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Un-Incorporating the Bill of Rights: The Tension between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedure Reforms

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UN-INCORPORATING THE BILL OF RIGHTS: THE TENSION BETWEEN THE FOURTEENTH AMENDMENT AND THE FEDERALISM CONCERNS THAT UNDERLIE MODERN CRIMINAL PROCEDURE REFORMS

JUSTIN F. MARCEAU*

> Judicial self-restraint which defers too much to the sovereign powers of the states and reserves judicial intervention for only the most revolting cases will not serve to enhance Madison's priceless gift of "the great rights of mankind secured under this Constitution."
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> — Justice William J. Brennan, 1961[1]

> Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues, no binding weight is to be attached to the State determination .... The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.
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> — Justice Felix Frankfurter, 1953[2]

This Article addresses the relationship between § 2254 of the Anti-Terrorism and Effective Death Penalty Act and the Fourteenth Amendment. There is a substantial body of literature that either laments or celebrates the rigid limitations on relief imposed on state prisoners attempting to vindicate their federal constitutional rights in federal court. In a series of cases beginning with Williams v. Taylor, *the Court has left little doubt that*

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[1] William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761, 778 (1961).

[2] Brown v. Allen, 344 U.S. 443, 508 (1953) (Frankfurter, J., separate opinion).

patently incorrect interpretations of the United States Constitution do not necessarily warrant relief under the applicable provision of the habeas corpus statute, § 2254. The question remains, however, whether such limitations on the ability of federal courts to enforce the Federal Constitution represents a constitutional problem.

This Article is the first attempt by a commentator to reconcile § 2254 with the Fourteenth Amendment, ultimately concluding that § 2254, as currently applied, is inconsistent with the Fourteenth Amendment's incorporation doctrine. The hallmark of incorporation under the Fourteenth Amendment, or more precisely, selective incorporation, is the promise that constitutional rights must apply with the same force and breadth in each of the fifty states, a promise that is impossible to realize under the strictures of § 2254. Because § 2254 impedes the ability of federal courts to apply the Federal Constitution to constitutional claims—e.g., the Sixth Amendment right to counsel—there appear to be serious Fourteenth Amendment concerns that have previously gone unexplored. Because of the limitations on relief for incorrect applications of the Constitution imposed by § 2254, and in view of the nature of certain of the rights announced in the Bill of Rights, this Article posits that the constitutional criminal procedure rights have been sub silentio *un-incorporated.*

The selective incorporation of the Bill of Rights through the Fourteenth Amendment is the hallmark of modern criminal procedure and represents a turning point in our nation's collective understanding of federalism.[3] By incorporating the Bill of Rights—both as to non-criminal

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[3] In discussing the significance of the incorporation doctrine, Justice Brennan noted:

> After his retirement, Chief Justice Earl Warren was asked what he regarded to be the decision during his tenure that would have the greatest consequence for all Americans. His choice was *Baker v. Carr*, because he believed that if each of us has an equal vote, we are equally armed with the indispensable means to make our views felt. I feel at least as good a case can be made that the series of decisions binding the states to almost all of the restraints of the Bill of Rights will be even more significant in preserving and furthering the ideals we have fashioned for our society.

William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 492-93 (1977). Brennan stressed that in order to be meaningful, the rights and remedies available under the Bill of Rights had to apply with equal force to both the federal and state governments. *Id.* He noted by example that the incorporation of the Fourth Amendment's prohibition on unreasonable searches and seizures was "virtually meaningless" so long as "the states were left free to decide for themselves whether any effective means of enforcing the guarantee was to be made available," and suggested that meaningful incorporation required that the exclusionary rule apply to state proceedings. *Id.* at 493.

rights such as free speech,[4] and as to criminal rights such as the right to counsel[5]—the Supreme Court sent a clear message to the states: the protections afforded to individuals under the Bill of Rights applied with equal force to state and federal governments.[6] Concerning the protection of rights enshrined in the Bill of Rights, incorporation and the Supremacy Clause required that "the states were to receive no greater deference for their judgments than the federal government."[7] This was consistent with the view of Alexander Hamilton that, particularly in the case of federal rights that are locally unpopular, the "local spirit may be found to disqualify the local tribunals for the jurisdiction of national cases."[8]

Recently, however, the Supreme Court's understanding of the relationship between state and federal courts regarding questions of federal constitutional law has strayed from the first principles of incorporation. The Court's federalism jurisprudence is so fractured as to defy a coherent narrative. The Supremacy Clause continues to be given the utmost force in the context of federal preemption,[9] but the Supreme Court's unwillingness

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[4] U.S. CONST. amend. I; Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (holding that the Due Process Clause of the Fourteenth Amendment renders the First Amendment's prohibition on the abridgment of speech equally applicable to the states).

[5] Gideon v. Wainwright, 372 U.S. 335 (1963) (extending the Sixth Amendment right to counsel to the states through the Fourteenth Amendment and holding that the right includes the right of the indigent to have counsel provided).

[6] *See, e.g.*, Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 317 (1982) ("It may be too extreme to say that the Justices supporting selective incorporation believed federalism was 'dead,' but certainly they would no longer place federalism on the plane it once occupied." (footnote omitted)); Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956) (emphasizing the need for a more limited approach to federalism when considerations about national rights are at issue).

[7] Israel, *supra* note 6, at 317 (discussing the conclusions of Justice Schaefer, *supra* note 6).

[8] THE FEDERALIST No. 81, at 486 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 905 (1994) ("Wholly apart from assertions about the purported superiority of federal judges, common sense suggests that the meaningfulness of judicial review is greatly enhanced if the reviewing court owes no special allegiance to the court whose judgment is subject to review." (footnote omitted)).

[9] The Court continues to express broad willingness to deem a provision of state law preempted by a federal provision. In fact, in just the 2007 term the Court decided three preemption cases overwhelmingly in favor of the federal government. *See* Riegel v. Medtronic, 128 S. Ct. 999 (2008) (Scalia, J.) (recognizing that the manufacturer of an FDA approved device may not be subject to a common law cause of action in state court); Rowe v. New Hampshire, 128 S. Ct. 989 (2008) (Breyer, J.) (holding that state law regulating delivery of tobacco products is preempted by federal law governing sale of tobacco, even though the state law was specifically intended to protect the health of children); Preston v. Ferrer, 128 S. Ct. 978 (2008) (Ginsburg, J.) (holding that when parties to a contract agree to

to insist on a meaningful and uniform application of federal rights, in particular constitutional criminal procedure rights, calls into question the vitality of incorporation as a principle of hornbook constitutional law.[10] The most anticipated federalism decision of the 2007 term, *Danforth v. Minnesota*,[11] was illustrative of the confusion that surrounds the future of constitutional criminal procedure in general, and the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) in particular.[12] In a surprising twist of alliances, Justices Roberts and Kennedy dissented from the seven-member majority's refusal to hold that state courts were constitutionally bound to the rules of retroactivity applicable to federal habeas corpus decisions; the two Justices dissented on the grounds that the role of federal courts in ensuring the uniform application of federal law is a "bedrock" principle of federalism.[13] Notably, both the majority and the dissent agreed that rules of constitutional law dictate uniformity; the disagreement arose as to whether the Court's retroactivity jurisprudence was of constitutional magnitude.[14] This Article sets out to unpack the tension between the view shared by all nine Justices in *Danforth* that the Supremacy Clause of the Constitution dictates that federal rights be applied uniformly and without exception by all state courts; and the Court's adjudication of the constitutional rights announced in the Fourth, Fifth, Sixth, and Eighth Amendments.[15]

Stated another way, a half-century has passed since the Bill of Rights began to be incorporated through the Fourteenth Amendment,[16] and it is

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arbitration of disputes, the Federal Arbitration Act supersedes state laws dictating jurisdiction in another forum in order to assess the validity of an arbitration clause).

[10] The Court's reluctance to insist on uniformity in the application of the criminal procedure rights is most easily identified in the context of the Court's habeas corpus jurisprudence. *See infra* Parts III, IV. But the willingness of the Court to insist on the uniform application of federal criminal rights is also evident in other contexts. *See infra* Part V.

[11] 128 S. Ct. 1029 (2008) (holding that *Teague*'s bar on the retroactive application of "new" rules of criminal procedure did not apply to state courts (citing Teague v. Lane, 489 U.S. 288, 308 (1989))).

[12] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 18, 21, 28, 42 U.S.C. (2006)).

[13] *Danforth*, 128 S. Ct. at 1047 (Roberts, C.J., dissenting) (stressing that the Court's failure to impose rigid constitutional uniformity is "startling").

[14] *Id.*

[15] *Id.* at 1053, 1053 n.2 (Roberts, C.J., dissenting) (stressing that the Supremacy Clause "was meant to prevent" any "disuniformity" as to constitutional interpretation).

[16] It is difficult to identify the first decision recognizing incorporation, at least as the doctrine is presently understood and applied. The origins of the modern incorporation doctrine are often traced to an opinion by Justice Brennan, *Ohio* ex rel. *Eaton v. Price*, 364 U.S. 263, 274-76 (1960) (Brennan, J., separate opinion). For a fuller discussion of the history and evolution of incorporation, see Israel, *supra* note 6.

useful to consider whether the fundamental rights announced in the first eight amendments to the Constitution continue to enjoy as much force, effect, and supremacy when applied against the states as they do when applied to the federal government.[17] Recent legislation and federal cases suggest that, at least with respect to the constitutional rights of criminal procedure, there is a movement afoot that defies the black letter conception of incorporation and instead favors deference to local interpretations of the Bill of Rights. That is to say, an argument can be made that the criminal procedure rights are being, if not radically un-incorporated, gradually rendered less effectual.

This Article examines the Court's willingness to tolerate, indeed endorse, localized applications of the constitutional amendments regarding the rights of criminal defendants, and contrasts this with the Court's continued adherence to the principle that it is the Court's "role under the Constitution as the final arbiter of federal law, both as to its meaning and its reach, . . . to ensure the uniformity of that federal law."[18] Because the Court continues to describe glowingly the supremacy of federal pronouncements in the field of criminal procedure, the question necessarily arises whether the Court's Fourteenth Amendment (incorporation) and Supremacy Clause jurisprudence are compatible with the limitations imposed on criminal defendants attempting to vindicate their federal rights.[19] Recognizing that federal habeas corpus proceedings may be the best, and in some instances the only, vehicle available for ensuring state court adherence to the Constitution, this Article devotes significant attention to the correlation between the availability of federal habeas corpus relief and the ability of a defendant to vindicate his constitutional rights.[20]

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[17] In 1969, Professor William W. Van Alstyne published *A Critical Guide to Marbury v. Madison*. 1969 DUKE L.J. 1. This piece could just as aptly be called *A Critical Guide to Selective Incorporation*. The purpose of Professor Van Alstyne's article was to revisit and assess the doctrine announced in *Marbury* because, in his view, all other rules of constitutional law "inevitably turn[] back to this early case." *Id.* at 2-3. In the same vein, the present Article endeavors to critically reflect on the history and evolution of the doctrine of incorporation because every question of federal criminal procedure "inevitably" turns on how the Fourteenth Amendment applies.

[18] *Danforth*, 128 S. Ct. at 1058 (Roberts, C.J., dissenting); *see also id.* at 1032 (stressing that state courts may not threaten federal uniformity as to federal rights by providing lesser or different interpretations of the federal constitutional protections).

[19] *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (recognizing limitations on the justiciability of Fourth Amendment claims). *See generally* 28 U.S.C. § 2254 (2000 & Supp. V 2005) (imposing limitations on relief for prisoners seeking federal habeas corpus relief).

[20] Of particular relevance to this Article, commentators have observed that when writ-of-error review as of right was available in federal court, the role of federal habeas review was less significant as a check on the application of federal law by state criminal courts; however, because writ-of-error review in federal court is now discretionary, federal habeas

As a matter of history, many fundamental criminal procedure rights were discovered and announced on federal habeas corpus review. As a practical matter, the fact that writ-of-error review as of right no longer exists dictates that the Supreme Court, through its discretionary certiorari jurisdiction, will rarely exercise jurisdiction over state criminal convictions. Accordingly, by curtailing substantive federal review of claims asserting federal constitutional rights in the habeas context, the federal rights themselves are, for all intents and purposes, no longer under the guardianship of the federal system, and instead are largely left to the discretion of state courts.[21] That is to say, legislation and case law, working in tandem, have begun to substantially undermine the principle that was at the core of the incorporation doctrine—that states were to receive no greater deference than the federal government in adjudicating the Constitution.[22]

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review has become the only available "substitute mechanism for post-conviction review of federal questions." Steiker, *supra* note 8, at 910; *see also* James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2071 n.440 (1992) ("The Court justified its preference for writ of error review on the ground that the writ of error was available as of right." (emphasis omitted)); Justin F. Marceau, *Deference and Doubt: The Interaction of AEDPA's § 2254(d)(2) & (e)(1)*, 82 TUL. L. REV. 385, 389 (2008) (stressing that "[o]n a theoretical level, even today, few would directly dispute the important role the writ of habeas corpus plays insofar as it is, effectively, the only mechanism through which a state prisoner can challenge the constitutional propriety of his trial in federal court.").

[21] Stated another way, the writ of habeas corpus has become "essential to federal supremacy." Steiker, *supra* note 8, at 886. *But see* Woodford v. Visciotti, 537 U.S. 19, 27 (2002) ("The federal habeas scheme leaves primary responsibility with the state courts for these judgments [as to the application of federal law], and authorizes federal-court intervention only when a state-court decision is objectively unreasonable. It is not that here. Whether or not we would reach the same conclusion as the California Supreme Court, 'we think at the very least that the state court's contrary assessment was not "unreasonable".'" (quoting Bell v. Cone, 535 U.S. 685, 701 (2002))). That is to say, under 28 U.S.C. § 2254, a federal court is not entitled to intervene and, for example, prevent a death sentence from being carried out, even though the federal court concludes in its independent judgment that the state-court decision applied the Constitution incorrectly. *Woodford*, 537 U.S. at 25. Unconstitutional executions are, in other words, an anticipated consequence of the current habeas corpus systems.

[22] Schaefer, *supra* note 6, at 26 ("Considerations of federalism of course remain important. But in the world today they must be measured against the competing demands arising out of the relation of the United States to the rest of the world . . . . [T]he criminal procedure sanctioned by any of our states is the procedure sanctioned by the United States."). To be sure, other court and legislative doctrines impose limitations on the ability of individuals seeking to vindicate constitutional rights—a statute of limitations or a bar on successive habeas petitions—but this Article attempts to explain the distinction between these ministerial limitations and the dramatic substantive limitations imposed by recent criminal procedure reforms. Reforms like AEDPA work to trigger substantive constitutional disuniformity that is different in kind and scope than that tolerated under the routinely, and uniformly, applied ministerial doctrines like statutes of limitations, and it is this sort of substantive disuniformity that is in tension with incorporation.

Nonetheless, after exploring the tension between recent criminal procedure reforms and the Fourteenth Amendment, as interpreted by the Supreme Court, this Article suggests that it is an open question as to whether the un-incorporation (or shrinking) of federal criminal procedure rights will help more than it hurts criminal defendants.[23]

I. INTRODUCTION

When people proclaim that they know their "rights," they are often referring in some general way to the Bill of Rights.[24] As Professor Akhil Amar has observed, persons asked about their rights or privileges as U.S. citizens will almost invariably "invoke rights that are explicitly declared in the Bill of Rights . . . ."[25] The rights to speech, religion, a fair trial, and to be free of cruel and unusual punishment, to name but a few, are viewed as synonymous with citizenship.[26] However, at least for the first century and a half of our constitution's history, the rights announced in the Bill of Rights were illusory as applied against the states. Until the middle of the twentieth century, an individual could not complain that his rights under the first ten Amendments were being violated by a state or local government; the Bill of Rights applied only to regulate the behavior of the federal government.[27]

In *Barron v. Baltimore*, Chief Justice John Marshall considered the question of whether the Bill of Rights applied to the states as well as the federal government.[28] In Chief Justice Marshall's view, the question was "of great importance, but not of much difficulty."[29] In ruling that the Fifth Amendment's prohibition on the taking of private property for public use without just compensation did not apply to state or local governments, Marshall reasoned that "[t]he [C]onstitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states."[30] Explaining further, Marshall added:

> Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had [C]ongress engaged in the extraordinary occupation of improving the constitutions of the several states by

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[23] *See infra* Part VI.

[24] *See* Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 HARV. J.L. & PUB. POL'Y 443, 444 (1996).

[25] *Id.*

[26] *Id.*

[27] Barron v. Baltimore, 32 U.S. 243 (1833).

[28] *Id.*

[29] *Id.* at 247.

[30] *Id.*

> affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.[31]

To be sure, Marshall's interpretation of the Bill of Rights was not an unprincipled limitation on the rights of individuals.[32] The enactment of the Fourteenth Amendment, however, provided the Court with a new lens through which to view this question of "great importance." By the mid-1960s, the Court had abandoned the framework set forth in *Barron* and ruled, instead, that (most of) the Bill of Rights was incorporated so as to apply against the states by virtue of the Due Process Clause of the Fourteenth Amendment.[33] That is to say, the Court adopted a position akin to the now mainstream view that the Bill of Rights applied against the states,[34] and over time held that the Fourteenth Amendment "impose[s] upon the states all of the [criminal] procedural guarantees of the Bill of Rights except for the grand jury indictment and civil jury trial requirements."[35]

Any suggestion that the Court will hold that the incorporated Bill of Rights no longer applies to the states is unfounded, even foolish.[36] Nonetheless, there exists a growing body of court opinions that sanctions legislative calls for deference to the adjudications by state courts of federal rights. The Court's evolving conception of federalism is, to be sure,

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[31] *Id.* at 250. Apparently, Marshall anticipated that the Framers would have used a phrase such as "[n]o State shall" if they intended for the rights enshrined in the Bill of Rights to apply against the states. *See* Amar, *supra* note 24, at 444; *see also* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1198 (1992) ("One can quibble around the edges, but the core of Marshall's argument is compelling." (footnote omitted)).

[32] Amar, *supra* note 31, at 1198.

[33] *See infra* Part II(A).

[34] Amar, *supra* note 24, at 444. Some commentators have suggested that the fact of overwhelming public support may, without more, lend legitimacy to the constitutional interpretations of the Supreme Court. JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA (2006) (arguing that the Supreme Court's constitutional jurisprudence generally should mirror public opinion).

[35] Israel, *supra* note 6, at 272; *see also* Laurence H. Tribe, *Reflections on Unenumerated Rights*, 9 U. PA. J. CONST. L. 483, 487 (2007) (noting that incorporation was achieved through a process of "gradual linear extrapolation," rather than "an act of one-time boundary-crossing exportation").

[36] Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 136-37 (1999) (citing Supreme Court cases and noting that the Court now takes for granted the idea that the Fourteenth Amendment's Due Process Clause incorporates certain aspects of the Bill of Rights).

confused,[37] but the waning practical force of the Warren Court's incorporation decisions is beyond question.[38] Even if the phrase un-incorporation is a touch hyperbolic, the premise certainly merits consideration.

Accordingly, it is worth beginning a dialogue about the status of selective incorporation as a doctrine of constitutional law by examining the sort of illustrative examples of judicial abdication that characterize modern federal review of state interpretations of the Fourth, Fifth, Sixth, and Eighth Amendments.[39] This Article explores the question of whether judicial deference to state judgments in the context of habeas corpus signals what has come to look like the beginning of a criminal procedure counter-revolution,[40] and provides examples of statutes and precedents that are illustrative of the growing acceptance of deference to state court judgments on questions of federal constitutional criminal procedure law. Although there are many limitations on the availability of remedies for constitutional harms, as with all questions of law, reasonable lines must be drawn. This Article argues that the disuniformity generated by the certain criminal procedure reforms is sufficiently substantive as to be impermissible as a matter of Fourteenth Amendment and Supremacy Clause jurisprudence.

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[37] *Compare* Danforth v. Minnesota, 128 S. Ct. 1029, 1053 (2008) (Roberts, C.J., dissenting) (decrying the majority opinion for inviting "disuniformity in federal law" and insisting that the Supremacy Clause prohibits the Constitution from being "applied differently in every one of the several States"), *with* Schriro v. Landrigan, 127 S. Ct. 1933, 1939 (2007) (holding that a prisoner is not entitled to a constitutional remedy merely because the state court misapplied federal constitutional law and, instead, insisting that something "substantially higher" than state court error as to federal law was required in order to justify relief).

[38] *See infra* Parts III, IV (analyzing the modern Court's hostility to the centerpiece of the Warren Court's constitutional jurisprudence); *see also* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 147-48 (1997) (noting that the Warren Court doctrine has been "busily reshaped" such that all of the Warren Court landmarks are "distinguished away" and "hollowed out from within").

[39] The term abdication is appropriate if one views the protection of federally defined rights as a non-delegable duty of federal courts. And abdication of the role of primary interpreter will, in some circumstances, constitute abandonment by the federal judiciary. It has been acknowledged that some states are "so intractably hostile to federal constitutional rights and locally unpopular criminal defendants that . . . state post-conviction remedies [are] a foregone fool's errand." Anthony G. Amsterdam, In Favorem Mortis*: The Supreme Court and Capital Punishment*, 14 HUM. RTS. 14, 17 (1987).

[40] Joseph L. Hoffman & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 66-67, 77-80 (describing the Warren Court's cases as effecting a revolution of federal constitutional law); Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 5 (1993) (describing the Warren Court's "constitutional revolution").

First, the most direct and express act of un-incorporation in the habeas corpus context is a Burger-era opinion, *Stone v. Powell*.[41] Although the holding in *Stone* that the Fourteenth Amendment does not incorporate the Fourth Amendment for purposes of collateral review is now accepted as relatively uncontroversial,[42] this opinion marked a radical departure from the Warren Court's incorporation doctrine.[43] If, as Justice Brennan stressed in his dissent, habeas corpus is the foremost vehicle for raising constitutional errors,[44] the Court's refusal to disturb a state court judgment despite a glaring violation of the Fourth Amendment is indicative of the dwindling force enjoyed by incorporated rights fifty years after selective incorporation began.

The second and third illustrations focus on a specific provision of AEDPA.[45] Under § 2254(d), a federal court may not grant a writ of habeas corpus unless the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . ."[46] Focusing on the "unreasonable application" and the "clearly established" law prongs of this requirement, this Article examines the force of AEDPA in requiring a level of deference that is in fundamental tension with the spirit and rationale of incorporation. To illustrate the conflict between AEDPA and incorporation, I will focus on one example arising under the Fifth Amendment[47] and one example arising under the Sixth Amendment.[48]

The fourth example, though illustrative of the broader trends in this area of law, is specific to a particular Eighth Amendment claim. The analysis focuses on the Court's holding in *Atkins v. Virginia* that executing

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[41] 428 U.S. 465 (1976).

[42] There are numerous reported decisions demonstrating that federal circuit courts unflinchingly apply the rule announced in *Stone*. For example, in *Woolery v. Arave*, 8 F.3d 1325, 1326 (9th Cir. 1993), the Ninth Circuit reversed a district court's grant of habeas relief because the grant of relief was premised on a Fourth Amendment violation. The Ninth Circuit did not disagree with the district court's conclusion that the Fourth Amendment was violated, and it acknowledged that the prosecution had even "neglected to assert that the claim was barred by the rule of *Stone v. Powell*." *Id.* Nonetheless, the Ninth Circuit, over a scathing dissent from Judge Reinhardt, held that *Stone* reflects a "categorical limitation on the scope of the exclusionary rule" that cannot be waived by the State. *Id.*

[43] *Stone*, 428 U.S. at 489-95.

[44] *See, e.g.*, *id.* at 511 (Brennan, J., dissenting) ("It is simply inconceivable that [a] constitutional deprivation suddenly vanishes after the appellate process has been exhausted.").

[45] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 18, 21, 28, 42 U.S.C. (2006)).

[46] 28 U.S.C. § 2254(d)(1) (2000).

[47] *See infra* Part III.B.

[48] *See infra* Part IV.

the mentally retarded constitutes cruel and unusual punishment.[49] Of particular relevance is the fact that federal courts have, at the urging of the Supreme Court, left to each individual state the task of defining by statute what constitutes mental retardation.[50] In other words, *Atkins* provides an example of a situation in which the Court recognizes that the Eighth Amendment as incorporated through the Fourteenth Amendment provides a substantive right to defendants, and that the scope of that right may be defined by the state. In essence, the Eighth Amendment protections apply to each state, but each state is allowed to define the substance of the right in a slightly different manner.

Finally, the Article concludes by analyzing whether this new era of incorporation, which prioritizes a formalistic rather than substantive adherence to the doctrine of selective incorporation, is more or less beneficial to persons charged with crimes than was the previous regime. This Article draws on scholarship suggesting that the robust procedural rights afforded to defendants by the Court have worked proportionately greater substantive and procedural harms on defendants over the long term. The question is whether recent reforms, though antithetical to constitutional incorporation, might trigger bold and progressive experimentation by the states.[51]

II. INCORPORATION GENERALLY: THE RATIONALE AND THE FUNCTION

A. DEFINING THE DOCTRINE

In order to assess the impact of recent actions by Congress and the Court on the doctrine of incorporation, it is necessary first to set forth with clarity the purpose and history of incorporation. The analysis of whether the current scope and application of the constitutionalized criminal procedure rights are in tension with the concept of incorporation must begin with a precise working definition for incorporation.[52]

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[49] 536 U.S. 304, 318 (2002) ("[T]he mentally retarded should be categorically excluded from execution.").

[50] *Id.* at 317 (leaving to the states "the task of developing appropriate ways to enforce the constitutional restriction" on executing the mentally retarded (quoting Ford v. Wainwright, 477 U.S. 399 405, 416-17 (1986))).

[51] *See, e.g.*, Brennan, *supra* note 3, at 503 ("[T]he very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach.").

[52] More precisely, the question is whether the Court's willingness to countenance disuniformity presents a Supremacy Clause issue. If the Constitution mandates a particular limitation on state action, there is little doubt that state practices inconsistent with this limitation run afoul of the Supremacy Clause. U.S. CONST. art. VI, cl. 2. Accordingly, federal legislation or judicial opinions that are in tension with the Fourteenth Amendment, as interpreted by the Supreme Court, are unconstitutional.

Properly understood, constitutional incorporation is a vehicle by which fundamental rights protected by the Constitution are nationalized. It is a doctrine grounded in pragmatic concerns about the importance of ensuring reasonable parity between constitutional rights and the availability of a remedy, and premised on the idea that the uniform application of the Bill of Rights must be given priority over local control and self-government.[53] As Professor Israel has explained, selective incorporation was justified on the theory that these rights were of such national and fundamental concern as to "outweigh[] considerations of judicial self-restraint and deference to the values of local control."[54]

Accordingly, one of the most useful ways of defining the doctrine is to explain what it is not: the incorporation of the Bill of Rights through the Fourteenth Amendment *is not* consistent with an expansive view of federalism that permits local experimentation and discretion on the part of state governments and courts.[55] This is not, however, to suggest that no affirmative definition of incorporation is available. For present purposes, incorporation can adequately be explained as the process by which selected rights are applied consistently and with equal force to the federal government and *each* of the states. Under this definition, "once a provision of the Bill of Rights has been held applicable to the States by the Fourteenth Amendment, it . . . appl[ies] to the States in full strength."[56] There cannot

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[53] Israel, *supra* note 6, at 316.

[54] *Id.* Deference to local control of national rights that are locally unpopular has always been regarded as inconsistent with the practical realization of those rights. *See, e.g.*, Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 802-03 (1965) (synthesizing sources reflecting the notion that "provincialism" and "local spirit" have been recognized as material impediments to the recognition of unpopular national rights in state courts, and recognizing this as one of the defining rationales for federal diversity jurisdiction).

[55] This is not to suggest that the proponents of incorporation had disregarded the notion of federalism in order to justify applying the Bill of Rights to the states. The proponents of incorporation viewed this symmetrical limitation on the authority of governments, both local and national, as a safeguard on fundamental liberties, not an unwarranted usurpation of governing authority by the federal government. *See, e.g.*, Pointer v. Texas, 380 U.S. 400, 414 (1965) (Goldberg, J., concurring). As Justice Goldberg noted, "[T]o deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual." *Id.*; *see also* Israel, *supra* note 6, at 317 (citing Schaefer, *supra* note 6, at 26) (noting that it would be "too extreme to say" that incorporation had completely killed federalism, but stressing that it was no longer on the same "plane it once occupied").

[56] *Pointer*, 380 U.S. at 413 (Goldberg, J., concurring) (noting that the idea of allowing states to serve as "laboratories" of local experimentation has no place in the context of fundamental rights and liberties guaranteed by the Bill of Rights).

be, in other words, a federal right and then various subjective applications (or "watered-down" versions) of this right across the states.[57]

In large part, the recognition that an incorporated right must be applied with some base line of uniformity (a federal floor) is a product of the relationship between the Supremacy Clause and all provisions of the Constitution. The doctrine of selective incorporation announced by the Warren Court,[58] and embraced by all subsequent Courts, provides that most provisions contained in the Bill of Rights apply to the states, and the Supremacy Clause dictates that all constitutional rights apply, as much as is practically possible, without variation between the states.[59] The concept of incorporation, therefore, cannot countenance deference to states as to the substance and content of the incorporated right.[60] Thus while the rights afforded to a defendant may vary as a matter of state law, a defendant's rights under the Federal Constitution should not vary according to the local whims and subjective political climate of a particular state.[61]

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[57] Malloy v. Hogan, 378 U.S. 1, 10-11 (1964); *see also Pointer*, 380 U.S. at 413 (Goldberg, J., concurring) (expressly rejecting Justice Harlan's call for a "watered-down" application of the Bill of Rights).

[58] Israel, *supra* note 6, at 253 (tracing the history of selective incorporation as the foundation for the "Warren Court's criminal procedure revolution").

[59] Under the doctrine of incorporation, "When it came to balancing society's need for protection from crime against the interests of suspected and accused persons, the states were to receive no greater deference for their judgments than the federal government." *Id.* at 317.

[60] Stated another way, the basic premise of the incorporation doctrine is that "when a procedural guarantee is applied to the states, it is applied with the same force as when it is applied to the federal Government." *Id.* at 325 (citation omitted); *see also* Brennan, *supra* note 1, at 778.

[61] The importance of uniformity in the interpretation of federal constitutional rights is also illustrated by a distinct line of cases regarding the role of federal courts when a state court decision rests on a confusing blend of state and federal law. *See* Michigan v. Long, 463 U.S. 1032, 1038 (1983). In *Long*, the Court stressed that it is "incumbent upon this Court . . . to ascertain for itself . . . whether the asserted non-federal ground independently and adequately supports the judgment." *Id.* (quoting Abie State Bank v. Bryan, 282 U.S. 765, 773 (1931)). More relevant, the Court went on to hold that when there is no independent state law ground for a decision, state courts are precluded from advancing a more *robust* reading of the individual rights at issue. *Id.* at 1042 n.8 (rejecting Justice Stevens's view that the Court should not review a state court decision as to a federal right unless the decision "endangered" a federal right). Like incorporation, the rationale underlying the *Michigan v. Long* independent and adequate doctrine is uniformity. "[S]tate courts are required to apply federal constitutional standards," and they may not interpret these standards in a way that is more generous or more restrictive than the interpretation provided by the federal courts. *Id.* Of course, it should be noted that as a practical matter, Justice Stevens's observation is likely correct—"the 'need for uniformity in federal law' is truly an ungovernable engine." *Id.* at 1070 (Stevens, J., dissenting). But the incorporationist mantra of uniformity is not inconsistent with the view espoused by Justice Stevens. All that incorporation requires is a uniform federal floor below which state action cannot go; the doctrine concedes, even invites, variation and disuniformity above this line.

Although this Article ultimately acknowledges that the Warren Court's approach to constitutional rights was not infallible and recognizes that moving away from incorporation might be good for the rights of defendants, it also posits that the time has come for the Court to clarify its Fourteenth Amendment jurisprudence. If the Constitution mandates a uniform application of federal rights, the tension with criminal procedure reforms like AEDPA must be squarely addressed by the Court. As it stands, the intellectual integrity of the "umpiring"[62] that Chief Justice John Roberts has recently announced as a first principle of adjudication is nowhere to be found in the Court's federalism jurisprudence regarding the scope and effect of federal constitutional rights. Within a several month period, Chief Justice Roberts has joined opinions that excoriate federal circuit courts for requiring state courts to apply federal law in manner consistent with federal interpretation,[63] and he has simultaneously written an opinion stressing that it is nothing short of "startling" for the Court to consider allowing variation or "disparate" interpretations of the "same Federal Constitution[al]" questions.[64] If the constitutional rights of criminal procedure no longer apply with full and uniform force against the state governments, the doctrine should be declared defunct.[65]

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[62] "Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire." *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.), *available at http://www.asksam.com/ebooks/releases.asp?file=JGRHearing.ask&dn=Swearing%20In%20%2d%20Opening%20Remarks%2c%20Judge%20Roberts.*

[63] Wright v. Van Patten, 128 S. Ct. 743 (2008); Schriro v. Landrigan, 127 S. Ct. 1933, 1939 (2007).

[64] Danforth v. Minnesota, 128 S. Ct. 1029, 1053 n.2 (2008) (Roberts, C.J., dissenting).

[65] Because incorporation is a principle of constitutional law, and not merely a court-created procedural rule, the rejection of incorporation must be initiated by the Supreme Court, not by Congress. Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of *Marbury v. Madison* . . . that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." (citation omitted)); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget that it is a *constitution* we are expounding."); *see also* Dickerson v. U.S., 530 U.S. 428, 437-38 (2000) (recognizing the material distinction between legislative and constitutional rules).

B. TRACING THE EVOLUTION OF INCORPORATION

Only by tracing the birth and evolution of constitutional incorporation is it possible to assess the veracity of one of this Article's central assertions: that incorporation is diametrically opposed to the sort of local control and deference to state courts that characterizes modern criminal procedure.[66] With an understanding of the origins and evolution of the concept of incorporation in place, it is possible to meaningfully debate whether specific congressional legislation and Supreme Court decisions have *sub rosa* undermined the spirit and purpose of incorporation.[67]

In Justice Brennan's view, there is no more significant rule of constitutional law than that of incorporation,[68] and given his defining role in the development of this doctrine, Justice Brennan's definition of incorporation seems an appropriate place to begin. Brennan defined it as the rule that:

> [T]he citizens of all our states are also and no less citizens of our United States, that this birthright guarantees our federal constitutional liberties against encroachment by governmental action at any level of our federal system, and that each of us is entitled to due process of law and the equal protection of the laws from our state governments no less than from our national one.[69]

Of course, understanding how (and which of) the Bill of Rights would be made applicable to the states via the phrase "due process of law" requires a dose of constitutional history.

When the Bill of Rights was proposed in 1789, Congress voted on and rejected an amendment offered by James Madison designed to limit the

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[66] Duncan v. Louisiana, 391 U.S. 145, 170 (1968) (Black, J., concurring) (responding to Justice Harlan's dissent in which he argues that the states must be allowed the freedom to experiment by stating, "I have never believed that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the Bill of Rights").

[67] Professor Akhil Amar has framed the question of whether the Bill of Rights must be applied with uniformity across the states in the following manner:

> Once "incorporated" or "absorbed," does a right or freedom declared in the Bill necessarily constrain state and federal governments absolutely equally . . . ? Or, on the other hand, can a guarantee in the Bill ever lose something in the translation, so that only a part of the guarantee—perhaps only its "core"—applies against state governments by dint of the Fourteenth Amendment?

Amar, *supra* note 31, at 1194.

[68] 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, 536 (1986) (stressing that incorporation was even more significant than cases like *Brown v. Board of Education* for the "preservation and furtherance of the ideals we have fashioned for our society").

[69] *Id.* at 536 (quoting Brennan, *supra* note 3, at 490).

powers of the state governments.[70] The original Bill of Rights simply did not "vest[] citizens with rights *against* states."[71] Not surprisingly, then, Chief Justice Marshall held that the Bill of Rights only applied as a limitation on the power of the federal government and did not serve any limiting function on the individual states.[72] But the events leading up to the Civil War exposed, once and for all, the fundamental disconnect that may occur when a constitutional democracy founded on notions of certain inalienable rights trusts the protection of these rights entirely to the local populations. As Professor Tribe has put it, the view that basic rights were adequately safeguarded by the states as the "level of government closest to the people . . . [was] impossible to maintain after the great battle over slavery had been fought."[73]

In direct response to the previous abuses by states, and to a well-founded fear that the southern states would continue their history of oppression, in 1868 Congress enacted the Fourteenth Amendment. The plain language of the amendment ushered in a new era in our nation's understanding of federalism and in the protections afforded to individuals:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[74]

But the scope of the protections provided under the Fourteenth Amendment would not be fully understood for another century, as the Court wrestled with various interpretive methods and approaches.

One of the first interpretive steps taken by the Court was to clarify that individuals did not gain protections enshrined in the Bill of Rights by virtue of the Privileges or Immunities Clause of the Amendment.[75] Although this position has periodically come under substantial and reasoned criticism, as of today the privileges or immunities of U.S. citizenship do not guarantee protections under the Bill of Rights.[76] For the most part, this debate has

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[70] *Id.* at 536-37.

[71] Amar, *supra* note 31, at 1260 (summarizing a central point of his previous article, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991)).

[72] Barron v. Baltimore, 32 U.S. (1 Pet.) 243 (1833).

[73] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-3, at 5 (1978); *see also* Brennan, *supra* note 68, at 537 ("The war exposed a serious flaw in the notion that states could be trusted to nurture individual rights . . . ." (citing TRIBE, *supra*, § 1-3, at 5)).

[74] U.S. CONST. amend. XIV.

[75] The Slaughter-House Cases, 83 U.S. (1 Wall.) 36, 79 (1873).

[76] Amar, *supra* note 31, at 1197 ("Brennan posed the wrong question: Is a given provision of the original Bill really a *fundamental* right? The right question is whether the provision really guarantees a privilege or immunity of individual citizens[hip] . . . .").

been largely irrelevant from a practical standpoint, insofar as the Court has, to varying degrees and based on differing rationales, provided for many of the first eight Amendments to apply against the states by virtue of the Fourteenth Amendment's Due Process Clause.

Setting aside debates about the Privileges or Immunities Clause, the history of incorporation is best understood in terms of the two directly opposed analytical approaches to incorporation, and the quasi-compromise position that became the law of the land. Not surprisingly each of the three approaches was championed by a separate Justice, and each now enjoys a fairly tidy shorthand reference. The first of the three major theories of incorporation was urged by Justice Felix Frankfurter and has come to be known as the "fundamental fairness" approach to incorporation.[77] The second is referred to as "total incorporation" and was suggested by Justice Hugo Black.[78] The prevailing approach, "selective incorporation," which had aspects of both of the other two understandings of incorporation, was invented and implemented by Justice William Brennan.[79]

From the perspective of understanding its practical application, though not its analytic underpinnings, the most straightforward of the three approaches was the total incorporation thesis. Under total incorporation, the Fourteenth Amendment "made applicable against the states each and every provision of the Bill, lock, stock, and barrel."[80] Total incorporation, which was famously and repeatedly argued for by Justice Black, actually may have its origins in the *Slaughter-House Cases*, the Supreme Court's

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[77] Adamson v. California, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring). It is worth noting that this "first" approach to incorporation was not, as a matter of history, the first in time. As Justice Frankfurter himself conceded in a law review article, many early nineteenth century cases recognized that the Fourteenth Amendment "made applicable" to the states, for example, the First Amendment. Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 747-48 (1965).

[78] *Compare Adamson*, 332 U.S. at 59-67 (Frankfurter, J., concurring), *with id.*, at 71-72 (Black, J., dissenting). The debate between Justices Black and Frankfurter has also been framed in terms of the relevant, similarly minded scholars: "The classic debate was between Charles Fairman, a supporter of Justice Frankfurter and his nonincorporation theory, and William Crosskey, stating the incorporationist views of Justice Black." George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 181 (2001) (footnotes omitted).

[79] *See, e.g.*, Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 274-76 (1960) (Brennan, J., separate opinion); *see also* Amar, *supra* note 31, at 1196 ("Justice Brennan tried to steer a middle course of 'selective incorporation.'"). Detractors have described selective incorporation differently. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting) ("[T]he Court has compromised on the ease of the incorporationist position, without its internal logic.").

[80] Amar, *supra* note 31, at 1196.

first foray into Fourteenth Amendment interpretation.[81] In his dissent from the *Slaughter-House* opinion, Justice Bradley argued that a legislature's decision to grant a monopoly to a single slaughter-house operator was not a reasonable regulation insofar as it constituted "an invasion of the right of others to choose a lawful calling, and an infringement of personal liberty."[82] Commentators have noted that Justice Bradley's expansive vision of the right to "personal liberty" against the states may have included all of the Bill of Rights.[83] However, Bradley's dissent did not gain traction with the Court and the notion of total incorporation substantially disappeared from the Court's consciousness, until Black's "heroic re-examination and resurrection" of the concept in 1947.[84]

In his dissent from the Court's opinion in *Adamson v. California*, Justice Black provided the most famous presentation of the total incorporation model.[85] In *Adamson*, Black set forth his simple formula: if a right is protected under the Bill of Rights, the right applies with equal force against the policing conduct of the states.[86] Scholars have accurately labeled Black's model as "mechanical."[87] In essence, "Black's approach simply prejudges the issue [as to whether a certain provision is incorporated] by deciding wholesale . . . [that] *all* the Bill's privileges and immunities" apply to the states.[88]

The second analytic framework for understanding the relationship between the Bill of Rights and the Fourteenth Amendment is known as the fundamental fairness approach. Although this approach found its most famous defense in the opinions of Justice Frankfurter,[89] the fundamental fairness framework was also accepted by a majority of the Court as the law

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[81] Israel, *supra* note 6, at 257.

[82] 83 U.S. (1 Wall.) 36, 120 (1872) (Bradley, J., dissenting).

[83] Israel, *supra* note 6, at 257 n.20 (recognizing a suggestion in the dissent that he did intend for all of the rights to apply against the states).

[84] Amar, *supra* note 31, at 1259. As a historical matter, *O'Neil v. Vermont*, 144 U.S. 323, 360-63 (1892) (Field, J., dissenting), is also understood as evincing a clear preference for total incorporation. *See* Bryan H. Wildenthal, *The Road to* Twining: *Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457, 1494 (2000) ("During the seventy-four years between *Slaughter-House* and *Adamson*, *O'Neil* thus represents the high-water mark for the incorporation theory on the Court.").

[85] 332 U.S. 46, 68-92 (1947) (Black, J., dissenting).

[86] "To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution." *Id.* at 89 (Black, J., dissenting).

[87] Amar, *supra* note 31, at 1227 (noting objections to "the particular brand of mechanical incorporation that Black's rhetoric at times appeared to suggest").

[88] *Id.* at 1263.

[89] *Adamson*, 332 U.S. at 59-67 (Frankfurter, J., concurring); Frankfurter, *supra* note 77.

of the land for nearly a full century after the enactment of the Fourteenth Amendment.[90]

At bottom, the fundamental fairness analysis is in direct tension with total incorporation because, as Justice Frankfurter explained, it requires the Court to recognize that there is no inherent or necessary relationship between the rights announced in the Bill of Rights and the requirement of due process provided for in the Fourteenth Amendment.[91] Under this view, the Fourteenth Amendment does not automatically extend the specific provisions of the Constitution that act as limitations on the power of the federal government; instead, the Fourteenth Amendment is understood to have an "independent potency," unencumbered by the Bill of Rights.[92] Accordingly, in any given case, the Fourteenth Amendment may apply against the states in a manner that tracks the application of the Bill of Rights to the federal government, but this will not always be the case.[93]

According to the fundamental fairness doctrine, the Fourteenth Amendment "requires only that states honor *basic principles of fundamental fairness* and ordered liberty—principles that might . . . overlap wholly or in part with some of the rules of the Bill of Rights."[94] As Justice Frankfurter articulated the doctrine, the Fourteenth Amendment provides protections "for all those rights which the courts must enforce because they *are basic to our free society.*"[95] Inherent in this conception of incorporation is the idea that due process and the "ordered liberty" it requires is a rather general and flexible concept.[96]

It is fair to say that the fundamental fairness doctrine, by virtue of its hostility to rigid rules and rights, focused on generalized notions of fairness and did not regard strict compliance and consistency of interpretation among the states and the federal government as an essential aspect of the relationship between the Bill of Rights and the Fourteenth Amendment.[97] The constitutional rights were said to apply to the states, but a sort of built-in margin of error or layer of deference was encompassed within the

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[90] Israel, *supra* note 6, at 273.

[91] *Adamson*, 332 U.S. at 59-67 (Frankfurter, J., concurring) (responding directly to Justice Black's total incorporation argument).

[92] *Id.* at 66.

[93] Israel, *supra* note 6, at 273 (noting that in a "particular case [fundamental fairness] may afford protection that parallels that of a Bill of Rights guarantee").

[94] Amar, *supra* note 31, at 1196 (emphasis added).

[95] Wolf v. Colorado, 338 U.S. 25, 27 (1949) (emphasis added).

[96] In *Wolf*, the Court applied the fundamental fairness test and concluded that, though the Fourth Amendment was generally incorporated against the states, all of the federal details, including the exclusionary rule, did not necessarily apply to the states. *Id.* ("Due process of law thus conveys neither formal nor fixed nor narrow requirements.").

[97] *Id.*

fundamental fairness review. Illustrative of this perspective is Justice Harlan's opinion in *Gideon v. Wainwright*.[98] Justice Harlan agreed with the Court's holding that indigent defendants had a constitutional right to counsel; however, in Harlan's view the right to counsel derived from general liberties embodied in the concept of due process, and not from the Sixth Amendment right to counsel.[99] Because the right to counsel, as envisioned by Justice Harlan, was predicated on the vagaries of due process, which would vary by situation, Harlan strenuously objected to the creation of a uniform and nationally applicable right to counsel.[100]

Obviously, Justice Harlan's view did not prevail, and today one of the most sacred rights bestowed upon defendants is the right to effective assistance of counsel under the Sixth Amendment.[101] More importantly, the majority opinion in *Gideon* also reflects an important trend away from fundamental fairness in the Court's Fourteenth Amendment jurisprudence.[102] As Justice Brennan noted, the *Gideon* opinion dealt "a devastating blow to an ad hoc, fundamental fairness approach to the application of the Federal Bill."[103] Indeed, it was the Court's discomfort with ad hoc and potentially varying interpretations of fundamental rights that led it to adopt the alternative doctrine proposed by Justice Brennan, selective incorporation.[104]

It was the idea that the Fourteenth Amendment only required that the states comply with the core of certain fundamental rights that ultimately led to the demise of the fundamental fairness approach. The notion that certain "watered-down" or varied interpretations of the Bill of Rights were permitted among the states was decisively rejected by the Court.[105] In detailing his decision to break from the precedent of fundamental fairness and its tolerance for a reasonable margin of differentiation in the application of the Bill, Justice Brennan explained that once a right had been incorporated or nationalized, the Constitution mandated that it apply "to the

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[98] 372 U.S. 335, 352 (1963) (Harlan, J., concurring).

[99] *Id.*

[100] *Id.*

[101] Strickland v. Washington, 466 U.S. 668 (1984).

[102] *See, e.g.*, Tracey L. Meares, *What's Wrong with* Gideon, 70 U. CHI. L. REV. 215, 215 (2003) ("Specifically, *Gideon* marks the beginning of a shift in the Court's articulation of the requirements of fair trials away from notions of fundamental fairness in the Due Process Clause and toward reference to the Bill of Rights via the process of incorporation.").

[103] Brennan, *supra* note 68, at 542.

[104] Meares, *supra* note 102, at 216 (stressing that the end of fundamental fairness meant an end to a "flexible" approach to applying the Bill of Rights).

[105] Malloy v. Hogan, 378 U.S. 1, 10-11 (1964) (quoting Ohio *ex rel* Eaton v. Price, 364 U.S. 263, 275 (1960)); Mapp v. Ohio, 367 U.S. 643, 656 (1961).

states with the full federal regalia intact."[106] There were not, in other words, any grounds for deferring to a state court's application of a "lesser version of the same guarantee as applied to the Federal Government."[107]

The Warren Court's break from fundamental fairness was, then, more than anything else, a product of the Court's complete repudiation of the notion that federal rights "need not apply with the same breadth or scope in state courts."[108] In departing from the fundamental fairness doctrine, however, the Court did not simply reverse itself and adopt Justice Black's total incorporation model. Instead, the Court embraced the doctrine of selective incorporation announced by Justice Brennan.

As a compromise, however, selective incorporation was hardly a true "middle course" between the two extremes.[109] While selective incorporation is a doctrine with elements of both fundamental fairness and total incorporation, Justice Brennan's allegiance to the total incorporation thesis was hardly a secret.[110] It has been suggested that selective incorporation "was simply Brennan's polite way of achieving total incorporation by indirection, clause by clause, without having to overrule pre-Warren Court precedent repudiating Black . . . ."[111] Perhaps the strongest support for this understanding of selective incorporation is that "Brennan and his brethren never met a right in the Bill they didn't like or deem fundamental enough to warrant incorporation."[112]

But it would be a serious mistake to merely equate Black's total incorporation model with Brennan's selective incorporation doctrine simply because Justice Brennan appeared ready to hold that all of the rights embodied in the Bill of Rights were incorporated. Recognizing the analytic melding of fundamental fairness and total incorporation that characterizes Brennan's approach is far more useful. From the doctrine of fundamental fairness the Court embraced the concept of conducting an individualized consideration of whether a particular right was incorporated, rather than

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[106] Brennan, *supra* note 68, at 544.

[107] Gideon v. Wainwright, 372 U.S. 335, 346-47 (1963) (Douglas, J., separate opinion).

[108] Brennan, *supra* note 68, at 549; *see also* Israel, *supra* note 6, at 291 (noting that the hallmark of the selective incorporation doctrine is the fact that when a "guarantee is found to be fundamental, due process 'incorporates' the guarantee and extends to the states the same standards that apply to the federal government under that guarantee" (footnotes omitted)).

[109] Amar, *supra* note 31, at 1196.

[110] Commenting on the Court's Fourteenth Amendment jurisprudence, Justice Brennan called it "unfortunate[] [that] the Court expressly rejected any notion that the Fourteenth Amendment mandated the wholesale application of any of the first eight amendments." Brennan, *supra* note 68, at 538.

[111] Amar, *supra* note 31, at 1263.

[112] *Id.*

simply announcing a wholesale incorporation of the Constitution.[113] Likewise, from the total incorporation doctrine, the Court imported the idea that, once a right is deemed incorporated, the constitutionality of a state's criminal procedure practices with regard to that right will be "judged under precisely the same standards applied [in federal courts]."[114]

In short, the Court's final word on incorporation was unequivocal as to the question of varying or competing constitutional standards. The Court recognized that an incorporated right, as most all aspects of the Fourth, Fifth, Sixth, and Eighth Amendments are, must apply consistently and with equal force in all state and federal courts.[115] The rejection of the fundamental fairness approach, which had as its central premise a notion that the rights might vary or apply in a slightly less onerous form to the states, left no doubt that the doctrine of selective incorporation provides no margin for local variation or experimentation that might provide less protection than promised by the incorporated right.[116] The question is whether selective incorporation's requirement that "the states were to receive no greater deference for their judgments than the federal government" is compatible with the recent restrictions on habeas corpus relief.[117]

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[113] *Id.*

[114] Israel, *supra* note 6, at 293.

[115] Justice Roberts has recently spoken on this question with similar definitiveness. Arguing that rules of retroactivity are of constitutional magnitude, Justice Roberts reminded the Court that the bedrock of our constitutional democracy is that "'a single sovereign's law should be applied equally to all,'" such that the Federal Constitution is applied in the same manner "in every one of the several States." Danforth v. Minnesota, 128 S. Ct. 1029, 1054 (2008) (Roberts, C.J., dissenting) (quoting Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 4 (1985)). And while the majority disagreed as to whether retroactivity was a constitutional rule subject to this Supremacy Clause analysis, it too reiterated the principle that "States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees." *Id.* at 1032 (majority opinion).

[116] As Justice Black once aptly characterized the incorporation position:

> I am not bothered by the argument that applying the Bill of Rights to the States, "according to the same standards that protect those personal rights against federal encroachment," interferes with our concept of federalism in that it may prevent States from trying novel social and economic experiments. I have never believed that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the Bill of Rights.

Duncan v. Louisiana, 391 U.S. 145, 170 (1968) (Black, J., concurring) (footnote omitted).

[117] Israel, *supra* note 6, at 317.

III. THE FIRST TIER OF UN-INCORPORATION: DEFERENCE TO STATE COURT INTERPRETATIONS OF THE CONSTITUTION WHEN DISCRETIONARY REVIEW WAS AVAILABLE IN FEDERAL COURT THROUGH CERTIORARI ON DIRECT APPEAL

As a general matter, the Court continues to apply the inflexible mandates of incorporation. In *Wallace v. Jaffree*, for example, the Court held that an Alabama statute authorizing a daily period for prayer during the school day was an endorsement of religion lacking any clearly secular purpose, and thus an affront to the Establishment Clause of the First Amendment.[118] In explaining the decision, the Court rejected what it called the "District Court's remarkable conclusion that the Federal Constitution imposes no obstacle to Alabama's establishment of a state religion," and noted that it is "firmly embedded in our constitutional jurisprudence . . . that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States."[119] The Court's holding, in other words, is premised on the notion that a provision of the Bill of Rights, once incorporated, restrains the states to the same extent as the federal government.[120] The question, however, is whether the Court's fidelity to selective incorporation extends to the realm of criminal procedure rights, which are most often litigated in collateral or habeas proceedings.

The distinction between habeas corpus challenges and a direct appeal of one's conviction (or any other question of constitutional interpretation) is a distinction of analytic significance.[121] Cognizant of the view that limits on habeas corpus speak only to *when* the Constitution may be interpreted and not *how* it is to be interpreted, the focus here is on those aspects of

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[118] 472 U.S. 38, 48-49 (1985).

[119] *Id.*

[120] The only Justice who finds fault with the broad concept of selective incorporation adopted by the Court is Justice Thomas, but even Justice Thomas's criticism of selective incorporation is limited. In Justice Thomas's view, the Establishment Clause "resists incorporation." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45-46 (Thomas, J., concurring). However, by limiting his rejection of the uniformity-driven theory of incorporation to the Establishment Clause, Justice Thomas has implicitly signaled his agreement with the rest of the Court that incorporation remains a valid principle of constitutional law.

[121] *See, e.g.*, Teague v. Lane, 489 U.S. 288, 308 (1989) (noting that concerns of comity and finality are of heightened significance once a conviction is affirmed and the direct appeal proceedings are complete); Kuhlmann v. Wilson, 477 U.S. 436, 436 (1986) (plurality opinion).

habeas decisions and legislation that effect a material limitation on those rights that were selectively incorporated against the states.[122]

To be sure, habeas reforms are, first and foremost, limitations on the sort of relief that may be obtained through collateral proceedings—after a conviction has been affirmed through all available avenues of appeal.[123] But the role of habeas corpus as a necessary vehicle for the vindication of constitutional rights is beyond question,[124] and therefore, the relationship between habeas reforms and the realization of the principles announced in the selective incorporation cases is, in many circumstances, quite tangible.[125] Moreover, the scope of certain habeas reforms combined with the nature of some of the rights cognizable *only* on habeas review leaves little question that altering the availability of post-conviction relief has subtly, but substantially, undermined the scope and purpose of the incorporation-era cases.[126] Stated another way, because a majority of the Court adheres to the constitutional principle that federal rights must be "applied equally" in "every one of the several States,"[127] unless these

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[122] For a detailed review of the importance of deciding constitutional questions on the merits, see Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 49 (2002); *see also* Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of Saucier v. Katz*, 16 GEO. MASON L. REV. (forthcoming 2008) [hereinafter *An Article III Defense*] (arguing that merits-first adjudication in the field of § 1983 litigation is constitutionally permissible and important to the development of constitutional law).

[123] Anthony Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 381 (1964) (considering the appropriateness of collateral relief on the basis of a Fourth Amendment claim following an otherwise constitutional *federal* trial).

[124] *Id.* at 380 ("[W]ith perhaps greater reason than supports the district courts' federal question, civil rights, and specified removal jurisdictions—not to speak of the diversity jurisdiction—it makes good sense to give a state criminal defendant a federal judge to try the facts underlying his federal constitutional claim." (footnote omitted)); *see also* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 424 (1995) ("[F]ederal habeas . . . has become . . . the most important source of constitutional protection for state prisoners.").

[125] The significance of habeas corpus to the Warren Court is evident from the Court's habeas trilogy: *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963); *Sanders v. United States*, 373 U.S. 1 (1963). Subsequent cases have curtailed, to varying degrees, these holdings, but in assessing the relevance of habeas reforms to the realization of the Court's incorporation jurisprudence, surely it is useful to consider the habeas decisions of the Court that originally announced the doctrine.

[126] Because federal habeas review has assumed a prominent and in some instances exclusive role as the safeguard on the fair application of constitutional rights, limitations on habeas are of significant import. *Cf.* Boyd v. United States, 116 U.S. 616, 635 (1886) ("It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.").

[127] Danforth v. Minnesota, 128 S. Ct. 1029, 1054 (2008) (Roberts, C.J., dissenting).

federal rights are to be viewed as mere hollow abstractions, the Constitution mandates that appropriate mechanisms (remedies) exist to ensure the uniform application of these rights, and in many instances federal habeas review is the only such remedy.

Historically, federal habeas review of state decisions has provided an important source of redress for the rights protected under the Fourth and Fifth Amendments. This Part examines legislative and court-created limitations on federal habeas review of these rights in order to assess whether the Court is quietly overruling the doctrine of incorporation. The reforms affecting the Fourth and Fifth Amendment, at least at first blush, present a more tenuous ground for treating selective incorporation as a doctrine in decline, because claims as to these two amendments could, at least theoretically, be raised on a writ of certiorari to the U.S. Supreme Court following the prisoner's direct appeal in state court, rather than via collateral proceedings such as federal habeas corpus proceedings.[128]

A. THE FOURTH AMENDMENT: ELIMINATING HABEAS RELIEF

1. Incorporating the Fourth Amendment

Professor Donald Dripps has said that "the best way to understand modern Fourth Amendment law is to characterize it as one long and awkward reaction against *Mapp v. Ohio*," the case announcing that the full protections of the Fourth Amendment apply to the states by virtue of the Fourteenth Amendment.[129] Understood in this way, perhaps the Court's disavowal of the Fourth Amendment in the field of habeas litigation should not be entirely surprising. After all, the exclusion of putatively reliable evidence has never been a very popular idea.[130] Denying individuals the opportunity to litigate Fourth Amendment violations on federal habeas review is, however, fundamentally inconsistent with the spirit and purpose

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[128] *See infra* Part III.A-B. As explained *infra*, however, the possibility of a grant of certiorari on direct review does not substantially lessen the importance of habeas corpus as a federal forum for vindicating federal rights. *See, e.g.*, Austin v. United States, 513 U.S. 5, 8 (1994) (per curiam) (noting that the right to counsel "does not extend to forums for discretionary review"). Under *Austin*, an indigent defendant does not have any right to the assistance of counsel in preparing a petition for certiorari to the U.S. Supreme Court. *Id.* Accordingly, it is somewhat disingenuous to celebrate a defendant's theoretical right to petition the Supreme Court as a basis for limiting federal review during habeas proceedings.

[129] Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559, 1615-16 (1996).

[130] Akhil Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 644 (1996) (arguing that the exclusionary rule is an "upside down" remedy because it "creates huge windfalls for guilty defendants, but gives no direct remedy to the innocent woman wrongly searched").

of the selective incorporation doctrine, a doctrine that to this day has never been expressly criticized by a majority of the Court.

In *Stone v. Powell*, the Court held that the Fourth Amendment does not provide a cognizable basis for federal habeas corpus relief.[131] Specifically, the Court limited the import of the Fourth Amendment's protections by providing that "the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."[132] In his dissent, Justice Brennan, the Justice with the greatest responsibility for the emergence of the selective incorporation doctrine,[133] expressed disbelief over the Court's willingness to affirm a conviction that, as a matter of federal law, was unconstitutional.[134] As Brennan noted, *Stone v. Powell* foreshadowed the Court's newfound willingness to deprive prisoners of a "federal forum for vindicating . . . federally guaranteed rights," a concept that he correctly viewed as antithetical to the underpinnings of incorporation.[135] Indeed, commentators have often noted that prior to *Stone v. Powell*, the Court had consistently refused to allow an unconstitutional conviction to stand.[136] In order to appreciate the tension between selective incorporation and the *Stone* decision, it is necessary to consider the constitutional pedigree of the Fourth Amendment's application to the states.

The seminal case recognizing that the protections afforded under the Fourth Amendment apply with equal force to the states and the federal government is *Mapp v. Ohio*.[137] In *Mapp*, the Court discussed the significance of having independent judges who are willing to jealously guard the rights announced in the Constitution, rather than elected judges who answer to political constituents.[138] The majority held that by excluding the use of evidence secured through an illegal search, federal courts are able to ensure that the Fourth Amendment is not merely "reduced to a 'form of

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[131] 428 U.S. 465, 482 (1976) ("[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.").

[132] *Id.* at 481-82.

[133] *See* Amar, *supra* note 31, at 1196 (crediting Justice Brennan with developing the concept of selective incorporation).

[134] *Stone*, 428 U.S. at 503 (Brennan, J., dissenting).

[135] *Id.* (emphasis omitted).

[136] *See, e.g.*, Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 690-91 (1982).

[137] 367 U.S. 643 (1961).

[138] *Id.* at 648 (discussing the historical significance of an independent judiciary to adjudicate unpopular rights).

words.'"[139] More significantly, stressing the need for a single uniformly-enforced federal standard, the Court overruled a prior decision that recognized that the Fourth Amendment was incorporated against the states but that refused to extend the exclusionary rule to state prisoners through the Due Process Clause of the Fourteenth Amendment.[140]

The holding that the exclusionary rule applies with equal force to the states was expressly premised on the Court's view that a federal right, once incorporated through the Fourteenth Amendment, applies with the "same" force to the states.[141] *Mapp* held that to acknowledge a constitutional right to privacy without providing the "logically and constitutionally necessary" exclusionary rights, as the Court did in *Wolf v. Colorado*, would be to "grant the right but in reality to withhold its privilege and enjoyment."[142] *Mapp* recognizes that the Fourth Amendment, which the Court had already held to apply to the states, is of no force or effect if divorced from its accompanying privilege of exclusion.[143] The exclusionary rule, in other words, is a constitutional rule.[144] Accordingly, the Fourth Amendment right to privacy, or to be free of unreasonable intrusions, is directly and intimately linked to the availability of a forum in which the right to exclude illegally-obtained evidence may be challenged.

The holding of *Mapp*, therefore, is in direct tension with the reasoning of *Stone v. Powell*, which notes that "[w]hile courts . . . must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence."[145] *Stone* shifts the Court's focus to matters of reliability and finality and ignores *Mapp*'s concern with the broader prophylactic question

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[139] *Id.* at 648 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

[140] *Id.* at 653-55 (overruling Wolf v. Colorado, 338 U.S. 25 (1949)).

[141] *Id.* at 655. In this regard, the Court's reasoning is of obvious import to the ongoing debate over rights and remedies. Some scholars argue that a constitutional "right" can never be limited, but that access to a remedy can, with very few limitations, be curtailed by Congress. *See, e.g.*, Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 959 (1998) (arguing that remedial limits on constitutional rights do "not violate the 'qualitative' requirements of Article III").

[142] 367 U.S. at 656.

[143] *Id.* The Court stressed that once operative against the states, the right "was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent." *Id.* at 655. In other words, although complete uniformity is never possible, unreasonable limitations on the remedy constitute a constitutional violation of the right.

[144] *See* Dickerson v. United States, 530 U.S. 428, 437 (2000) (stressing the distinction between constitutional rules and rules created by the Court in order to aid in the administration of constitutional rules).

[145] Stone v. Powell, 428 U.S. 465, 485 (1976).

of how the privacy rights announced in the Fourth Amendment can be realized without a remedy.[146] Of course, *Stone* has never been read as a direct limit on the rule announced in *Mapp*. On the other hand, *Stone* arises in the context of habeas corpus proceedings, and the question is not whether the exclusionary rule applies at trial or on direct appeal, but rather whether a violation of the Fourth Amendment that is not discovered until federal habeas review entitles a prisoner to a new trial.[147] That is, does a violation of the Fourth Amendment only amount to constitutional injury if it is recognized and litigated on direct appeal?

Stated more directly, the question posed in this Part is whether the elimination of habeas relief for patent Fourth Amendment violations is inconsistent with *Mapp v. Ohio* and the reasoning that led to the incorporation of the Fourth Amendment. Though as a general matter, habeas appeals and direct appeals are substantially different and the two should not be conflated,[148] the practical realities of criminal defense representation suggest that the limitations on Fourth Amendment relief dictated by *Stone* have a direct effect on *how* the right will be applied across the states, and not merely *when* a prisoner is required to raise his Fourth Amendment claims.[149]

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[146] *Id.* at 482, 486, 489, 495 (focusing the inquiry exclusively on questions of procedural fairness).

[147] Although *Stone* is written so as to suggest that its goal of finality is entirely consistent with the spirit and purpose of the exclusionary rule, as enforceable through direct appeal, the Court's change in tone and priority is unmistakable. *Compare Mapp*, 367 U.S. at 647 (warning that the Court's duty as the final arbiter of constitutional rights was to guard against "stealthy encroachments thereon" (quoting Boyd v. United States, 116 U.S. 616, 635 (1886))), *with Stone*, 428 U.S. at 495 (focusing on the need for finality).

[148] *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 447 (1963) (raising questions about the compatibility of federal habeas and finality and federalism).

[149] In an ironic twist to the story of un-incorporation, the concept of selective incorporation was first announced in a habeas corpus case raising a Fourth Amendment claim. Ohio *ex rel* Eaton v. Price, 364 U.S. 263, 274 (1960) (Brennan, J.). In this case, an evenly divided (4–4) Court affirmed a conviction (Supreme Court procedures dictate that a tie vote results in an affirmance of the lower court's decision). However, in announcing what would come to be known as the concept of selective incorporation, Justice Brennan rejected the idea that a "watered-down" version of the Fourth Amendment could be applied to the states. *Id.* at 275. If the right was incorporated, as the Fourth Amendment had been, then it was to apply with uniform force to all state court proceedings. Thus, selective incorporation first appeared in the context of a Fourth Amendment habeas proceeding, and the process of un-incorporation arguably began with the Court's decision in a habeas case involving a Fourth Amendment claim.

2. Un-Incorporating the Fourth Amendment

At first blush, eliminating habeas relief does not appear inconsistent with the holding that the "exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments."[150] After all, the prisoner has the opportunity the raise this claim on direct appeal in state court, and more importantly for purposes of an incorporation argument, in federal court through a writ of certiorari to the Supreme Court. If federal review of the Fourth Amendment claim is available in at least one court, e.g., the Supreme Court on a grant of certiorari on direct appeal, the proponents of limiting habeas corpus relief would argue that no legitimate interest is served by allowing the matter to be re-litigated through federal habeas proceedings.[151] The reality, however, is that federal habeas has always been the critical avenue for vindicating constitutional rights.[152] The difficulty in obtaining a grant of certiorari from the Supreme Court, because of the limited number of cases reviewed by the Court and the Court's focus on establishing nationwide precedents rather than correcting constitutional errors, make the elimination of federal habeas review a material impediment to the uniform application and development of the Fourth Amendment.[153]

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[150] *Mapp*, 367 U.S. at 657.

[151] This view was summarized by the Supreme Court in *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) ("[I]t must be remembered that direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review—which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari—comes to an end, a presumption of finality and legality attaches to the conviction and sentence."). In other words, the primacy of certiorari review in safeguarding constitutional rights renders federal habeas review a non-critical proceeding. It has been observed, however, that the view that "'the role of federal habeas proceedings . . . is secondary and limited'" and that "certiorari is the primary federal judicial protection against constitutional violations in state-court [proceedings] . . . is unprecedented in law and untrue in fact." Amsterdam, *supra* note 39, at 54 (quoting *Barefoot*, 463 U.S. at 887). As Professor Amsterdam has explained, the certiorari process is simply incapable of providing a meaningful vehicle for vindicating federal rights because certiorari is not granted to correct errors in individual cases, not "even the most egregious constitutional errors"; it is only granted in those cases where the Court's "nationwide precedent-setting function" is served. *Id.*; *see also id.* at 54-56 (providing three examples where the Court has either explicitly or implicitly acknowledged that it will not permit grants of certiorari to be used as a vehicle to merely correct errors, even in capital cases).

[152] *See, e.g.*, Danforth v. Minnesota, 128 S. Ct. 1029, 1036 (2008) (recognizing that prior to *Teague*, new rules of constitutional criminal procedure were routinely announced on federal habeas review).

[153] Amsterdam, *supra* note 39, at 54; *see also* Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 275 (2006) (stressing that the Supreme Court is not merely another federal court of appeals in that it does not review cases simply to correct legal errors,

A defining rationale for the incorporation of certain rights, including the Fourth Amendment's right to be free from unreasonable searches, was a desire to have a uniform application of rights between the states and federal government.[154] As commentators have noted, "America [is] too much one country to justify the deference to local diversity that [would] produce[] a checkerboard of human rights in the field of criminal procedure."[155] Several factors tend to suggest that by limiting *when* Fourth Amendment relief is available, the underlying goal of uniformity among the states will be subverted and the *substance* of the right diminished.[156]

First, the impact of eliminating habeas review for a class of constitutional claims is demonstrated by, among other things, the role that federal habeas review has played in first announcing a number of new constitutional rights that are now recognized as fundamental protections under the Bill of Rights. A number of the Constitution's most cherished rights in the field of criminal procedure were announced, not on direct appeal to the Supreme Court, but on federal habeas corpus review. For example, in *Gideon v. Wainwright*, the Court announced for the first time, in the context of a federal habeas corpus appeal, the right of indigent defendants to be appointed counsel free of charge.[157] It is difficult to imagine a right of greater importance in the field of criminal procedure.[158] More importantly, the habeas origins of this right are arguably more than mere coincidence.[159]

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and noting, instead, that the Court has developed "excessively narrow" grounds for granting certiorari and reviewing a case).

[154] *Mapp*, 367 U.S. at 655 (noting that the Fourteenth Amendment calls for the Fourth Amendment to be applied in the "same" manner against the states and the federal government); *see also id.* at 656 (recognizing that the Court has never "hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press").

[155] Israel, *supra* note 6, at 316-17 (quoting FRED P. GRAHAM, THE SELF INFLICTED WOUND 39-40 (1970)); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 274 (1973).

[156] Justice Brennan commented that *Mapp v. Ohio* reflected a critical "turning point," making it clear that the selectively incorporated rights applied to the same "scope [and] extent" in state and federal courts so as to effect a "nationalization of the Bill." Brennan, *supra* note 68, at 540-41.

[157] 372 U.S. 335, 344-45 (1963).

[158] Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1389 (2004) ("Unquestionably, *Gideon* was one of the most monumental criminal procedure cases ever decided . . . .").

[159] Consider some of the statistics regarding habeas corpus relief prior to the advent of the far-reaching limitations that now characterize the field. By analyzing the availability of habeas relief prior to the *finality* driven reforms, one can get a sense of how common it was

It is widely known that the resources available to lawyers representing indigent defendants in the federal court system are, in many instances, vastly superior to what is available to indigent defendants in the state system.[160] For an indigent defendant, the difference could be an overworked and underpaid young lawyer appointed by the state for trial and direct appeal, and, as was the case for Mr. Gideon, the likes of Abe Fortas representing the indigent defendant on his federal habeas corpus appeal.[161] To be sure, this greatly over-simplifies the range of qualifications of attorneys available at the state and federal levels, and obviously *Gideon* presents a claim under the Sixth Amendment. But the prospect of discovering or announcing new rules of criminal procedure on habeas because of the fact that attorneys have lighter case loads and greater resources is equally likely in the Fourth Amendment context. As one commentator has noted, habeas allows for a "vigorous federalist balance" "rein[ing] in recalcitrant states and [giving] federal courts the 'final say.'"[162]

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for a federal court, unencumbered by procedural requirements calling for deference to state courts, to find that a state court conviction was inconsistent with the Federal Constitution.

> Between 1976 and 1983, the federal courts of appeals had decided a total of 41 capital *habeas* appeals, and had ruled in favor of the condemned inmate in 30, or 73.2 percent, of them. In the Fifth Circuit, . . . considering only cases in which the condemned inmate had been the appellant, more than 70 percent of such appeals had produced decisions in the inmates' favor.

Amsterdam, *supra* note 39, at 51 (emphasis omitted). As Professor Amsterdam suggests:

> Contemplate for a moment what this means[:] In every one of these cases, the inmate's claims had been rejected by a state trial court and by the state's highest court, at least once and often a second time in state post-conviction proceedings; the Supreme Court had usually denied certiorari at least once and sometimes twice; and a federal district court had then rejected the inmate's claims of federal constitutional error infecting his conviction and/or death sentence. Yet in over 70 percent of the cases, a federal court of appeals found merit in one or more of the inmates' claims.

Id. These statistics alone provide a sobering reminder of the role that habeas corpus has played in ensuring that state convictions are consistent with the Federal Constitution.

[160] *See, e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1095 (2006) (describing the federal defender system as a "model for the delivery of training"); *see also id.* at 1127 (calling for federal funding for state public defender systems so that states can begin providing "competent criminal representation"). The truth is, state lawyers are simply "paid too little," and the same is not true of federal defense lawyers. *Id.* at 1062 (citing Law.com, What Lawyers Earn 2000, http://www.law.com/special/professionals/nlj/earn/earns_4.html (last visited Oct. 16, 2008)).

[161] *Gideon*, 372 U.S. at 335 ("Abe Fortas, Washington, D.C., for petitioner").

[162] Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 537 (2008). From this perspective, it is not as though federal courts are regarded as the idyllic forum for constitutional issues. *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that federal courts provide a more competent and reliable forum for adjudicating federal constitutional questions). The interest protected by federal habeas is not some

After *Stone v. Powell*, however, the resources of the federal system are irrelevant to the quest to ensure that states are correctly and uniformly applying the protections of the Fourth Amendment.

Directly related to the relationship between adequate resources and the vindication of the selectively incorporated rights is the question of whether a direct appeal review of one's constitutional claims by the U.S. Supreme Court is a practically viable option. Certainly opponents of federal habeas corpus who view federal habeas as mere duplicative litigation would agree that the absence of any opportunity for review of state court interpretations of constitutional rights by the Court on direct review would constitute a direct assault on the doctrine of incorporation.[163] After all, without the availability of review by any federal court on direct review, there would be no avenue for a defendant to ever vindicate his Fourth Amendment rights in federal court.[164] The high court would no longer be the "ultimate arbiter of the rights of its citizens."[165] The question, then, is to what extent certiorari review provides a meaningful opportunity for constitutional redress so as not to render the right a mere abstraction.

Notably, the availability of certiorari on direct review is extremely limited. Both as an empirical reality based on the Court's docket and the rules governing grants of certiorari, and as a practical matter in terms of the resources needed to file a petition for certiorari with the Court, in most cases state prisoners are deprived of any opportunity to have the state court's interpretation of their constitutional rights reviewed by a federal court. The Court's own structures and procedural rules tend to foster the very sort of under-litigation on direct review that makes habeas review so critical to a uniform application of the incorporated rights of criminal procedure.[166]

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guarantee of grand, consistent, and independent constitutional truths, but rather, it is the promise of a (possible) check on otherwise recalcitrant states.

[163] The most famous critique of the modern approach to federal habeas review was written by Professor Bator. Bator, *supra* note 148 (arguing that when there has already been a "full and fair" review of a federal claim, principles of collateral estoppel suggest that federal habeas review is superfluous).

[164] Moreover, there would be no forum in which defendants could have their other—non-Fourth Amendment claims—reviewed in federal court other than habeas review.

[165] Welton O. Seal, Jr., *"No Equal Justice": The Court Reins in the Right to Appointed Appellate Counsel in* Austin v. United States, 73 N.C. L. REV. 2408, 2427 (1995) (quoting Moffitt v. Ross, 483 F.2d 650, 653 (4th Cir. 1973)).

[166] It is a well-settled principle of Supreme Court practice that the "denial of a writ of certiorari imports no expression of opinion upon the merits of [a] case." United States v. Carver, 260 U.S. 482, 490 (1923). This is because the Court's decision to grant certiorari is not predicated on whether a case was correctly decided as a matter of federal constitutional law, but whether a Supreme Court decision on the issue could create useful nationwide

The Court's certiorari jurisdiction is extremely limited and, for the most part, bars the Court from granting certiorari merely to correct the interpretational or legal errors of a state court.[167] But for an indigent defendant, the Court's rules may not be the greatest impediment to gaining federal review. As Justice Rehnquist acknowledged, the process of obtaining certiorari review is complicated, highly specialized, and "arcane."[168] Without effective representation, it is difficult to imagine how a prisoner with a claim of constitutional error, much less a claim of nationwide precedential significance, would be able to gain certiorari review of his claim.

The Supreme Court has held that the right to counsel extends to appeals.[169] Recognizing that, like a trial, an appeal is "governed by intricate rules that to a layperson would be hopelessly forbidding," the Court held that the right to an appeal would be a "futile gesture" unless it included a right to effective assistance of counsel.[170] Neither courts nor commentators have ever called into question the reasoning in support of a right to effective counsel on appeal. It would, therefore, be odd to view a defendant's right to petition the Court for certiorari review of his constitutional claims as anything other than a "meaningless ritual"[171] if defendants are not entitled to counsel, much less the effective assistance of counsel, in doing so.[172] Nonetheless, the Court has limited the right to counsel to the first non-discretionary appeal. There is no right to the assistance of counsel in seeking certiorari.[173] Accordingly, the right to non-habeas federal review of a constitutional claim is often theoretical.[174] There

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precedent or a looming conflict between circuits. SUP. CT. R. 10, *available at* http://www.supremecourtus.gov/ctrules/rulesofthecourt.pdf (last visited Nov. 16, 2008).

[167] Amsterdam, *supra* note 39.

[168] Ross v. Moffitt, 417 U.S. 600, 616 (1974).

[169] Evitts v. Lucey, 469 U.S. 387, 397 (1985).

[170] *Id.* at 396-97.

[171] Douglas v. California, 372 U.S. 353, 357-58 (1963).

[172] Austin v. United States, 513 U.S. 5 (1995) (per curiam); *Ross*, 417 U.S. at 605.

[173] *Ross*, 417 U.S. at 605 (holding that a defendant has no federal constitutional right to assistance of counsel for discretionary appeals on direct review); *see also* Pennsylvania v. Finley, 481 U.S. 551 (1987) (reiterating the holding of *Ross*).

[174] The Court's refusal to require the appointment of counsel for discretionary appeals, standing alone, represents a dramatic break from the framework of selective incorporation and deserves independent attention. It has been observed that whereas the Court's focus in the incorporation era cases was with procedural fairness and the protection of the rights enshrined in the Bill of Rights, the cases that decline to extend the right to counsel to discretionary appeals are conspicuously framed in terms of "administrative efficiency." Seal, *supra* note 165, at 2414-15. *But see also* Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211, 247

are very few defendants that can effectively manage their own state court discretionary appeals, much less the arcane and complicated practice of presenting an issue to the U.S. Supreme Court without the right to effective counsel.

The effect of this inability to induce federal review of one's claims on direct appeal cannot be overstated. If the Court does not grant certiorari on any material proportion of the criminal appeals affirmed by state supreme courts, and if certiorari is not even sought in many cases because there is no counsel or means for such an appeal, it is difficult to rationalize the view that habeas corpus appeals are but an extra, even spurious, layer of appeal. Habeas corpus claims seem to be the only federal route to raise and vindicate federal rights that are wrongly interpreted by state courts. A review of published habeas decisions from federal courts—both the Supreme Court and the circuit courts—underscores this conclusion.[175] In a case before the Supreme Court in the 2006 term, *Shriro v. Landrigan*, the Court relied on the convoluted provisions of AEDPA, which apply only to habeas cases, in order to deny Landrigan an evidentiary hearing as to his constitutional claims.[176] Noticeably missing from the Court's opinion, which set forth in painstaking detail the limited role federal courts must play when a case is on habeas rather than direct appeal, was any mention of the fact that the Court had refused to grant certiorari when Landrigan had previously presented many of the same claims he raised on habeas to the Court on direct appeal.[177]

This problem of the unavailability of counsel for the certiorari process is particularly acute where, as in the context of the Fourth Amendment, there simply is not any federal habeas review.[178] In describing the impact of *Stone v. Powell*, one commentator has aptly noted that "[b]y announcing numerous exceptions to *Mapp*'s exclusionary rule while simultaneously cutting off federal habeas corpus review of *Mapps*'s application in state courts, the Supreme Court effectively has overruled *Mapp* sub

(2008) (stressing the importance of seeking certiorari from direct criminal appeals or from state post-conviction proceedings insofar as certiorari review of the claim would be de novo).

[175] *See, e.g.*, Brown v. Ornoski, 503 F.3d 1006 (9th Cir. 2007) (denying constitutional claims of a capital defendant because the case was before the court on habeas review, although the claims asserted either were not available on direct appeal or were raised in a petition for certiorari to the Supreme Court following direct appeals in the state court).

[176] 127 S. Ct. 1933 (2007).

[177] Landrigan v. Arizona, 510 U.S. 927 (1993) (denying the petition for writ of certiorari following Landrigan's direct appeal to the Arizona Supreme Court).

[178] Stone v. Powell, 428 U.S. 465 (1976).

silentio . . . ."[179] Stated another way, through *Stone* the Court "has reinstated the nonbinding framework of [the] Fourth Amendment . . . that had previously prevailed under *Wolf*."[180] The Court's incorporation doctrine dictates that all of the procedural details apply equally against state and federal actors, and this maxim is in direct tension with the jurisprudence of fundamental fairness, which, through decisions like *Wolf*, expressly approved the stratification of higher order (more complete) federal rights that applied against the federal and state governments, and lower order federal rights that applied only against the federal government.[181] Furthermore, to give incorporation substantive content, if a federal right exists, there must be a practical means of vindicating it; that is, "[i]f a provision of the Bill of Rights is sufficiently rooted in our traditions and constitutional text to command application against the states via the Due Process Clause, there is little basis for concluding that it is not sufficiently important to justify federal enforcement."[182]

The trend away from the gloss of uniformity prescribed in *Mapp* is particularly troubling in light of the heightened need for federal guidance in this realm of constitutional law. In the decades since *Stone* was published in 1976, the changing landscape of police technology has made the Fourth Amendment's prohibition on unreasonable searches and seizures all the more relevant, but all the more difficult to define.[183] Thus, federal courts must be involved in reviewing the interpretations of the Fourth Amendment provided by state courts if the purpose of selective incorporation in bringing uniformity to the adjudication of the Bill of Rights is to be realized. Yet,

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[179] Kenneth Katkin, *"Incorporation" of the Criminal Procedure Amendments: The View from the States*, 84 NEB. L. REV. 397, 421 (2005).

[180] *Id.* ("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."). Most strikingly, Professor Katkin has noted that "some state courts have openly announced that *Mapp* is no longer binding on them." *Id.* (citing People v. Carter, 655 N.W.2d 236, 239 n.1 (Mich. Ct. App. 2002)) (recognizing that *Mapp* is no longer the controlling Supreme Court authority).

[181] Wolf v. Colorado, 338 U.S. 25, 28 (1949) (refusing to extend the exclusionary rule to state prosecutions).

[182] Steiker, *supra* note 8, at 920. One could argue that a statute of limitations or other limitation on the ability of a petitioner to vindicate a constitutional right must also create unconstitutional disuniformity. However, there is a material distinction between the substantive disharmony created by rules like *Stone* that affirmatively bar any federal review, and a ministerial limitation like a statute of limitations, which is in fact *applied uniformly* across the states.

[183] "[T]he rapid growth of technology in our contemporary world heightens our need to understand the Court's definition of what constitutes a 'search' within the meaning of the Fourth Amendment." Kathryn R. Urbonya, *A Fourth Amendment "Search" in the Age of Technology: Postmodern Perspectives*, 72 MISS. L.J. 447, 454-55 (2003).

the Court has remained deafeningly silent on many of the major Fourth Amendment controversies of the day.[184]

The dirty secret of limiting habeas review is, therefore, that in most cases it is the only federal review that a defendant will get. The net result is that some important Fourth Amendment issues are being decided by state supreme courts, not the U.S. Supreme Court, and because there is no federal oversight, the uniformity that once defined incorporation no longer exists.[185] In short, there can be little doubt that *Mapp*'s requirement that the Fourth Amendment be "enforceable in the same manner and to like effect"[186] across the states is no longer a practical reality.[187]

It is one thing for the courts or Congress to announce limitations on the availability of secondary or tertiary federal review, but it is quite another thing to limit or eliminate the only realistic opportunity a prisoner has for federal review of a state court's interpretation and application of a federal constitutional right. As was the case under the fundamental fairness doctrine, there is no substantive uniformity, or even attempt at uniformity of federal constitutional doctrine; once again we have a "checkerboard" of Fourth Amendment rights.[188]

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[184] For example, there has been significant litigation involving the Fourth Amendment's privacy guarantees and how they apply to law enforcement's use of DNA databases. In *Landry v. Attorney General*, individuals brought suit in Massachusetts state court challenging the validity of a DNA database statute that required involuntary collection of blood sample from all persons convicted of one of thirty-three enumerated offenses. 709 N.E.2d 1085 (Mass. 1999). The Massachusetts Supreme Court rejected the Fourth Amendment claim and a petition for certiorari was filed. The United States Supreme Court denied certiorari in *Landry v. Reilly*, 528 U.S. 1073 (2000), and thus, the issue of how the Fourth Amendment was to apply in this context was left to the discretion of state courts without guidance from any federal court.

[185] Illustrative of the disuniformity emerging in the Fourth Amendment context is the question of whether probationers retain any Fourth Amendment protections against searches. For a discussion of this topic, see Marc R. Lewis, *Lost in Probation: Contrasting the Treatment of Probationary Search Agreements in California and Federal Courts*, 51 UCLA L. REV. 1703 (2004) (noting that while California courts refuse to provide any Fourth Amendment exclusionary remedy to a probationer, federal courts simply treat a probation agreement as one factor in the reasonableness test that is part of the Fourth Amendment inquiry). Presumably, if federal courts sitting in habeas review were permitted to enforce the Fourth Amendment, this tension would be eliminated, and Fourth Amendment uniformity would exist.

[186] Mapp v. Ohio, 367 U.S. 643, 660 (1961).

[187] Katkin, *supra* note 179, at 421 n.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.").

[188] Israel, *supra* note 6, at 316-17.

B. THE FIFTH AMENDMENT: PLACING TIME RESTRICTIONS ON THE UNIFORM APPLICATION OF FEDERAL RIGHTS

1. Application of Federal Rights

As with the Fourth Amendment, the claim that the Fifth Amendment has been substantially un-incorporated rests on the assumption that limiting habeas relief as to Fifth Amendment claims may, in certain circumstances, diminish the substantive content of the Fifth Amendment rights. Unlike the Fourth Amendment, however, habeas relief has not been strictly eliminated for petitioners claiming violations of their Fifth Amendment rights.[189] The Court has held that a prisoner's Fifth Amendment-based rights are fundamentally related to his basic entitlement to a fair trial; thus, federal habeas review is justified, although not without significant limitations.[190]

Given the Court's rationale for refusing to extend *Stone* to the Fifth Amendment context—citing the role of the Fifth Amendment in "assur[ing] the fairness, and thus the legitimacy, of our adversary process"[191]—the scope of the limitations on habeas relief that have been imposed by Congress and enforced by the federal courts is rather surprising. Under the terms of AEDPA, a prisoner's access to habeas relief for otherwise undisputed violations of the federal rights incorporated through the Fourteenth Amendment is drastically curtailed.[192] The limitations in AEDPA are broad, and do not apply only to habeas claims raising issues under the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment.[193] Nonetheless, the nature of a "due process" right makes one aspect of AEDPA's limitations on habeas relief uniquely relevant.

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[189] *See, e.g.*, Withrow v. Williams, 507 U.S. 680 (1993) (holding that the restrictions on federal habeas review announced in *Stone v. Powell* as to the Fourth Amendment do not extend to a state prisoner's claim that his conviction is unconstitutional under *Miranda*); *id.* at 686 ("We simply concluded in *Stone* that the costs of applying the exclusionary rule on collateral review outweighed any potential advantage to be gained by applying it there," but such was not the case with Fifth Amendment rights like the privilege against self-incrimination.). Perhaps fearing the backlash from such a broad pronouncement, the Court has repeatedly declined to extend *Stone* beyond the Fourth Amendment. *See, e.g.*, Jackson v. Virginia, 443 U.S. 307, 321 (1979) (refusing to apply *Stone* so as to bar a due process claim of insufficient evidence); *see also* Carey v. Musladin, 549 U.S. 70 (2006) (denying relief, but taking for granted that due process requires an avenue for habeas claims).

[190] *Withrow*, 507 U.S. at 688.

[191] *Id.* (citations omitted).

[192] *See, e.g.*, 28 U.S.C. § 2244 (2000) (applying, for the first time in history, a statute of limitations on habeas corpus claims); 28 U.S.C. § 2254 (2000) (imposing substantive limitations on the availability of relief).

[193] In the context of criminal procedure due process adjudications, it is not always clear whether the court is interpreting and applying the Due Process Clause of the Fifth or the Fourteenth Amendment. Moreover, the content of due process as a freestanding right, not as

Justice Owen Roberts once announced that "[t]he phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights."[194] Stated another way, "Rules of due process are not subject to mechanical application in unfamiliar territory."[195] This means that in interpreting the scope of due process protections in the realm of criminal procedure, judges are required to recognize rights and apply procedural protections that are "neither required at common law nor explicitly commanded by the text of the Constitution."[196] This standard, though open-ended, never proved to be particularly unworkable.[197] However, one of the limitations on relief contained in AEDPA, § 2254(d)(1), narrows the scope of habeas relief to claims that have been previously recognized and expressly accepted by the Court, thus building a substantial road-block to the concept of due process as an evolving and emerging source of protections.[198]

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the right through which others are incorporated, is a matter of significant debate. *See, e.g.*, Jerold Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 306 (2001) (attempting to define the content of due process as applied to criminal procedure in the post-incorporation context).

[194] Betts v. Brady, 316 U.S. 455, 462 (1942).

[195] Sacramento v. Lewis, 523 U.S. 833, 850 (1998) ("That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." (quoting *Betts*, 316 U.S. at 462)).

[196] Medina v. California, 505 U.S. 437, 454 (1992) (O'Connor, J., concurring).

[197] As a matter of history, the Court has repeatedly acknowledged the need to develop, not just interpret, due process. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68 (1985) (recognizing a due process right to psychiatric assistance when sanity is significantly in question); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (creating a due process right to hearing and counsel before probation revoked); Chambers v. Mississippi, 410 U.S. 284 (1973) (creating a due process right to introduce certain evidence); Sheppard v. Maxwell, 384 U.S. 333 (1966) (creating a due process right to protection from prejudicial publicity and courtroom disruptions); Brady v. Maryland, 373 U.S. 83 (1963) (establishing a due process right to discovery of exculpatory evidence); Griffin v. Illinois, 351 U.S. 12 (1956) (creating a due process right to trial transcripts on appeal).

[198] The discussion of the limitations imposed on habeas relief in the context of the Sixth Amendment, *infra* Part VI, focuses on the fact that certain claims under the Sixth Amendment cannot, as a matter of law, be raised on direct review. That is to say, post-conviction proceedings and federal habeas are a defendant's first opportunity to raise, for example, ineffective assistance of counsel. Similar concerns are also relevant for many generic due process claims involving the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment. It is, for example, impossible for a defendant to fully and fairly litigate a claim of prosecutorial misconduct for failing to disclose exculpatory evidence, *Brady*, 373 U.S. at 87, without the benefit of evidentiary development or hearings, which are not permitted during the course of direct appeals. Indeed, commentators have begun to realize that "federal habeas review does not merely provide one forum among many in which claims of prosecutorial misconduct can be raised effectively.... [T]here are many reasons

Under § 2254(d)(1), a prisoner is only entitled to relief if the basis for his plea has previously been held by the Court to constitute an established constitutional injury—i.e., "clearly established law."[199] More precisely, the Court has defined AEDPA's clearly established law limitation as follows: "the phrase 'clearly established Federal law, as determined by [this] Court' refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision."[200] To the extent that due process is a "living principle . . . not confined within a permanent catalogue of what may at a given time be deemed the limits or essentials of fundamental rights," the introduction of a statutory provision that defines due process by reference to a particular point in time would seem incompatible.[201]

In 2006, the Court decided *Carey v. Musladin*, the first opinion to directly address this new AEDPA-imposed concept of due process as frozen in time.[202] In *Musladin*, the Court was tasked with deciding whether the defendant's due process right to a fair trial was violated when the victim's family attempted to solicit sympathy from the jury by wearing buttons with the victim's picture on them to the trial.[203] Justice Thomas, writing for the majority, acknowledged that the Court had previously held that an incriminating or prejudicial courtroom spectacle violates the defendant's

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why state courts may lack the necessary institutional competence to address the problem adequately." Ryan P. Alford, *Catalyzing More Adequate Federal Habeas Review of Summation Misconduct: Persuasion Theory and the Sixth Amendment Right to an Unbiased Jury*, 59 OKLA. L. REV. 479, 524 (2006) (citing, among other things, the relationships between local prosecutors and state judges and the political aspirations of state judges as strong indicia that most states are unable to provide an adequate corrective process for constitutional injuries). The existence of identified limitations on the ability of some state courts to provide a forum in which defendants can fairly raise constitutional claims justifies viewing limitations on federal habeas relief as a direct limitation on the ability of federal courts to ensure that federal rights are being fully, fairly, and uniformly applied.

[199] 28 U.S.C. § 2254(d)(2) (2006) (limiting relief to claims of "clearly established federal law").

[200] Williams v. Taylor, 529 U.S. 362, 412 (2000).

[201] Wolf v. Colorado, 338 U.S. 25, 27 (1949). Notably, the concept of a rather amorphous definition of due process was exactly what Justice Black railed against in his opinions advocating total incorporation. *See, e.g.*, Adamson v. California, 332 U.S. 46, 92 (1947) (Black, J., dissenting). However, even under the selective incorporation doctrine, it remained possible to recognize evolving and expanding due process protections. *See supra* note 197 (citing cases recognizing due process as expanding and evolving, although the incorporated rights remained rigidly tied to the definition applied against the federal government).

[202] 549 U.S. 70 (2006).

[203] *Id.* at 72.

due process rights under the Fourteenth Amendment.[204] Justice Thomas, however, focused on the fact that the prior prejudicial presentations—e.g., forcing the prisoner to appear in prison clothes—were "state" rather than "spectator" imposed harms.[205] Recognizing "the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct," as opposed to that of the state, the Court held that relief was unavailable because there was not any "clearly established Federal law."[206]

The significance of this opinion rests, not so much on the issue of whether it is consistent with due process for potentially inflammatory buttons to be worn in court—a question the Court refused to address—but with the express recognition that habeas relief is not available for otherwise valid constitutional claims if the Court has not expressly addressed such claims in a previous holding.[207] Indeed, Justice Stevens's separate opinion notes the irony underlying the Court's reliance on dictum in a previous opinion—*Williams*—to support the view that only "holdings, as opposed to the dicta" are relevant to defining the contours of due process.[208] In Justice Stevens's view, the Court was constitutionally required to address the question on the merits.[209] Due process adjudications require flexibility, insofar as the right of due process has been described as the "least frozen concept of our law,"[210] and Justice Stevens argued that the Court must be

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[204] *Id.* at 75-77 (citing Holbrook v. Flynn, 475 U.S. 560 (1986); Estelle v. Williams, 425 U.S. 501 (1976)). Both *Estelle* and *Flynn* are post-incorporation cases that acknowledge the evolving quality of due process.

[205] *Id.* at 75-76.

[206] *Id.* at 77.

[207] According to one scholarly discussion of *Estelle*:

> A majority of the Court agreed on three criteria for "clearly established" law under § 2254(d)(1). First, a majority agreed with Justice O'Connor's definition of the phrase as referring "to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions." Second, a majority agreed that the time limitation [imposed on the evolution of a due process concept] was the date of the relevant state court decision. Third, a majority agreed that the clause "as determined by the United States Supreme Court" limited the source of "clearly established Federal law" to Supreme Court precedent.

Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under the Antiterrorism and Effective Death Penalty Act*, 54 CATH. U. L. REV. 747, 766 (2005).

[208] *Musladin*, 549 U.S. at 78-79 (Stevens, J., concurring) (discussing the irony of relying on dictum in *Williams v. Taylor*, 529 U.S. 362, 412 (2000), in order to preclude the use of dictum in § 2254 review).

[209] *Id.*

[210] Griffin v. Illinois, 351 U.S. 12, 20 (1956) (Frankfurter, J., concurring).

able to acknowledge a new (or existing, but unrecognized) component of due process.[211]

The case history suggests that Mr. Musladin did not seek certiorari in his case following the conclusion of his direct or post-conviction appeals in state court. This failure to pursue federal review outside of the habeas context makes Justice Kennedy's separate opinion factually accurate, if nonetheless practically difficult to address. Justice Kennedy wrote separately to express his view that due process may in fact require a "new rule" in this context; however, Justice Kennedy stressed that there were no due process grounds for relief in light of the "procedural posture of this case."[212] In short, the fact that the case was before the Court on habeas rather than direct review excused the Court from insisting that his right to due process be further fleshed out and enforced as a matter of federal law.[213] Lower federal courts, state courts, and Mr. Musladin were all deprived of clarity as to content of the due process right to be tried in a courtroom free of unduly prejudicial influences because the case arrived before the Court on habeas review.[214] As Professor Alan Chen has noted,

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[211] *Musladin*, 549 U.S. at 78-79 (Stevens, J., concurring). Reviewing the transcripts from oral argument in *Musladin*, Justice Stevens's frustration with the Court's narrow approach to due process is evident:

> JUSTICE STEVENS: May I ask this question? Supposing we all thought that this practice in this particular case deprived the defendant of a fair trial, but we also agreed with you that AEDPA prevents us from announcing such a judgment.
>
> What if we wrote an opinion saying it is perfectly clear there was a constitutional violation here, but Congress has taken away our power to reverse it.
>
> Then a year from now, the same case arises. Could we follow—could the district court follow our dicta or could it—would it be constrained to say we don't know what the Supreme Court might do?
>
> [Counsel for Petitioner]: It could not follow this Court's dicta . . . only the holdings, not the dicta, of this Court establish clearly—clearly establish Supreme Court authority.

Transcript of Oral Argument at 17-18, Carey v. Musladin, 549 U.S. 70 (No. 05-785).

[212] *Musladin*, 549 U.S. at 80-81 (Kennedy, J., concurring).

[213] For a discussion of the importance of merits-based constitutional adjudications, see Kamin, *An Article III Defense*, *supra* note 122.

[214] It is probably safe to assume that had Musladin sought certiorari after the completion of state post-conviction proceedings, it would have been denied. *See, e.g.*, Lawrence v. Florida, 127 S. Ct. 1079, 1084 (2007) (rejecting the view that certiorari review is properly classified as part of the post-conviction process and noting that Supreme Court review of state post-conviction proceedings is exceedingly rare). The Court granted certiorari in *Musladin* not in spite of, but because, the case was on habeas review. The Court was interested in defining the contours of the "clearly established" law limitation, not the contours of constitutional uniformity. *Id.* at 1089; *see also* Shay & Lasch, *supra* note 174, at 240-41 (summarizing empirical findings and noting, "The ascendant star has been federal habeas cases, expanding from a quarter of the Court's criminal docket to slightly over 40 percent").

this abandonment of merits-based constitutional adjudication has the effect of stripping constitutional rights of their force and content, because lower courts, in applying the precedent, tend to treat a non-merits-based constitutional adjudication as though it were a merits-based adjudication.[215] In essence, AEDPA's limitations simultaneously strip federal courts of the power to interpret and apply criminal procedure rights uniformly, and affirmatively establish structural systems that encourage a downward spiral of constitutional criminal procedure rights.[216]

An even more recent opinion of the Court, *Wright v. Van Patten*, further illuminates the significance of the "clearly established Federal law" limitation imposed by § 2254(d).[217] In *Van Patten*, the Court considered whether a lawyer representing a man charged with first-degree murder had provided ineffective assistance of counsel by participating in a plea hearing by phone.[218] In a per curiam opinion, the Court concluded that "[b]ecause our cases give no clear answer to the question presented . . . relief is unauthorized."[219] Accordingly, rather than interpreting the Sixth Amendment, providing guidance, and creating uniformity among state and

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[215] The most notable feature of the Court's increased willingness to review habeas corpus cases is, as Professor Chen predicted shortly after the enactment of AEDPA, the chilling effect on lower courts, and state courts in particular, as to the content of federal rights. Professor Chen has noted that AEDPA:

> [M]ay . . . lead to greater confusion about the law, or even to subversive transformations of substantive law . . . [because] state courts still look to federal court decisions for guidance on matters concerning federal questions . . . [but] [§] 2254(d)(1) ensures . . . that the federal courts' decisions will provide guidance not about the *substantive constitutional law*, but about the range of possible *reasonable interpretations* and applications of that law.

Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 628 (1999) (emphasis added). Professor Chen predicted that:

> Some state courts may reasonably misread these decisions as affecting not only federal habeas review, but also the course of constitutional development. Accordingly, a state court might read a federal court's decision concluding that another state court had not erred unreasonably as an endorsement of that state court's actual doctrinal conclusion.

Id. The *Musladin* decision has been misconstrued as a decision of constitutional law in just this way by state courts. *See, e.g.*, State v. Lord, 165 P.3d 1251, 1256 (Wash. 2007) (citing *Musladin* and denying a claim based on buttons worn by spectators by noting that "United States Supreme Court precedent is consistent with our conclusion and confirms that this issue is appropriate for state court resolution"); *id.* at 1257 (suggesting that *Musladin* holds that state courts are free to interpret the Constitution in varying ways on this question).

[216] *Cf.* Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485, 512-13 (1987) (explaining the concept of downward spirals as an analytic model).

[217] 128 S. Ct. 743 (2008).

[218] *Id.* at 744.

[219] *Id.* at 747.

federal courts, the Court simply acknowledged that "a lawyer physically present will tend to perform better," and noted that the posture of the case required that "the merits of telephone practice . . . [be left] for another day."[220] In short, the fact that the first federal court to review Van Patten's claim of constitutional injury on the basis of telephonic representation found constitutional injury was determined to be completely irrelevant, and, instead, the Court made clear that there is no uniform or defining interpretation in this field.[221]

As with Fourth Amendment cases, because the most significant limitations on due process review turn on the procedural posture of the case, it is tempting to blame the defendant for not appealing to the Court after losing on direct review in state court. After all, habeas review following the completion of state court litigation does seem inconsistent with the doctrines of claim preclusion and res judicata.[222] Habeas, then, is a realm where the vindication, if not the definition, of substantive rights is governed by process. But the mechanics of the pre-habeas process are too flawed to justify glossing over the substantive rights at issue.[223]

There are, in other words, material problems with the assertion that every indigent defendant has an opportunity to fully present his or her constitutional claims to the Court on direct review; there are simply too few resources, too few certiorari grants, and there is too much at stake to view

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[220] *Id.* at 746-47. In his concurring opinion, Justice Stevens stated, "I emphasize that today's opinion does not say that the state courts' interpretation of *Cronic* was correct, or that we would have accepted that reading if the case had come to us on direct review . . . ." *Id.* at 748. In *United States v. Cronic*, 466 U.S. 648 (1984), the Court announced a modified formulation of the conventional test for assessing ineffective assistance of counsel. Under *Cronic*, the Court recognizes certain narrow circumstances where the prisoner is entitled to relief under the Sixth Amendment without any showing of prejudice. *Id.* at 658-60 (permitting lower courts to presume prejudice from, among other things, the "complete denial of counsel").

[221] Again, contrary to the unequivocal purpose of selective incorporation—achieving a uniformity that would prevent a patchwork of interpretations of the federal Bill of Rights—the Court is actively rejecting efforts by federal courts to announce and interpret constitutional criminal procedure rights. *See also* Kamin, *An Article III Defense*, *supra* note 122 (recognizing the risk that constitutional rights will become inadvertently and permanently fossilized when the Court refuses to address the merits of constitutional claims).

[222] Bator, *supra* note 148, at 447 (urging that a full and fair review of a claim in state court should eliminate any basis for federal habeas relief).

[223] Scholars have observed that AEDPA "does not, on its face, seem to undercut the power of federal courts to review the substance of state court decisions of federal law." Bloom, *supra* note 162, at 539 (emphasis omitted). But this is precisely what makes AEDPA and other procedural habeas rules so subtly invasive—it is the triumph of process over substance, wherein the process dictates the scope or availability of the substantive right.

habeas as merely an affront to the autonomy of states.[224] It is particularly telling that the landmark case incorporating the Fifth Amendment and applying a uniform concept of due process to the states, *Malloy v. Hogan*, was presented to the Court, like so many of the critical constitutional questions of the day, in the habeas corpus context.[225] If one recognizes *Malloy* as announcing a constitutional rule under the Fourteenth Amendment, then the Court's willingness to apply congressionally enacted habeas reforms that undercut the force of this precedent serves to trenchantly illustrate the damaged status of selective incorporation as a doctrine of constitutional law.[226]

Moreover, given the Court's jurisprudential stinginess with regard to the right to counsel on appeal, the reasoning of cases like *Musladin* that defendants must remain incarcerated, or subject to execution, in spite of the fact that their conviction or sentence is unconstitutional seems dubious. Specifically, the Court's pronouncement that only the Supreme Court can announce "clearly established law" for purposes of AEDPA, and the necessary corollary to this conclusion, that "clearly established law" may only be discovered on certiorari review, seems an uneasy fit with the Court's holding that there is no right to counsel for defendants seeking a writ of certiorari.[227] A unanimous Court has recently held that the right to appointed counsel "does not extend to forums for discretionary review,"[228] but discretionary review to the Court is the only vehicle available to defendants attempting to define the clearly established contours of an emerging area of law.

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[224] *See, e.g.*, Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2333 (1993).

[225] Malloy v. Hogan, 378 U.S. 1, 7 (1964) (holding that on a habeas review the "same standard[s]" of due process "apply to state and federal cases"); *id.* at 10 (stressing that the Court could not apply a "less stringent standard" when reviewing the state's action than it would apply as a matter of federal procedure).

[226] The cleanest argument that the deference prescribed under AEDPA is unconstitutional requires one to view substantive federal habeas corpus review as a constitutional right, and scholars have persuasively argued this very point. Steiker, *supra* note 8, at 868 ("[T]he Suspension Clause and the Fourteenth Amendment together are best read to mandate federal habeas review of the convictions of state prisoners."). Alternatively, some regard AEDPA's attempt to "qualitatively" limit the jurisdiction of federal courts by dictating new rules for stare decisis as patently unconstitutional. Crater v. Galaza, 508 F.3d 1261, 1261-70 (9th Cir. 2007) (Reinhardt, J., dissenting from denial of rehearing en banc). This Article takes a different approach: if incorporation of the federal criminal procedure rights is a constitutional doctrine, and it seems clear that it is, then because federal habeas review is *the only* viable mechanism for a prisoner to vindicate his incorporated federal rights in federal court, AEDPA's curtailment of federal habeas review is in tension with the Constitution.

[227] Ross v. Moffitt, 417 U.S. 600, 605 (1974); *see also* Austin v. United States, 513 U.S. 5, 8 (1994).

[228] *Austin*, 513 U.S. at 8.

In light of these circumstances and the overriding importance of habeas as a tool for defining constitutional rules—e.g., the *Gideon* right to counsel—the idea that the vindication of one's incorporated rights can be conditioned on whether the Court has previously adjudicated the same claim seems irreconcilable with the tenets of selective incorporation. The "clearly established" law requirement of § 2254(d)(1), as currently applied, is in tension with Fourteenth Amendment.

IV. THE UN-INCORPORATION OF A RIGHT THAT IS NOT COGNIZABLE UNTIL POST-CONVICTION PROCEEDINGS

A. THE SIXTH AMENDMENT

The Sixth Amendment right to the effective assistance of counsel plays a unique role in safeguarding the other rights promised to criminal defendants by the Constitution.[229] Without competent counsel who jealously guards the constitutional rights of the defendant, the whole edifice crumbles, and the criminal procedure rights guaranteed by the Constitution become a mere "'form of words', valueless and undeserving of mention . . . ."[230] Similarly, when considering the relationship between habeas corpus and defining substantive rights, the Sixth Amendment is uniquely important. For purposes of the Sixth Amendment, unlike the Fourth and Fifth Amendments, a structural or procedural limitation on the availability of habeas corpus relief directly affects the substantive content of the Sixth Amendment right to counsel.[231]

There are two basic considerations that render the review of an ineffective assistance of counsel claim on habeas corpus fundamentally different from the habeas review of nearly any other constitutional right. First, imagine a defendant whose trial is marred by numerous constitutional errors. If his appellate counsel is so deficient as to neglect to raise these errors on direct appeal, relief is not available on these claims. Moreover, the defendant will not have the opportunity to raise the issue of appellate counsel's ineffective assistance until post-conviction proceedings. In a

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[229] Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us an obvious truth.").

[230] Mapp v. Ohio, 367 U.S. 643, 654 (1961); *see also Gideon*, 372 U.S. at 343 ("The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done." (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)) (internal quotation marks omitted)).

[231] The content of the Sixth Amendment is uniquely implicated by procedural habeas reforms because, as explained *infra* note 233, Sixth Amendment claims are generally not cognizable on direct appeal from a criminal conviction.

sense, the right to effective appellate counsel is the gateway to most every other constitutional claim, but this right cannot be litigated until the commencement of post-conviction proceedings. Secondly, direct appellate proceedings are not well suited for raising a claim that trial counsel was constitutionally ineffective under the Sixth Amendment.[232] Indeed, some states have expressly held that defendants are prohibited from raising claims of ineffective assistance of counsel on direct appeal.[233]

As to the first consideration that is unique to the ineffective assistance of counsel context, the Constitution requires that defendants be afforded effective assistance of counsel during their first appeal as of right.[234] This is significant because if counsel fails to raise a defendant's valid claims under the Fourth, Fifth, or Sixth Amendments, the defendant will never have an opportunity to fully and fairly litigate these claims.[235] Therefore, direct appeals are the sole vehicle through which a defendant can appeal the constitutionality of his trial without offending any of the federalism and claim preclusion concerns raised by critics of habeas corpus.[236]

The availability of constitutional review in federal court through direct appeal proceedings, therefore, turns on the effectiveness of direct appellate counsel. Of course, appellate counsel will, from time to time, provide

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[232] Massaro v. United States, 538 U.S. 500 (2003) (holding that direct appeal proceedings are not well-suited to the adjudication of ineffective assistance of counsel claims); Steiker & Steiker, *supra* note 124, at 424 (reflecting on the fact that habeas is the only time that a non-record claim can be adjudicated).

[233] State v. Spreitz, 39 P.3d 525 (Ariz. 2002) (holding that ineffective assistance of counsel claims may only be litigated in post-conviction proceedings and that relief would not be awarded on direct appeal).

[234] Douglas v. California, 372 U.S. 353 (1963). Notably, the problems presented by ineffective assistance of appellate counsel, though of paramount importance to the realization that habeas relief may be the first and only opportunity for a defendant to vindicate constitutional rights, is not, strictly speaking, an example of un-incorporation. *Id.* (recognizing that the right to effective appellate counsel is derived, not from the Sixth Amendment, but purely from the Fourteenth Amendment's due process guarantee).

[235] As to claims arising under the Fifth or Sixth Amendments, a defendant could raise the claims on habeas, but the claims would be subjected to the deferential review afforded to habeas claims as discussed throughout this Article. A claim under the Fourth Amendment that is not raised by counsel, however, is completely waived. Stone v. Powell, 428 U.S. 468, 485 (1976).

[236] As noted previously, however, the right to appellate counsel only extends to the first appeal of right in state court. Ross v. Moffitt, 417 U.S. 600 (1974). The fact that defendants are not entitled to competent counsel when they seek certiorari to the United States Supreme Court should not be overlooked by the critics of habeas corpus who view substantial deference during habeas proceedings as a reasoned response to the fact that the defendant could have petitioned for certiorari on direct appeal. *Cf.* Carey v. Musladin, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring) (suggesting that he might have been inclined to grant relief in the case were it before the Court in a different "procedural posture"—if it were not a habeas corpus case).

constitutionally deficient representation and fail to raise or properly present certain claims to the state or federal court on direct appeal. Unfortunately, the structures in place for criminal appeals do not allow for a redo of one's direct appeal, or a direct appeal of one's direct appeal on the basis of ineffective counsel. Thus, the first and only mechanism available to a defendant wishing to realize his right to effective assistance of appellate counsel is a post-conviction proceeding.[237] Accordingly, the adjudication of a direct appeal claim of ineffective assistance of counsel through collateral proceedings does not present any of the typical concerns about preclusion and federalism argued by Professor Bator and others. Nonetheless, the same onerous, often insurmountable, limitations on habeas relief apply to this form of ineffective assistance claim.[238]

However, the exceptionalism of ineffective assistance of appellate counsel as a harm that evades review on direct appeal is also a characteristic of a claim of ineffective assistance of trial counsel.[239] The practical and legal limitations on a defendant's ability to adjudicate claims of trial counsel ineffectiveness make it impossible for a defendant to litigate his Sixth Amendment right on direct appeal, leaving post-conviction proceedings as the only possible avenue for relief, and federal habeas corpus as the only viable federal forum.

The specific practical and legal considerations that rule out the possibility of fully and fairly litigating an ineffective assistance of counsel claim on direct appeal are well documented, but notably absent from the usual critiques of habeas corpus arguing that such litigation should be treated as duplicative, and therefore precluded.[240] First, in holding that a

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[237] Whereas the right to effective assistance of appellate counsel is not an incorporated right, the Court has recognized the right to effective assistance of trial counsel as an incorporated right. *Douglas*, 372 U.S. 353 (noting that the right to effective assistance of counsel is strictly a due process right, although relief determinations are governed by the Court's Sixth Amendment jurisprudence).

[238] Imagine that the trial court made a grievous error and failed to suppress certain key evidence that was obtained in clear violation of the Fourth Amendment. Under the Fourteenth Amendment, a defendant has the right to the effective assistance of counsel on his first round of appeals and the right to present the trial court's error to the state's appellate court. *Douglas*, 372 U.S. at 356-57. If the Fourth Amendment claim is properly raised on appeal, the defendant will receive a new trial. If, however, appellate counsel fails to adequately present the Fourth Amendment issue in the state court of appeals, the defendant is completely barred under *Stone v. Powell* from raising this issue on habeas. The only possible vehicle for vindicating the constitutional right would be a habeas corpus petition alleging ineffective assistance of appellate counsel.

[239] Strickland v. Washington, 466 U.S. 668 (1984).

[240] *See, e.g.*, Bator, *supra* note 148, at 441; Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) (suggesting just four exceptions to requiring a showing of innocence in order to warrant habeas relief).

prisoner was not barred from raising ineffective assistance of trial counsel in habeas proceedings even though the same claim had been raised on direct appeal, the Supreme Court recognized: "The evidence introduced at trial . . . will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis."[241] One commentator described the opinion by saying, "The heart of that decision is that ineffective assistance claims typically cannot be litigated effectively on direct appeal."[242] In short, Supreme Court precedent exists for the proposition that defendants have no practical way to fully and fairly litigate the issue of ineffective assistance of counsel prior to post-conviction proceedings.[243] This belies the framework enforced by the Court and Congress that treats the litigation of *Strickland* claims in federal habeas proceedings as a superfluous infringement on the independence of states, independence that comes at the expense of a defendant's only viable mechanism for ensuring that state courts adhere to the dictates of the federally enshrined Sixth Amendment rights.[244]

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[241] Massaro v. United States, 538 U.S. 500, 505 (2003). Without evidentiary development beyond the record, the Court noted that it would often be impossible to establish deficient performance or prejudice. *Id.*

[242] Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable Reflections on* Massaro v. United States, 42 BRANDEIS L.J. 793, 796-97 (2004); *id.* at 797 ("The only real hope, again says the Court unanimously, is to develop a specialized factual record on collateral attack.").

[243] *Id.*

[244] In addition to seeking certiorari to the Supreme Court on direct appeal, a prisoner may also petition the Supreme Court for certiorari review *following* the completion of state post-conviction proceedings. That is to say, after completing state habeas proceedings, but prior to commencing federal habeas proceedings, a prisoner may, once again, seek federal review in the Supreme Court. Thus, there is, at least theoretically, a federal forum for adjudicating this claim in which the deference mandated by AEDPA does not apply. As a practical matter, however, there are at least three limitations on this form of federal review that render it wholly inadequate as a cure for the disuniformity in the application of federal rights. First, some of AEDPA's most onerous limitations would still apply in this forum, in particular the limitations regarding *when* a federal right must have been announced. AEDPA precludes habeas relief unless the claim is premised on "clearly established" Supreme Court law that existed at the time of the state court adjudication, 28 U.S.C. § 2254(d)(1) (2000), but *Teague's* similar limitations on the application of "new" rules would apply so as to bar the application of new rules of constitutional law once a prisoner's direct appeal was complete. Second, practitioners, perhaps out of an awareness of how rare certiorari grants are, or perhaps as a result of their workload regarding non-discretionary review in other cases, rarely seek discretionary certiorari review to the U.S. Supreme Court following a state court's denial of post-conviction relief. It seems beyond question that practitioners must seek certiorari following a denial of post-conviction relief, if for no other reason than to preclude the Court from later faulting them for not raising a claim in a "non-habeas" posture; but the reality is that this discretionary review, much less relief, is virtually impossible to obtain. Indeed, the third consideration that suggests that certiorari review following state

In addition to the practical limitations that have led the Supreme Court to conclude that litigating *Strickland* on direct appeal is generally frivolous, some states have actually imposed a legal barrier to the adjudication of these claims on direct appeal in state court.[245] For example, the Arizona Supreme Court has expressly held that claims of ineffective assistance of counsel must be raised in post-conviction proceedings, and may not be raised on direct appeal.[246]

In sum, the right to effective assistance of counsel provided by the Sixth Amendment and applied to the states through the Fourteenth Amendment provides a compelling example of a constitutional right that is being un-incorporated. A prisoner has no way to seek a meaningful review in federal court of an ineffective assistance of counsel claim, both as to trial and appellate counsel. The first and only practical opportunity that a federal court has to ensure that the uniformity of interpretation required by selective incorporation is carried out is federal habeas review, and habeas review has been substantially curtailed in recent decades. Selective incorporation had as its core principle the idea that certain rights would be nationalized, that is, applied with equal force and consistency across the states.[247] Among other things, the enactment of AEDPA has substantially undermined this goal.

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post-conviction proceedings is not a viable federal forum for vindicating federal rights is the Court's own view that certiorari is unnecessary at this stage of litigation. In *Lawrence v. Florida*, the Court noted that "this Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims, choosing instead to wait for federal habeas proceedings." 127 S. Ct. 1079, 1084 (2007) (internal quotation marks and citations omitted). The Court stressed that there is no need to toll the federal statute of limitations for filing a habeas petition in the federal district court while a petition for certiorari is pending in the Supreme Court, even though this means that two federal courts will simultaneously have before them the same issues, because the likelihood of certiorari is "quite small" and because "more likely" than not the Court will summarily deny certiorari without a careful review of the issues. *Id.* Accordingly, as a practical matter, and on advice from the Supreme Court, prisoners are required to "wait for federal habeas proceedings" to vindicate incorporated rights; there is not, in other words, a viable federal forum for review of federal criminal procedure rights prior to habeas corpus. *Id.*

[245] *See, e.g.*, State v. Spreitz, 39 P.3d 525 (Ariz. 2002).

[246] *Id.* (stating that *Strickland* claims raised on direct appeal will merely be dismissed without prejudice to be raised again during post-conviction proceedings).

[247] *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 10-11 (1964); Pointer v. Texas, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring); *see also* Israel, *supra* note 6, at 316-17.

B. THE INTERACTION OF AEDPA AND THE SIXTH AMENDMENT

Section 2254(d)(1) of AEDPA applies to all constitutional claims raised by a state prisoner litigating a federal habeas corpus petition.[248] However, in light of the fact that claims of ineffective assistance of counsel cannot be litigated on direct appeal, one of the limitations contained in § 2254(d)(1) is uniquely effective in blocking the sort of nationalized system of rights dictated by selective incorporation.

Among the many reforms to habeas corpus mandated by the enactment of AEDPA in 1996,[249] one provision, § 2254(d)(1), addresses how the substantive merits of a case should be adjudicated. Under this provision, a writ of habeas corpus cannot be granted unless the state court "adjudication of the claim . . . resulted in a decision that was contrary to, or involved an *unreasonable application* of, clearly established Federal law."[250] In *Williams v. Taylor*, the Supreme Court explored the phrase "unreasonable application," and formulated a definition that *sub silentio* diminished the relevance of the selective incorporation doctrine, particularly as to claims of ineffective assistance of counsel.[251]

Of primary relevance for purposes of a discussion about incorporation, the *Williams* majority held that "an unreasonable application of federal law is different from an incorrect . . . application of federal law."[252] A state court's denial of habeas relief that is premised on an erroneous or incorrect application of the Sixth Amendment, or any other incorporated right, does not entitle a prisoner to relief.[253] As one commentator has summarized the provision: "Wrong is not enoug[h]. To issue the writ under § 2254(d)'s 'unreasonable application' clause, a state court decision must be wrong *and* unreasonable, i.e., it must be unreasonably wrong."[254]

For proponents of a robust writ of habeas corpus, such a limitation actually undermines the very federalist model it purports to preserve,[255] but this is a familiar debate. The very battle that is now being waged in the

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[248] 28 U.S.C. § 2254(d)(1).

[249] 28 U.S.C. §§ 2244, 2254, 2261-66 (2000 & Supp. V 2005).

[250] 28 U.S.C. § 2254(d)(1) (emphasis added).

[251] 529 U.S. 362, 385-86 (2000).

[252] *Id.* at 412 (emphasis omitted).

[253] *Id.*

[254] Bloom, *supra* note 162, at 540; *id.* at 541 n.274 ("*Taylor* does not simply invite state courts to draw unexpected shapes on a clean constitutional slate. It allows them to ignore the shapes the Court has already drawn, coloring outside preexisting lines.").

[255] *Id.* at 537 (noting that habeas corpus may promote a "vigorous federalist balance"); *see also* Mapp v. Ohio, 367 U.S. 643, 657-58 ("[T]he very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts." (quoting Elkins v. United States, 364 U.S. 206, 221 (1960))).

courts between habeas apologists, on the one hand, and those who view deference to procedurally fair state court adjudications to be of the utmost importance, on the other, is not only reminiscent of, but eerily repetitive of, the debates regarding the meaning and scope of the Fourteenth Amendment's Due Process Clause. In the 1960s, during the heat of the incorporation debate, proponents of selective incorporation explicitly rejected the notion that the states could provide prisoners "watered-down versions of . . . the Bill of Rights guarantees,"[256] and instead insisted that federal rights be enforced just as "strictly against the States as . . . against the Federal Government . . . ."[257] Opponents of selective incorporation, in contrast, argued that "compelled uniformity" in the application of federal rights was "inconsistent with the purpose of our federal system."[258] Similarly, opponents of limiting federal habeas review cite concerns about the need for a uniform and absolute protection of the Bill of Rights, while those in favor of limiting habeas relief stress the need for affording state courts latitude in their adjudication of federal rights.

Obviously the two positions advanced in each debate are incompatible—i.e., federal courts cannot insist on a uniform application of federal law by state courts while simultaneously deferring to state court judgments that are inconsistent with federal law.[259] A certain degree of disuniformity in the application of federal law will always exist,[260] but the

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[256] Gideon v. Wainwright, 372 U.S. 335, 347 (1963) (Douglas, J., concurring).

[257] *Mapp*, 367 U.S. at 656.

[258] Malloy v. Hogan, 378 U.S. 1, 16 (Harlan, J., dissenting).

[259] The doctrine of fundamental fairness, which was *rejected* in favor of selective incorporation, recognized criminal procedure rights that "could overlap in part with the protections found in the Fourth, Fifth, Sixth and Eighth Amendments, but [that were] much narrower in scope." Israel, *supra* note 193, at 304. In contrast, by limiting the availability of habeas relief, particularly for claims like the Sixth Amendment ones that are only cognizable in the habeas context, the Court has *accepted* a framework wherein state courts are expressly permitted to narrow the scope of federal rights. *See, e.g.*, Anderson v. Terhune, 467 F.3d 1208, 1212 (9th Cir. 2006) (stressing that if it were merely tasked with applying the Fifth Amendment, the result would be different, but affirming the state court's denial of habeas relief even though, as the Court concedes, "the state court's interpretation might not be the most plausible one").

[260] For example, federal law is interpreted differently in the various federal circuit courts; certainly the Fifth Circuit does not consider itself bound by Ninth Circuit case law. But this lack of uniformity is materially different from § 2254's mandate that federal courts, up to and including the Supreme Court, must defer to state court decisions that apply federal law incorrectly. Indeed, the Supreme Court's rules governing certiorari grants and rules governing en banc review in circuit courts tend to suggest that circuit splits, reflecting disuniformity as to federal law, provide a compelling justification for additional federal review. That is, an en banc court or the Supreme Court would consider variation in the application of federal law as highly relevant in deciding whether to exert an additional, nationalizing—unifying—level of review. In other words, circuit splits and other such

spirit and purpose of incorporation as a well-defined principle of constitutional law is incompatible with the deference prescribed by § 2254(d). Nonetheless, the Court currently purports to follow the selective incorporation doctrine, and yet it applies AEDPA without acknowledging any contradiction.[261] By affirming a state court's incorrect application of the Sixth Amendment on the grounds that the error was not unreasonably wrong, the Court's process is not merely affecting when the right at issue can be raised, but affirmatively enabling alternative state court interpretations of federal rights.[262]

The tension between the Court's interpretation of AEDPA and selective incorporation is illustrated by *Woodford v. Visciotti*, a habeas case involving a prisoner's first and only attempt to vindicate in federal court his Sixth Amendment right to effective assistance of counsel.[263] The defendant in this case, John Visciotti, argued that he received constitutionally ineffective assistance of counsel during the sentencing phase of his capital trial.[264] Mr. Visciotti litigated various evidentiary rulings and questions of law throughout his direct appeal proceedings, and even filed a petition for certiorari to the Supreme Court, which was denied.[265] There was, then,

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disuniformity are merely an unpleasant by-product of a multi-tiered Judiciary, not an admission that federal law may, or must, vary. The current application of AEDPA affirmatively condones variation or misapplication of federal law. Complete uniformity may be an "ungovernable engine," *Michigan v. Long*, 463 U.S. 1032, 1070 (1983) (Stevens, J., dissenting), but that does not mean that it is constitutionally permissible to allow and facilitate state court deviation from the strictures of federal law.

[261] Strictly speaking, one could argue that there is no contradiction in the Supreme Court's jurisprudence insofar as the Court has never actually held that AEDPA is constitutional. Indeed, circuit court judges continue to entertain the possibility that AEDPA may be found unconstitutional. *See, e.g.*, Crater v. Galaza, 508 F.3d 1261, 1261-70 (9th Cir. 2007) (Reinhardt, J., dissenting from denial of rehearing en banc) (arguing that AEDPA violates separation of powers). As a practical matter, however, there is little question that the Court views AEDPA as constitutional. The Court has repeatedly refused to address the squarely presented question of the constitutionality of AEDPA. *Compare* Williams v. Taylor, 529 U.S. 362, 379-89 (2000) (addressing at length the application of § 2254(d)(1) without addressing the underlying constitutionality of the provision), *with* Petition for a Writ of Certiorari, Williams v. Taylor, 529 U.S. 362 (2000) (No. 98-8384) (urging the Court to grant certiorari on the question of AEDPA's constitutionality), *and* Williams v. Taylor, 526 U.S. 1050 (1999) (mem.).

[262] These variations as to federal rights, however, can only come in the form of less protection. *Long*, 463 U.S. at 1038, provides a firm ceiling for federal rights by dictating that states are not allowed to interpret federal rights more broadly than do federal courts, but AEDPA expressly permits state courts to err on the side of not recognizing the full scope of a federal right when interpreting the Bill of Rights.

[263] 537 U.S. 19 (2003).

[264] *Id.* at 20.

[265] *See* People v. Visciotti, 825 P.2d 388 (Cal. 1992) (affirming conviction on direct appeal); Visciotti v. California, 506 U.S. 893 (1992) (denying certiorari).

absolutely no federal oversight regarding the state's application of the Sixth Amendment until federal habeas proceedings were commenced.

Accordingly, Visciotti filed a timely petition for habeas corpus in federal court.[266] A federal trial court reviewed the record and concluded that, as Visciotti alleged, his constitutional right to effective representation had been violated, and as a result the fairness of his trial undermined. On appeal, the Ninth Circuit Court of Appeals agreed and affirmed the district court's grant of habeas relief as to the sentence.[267] In a curt per curiam opinion, the Supreme Court reversed, holding that the Court of Appeals had failed to acknowledge that under § 2254(d)(1) a state court was not required to correctly apply federal law.[268] The unanimous Court did not disagree with the district court and the Ninth Circuit's interpretation of the Sixth Amendment, but, rather, reversed the grant of habeas relief on the grounds that an "*unreasonable* application of federal law is different from an *incorrect* application of federal law."[269] Ultimately, the Court concluded that the Ninth Circuit's analytic misstep was its willingness to "substitute[] its own judgment for that of the state court."[270] That is, the federal court's interpretation of the Sixth Amendment was held to be of no moment. The Court held that "under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly."[271]

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[266] Visciotti v. Woodford, 288 F.3d 1097, 1101 (9th Cir. 2002).

[267] *Id.*

[268] *Visciotti*, 537 U.S. at 24-25.

[269] *Id.* at 25 (quoting Williams v. Taylor, 529 U.S. 362, 410 (2000)).

[270] *Id.* This rejection of a strict definition of ineffective assistance of counsel to which state courts must adhere tracks Justice Harlan's opposition to the selective, meaning strict, incorporation of the Fifth Amendment. In Justice Harlan's view, the federal courts should "never attempt[] to define with precision" the rights embodied under the Due Process Clause of the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 22 (1964) (Harlan, J., dissenting) (quoting Holden v. Hardy, 169 U.S. 366, 389 (1898)).

[271] *Visciotti*, 537 U.S. at 27. In the Sixth Amendment context alone, there is additional authority from the Supreme Court for the proposition that a state court's refusal to award relief on the basis of a patent violation of the Constitution is not a basis for federal habeas relief. In *Bell v. Cone*, for example, the Court stressed that "it is not enough to convince a federal habeas court that . . . the state-court decision applied [the Sixth Amendment] incorrectly." 535 U.S. 685, 689-99 (2002). This is striking in light of the Court's continued assurances that uniformity of right and remedy is mandated as to "federal constitutional guarantees." Danforth v. Minnesota, 128 S. Ct 1029, 1041 (2008) (rejecting the notion that the court-created, or non-constitutional, rule of retroactivity announced in *Teague* had to be applied with uniformity by state courts, but insisting that state laws and practices must not "infringe on federal constitutional guarantees"). There is, in short, a toothless commitment to the supremacy of the constitutional criminal procedure rights; they are still recited as though they are beyond abridgment, but there is no practical course for enforcing this

This overt hostility by a unanimous Supreme Court to the supremacy of federal courts as the principal architects of federal rights is a striking repudiation of the spirit and purpose of selective incorporation. If a federal court is not free to overrule an incorrect state court application of the Bill of Rights, particularly of a specific right that cannot viably be raised in federal court prior to habeas review, then it is time to critically reassess the vitality of the selective incorporation doctrine. When the right to counsel was first incorporated against the states through the Fourteenth Amendment in *Gideon v. Wainwright*, Justice Douglas expressly rejected the idea that the version of the Sixth Amendment that applied against the states was a "watered-down version" of the federal guarantee; if the right applied to the states, the promise of vindicating that right must be equally robust and available regardless of whether the claim arose from a state or federal trial.[272] Indeed the very essence of selective incorporation was "compelled uniformity"[273] as to individual rights such that "the same standards must determine whether [a constitutional violation exists] in either a federal or state proceeding."[274] Under AEDPA, however, prisoners like Visciotti are no longer entitled, at any point during their appeals, to have a federal court cleanly interpret and apply the Sixth Amendment. Instead, federal review is always encumbered and watered-down by the deference to state courts prescribed in § 2254. The access to a remedy has become so encumbered as to relegate the right to its pre-incorporation status as "a mere form of words, valueless and undeserving of mention."[275]

The deviation from the defining principles of incorporation illustrated by the *Visciotti* opinion is illustrative, but not at all unique. Describing the breadth of § 2254(d)(1)'s impact, one commentator has noted that where the issues of federal law are uncomplicated, the state courts will have little margin to be "reasonably *in*correct" and federal and state law will exist harmoniously, but where the substantive law is more complicated, § 2254 allows the state courts to view "reaching correct doctrinal answers [as] . . . a strenuous *and* avoidable chore."[276]

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promise of constitutionally mandated uniformity, particularly as to a right like ineffective assistance of counsel that cannot be raised until habeas proceedings are commenced.

[272] 372 U.S. 335, 347 (1963) (Douglas, J., concurring).

[273] *Malloy*, 378 U.S. at 16 (Harlan, J., dissenting) (rejecting the majority's imposition of "compelled uniformity" on the states).

[274] *Id.* at 11 ("It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court.").

[275] Mapp v. Ohio, 367 U.S. 643, 655 (1961) (internal quotations omitted) (describing the status of the Fourth Amendment prior to selective incorporation).

[276] Bloom, *supra* note 162, at 542. Although the arguments provided in support of curtailing federal habeas relief often cite concerns about federalism, the earliest cases

To the lay person unfamiliar with the nuance and subjectivity that characterizes constitutional interpretation, AEDPA's limitation on relief may seem trivial, even semantic. The fact is, however, judicial elaboration regarding the scope of constitutional rights is a complicated and evolving undertaking that requires constant tinkering and revision by federal courts. As Justice Brennan noted almost a decade before the enactment of AEDPA, "Most [constitutional] cases involve a question of law that is at least debatable, permitting a rational judge to resolve the case in more than one way."[277] Accordingly, only the most mundane issues of constitutional law give rise to basic settled principles, and under § 2254 only these issues will be adjudicated with uniformity in state and federal court.[278]

Not only is uniformity impossible to impose as a practical matter under the constraints of AEDPA, but the Supreme Court has gone so far as to suggest that the details of federal constitutional jurisprudence are largely irrelevant to state courts. The Court has suggested that a vague sense of reasonableness is more than sufficient for purposes of constitutional criminal procedure; complying with AEDPA, the Court held, "does not require citation of our cases—indeed, it does not even require *awareness* of our cases."[279] Similarly, state court errors as to federal law must be deferred to by federal courts not only when the court is merely mistaken as to scope and meaning of federal rights, but also when the state court "brashly disregard[s] still-valid Supreme Court precedent."[280] This is because AEDPA's "unreasonableness" gloss permits both innocent errors

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announcing the selective incorporation gave serious consideration to the complexities posed by the federal review of state court adjudications. In *Mapp v. Ohio*, for example, the Court stated that "the very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts." 367 U.S. at 657-58 (quoting Elkins v. U.S., 364 U.S. 206, 221 (1960)).

[277] Teague v. Lane, 489 U.S. 288, 333 (1989) (Brennan, J., dissenting).

[278] It has been recognized that very few matters of criminal procedure are "dictated" by Supreme Court precedent. Instead, particularly with emerging investigative technologies and the evolving nature of crimes, many cases will present a question that is "at least debatable" as a matter of federal law. *Id.* at 333 (Brennan, J., dissenting). Accordingly, AEDPA effectively eliminates meaningful federal review of most federal constitutional issues. Of course, this is not to suggest that federal courts have a monopoly on the right answers or the best interpretive methodologies. *See* Bator, *supra* note 148, at 446-47. Nonetheless, to the extent that the consistent and uniform application of the Bill of Rights, as interpreted by the federal courts, is the hallmark of selective incorporation, it cannot be doubted that AEDPA and other habeas reforms substantially undermine this goal.

[279] Early v. Packer, 537 U.S. 3, 8 (2002); *see also* Herring v. Sec'y, Dep't of Corr., 397 F.3d 1338, 1347 (11th Cir. 2005) ("Even a summary unexplicated rejection of a federal claim qualifies as an adjudication entitled to deference under § 2254(d).").

[280] Bloom, *supra* note 162, at 542; *see also* Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1080 (2004) (discussing the state court decision in *Lockyer v. Andrade*, 538 U.S. 63 (2003)).

and deliberate deviations—"state court[s] [need] not track the swings of long-running philosophical debates" or track federal interpretations of nuanced doctrines.[281] Just as the proponents of the fundamental fairness approach to incorporation had advocated due process protection for the *core* of the Bill of Rights without all of the "federal regalia,"[282] AEDPA alleviates the need for uniformity of interpretation and protects persons from only those violations of their federal rights that are *so unreasonable* as to constitute a fundamentally unfair application of federal law.[283]

In short, the fundamental purpose of selective incorporation is irreconcilable with AEDPA's requirement that a "substantially higher threshold" than incorrectness is required in order for a federal court to grant habeas corpus relief.[284] The defining motivation behind the selective incorporation doctrine was a desire to have the Bill of Rights applied uniformly across the fifty states so as to avoid "[j]udicial self-restraint which defers too much to the sovereign powers of the states and reserves judicial intervention for only the most revolting cases."[285] The distinction between a "revolting" constitutional error and an "unreasonably wrong" constitutional error seems elusive. Likewise the limitations on relief imposed by AEDPA, in practice, are closely related to the now defunct constitutional doctrine of fundamental fairness. Because the right to effective assistance of counsel can only be litigated in collateral

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[281] Bloom, *supra* note 162, at 542 (noting that this is "precisely what the Supreme Court permit[s] [state courts] to do").

[282] Brennan, *supra* note 68, at 543-44 (1986) (commenting on his opinion in *Malloy v. Hogan*, 378 U.S. 1 (1984), by noting that the Court expressly rejected the idea that only "*the core* of the Self-Incrimination Clause, that is, the prohibition against use of physically coerced confessions" applied against the states (emphasis added)).

[283] Illustrative of this tolerance for disuniformity in the application of federal rights is the fact that some federal circuits have held that the limitations on relief contained in AEDPA apply even to those state court decisions that fail to provide any explanation for the decision. Evan Tsen Lee, *Section 2254(d) of the Habeas Statute: Is It Beyond Reason?*, 56 HASTINGS L.J. 283, 284 (2004) (examining the question of "how federal habeas courts should review 'silent' state court decisions—that is, summary affirmances or summary denials of relief, or opinions that dispose of whole claims in a perfunctory manner (e.g., 'Petitioner's other claims are without merit.')"). Given that, under *Visciotti*, incorrect decisions will be upheld so long as the result is not unreasonably wrong, there are strong incentives for a state court hostile to criminal appeals to merely deny the state appeals pro forma, knowing full well that if the question raised is analytically complicated, the Supreme Court will almost certainly refuse to view the denial as unreasonable for purposes of § 2254(d)(2). In short, state courts need not even make an effort to understand a particularly complicated area of criminal procedure; a mere silent denial that is wrong as a matter of law will be affirmed. *Id.* at 285-86 (noting that "[t]he Second, Fourth, Seventh, and Eleventh Circuits have held that silent judgments" warrant deference under § 2254(d)(1)'s unreasonableness provision).

[284] Schriro v. Landrigan, 127 S. Ct. 1933, 1939 (2007).

[285] Brennan, *supra* note 1, at 778.

proceedings, the Court's willingness to strip individuals of a nationalizing federal interpretation of this federal right is material. No longer are federal courts the primary and authoritative voice as to the scope and meaning of constitutional rights in the field of criminal law; instead, state courts are provided with the discretion to define or vary from the mandates of federal constitutional law.[286]

V. THE EIGHTH AMENDMENT: ALLOWING STATES TO DEFINE THE CORE OF A FEDERAL RIGHT

Like the Fourth, Fifth, and Sixth Amendments discussed earlier in this Article, the Eighth Amendment was incorporated through the Fourteenth Amendment.[287] The incorporation of the Eighth Amendment, like that of the other criminal rights, was intended to impose a sort of rigid uniformity in the application of the Bill of Rights that had not existed prior to the Court's decision to adopt the selective incorporation doctrine.[288] Unlike the rights protected by the Fourth, Fifth, and Sixth Amendments, the rights enshrined in the Eighth Amendment are substantive rather than procedural. Nonetheless, the Court's recent hostility to rigid national protections is diluting the protections provided for in the Eighth Amendment.

In *Robinson v. California*, the Supreme Court held that the Eighth Amendment's prohibition of cruel and unusual punishment was incorporated against the states.[289] In the parlance of selective incorporation, this meant that precisely the "same standards" must apply in assessing whether a state or federal punishment was cruel and unusual.[290] A prohibition made applicable by the Fourteenth Amendment applies with no "less vigor" than the same prohibition under the Eighth Amendment.[291] Either a punishment is cruel and unusual if imposed by any state or the

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[286] The authority to define federal rights enjoyed by state courts under AEDPA is particularly troubling in light of the double deference inherent in the AEDPA scheme. As Professor Chen has pointed out, most post-conviction claims will turn on some form of a "reasonableness" inquiry, and where federal courts are denying habeas relief based on particular fact patterns, state courts will inevitably infer the reasonableness of this conclusion, in spite of the fact that the federal court decision is justified only by reference to the deference prescribed in § 2254(d). Chen, *supra* note 215, at 628. In other words, AEDPA has the tendency to create a downward spiral in the field of criminal procedure rights insofar as state courts look to the holdings, but perhaps not the reasoning, of federal decisions in which the court's judicial hands were tied by the constraints of AEDPA—in effect it is a two-way street of narrowing the scope of criminal procedure rights.

[287] Robinson v. California, 370 U.S. 660 (1962) (recognizing that the Eighth Amendment applies against the states under the selective incorporation doctrine).

[288] *Id.*

[289] *Id.*

[290] Malloy v. Hogan, 378 U.S. 1, 10 (1964).

[291] Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 275 (1960) (Brennan, J., concurring).

federal government, and therefore unconstitutional, or the punishment is constitutional in all states.[292]

For better or worse, the Court's recent interpretations of the Eighth Amendment betray the straight-forward, one-size-fits-all system of categorical rules envisioned by selective incorporation. The nationalized prohibition on cruel and unusual methods of punishment, of course, remains in effect, and the Supreme Court continues to define classes of punishment that so offend notions of decency as to be inconsistent with the Eighth Amendment.[293] However, the Court is increasingly willing to delegate to the states the authority to define and limit the procedural contours of these substantive rights.[294] As with so many things in law, the power to define the processes and structures available to recognize a right largely dictates the force and substantive content of the right—as the procedures go, so goes the substance. The Court's jurisprudence regarding the execution of the mentally retarded provides one striking example of the court's willingness to delegate the procedural aspects and, therefore, the substantive content of a right, to the state courts.

In *Atkins v. Virginia*, the Court recognized that mentally retarded persons are "ineligible for the death penalty."[295] To be sure, *Atkins*'s recognition that it is a violation of the Eighth Amendment to permit a mentally retarded individual to be executed constitutes a landmark development in the field of constitutional law.[296] However, the import and clarity of this right has been clouded by virtue of the fact that the Court has permitted each state to define, relatively free of federal constraints, mental

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[292] The absence of a remedy in the Eighth Amendment context would render the right particularly illusive. If there is no federal vehicle for preventing capital punishments that are, as a matter of federal law, cruel and unusual, then there is effectively no right.

[293] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the execution of a mentally retarded person is a categorical violation of the Eighth Amendment); Ford v. Wainwright, 477 U.S. 399, 410 (1986) (holding that "the Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane").

[294] *See infra* text accompanying notes 295-320.

[295] *Atkins*, 536 U.S. at 320.

[296] The *Atkins* decision has had a particularly broad impact on the justice system because the decision applies retroactively to capital cases that were already final when the opinion was issued. This result, while rare, was dictated by the Court's previous decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), which held that the execution of mentally retarded persons was not prohibited by the Constitution, but also noted that a prohibition on executing the mentally retarded was the sort of "new rule" envisioned as an exception under *Teague*'s retroactivity bar. *See* Bell v. Cockrell, 310 F.3d 330, 333 (5th Cir. 2002); *see also id.* at 332 (quoting *Penry* as to the question of retroactivity: "'[I]f we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons . . . such a rule would fall under the first exception to [*Teague*'s] general rule of non-retroactivity and would be applicable to defendants on collateral review'").

retardation.[297] Even now, more than five years after the *Atkins* decision, states continue to define mental retardation in vastly disparate manners and without guidance from the Supreme Court.[298] Recently, the Court implicitly signaled its approval of the disparate definitions of mental retardation by refusing to grant certiorari in a case that squarely presented the issue of Texas's uniquely narrow statutory definition of mental retardation.[299]

In order to appreciate the dissonance between the hallmark of selective incorporation, uniformity of interpretation as to rights announced in the federal Bill of Rights, and the Court's Eighth Amendment jurisprudence, it is illustrative to consider some of the variations between states as to the application of the rule announced in *Atkins*. The question of the applicable burden of proof is one area of striking and material differentiation between the states as a result of the Court's failure to specify the constitutional procedures necessary for identifying mentally retarded persons. Not infrequently the battle over the appropriate standard of proof or burden of persuasion will dictate the outcome of the case.[300] Accordingly, variation among the states as to the burden of proof will inevitably lead to substantial disparity between those deemed mentally retarded and, therefore, ineligible for a sentence of death. Nonetheless, the Court has permitted states to develop their own unique procedures (including burdens of persuasion) for adjudicating *Atkins* claims, and in the process has created substantial variation in the application of the Eighth Amendment.

The procedures and burdens for proving an Atkins claim could not be more varied between the states. Although many state courts and legislators have adopted the preponderance of evidence standard for *Atkins* claims,[301] a handful of states require the petitioner to prove his or her mental

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[297] *See Atkins*, 526 U.S. at 317.

[298] *See infra* notes 300-21.

[299] Chester v. Texas, 128 S. Ct. 373 (2007) (denying certiorari).

[300] *Cf.* Lavine v. Milne, 424 U.S. 577, 585 (1976) ("Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive . . . ."); Speiser v. Randall, 357 U.S. 513, 525 (1958) (recognizing that "the burden of proof . . . may be decisive of the outcome . . . ").

[301] *See, e.g.*, ARK. CODE ANN. § 5-4-618(c) (2006); CAL. PENAL CODE § 1369(f) (2000 & West Supp. 2008); IDAHO CODE ANN. § 19-2515A(3) (2000 & Supp. 2008); 725 ILL. COMP. STAT. 5/114-15(b) (Supp. 2008); MO. STAT. § 565.030.4(1) (West Supp. 2008); NEB. REV. STAT. § 28-105.01(4)(b)(ii) (Supp. 2006); NEV. REV. STAT. ANN. § 174.098(5)(b) (LexisNexis 2006); *see also* N.M. STAT. § 31-20A-2.1(c) (2008); S.D. CODIFIED LAWS § 23A-27A-26.3 (2004); TENN. CODE ANN. § 39-13-203(c) (2006); UTAH CODE ANN. § 77-15a-104(12)(a) (2003); VA. CODE ANN. § 19.2-264.3:1.1(c) (2008); WASH. REV. CODE ANN. § 10.95.030(2) (West 2002).

retardation by clear and convincing evidence,[302] one state requires the petitioner to prove mental retardation beyond a reasonable doubt,[303] and at least one held for a period of time following *Atkins* that the state was required to prove that the defendant was not mentally retarded beyond a reasonable doubt.[304] There is no question that the Eighth Amendment has been incorporated so as to limit the actions of all fifty states and create a uniform standard of national rights, and there is no dispute that it is a per se violation of the Eighth Amendment for a mentally retarded person to be executed.[305] However, arbitrariness in the form of political (state) boundaries, not uniformity, characterizes the question of whether a mentally impaired individual will be executed.

Imagine that a mentally retarded person was sentenced to death and in 2004, two years after the *Atkins* decision, sought to have his death sentence declared unconstitutional under *Atkins*. If this individual resided in Georgia, he would have been required to prove beyond a reasonable doubt that he was mentally retarded in order to have his death sentence set aside.[306] In contrast, if he lived in New Jersey, he could have avoided execution unless the prosecution was able to prove beyond a reasonable doubt that he was not mentally retarded.[307] Obviously, the Eighth Amendment would mean something very different for the defendant depending on whether the individual resided in New Jersey or Georgia.

In addition to the patchwork of burdens of proof, other details regarding the procedures for assessing mental retardation under the Eighth Amendment are equally varied. Under Arizona law, for example, defendants are entitled to a presumption of mental retardation if their IQ is sixty-five or lower.[308] Accordingly, once a prisoner in Arizona provides an IQ test score of sixty-five or less to the state court, then, as was the case

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[302] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703.02(G) (Supp. 2007); COLO. REV. STAT. § 18-1.3-1102(2) (2008); DEL. CODE ANN. tit. 11, § 4209(d)(3)(b) (2007); FLA. STAT. ANN. § 921.137(4) (West 2006 & Supp. 2008); IND. CODE ANN. § 35-36-9-4 (West 2004 & Supp. 2008).

[303] GA. CODE ANN. § 17-7-131(c)(3) (West 2000 & Supp. 2007).

[304] State v. Jimenez, 880 A.2d 468, 484 (N.J. Super. Ct. App. Div. 2005), *rev'd*, State v. Jimenez, 908 A.2d 181, 191 (N.J. 2006).

[305] The *Atkins* decision makes clear that merely permitting proof of mental retardation for purposes of mitigation is not constitutionally sufficient. Mental retardation must be viewed as creating a per se exemption to capital punishment. Atkins v. Virginia, 536 U.S. 304, 320 (2002).

[306] *See* GA. CODE ANN. § 17-7-131(c)(3).

[307] *Jimenez*, 880 A.2d at 484. Notably, some sense of uniformity was imposed by the New Jersey Supreme Court when, in 2006, the Court reversed the New Jersey Court of Appeals and reallocated the burden of proof to the petitioner. *Jimenez*, 908 A.2d at 191 (adopting the preponderance of evidence standard).

[308] ARIZ. REV. STAT. ANN. § 13-703.02(G) (Supp. 2007).

under the old New Jersey system, the burden shifts to the prosecution to prove that he *is not* mentally retarded.[309] This establishes a presumption against the death penalty when a defendant has an IQ that is well below average intellectual functioning.[310]

Under Texas law, by contrast, the mechanism for assessing whether a defendant is mentally retarded is without any categorical rules, and more importantly, expressly rejects the importance of a national Eighth Amendment standard.[311] Under Texas law, mental retardation determinations are made entirely on the basis of a series of factors developed by the Texas Court of Criminal Appeals in *Ex parte Briseno*.[312] Of the utmost importance to an understanding of the *Atkins* standard under Texas law is an assessment of the analytic steps taken by the Texas courts in defining the *Atkins* test. In particular, the Texas Court of Appeals noted that their task was to "define that level and degree of mental retardation at which a *consensus of Texas citizens* would agree that a person should be exempted from the death penalty."[313] In other words, the question was framed in terms of the *Texas political constituency*, not in terms of a uniformly (national) incorporated right to be free from cruel and unusual punishment.

In stark contrast to the presumption of retardation that exists under Arizona law, under the *Briseno* test applied in Texas, the right to *Atkins* relief is so narrowly defined as to significantly undermine the protections announced in *Atkins*, regardless of a prisoner's IQ.[314] Illustrative is the *Briseno* test's concern with the facts of the crime. The *Briseno* court instructs that in assessing mental retardation a court must consider the crime for which the defendant was convicted and evaluate whether it required

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[309] *See id.*

[310] State v. Arellano, 143 P.3d 1015, 1018 (Ariz. 2006) ("[A]n IQ of sixty-five or below establishes a rebuttable presumption of mental retardation . . . ."). The remainder of the Arizona statute tracks closely with the leading mental health literature in the field of mental retardation and defines mental retardation by reference to two factors: (1) sub-average intellectual functioning, and (2) significant limitations in adaptive functioning skills. ARIZ. REV. STAT. ANN. § 13-703.02(K); *see also* State v. Grell, 66 P.3d 1234, 1238 (Ariz. 2003) ("'[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.'" (quoting *Atkins*, 536 U.S. at 320)).

[311] *Ex parte* Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004).

[312] *Id.*

[313] *Id.* at 6 (emphasis added).

[314] *See id.*

"forethought, planning, and complex execution of purpose," factors that have been expressly discredited by most states across the country.[315]

These divergent standards as to a federal constitutional right are in tension with the general dictates of federal supremacy and the specific mandates of constitutional incorporation. There is simply no federal oversight, much less uniformity. For example, although federal courts have applied certain minimum scientific requirements to the evaluation of an *Atkins* claim in the context of federal death penalty cases,[316] the Supreme Court has refused to extend this federal standard to the states. Instead, whereas a defendant sentenced to death in Arizona might enjoy a presumption of mental retardation based on a low IQ score, the very same defendant in Texas might be deemed ineligible for *Atkins* relief on the basis of a judicial test involving an examination of the facts of the crime. In a sense, rather than a single and uniform application of the Eighth Amendment that does not countenance any dilution, the application of the *Atkins* standard across the states reflects the very sort of disparity among states that fueled the enactment of the Fourteenth Amendment and the eventual acceptance by the Court of the selective incorporation doctrine.[317]

Commentators could reasonably debate the wisdom and equity of the Court's decision to "'leave to the State[s] the task of developing appropriate ways to enforce'" the *Atkins* rule.[318] However, the realization of an Eighth Amendment right through "generalized notions" that vary by state and lack any sort of compelled uniformity is indisputably inconsistent with the spirit and purpose of selective incorporation.[319] Because selective incorporation

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[315] *Id.* at 8-9. Notably, the Oklahoma Court of Appeals has recognized that a focus on the defendant's criminal activity as a means of establishing that he is not mentally retarded is inconsistent with the "spirit [and] letter of the law prohibiting the execution of the mentally retarded." Lambert v. State, 126 P.3d 646, 659 (Okla. Crim. App. 2005). In other words, neighboring states have mechanisms for defining mental retardation that are in direct tension with one another.

[316] *See, e.g.*, United States v. Nelson, 419 F. Supp. 2d 891, 894-95 (E.D. La. 2006) (holding that the AAMR and the DSM-IV-TR definitions reflect a national consensus as to the proper definition of mental retardation).

[317] Amar, *supra* note 31, at 1242 (tracing the evolution of the Fourteenth Amendment and stressing that incorporation was born out of palpable fear that the Southern states would refuse to recognize the rights of freed slaves and others following the Civil War). By 1866, individuals sought protection from local governments and not merely the federal government because, as Professor Amar puts it, "[T]he tyranny of slavery could not be blamed on a distant and dictatorial center, but instead had been perpetrated by local democracies." *Id.*

[318] Atkins v. Virginia, 536 U.S. 304, 317 (2002) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416 (1986), which left insanity determinations to the states). It is worth noting that *Atkins* is not the Court's first constitutional rule, the substance of which has been delegated to the states without any strict guidance. *See Ford*, 477 U.S. at 405.

[319] Brennan, *supra* note 68, at 542.

requires federal rights to be applied identically in every state, the Indiana Supreme Court recently held that *Atkins* only allows for variation among the states above a rigid "nationwide minimum" because the "Eighth Amendment must have the same content in all United States jurisdictions."[320] Accordingly, the Indiana Supreme Court has asserted that uniformity requires deference by the courts to the "definitions [of mental retardation] accepted by those with expertise in the field."[321]

However, Indiana lacks the authority to impose a uniform interpretation of the Eighth Amendment on other states. And the U.S. Supreme Court has recently indicated its unwillingness to announce a definition of mental retardation that could be applied consistently across the states.[322] In states like Texas where the death penalty is very popular, the Court's willingness to delegate its authority to expound the precise meaning of the Eight Amendment is profound. As Alexander Hamilton observed, state courts are less likely to "give full scope" to federal rights that are "unpopular locally,"[323] and as a result, as was the case before selective incorporation, the Eighth Amendment is characterized by a "checkerboard of human rights in the field of criminal procedure."[324]

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[320] Pruitt v. State, 834 N.E.2d 90, 108 (Ind. 2005).

[321] *Id.*

[322] *See* Chester v. Texas, 128 S. Ct. 373 (2007) (denying certiorari). It appears that the Supreme Court has no intention, at least in the foreseeable future, of enforcing uniformity in the mental retardation context of the Eighth Amendment. Prisoners have regularly petitioned for certiorari after state or federal denial of their *Atkins* claim, oftentimes highlighting the disparate methods of adjudicating mental retardations between the states, and the Court has not granted certiorari in any of these cases. *See, e.g.*, Van Tran v. Tennessee, 128 S. Ct. 532 (2007) (denying certiorari); Cherry v. Florida, 128 S. Ct. 490 (2007) (denying certiorari); *Chester*, 128 S. Ct. 373 (denying certiorari); Grell v. Arizona, 127 S. Ct. 2246 (2007) (denying certiorari); Webster v. United States, 127 S. Ct. 45 (2006) (denying certiorari). Because the Eighth Amendment only forbids punishments that are both cruel and *unusual*, it is possible that the Court will wait a decade or more to allow the states to experiment, and then eventually determine that those states with *Atkins* procedures that are unusual as compared to the practices of other states are violating the Eighth Amendment. *Compare Ford*, 477 U.S. 399 (prohibiting the execution of the insane as a matter of Eighth Amendment law but leaving much discretion to the states), *with* Panetti v. Quarterman, 127 S. Ct. 2842, 2860 (2007) (expressly declaring Texas's test for insanity unconstitutional under *Ford*). But a strong argument can be made that permitting experimentation in the form of executing those who are mentally retarded under the law or procedures of one state and not another is itself inconsistent with the basic notions of decency and fairness that underlie the Eighth Amendment.

[323] Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 158 (1953).

[324] Israel, *supra* note 6, at 316-17 (internal quotations omitted). As Justice Brennan noted, a constitutional right is "virtually meaningless" so long as "the states [are] left free to decide for themselves . . . [the] means of enforcing the guarantee." Brennan, *supra* note 3, at

VI. CONFRONTING THE REALITY OF UN-INCORPORATION: ASSESSING THE ADVANTAGES AND DISADVANTAGES OF A SYSTEM THAT DOES NOT UNIFORMLY IMPOSE BILL OF RIGHTS PROTECTIONS AGAINST THE STATES

Because the mantra of uniformity and full force application has given way to a system where state adjudications of federal rights are now reviewed under a less stringent standard than is applicable in federal proceedings, it is appropriate to consider the implications of these changes on the whole of constitutional criminal procedure. First, it should be obvious from the analysis above that criminal procedure reforms, AEDPA in particular, are patently unconstitutional if selective incorporation continues to be regarded as the appropriate framework for discerning *which* provisions of the Bill of Rights apply to the states and to *what extent* the rights apply to the states.[325] Perhaps, more than any of the other challenges to AEDPA, the tension between Fourteenth Amendment incorporation and § 2254(d) presents a serious constitutional question that must be addressed by the courts.

The purpose of this Article, however, is not exclusively to raise anew the question of AEDPA's constitutionality. Instead, this piece is intended to serve as a critical review of selective incorporation, and more importantly, as vehicle for beginning what should be a long dialogue about the continued relevance of selective incorporation as a first principle of constitutional criminal procedure. Given the gusto with which the Court has embraced, or even invented, modern limitations on the ability of

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492-93. Or, as Professor Charles Black once commented, without a strict system uniformity like that imposed by the doctrine of incorporation:

> [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."

Charles L. Black, Jr., *"One Nation Indivisible": Unnamed Human Rights in the States*, 65 ST. JOHN'S L. REV. 17, 55 (1991).

[325] *Cf.* Dickerson v. United States, 530 U.S. 428, 437 (2000) (recognizing that "Congress may not legislatively supersede [this Court's] decisions interpreting and applying the Constitution" (citing City of Boerne v. Flores, 521 U.S. 507 (1997))). Under § 5 of the Fourteenth Amendment, Congress is afforded the remedial power to enforce substantive rights, but "[f]ew questions of constitutional law are as uncertain as the scope of congressional power to enforce the substantive provisions of the Fourteenth Amendment." Calvin Massey, *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV. 1, 1 (2007). Additionally, there is nothing to suggest that AEDPA was intended by Congress to be, or even could be, a remedial protection of substantive constitutional rights. *Id.* at 1-3 (recognizing that Congress's remedial actions must be congruent and proportional to the wrong being remedied, but suggesting that § 5 powers might be greater when Congress is not subjecting the states to private suits for damages).

defendants to vindicate their constitutional rights, it is fair to say that selective incorporation has fallen silently into disfavored status. Accordingly, though selective incorporation has been the controlling constitutional doctrine for nearly fiftyyears, it is time to consider the status of criminal procedure in an un-incorporated, or post-incorporation, era.[326] In particular, the scholarship of Professor William Stuntz, and the body of related commentary it has triggered, provides a potential framework for assessing the implications of what, for purposes of this piece, I have called un-incorporation.

A. THE GREATER THE PROCEDURAL RIGHTS, THE SMALLER THE SUBSTANTIVE RIGHTS

Through an inductive analysis of four illustrative examples of un-incorporation, this Article suggests that something of lasting and historically significant import is afoot in the field of procedural criminal law. Notably, however, up to this point there has been virtually no moralizing or general policy commentary on these changes; by and large, the approach has been a purely positivistic or descriptive one. From the perspective of traditional proponents of a robust network of protections for the criminally accused, this rolling back of the Warren Court's procedural revolution is nothing short of a tragedy—promising that more innocent suspects will be convicted and more guilty criminals will be sentenced following unconstitutional investigations and/or trials. And the parade of horribles may be exactly on the mark. Certainly, the criminal justice system as it has come to be known in the United States is shedding the once sacrosanct skin of what the Court now views as superfluous procedural rights.

But a discussion of procedural changes, particularly dramatic paradigm altering shifts in the field of criminal law, would be incomplete if it did not at least consider the matter from the perspective of Professor Stuntz. In Stuntz's view, the Warren-era constitutionalizing of criminal procedure rights, though well-intentioned, may have caused more harm than good to

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[326] The term "post-incorporation" has been used before; however, prior to the enactment of AEDPA and other court-created and legislative limitations on the ability of prisoners to vindicate constitutional rights, most such uses were probably premature. *See, e.g.*, Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 317-18 (1986) ("The ongoing civil liberties exchange between the federal and state high courts underscores the importance of federalism as a means of securing rights even in a post-incorporation world.").

the justice system.[327] Accordingly, Stuntz urged commentators to begin a dialogue about the "substantial unappreciated costs" of robust procedural rights in the field of criminal law.[328]

This dialogue requires some familiarity with Stuntz's hypothesis as to procedural rights. Stuntz asserts that more attention should be paid to the consequences of criminal procedure. Specifically, he argues that "[c]onstitutionalizing procedure, in a world where substantive law and funding are the province of legislatures, may tend to encourage bad substantive law and underfunding."[329] In Stuntz's view, strong constitutionalized procedural rights, which create the illusion of "technicalities" for the guilty, are "not wrong in principle, but . . . at odds with [the nature of] the system."[330] The argument is that "[i]n a legislatively funded system with state-paid prosecutors and defense attorneys, judge-made procedural rights are bound to have some perverse effects."[331] After all, "the criminal justice system is characterized by extraordinary discretion—over the definition of crimes (legislatures can criminalize as much as they wish), over enforcement (police and prosecutors can arrest and charge whom they wish), and over funding (legislatures can allocate resources as they wish)."[332] As an example of unfavorable shifts in substantive criminal law that may flow from the procedural rights, Stuntz points to the movement to criminalize "'reckless sex,' defined as failure to use a condom in an initial sexual encounter."[333] The criminalization of "reckless sex" is described as "a winnable alternative to acquaintance rape prosecutions . . . of upper-class defendants."[334] Apparently, frustrated that "well-off defendants" facing prosecutors with tight budgets will oftentimes escape prosecution or conviction because of procedural maneuvering—"think of Kobe Bryant [or] Michael Jackson"—one solution is to consistently broaden the criminal laws.[335]

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[327] William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997) ("Ever since the 1960s, the right has argued that criminal procedure frees too many of the guilty. The better criticism may be that it helps to imprison too many of the innocent.").

[328] *Id.* at 6.

[329] *Id.*

[330] *Id.* at 56, 75.

[331] *Id.* at 5; *see also* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 781 (2006) ("The constitutional proceduralism of the 1960s and after helped to *create* the harsh justice of the 1970s and after." (citation omitted)).

[332] Stuntz, *supra* note 327, at 5.

[333] Stuntz, *supra* note 331, at 796.

[334] *Id.*

[335] *Id.* at 797 (citation omitted).

Although there can be little doubt that criminal procedure rights, as developed through the Court's interpretation of the Fourth, Fifth, and Sixth Amendments, reflect a profoundly important aspect of our justice system, at least in Professor Stuntz's view, these rights come at substantial cost to indigent defendants. Accordingly, the Court's recent disavowal of the procedural hallmarks of the Warren Court with regards to state court defendants suggests that Stuntz's work could be illuminating as to the long-term effects of these procedural retrenchments.

B. THE INVERSE OF STUNTZ'S THEORY

Principles of logic dictate that the contrapositive (negation and reversal) of a true statement is always true. Accordingly if it is true, as Professor Stuntz asserts, that the broadening of criminal procedure rights has caused the creation of bad substantive law and underfunding, then it logically follows that well-funded defense systems and affirmatively good substantive criminal law would result in the creation of less criminal procedure rights by the courts.[336] Unfortunately, unlike a contrapositive, the inverse (the negation of both premises) of a true statement is not always true, and it is the inverse of Stuntz's thesis that is most relevant to the discussion at hand. That said, Stuntz has acknowledged that "other [factual] scenarios" could "push[] prosecutors and courts in very different directions,"[337] and in the spirit of furthering the discussion regarding the relationship between substantive rights and procedural vehicles for recognizing those rights, it is worth considering whether a reduction in the force of criminal procedure protections will spur the development of a more favorable body of substantive criminal law.

Specifically, the inverse of Professor Stuntz's thesis might be stated as follows: When the procedural rights of defendants are treated as less sacred

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[336] At bottom, this is what Professor Stuntz is urging, an abandonment of the conventional preference for judicially mandated procedural protections over legislatively driven procedural and substantive law. Stuntz, *supra* note 327, at 6 ("But constitutionalizing some aspects of substantive criminal law and defense funding would not tend to encourage bad procedure, or bad anything else."). The key is that legislators define what constitutes a crime, they define what the sentence for the crime will be, and they set the budgets for the public defenders, prosecutors, courts, and prisons. Stuntz, *supra* note 331, at 786. Furthermore, "politicians respond to incentives, and constitutional [procedural] law creates bad ones." *Id.* Moreover, Stuntz argues that it is much more politically feasible for legislatures to craft broad procedural protections for defendants than it is for them to pass reductions in criminal liability or sentencing. *Id.* at 796 (noting that there is a large political constituency supporting procedural checks for the potentially innocent, and not much political will in support of "contract[ing] criminal liability"); *see also id.* at 792-93 n.72 (arguing that if "*Miranda*'s restrictions were relaxed, a great many [other procedural] . . . laws would be enacted").

[337] Stuntz, *supra* note 327, at 5.

and are not uniformly applied as a matter of constitutional law, the substantive legal framework and the funding of the justice system should improve. Two questions flow naturally from this thesis. First, and most importantly, has the process of un-incorporation as described in this Article renounced the constitutional grounding of procedural rules in a way that might motivate legislatures to respond in kind with substantive reforms? And second, is there convincing empirical support for the notion that diminishing procedure will actually generate progressive reforms in the justice system? As to the latter question, there is surely room for debate, and more research and commentary is needed on this point, but there is at least anecdotal support for the notion that legislatures will step in to provide procedural safeguards for the accused when the courts have not "occupied the relevant field" with mandatory constitutional rules.[338]

Unfortunately, progressive legislative efforts in the field of criminal law appear to require an affirmative trigger—an affirmative judicial repudiation or rejection of a certain procedural right. The sort of *sub silentio*, gradual undermining of the incorporated rights that has characterized the Court's application of AEDPA and its announcing of other limitations, such as in *Stone v. Powell*, would not constitute such a trigger. In other words, the un-incorporation regime as currently being carried out might have the uniquely and doubly deleterious effect of repudiating the procedural criminal rules without spurring the concomitant substantive criminal law. The reason for this is simple: the relative unhinging of the federal criminal procedure protections at the hands of the Court is not being done with adequate candor.

Most of the opinions denying state court prisoners federal relief reiterate, reaffirm, and purport to uphold the constitutional rule in question. Rather than striking down the right head-on, the Court perpetually presents one structural reason after another as to why the claim happens not to be

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[338] Some of the examples cited by commentators like Stuntz include statutory protections of privacy interests in things like bank records, library records, phone records, and video rentals. Stuntz, *supra* note 331, at 797 ("In several of those areas, Congress acted shortly after the Supreme Court *expressly declined* to protect the relevant activity through the Fourth Amendment." (emphasis added)). It is the absence of mandatory constitutional regulation, indeed the rejection of such procedures that prompts legislative action. *Id.* at 798-99 (citing the legislative reversal of the Court's holding that victims of police brutality were not entitled to injunctive relief against the police departments, and the broad legislative response to the case—*Whren v. United States*, 517 U.S. 806 (1996)—that effectively bars Fourth Amendment claims in racial profiling cases); *see also id.* at 799-800 (suggesting that state and federal legislation protecting and encouraging DNA-based innocence claims is a product of the Court's reluctance to recognize freestanding innocence as a basis for habeas corpus relief).

cognizable "in this case."[339] Justice Kennedy frequently speaks for the Court when he refuses to award a prisoner relief on the grounds that the "procedural posture of this case" suggests that the Court ought not to reach the constitutional question at issue.[340] If the inverse of Stuntz's thesis is to have any chance of being realized, that is, if the diminishing realm of procedural rules is to result in the development of a more progressive justice system, the Court's approach to un-incorporation will need to change.

If the view that substantive progress may result from these procedural retrenchments is to be viewed as anything other than hopeless optimism, the Court must candidly announce the changing landscape of the criminal justice field. The undoing of selective incorporation for all practical intents and purposes must be announced. If state legislatures and courts are going to be entrusted with developing unique substantive and procedural protections for defendants, a federal catalyst is needed. In essence, the triggering of the sort of ingenuity and political will necessary to develop a more equitable justice system will require an express renunciation of selective incorporation by the Court. Candor by federal courts as to whether the key procedural protections of the federal system, the Fourth, Fifth, and Sixth Amendments, still apply with uniformity and full force across each of the fifty states and the federal government is a precondition to spurring states toward the development of more equitable systems.

If stare decisis or equitable considerations convince the Court that the gloss of uniformity that is definitional to selective incorporation must remain, then AEDPA and *Stone v. Powell* ought to be recognized as having created unconstitutional disuniformity in the application of federal rights by depriving prisoners of a meaningful federal forum (or remedy) for constitutional criminal procedure rights. On the other hand, if uniformity in the application of the Federal Bill is no longer the lodestar of constitutional criminal procedure, then the federal courts should acknowledge the diminished status of selective incorporation. Such an acknowledgment would facilitate transparency regarding the limited scope of the federal criminal procedure rights in state courts. Under the current system, prisoners get the worst of both worlds. On the one hand, federal courts

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[339] Oftentimes, the Court will simply state that given the posture of the case before it, the precise issue will have to be decided "another day." *See, e.g.*, Wright v. Van Patten, 128 S. Ct. 743, 747 (2008). Likewise, in *Stone v. Powell*, the Court purported to reaffirm the rule announced in *Mapp* while simply limiting when such a claim may be raised. 428 U.S. 465 (1976). Of course, as noted earlier, the limitations announced in *Stone* have led state courts to conclude that *Mapp*'s exclusionary rule is no longer binding on state courts. Katkin, *supra* note 179, at 421.

[340] Carey v. Musladin, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring).

announce that the Warren-era procedural rules are to be applied uniformly, and thus prisoners are deprived of the potential benefits of state experimentation that might be facilitated if the Court forthrightly announced the diminishing relevance of the constitutional criminal procedure rights. And on the other hand, the federal courts apply AEDPA as well as court-created limitations on habeas relief, thereby effectively subverting the Warren-era protections.

In sum, Professor Stuntz's research suggests a strong correlation between heightened procedural protections and a diminished concern for justice in substantive law. There is a sense that advocates for a more equitable justice system rob Peter to pay Paul when they prefer judge-made procedural rules over legislative reforms to the justice system. Presently, however, federal courts are enforcing drastic limitations on the ability of defendants to enforce the federal procedural rights, and yet the federal courts are refusing to acknowledge that selective incorporation and the procedural rules it imposes upon the states are of diminishing relevance. In effect, this *sub silentio* infringement of the federal procedural rights creates a scenario where the Court is robbing both Peter and Paul. There is no express trigger for states to begin experimenting with new, more equitable substantive or procedural frameworks, and the constitutional procedural rules are of increasingly limited force in federal court.

Assuming Stuntz's substance/procedure correlation is malleable, then just as an increase in procedure corresponds to a diminishing corpus of substantive law, a decrease in the availability of procedural protections may correspond with an improvement in the substantive law. A substantial body of literature documents the demise of the Warren era's criminal procedure revolution, and this Article in particular situates this question within the domain of the Court's Fourteenth Amendment jurisprudence. However, significantly more scholarship is needed in order to fairly and adequately address the long-term implications of the diminishing realm of federal criminal procedure. And more important still, there is a need for federal courts to begin a more honest discussion about the practical force and effect of federal procedural rights following the structural limitations imposed on state prisoners attempting to vindicate these rights in a post-*Stone*, post-AEDPA world.

VII. CONCLUSION

It is a bedrock principle of constitutional law and federalism that "[t]he constitution and laws of a State, so far as they are repugnant to the constitution and laws of the United States, are absolutely void."[341] Early in

[341] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 414 (1821).

our nation's history, while adapting to the notion of a union of united-states, various states had suggested that the "[c]ourts of the United States . . . cannot be appellate Courts in relation to the State Courts, which belong to a different sovereignty—and of course, their commands or instructions impose no obligation."[342] But in *Martin v. Hunter's Lessee*, Justice Story provided the lasting framework for questions of federal law. He reasoned that because "state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice," federal review is the touchstone of uniformity and fairness in the application of federal law.[343] Accordingly, commentators have noted that, as a matter of history, "no function of the [federal] Court has ranked higher than the protection of federal rights from hostility or misunderstanding on the part of state courts."[344] Chief Justice Roberts recently reiterated this view when he cited the "*uniformity*" principle announced in *Hunter's Lessee* as the bedrock and "fundamental principle of our Constitution."[345]

Likewise, a fear of state prejudices and a preference, rational or not, for a detached federal forum serves as the justification for federal question jurisdiction, diversity jurisdiction, and the recent class action fairness legislation. In view of this broad recognition of the dangers inherent to trusting the protection of federal rights exclusively to state courts, it is not surprising that when the Supreme Court made the Bill of Rights applicable to the States via the Fourteenth Amendment, concerns about the need for the unifying voice of federal oversight were of central import. To this end, the express purpose of selective incorporation, as opposed to its predecessor fundamental fairness, was to avoid "[j]udicial self-restraint which defers too much to the sovereign powers of the states and reserves judicial intervention for only the most revolting cases." Relative uniformity as to federal rights was achieved by holding that once a right was deemed incorporated, "it applied identically in state and federal proceedings."[346]

There has always been complexity in the field of constitutional criminal law, but selective incorporation insured that the evolution of the field was applied uniformly across the states—the job of defining the scope of federal criminal rights was, in a sense, a non-delegable duty entrusted only to those courts that were above the political fray and immune from the

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[342] Hunter v. Martin, 18 Va. (4 Munf.) 1, 12 (1813).

[343] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347-48 (1816).

[344] Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 428.

[345] Danforth v. Minnesota, 128 S. Ct. 1029, 1053 (2008) (Roberts, C.J., dissenting) (internal quotation marks omitted).

[346] Brennan, *supra* note 68, at 545.

capriciousness of election cycles. The role of the Court in enforcing against the states the criminal procedure guarantees found in the Bill of Rights was recognized as maintaining a baseline of uniformity.

Over the past fifty years, since the doctrine of selective incorporation was announced, limitations on federal habeas review and the Court's willingness to permit variation as to substantive rights announced under the Eighth Amendment have effectively rendered the promise of uniformity in the enforcement of the Bill of Rights hollow. There is a crisis of chaos in the Court's federalism jurisprudence. On the one hand, reforms such as AEDPA dictate that the content of the criminal procedure rights will oftentimes be subject to reasonable variation among the fifty states. In this regard, the only thing that remains uniform about the application of the incorporated rights to criminal procedure is that they need not and will not be applied uniformly by the state courts. But on the other hand, the Court continues to view federal courts as the critical guardian of the actual content of the federal constitutional rights. As Chief Justice Roberts recently expressed the role of the Court in the realm of constitutional criminal procedure, "[O]ur role under the Constitution [is that of] the final arbiter of federal law, both as to its meaning and its reach, and [we have] the accompanying duty to ensure the uniformity of that federal law."[347]

But the Court cannot have it both ways. Either the Fourteenth Amendment in conjunction with the Supremacy Clause mandates uniformity of content and remedy, or it does not. In the habeas corpus context alone—which serves as the sole federal vehicle for vindicating some federal rights—the Court's willingness to condone substantially incorrect interpretations of the Constitution, and to affirmatively prevent correcting actions by federal courts, is illustrative of the tension between the ideal of uniformity and the reality of constitutional disparity.[348]

It is simply no longer the case that the federal criminal procedure rights apply with "the same breadth or scope" in each of the fifty states,[349] and there is a need for candor on the part of the Supreme Court as to this matter. Congress cannot legislatively undo a constitutional doctrine such as selective incorporation, but the Court's unwillingness to declare unconstitutional AEDPA's scheme of deference to state court adjudications of federal law might foreshadow systemic shifts in the Court's unsettled federalism jurisprudence. If uniformity of federal law is no longer the rule

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[347] *Danforth*, 128 S. Ct. at 1054.

[348] In a recent admonition to a federal circuit court, the Supreme Court stressed that habeas relief on the basis of a federal constitutional claim is not available unless the prisoner meets a "substantially higher threshold" than incorrectness on the part of the state court. Schriro v. Landrigan, 127 S. Ct. 1933, 1939 (2007).

[349] Brennan, *supra* note 68, at 549.

of the day with regards to criminal procedure rights, then it is time for the Court to expressly acknowledge this fact and let commentators and practitioners take stock of the remaining pieces of the criminal procedure revolution. Ultimately, some may conclude that under Professor Stuntz's model for understanding the relationship between substantive and procedural rights, the justice system will be rendered more equitable over the long term by a reduction in the Warren Court's criminal procedure protections. But the necessary first step is a dialogue about the status of federal rights vis-à-vis the states, or more precisely, the constitutionality of AEDPA as a matter of Fourteenth Amendment law.