answers."²¹⁶ For this reason, the judge held the defendant in contempt and ordered him "confined in the County Jail . . . for a period of sixty days . . . or until such time as he . . . shall appear and answer the questions heretofore propounded to him by this Court"²¹⁷

Reviewing a petition for state habeas corpus relief filed on behalf of the defendant, the Michigan Supreme Court, by an equally divided vote, did not vacate the defendant's contempt conviction.²¹⁸ Voting to sustain the conviction, four justices of the Michigan Supreme Court stated that because the defendant's "contempt, if any, was committed in the face of the court and required no extraneous proofs as to its occurrence, . . . [i]t was properly dealt with summarily."²¹⁹ These four justices reasoned that it would be an "idle gesture"—not required by the state constitution—to require a "one-man grand jury" proceeding to be formally adjourned, and a public court session to be formally "re-convened," before a judge serving as a "one-man grand jury" could hold a recalcitrant grand jury witness in contempt.²²⁰

The other four Michigan Supreme Court justices, in contrast, voted to overrule the defendant's contempt conviction on the ground that no criminal conviction, even for "contempt," could lawfully be sustained in a case in which no evidentiary record had been made or preserved for appellate review.²²¹ Relying on federal constitutional precedent as persuasive authority, these four justices would have invalidated the defendant's contempt conviction on the ground that the failure of the judge who had served as the "one-man grand jury" to make a record of the proceeding that had led to the defendant's contempt conviction mandated that the conviction be vacated.²²² Notably, however, even the four justices who voted to vacate the defendant's contempt conviction

216. *Id.* at 260.

217. *Id.*

218. *In re Dohany (Ex parte Oliver)*, 27 N.W.2d 323 (Mich. 1947), *rev'd*, *Oliver*, 333 U.S. 257. Because the Michigan Supreme Court in *Oliver* was equally divided, the lower court's decision denying the defendant's petition for writ of habeas corpus was sustained, but no precedent was established.

219. *In re Dohany (Ex parte Hartley)*, 27 N.W.2d 48, 50 (Mich. 1947) (plurality opinion of Dethmers, J.), *overruled by Oliver*, 333 U.S. 257.

220. *Id.*

221. *See Dohany (Ex parte Oliver)*, 27 N.W.2d at 328 (Worth, J.) ("Contempt proceedings are criminal in their nature rather than civil. . . . [T]he power to imprison for contempt . . . should be exercised with great caution, and only upon proof which establishes the facts found beyond a reasonable doubt, or which must, in any event, be clear and convincing." (quoting *In re D. Levy & Co.*, 142 F. 442, 444 (2d Cir. 1905))).

222. *See id.* ("Had the above practice been pursued in the instant case a record might or might not have been made which would have disclosed justification for a contempt commitment. But on the record before us a determination in accord with that of the circuit judge would be based on pure guess or merest conjecture. Such a record does not justify punishment for contempt of court").

tion did not assert that the defendant's right to a public trial was violated by the failure of the trial judge serving as a "one-man grand jury" to open the defendant's contempt proceeding to the public—apparently because the defendant failed to raise the issue.²²³

The specific question of whether the secrecy of the contempt proceeding before the "one-man grand jury" violated the *Oliver* defendant's constitutional right to a public trial also was not raised in the defendant's petition for certiorari to the United States Supreme Court.²²⁴ Nonetheless, in *Oliver* the United States Supreme Court "incorporated" into the Fourteenth Amendment the right to a public trial, and vacated the defendant's state contempt conviction.²²⁵ In so doing, the Court noted that it had been "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country."²²⁶ It further noted that "[s]ummary trials for alleged misconduct called contempt of court have not been regarded as an exception to this universal rule against secret trials" ²²⁷ Nor had any state other than Michigan

223. *Oliver*, 333 U.S. at 286 (Jackson, J., dissenting) ("The principal ground assigned for reversal of the judgment of conviction is the alleged secrecy of the contempt procedure. That ground was not . . . raised in the petition for writ of habeas corpus in the state courts. Therefore, it has not been litigated and the record has not been made with reference to it."); *accord id.* at 285 (Frankfurter, J., dissenting) ("[T]he precise issues on which this Court decides this case have never been explicitly challenged before, or passed on, by the Supreme Court of Michigan").

224. *See id.* at 286 (Jackson, J., dissenting) ("The principal ground assigned for reversal of the judgment of conviction is the alleged secrecy of the contempt procedure. That ground was not assigned for review in the petition for certiorari to this Court.").

225. *Id.* at 273 ("In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.").

226. *Id.* at 266 (footnote omitted); *accord id.* at 271–72 ("[U]nless in Michigan and in one-man grand jury contempt cases, no court in this country has ever before held, so far as we can find, that an accused can be tried, convicted, and sent to jail, when everybody else is denied entrance to the court, except the judge and his attaches. And without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged.") (footnote omitted). The Court noted that "[c]lasses within the jurisdiction of courts martial may be regarded as an exception." *Id.* at 266 n.12 (citing *Ex parte Quirin*, 317 U.S. 1, 43 (1942)). It further noted that "[w]hatever may be the classification of juvenile court proceedings, they are often conducted without admitting all the public. But it has never been the practice wholly to exclude parents, relatives, and friends, or to refuse juveniles the benefit of counsel." *Id.*

227. *Id.* at 266 (footnote omitted).

ever categorically denied public trials to defendants charged with contempt of a grand jury.²²⁸

Since *Oliver*, there has been little or no state or federal litigation, or public controversy, concerning the right of criminal defendants to receive a public trial. This relative quietude may reflect the fact that the right of criminal defendants to receive a public trial was very well established in the constitutional law of every state long before *Oliver*.²²⁹ Certainly, Michigan courts both before²³⁰ and after²³¹ *Oliver* have always construed the Michigan Constitution to strongly protect the right to a public trial.

Including Michigan, the right to a public criminal trial has always been expressly protected by the constitutions of forty-two states.²³² One state, Virginia, lacked such an express provision until 1971, when

228. *See id.* at 265 ("Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge the witnesses guilty of contempt of court in secret or in public or at all. Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court.") (footnote omitted). *But cf. id.* at 272 & n.30 ("Certain proceedings in a judge's chambers, including convictions for contempt of court, have occasionally been countenanced by state courts, but there has never been any intimation that all of the public, including the accused's relatives, friends, and counsel, were barred from the trial chamber.").
229. *See, e.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1785, at 662 (1833) (noting that the Sixth Amendment's Public Trial Clause "does but follow out the established course of the common law in all trials for crimes. The trial is always public"); *see also Oliver*, 333 U.S. at 266 (surveying state constitutional "public trial" doctrine); Note, *The Right to a Public Trial in Criminal Cases*, *supra* note 207 (same).
230. *See, e.g.*, *Detroit Free Press, Inc. v. Recorder's Court Judge*, 294 N.W.2d 827, 833 n.17 (Mich. 1980) ("The right of an accused to demand a public trial has long been recognized as a fundamental right in Michigan jurisprudence.") (citations omitted); Note, *Public Trial in Criminal Cases*, 52 MICH. L. REV. 128, 133 & n.39 (1953) (asserting that the right to a public trial in Michigan is protected more strongly in Michigan than in other states; in Michigan, unlike elsewhere, "[a] public trial . . . means something more than a fair trial and therefore is not to be strictly limited to classes of persons necessary to insure a fair trial" (citing *People v. Greeson*, 203 N.W. 141 (Mich. 1925); *People v. Murray*, 50 N.W. 995, 997-98 (Mich. 1891))).
231. *Detroit Free Press, Inc.*, 294 N.W.2d at 833-34 & nn.17-18 (Mich. 1980) (holding that trial and conviction of an accused in secret, even in a contempt proceeding, will be grounds for reversal; therefore, accused may not waive right to public trial); *People v. Medcoff*, 73 N.W.2d 537, 541 (Mich. 1955) ("[P]ublic trial" guarantee of the Michigan constitution is "fundamental to a criminal proceeding . . ."); *People v. Kline*, 494 N.W.2d 756, 759 (Mich. Ct. App. 1992) (holding that although the state constitutional right to a public trial "is not absolute, that right will only rarely give way to other interests" (citing *Waller v. Georgia*, 467 U.S. 39 (1984))).
232. For a survey of the state law on the right to a public trial at the time the Sixth Amendment was "incorporated," *see Oliver*, 333 U.S. at 267-68 nn.17-20.

it added one.²³³ Of the seven remaining states, New York²³⁴ and Nevada²³⁵ have always protected the right to a public trial by statute, while Maryland,²³⁶ Massachusetts,²³⁷ New Hampshire,²³⁸ North Carolina,²³⁹ and Wyoming²⁴⁰ have protected it as a matter of “constitutional common law” or under their state constitutional “due process clauses.”²⁴¹ Accordingly, “incorporation” of the right to a public trial changed, at most, one rarely-used aspect of the substantive law of one

233. VA. CONST. art. 1, § 8 (ratified in 1971) (copying the Sixth Amendment verbatim). At least since 1950, however, Virginia has protected the right to a public trial by statute. The Virginia statute provides that:

In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, *provided that the right of the accused to a public trial shall not be violated.*

VA. CODE ANN. § 19.2-266 (1994) (emphasis added).

234. See N.Y. CIV. RIGHTS LAW § 12 (McKinney 1992) (copying Sixth Amendment verbatim); N.Y. JUD. LAW § 4 (McKinney 1983) (“The sittings of every court within this state shall be public, and every citizen may freely attend the same . . .”). These two statutory provisions are to be construed *in pari materia* with each other, to protect the same rights protected by the Sixth Amendment, after which they were patterned. United Press Ass’ns v. Valente, 120 N.Y.S.2d 174, 179 (App. Div. 1953), *aff’d*, 123 N.E.2d 777 (N.Y. 1954).
235. See NEV. REV. STAT. § 1.090 (1993) (“The sitting of every court of justice shall be public . . .”); see also *Oliver*, 333 U.S. at 268 n.19 (citing Nevada as a state where the right to a public trial has always been protected by statute).
236. See *La Guardia v. State*, 58 A.2d 913, 916 (Md. 1948) (finding that the right to public trial is protected by state constitutional provision guaranteeing “that the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that law” (quoting MD. CONST. dec. of rts. art. 5)); *accord Dutton v. State*, 91 A. 417, 422–23 (Md. 1914); see also *Oliver*, 333 U.S. at 268 n.20 (counting Maryland among states where right to public trial always was protected).
237. See *Commonwealth v. Blondin*, 87 N.E.2d 455, 459–60 (Mass. 1949) (aligning Massachusetts “public trial” jurisprudence with that of states whose constitutions contained express “public trial” provision), *cert. denied*, 339 U.S. 984 (1950); see also MASS. GEN. LAWS ANN. ch. 278, § 16C (1992) (trial judge may exclude spectators from courtroom during incest or rape trial, but only if “the defendant in such trial by a written statement waives *his right to a public trial* for those portions from which spectators are so excluded”) (emphasis added).
238. See *Martineau v. Helgemoe*, 379 A.2d 1040, 1041 (N.H. 1977) (“[A]lthough there is no specific reference to the right to a public trial in our state constitution, it is protected by the requirement of due process.” (citing N.H. CONST. pt. I, art. 15)).
239. See *Raper v. Berrier*, 97 S.E.2d 782, 784 (N.C. 1957) (“The tradition of our courts is that their hearings shall be open. The Constitution of North Carolina so provides The public, and especially the parties are entitled to see and hear what goes on in the courts That courts are open is one of the sources of their greatest strength.” (citing N.C. CONST. art. 1, § 35) (“All courts shall be open”)).
240. *Williams v. Stafford*, 589 P.2d 322, 325 (Wyo. 1979) (“There is almost universal agreement among the courts, which have considered the right-of-access issue, that access to court proceedings should be limited only in exceptional circumstances.”).
241. See *supra* notes 236–40.

state, Michigan, in which the right to a public trial was otherwise well-established.

E. Criminal Jury Trial

Even before the Bill of Rights was written or ratified, the United States Constitution guaranteed trial by jury in federal criminal prosecutions. Article III provides that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury”²⁴² The Bill of Rights repeats this guarantee, as a right of the accused: “In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed”²⁴³ The Supreme Court has stated that the Sixth Amendment merely “amplified” the protection found in Article III, and did not add any substance to it.²⁴⁴ Similarly, every state constitution has always guaranteed the right to jury trial in criminal cases.²⁴⁵

In 1968, the United States Supreme Court “incorporated” the right to criminal jury trial as a limit on state power in *Duncan v. Louisiana*.²⁴⁶ At that time, the Louisiana Constitution, like that of every other state, guaranteed that: “In all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury.”²⁴⁷ However, unlike any other state,²⁴⁸ Louisiana at that time qualified

242. U.S. CONST. art. III, § 2, ¶ 3.

243. U.S. CONST. amend. VI.

244. *Callan v. Wilson*, 127 U.S. 540, 549 (1888). For the contrary view that the right to jury trial articulated in Article III belongs primarily to the public (and thus should not be waivable by the criminal defendant), while the right to jury trial articulated in the Sixth Amendment belongs primarily to the criminal defendant, see AMAR, *supra* note 14, at 104–08.

245. *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968); see also AMAR, *supra* note 14, at 83 & n.7 (“[T]he only right secured in all state constitutions penned between 1776 and 1787 was the right of jury trial in criminal cases.” (citing LEONARD W. LEVY, *THE EMERGENCE OF A FREE PRESS* 227 (1985))); *THE BILL OF RIGHTS AND THE STATES* xix (Patrick T. Conley & John P. Kaminski eds. 1992) (listing criminal jury provisions found in each of the revolutionary declarations of rights and constitutions).

246. 391 U.S. 145 (1968).

247. LA. CONST. of 1921, art. 7 § 41 (previously codified at LA. CONST. of 1913, art. 9 and LA. CONST. of 1898, art. 9, and currently codified as amended at LA. CONST. art. 1, § 16).

248. See *Duncan*, 391 U.S. at 161 (“In 49 of the 50 States crimes subject to trial without jury . . . are [misdemeanors] punishable by no more than one year in jail.”). New Hampshire’s constitution, like Louisiana’s, did not expressly protect the right to jury trial in noncapital criminal cases. See N.H. CONST. pt. 1, art. 16 (“Nor shall the legislature make any law that shall subject any person to a capital punishment . . . without trial by jury.”) (emphasis added). Nonetheless, New Hampshire courts had long interpreted the state constitution’s “law of the land” clause to protect a defendant’s right to jury trial even in noncapital criminal cases. See, e.g., *State v. Gerry*, 38 A. 272, 272 (N.H. 1896) (“It has never been

its constitutional guarantee of the right to criminal jury trial by providing that “[c]ases in which the punishment is not necessarily imprisonment at hard labor or death, shall be tried by the court without a jury or by a jury less than twelve in number.”²⁴⁹

The *Duncan* case arose when Gary Duncan, a 19 year-old African-American, intervened in a street confrontation between two of his young relatives, a nephew and cousin, and four white boys.²⁵⁰ Each of the boys involved was about twelve years old; all attended the same public school, which had just recently been desegregated by order of a federal district court.²⁵¹ Duncan was charged with simple battery, allegedly for slapping one of the white boys—the stepson of the local justice of the peace—on the arm.²⁵² Under Louisiana law, simple battery was then classified as a misdemeanor, punishable by a maximum of two years imprisonment and a \$300 fine.²⁵³ Although Duncan sought a jury trial, the Louisiana state courts refused, holding that “because the Louisiana Constitution grants jury trials only in cases in which capital punishment or imprisonment at hard labor may be im-

denied or doubted that by this article trial by jury . . . is secured to the defendant in all criminal cases without exception.”); accord *Copp v. Henniker*, 55 N.H. 179, 195 (1875). New Hampshire’s “law of the land” clause provides: “No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land . . .” N.H. CONST. pt. 1, art. 15.

249. LA. CONST. of 1921, art. 7, § 41 (previously codified at LA. CONST. of 1913, art. 9 and LA. CONST. of 1898, art. 9). This qualification was removed in 1974, when Louisiana adopted its current state constitution. See Lee Hargrave, *Declaration of Rights of Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 55–57 (1974) (discussing changes in Louisiana state constitutional right to criminal jury trial that were implemented by the 1974 Louisiana Constitution). As amended again in 1998, Louisiana’s constitution now provides:

A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, all of whom must concur to render a verdict.

LA. CONST. art. 1, § 17(A) (as amended in 1998); see also La. Acts 1997, No. 1502, § 1 (1998) (amending 1974 constitution to require six-member juries to achieve unanimity).

250. *Duncan v. Perez*, 445 F.2d 557, 558 (5th Cir. 1971).
 251. *Id.*
 252. *Id.* at 559. This allegation was disputed by Duncan and his relatives, who each testified at Duncan’s trial that Duncan had not slapped the young white boy, but rather had merely touched him. *Duncan*, 391 U.S. at 147. It was undisputed that the white boy was not hurt, and displayed no bruise minutes after the incident. *Duncan*, 445 F.2d at 560.
 253. See *Duncan*, 391 U.S. at 146 & n.1 (citing LA. REV. STAT. 14:35 (1950)).

posed," Duncan did not have a state constitutional right to a jury trial.²⁵⁴

Following a nonjury trial before a local justice of the peace, Duncan was convicted of simple battery and sentenced to two months in prison and a fine of \$150.00, with an additional twenty days in prison if the fine was not paid.²⁵⁵ In an unpublished summary disposition, the Louisiana Supreme Court refused to review Duncan's case.²⁵⁶

On certiorari, the United States Supreme Court "incorporated" the right to jury trial in state criminal cases into the Fourteenth Amendment, and reversed Duncan's conviction.²⁵⁷ In holding that states were required to provide jury trials in serious criminal cases, the Supreme Court noted that "[t]he laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so."²⁵⁸ At the same time, the *Duncan* Court also acknowledged the existence of "a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States."²⁵⁹ While declining to specify "the exact location of the line between petty offenses and serious crimes," the *Duncan* Court stated that crimes punishable by more than one year in prison would be presumed to be sufficiently "serious" to implicate the constitutional right to jury trial.²⁶⁰ In so concluding, the Court noted that Louisiana was

254. *Id.* at 146.

255. *See id.*; *Duncan*, 445 F.2d at 559. The justice of the peace who convicted Duncan did not issue a written opinion in the case.

256. *State v. Duncan*, 195 So. 2d 142 (La. 1967) (summary disposition), *rev'd*, *Duncan*, 391 U.S. 145.

257. *Duncan*, 391 U.S. at 149-50 ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee. Since we consider the appeal before us to be such a case, we hold that the Constitution was violated when appellant's demand for jury trial was refused.") (footnotes omitted).

258. *Id.* at 154.

259. *Id.* at 159; *see also id.* at 160 ("So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions."); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966) (holding that jury trial is not required for trials of "petty offenses" carrying possible penalties up to six months); Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 981 (1926) ("[S]o far as history is a guide those multitudinous infractions of the detailed rules of modern society which we significantly group as police regulations need not be enforced with all the paraphernalia of jury trial.")

260. *See Duncan*, 391 U.S. at 161-62. In a subsequent case, the Court determined "that no offense can be deemed 'petty' for purposes of the right to trial by jury

already the only jurisdiction that did not already provide a jury trial in all such cases.²⁶¹

Thus, at most, *Duncan's* "incorporation" of the right to criminal jury trial changed the substantive law of only one state—Louisiana—by requiring that state to provide jury trials in certain "serious" criminal cases involving crimes punishable by more than one year in prison, but less than hard labor. Yet, for three reasons, even this conclusion may overstate the practical significance of the Supreme Court's decision to "incorporate" the right to criminal jury trial in *Duncan*.

First, as a practical matter, even prior to *Duncan*, jury trials were ordinarily provided to most criminal defendants facing felony charges in Louisiana. Notably, the Louisiana Constitution of 1921 did *not* prohibit jury trials in such cases. Rather, it provided that "cases in which the penalty is not necessarily imprisonment at hard labor, or death, shall be tried by the court without a jury *or by a jury less than twelve in number.*"²⁶² In a separate provision, the Louisiana Constitution of 1921 formerly provided that such cases could be tried before "bob-tailed jur[ies] of five with unanimous consent required."²⁶³ Moreover, because conviction for the vast majority of felonies in pre-*Duncan* Louisiana carried with it the potential for a sentence of imprisonment at hard labor, Louisiana courts had held that a jury trial was required in virtually all non-misdemeanor cases.²⁶⁴

where imprisonment for more than six months is authorized." *Baldwin v. New York*, 399 U.S. 66, 69 (1970).

261. See *Duncan*, 391 U.S. at 161 & n.33 ("In 49 of the 50 States crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail." (citing applicable statutes and cases)).

262. LA. CONST. of 1921, art. 7, § 41 (emphasis added) (previously codified at LA. CONST. of 1913, art. 9 and LA. CONST. of 1898, art. 9). This language does not appear in the current Louisiana Constitution, which was ratified in 1974. See *supra* note 249; see also Hargrave, *supra* note 249, at 55–57 (1974) (discussing changes in Louisiana state constitutional right to criminal jury trial that were implemented by the 1974 Louisiana Constitution).

263. Hargrave, *supra* note 249, at 56 & n.300 (citing LA. CONST. of 1921, art. 7, § 41) (discussing La. Acts 1997, No. 1502, § 1 (approved by public referendum Oct. 3, 1998, effective Nov. 5, 1998)). A modified version of this language was carried over into article 1, section 17(A) of the Louisiana Constitution. See *supra* note 249. As amended in 1998, article 1, section 17(A) now requires a six-member jury in a criminal case to achieve unanimity before a judgment on the jury's verdict may be rendered.

264. Under pre-*Duncan* Louisiana law, crimes that were punishable by "imprisonment with or without hard labor" were called "relative felonies," and had been held to require a jury trial even where the actual sentence imposed did not include hard labor. See, e.g., *State v. Green*, 26 So.2d 693, 694 (La. 1946) ("According to section 41 of article VII of the [1921] Constitution a prosecution for theft of property of a value exceeding \$20 but less than \$100, being punishable by imprisonment with or without hard labor, is triable by a jury of 5 members, unless the defendant waives his right to the trial by jury . . ."); see also, e.g., *State v. Gable*,

Second, although Louisiana's constitutional protection for jury trial in criminal cases lagged behind that offered by the other forty-nine states, this gap was already beginning to close by the time *Duncan* was decided. In 1973, just five years after *Duncan*, Louisiana held a constitutional convention to replace its outdated constitution of 1921. At this convention, "the framers of the [new] state constitution . . . ma[d]e it clear that the state constitutional guarantee of the right to a jury in criminal cases was intended to incorporate then-existing federal precedents."²⁶⁵ Consistent with both federal precedent and its framers' intentions, the Louisiana Constitution of 1974 now guarantees the right of jury trial in all criminal cases where the defendant is subject to punishment by more than six months of imprisonment.²⁶⁶ After *Duncan*, of course, Louisiana would have been bound under the Fourteenth Amendment to comply with applicable federal precedents even if it had not codified those federal precedents in its new state constitution. Nonetheless, nothing in the Fourteenth Amendment required Louisiana to lend its own imprimatur to the constitutional doctrine set forth in those federal precedents, or to codify that doctrine into the Louisiana Constitution.²⁶⁷ For that reason, Louisiana's voluntary decision to do so in 1974 does manifest the state's endorsement, albeit belatedly, of *Duncan's* substantive principle that every person accused of a serious crime who is potentially subject to more than six months imprisonment is entitled to receive a trial by jury.

Third, it should be noted that the *Duncan* case itself was more than a run-of-the-mill "simple battery" case. Rather, the case received

12 So. 2d 809, 810 (La. 1943) (holding that where defendant charged with theft of property worth \$35 faced potential sentence of imprisonment, with or without hard labor, for not more than two years, "it is clear that defendant was properly tried by a jury of five" (citing LA. CONST. of 1921, art. 7, § 41)).

265. John Devlin & David Hilburn, *Louisiana Constitutional Law*, 52 LA. L. REV. 575, 600-01 & n.120 (1992) (citing VII Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts 1184 (1977)); accord *id.* (noting that the records of the 1973 Louisiana Constitutional Convention "reflect[] the intent of the drafters that the criminal jury guarantee of the state constitution track the substantive requirements of *Duncan v. Louisiana*, 391 U.S. 145 (1968), among other federal precedents").
266. See LA. CONST. art. 1, § 17(A) (amended 1998) ("A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, all of whom must concur to render a verdict."). This provision codifies the federal precedents announced in *Baldwin v. New York*, 399 U.S. 66, 69 (1970), which held that a jury trial is required for all crimes punishable by more than six months imprisonment, and *Ballew v. Georgia*, 435 U.S. 223 (1978), which held that a criminal jury must consist of at least six members.
267. Compare, e.g., LA. REV. STAT. ANN. 14:32.9 (Supp. 2004) (enacted 1997) (containing an unenforceable provision purporting to prohibit "partial birth abortion" procedure, which remains on books notwithstanding the decision of United States Supreme Court in *Stenberg v. Carhart*, 530 U.S. 914 (2000)).

extraordinarily heavy attention in its time, because it was widely perceived as a proxy battle over the federal courts' enforcement of school desegregation in Louisiana.²⁶⁸ The case also produced substantial satellite litigation, primarily under the Equal Protection Clause.²⁶⁹ Indeed, the case was so politically and racially charged, and so visible, that the Louisiana legislature immediately responded to the Supreme Court's decision in *Duncan* by reducing the maximum sentence for simple battery from two years to six months, seemingly in order to force Duncan to face retrial without a jury.²⁷⁰ Ultimately, a federal district judge enjoined the District Attorney of Plaquemines Parish, Louisiana, from further prosecuting Duncan, after finding that the entire prosecution had been instituted "in bad faith and for purposes of harassment," and that the retrial of Duncan would "deter and suppress the exercise of federally secured rights by Negroes in Plaquemines Parish."²⁷¹

Undoubtedly, Gary Duncan was a victim of invidious racial discrimination perpetrated by a vindictive local government under color of state law. In this regard, Duncan's equal protection claim was virtually archetypal, and it is altogether fitting that he prevailed in advancing that claim.²⁷² At the same time, it must be noted that the "incorporation" of the right to criminal jury trial in *Duncan* did not end the racial harassment that Duncan was made to endure. Nor, it

268. See, e.g., *Duncan v. Perez*, 321 F. Supp. 181, 184-85 (E.D. La. 1970), *aff'd*, 445 F.2d 557 (5th Cir. 1971) ("The various stages of the Duncan and Sobol cases have been thoroughly publicized in the New Orleans papers Not only did the charge against him relate to the occasional racial violence that accompanied the integration of the Boothville-Venice School, the civil rights overtones of the case were underscored by the participation of civil rights attorneys, by the appeal to the Supreme Court of the United States, and by the arrest of [Duncan's attorney] and the extensive proceedings which followed.").

269. For further insight into the racial bitterness that permeated this and related proceedings, see *id.*; *Sobol v. Perez*, 289 F. Supp. 392 (E.D. La. 1968); *United States v. Plaquemines Parish Sch. Bd.*, 291 F. Supp. 841 (E.D. La. 1967), *aff'd*, 415 F.2d 817 (5th Cir. 1969). During the course of Duncan's simple battery prosecution, Duncan was subjected to multiple arrests, repeated resettings of unusually high pre-conviction bail, an unlawful demand for a double appeal bond, prejudicial comments by the prosecutor and the state trial judge, and the arrest of his chief counsel on a baseless charge of the unlawful practice of law. *Duncan v. Perez*, 445 F.2d 557, 559 n.3 (5th Cir. 1971).

270. *Duncan*, 445 F.2d at 559 n.2.

271. *Duncan*, 321 F. Supp. at 184. In particular, the federal district court found that:

If Duncan were required to face retrial, it would constitute an unmistakable message to Negroes in Plaquemines Parish that it is unprofitable to step outside familiar patterns and to seek to rely on federal rights to oppose the policies of certain parish officials. The destructive effect on the exercise of federal rights could not be corrected by Duncan's possible subsequent success in state or federal court.

Id. at 185.

272. For further discussion of the relationship between "incorporation" and equal protection, see Katkin, *supra* note 71.

would appear, did it change the substantive law of any state other than Louisiana in any way. Even in Louisiana, as a practical matter, *Duncan's* "incorporation" of the Sixth Amendment right to criminal jury trial extended that right only to a small class of minor felony cases in which jury trials were not already being provided in Louisiana in 1968. Moreover, since Louisiana adopted its current constitution in 1974, the right to jury trial has been guaranteed by the Louisiana Constitution in every criminal case in which it is protected under *Duncan*. Today, the constitution of every state protects the right to jury trial in every criminal case in which the same right is protected by "incorporation" of the Sixth Amendment.

There are several respects, however, in which the scope and definition of the right to criminal jury trial does continue to vary from state to state. The major subjects of continued variation are jury waiver rights, jury size, and juror unanimity requirements.

Since at least 1908, federal courts have permitted criminal defendants to waive the right to jury trial.²⁷³ Although the states have not been unanimous on this point, "incorporation" has not affected a criminal defendant's right to waive a jury trial in state court. Today, North Carolina is the only state in which a criminal defendant cannot waive a jury trial.²⁷⁴ However, only ten states—Colorado, Connecticut, Illinois, Louisiana, Maryland, Minnesota, New Hampshire, Ohio, Oklahoma, and West Virginia—follow the federal approach of vesting the defendant with an absolute right to waive a jury trial.²⁷⁵ Nineteen states—Alabama, Alaska, Arizona, Delaware, Indiana, Iowa, Kansas, Kentucky, Nevada, New Mexico, North Dakota, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin, and Wyoming—require the consent of both the prosecutor *and* the court for a criminal defendant to waive a jury trial.²⁷⁶ The remaining twenty states require the consent of either the prosecutor *or* the court for a criminal defendant to waive a jury trial.²⁷⁷ "Incorporation" of the Sixth Amendment right to criminal jury trial has never been held to vest state criminal defendants with the same unilateral right to waive jury trial enjoyed by federal criminal defendants.

Since the late nineteenth century, the Supreme Court has held that the Sixth Amendment fixes the size of federal juries at twelve

273. *Dickinson v. United States*, 159 F. 801 (1st Cir. 1908), *cited in* *Patton v. United States*, 281 U.S. 276, 293-96 (1930). In *Patton*, the Supreme Court overruled its earlier decision in *Thompson v. Utah*, 170 U.S. 343 (1898), which had held that the Sixth Amendment did not permit waiver of the right to trial by jury in a federal prosecution.

274. V. HALE STARR & MARK McCORMICK, *JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS* § 2.3 (2d ed. 1993).

275. *Id.* § 2.3, at 40 & n.2.

276. *Id.* § 2.3, at 40 & n.1.

277. *Id.* § 2.3.

members.²⁷⁸ In practice, the twelve member federal jury dates back farther than the Bill of Rights.²⁷⁹ Despite “incorporating” the Sixth Amendment right to criminal jury trial, however, the Court has never incorporated the requirement that a jury consist of twelve jurors. In *Williams v. Florida*,²⁸⁰ the Court upheld a Florida statute providing for a six-person jury in serious criminal cases.²⁸¹ Today, thirty-four states allow juries of fewer than twelve in some courts in criminal actions.²⁸²

Similarly, since the decision of *Patton v. United States*²⁸³ in 1930, unanimity in a twelve-member federal jury has been required for a conviction. Yet even after “incorporating” the right to criminal jury trial, the Supreme Court has never required unanimity in state juries. In *Apodaca v. Oregon*,²⁸⁴ the Court upheld a conviction entered on a ten-to-two jury vote. In *Johnson v. Louisiana*,²⁸⁵ it upheld a nine-to-three conviction. The Court in *Apodaca* and *Johnson*—decided the same day—could not agree on *why* these non-unanimous verdicts passed constitutional muster. Eight of the nine Justices who decided the cases agreed that juror unanimity requirements in state criminal cases should track those in federal cases. However, four Justices argued that unanimous verdicts should no longer be required even in

278. *Thompson*, 170 U.S. at 349–50. Today, however, federal criminal defendants may waive their right to a twelve-member jury and stipulate in writing to a lesser number. FED. R. CRIM. P. 23(a).

279. See 2 STORY, *supra* note 229, § 1772.

280. 399 U.S. 78 (1970).

281. *Id.* at 98–101. *But see* *Ballew v. Georgia*, 435 U.S. 223, 230–33 (1978) (striking down five-member state jury as violating Due Process Clause). It is not clear under what principle a six-member state jury conforms with the due process required by the Fourteenth Amendment but a five-member state jury does not. See STARR & MCCORMICK, *supra* note 274, § 1.1, at 7–8 (“Although the Court unanimously agreed in *Ballew* that a Georgia criminal trial to a jury of five persons deprived the defendant of his right to trial by jury under the sixth and fourteenth amendments, the Court did not agree on a reason for a constitutional distinction between a six-person and a five-person jury [the empirical studies cited in Justice Blackmun’s *Ballew* concurrence] tended to undermine the foundation of *Williams* rather than constitute a foundation for the distinction in *Ballew*.”).

282. STARR & MCCORMICK, *supra* note 274, § 2.1, at 39 & n.4 (citing NAT’L CENTER FOR STATE COURTS, FACETS OF THE JURY SYSTEM: A SURVEY 5 (1976) [hereinafter NAT’L CENTER FOR STATE COURTS]). The States are Alaska, Arizona, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. *Id.* at 41–43. In North Dakota, no statute authorizes juries to be smaller than twelve. *Id.* at 44.

283. 281 U.S. 276, 288 (1930).

284. 406 U.S. 404 (1972).

285. 406 U.S. 356 (1972).

federal jury trials, while four argued that unanimity should be required in both state and federal trials.

In casting the deciding vote in both cases, Justice Powell established that the Sixth Amendment requires unanimity in federal jury trials, but the Fourteenth Amendment does not require unanimity in state jury trials.²⁸⁶ This bifurcated rule remains the law today, and has been endorsed by Chief Justices Burger and Rehnquist.²⁸⁷

Today, only four states permit nonunanimous verdicts in criminal cases.²⁸⁸ The constitutions of two other states permit the legislature to adopt nonunanimous verdicts in non-felony criminal cases.²⁸⁹ Although a substantial supermajority of states requires unanimity, the Supreme Court has never imposed this requirement on outlying states. The Court has never reversed any state criminal conviction obtained by a non-unanimous jury verdict, regardless of the closeness of the jury vote.

The Supreme Court, after *Duncan*, continued to define what aspects of the right to jury trial were "incorporated" against the states. In a few instances, the Court disallowed jury procedures that were being used in only one state or city.²⁹⁰ More often, the Court found no violation, even when reviewing practices unique to one jurisdiction.²⁹¹ Thus, "incorporation" of the Sixth Amendment right to criminal jury

286. *Apodaca*, 406 U.S. at 369-71 (Powell, J.).

287. See *Crist v. Bretz*, 437 U.S. 28, 39 (1978) (Burger, C.J., dissenting) ("[C]onstitutional guarantees are trivialized by the insistence on mechanical uniformity between state and federal practice. There is, of course, no reason why the state and federal rules must be the same."); *accord id.* at 40 (Powell, J., dissenting).

288. STARR & McCORMICK, *supra* note 274, § 2.2, at 40 & n.4 (citing NAT'L CENTER FOR STATE COURTS, *supra* note 282, at 9). The states are Louisiana, Oklahoma, Oregon, and Texas. See LA. CONST. art. I, § 17; OKLA. CONST. art. II, § 19; OR. CONST. art. I, § 11. The Texas Constitution contains no provision specifically authorizing nonunanimous criminal juries. See TEX. CONST. art. I, § 10 ("In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury.").

289. IDAHO CONST. art. I, § 7 (requiring five-sixths verdict in misdemeanor cases); MONT. CONST. art. 1, § 24 (requiring two-thirds verdict in misdemeanor cases).

290. See *Burch v. Louisiana*, 441 U.S. 130 (1979) (holding that six member non-unanimous juries, used only in Louisiana, violate Fourteenth Amendment); *Baldwin v. New York*, 399 U.S. 117 (1970) (holding that mandatory bench trials for crimes with sentences potentially exceeding six months, by then used only in New York City, violate Fourteenth Amendment).

291. See, e.g., *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989) (holding that jury not required in trial of a DUI charge, even though conviction would require a mandatory jail term of at least two days); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (holding that state juvenile criminal proceedings need not offer jury trials); *Ludwig v. Massachusetts*, 427 U.S. 618 (1976) (holding that "two-tier" trial system in state court permitting trial by jury only in a de novo trial following appeal does not violate Fourteenth Amendment, even though identical system in federal court was previously held to violate Sixth Amendment in *Callan v. Wilson*, 127 U.S. 540 (1888)).

trial, which might have heralded significant change in the substantive law of a great many states, ended up changing the law of a small number of states in a small class of cases.

The Supreme Court in *Duncan* predicted that “[i]t seems very unlikely to us that our decision today will require widespread changes in state criminal processes.”²⁹² Had it subsequently “incorporated” the federal jury size or unanimity requirements, it would have undermined its own prediction. Instead, the Court made its prediction come true.²⁹³

F. Notice of Charges

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.”²⁹⁴ The requirement that criminal defendants receive prompt notice of the charges against them has long been understood as an essential element of due process of law.²⁹⁵ Indeed, the requirement that a criminal defendant is entitled to receive notice of the charges against her is sufficiently well-settled in state and federal criminal procedure that the Supreme Court has never reversed a state criminal conviction solely for denying this right. The Court did, however, express dicta in *Oliver*, stating that the right to be informed of the nature and cause of the accusation is “incorporated” via the Fourteenth Amendment as a limit on state power.²⁹⁶

292. *Duncan v. Louisiana*, 391 U.S. 145, 158 n.30 (1968).

293. Even *Duncan* itself did not affect many criminal trials. As the Court noted in *Duncan*, “every American State, including Louisiana, uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury’s verdict.” *Id.* at 150 (emphasis added).

294. U.S. CONST. amend. VI.

295. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648–49 (2004) (“For more than a century the central meaning of procedural due process has been clear: ‘Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.’ It is equally fundamental that the right to notice and an opportunity to be heard ‘must be granted at a meaningful time and in a meaningful manner.’” (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))). Before the Civil War, the Supreme Court originally developed this interpretation of the Fifth Amendment’s Due Process Clause in civil cases, rather than criminal cases. This may be due to the fact that the Sixth Amendment’s express notice requirement applied directly to criminal cases, whereas only due process applied in civil cases. See, e.g., *Boswell’s Lessee v. Otis*, 50 U.S. (9 How.) 336, 350 (1850) (“No principle is more vital to the administration of justice, than that no man shall be condemned in his person or property without notice, and an opportunity to make his defence.”); accord *Nations v. Johnson*, 65 U.S. (24 How.) 195, 203 (1860).

296. *In re Oliver*, 333 U.S. 257, 273 (1948) (“A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence . . .”).

In 1948, when *Oliver* was decided—and still today—forty-seven state constitutions expressly guaranteed the right of a criminal defendant to be informed of the nature and cause of the accusation against him. Two other states, Nevada²⁹⁷ and North Dakota,²⁹⁸ have always expressly protected the same right by statute. Idaho, the only state with no express constitutional or statutory guarantee, has always protected the right of criminal defendants to be informed of the charges against them as an element of the Idaho Constitution's due process clause.²⁹⁹

The *Oliver* case itself arose in Michigan, a state whose constitution then (as now) guaranteed that “[i]n every criminal prosecution, the accused shall have the right . . . to be informed of the nature of the accusation.”³⁰⁰ Michigan courts both before and after *Oliver* always

297. NEV. REV. STAT. § 173.075(1) (2004) (“The indictment or the information must be a plain, concise and definite written statement of the essential facts constituting the offense charged.”). The Nevada statute also provides:

The indictment or information must state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission is not a ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

Id. § 173.075(3). Predecessor versions of these statutes have been in effect since Nevada achieved statehood in 1864. *See, e.g.*, *State v. McKiernan*, 30 P. 831, 832 (Nev. 1882) (finding that an indictment is “sufficient if the offense is ‘clearly and distinctly set forth in ordinary and concise language, in such a manner as to enable a person of common understanding to know what is intended.’”) (citation omitted); *accord State v. Raymond*, 117 P. 17, 18 (Nev. 1911); *State v. Switzer*, 145 P. 925, 926 (Nev. 1914).

298. Two years before North Dakota attained statehood, it enacted a Code of Criminal Procedure containing all of the rights guaranteed by the Sixth Amendment. N.D. CODE CRIM. P. of 1877, § 11, *currently codified at* N.D. CENT. CODE § 29-01-06 (2003). Included in this code, which has remained in effect ever since, was a guarantee that: “In all criminal prosecutions the party accused has the right . . . [t]o demand and be informed of the nature and cause of the accusation.” *Id.* § 29-01-06(2). This provision has never been understood to mean anything different than the identical provision in the Sixth Amendment.

299. IDAHO CONST. art. I, § 13 (“No person shall . . . be deprived of life, liberty or property without due process of law.”). *See, e.g.*, *State v. Kouni*, 76 P.2d 917 (Idaho 1938) (finding that a law authorizing commissioner of law enforcement to suspend driver's license after involvement in accident resulting in personal injury, without notice or hearing, violated due process); *Bear Lake County v. Budge*, 75 P. 614 (Idaho 1904) (finding that due process requires, as a condition precedent to a judicial determination affecting right to life, liberty, or property, that personal service of process be obtained when practicable; constructive service can be provided only when actual service is impracticable).

300. The *Oliver* case arose under article II, section 19 of the Michigan Constitution of 1908. That constitution was later replaced in 1963. However, the provision at issue in *Oliver* was retained in the 1963 constitution, and is now codified at MICH. CONST. art. 1, § 20.

enforced this constitutional requirement.³⁰¹ Consistent with this state constitutional requirement, the defendant in *Oliver* did, in fact, receive clear notice of the nature and cause of the contempt-of-court charge brought against him in state court.³⁰² The defendant never claimed otherwise, and the United States Supreme Court's reference to the "incorporation" of this right in the *Oliver* case was pure dicta.

In the half-century since *Oliver* was decided, the "incorporation" of the criminal defendant's right to receive notice of charges has led the Supreme Court to reverse state criminal convictions in only one subsequent case—*Cole v. Arkansas*,³⁰³ in which several labor unionists were charged with unlawfully assembling to promote the use of violence in connection with a labor dispute. At trial in state court, the defendants were convicted, notwithstanding the prosecution's failure at trial to present any evidence pertaining to one essential element of the offense.³⁰⁴ On appeal, the Arkansas Supreme Court did not reach the defendants' claim that the evidence presented at trial had been insufficient. Instead, the court affirmed the convictions on the alternative ground that even if the offense element at issue had not been proved, the record evidence was sufficient to support convictions for a related offense with which the defendants had not been charged.³⁰⁵

On certiorari, the United States Supreme Court reversed, holding that "[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."³⁰⁶ Linking this due process principle to the more specific "notice of charges" language of the Sixth Amendment, the *Cole* Court opined that "[n]o principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all

301. See, e.g., *People v. Traughber*, 439 N.W.2d 231, 234 (Mich. 1989) ("An information must be specific for two reasons: it affords the defendant due notice of the charges against him and protection against double jeopardy should he be retried [T]he dispositive question is whether the defendant knew what acts he was being tried for so he could adequately put forth a defense.") (citation omitted); *People v. Hamilton*, 38 N.W. 921 (Mich. 1888) (dismissing information for failing to specifically describe acts that defendant was alleged to have committed); *Enders v. People*, 20 Mich. 233 (1870) (holding that an indictment that describes the offense in the generic words of the statute is constitutionally insufficient if it fails to aver any fact essential to the description of the offense).

302. *In re Oliver*, 333 U.S. 257, 259 (1948) (describing judge's statement to defendant that defendant was being charged with contempt-of-court because defendant's grand jury testimony did not "jell" with testimony of other grand jury witnesses).

303. 333 U.S. 196 (1948).

304. *Id.* at 198–200.

305. *Cole v. State*, 202 S.W.2d 770, 771 (Ark. 1947), *rev'd*, 333 U.S. 196 (1948).

306. *Cole*, 333 U.S. at 201.

courts, state or federal.”³⁰⁷ In essence, the *Cole* Court held that where the prosecution fails to prove the offense for which a criminal defendant was charged, the United States Constitution bars conviction of the defendant for a different offense for which the defendant was not charged. While this holding seemingly changed the substantive law of Arkansas, it does not appear to have changed the law of any other state. Moreover, the *Cole* Court’s discussion of “procedural due process” suggests that the Court might have reached the same conclusion purely on that basis, even if the Court had never specifically “incorporated” the Sixth Amendment right of a criminal defendant to be informed of the nature and cause of the accusation.³⁰⁸ Thus, the “incorporation” of the Sixth Amendment right to “notice of charges” has, at most, changed the substantive law of one state in one particular respect.

G. Right To Counsel

In 1669, Rhode Island became the first government in the English-speaking world to protect the right of criminal defendants to the assistance of counsel when it passed a statute declaring that “it shall be the lawful privilege of any man that is indicted, to procure an attorneye [sic] to plead any poynt [sic] of law that may make for the clearing of his innocencye [sic].”³⁰⁹ By the time of the American Revolution, the right to counsel was well-established in all the colonies.³¹⁰

Inexplicably, George Mason’s influential Virginia Declaration of Rights of 1776 made no reference to the right to counsel. Today, Virginia’s Constitution of 1971 still makes no reference to this right, which has been expressly protected by the constitutions of every other state.³¹¹

307. *Id.* (citing *Oliver*, 333 U.S. at 273).

308. *Id.*

309. LEVY, *supra* note 48, at 356 (quoting 2 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND (1636–1792) 238–39 (John Russell Bartlett ed., 1856)). England did not pass its first statute guaranteeing the right to counsel until 1836. WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8 (1955). That statute provided that “all persons tried for felonies should be admitted, after the close of the case for the prosecution, to make full answer and defence thereto, by counsel learned in the law, or by attorney in courts where attorney practice as counsel.” *Id.* at 11 (citing 6 & 7 W. 4, ch. 114, § 1 (1836)).

310. See BEANEY, *supra* note 309, at 14–18.

311. See *id.* at 81 & app. at 237. Three different verbal formulations of this right predominate the state constitutions. Nine states—Alaska, Hawaii, Iowa, Louisiana, Michigan, Minnesota, New Jersey, Rhode Island, and West Virginia—use the phrasing of the Sixth Amendment: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI. Nineteen states—Alabama, Arkansas, Connecticut, Delaware, Florida, Indiana, Kentucky, Massachusetts, Maine, Mississippi, New

The omission of the right to counsel from Virginia's series of constitutions³¹² did not signify disapproval of the right. In 1786, before the United States Bill of Rights was drafted, Virginia enacted a statute guaranteeing criminal defendants the right to retain counsel for assistance at trial.³¹³ Two years later, when it ratified the United States Constitution, Virginia proposed a list of twenty rights that ought to be protected by the forthcoming United States Bill of Rights.³¹⁴ The eighth of these suggestions was that "[i]n all criminal and capital prosecutions a man hath a right to . . . be allowed counsel in his favor" ³¹⁵ In fact, Virginia was one of only two of the thirteen original states to propose that the United States Bill of Rights should contain a provision protecting the right of criminal defendants to counsel.³¹⁶

By the early twentieth century, Virginia had widened its statutory protection of the right to counsel to include a right to appointed counsel for indigent felony defendants.³¹⁷ Also by the early twentieth century, the Virginia Supreme Court had established that the right to counsel was protected by the Virginia Constitution's "law of the land"

Hampshire, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, and Wisconsin—use a form employed in some of the early state constitutions, those of Massachusetts and Pennsylvania in particular, to the effect that the accused shall have the right "to be fully heard in his defence by himself, or his counsel, at his election." MASS. CONST. dec. of rts. art. XII. Eighteen states—Arizona, California, Colorado, Idaho, Illinois, Kansas, Missouri, Montana, North Dakota, Nebraska, Nevada, New Mexico, New York, Ohio, South Dakota, Utah, Washington, and Wyoming—adhere to an alternate form pioneered in New York and Delaware providing that "[i]n any trial in any court whatever the accused shall be allowed to appear and defend in person and with counsel." N.Y. CONST. art. I, § 6. Three states use their own unique phrasing. GA. CONST. art. I, § 1, ¶ 14 ("Every person charged with an offense against the laws of this state shall have the privilege and benefit of counsel."); MD. CONST. dec. of rts. art. XXI ("In all criminal prosecutions, every person charged with crime hath a right . . . to be allowed counsel."); N.C. CONST. art. I, § 23 ("In all criminal prosecutions, every man has the right . . . to have counsel for his defense."). To this Author's knowledge, no significance has ever been attached by any court to these verbal differences.

312. Virginia ratified new constitutions in 1776, 1865, 1870, 1902, and 1971.

313. BEANEY, *supra* note 309, at 19 & n.52 (citing 12 STATUTES AT LARGE OF VIRGINIA 343 (Hening ed. 1823)).

314. *Id.* at 22.

315. *Id.* (citing 3 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 658 (2d ed. 1901)).

316. *Id.* The other original state that proposed such a provision was North Carolina. *Id.*

317. VA. CODE ANN. §§ 19.2-157, 19.2-159 (1995) (enacted in 1950); *see also* 1916 Va. Acts ch. 373, *codified at* VA. CODE § 3518 (1942) (repealed 1950) (authorizing a trial judge to appoint counsel to defend "a poor person charged with an offense that may be punishable by death, or by confinement in the penitentiary for a period of more than ten years, [and] he may direct that a sum of money not to exceed twenty-five dollars shall be paid out of the treasury of such county or city" to compensate appointed counsel).

clause,³¹⁸ and that this right included the right of an indigent criminal defendant to have counsel appointed at his request.³¹⁹

While the states unanimously agreed that the right to retain counsel should be protected, a controversial consequence of the "incorporation" of the right to counsel was the subsequent "incorporation," in *Gideon v. Wainwright*,³²⁰ of the Sixth Amendment requirement that counsel be appointed to represent indigent criminal defendants. Appointment of counsel began not in the federal courts, but rather in those of several states. As early as 1718, Pennsylvania adopted a statute requiring the appointment of counsel in all capital cases.³²¹ In 1750, the practice of appointing counsel to all indigent criminal defendants so requesting was established in Connecticut, though not codified by statute.³²² In 1795, New Jersey provided by statute that courts must "assign to such person, if not of ability to procure counsel, such counsel, not exceeding two, as he or she shall desire."³²³ The practice of Pennsylvania, New Jersey, and Connecticut, however, apparently was not emulated by many other state or federal courts during the eighteenth or nineteenth centuries.³²⁴

The catalyst sparking more courts and legislatures to begin requiring the appointment of council may have been the promulgation in 1930 of the American Law Institute's Model Code of Criminal Proce-

318. VA. CONST. art. I, § 8 ("[I]n criminal prosecutions a man . . . shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers."). See, e.g., *Watkins v. Commonwealth*, 6 S.E.2d 670, 671 (Va. 1940) ("While there is no specific provision in the Constitution of Virginia guaranteeing to persons accused of crime the right to have the assistance of counsel, this court recognized the right to be a fundamental one. It is, we think, one of the rights guaranteed to an accused under our Bill of Rights." (citing *Barnes v. Commonwealth*, 23 S.E. 784, 787 (Va. 1895); VA. CONST. art. I, § 8) (footnote omitted)); accord *Fitzgerald v. Smyth*, 74 S.E.2d 810 (Va. 1953); *Cottrell v. Commonwealth*, 46 S.E.2d 413 (Va. 1948).
319. *Watkins*, 6 S.E.2d at 671 ("It is well settled that courts of record having criminal jurisdiction possess the inherent authority, *independent of statute*, to appoint counsel to defend paupers and other indigent persons charged with crime.") (emphasis added and citations omitted); *Stonebreaker v. Smyth*, 46 S.E.2d 406, 409-10 (Va. 1948) ("The phrase, 'the law of the land,' . . . mean[s] that no person in a criminal case shall be denied the right to the assistance of counsel of his own selection, and that no person indicted for an infamous offense who is financially unable to engage counsel shall be denied the aid of counsel if this fact is brought to the attention of the trial judge.").
320. 372 U.S. 335 (1963). The *Gideon* case arose from Florida.
321. BEANEY, *supra* note 309, at 16 (citing 3 STATUTES AT LARGE OF PENNSYLVANIA 199 (Busch, 1896)).
322. *Id.* (citing 2 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF CONNECTICUT 392 (1795)).
323. *Id.* at 20 (citing *Acts of General Assembly of New Jersey, 1791-96*, at 1012).
324. *But see* *Carpenter v. County of Dane*, 9 Wis. 249 (1859) (finding due process clause of Wisconsin Constitution requires appointment of counsel for indigents charged with felonies).

ture, which contained a provision placing on the trial judge the duty of appointing counsel at the arraignment of one accused of a felony who needed counsel and was without counsel.³²⁵ Shortly after the official draft of the Code began circulating, one federal court declared that “[i]t goes without saying that an accused who is unable by reason of poverty to employ counsel is entitled to be defended in all his rights as fully and to the same extent as is an accused who is able to employ his own counsel to represent him.”³²⁶ In 1938, the United States Supreme Court held that the Sixth Amendment requires the appointment of counsel for indigent defendants in all criminal cases in federal courts.³²⁷ At that time, the Supreme Court declined to extend this requirement to state courts.³²⁸

During the 1930s and 1940s, however, as the appointment of counsel for indigent defendants became entrenched in the federal courts, many states also began to require it. By the late 1940s, seven state supreme courts had construed their state constitutional “right to counsel” provisions to mandate such a requirement.³²⁹ Furthermore, every state, by 1955, had enacted a statute requiring the appointment of counsel in at least some criminal cases.

The least generous statutory provision, enacted in eight states, required the trial court to appoint counsel in capital cases only.³³⁰ Two

325. CODE OF CRIMINAL PROCEDURE § 209 (1930). The Code, in turn, may have been influenced by the local practice in some federal district courts. *See, e.g.*, Local Rule 24 (N.D. Cal. 1926) (“It shall be the duty of every attorney to act as such without compensation whenever he is appointed by the court to act for any person accused of crime who has no other attorney.”).
326. *Downer v. Dunaway*, 53 F.2d 586, 589 (5th Cir. 1931).
327. *Johnson v. Zerbst*, 304 U.S. 458, 463 (“The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of life or liberty unless he has or waives the assistance of counsel.”) (footnote omitted).
328. *See id.* at 463 & n.11 (citing *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833); *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532, 557 (1874)). Both of the cited cases stand for the proposition that the United States Bill of Rights restricts the actions of the United States government but does not directly restrict the states.
329. *See* BEANEY, *supra* note 309, at 82–84 nn.7–16, 20 (citing *People ex rel. Moore v. Hunt*, 16 N.Y.S.2d 25 (App. Div. 1939); *People v. McLaughlin*, 53 N.E.2d 356 (N.Y. 1944); *In re Jingles*, 165 P.2d 12 (Cal. 1946); *People v. Avilez*, 194 P.2d 829 (Cal. Dist. Ct. App. 1948); *Cook v. State*, 172 S.E. 471 (Ga. Ct. App. 1934); *Jones v. State*, 195 S.E. 316 (Ga. Ct. App. 1938); *Batchelor v. State*, 125 N.E. 773 (Ind. 1920); *Bielich v. State*, 126 N.E. 220 (Ind. 1920); *State v. Crosby*, 50 P. 127 (Nev. 1897); *State v. MacKinnon*, 168 P. 330 (Nev. 1917); *State v. Garcia*, 142 P.2d 552 (N.M. 1943); *Alexander v. O’Grady*, 137 Neb. 645, 290 N.W. 718 (1940), *cert. denied*, 311 U.S. 682 (1940)).
330. The eight states were Alabama, Florida, Massachusetts, Mississippi, North Carolina, Pennsylvania, South Carolina, and Texas. *See id.* at 84 & n.24 (citing statutory provisions in effect in 1955). The Pennsylvania provision, PA. CONS. STAT. ANN. §19-783 (Purdon 1930), was the same provision that had been enacted in 1718. STATUTES AT LARGE OF PENNSYLVANIA 199 (Busch, 1896). The Texas provi-

of these eight states, however, began requiring the appointment of counsel in all felony cases between 1955 and 1960.³³¹ Three states required by statute the appointment of counsel in capital cases or cases carrying a potential life sentence,³³² but in one of these states the state supreme court had held that *all* criminal defendants were entitled to appointed counsel under the state constitution's right to counsel clause,³³³ and in another, the normal practice was to appoint counsel in all felony cases, despite the statute's limitation.³³⁴ One state, New Hampshire, required counsel to be appointed to any indigent defendant facing a term of more than three years in prison.³³⁵ Three states authorized the trial judge to appoint counsel on behalf of any indigent criminal defendant, but did not require him to do so.³³⁶

In each of the remaining thirty-seven states, the provision for appointment of counsel for indigent criminal defendants in effect in 1963 was at least as generous as that required by the Supreme Court's decision that year in *Gideon*.³³⁷ As of 1955, nine states had enacted statutes requiring the appointment of counsel for any indigent criminal defendant so requesting, but not requiring that the accused be advised of this right.³³⁸ This approach comports with the minimum required by the Court in *Gideon*. By 1950, however, state courts in at least five of these nine states had ruled that indigent defendants must be in-

sion, TEX. CODE CRIM. PROC. art. 10a (Vernon 1936), had been interpreted by Texas courts to permit a defendant to waive his right to a jury trial *before* being appointed counsel. See *Wilson v. State*, 252 S.W.2d 197 (Tex. Crim. App. 1952).

331. Mass. Sup. Jud. Ct. Gen. R. 10 (1958); TEX. CODE CRIM. PROC. art. 494 (Vernon 1959). Both are cited in Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 19-20 (1962).
332. Maine and Nebraska had such statutes in 1955. See BEANEY, *supra* note 309, at 84 & n.25 (citing statutory provisions in effect in 1955). When Hawaii joined the Union in 1959, its first statute provided for appointment of counsel only in capital cases and cases where a life sentence could be imposed. HAW. REV. L. § 253-5 (1955), cited in *McNeal v. Culver*, 365 U.S. 109, 122 (1961).
333. *Alexander*, 137 Neb. 645, 290 N.W. 718 (interpreting NEB. CONST. art. I, § 11).
334. The practice in Hawaii, both before and after it achieved statehood in 1959, was to appoint counsel in all felony cases. Kamisar, *supra* note 331, at 19 n.91.
335. BEANEY, *supra* note 309, at 84 & n.25 (citing statutory provision in effect in 1955).
336. These states were Maryland, Michigan, and Rhode Island. *Id.* at 84-85 & n.26 (citing statutory provisions in effect in 1955). Michigan, however, beginning in 1946, required by supreme court rule that all Michigan trial courts "advise the accused that he is entitled . . . to have counsel, and that in case he is financially unable to provide counsel that the court will, if accused so requests, appoint counsel for him." *Id.* at 87-88 & n.36 (citing MICH. CT. R. 35-A § 1 (1946)). The rule is quoted in full in *People v. Bumpus*, 94 N.W.2d 854, 855 (Mich. 1959).
337. See Kamisar, *supra* note 331, at 17 (calculating the number thirty-seven).
338. These nine states were Arkansas, Illinois, Indiana, Kentucky, Louisiana, Minnesota, Missouri, Washington, and Wyoming. BEANEY, *supra* note 309, at 85 & n.28 (citing statutory provisions in effect in 1955).

formed of their right to appointed counsel.³³⁹ Thirteen states in 1955 required the appointment of counsel whenever requested, or, when not requested, if the court felt it necessary.³⁴⁰ Fourteen state statutes required the court to advise the accused of his right to have counsel appointed if he is indigent, or to appoint counsel in every case unless the defendant objected.³⁴¹ In one state, Nebraska, the right to appointed counsel had been held by the state supreme court to adhere to all indi-

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339. The Indiana Supreme Court interpreted the right to counsel provision of its constitution, IND. CONST. art. I, § 13, to require that trial courts advise the accused of his right to counsel, and offer counsel to him in "all criminal cases." *Batchelor v. State*, 125 N.E. 773 (Ind. 1920); *Bielich v. State*, 126 N.E. 220 (Ind. 1920). Later, the court clarified that "all criminal cases" included both appeals, *State v. Hilgemann*, 34 N.E.2d 129 (Ind. 1941), and misdemeanor cases, *Bolkovac v. State*, 98 N.E.2d 250 (Ind. 1951). Thus, Indiana provided significantly more protection for the right to counsel than *Gideon* would require. The Louisiana and Kentucky Supreme Courts "interpreted" their statutes to require trial courts to advise all defendants appearing without counsel of their right to have counsel appointed if indigent. *State v. Youchunas*, 174 So. 356 (La. 1937); *Gholson v. Commonwealth*, 212 S.W.2d 537 (Ky. 1948). The Supreme Courts of Illinois and Missouri, in 1948 and 1945, respectively, promulgated court rules requiring that criminal defendants be advised of their statutory right to have counsel appointed. BEANEY, *supra* note 309, at 88 & nn.39-41 (citing court rules).
340. These states were Colorado, Connecticut, Delaware, Georgia, Idaho, New Jersey, New Mexico, Ohio, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin. BEANEY, *supra* note 309, at 85-86 & n.29 (citing statutory provisions in effect in 1955). Of these states, the Georgia and New Mexico courts had interpreted their state constitutions to require the appointment of counsel in all cases unless knowingly waived. *Id.* at 82-83 & nn.10, 15, (citing *Cook v. State*, 172 S.E. 471 (Ga. Ct. App. 1934); *Jones v. State*, 195 S.E. 316 (Ga. Ct. App. 1938); *State v. Garcia*, 142 P.2d 552 (N.M. 1943)). The supreme courts of West Virginia and New Jersey had promulgated court rules containing the same requirement. BEANEY, *supra* note 309, at 88-89 & nn.43-44 (citing court rules). In 1961, the Colorado Supreme Court promulgated a rule requiring the appointment of counsel in all cases. *Kamisar, supra* note 331, at 17 n.77 (citing Colo. R. Crim. P. 44 (1961)).
341. These states were Alaska, Arizona, California, Hawaii, Iowa, Kansas, Montana, Nevada, New York, North Dakota, Oklahoma, Oregon, Utah, and Virginia. BEANEY, *supra* note 309, at 85 & n.27 (citing statutory provisions in effect in 1955, not including Hawaii and Alaska); *Kamisar, supra* note 331, at 17 & nn.76-78 (citing statutory provisions in effect in 1961, including Hawaii and Alaska); see also *McNeal v. Culver*, 365 U.S. 109, 119-22 (1961) (appendix to opinion of Douglas, J.) (cataloguing state law regarding appointed counsel). Professor *Kamisar* notes that Colorado began requiring the appointment of counsel in all cases shortly after the *McNeal* decision, and that Justice Douglas appears to have overlooked Michigan, which already required the appointment of counsel at the time *McNeal* was decided, but which does not appear in Justice Douglas's appendix. *Kamisar, supra* note 331. Interestingly, Virginia, the one state without a right to counsel provision in its constitution, offered by statute the highest level of protection of the right.

gent criminal defendants, though a state statute provided for appointed counsel only in rape and murder cases.³⁴²

Not only did thirty-seven states require appointment of counsel at least for all indigent felony defendants requesting it, but in eight of the remaining thirteen states, the practice of appointing counsel had developed without benefit of any statute or rule of court.³⁴³ Even in Florida, the state from which *Gideon* arose, public defenders had been established locally in Miami, Tampa, and Fort Lauderdale before 1960.³⁴⁴ Thus, by 1963, only in Alabama, Mississippi, North Carolina, South Carolina, and rural Florida, were most indigent criminal defendants charged with non-capital felonies unlikely to be able to obtain appointed counsel. Only in the rural areas of eight other states was there any chance that such defendants might not be able to obtain appointed counsel. For the vast majority of Americans, and even of indigent American non-capital felony defendants, the Supreme Court's decision in *Gideon* did not change the law of their states, or affect their (already established) ability to obtain appointed counsel.³⁴⁵

Moreover, even in the minority of states and regions where *Gideon's* "incorporation" of the Sixth Amendment right to counsel created a new substantive right for indigent criminal defendants, the impact of this new right on state criminal procedure may not be as significant as it first might appear.

For although since *Gideon v. Wainwright* the Supreme Court has required [state and local] government[s] to hire a lawyer for every felony defendant who cannot afford one, the Court has never said how much the government must pay, and it has imposed only the weakest of demands on the kind of the representation the government purchases.³⁴⁶

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342. *Alexander v. O'Grady*, 137 Neb. 645, 290 N.W. 718 (1940) (interpreting NEB. CONST. art. I, § 11).
343. These states were Maine, Maryland, Massachusetts, Michigan, New Hampshire, Pennsylvania, Texas, and Rhode Island. See Kamisar, *supra* note 331, at 67-74 (detailing local practices as explained by prosecutors, judges, and other authorities in the thirteen states lacking appointment statutes covering all felony cases). In these states, defendants in cities were highly likely to receive assistance of counsel on request, though rural defendants were somewhat more likely to fall between the cracks. *Id.* at 18-19. In Michigan, appointment of counsel was guaranteed by state supreme court rule. MICH. CT. R. 35-A § 1 (1946).
344. Kamisar, *supra* note 331, at 20.
345. In the post-*Gideon* era, three states have strongly endorsed the decision by expressly codifying the right to appointment of counsel for indigent criminal defendants in their state constitutions. HAW. CONST. art. 1, § 14 (amended 1968); LA. CONST. art. I, § 13 (ratified 1974); N.H. CONST. pt. I, art. 15 (amended 1966).
346. David A. Sklansky, *Quasi-Affirmative Rights In Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1280 (2002) (footnotes omitted); see also William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 7 (1997) (observing that legislatures dissatisfied with procedural rules fashioned by courts can often resist by reducing the availability of resources needed to take advantage of such rules).

Despite the lack of federal guidance, state courts have begun to set constitutional floors delineating minimum amounts the government must pay to underwrite the defense of an indigent criminal defendant. Thus, in 1984, the Arizona Supreme Court held that Mohave County's practice of assigning legal representation of indigent defendants to the lowest-bidding attorney, without considering the time or expenses that would be necessary to adequately represent the defendants, or the competency of the attorneys, failed to satisfy state (or federal) constitutional requirements.³⁴⁷ The Louisiana Supreme Court followed suit in 1993, holding unconstitutional New Orleans's system under which one typical court-appointed attorney representing indigent defendants had been assigned to seventy active felony cases, and had represented 418 defendants during a seven-month period.³⁴⁸ The attorney's clients were routinely incarcerated for thirty to seventy days before he could meet with them, and the attorney had at least one serious felony case set for trial on every trial date during the seven-month period in question.³⁴⁹ Other state courts—including those of Florida, the state from which *Gideon* arose—have relied upon evidence of grossly overworked attorneys to revamp public defense systems under their jurisdiction.³⁵⁰

Even in *Gideon*, one of the most celebrated and controversial cases of the Warren Court's procedural revolution, the doctrine of "incorporation" did not alter the substantive law of more than a handful of states. Moreover, even in that handful of affected states, the *Gideon* decision appears only to have nudged the law a little bit forward, in the same direction that the states were already moving.

V. CONCLUSION

The "incorporation" against the states of most of the rights set forth in the Fourth, Fifth, and Sixth Amendments is among the most

347. *State v. Smith*, 681 P.2d 1374, 1378–83 (Ariz. 1984) (citing ARIZ. CONST. art. 2, §§ 4, 24; U.S. CONST. amends. V–VI).

348. *State v. Peart*, 621 So. 2d 780, 783–84, 791 (La. 1993) (citing LA. CONST. art. 1, § 13; U.S. CONST. amend. VI).

349. *Id.*

350. *See, e.g., In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1139 (Fla. 1990) (finding that the enormous backlog of appellate cases assigned to public defenders would support state habeas corpus relief for indigent appellants unless new funds were appropriated within 60 days); *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 66–68 (Mo. 1981) (establishing temporary guidelines to solve problem of providing legal assistance to indigent defendants after state fund was exhausted), *cert. denied*, 454 U.S. 1142 (1982). In neither of these two cases did the state courts at issue expressly rely on state constitutional right to counsel clauses. Instead, both courts appear to have conflated state and federal constitutional standards.

celebrated,³⁵¹ and most criticized,³⁵² aspects of the Supreme Court's body of work. This attention is not unwarranted. In two respects, "incorporation" helps ensure certain minimum protection for fundamental civil liberties. First, "incorporation" provides a federal forum for the vindication of what would otherwise be state law rights. In light of the strong federal interest in protecting all persons against invidious discrimination,³⁵³ the availability of an additional, neutral forum in which unpopular individuals can seek adjudication of disputes can only be salutary.³⁵⁴

Second, "incorporation" concentrates in the United States Supreme Court the power to define the minimum level of protection of individual rights required by a particular constitutional provision.³⁵⁵ While

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351. See, e.g., Christopher A. Bracey, *Truth and Legitimacy In the American Criminal Process*, 90 J. CRIM. L. & CRIMINOLOGY 691, 698 (2000) ("The criminal process revolution . . . was the expression of a profound desire to return *truth* and *democratic* principle to America's legal institutions—a deliberate (albeit limited) effort to attain moral redemption and regain institutional legitimacy.").
352. See, e.g., Richard A. Posner, *The Cost of Rights: Implications for Central and Eastern Europe—and for the United States*, 32 TULSA L.J. 1, 7 (1996) (arguing that incorporation "made the criminal justice system cumbersome, expensive—and quite possibly less effective in deterring crime").
353. See, e.g., Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 5 (1976); see also Katkin, *supra* note 71 (developing this theme).
354. See generally Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105–06 (1977) (arguing that state courts often fail to protect the rights of unpopular individuals as forcefully as federal courts); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles"*, 78 VA. L. REV. 1769, 1779–81 (1992) (same); Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 224–25 (1983) (supporting Neuborne's prediction). *But cf.* Craig M. Bradley, *Are the State Courts Enforcing the Fourth Amendment?*, 77 GEO. L.J. 251, 253 (1988) (concluding that "[m]ost states are doing a fairly good job, some states a poor job, and some, deciding most cases by unreported opinions, are hard to evaluate"); Barry Friedman, *Under The Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211 (2004) (arguing that individual rights are best protected when cases that raise both state and federal issues can be litigated in both state and federal court systems). For an opposing perspective, see William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 619–21 (1999) (arguing that elected state judges can be more receptive to rights-based claims than federal judges, because politics keeps judges sensitive to concerns of minority voting blocs).
355. Notably, "incorporation" does not have the countervailing effect of empowering the Supreme Court to set a *maximum* level of protection of individual rights, because states are free to protect rights that are not protected by the Fourteenth Amendment. See, e.g., Justice Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 980 (1985) ("The first ten amendments [to the United States Constitution] establish a foundation for the protection of human liberty. A state may not undermine that foundation, but its constitution may build additional protections above the federal floor."); accord *Commonwealth v.*

this power is potentially transformative, in practice the Court has wielded it quite sparingly. With respect to the rights enumerated in the Fourth, Fifth, and Sixth Amendments, the Court's "conventionalist"³⁵⁶ interpretations have rarely moved ahead of prevailing state practice.³⁵⁷ Indeed, on the handful of occasions in which the Court has sought to ratchet up the minimum level of protection for these rights, it has quickly backed down when faced with criticism or resistance.³⁵⁸ For this reason, the doctrine of "incorporation" has not substantially altered criminal procedure as it exists in the fifty states.³⁵⁹

During the decades that the Bill of Rights has been "incorporated," many state courts have interpreted their state constitutions to protect the rights of criminal suspects and defendants more expansively than the United States Constitution.³⁶⁰ Commentators, including many

Edmunds, 586 A.2d 887, 895 (Pa. 1991) ("Although we may accord weight to federal decisions where they 'are found to be logically persuasive and well reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees,' we are free to reject the conclusions of the United States Supreme Court so long as we remain faithful to the minimum guarantees established by the United States Constitution.") (internal citations omitted).

356. Professor Thomas Merrill uses this term to describe a jurisprudence extremely deferential to precedent, for the purpose of shutting off the courts from being used as a vehicle to achieve social change. See Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 511 (1996) ("When the meaning of an enacted text is not plain, the conventionalist interpreter seeks out not the original meaning but the conventional meaning—the consensus view about the meaning in the legal community of today.").
357. The Court's declaration that indigent criminal defendants are entitled to appointed counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), for example, was consistent with the approach taken by the overwhelming majority of states in 1963. See *supra* section III.F. Although the *Gideon* decision required a handful of states to modify their practice to conform to the national majority, the decision was well-received when delivered and is no longer particularly controversial today.
358. The most significant cases in this regard are *Mapp v. Ohio*, 367 U.S. 643 (1961), which "incorporated" the exclusionary rule for Fourth Amendment violations, and *Miranda v. Arizona*, 384 U.S. 436 (1966), which required state police officers to give warnings before interrogation. See Part III, *supra*. While both of these cases remain good law, the Court has vitiated their significance by carving out new exceptions to their application at every opportunity.
359. Cf. Corinna Barrett Lain, *Counter-majoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1366 (2004) ("Of course, whenever a locality is out of step with an emerging or established national consensus and the Supreme Court validates that consensus, its decision will be counter-majoritarian in a way—but that kind of counter-majoritarian decision making can occur even without judicial review.").
360. See, e.g., William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions As Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 & n.77 (1986) ("Between 1970 and 1984, state courts, increasingly reluctant to follow the federal lead, have handed down over 250 published opinions holding that the constitutional minimums set by the United States Supreme Court were insufficient to satisfy the more stringent requirements of state constitutional

state judges, have noted and encouraged the trend towards protecting civil liberties through a "new judicial federalism."³⁶¹ As state constitutions have increasingly become vehicles for protecting civil liberties, however, the significance of the "incorporated" Fourth, Fifth, and Sixth Amendments has correspondingly diminished.

In recent years, the United States Supreme Court has enthusiastically defended the prerogatives of the states in our system of constitutional federalism.³⁶² If this trend continues, then the Supreme Court may some day reconsider "incorporation." Without "incorporation," the states would experience neither the reign of injustice feared by some, nor the liberation of the police sought by others. Rather, with or without "incorporation," state criminal procedure would remain substantially unchanged. Throughout American history, the states have always emulated United States constitutional law both in drafting and interpreting their own constitutions. Concomitantly, the United States Supreme Court has often been influenced by state constitutional decisions. States have shown no inclination to reduce the rights of criminal suspects and defendants below the minimum levels currently required by the "incorporation" doctrine. For this reason, there may be less at stake in the "incorporation" debate than commentators on both sides have believed.

law." (citing Collins, *Reliance on State Constitutions*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 1, 2 (B. McGraw ed., 1985))).

361. See *id.*; see also, e.g., Hon. Shirley S. Abrahamson, *State Constitutional Law, New Judicial Federalism, and the Rehnquist Court*, 51 CLEV. ST. L. REV. 339 (2004); Justice William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Vern Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454 (1970); Hon. Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Hon. Margaret H. Marshall, "Wise Parents Do Not Hesitate To Learn From Their Children": *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633 (2004).
362. See, e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).