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Sloss, David L.

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David L. Sloss*

The Supreme Court decided both Dobbs v. Jackson Women's Health and New York State Rifle v. Bruen in June 2022. Bruen involves gun rights and incorporation doctrine. Dobbs addresses abortion rights and substantive due process (SDP). However, the doctrinal distinction between SDP and incorporation is untenable. Both doctrines are rooted in the Fourteenth Amendment Due Process Clause; neither finds support in the text or original understanding of the Fourteenth Amendment.

The Court applies the same historical test for both SDP and incorporation cases to determine which rights the Due Process Clause protects. Both doctrines address legal issues where states traditionally enjoyed broad autonomy. The Court's historical test fails to provide a principled justification for the central feature of both doctrines: the decision to replace a consistent historical tradition of state autonomy with a new federal constitutional rule that mandates national uniformity.

Before WW II, the Court treated SDP and incorporation as a single doctrine; it invoked natural law to justify that doctrine. This article contends that natural law provides the only theoretically coherent rationale for the doctrine. The article defends a natural law test linked to the human rights principles in the Universal Declaration of Human Rights.

The human rights (HR) test offers three main advantages over the historical test. First, the HR test is more compatible with the constitutional principles of dual sovereignty and legislative primacy. Second, the HR test is less subjective and less

* David L. Sloss is the John A. & Elizabeth H. Sutro Professor of Law at Santa Clara University. I thank Pratheepan Gulasekaram, Michael Ramsey, Marc Spindelman, and Alex Tsesis for helpful comments on earlier drafts of the article. I thank Marisa Hawley for excellent research assistance. And I thank the editors of Santa Clara Law Review.

prone to manipulation than the historical approach. Third, the natural law, HR theory provides a principled justification for the decision to replace a historical tradition of state autonomy with a uniform, federal constitutional rule. Under the HR test, the right to bear arms does not qualify as a fundamental right. In contrast, there is a plausible argument that a woman's right to terminate her pregnancy is a fundamental right, but that argument is not a slam dunk.

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I. INTRODUCTION

In June 2022, the Supreme Court issued opinions in both *Dobbs v. Jackson Women's Health Organization*[1] and *New York State Rifle and Pistol Ass'n. v. Bruen*.[2] In *Dobbs*, the Court reversed almost fifty years of precedent, overruling both *Roe v. Wade*[3] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[4] *Dobbs* held that the Fourteenth Amendment Due Process Clause does not protect a woman's right to terminate an unwanted pregnancy. The Court justified its decision, in part, by saying that the prior decision in *Roe* "represented the exercise of raw judicial power."[5]

In *Bruen*, the Court extended its prior holding in *McDonald v. City of Chicago*.[6] *McDonald* held—contrary to a settled constitutional understanding that had prevailed for more than two centuries—that the Fourteenth Amendment Due Process Clause imposes constitutional limits on the power of state and

1. 142 S. Ct. 2228 (2022).
2. 142 S. Ct. 2111 (2022).
3. 410 U.S. 113 (1973).
4. 505 U.S. 833 (1992).
5. *Dobbs*, 142 S. Ct. at 2241 (quoting *Roe*, 410 U.S. at 179 (White, J., dissenting)).
6. 561 U.S. 742 (2010).

local governments to enact gun control regulations. For reasons explained later in this essay, *McDonald* involved "the exercise of raw judicial power."[7] Therefore, if the Court was aiming for jurisprudential consistency between *Bruen* and *Dobbs*, *Bruen* should have overruled *McDonald*. Instead, the Court doubled down on its prior constitutional error in *McDonald*, holding that the Due Process Clause protects a person's right to carry a handgun outside the home.[8]

This essay examines the Court's constitutional jurisprudence related to gun rights and abortion rights in light of its recent decisions in *Dobbs* and *Bruen*. This essay makes three central claims. First, although the Court treated *Dobbs* as a substantive due process case and *Bruen* as an incorporation case, the two doctrines—incorporation and substantive due process—are best understood as two distinct aspects of a single doctrine. Second, in applying the Fourteenth Amendment Due Process Clause, the Court should apply a natural law test, not a historical test, to determine the proper scope of constitutional protection for particular rights. Third, under the natural law test, both *McDonald* and *Bruen* were wrongly decided. Whether *Dobbs* was wrongly decided is a closer question; I return to that question in Part Five.

Both incorporation and substantive due process cases involve application of the Fourteenth Amendment Due Process Clause to impose judicially created constitutional limits on the states. Before 1947,[9] the Court applied a unified approach to both types of cases: there was no practical distinction between the two doctrines. Use of the "incorporation" label involves judicial sleight-of-hand that obfuscates the essential similarity between the two doctrines. Moreover, the incorporation label induces courts to disregard the federalism and separation of powers principles that should, under a proper constitutional analysis, constrain judicial activism under the Fourteenth

7. *Roe*, 410 U.S. at 179 (White, J., dissenting). Justice Alito wrote the majority opinions in both *Dobbs* and *McDonald*, suggesting that he supports the exercise of raw judicial power when it achieves results consistent with his normative preferences. Of course, one could level the same charge at both liberal and conservative Justices.

8. *Bruen*, 142 S. Ct. at 2111.

9. Justice Black initiated the development of modern incorporation doctrine with his dissenting opinion in Adamson v. People of State of California, 332 U.S. 46 (1947).

Amendment. Therefore, the Court should revive the unified approach to the two doctrines that prevailed before 1947.[10]

My second claim is that the Court should apply a natural law test, not a historical test, to determine the proper scope of constitutional protection under the Due Process Clause. Both the historical and the natural law tests are designed to determine which rights are "fundamental" and therefore merit heightened protection under the Due Process Clause. Both tests have been expressed in different ways at different times. The historical test asks whether a particular right is "deeply rooted in this Nation's history and tradition."[11] In contrast, under the natural law test, a right is fundamental if it is "implicit in the concept of ordered liberty,"[12] or it implicates "immutable principles of justice which inhere in the very idea of free government."[13]

Proponents of the historical test claim that it is less subjective than the natural law test and that it is less prone to abuse. In fact, the opposite is true. The Court deploys historical analysis opportunistically, citing sources that support its preferred outcome and rejecting sources that cut the other way.[14] Or, as Justice Scalia commented in a different context, the basic interpretive method is "to look over the heads of the crowd and pick out its friends."[15] Moreover, the Court has applied the historical test to override traditional federalism protections for state autonomy and to evade separation-of-powers constraints on unbridled judicial lawmaking. In contrast, the specific version of the natural law test that I present and defend in this essay provides more robust protection for state autonomy and imposes meaningful limits on judicial lawmaking.

Most importantly, the historical test that the Court applied in *McDonald* and *Bruen* to rationalize an expansive view

10. I do not wish to endorse a cavalier attitude toward precedent. As will become clear later in this essay, although my proposal would involve overruling some important cases, it would preserve most of the Court's incorporation and substantive due process doctrine.

11. *Dobbs*, 142 S. Ct. at 2242.

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

13. Twining v. New Jersey, 211 U.S. 78, 102 (1908).

14. For trenchant criticism of the Court's flawed historical analysis in *Bruen*, *see, e.g.*, Patrick J. Charles, *The Fugazi Second Amendment: Bruen's Text, History, and Tradition Problem and How to Fix It*, 71 CLEV. STATE L. REV. 623 (2023).; Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L. J. 102 (2023).

15. Roper v. Simmons, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting).

of gun rights under the Fourteenth Amendment is theoretically incoherent. The central question in every case where the Court is asked to impose a new federal constitutional limitation on the states via the Due Process Clause is whether the Court should jettison a consistent historical tradition of state autonomy and replace it with a new federal rule of "compelled uniformity" (in Justice Harlan's phrase).[16] For example, in *Roe*, the Court discarded a consistent historical tradition in which states decided for themselves the scope of protection, if any, for a woman's right to choose, and replaced that tradition with a new federal constitutional rule that limited state autonomy.[17] Similarly, in *McDonald*, the Court rejected a consistent historical tradition that granted states virtually unlimited power to enact whatever gun control regulations they chose, free from federal interference, and replaced the traditional rule of state autonomy with a new federal constitutional rule that established compelled uniformity.[18]

It defies logic to argue, as the majority did in *McDonald*, that a deeply rooted historical tradition of state law protection for a particular right justifies judicial creation of a newly minted constitutional rule that mandates federal uniformity. If the historical record demonstrates that there was a consistent, uniform tradition protecting the right at the state level, then a uniform federal constitutional rule serves no purpose (except to transfer decision-making authority from elected state legislatures to unelected federal judges). But if the historical record manifests a diversity of state laws on the subject, then that history—combined with our tradition of constitutional federalism—provides a powerful argument *against* replacing the historical tradition of state autonomy with a new federal constitutional rule of compelled uniformity. Either way, history cannot provide a theoretically coherent rationale for judicial creation of a new federal constitutional rule in an area that—for 150 or 200 years—was governed exclusively, or almost exclusively, by state law.

16. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 16 (1964) (Harlan, J., dissenting) (noting, in a case where the Court incorporated the Fifth Amendment privilege against self-incrimination, that the "ultimate result is compelled uniformity, which is inconsistent with the purpose of our federal system").

17. Roe v. Wade, 410 U.S. 113 (1973).

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

Since the Court's preferred historical test fails to provide a coherent rationale for either incorporation or substantive due process, the Court has three options: (1) reject both incorporation and substantive due process doctrines in their entirety because there is no principled justification for either doctrine; (2) accept both doctrines solely on the basis of *stare decisis*, while acknowledging that the Justices created both doctrines out of whole cloth, without ever articulating a coherent rationale; or (3) present a *post hoc* rationale that preserves most (but not all) of existing doctrine and that articulates a coherent, principled justification for the doctrine that is preserved. The first option is much too radical for my taste. The second is deeply unsatisfying. Hence, the second half of this paper explores the third option.

A natural law test could potentially provide a theoretically coherent justification for replacing a historical tradition of state autonomy with a new constitutional rule that mandates federal uniformity. The argument, in brief, is this. The Declaration of Independence declares that it is "self-evident" that all "men" (that is, all human beings) "are endowed . . . with certain inalienable rights."[19] The traditional natural law test specifies that rights qualify as "inalienable" or "fundamental" if "neither liberty nor justice would exist if they were sacrificed."[20] The imperative to preserve liberty and justice is itself a sufficient rationale for courts to intervene to protect inalienable rights from infringement by state governments. If a state law actually does violate "immutable principles of justice which inhere in the very idea of free government,"[21] then courts would be abdicating their judicial duty if they failed to invalidate that law.

The main critique of natural law is that people disagree about which rights are inalienable, and which laws violate immutable principles of justice. Moreover, critics contend, the natural law test invites judges to decide cases on the basis of subjective preferences, rather than neutral, objective criteria. In fact, that critique is misplaced. As explained in Part Five, courts can apply a combination of international human rights law and comparative constitutional law to determine—on the

19. DECLARATION OF INDEPENDENCE (U.S. 1776).
20. Palko v. Connecticut, 302 U.S. 319, 326 (1937).
21. Twining v. New Jersey, 211 U.S. 78, 102 (1908).

basis of neutral,[22] objective criteria—which rights qualify as fundamental under the Due Process Clause. Moreover, that methodology is more compatible with principles of constitutional federalism than the historical test, which the Court has abused to override state autonomy in a range of areas where application of the natural law (human rights) test would preserve state autonomy.

Many people associate natural law with a conservative, Christian tradition, but there is nothing inherently conservative about natural law. Professor Robin West distinguishes between conservative and progressive natural law as follows:

> "Whereas the conservative natural lawyer gives content to the moral ideal toward which law aspires by reference to a community's conventional morality . . . for the progressive natural lawyer, the ideal toward which government should aim is informed not by history but by possibility, not by authority, but by vision, and not by the traditions that have triumphed over unlived dreams but by the dreams that have survived in the interstices of the triumphant traditions."[23]

The version of natural law that I elaborate in this essay aligns nicely with West's vision of progressive natural law. However, my argument should also appeal to conservatives insofar as I advocate a natural law test that constrains judicial use of incorporation doctrine to override state law in areas that were originally reserved to the states under the Tenth Amendment.

The remainder of this essay proceeds in four parts. Part Two presents a brief synopsis of the doctrinal evolution of both incorporation and substantive due process (SDP) doctrines. Part Three contends that the two doctrines are best understood as distinct aspects of a single doctrine. Part Three also demonstrates that modern incorporation doctrine raises significant

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22. No approach to constitutional interpretation is morally neutral; an approach based on international human rights law is no exception. However, the moral principles embodied in international human rights treaties reflect a widely shared international agreement about the rights that qualify as "inalienable rights of all members of the human family." G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]. Moreover, those moral principles are broadly consistent with American historical traditions that predate the conservative judicial revolution that began in the 1990s. *See generally* LOUIS HENKIN, THE AGE OF RIGHTS (1990).

23. Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 686 (1990).

legitimacy concerns because it is difficult to reconcile with the core constitutional principles of dual sovereignty and legislative primacy. Part Four presents a critique of the historical test that the Court has applied in recent cases involving gun rights and abortion rights. Part Four also presents a theoretical defense of the progressive natural law approach.

Part Five explains and defends a specific natural law test. Under that test, a right is "fundamental" only if it is codified explicitly in the Universal Declaration of Human Rights[24] or the International Covenant on Civil and Political Rights,[25] or if comparative constitutional analysis demonstrates that the right is recognized by a super-majority of national governments.[26] Part Five demonstrates that most, but not all, of the Court's key incorporation and substantive due process decisions can be justified by applying the proposed test. Gun rights clearly do not qualify as fundamental rights under that test. Whether abortion rights qualify is a closer question.

Before proceeding further, two caveats are necessary. First, Supreme Court precedent is an important source of constitutional meaning. Therefore, even though I agree with the *Dobbs* majority that *Roe* was poorly reasoned, the dissent in *Dobbs* made a powerful argument for preserving *Roe* and *Casey* on the basis of *stare decisis*. Second, in the aftermath of *Dobbs*, advocates should reconsider the equal protection argument in favor of a woman's right to terminate an unwanted pregnancy.[27] Clearly, the current Supreme Court majority will not agree that the Equal Protection Clause justifies heightened constitutional protection for a woman's right to choose. However, a future Court might agree, and the Equal Protection Clause provides a stronger textual foundation for the asserted right than the Due Process Clause. Regardless, this essay dodges both the *stare decisis* and the Equal Protection issues. Instead, this essay analyzes the scope of protection for

24. UDHR, *supra* note 22.

25. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-103, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

26. *See infra* notes 216-221 and accompanying text for a more detailed explanation of the methodology.

27. *See* Cary Franklin & Reva Siegel, *Equality Emerges as a Ground for Abortion Rights In and After Dobbs* (Dec. 31, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4315876.

fundamental rights under the Fourteenth Amendment Due Process Clause.

II. DOCTRINAL EVOLUTION

Part Two presents a conventional account of the evolution of incorporation and substantive due process doctrines. Part Three contends that the two doctrines are best understood as a single doctrine. In this part, though, I present them as separate doctrines in accordance with the prevailing view. My account of substantive due process follows the presentation in the Feldman & Sullivan constitutional law casebook.[28] My account of incorporation doctrine generally follows Justice Alito's presentation in *McDonald v. City of Chicago,*[29] although I part company from Justice Alito in certain respects.

A. Substantive Due Process

The history of substantive due process begins with the Supreme Court's 1897 decision in *Allgeyer v. Louisiana*.[30] In *Allgeyer*, "for the first time, the Court invalidated a state law on substantive due process grounds."[31] After *Allgeyer*, the Court applied the doctrine of economic substantive due process quite aggressively to invalidate state economic regulations that interfered with "liberty of contract." During this period, known as the "*Lochner* era,"[32] "the Court invalidated nearly 200 [state and local] regulations on substantive due process grounds."[33] The *Lochner* era came to an abrupt end in 1937 when the Court decided *West Coast Hotel Co. v. Parrish*.[34] *West Coast Hotel* expressly overruled *Adkins v. Children's Hospital*.[35] *West Coast Hotel* implicitly overruled the entire *Lochner* line of cases, which construed the word "liberty" in the Due

28. NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 485-604 (20th ed. 2019).

29. McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).

30. Allgeyer v. Louisiana, 165 U.S. 578 (1897).

31. FELDMAN & SULLIVAN, *supra* note 28, at 489.

32. The period is named for the Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905).

33. FELDMAN & SULLIVAN, *supra* note 28, at 496.

34. 300 U.S. 379 (1937) (upholding the validity of a state law that prescribed minimum wages for women).

35. 261 U.S. 525 (1923) (invalidating a District of Columbia law that prescribed minimum wages for women).

Process Clause to prevent state and local governments from interfering with freedom of contract.

Even so, two substantive due process cases decided during the *Lochner* era are still good law: *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.[36] *Meyer* invalidated a state law that prohibited teaching foreign languages to young children. *Pierce* invalidated a state law that required children to attend public schools. Both laws, in the Court's view, violated the Fourteenth Amendment because they interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control."[37]

The Court's 1965 decision in *Griswold v. Connecticut*[38] gave birth to modern substantive due process doctrine. Whereas substantive due process in the *Lochner* era focused on economic rights, substantive due process since *Griswold* has focused on privacy and autonomy. In *Griswold*, the Court invalidated a state law that criminalized the use of contraceptives by married couples,[39] stating that "the right of privacy which presses for recognition here is a legitimate one."[40] The Court cited both *Meyer* and *Pierce*, saying that "we reaffirm the principle of the *Pierce* and the *Meyer* cases."[41] It also cited *Skinner v. Oklahoma*,[42] a 1942 decision invalidating an Oklahoma law that provided for compulsory sterilization of a certain class of criminals. Both *Skinner* and *Griswold* affirm the right to make decisions about procreation without unwarranted state intervention.

The Court's next major substantive due process decision after *Griswold* was *Roe v. Wade*,[43] decided in 1973. *Roe* held that the Due Process Clause protects a woman's right to terminate her pregnancy.[44] *Roe* gave rise to a 50-year legal and political battle over abortion rights that has had a profound impact on the Court and American politics.[45] During that period,

36. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).
37. *Pierce*, 268 U.S. at 534-35.
38. 381 U.S. 479 (1965).
39. *See id*. at 480.
40. *Id*. at 485.
41. *Id*. at 483.
42. 316 U.S. 535 (1942).
43. 410 U.S. 113 (1973).
44. *Id*.
45. *See generally* David S. Cohen et. al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023); David S. Cohen, Greer Donley, Rachel Rebouché,

the Court decided more than a dozen cases that gradually narrowed the scope of a woman's right to terminate her pregnancy, without directly overruling *Roe*.[46] The Court finally overruled *Roe* in 2022 in *Dobbs v. Jackson Women's Health Organization*.[47] *Dobbs* may have settled the legal controversy surrounding abortion rights under the Due Process Clause, at least temporarily, but the political and moral controversy continues unabated.

Setting aside abortion, substantive due process cases since *Griswold* fall into three main categories: marriage and family relationships,[48] gay and lesbian rights,[49] and the so-called "right to die."[50] In *Cruzan v. Director, Missouri Dept. of Health*,[51] the Court held that Missouri did not violate the Fourteenth Amendment by preventing the parents of a young woman in a persistent vegetative state from withdrawing artificial nutrition and hydration. Then, in *Washington v. Glucksberg*, the Court held that the Fourteenth Amendment does not protect the asserted right to physician-assisted suicide.[52]

In contrast to the right to die cases, petitioners seeking substantive due process protection for marriage and family relationships have been more successful. In *Loving v. Virginia*, the Court invoked both the Equal Protection and Due Process Clauses to invalidate a state law prohibiting interracial marriage.[53] In *Moore v. East Cleveland*, the Court invalidated a local zoning ordinance that effectively barred a grandmother from living with her two grandsons because they were cousins, not brothers.[54] And in *Turner v. Safley*, the Court invalidated a prison regulation that restricted the marriage rights of prisoners.[55] However, in *Michael H. v. Gerald D.*, the Court rejected a substantive due process claim brought by a man who

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Rethinking Strategy After Dobbs, 75 STAN. L. REV. ONLINE 1 (2022); Gary J. Simson, Rosalind S. Simson, *Rescuing Roe*, 24 N.Y.U. J. LEGIS. & PUB. POL'Y 313 (2022).

46. *See* FELDMAN & SULLIVAN, *supra* note 28, at 524-46.
47. 142 S. Ct. 2228 (2022).
48. *See* FELDMAN & SULLIVAN, *supra* note 28, at 547-53.
49. *See id*. at 553-92.
50. *See id*. at 592-604.
51. 497 U.S. 261 (1990).
52. 521 U.S. 702 (1997).
53. 388 U.S. 1 (1967).
54. 431 U.S. 494 (1977).
55. 482 U.S. 78 (1987).

claimed to be the biological father of a child with whom he sought visitation rights.[56]

The Court's decisions related to LGBT rights have involved a mix of due process and equal protection rationales. In *Lawrence v. Texas*, the Court relied primarily on the Due Process Clause to invalidate a Texas law that prohibited private, consensual homosexual activity.[57] In contrast, *Romer v. Evans* relied on the Equal Protection Clause to invalidate a state constitutional amendment that prohibited action by local governments designed to protect the LGBT community.[58] *United States v. Windsor* involved a mixed rationale that combined due process and equal protection principles.[59] *Windsor* invalidated the Defense of Marriage Act (DOMA), a federal statute, because the law (as applied) "violates basic due process and equal protection principles applicable to the Federal Government."[60] Similarly, in *Obergefell v. Hodges*, the Court held that the combined effect of the Due Process and Equal Protection Clauses grants same-sex couples a constitutional right to marry.[61]

B. Incorporation Doctrine

Justice Black initiated the development of modern incorporation doctrine with his dissenting opinion in *Adamson v. California* in 1947.[62] Black acknowledged that, under the original Constitution, the Bill of Rights constrained only the federal government, not the states. However, he argued, a key purpose of the Fourteenth Amendment was to make the Bill of Rights binding on state governments.[63] Therefore, in his view—known as the "total incorporation theory"—the Fourteenth Amendment should be construed to make *the entire* Bill of Rights binding on the states. In an important law review article published in 1949, Professor Charles Fairman argued persuasively that Justice Black's historical argument

56. 491 U.S. 110 (1989).

57. 539 U.S. 558 (2003). *Lawrence* overruled the Court's prior decision in Bowers v. Hardwick, 478 U.S. 186 (1986), which upheld the constitutional validity of a similar Georgia law.

58. 517 U.S. 620 (1996).

59. 570 U.S. 744 (2013).

60. *Id*. at 769.

61. 576 U.S. 644 (2015).

62. 332 U.S. 46 (1947).

63. *See id*. at 71-75 (Black, J., dissenting).

supporting total incorporation was mostly incorrect, or at best unsubstantiated.[64] Due partly to Fairman's influence, the Supreme Court never adopted Black's total incorporation theory.

Instead, the Court embraced "selective incorporation" doctrine. Under that doctrine, "fundamental" rights included in the Bill of Rights bind state governments under the Due Process Clause, but other rights included in the Bill of Rights do not bind the states. In a single footnote in *McDonald v. City of Chicago*,[65] Justice Alito identified nineteen provisions in the Bill of Rights that the Court had incorporated into the Due Process Clause through selective incorporation as of 1971. They include five discrete First Amendment rights;[66] three separate Fourth Amendment rights;[67] three distinct Fifth Amendment rights;[68] six separate Sixth Amendment rights;[69] and two discrete Eighth Amendment rights.[70] Curiously, Justice Alito's list omits three other rights that the Court incorporated before 1971: the First Amendment right to petition the government,[71] the Sixth Amendment right to an impartial jury,[72] and the Sixth Amendment right to assistance of counsel.[73]

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

65. 561 U.S. 742, 764 n. 12 (2010).

66. *See* Everson v. Board of Ed., 330 U.S. 1 (1947) (Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause); De Jonge v. Oregon, 299 U.S. 353 (1937) (freedom of assembly); Near v. Minnesota, 283 U.S. 697 (1931) (freedom of the press); and Gitlow v. New York, 268 U.S. 652 (1925) (freedom of speech).

67. *See* Aguilar v. Texas, 378 U.S. 108 (1964) (warrant requirement); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule); and Wolf v. Colorado, 338 U.S. 25 (1949) (freedom from unreasonable search and seizure).

68. *See* Benton v. Maryland, 395 U.S. 784 (1969) (Double Jeopardy Clause); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination); and Chicago, B & Q. R. Co. v. Chicago, 166 U.S. 226 (1897) (Takings Clause).

69. *See* Duncan v. Louisiana, 391 U.S. 145 (1968) (trial by jury in criminal cases); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (Confrontation Clause); Gideon v. Wainwright, 372 U.S. 335 (1963) (state's duty to appoint counsel at state's expense); and In re Oliver, 333 U.S. 257 (1948) (right to a public trial).

70. *See* Schilb v. Kuebel, 404 U.S. 357 (1971) (excessive bail); Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment).

71. Edwards v. South Carolina, 372 U.S. 229 (1963).

72. Irvin v. Dowd, 366 U.S. 17 (1961).

73. Powell v. Alabama, 287 U.S. 45 (1932). Justice Alito stated that the Court incorporated the Sixth Amendment right to counsel in *Gideon v. Wainwright* in 1963. *See* McDonald v. City of Chi., 561 U.S. 742, 764 n.12. (2010). However, the Court held in *Powell* that the Fourteenth Amendment guarantees a right to

The Court did not incorporate any additional rights between 1971 and 2010. Since 2010, the Court has incorporated the Second Amendment right to bear arms,[74] the Eighth Amendment prohibition on excessive fines,[75] and the Sixth Amendment right to a unanimous jury verdict.[76] Thus, as of 2023, the Court has incorporated 25 discrete provisions from the Bill of Rights into the Due Process Clause.[77] Only three provisions remain unincorporated: the Third Amendment ban on quartering soldiers, the Fifth Amendment Grand Jury Clause, and the Seventh Amendment right to a jury trial in suits at common law.

Justice Alito's account in *McDonald* correctly identified Justice Black's dissenting opinion in *Adamson* (1947) as a key inflection point in the evolution of incorporation doctrine.[78] Although the Court decided seven cases before 1947 holding that specific Bill of Rights provisions bind the states,[79] none of those cases used the term "incorporation." If one broadens the search to include cases holding that specific Bill of Rights provisions *do not* bind the states, only one such case before 1947 used the term "incorporation."[80] In short, when analyzing whether specific Bill of Rights provisions bind the states, the Court did not frame its analysis in terms of "incorporation" until after 1947.

Terminology aside, Justice Alito highlighted three features of the doctrine that changed after 1947.[81] First, the Court "shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due

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counsel in state courts, at least in some cases. *Gideon* went further by holding that states are required to provide counsel at no expense for indigent defendants.

74. *McDonald*, 561 U.S. at 742 (2010).

75. Timbs v. Indiana, 139 S. Ct. 682 (2019).

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

77. *See supra* notes 66-76 and accompanying text.

78. *See McDonald*, 561 U.S. at 761-63.

79. Everson v. Board of Ed., 330 U.S. 1 (1947) (Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause); De Jonge v. Oregon, 299 U.S. 353 (1937) (freedom of assembly); Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel); Near v. Minnesota, 283 U.S. 697 (1931) (freedom of the press); Gitlow v. New York, 268 U.S. 652 (1925) (freedom of speech); Chicago, B & Q. R. Co. v. Chicago, 166 U.S. 226 (1897) (Takings Clause).

80. Betts v. Brady, 316 U.S. 455, 461-62 (1942) ("The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment."). Palko v. Connecticut, 302 U.S. 319, 326 (1937), used the term "absorption" to express a similar idea.

81. *See McDonald*, 561 U.S. at 764-66.

Process Clause."[82] This claim is clearly correct. Between 1875 and 1947, the Court decided ten cases holding that specific Bill of Rights provisions *do not bind* the states.[83] During the same period, it decided only seven cases holding that specific Bill of Rights provisions *do bind* the states.[84] In contrast, between 1948 and 1972, the Court decided fifteen selective incorporation cases holding that particular Bill of Rights provisions bind the states.[85] During that period, it decided only two cases that rejected selective incorporation.[86]

Second, beginning with *Malloy v. Hogan* in 1964,[87] the Court "held that incorporated Bill of Rights protections are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."[88] As discussed in Part Three, this feature of modern incorporation doctrine is difficult to reconcile with the constitutional principle of dual sovereignty and with the Court's professed commitment to

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82. *Id*. at 764.

83. Adamson v. California, 332 U.S. 46 (1947) (Fifth Amendment rule on self-incrimination); Betts v. Brady, 316 U.S. 455 (1942) (Sixth Amendment right to have state pay for counsel); Palko v. Connecticut, 302 U.S. 319 (1937) (Fifth Amendment Double Jeopardy Clause); Twining v. New Jersey, 211 U.S. 78, 102 (1908) (Fifth Amendment rule on self-incrimination); West v. Louisiana, 194 U.S. 258 (1904) (Sixth Amendment Confrontation Clause); Miller v. Texas, 153 U.S. 535 (1894) (Second Amendment); Presser v. Illinois, 116 U.S. 252 (1886) (Second Amendment); Hurtado v. California, 110 U.S. 516 (1884) (Fifth Amendment Grand Jury Clause); United States v. Cruikshank, 92 U.S. 542 (1876) (Second Amendment); Walker v. Sauvinet, 92 U.S. 90 (1875) (Seventh Amendment). It bears emphasis that three of these cases specifically rejected incorporation of the Second Amendment: *Miller*, *Presser*, and *Cruikshank*. In *McDonald*, Justice Alito dismissed the significance of those three cases. *See McDonald*, 561 U.S. at 758-59.

84. *See supra* note 79.

85. Schilb v. Kuebel, 404 U.S. 357 (1971); Benton v. Maryland, 395 U.S. 784 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968); Washington v. Texas, 388 U.S. 14 (1967); Klopfer v. North Carolina, 386 U.S. 213 (1967); Pointer v. Texas, 380 U.S. 400 (1965); Aguilar v. Texas, 378 U.S. 108 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Edwards v. South Carolina, 372 U.S. 229 (1963); Robinson v. California, 370 U.S. 660 (1962); Mapp v. Ohio, 367 U.S. 643 (1961); Irvin v. Dowd, 366 U.S. 17 (1961); Wolf v. Colorado, 338 U.S. 25 (1949) (freedom from unreasonable search and seizure); and In re Oliver, 333 U.S. 257 (1948).

86. Apodaca v. Oregon, 406 U.S. 404 (1972) (Sixth Amendment requirement for a unanimous jury verdict does not bind the states); Wolf v. Colorado, 338 U.S. 25 (1949) (Fourth Amendment exclusionary rule does not bind the states).

87. *Malloy v.* Hogan, 378 U.S. 1, 10-11 (1964).

88. *McDonald*, 561 U.S. at 765 (internal quotations and citations omitted).

federalism principles.[89] Nevertheless, the Court's recent incorporation decisions endorse wholeheartedly the idea that specific Bill of Rights provisions apply to the states under the Fourteenth Amendment in precisely the same way that they apply to the federal government under the first eight amendments.[90]

Third, Justice Alito claims that, after 1947, the Court abandoned the earlier natural law test for determining which rights are "fundamental" and replaced it with a historical test that focuses on the American "scheme of ordered liberty and system of justice."[91] This claim is highly misleading.

The Court decided a total of 29 "incorporation cases" between 1897 and 1972,[92] including seven cases holding that a specific provision *does not bind* the states, and 22 cases holding that a specific provision *does bind* the states.[93] A careful analysis of those cases demonstrates that the Court applied no less than four different tests to determine which provisions in the Bill of Rights bind the states. Of those 29 cases, five applied a natural law test,[94] three applied a historical test,[95] five applied a test that combines history and natural law,[96] and seven cases

89. *See infra* Part III.

90. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1398 (2020); Timbs v. Indiana, 139 S.Ct. 682, 687 (2019); *McDonald*, 561 U.S. at 765.

91. *McDonald*, 561 U.S. at 764.

92. All 29 cases are listed in Table One. Citations for all 29 cases are included in notes 66 to 76, *supra*. Wolf v. Colorado, 338 U.S. 25 (1949) is counted twice in Table One because it held both that the Fourth Amendment search and seizure rule binds the states, and that the Fourth Amendment exclusionary rule does not bind the states.

Five "incorporation cases" decided before 1897 are excluded from Table One: Miller v. Texas, 153 U.S. 535 (1894); Presser v. Illinois, 116 U.S. 252 (1886); Hurtado v. California, 110 U.S. 516 (1884); United States v. Cruickshank, 92 U.S. 542 (1876); and Walker v. Sauvinet, 92 U.S. 90 (1875). All five cases held that specific Bill of Rights provisions *do not bind* the states. *See supra* note 83. However, all five were decided at a time when the Supreme Court consistently maintained that the Fourteenth Amendment did not make any Bill of Rights provisions binding on the states. Therefore, those cases do not shed light on the criteria that the Court used to decide which Bill of Rights provisions are selectively incorporated.

93. *See* Table One.

94. *See, e.g.*, Twining v. New Jersey, 211 U.S. 78, 102 (1908) (a Bill of Rights provision binds the states only if it implicates "immutable principles of justice which inhere in the very idea of free government").

95. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (stating that a right qualifies if it "is fundamental to the American scheme of justice").

96. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 340-43 (1963).

applied a procedural fairness test.[97] Most importantly, nine cases simply held that a specific Bill of Rights provision binds the states as a matter of judicial fiat, without identifying any criteria for distinguishing between incorporated and unincorporated rights.[98]

Table One divides all 29 cases into two historical periods, showing the number of decisions applying each test during each period. Case names in bold font are cases holding that a specific right does bind the states. Case names in regular font are cases holding that a specific right does not bind the states.[99] Table One shows that Justice Alito's claim is correct in one sense: the Court was more likely to use a natural law test before 1947 and more likely to use a historical test after 1947. However, cases applying a natural law test constitute a minority of the pre-1948 cases (5 of 12) and cases applying a historical test constitute a very small minority of the post-1947 cases (3 of 17 cases). Thus, Justice Alito's claim that the Court had settled definitively on a historical test by 1972 is plainly incorrect.

Table One also highlights two other points that merit comment. First, several cases that are typically classified as "incorporation" cases might fairly be described as procedural due process cases—specifically, the seven cases in the row labeled "procedural fairness." In four of those cases, the Court held that specific Bill of Rights provisions bind the states because application to the states was necessary to comport with basic

97. *See* Table One. For an example of the "procedural fairness" test, *see* Pointer v. Texas, 380 U.S. 400, 403 (1965) (stating that a Bill of Rights provision binds the states if it is "essential to a fair trial").

98. *See* Table One. Five of the nine cases listed in the "judicial fiat" row are First Amendment cases. Gitlow v. New York, 268 U.S. 652 (1925) said: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id*. at 666. Later First Amendment cases simply cited *Gitlow*, or other cases that relied on *Gitlow*, for the proposition that specific First Amendment provisions bind the states, without articulating any criteria for distinguishing between incorporated and unincorporated clauses. *See, e.g*., Edwards v. South Carolina, 372 U.S. 229, 235 (1963); Everson v. Board of Ed., 330 U.S. 1, 8 (1947); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Near v. Minnesota, 283 U.S. 697, 723-724 (1931).

99. Wolf v. Colorado, 338 U.S. 25 (1949), is listed twice because the Court held that the Fourth Amendment prohibition on unreasonable search and seizure binds the states (in bold), but that the Fourth Amendment exclusionary rule does not bind the states (not in bold).

notions of procedural fairness.[100] Second, both before and after 1947, the Court's dominant approach to selective incorporation was simply to declare, as a matter of judicial fiat, that a particular right qualifies as "fundamental," or that a particular provision in the Bill of Rights binds the states, without articulating any intelligible criteria for distinguishing between incorporated and unincorporated rights. As Justice Harlan said in *Duncan v. Louisiana*, the Court failed to articulate "a cogent reason for applying the Sixth Amendment to the states. . . . [It] merely declares that the clause in question is 'in' rather than 'out'. . . . The Court has justified neither its starting place nor its conclusion."[101]

100. *See* Washington v. Texas, 388 U.S. 14, 17-18 (1967) ("essential to a fair trial"); Pointer v. Texas, 380 U.S. 400, 403 (1965) ("essential to a fair trial"); Irvin v. Dowd, 366 U.S. 717, 722 (1961) (Due Process Clause "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors"); *In re* Oliver, 333 U.S. 257, 266-73 (1948).

101. 391 U.S. 145, 180-81 (1968) (Harlan, J., dissenting).

Table One

	1875 to 1947	**1948 to 1972**
Natural Law	**Chicago, B & Q. R. Co.** (1897) Twining v. New Jersey (1908) **De Jonge v. Oregon** (1937) Palko v. Connecticut (1937) Adamson v. California (1947)	No cases
Historical Test	No cases	**Klopfer v. North Carolina** (1967) **Duncan v. Louisiana** (1968) **Benton v. Maryland** (1969)
Combined Test (natural law and history)	**Powell v. Alabama** (1932)	Wolf v. Colorado (1949) **Wolf v. Colorado** (1949) **Mapp v. Ohio** (1961) **Gideon v. Wainwright** (1963)
Procedural Fairness	West v. Louisiana (1904) Betts v. Brady (1942)	**In re Oliver** (1948) **Irvin v. Dowd** (1961) **Pointer v. Texas** (1965) **Washington v. Texas** (1967) Apodaca v. Oregon (1972)
Judicial Fiat	**Gitlow v. New York** (1925) **Near v. Minnesota** (1931) **Cantwell v. Connecticut** (1940) **Everson v. Board of Ed.** (1947)	**Robinson v. California** (1962) **Edwards v. S. Carolina** (1963) **Malloy v. Hogan** (1964) **Aguilar v. Texas** (1964) **Schilb v. Kuebel** (1971)

III. INCORPORATION VS. SDP

Under current constitutional doctrine, the distinction between incorporation and substantive due process hinges on the contrast between enumerated and unenumerated rights. Enumerated rights are those found in the text of the Constitution, such as the right to bear arms.[102] Unenumerated rights are those lacking a textual foundation, such as the right to marry.[103] Incorporation doctrine involves judicial enforcement of enumerated rights, whereas substantive due process involves judicial enforcement of unenumerated rights. The Court's recent decisions in *Dobbs* and *Bruen* suggest that the current conservative majority believes that judicial enforcement of enumerated rights is legitimate,[104] but judicial enforcement of unenumerated rights is highly suspect.[105]

Part Three challenges this way of thinking about Fourteenth Amendment doctrine. The first section problematizes the presumed distinction between enumerated and unenumerated rights. The second section analyzes the doctrine through the lens of two key constitutional principles: dual sovereignty and legislative primacy. That analysis suggests that modern incorporation doctrine actually raises greater legitimacy concerns than substantive due process.

A. Text and Precedent

There are several problems with the Court's tendency to privilege enumerated rights over unenumerated rights. First, both incorporation and substantive due process doctrines are based on precisely the same text: the Fourteenth Amendment Due Process Clause. Incorporation doctrine relies on a construction of the Due Process Clause that is entirely divorced from the actual text of the Constitution. The text stipulates that no state shall "deprive any person of life, liberty, or property, without due process of law."[106] Incorporation doctrine construes that text to mean that most, but not all, of the first eight amendments to the U.S. Constitution shall henceforth be

102. *See* U.S. CONST. amend. II.

103. *See* Obergefell v. Hodges, 576 U.S. 644 (2015) (extending right of marriage to same-sex couples); Loving v. Virginia, 388 U.S. 1 (1967) (extending right of marriage to inter-racial couples).

104. *See* N. Y. State Rifle and Pistol Ass'n. v. Bruen, 142 S. Ct. 2111 (2022).

105. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

106. U.S. CONST. amend. XIV.

binding on state and local governments. As Justice Harlan observed: "The great words of the . . . first section of the Fourteenth Amendment would have been an exceedingly peculiar way to say that the rights heretofore guaranteed against federal intrusion by the first eight Amendments are henceforth guaranteed against state intrusion as well."[107] In short, the Court's ostensible commitment to textualism, as manifested in a preference for incorporation over substantive due process, is belied by the fact that incorporation doctrine, in its entirety, is based on a construction of the Fourteenth Amendment that has no basis in the actual text of the Constitution.[108]

Second, the Court applies almost identical linguistic formulations in both incorporation and SDP cases to set forth the doctrinal test that determines whether a particular right is protected under the Due Process Clause. For example, in *McDonald v. City of Chicago*, the Court said that a specific provision in the Bill of Rights is incorporated into the Fourteenth Amendment if it is "fundamental to our scheme of ordered liberty, or . . . deeply rooted in this Nation's history and tradition."[109] Similarly, in *Dobbs v. Jackson Women's Health Org.*, the Court said that a right qualifies for protection under substantive due process if it is "deeply rooted in [our] history and tradition and . . . essential to our Nation's scheme of ordered liberty."[110] If the Court really believes that it is legitimate to

107. *Duncan*, 391 U.S. at 176 (Harlan, J., dissenting).

108. Justice Thomas has tried to remedy the lack of textual support for incorporation doctrine by arguing that the doctrine is properly grounded in the Fourteenth Amendment Privileges and Immunities Clause, rather than the Due Process Clause. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 805-850 (2010) (Thomas, J., concurring). The P&I Clause states: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1. Insofar as Justice Thomas wants to defend selective incorporation doctrine, the P&I Clause fares no better than the Due Process Clause: neither clause provides intelligible criteria for deciding which Bill of Rights provisions do or do not bind the states. Insofar as Justice Thomas wants to defend total incorporation, he is really making a historical argument about the original understanding of the Fourteenth Amendment. That argument fails for two reasons. First, the historical evidence supporting total incorporation is exceedingly thin. *See* Fairman, *supra* note 64. Second, there are sound, practical reasons why the Court has rejected total incorporation. Incorporation of the Fifth Amendment Grand Jury Clause would radically alter criminal procedure in about half the states. Moreover, incorporation of the Seventh Amendment right to a jury trial in civil cases would wreak havoc on state courts. The Supreme Court, wisely, has resisted calls to incorporate those two provisions.

109. *McDonald* 561 U.S. at 767 (internal quotations omitted).

110. *Dobbs*, 142 S. Ct. at 2246 (internal quotations omitted).

enforce enumerated rights, but not unenumerated rights, why does it use precisely the same doctrinal test to determine which rights are "incorporated" and which rights are "fundamental" for the purpose of substantive due process? The fact that the Court uses the same doctrinal test for both suggests that the two doctrines are best understood as distinct aspects of a single doctrine.

Third, the Ninth Amendment envisions judicial enforcement of unenumerated rights. The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[111] Professor Thomas Grey argues that the Ninth Amendment is "a license to constitutional decision makers to look beyond the substantive commands of the constitutional text to protect fundamental rights not expressed therein."[112] The Ninth Amendment reminds us that certain "values may be seen as permanent and universal features of human social arrangements—natural law principles—as they typically were in the 18th and 19th centuries."[113] Insofar as modern doctrine privileges enumerated rights over unenumerated rights, that doctrine is difficult to reconcile with the text of the Ninth Amendment, which instructs us not to "deny or disparage" unenumerated rights.

Granted, the Ninth Amendment is not framed as a command to the judiciary. However, neither the First nor the Second Amendment is framed as a command to the judiciary.[114] Even so, under incorporation doctrine, the Court construes the Fourteenth Amendment as authorization for federal courts to apply almost the entire Bill of Rights to the states.[115] The Ninth Amendment is an integral part of the Bill of Rights.[116] If the Fourteenth Amendment authorizes the federal judiciary to apply other Bill of Rights provisions as limitations on state

111. U.S. CONST., Amend IX.

112. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 709 (1975).

113. *See id*. *See also* Alexander Tsesis, *The Declaration of Independence and Constitutional Interpretation*, 89 SOUTHERN CAL. L. REV. 369, 373 (2016) (noting that "the Ninth Amendment demonstrated the framers' persistent belief that inalienable, natural human rights were not the creation of the state, but the birthright of the people.").

114. *See* U.S. CONST., Amend I, Amend II.

115. *See supra* notes 66-76 and accompanying text.

116. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 119-33 (1998).

power, then it follows that the Fourteenth Amendment also authorizes federal courts to apply the Ninth Amendment as a limitation on state power. Indeed, one way to explain modern substantive due process (SDP) doctrine is to say that, in SDP cases, the Court is applying the Ninth Amendment to the states via the Due Process Clause in precisely the same way that it applies the First, Fourth and other amendments to the states via the Due Process Clause in incorporation cases.[117]

Fourth, the distinction between incorporation doctrine and substantive due process doctrine is based on a purported distinction between enumerated and unenumerated rights that does not withstand close analysis. For example, in *Mapp v. Ohio,*[118] the Court ostensibly incorporated an enumerated right: i.e., the Fourth Amendment exclusionary rule. However, the exclusionary rule does not appear in the text of the Fourth Amendment. Therefore, the right to have evidence excluded should arguably be classified as an unenumerated right, not an enumerated right.[119] Similarly, in *Ramos v. Louisiana*,[120] the Court ostensibly incorporated the Sixth Amendment right to a unanimous jury verdict. However, that right does not appear in the text of the Sixth Amendment. Therefore, the right to a unanimous jury verdict should arguably be classified as an unenumerated right, not an enumerated right.[121]

In reality, the right to a unanimous jury verdict is based on "constitutional construction"[122] of the Sixth and Fourteenth Amendments. Similarly, a woman's right to terminate her

117. *Griswold v. Connecticut*, 381 U.S. 479 (1965), was a foundational case for the development of modern SDP doctrine. In his concurring opinion in *Griswold*, Justice Goldberg argued that "the right of privacy in the marital relation is fundamental and basic—a personal right 'retained by the people' within the meaning of the Ninth Amendment . . . [and] protected by the Fourteenth Amendment from infringement by the States." *Id*., at 499 (Goldberg, J., concurring).

118. 367 U.S. 643 (1961).

119. *Mapp* overruled Wolf v. Colorado, 338 U.S. 25 (1949). In *Wolf*, the Court's analysis assumed that the exclusionary rule was a judicially created rule, not an enumerated right.

120. 140 S. Ct. 1390 (2020).

121. *Ramos* overruled Apodaca v. Oregon, 406 U.S. 404 (1972). In *Apodaca*, the plurality opinion assumed that the requirement for a unanimous jury verdict was a judicially created rule, not an enumerated right.

122. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (2001) (introducing the term "constitutional construction" to account for the fact that interpretation of constitutional text typically involves an element of judicial lawmaking).

pregnancy, which the Court first recognized in *Roe v. Wade*,[123] is based on constitutional construction of the Fourteenth Amendment. If one examines the actual text of the Constitution, it is clear that the constitutional text provided no more definitive answer in *Ramos v. Louisiana* than it did in *Roe v. Wade*. In both cases, the Court considered several other factors, in addition to the text of the Constitution, to answer the question presented. The same basic point applies to virtually every case where the Court is ostensibly applying the Bill of Rights to the states via the Due Process Clause.[124] Therefore, the claim that incorporation cases (like *Mapp* and *Ramos*) involve textual rights, whereas substantive due process cases (like *Roe*) involve non-textual rights is simply wrong. Both incorporation and SDP cases require courts to analyze a broad range of textual and non-textual factors to render judicial decisions.

B. Dual Sovereignty and Legislative Primacy

The U.S. Constitution creates a system of dual sovereignty that divides sovereignty between the federal government and fifty state governments. In Justice Kennedy's colorful phrase: "The Framers split the atom of sovereignty."[125] The principle of dual sovereignty finds expression in the text of the Tenth Amendment, which reserves to the states "the powers not delegated to the United States by the Constitution."[126] Since the Rehnquist Court launched the so-called "federalism revolution" with its landmark decision in *United States v. Lopez*,[127] the Court has invoked the principle of dual sovereignty regularly in cases where litigants challenge congressional legislation on federalism grounds.[128] Similarly, in *Dobbs*, the Court

123. 410 U.S. 113 (1973).

124. For example, in *Bruen*, the Court held that the Second Amendment protects the right to carry handguns in public for self-defense. *See Bruen*, 142 S. Ct. 2111 (2022). The constitutional text does not mention "handguns," or "public" or "self-defense." The Court engaged in constitutional construction by reading all those terms into the Second Amendment.

125. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

126. U.S. CONST., amend X.

127. 514 U.S. 549 (1995).

128. *See, e.g.*, Murphy v. National Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475 (2018) ("Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of 'dual sovereignty'.") (quoting Gregory v. Ashcroft, 501 U.S. 452, 457 (1991)); Federal

invoked the principle of dual sovereignty (or federalism) as a core element of its rationale for granting state legislatures the power to regulate abortion in accordance with their policy preferences.[129]

The Declaration of Independence says it is "self-evident" that governments derive "their just Powers from the Consent of the Governed."[130] Thus, the Constitution's Framers began with an assumption of "legislative primacy."[131] The core idea is that We the People are governed by laws enacted by our elected legislators. In Justice Scalia's words: "The reason for insistence on legislative primacy is obvious and fundamental: In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."[132] The principle of legislative primacy means that legislatures, not courts, have the primary responsibility for protecting fundamental rights. As the Court said in *Hurtado v. California*, the greatest security for "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . resides in the right of the people to make their own laws, and alter them at their pleasure."[133] For the reasons explained below, certain aspects of modern incorporation doctrine are difficult to reconcile with the twin principles of dual sovereignty and legislative primacy.

1. Incorporation Doctrine and Dual Sovereignty:

References to "federalism" or "dual sovereignty" or "state autonomy" are curiously absent from the Court's incorporation decisions. When it applies incorporation doctrine, the Court behaves as if it believes that the Constitution creates a system of

Maritime Com'n v. South Carolina State Ports Authority, 535 U.S. 743, 751 (2002) ("Dual sovereignty is a defining feature of our Nation's constitutional blueprint"); Printz v. U.S., 521 U.S. 898, 918 (1997) ("It is incontestable that the Constitution established a system of "dual sovereignty.").

129. *Dobbs*, 142 S. Ct. 2228, 2240 (2022) ("For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens.").

130. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

131. *See generally* EDWARD A. PURCELL JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000) (presenting a detailed defense of legislative primacy as a core constitutional principle).

132. Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) (internal quotations omitted).

133. 110 U.S. 516, 535 (1884).

judicial sovereignty in which the Supreme Court sits as a "super-legislator" that exercises veto power over state legislation.[134] Thus, the Court's modern incorporation doctrine exists in uneasy tension with the principle of dual sovereignty.[135]

The problem stems from a cavalier statement that the Court made for the first time in *Malloy v. Hogan*.[136] *Malloy* involved a prisoner held in contempt by a Connecticut state court after refusing to answer certain questions. State law provided a right against self-incrimination. The state court concluded—after a detailed factual inquiry—that Malloy could answer the question without impairing his privilege against self-incrimination.[137] Justice Brennan, writing for a 5-4 majority, held that the Fifth Amendment privilege against self-incrimination binds the states under the Fourteenth Amendment, and that Connecticut had violated the Fifth Amendment.[138] In that context, the Court "rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," saying that it "would be incongruous to have different standards determine the validity of a claim of privilege . . . depending on whether the claim was asserted in a state or federal court."[139]

The Court never explained why it would be "incongruous" to apply different standards in state and federal courts. As Justice Harlan observed in dissent: "Such 'incongruity' . . . is at the heart of our federal system. The powers and responsibilities of the state and federal governments are not congruent; under our Constitution, they are not intended to be."[140] In short, one essential corollary of the principle of dual sovereignty is that each state government decides for itself the procedures to apply in state courts, subject to the caveat that such procedures must comport with "fundamental fairness," as required by the

134. Justice Harlan made this point forcefully in several dissenting opinions in incorporation cases. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 807-09 (1969) (Harlan, J., dissenting); Duncan v. Louisiana, 391 U.S. 145, 171-83 (1968) (Harlan, J., dissenting); Malloy v. Hogan, 378 U.S. 1, 27-33 (1964) (Harlan, J., dissenting); Mapp v. Ohio, 367 U.S. 643, 678-86 (1961) (Harlan, J., dissenting).

135. Judge Bybee has made a similar argument. *See* Jay S. Bybee, *The Congruent Constitution (Part One): Incorporation*, 48 B.Y.U. L. REV. 1 (2022).

136. 378 U.S. 1 (1964).

137. *See id*. at 29-30 (Harlan, J., dissenting).

138. *See id*. at 8-13.

139. *Id*. at 10-11.

140. *Id*. at 27 (Harlan, J., dissenting).

Fourteenth Amendment Due Process Clause.[141] In *Malloy*, the majority made no claim that the state court had violated principles of fundamental fairness. It merely insisted, without justification, that "the same standards must [apply] . . . in either a federal or state proceeding."[142]

Since it decided *Malloy*, the Court has frequently repeated the *Malloy* mantra that the Court does not apply a "watered-down, subjective version" of the Bill of Rights to the states.[143] Several individual Justices have objected to the Court's insistence that specific clauses in the Bill of Rights must apply to the states in precisely the same way that they apply to the federal government. Justice Powell's concurring opinion in *Johnson v. Louisiana*[144] is illustrative: "In holding that the Fourteenth Amendment has incorporated 'jot-for-jot and case-for-case' every element of the Sixth Amendment, the Court derogates principles of federalism that are basic to our system. In the name of uniform application of high standards of due process, the Court has embarked upon a course of constitutional interpretation that deprives the States of freedom to experiment with adjudicatory processes different from the federal model."[145]

In other contexts, the Court has insisted that a judicial decision to impose a uniform federal rule on the states must be justified by explaining why federal uniformity is necessary, or at least desirable. Indeed, in the line of cases developing post-

141. *See, e.g*., Klopfer v. North Carolina, 386 U.S. 213, 226-227 (1967) (Harlan, J., concurring) ("I would rest decision of this case not on the 'speedy trial' provision of the Sixth Amendment, but on the ground that this unusual North Carolina procedure . . . violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment."); Pointer v. Texas, 380 U.S. 400, 408-409 (1965) (Harlan, J., concurring) ("The concept of Fourteenth Amendment due process . . . recognizes that our Constitution tolerates, indeed encourages, differences between the methods used to effectuate legitimate federal and state concerns, subject to the requirements of fundamental fairness."); Malloy v. Hogan, 378 U.S. 1, 20 (1964) (Harlan, J., dissenting) ("The coerced confession cases are relevant to the problem of this case not because they overruled Twining sub silentio, but rather because they applied the same standard of fundamental fairness which is applicable here.").

142. *Malloy*, 378 U.S. at 11.

143. *See, e.g*., Benton v. Maryland, 395 U.S. 784, 794 (1969); Pointer v. Texas, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring).

144. 406 U.S. 356 (1972).

145. *Id*. at 375 (Powell, J., concurring). *See also* Duncan v. Louisiana, 88 S.Ct. at 1459-60 (1968) (Fortas, J., concurring); Duncan, 391 U.S. at 180-81 (Harlan, J., dissenting).

Erie federal common law, the Court has explained at length why federal uniformity is necessary to promote uniquely federal interests.[146] In its incorporation cases, though, the Court has never explained why a uniform federal rule is necessary or desirable, apart from insisting that it will not apply a "watered-down, subjective version" of the Bill of Rights to the states. Thus, in the final analysis, the *Malloy* mantra about watered-down rights is nothing more than a judicial power-grab, which is antithetical to the principle of dual sovereignty and is not justified by any intelligible rationale.

The Court decided most of the major incorporation cases between 1948 and 1972,[147] a period when the Justices assumed that the Constitution imposed almost no judicially enforceable federalism limitations on Congress's legislative powers.[148] Given the Court's lack of attention to the principle of dual sovereignty during that period, it is not surprising that the Court developed an incorporation doctrine that was at odds with federalism principles.

However, in its 1995 decision in *United States v. Lopez*,[149] the Court reaffirmed its commitment to judicially enforceable federalism limitations on Congress. In light of *Lopez* and its progeny, it is somewhat surprising that the Court's three major incorporation decisions since *Lopez*—*McDonald*, *Timbs*, and *Ramos*—all repeat the *Malloy* mantra about watered-down rights.[150] In all three cases, the Court simply assumed the desirability of federal uniformity, without addressing the manifest conflict between incorporation doctrine and dual sovereignty, and without explaining why a uniform federal rule was necessary or desirable to promote uniquely federal interests. Indeed, in all three cases—*McDonald*, *Timbs*, and *Ramos*—if the Court had inquired whether there was a need for federal uniformity, the answer would have been self-evident: there was no legitimate reason for the Court to replace the pre-

146. *See generally* RICHARD H. FALLON, JR. ET AL, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 643-722 (7th ed. 2015).

147. *See supra* notes 62-77 and accompanying text.

148. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 262-71 (5th ed. 2015).

149. 514 U.S. 549 (1995).

150. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1398 (2020); Timbs v. Indiana, 139 S.Ct. 682, 687 (2019) ("if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires"); McDonald v. City of Chicago, 561 U.S. 742, 765 (2010).

existing practice of state diversity with a new rule mandating uniformity.

2. Incorporation Doctrine and Legislative Primacy

The Court's incorporation doctrine involves a tremendous amount of "bootstrapping." The Court decides in a single case, for example, that the Free Exercise Clause (or some other clause) binds the states.[151] After making that initial incorporation decision, the Court proceeds to decide dozens or hundreds of cases applying the Free Exercise Clause (or some other clause) to the states in precisely the same way that it applies to the federal government, since *Malloy* rejected applying "watered down" rights to the states. In doing so, the Court typically gives almost no weight to the fact that the specific issue presented requires a careful balancing of competing policy concerns: the type of balancing that, under the principle of legislative primacy, is best left to our elected representatives. In sum, a single decision to incorporate a single right leads to a cascade of subsequent decisions in which the Court substitutes its judgment for the judgments of state legislatures.

The Court's recent decision in *Carson v. Makin* illustrates the point.[152] Maine is a very rural state, with dozens of school districts that are not large enough to support a secondary school. The Maine legislature provides tuition assistance to parents of children who live in a school district without a public secondary school. Under the tuition assistance program, the parents may designate either a public or private school for their children to attend and the state makes a payment to the chosen school.[153] In 1981, the Maine legislature amended the governing statute to bar payment of state funds to "sectarian" schools. They did so based on the legal advice of the state attorney general, who issued an opinion stating that the Establishment Clause bars state funding of sectarian schools.[154] That opinion was entirely consistent with the Supreme Court's then-current First Amendment jurisprudence. However, the Court's interpretation of the Establishment and Free Exercise

151. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding that the Free Exercise Clause binds the states).

152. 142 S. Ct. 1987 (2022).

153. *See id*. at 1993-94.

154. *Id*. at 1994.

Clauses has changed dramatically since 1981.[155] Accordingly, the Court held in *Carson v. Makin* that Maine's legislative decision to prohibit payment of state funds to sectarian schools—a decision that was previously required by the Establishment Clause—is now precluded by the Free Exercise Clause, because Maine restricted the Free Exercise rights of parents who want to send their children to sectarian schools.[156]

In his dissent, Justice Breyer criticized the majority for failing "to recognize the play in the joints between the two" religion clauses in the First Amendment.[157] He added that "that play gives States some degree of legislative leeway."[158] It bears emphasis that Maine's legislative choice involved a careful balancing of at least four distinct policy goals: supporting public education, responsible management of state funds, preserving separation between church and state, and avoiding state interference with parental choices about their children's education. Two of those policy goals—public education and spending decisions—are uniquely within the competence of state legislatures. Before the Supreme Court incorporated the Free Exercise Clause in 1940 and the Establishment Clause in 1947,[159] choices involving the balancing of such competing policy concerns were left almost entirely to state legislatures: there were no federal constitutional rules restricting the states' legislative choices. Now, thanks to a series of decisions construing the two religion clauses, the Supreme Court has gradually tightened the noose around state legislatures to the point where they have very little discretion to balance competing policy goals. In this way, incorporation doctrine subverts the core constitutional principle of legislative primacy. The Supreme Court has

155. *See, e.g.*, Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J. 1763 (2023).

156. *Carson*, 142 S. Ct. 1987, 1994. It bears emphasis that Maine did not prevent parents from sending their children to sectarian schools. The state simply told them that they would have to pay for it themselves. The Court's holding—in effect, that the state must fund sectarian education—finds little support in either the text or the original understanding of the Free Exercise Clause. *See* Lupu & Tuttle, *supra* note 155.

157. *Id*. at 2002 (Breyer, J., dissenting).

158. *Id.*

159. *See* Everson v. Board of Ed., 330 U.S. 1 (1947) (Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause).

appropriated the power of our elected legislators and claimed that power for itself.[160]

The religion clauses are not unique in this respect. During the two Supreme Court terms that ended in June 2021 and June 2022, the Court decided 26 cases applying the Bill of Rights to the states, including ten First Amendment cases,[161] one Second Amendment case,[162] seven Fourth Amendment cases,[163] three Fifth Amendment cases,[164] two Sixth

160. Of course, the Court claims that its constitutional mission is to protect fundamental rights. However, it is preposterous to claim that parents have a fundamental right to compel the state to expend state funds to pay for their children's sectarian, religious education.

161. Kennedy v. Bremerton School District, 142 S. Ct. 2407 (2022) (holding that school district violated First Amendment rights of high school football coach); Carson v. Makin, 142 S. Ct. 1987 (2022) (holding that Maine legislature violated Free Exercise Clause); Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022) (holding that flags displayed in front of city hall do not constitute government speech); City of Austin v. Reagan National Advertising, LLC, 142 S. Ct. 1464 (2022) (holding that city regulation of billboards was content neutral speech regulation); Houston Community College System v. Wilson, 142 S. Ct. 1253 (2022) (holding that member of Board of Trustees did not have actionable First Amendment claim); Americans for Prosperity Foundation v. Bonta, 141 S. Ct. 2373 (2021) (holding that California tax regulation requiring disclosure of information violated First Amendment rights of charitable organizations); Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (holding that school violated cheerleader's First Amendment rights); Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (Philadelphia's refusal to contract with Catholic Social Services (CSS) unless CSS agreed to certify same-sex couples as foster parents violated Free Exercise Clause); Tandon v. Newsom, 141 S. Ct. 1294 (2021) (holding that pandemic restrictions violated Free Exercise Clause); Roman Catholic Diocese of Brooklyn, 141 S. Ct. 63 (2020) (upholding Free Exercise claim of petitioner who challenged pandemic restrictions).

162. New York State Rifle and Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

163. Thompson v. Clark, 142 S. Ct. 1332 (2022) (ruling in favor of plaintiff's 1983 claim); City of Tahlequah v. Bond, 142 S. Ct. 9 (2021) (police officers entitled to qualified immunity); Rivas-Villegas v. Cortesluna, 142 S. Ct. 4 (2021) (police officer entitled to qualified immunity); Lombardo v. St. Louis, 141 S. Ct. 2239 (2021) (remanding for lower court to reconsider plaintiff's excessive force claim); Lange v. California, 141 S. Ct. 2011 (2021) (criminal defendant entitled to suppress evidence obtained from warrantless entry of home); Caniglia v. Strom, 141 S. Ct. 1596 (2021) (upholding plaintiff's Fourth Amendment claim based on warrantless search of home); Torres v. Madrid, 141 S. Ct. 989 (2021) (holding that officers seized Torres by shooting her with intent to restrain her movement).

164. Vega v. Tekoh, 142 S. Ct. 2095 (2022) (holding that a violation of the *Miranda* rule does not provide a basis for a 1983 claim); Pakdel v. City and County of San Francisco, 141 S. Ct. 2226 (2021) (remanding with instructions for lower court to reconsider plaintiffs' regulatory takings claim); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (holding that a California regulation granting labor organizations a right of access to an agricultural employer's property violated the Takings Clause).

Amendment cases,[165] and three Eighth Amendment cases.[166] These 26 cases comprise roughly twenty percent of the Court's entire caseload during those two terms,[167] and an even larger percentage of the Court's constitutional cases. Thus, in numerical terms, the Court applies incorporation doctrine much more frequently than any other constitutional doctrine.[168]

Not all of the Court's incorporation decisions implicate the norm of legislative primacy. Some cases challenge state or local executive action.[169] Other cases challenge state judicial action.[170] Regardless, the Court routinely decides incorporation cases in which it invalidates state legislation involving subject matter that was governed exclusively by state law, not federal law, before the Court incorporated the relevant Bill of Rights provision.[171] Moreover, the Court has never articulated a consistent, principled justification for the key feature of incorporation doctrine: the transfer of decision-making authority from state legislatures to federal courts.

Professor Mark Lemley argues that we are currently witnessing the rise of "the imperial Supreme Court."[172] In his

165. Hemphill v. New York, 142 S. Ct. 681 (2022) (holding that the trial court violated defendant's rights under the Confrontation Clause); Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (holding that the *Ramos* rule requiring a unanimous jury verdict in state criminal trials does not apply retroactively on federal habeas review).

166. Nance v. Ward, 142 S. Ct. 2214 (2022) (holding that death row prisoner may bring 1983 suit to challenge lethal injection as a method of execution); Jones v. Mississippi, 141 S. Ct. 1307 (2021) (upholding life-without-parole sentence for 15-year-old against Eighth Amendment challenge); Taylor v. Riojas, 141 S. Ct. 52 (2020) (conditions of confinement for Texas state prisoner violated Eighth Amendment).

167. The Court issued 134 merits decisions in the two terms that ended in June 2022, not including cases decided on the Court's "shadow docket." 26 divided by 134 = 19.4 percent.

168. Many of the Court's recent "incorporation" cases do not even mention the Fourteenth Amendment, despite the fact that, as a formal matter, the Court applies the various Bill of Rights provisions to the states via the Fourteenth Amendment. For practical purposes, the Court behaves as if the Bill of Rights applies to the states of its own force, even though that is not true.

169. *See, e.g*., Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).

170. *See, e.g*., Hemphill v. New York, 142 S. Ct. 681 (2022) (holding that the trial court violated defendant's rights under the Confrontation Clause).

171. *See, e.g*., New York State Rifle and Pistol Ass'n. v. Bruen, 142 S. Ct. 2111 (2022) (Second Amendment); Carson v. Makin, 142 S. Ct. 1987 (2022) (Free Exercise Clause); Americans for Prosperity v. Bonta, 141 S. Ct. 2373 (2021) (freedom of association).

172. Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022).

words: "The Court has taken significant, simultaneous steps to restrict the power of Congress, the administrative state, the states, and the lower federal courts. . . . The common denominator across multiple opinions in the last two years is that they concentrate power in one place: the Supreme Court."[173] Incorporation doctrine is a key tool in the Court's arsenal, enabling the Court to appropriate power that the Constitution vests in state legislatures and to claim that power for itself. Thus, there is significant tension between the Court's incorporation doctrine and the twin principles of dual sovereignty and legislative primacy. That tension does not mean that incorporation doctrine is illegitimate. However, it does mean that the doctrine requires a principled justification. Part Four considers potential justifications.

IV. NATURAL LAW VS. HISTORY

As noted previously, the Court applies essentially the same doctrinal test to determine whether a right is "fundamental" for both substantive due process (SDP) and incorporation doctrines.[174] The primary test is historical: whether a right is "deeply rooted in this Nation's history and tradition."[175] Ironically, though, that historical test is not deeply rooted in history or tradition. It constitutes a fairly recent departure from a much older natural law tradition, which itself is deeply rooted in our nation's history. Under the natural law test, a right is fundamental if it implicates "immutable principles of justice which inhere in the very idea of free government."[176]

The Court first articulated the modern version of the historical test in *Moore v. City of East Cleveland* (1977), where Justice Powell said: "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[177] Granted, the Court employed historical analysis in older incorporation and SDP cases, but the formulation changed over the years. Compare *Moore* to *Snyder v. Massachusetts* (1934), where the Court said: "Massachusetts is free to regulate the

173. *Id.* at 97.

174. *See supra* notes 109-110 and accompanying text.

175. *McDonald*, 561 U.S. at 767 (2010) (internal quotations omitted). *See also* Dobbs v. Jackson Women's Health Org., 142 S. Ct. at 2246.

176. Twining v. New Jersey, 211 U.S. 78, 102 (1908).

177. 431 U.S. 494, 503 (1977) (plurality opinion).

procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[178]

Modern SDP cases cite *Snyder* as a key precedent for the historical test.[179] In *Snyder*, though, the Court spoke about "justice" and "conscience."[180] Those terms are absent from *Moore*. The terms "justice" and "conscience" implied that the *Snyder* Court based its legal judgment at least partly on a moral judgment. Between 1934 and 1977, though, the Justices became increasingly uncomfortable with express reliance on moral factors to explain their decisions to classify rights as "fundamental."[181] Since 1977, the Justices have continued to exercise moral judgment in both incorporation and substantive due process cases: indeed, the necessity to exercise moral judgment is an inescapable aspect of the judicial role.[182] However, modern Justices try to hide their moral judgments behind a thin veil of historical analysis. Thus, one key advantage of natural law is that Justices applying the natural law test are more honest and transparent about their moral judgments. In contrast, Justices applying the historical test tend to be intellectually dishonest, insofar as they pretend to decide cases based on objective, morally neutral, historical factors.

A. A Critique of the Historical Test

My claim that historical analysis is neither objective nor morally neutral requires further elaboration. Part Two documented the fact that the Supreme Court has decided twenty-

178. 291 U.S. 97, 105 (1934). *Snyder* is best categorized as a procedural due process case, but the modern Supreme Court has cited *Snyder* in both incorporation and SDP cases.

179. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (citing *Snyder*).

180. *See Snyder*, 291 U.S. at 105.

181. *See, e.g.*, Adamson v. California, 332 U.S. 46, 70 (1947) (Black, J., dissenting) ("I would not reaffirm the *Twining* decision. I think that decision and the 'natural law' theory of the Constitution upon which it relies, degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise.").

182. *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (Due process has not been reduced to any formula; its content cannot be determined by reference to any code. . . . No formula could serve as a substitute, in this area, for judgment and restraint.")

five separate cases in which it "incorporated" a right from the Bill of Rights into the Due Process Clause *for the first time*.[183] Similarly, Part Two demonstrated that the Court has decided at least eight cases in which it recognized, *for the first time*, a new right related to privacy and/or autonomy that it linked to the Fourteenth Amendment Due Process Clause.[184] Table Two lists the key cases.

183. *See supra* notes 62-76 and accompanying text.

184. *See supra* notes 36-61 and accompanying text. Counting SDP cases is somewhat trickier than counting incorporation cases. The number eight is not a magic number. Reasonable people could disagree about precisely which cases belong in this category and how to count them.

Table Two

	Incorporation	**Substantive Due Process**
Before 1948	B&Q R'wy Co. v. Chicago (1897) Gitlow v. New York (1925) Near v. Minnesota (1931) Powell v. Alabama (1932) De Jonge v. Oregon (1937) Cantwell v. Connecticut (1940) Everson v. Bd. of Educ. (1947)	Meyer v. Nebraska (1923) Skinner v. Oklahoma (1942)
1948 to 1977	In re Oliver (1948) Wolf v. Colorado (1949) Mapp v. Ohio (1961) Irvin v. Dowd (1961) Robinson v. California (1962) Gideon v. Wainwright (1963) Edwards v. S. Carolina (1963) Aguilar v. Texas (1964) Malloy v. Hogan (1964) Pointer v. Texas (1965) Klopfer v. N. Carolina (1967) Washington v. Texas (1967) Duncan v. Louisiana (1968) Benton v. Maryland (1969) Schilb v. Keubel (1971)	Griswold v. Connecticut (1965) Loving v. Virginia (1967) Roe v. Wade (1973) Moore v. East Cleveland (1977)
After 2000	McDonald v. City of Chicago (2010) Timbs v. Indiana (2019) Ramos v. Louisiana (2020)	Lawrence v. Texas (2003) Obergefell v. Hodges (2015)

In every case where the Supreme Court is asked to incorporate a specific Bill of Rights provision into the Due Process Clause for the first time—and in every case where the Court is asked to recognize a new right as a matter of substantive due process—the Court is operating against a historical background of state autonomy. Consider two cases that illustrate this point. In *Timbs v. Indiana*, the Court held that the Eighth Amendment's Excessive Fines Clause binds the states because it is "incorporated by the Due Process Clause of the Fourteenth Amendment."[185] For more than two hundred years before *Timbs*, the power to decide whether a particular fine was excessive was a power "reserved to the states" under the Tenth Amendment.[186] *Timbs* replaced that historical tradition of state autonomy with a new federal constitutional rule that required "compelled uniformity."[187] Similarly, in *Lawrence v. Texas*, the Court held, as a matter of substantive due process, that the Fourteenth Amendment protects the rights of adult gay men and women to engage in private, consensual sexual activity.[188] For more than two hundred years before *Lawrence*, each state government had the power to decide for itself whether to criminalize private, consensual homosexual activity. *Lawrence* replaced the historical tradition of state autonomy with a new federal constitutional rule that required compelled uniformity.

In short, both *Timbs* and *Lawrence* involved a transfer of decision-making authority from state governments to federal courts. More broadly, all 25 incorporation cases and all eight substantive due process cases listed in Table Two effectively granted decision-making authority to federal courts in areas that, under earlier "constitutional understandings,"[189] were reserved to the states under the Tenth Amendment. The Court acknowledged this point explicitly in *Dobbs v. Jackson Women's Health Org.*, when it decided to overrule *Roe v.*

185. Timbs v. Indiana, 139 S.Ct. 682, 686-87 (2019).

186. U.S. CONST., amend. X.

187. Malloy v. Hogan, 378 U.S. 1, 16 (1964) (Harlan, J., dissenting).

188. 539 U.S. 558 (2003).

189. Scholars use the term "constitutional understandings" to describe a set of shared assumptions about constitutional meaning that are not necessarily codified in the specific holding of any particular decision. *See generally* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007).

Wade.[190] In the vast majority of incorporation and substantive due process cases, though, the Court fails to acknowledge this point. Even so, a commitment to intellectual honesty requires scholarly commentators to call a spade a spade. Whenever the Court decides to jettison a historical tradition of state autonomy and replace it with a new constitutional rule that requires federal uniformity, it would be intellectually dishonest to pretend that the Court is not transferring decision-making authority from state governments to federal courts.

As discussed in Part Three, the transfer of decision-making authority necessarily implicates both dual sovereignty and legislative primacy.[191] Thus, in every case where the Court declares, for the first time, that a particular right is "fundamental," or that the right is "incorporated," the Court is making an implicit moral/policy judgment that judicial protection of the right by federal courts is so important that it justifies a departure from the twin principles of dual sovereignty and legislative primacy. Most scholars agree that the Court has the power to make these types of moral/policy judgments.[192] However, every such judgment requires a principled justification.

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190. *See Dobbs*, 142 S. Ct. at 2240 ("For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens.").

191. Most incorporation and substantive due process cases transfer decision-making authority from state legislatures to federal courts However, in incorporation cases that involve procedural rights, the Court is transferring decision-making authority from state courts to federal courts.

192. A strict originalist could make a compelling argument that the Constitution, as originally understood, does not grant the Supreme Court any power to engage in judicial lawmaking, and that therefore all acts of judicial lawmaking are illegitimate. Regardless, at this juncture in our constitutional history, judicial lawmaking by the Supreme Court has become deeply embedded in the fabric of constitutional law. It is now far too late to claim that all acts of judicial lawmaking are illegitimate. Even so, specific acts of judicial lawmaking by the Supreme Court require justification. Absent a principled justification, judicial lawmaking is nothing more than "the exercise of raw judicial power," *Dobbs*, 142 S. Ct. at 2241 (quoting *Roe*, 410 U.S. at 179 (White, J., dissenting)), which is universally understood to be illegitimate. Moreover, when the Court engages in judicial lawmaking under the Fourteenth Amendment Due Process Clause—thereby imposing new constitutional restrictions on the States in areas previously governed by state law—the Court is arguably violating the Tenth Amendment if it fails to articulate a principled justification for its decision.

In recent incorporation cases, such as *Timbs v. Indiana*[193] and *McDonald v. City of Chicago*,[194] the Court purports to find that principled justification in historical analysis. However, in both *Timbs* and *McDonald*—and in other cases relying on historical arguments—the historical analysis demonstrates, at best, that there is a deeply rooted tradition of legal protection for the right at issue *under state law*.[195] Neither *Timbs* nor *McDonald* cited a historical tradition in which the federal government protected the right at issue from state infringement; that tradition simply did not exist. Moreover, to reiterate, the crucial question in every case where the Court is asked to recognize a new right under the Due Process Clause—either by incorporation or by substantive due process—is whether to replace an established legal regime that relies on state law to protect the right at issue with a new regime that relies on federal constitutional law.

The Court has never explained why a tradition of robust protection for a right at the state level justifies a decision to transfer decision-making authority from state legislatures to federal courts. Indeed, by acknowledging explicitly that both incorporation and substantive due process cases involve a transfer of decision-making authority from state legislatures to federal courts, it is virtually self-evident that historical analysis cannot provide the necessary legitimating rationale. If the historical record demonstrates that there was a consistent, uniform tradition protecting the right at the state level, then a new, uniform federal constitutional rule serves no purpose, except to rob state governments of the legislative autonomy promised them under the Tenth Amendment. Conversely, if the historical record manifests a diversity of state laws on the subject, then that history—combined with our tradition of constitutional federalism—provides a powerful argument *against* replacing the historical tradition of state autonomy with a new constitutional rule mandating federal uniformity. Either way, history cannot provide a theoretically coherent rationale for judicial creation of a new federal constitutional rule in an area that—for 150 or 200 years—was governed exclusively, or

193. 139 S.Ct. 682 (2019) (incorporating the Eighth Amendment Excessive Fines Clause).

194. 561 U.S. 742 (2010) (incorporating the Second Amendment right to bear arms).

195. *See Timbs*, 139 S.Ct. at 687-90; *McDonald*, 561 U.S. at 767-78.

almost exclusively, by state law. The Court cannot solve this problem by replacing shoddy historical analysis with more intellectually sophisticated historical analysis. The justification for transferring decision-making authority from state legislatures to federal courts must ultimately rest on a normative judgment that federal judicial protection of the right at issue is so important that it warrants a departure from the twin principles of dual sovereignty and legislative primacy.

Thus, we are left with three options: (1) reject both incorporation and substantive due process doctrines in their entirety because there is no principled justification for either doctrine; (2) accept both doctrines solely on the basis of *stare decisis*, while acknowledging that the Court created both doctrines out of whole cloth, without ever articulating a coherent rationale; or (3) present a *post hoc* rationale that preserves most (but not all) of existing doctrine and that articulates a coherent, principled justification for the doctrine that is preserved. The first option is much too radical for my taste. The second is deeply unsatisfying. Hence, the remainder of this paper explores the third option.

B. A Defense of Natural Law

Consider this thought experiment. Assume that we conduct a survey of people from dozens of countries in different geographic regions, including people from different ethnic, religious, and cultural backgrounds. In the survey, we ask everyone a simple question: "Do you think that you have a moral right not to be tortured?" Presumably, almost one hundred percent of respondents would say "yes." That raises a question: Why do human beings agree that they have a right to be free from torture? One possible answer is that God, or some other divine being, has so decreed. From my perspective, though, one does not need to invoke a divine being to support the claim that all human beings have a moral right to be free from torture. We have a moral right to be free from torture because we all agree that we have a moral right to be free from torture. To quote Ludwig Wittgenstein, "This is agreement not in opinions, but rather in form of life."[196]

196. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 241, at 94 (G.E.M. Anscombe trans., 3d ed. 1958). Philosophers might find it odd to cite Wittgenstein in support of a theory of natural law. Many natural law theorists believe that natural law principles are rooted in objective moral truths.

The "form of life" that is common to all human beings is not merely biological. Our human form of life is also characterized by the fact that we live in societies where individual human beings are subject to government power. Virtually all human beings share common moral intuitions that certain exercises of government power are morally illegitimate, regardless of the rules codified in positive law. The shared moral intuition that we have a right to be free from torture and other forms of government abuse is codified in numerous international human rights instruments, including the Universal Declaration of Human Rights (UDHR),[197] the International Covenant on Civil and Political Rights (ICCPR),[198] the European Convention on Human Rights,[199] the American Convention on Human Rights,[200] and the Convention Against Torture.[201] Moreover, the ban on torture is codified in about 80 percent of all national constitutions.[202]

The central premise of international human rights law is that "all members of the human family" have "inherent dignity and . . . equal and inalienable rights."[203] Thomas Jefferson expressed a very similar idea in the Declaration of Independence, stating that it is "self-evident" that all "men" (that is, all human beings) "are endowed . . . with certain inalienable rights."[204] The Supreme Court has made clear that those inalienable rights merit heightened protection under the Due Process Clause. The traditional natural law test specifies that

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Wittgenstein rejected the notion of objective truth, but he defended the idea that truth is inter-subjective. Although natural law theory is incompatible with the idea that moral truths are purely subjective, natural law theory is entirely compatible with the idea that moral truths are inter-subjective: i.e., that they are rooted in agreement in "form of life."

197. UDHR, *supra* note 22.

198. ICCPR, *supra* note 25.

199. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

200. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

201. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

202. The 80 percent figure is derived from the Comparative Constitutions Project database. *See infra* note 222.

203. UDHR, *supra* note 22. It bears emphasis that this language is included in the very first paragraph of the Preamble.

204. DECLARATION OF INDEPENDENCE. *See* Tsesis, *supra* note 113, at 373 (noting that Jefferson "regarded the Declaration to be an official statement of the national government's obligation to secure the people's inalienable rights").

rights qualify as "inalienable" or "fundamental" if "neither liberty nor justice would exist if they were sacrificed,"[205] or if they implicate "immutable principles of justice which inhere in the very idea of free government."[206] In short, any government that violates those rights is, by definition, not a free government. Thus, the core natural law justification for both incorporation doctrine and substantive due process doctrine is clear: the imperative to preserve a system of free government is a sufficient rationale for courts to intervene to protect fundamental rights from infringement by state governments.

From the earliest days of constitutional history, U.S. courts have played an essential role in preventing governments from infringing fundamental rights. For example, writing for the Court in 1798, Justice Chase said: "I cannot subscribe to the omnipotence of a State Legislature . . . There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power."[207] Later, in the twentieth century, certain Supreme Court Justices began to express philosophical doubts about the validity of natural law reasoning.[208] Even so, if courts in the twenty-first century allow metaphysical doubts about natural law to prevent them from performing their historic mission to protect fundamental rights from government infringement, then they risk sacrificing both liberty and justice on the altar of philosophical skepticism.[209]

As discussed in Part Three, our constitutional commitments to dual sovereignty and legislative primacy require courts to exercise restraint when litigants invoke natural law principles to support arguments for invalidating state legislation. However, judicial restraint does not require abdication of the judicial duty to protect fundamental rights. Moreover, in practice, a natural law approach to the Due Process Clause is

205. Palko v. Connecticut, 302 U.S. 319, 326 (1937).

206. Twining v. New Jersey, 211 U.S. 78, 102 (1908).

207. Calder v. Bull, 3 U.S. (3 Dall.) 386, 387-88 (1798).

208. *See, e.g.*, Adamson v. California, 332 U.S. 46, 69-70 (1947) (Black, J., dissenting) (criticizing the majority for adhering to *Twining* "and the 'natural law' theory of the Constitution upon which it relies").

209. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 730 (2004) ("We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.").

more protective of state autonomy—and therefore more consistent with the principles of dual sovereignty and legislative primacy—than the historical test favored by the contemporary Supreme Court.[210] Indeed, Table One shows that, in every incorporation case where the Court applied a historical test, it brushed aside concerns about state autonomy and incorporated a new right into the Fourteenth Amendment.[211] In contrast, in incorporation cases decided before 1948 where the Court applied a natural law test, it was more likely to protect state autonomy by rejecting arguments for incorporation.[212] Moreover, as explained in Part Five, application of the specific natural law test presented in this article would effectively return power to the states in several areas where the Court has employed incorporation doctrine to transfer decision-making authority from state legislatures to federal courts.

One objection to a natural law approach (aside from metaphysical skepticism) is that it encourages judges to decide individual cases based on their own subjective moral and/or policy preferences, rather than applying the law in a neutral fashion. Part Five demonstrates that that objection is not well-founded. Philosophers often associate the term "natural law" with a methodology that derives rules from first principles that are ultimately rooted in divine revelation. In contrast, Part Five explains and defends an objective natural law test that relies on existing legal documents to determine whether a right qualifies as "fundamental," and therefore binds the states under the Due Process Clause. That test relies on a combination of international human rights law and comparative constitutional law to determine the scope and content of rights protected under the Due Process Clause. The same objective test is applicable to both incorporation cases and SDP cases, although application of the test in SDP cases is more indeterminate than its application in incorporation cases.

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210. *See* David L. Sloss, *Incorporation, Federalism, and International Human Rights*, in HUMAN RIGHTS AND LEGAL JUDGMENTS: THE AMERICAN STORY (Austin Sarat, ed. 2017).

211. *See* Table One. Table One excludes the Court's three most recent incorporation decisions: *McDonald, Timbs*, and *Ramos*. In those cases, also, the Court used a historical test to brush aside concerns about state autonomy and incorporate a new right into the Fourteenth Amendment.

212. *See* Table One.

V. APPLYING THE NATURAL LAW (HUMAN RIGHTS) TEST

Part Five introduces a specific natural law test that is designed to determine which rights qualify as "fundamental" for the purpose of both incorporation and SDP doctrines. The test relies on both international human rights law and comparative constitutional law to determine which rights are fundamental. The proposed test allows courts to apply objective criteria—rather than individual, subjective preferences—to determine which rights merit heightened protection under the Due Process Clause. I do not claim that those criteria are "neutral." No scheme for distinguishing between fundamental rights (which merit heightened protection) and non-fundamental rights (which do not) is "neutral." However, the proposed test is "objective" in the sense that people with different normative preferences applying the test should reach very similar conclusions about which rights qualify as fundamental under the test. For the reasons explained below, the test yields more consistent, predictable results when applied to incorporation cases than it does when applied to SDP cases.[213]

Part Five is divided into four sections. The first section explains and defends the proposed test. The next section applies that test to incorporation doctrine; it shows that 19 of the 25 rights that the Supreme Court has incorporated qualify as fundamental rights under the human rights test. The right to bear arms is not one of those. The third section applies the human rights test to a set of seven distinct rights that are currently protected under SDP doctrine. The final section applies the human rights test to abortion. For reasons explained below, when applied to a woman's right to terminate her pregnancy, the human rights test does not yield a clear, definitive result.

A. The Proposed Human Rights Test

The Universal Declaration of Human Rights, which is the foundational document of modern international human rights law, begins with the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family."[214] The United Nations adopted the UDHR "as a common standard of achievement for all peoples and all nations . . .

213. *See infra* sections IV.B and IV.C.
214. UDHR, *supra* note 22, Preamble.

to secure [the] universal and effective recognition and observance" of those inalienable rights.[215]

The proposed test is fairly simple. A particular right qualifies as "fundamental" under the Due Process Clause if: (a) it is included in the UDHR, or (b) it is included in the ICCPR,[216] or (c) it is included in the national constitutions of more than 60 percent of the world's nations. Whether a particular right is "included" necessarily involves some judgment calls about the level of specificity required. I discuss the hard judgment calls explicitly in the ensuing sections that analyze application of the test to both incorporation and SDP doctrines. The Appendix presents a side-by-side comparison of specific text from the Bill of Rights, the UDHR, and the ICCPR so that readers can judge for themselves whether a particular right in the Bill of Rights is also included in the UDHR and/or the ICCPR.

An objective test for determining which rights qualify as "fundamental" must begin with some document as a baseline. The Bill of Rights is not an appropriate baseline because there are certain rights in the Bill of Rights that almost everyone agrees do not qualify as fundamental rights.[217] The test, to be useful and valid, must distinguish between those rights in the Bill of Rights that are fundamental and those that are not fundamental. We need a document other than the Bill of Rights to provide the necessary baseline.

There are several reasons why the UDHR is the best available document for this purpose. First, the UDHR codifies shared moral intuitions about the scope and content of natural rights that transcend geographical, cultural, and religious divides.[218] In Michael Perry's apt phrase, the UDHR laid the foundation for the development of a "global political

215. *Id.*

216. ICCPR, *supra* note 25.

217. Incorporation of the Fifth Amendment Grand Jury Clause would radically alter criminal procedure in about half the states. Incorporation of the Seventh Amendment right to a jury trial in civil cases would wreak havoc on state courts. The Supreme Court, wisely, has resisted calls to incorporate those two provisions. *See* Hurtado v. California, 110 U.S. 516, 536-37 (1884) (rejecting application of the Fifth Amendment Grand Jury Clause to the states); Walker v. Sauvinet, 92 U.S. 90, 93 (1875) (rejecting application of the Seventh Amendment to the states).

218. When the United Nations created a committee to draft the UDHR, it purposely selected committee members from all geographic regions to represent different cultural, religious, and non-religious perspectives. *See* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 21-51 (2001).

morality."[219] The UDHR is widely accepted as an authoritative expression of fundamental rights in most countries, as evidenced by the fact that 173 states have ratified the ICCPR and 171 states have ratified the ICESCR.[220] Those two treaties effectively codify the rights listed in the UDHR in the form of binding treaties. Moreover, most states that have either amended their Constitutions or adopted new Constitutions in the past 50 years have used the UDHR as a template for determining which rights to codify in their national Constitutions.[221]

Table Three provides additional data to support the claim that states have relied on the UDHR as a template for drafting national constitutions. Table Three lists 25 rights that the Supreme Court has incorporated into the Due Process Clause. The Comparative Constitutions Project (CCP) database has information about the inclusion of twenty (20) of those rights in national constitutions.[222] (The other five rights are shown as "n.a." in the "CCP All" column in Table Three because the CCP database does not track those rights.) Using data from the CCP database, Table Three presents information about the percentage of countries in the world that include particular rights in their national constitutions. The twenty rights listed in Table Three for which data is available in the CCP database can be divided into two groups: five rights that do not appear in the UDHR[223] (shown as "No" in the UDHR column in table Three) and fifteen rights that do appear in the UDHR. Aggregation of the percentages in the "CCP All" column in Table Three yields the following results. If a right does appear in the UDHR, then, on average, that right is included in 65 percent of national

219. MICHAEL J. PERRY, A GLOBAL POLITICAL MORALITY: HUMAN RIGHTS, DEMOCRACY, AND CONSTITUTIONALISM (2017).

220. *See* Office of the High Commissioner for Human Rights, *Status of Ratification Interactive Dashboard*, (last visited May 6, 2023).

221. *See, e.g.*, Zachary Elkins et al., *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L.J. 61 (2013); Colin J. Beck et al., *Constitutions in World Society: A New Measure of Human Rights*, in CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER (Tom Ginsburg, Terence C. Halliday & Gregory Shaffer eds., 2019).

222. The Comparative Constitutions Project has compiled a detailed database of national constitutions that is available for download at https://comparativeconstitutionsproject.org/download-data/. As explained in more detail below, *see infra* notes 231-235 and accompanying text, the comparative constitutional analysis in this paper relies on CCP data.

223. These are the Establishment Clause, the right to petition the government, the right to a jury trial, the prohibition on excessive bail, and the right to bear arms.

constitutions.[224] If a right does not appear in the UDHR, then, on average, that right is included in only 29 percent of national constitutions.[225] These figures reinforce the claim that states have relied on the UDHR as a template for drafting national constitutions.

In sum, both treaty ratification data and data from the CCP database demonstrate that the UDHR has gained widespread, global acceptance as an authoritative statement about which rights qualify as "inalienable rights of all members of the human family."[226] As Wittgenstein says: "This is agreement not in opinions, but rather in form of life."[227] Even so, my proposed test does not rely exclusively on the UDHR to determine which rights qualify as fundamental. Many of the Supreme Court's incorporation decisions involve the Sixth Amendment rights of criminal defendants.[228] The UDHR provides generally that a criminal defendant is entitled to "all the guarantees necessary for his defence,"[229] but does not specify those rights in detail. In contrast, Article 14 of the ICCPR provides a more detailed enumeration of the procedural rights accorded to criminal defendants.[230] Therefore, the proposed test specifies that a right qualifies as "fundamental" under the Due Process Clause if it is listed explicitly in either the UDHR or the ICCPR.

Skeptics may argue that the texts of the UDHR and the ICCPR provide very little useful information because the UDHR is not legally binding and ratification of the ICCPR is mostly an empty gesture.[231] To address the skeptics (and to satisfy my own intellectual curiosity), the test includes a third element: whether a right is included in the national constitutions of more than 60 percent of the world's nations. The comparative constitutional analysis relies on the Comparative Constitutions Project (CCP) database for information about

224. The figures range from a low of 26 percent for the right to confront witnesses, to a high of 94 percent for the right of free speech. *See* Table Three.

225. The figures range from a low of 2 percent for the right to bear arms to a high of 62 percent for the right to petition the government. *See* Table Three.

226. UDHR, *supra* note 22, Preamble.

227. Wittgenstein, *supra* note 196, at 94.

228. *See supra* notes 69-76 and accompanying text.

229. UDHR, *supra* note 22, art. 11(1).

230. ICCPR, *supra* note 25, art. 14.

231. *See, e.g.*, SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).

the codification of rights in national constitutions.[232] In analyzing data about national constitutions, I considered two different variants of the test—one that considers the constitutions of all nations included in the CCP database, and one that focuses exclusively on liberal democracies.[233] The argument for focusing exclusively on liberal democracies is that the "immutable principles of justice" standard, as formulated by the Supreme Court, refers explicitly to "free government."[234] Many governments in the world do not qualify as "free governments." The "CCP Lib Dem" column in Tables Three and Four presents the data for liberal democracies. Tables Three and Four show that the comparative constitutional test yields very similar results (with a 60 percent threshold), regardless of whether one analyzes all governments, or just liberal democracies.[235]

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232. *See* CCP database, *supra* note 222. The database includes data for 197 "states." Four of those states are not actually U.N. member states: Abkhazia, Kosovo, South Ossetia, and Taiwan. For this project, I used the 2021 data. The database has blank entries for 2021 for all the individual rights provisions for 14 of the 197 states (including Abkhazia and South Ossetia). I excluded those 14 states from the denominator used to calculate the percentages in the "CCP All" column in Tables Three and Four. That left a denominator of 183 for "CCP All," which includes Kosovo and Taiwan.

233. I consulted two different sources to develop a list of countries that qualify as "liberal democracies." The Economist Intelligence Unit (EIU) publishes an annual "Democracy Index" that divides countries into four groups: "full democracy," "flawed democracy," "hybrid regime" and "authoritarian regime." *See Economist Intelligence Unit, Democracy Index 2021: The China Challenge*, https://www.eiu.com/n/campaigns/democracy-index-2021/. The V-Dem Institute publishes an annual democracy report that presents a different fourfold classification of regime types as "liberal democracies," "electoral democracies," "electoral autocracies," and "closed autocracies." *See V-Dem Institute, Democracy Report 2022: Autocratization Changing Nature?*, https://v-dem.net/media/publications/dr_2022.pdf. The underlying data for the V-Dem report is available for download at https://www.v-dem.net/data/the-v-dem-dataset/. The "Regimes of the World" (ROW) variable in the V-Dem database classifies all countries in the database into those four categories. I classify a country as a "liberal democracy" if the Economist labels it a "full democracy" (21 countries) or V-Dem labels it a "liberal democracy" (34 countries). Under that test, 36 countries in the world qualify as liberal democracies.
Israel is one of those 36 countries, but Israel is also one of the 14 states for which the CCP database has blank entries for 2021. Therefore, I excluded Israel from the "CCP Lib Dem" calculation in Tables Three and Four, leaving a denominator of 35 for the "CCP Lib Dem" columns.

234. Twining v. New Jersey, 211 U.S. 78, 102 (1908) (referring to "immutable principles of justice which inhere in the very idea of free government").

235. The data presented in Tables Three and Four also shows readers how conclusions would change if one raised or lowered the 60 percent threshold. Obviously, 60 percent is a somewhat arbitrary figure, but one must draw a line somewhere to apply the test. The 60 percent figure provides a fairly good indicator

I considered framing the test in conjunctive terms, rather than disjunctive terms. (To qualify under that approach, a right would have to be included in either the UDHR or the ICCPR, and it would have to satisfy the 60 percent threshold for comparative constitutional analysis.) A conjunctive test would yield a much shorter list of fundamental rights because many rights that are explicitly enumerated in the UDHR and/or the ICCPR do not satisfy the 60 percent threshold for comparative analysis. (See Tables Three and Four.) However, I decided to use a disjunctive test for two reasons. First, many states provide statutory protections for certain rights without listing those rights explicitly in their national constitutions. Hence, the comparative constitutional test understates the degree to which rights are actually accorded legal protection within national legal systems. Second, as discussed in the following sections, the disjunctive test is broadly consistent with Supreme Court precedent. In contrast, application of the conjunctive test would require overruling a large body of Supreme Court precedent in both incorporation and SDP cases.

Sovereigntists may object that my proposed test effectively "offshores" constitutional interpretation to actors outside the U.S. political system. In Justice Scalia's words: "We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened . . . cannot be imposed upon Americans through the Constitution."[236] Justice Scalia's objection is based on a false premise, which Professors Shaffer, Ginsburg, and Halliday call the "nationalist myth" of constitution-making.[237] The nationalist myth envisions "constitution-making as the work of a small group of national authors debating first principles."[238] Shaffer, Ginsburg, and Halliday demonstrate that "this common way of conceiving of constitution-making . . . is simply wrong. . . . When one examines the actual processes by which constitutional documents are made, one

as to whether people from different countries agree that a particular right is inalienable.

236. Atkins v. Virginia, 536 U.S. 304, 348 (2002) (Scalia, J., dissenting).

237. Tom Ginsburg, Terence C. Halliday & Gregory Shaffer, *Introduction* to CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER 1, 3-6 (Ginsburg, Halliday & Shaffer eds., 2019).

238. *Id*. at 4.

sees an array of transnational influences, actors, and ideas that provide the very grammar for the project."[239]

The United States Constitution is no exception. Professors Golove and Hulsebosch argue persuasively that "a core purpose of American constitution-making was to facilitate the admission of the United States into the European-based system of sovereign states governed by the law of nations."[240] On their account: "Foreign affairs did not merely contribute to American constitution-making; they were the main event. The fundamental purpose of the Federal Constitution was to create a nation-state that the European powers would recognize, in the practical and legal sense, as a "civilized state" worthy of equal respect in the international community."[241]

Not only do transnational forces influence constitution-making; they play an equally important role in the process of constitutional construction. As I have argued elsewhere, "judges in supreme courts and constitutional courts throughout the world routinely engage in the practice of judicial borrowing when they construe their national constitutions."[242] Again, the United States is no exception.

Consider the Supreme Court's landmark decisions in *Brown v. Board of Education* [243] and *Bolling v. Sharpe*[244] as an example. Counsel for the petitioners in *Bolling* devoted a substantial portion of their brief to supporting the claim that "respondents' refusal to admit minor petitioners to Sousa Junior High School solely because of race deprives them of fundamental freedoms in violation of . . . the Charter of the United Nations."[245] Other briefs emphasized the argument that the United States must eliminate racial segregation in public schools to advance its foreign policy goals. For example, an amicus brief filed by the Truman Administration said:

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239. *Id*. at 1.

240. David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, The Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 935 (2010).

241. *Id*.

242. David L. Sloss, *Sovereignty and National Constitutions*, 17 UNIV. OF ST. THOMAS L. J. 625, 631 (2021).

243. 347 U.S. 483 (1954).

244. 347 U.S. 497 (1954).

245. Brief for Petitioners, Bolling v. Sharpe, at 54, 347 U.S. 497 (1954) (No. 8), *available at* 1952 WL 47257.

> It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed. The United States is trying to prove to the people of the world . . . that a free democracy is the most civilized and most secure form of government yet devised by man. We must set an example for others by showing firm determination to remove existing flaws in our democracy. . . . The continuance of racial discrimination in the United States remains a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations; and it jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world.[246]

Although the Supreme Court did not explicitly rely on international law or foreign policy in its published decisions in *Brown* and *Bolling*, there is no question that the Cold War foreign policy context influenced the Court's decisions.[247] Scholars have shown that "the Cold War imperative for racial change"[248] likely persuaded Justices Burton and Minton to vote to end racial segregation. Additionally, Justice Reed, who was likely the last justice to agree to support Chief Justice Warren's opinion in *Brown*, was probably also swayed by foreign policy considerations.[249]

In sum, the sovereigntist objection to reliance on international law and comparative constitutional law as an aid to constitutional construction is founded on a mistaken assumption that the U.S. Constitution exists in an isolation chamber, shielded from transnational influences. That was not true at the Founding and it is not true today. Sovereigntists "cannot block the dissemination of ideas across national borders any more than they can block the transmission of a virus across national borders. Any attempt to do so is doomed to fail."[250]

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246. Brief for the United States as Amicus Curiae, Brown v. Bd. of Education, at 6-8, 347 U.S. 483 (1954) (Nos. 1, 2, 3, 4, 5), *available at* 1952 WL 82045.

247. *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY, 104-12 (2000).

248. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 299 (2004).

249. *See* John Q. Barrett, *Supreme Court Law Clerks' Recollections of* Brown v. Board of Education, 78 ST. JOHN'S L. REV. 515, 547 (2004).

250. Sloss, *supra* note 242, at 626.

B. Applying the Test to Incorporation Cases

This section examines the application of the natural law (human rights) test to incorporation cases. Table Three presents the results of that analysis. The left-hand column lists the twenty-five rights that the Supreme Court incorporated between 1897 and 2020. Table Three lists those rights chronologically by the date of incorporation, from top to bottom. The table includes two rows of "Xs" to show historical breaks separating three periods: 1897 to 1940, 1947 to 1971, and 2010 to 2020. Column 2 identifies the textual source of the right at issue in the Bill of Rights. Columns 3 and 4, respectively, identify the textual source of the right at issue in the UDHR and ICCPR.[251] Column 5 indicates the percentage of states in the world that include the right at issue in their national constitutions. Column 6 indicates the percentage of the world's liberal democracies that include the right at issue in their national constitutions.[252] The right-hand column indicates whether the right at issue qualifies as a fundamental right under the proposed test.

Table Three shows that 19 of the 25 rights that the Supreme Court has incorporated into the Due Process Clause qualify as fundamental rights under the natural law (human rights) test. It is instructive to divide those 25 rights into three time periods, based on the date when the right was originally incorporated. First, all six rights that the Court incorporated before 1945 qualify as fundamental rights.[253] This conclusion is not surprising, because the Court frequently applied a natural law test in incorporation cases before 1945. Second, thirteen of the sixteen rights that the Court incorporated between 1947 and 1971 qualify as fundamental rights.[254] As explained below,[255] this result is attributable to the fact that, during this period, the Court was applying a human rights test implicitly, but not explicitly, to decide which rights should be incorporated. Third, none of the three rights that the Court incorporated after 2000 qualify as fundamental rights. Again, this

251. The Appendix provides the actual text of the relevant provisions from the Bill of Rights, the UDHR, and the ICCPR so that readers can compare the texts for themselves.

252. *See supra* note 233 (on liberal democracies).

253. *See* Table Three.

254. *See* Table Three.

255. *See infra* notes 265-268 and accompanying text.

conclusion is not surprising because the Court's jurisprudence deviated sharply from a natural law, human rights perspective after about 1980.

Table Three: Rights that Have Been Incorporated

Right (Year Incorporated)	**U.S. Const. (2)**	**UDHR (3)**	**ICCPR (4)**	**CCP All (5)**	**CCP Lib Dem (6)**	**Fundamental Right? (7)**
Takings Clause (1897)	Fifth Am	17	No	66%	57%	Yes
Free Speech (1925)	First Am	19	19	94%	83%	Yes
Free Press (1931)	First Am	19	19	64%	49%	Yes
Right to Counsel (1932)	Sixth Am	11[A]	14(3)(d)	74%	51%	Yes
Assembly (1937)	First Am	20	21	93%	86%	Yes
Free Exercise (1940)	First Am	18	18	92%	89%	Yes
x x x x x x x x	x x x x x	x x x x	x x x x	x x x x	x x x x	x x x x x x x x
Establishment (1947)	First Am	No	No	27%	26%	**NO**
Public Trial (1948)	Sixth Am	10	14(1)	68%	60%	Yes
Search/Seizure (1949)	Fourth Am	12	17	62%	51%	Yes
Impartial Tribunal (1961)	Sixth Am	10	14(1)	55%	34%	Yes
Exclusionary Rule (1961)	Fourth Am	No	No	n.a.	n.a.[C]	**NO**
Cruel, Unusual (1962)	Eighth Am	5	7	83%	60%	Yes
Petition (1963)	First Am	No	No	62%	60%	Yes
Appointed Counsel (1963)	Sixth Am	11[A]	14(3)(d)	33%	23%	Yes
Warrant (1964)	Fourth Am	9	9(1)	n.a.	n.a.[C]	Yes

Self-Incrimination (1964)	Fifth Am	11[A]	14(3)(g)	55%	37%	Yes
Confront Witness (1965)	Sixth Am	11[A]	14(3)(e)	26%	23%	Yes
Speedy Trial (1967)	Sixth Am	11[A]	14(3)(c)	54%	57%	Yes
Compulsory Process (1967)	Sixth Am	11[A]	14(3)(e)	n.a.	n.a.[C]	Yes
Jury Trial (1968)	Sixth Am	No	No	18%	29%	**NO**
Double Jeopardy (1969)	Fifth Am	11[A]	14(7)	53%	34%	Yes
Excessive Bail (1971)	Eighth Am	No	9(3)[B]	34%	43%	Yes
x x x x x x x x	x x x x x	x x x x	x x x x	x x x x	x x x x	x x x x x x x
Bear Arms (2010)	Second Am	No	No	2%	3%	**NO**
Excessive Fines (2019)	Eighth Am	No	No	n.a.	n.a.[C]	**NO**
Unanimous Jury (2020)	Sixth Am	No	No	n.a.	n.a.[C]	**NO**

Notes to Table Three

A – Article 11 of the UDHR provides that criminal defendants are entitled to "all the guarantees necessary for" their defense. I construe this language to include all the specific rights identified in articles 14(3) and 14(7) of the ICCPR.

B – Article 9(3) of the ICCPR states: "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial." This language is not an exact match for the Eighth Amendment, which prohibits "excessive bail." Even so, I construe Article 9(3) to prohibit excessive bail.

C – "n.a." means that the Comparative Constitutions Project Database does not contain information about the inclusion of the particular right at issue in national constitutions.

Several points in Table Three merit additional comment. First, of all the rights listed in Table Three that are coded in the CCP database, gun rights enjoy the least support from comparative constitutional law. Only two percent of states, and three percent of liberal democracies, provide constitutional protection for the right to bear arms.[256] That fact, combined with the fact that the right to bear arms is not protected under either the UDHR or the ICCPR, demonstrates persuasively that gun rights do not satisfy the *Palko* standard: "neither liberty nor justice would exist if they were sacrificed."[257] The Court's holding in *McDonald* that the right to bear arms is a "fundamental right" is indefensible on the basis of any plausible natural law rationale.

Second, the First Amendment right to petition the government is the only right that qualifies as "fundamental" based on comparative constitutional analysis that does not also qualify based on the text of the UDHR and/or ICCPR.[258] One could make a plausible argument that the right to petition the government is implicit in several other provisions of the UDHR and ICCPR,[259] but neither document refers explicitly to a right "to petition the government for a redress of grievances."[260] Even so, I conclude that the right of petition qualifies as a fundamental right because it is included in 62 percent of national constitutions, and 60 percent of the constitutions of liberal democracies.[261]

Third, the Takings Clause is the only incorporated right that is included in the UDHR, but not in the ICCPR. This fact can be explained by reference to the history of international human rights law. After the UN adopted the UDHR, the UN Commission on Human Rights began drafting a Covenant on Human Rights, which was originally intended to codify all the

256. *See* Table Three.

257. Palko v. Connecticut, 302 U.S. 319, 326 (1937).

258. *See* Table Three.

259. Article 20 of the UDHR states: "Everyone has the right to freedom of peaceful assembly and association." Article 21 states: "Everyone has the right to take part in the government of his country." The ICCPR includes similar provisions. *See* ICCPR, *supra* note 25, arts. 21, 25. Viewed together, these two articles arguably express an implied right to petition the government for redress of grievances.

260. U.S. Const. amend. I.

261. *See* Table Three.

UDHR rights in a single, legally binding treaty.[262] However, thanks largely to Cold War divisions between the Soviet Union and the West, the UN Commission decided to divide the draft treaty into two separate treaties: the ICCPR, and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[263] Economic rights were included in the ICESCR, not the ICCPR.[264]

Fourth, Table Three shows that the Court issued the majority of its incorporation decisions between 1947 and 1971. Not coincidentally, this was the crucial period when both international and domestic actors carried out a human rights revolution. On the international plane, the UN adopted the UDHR in 1948. The Commission on Human Rights finished drafting the ICCPR and ICESCR in 1966. Both treaties entered into force in 1976. During the same period, as Professor Sandholtz and I have demonstrated, the federal government was carrying out a "federalization of human rights" in the United States: i.e., a transfer of decision-making authority over human rights from the states to the federal government.[265] In our co-authored article, we identify 68 discrete rights that are included in both the UDHR and the CCP database.

> As of 1948, state governments exercised primary or exclusive regulatory authority for 71% of those rights (48 of 68), whereas the federal government exercised primary or exclusive regulatory authority for only 29% (20 of 68). By 1976, the allocation of authority between state and federal governments had flipped. As of 1976, the federal government exercised primary or exclusive regulatory authority for 74% of those rights (50 of 68), and state governments

262. *See* Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights, in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS (Louis Henkin ed. 1981).

263. International Covenant on Economic, Social, and Cultural Rights, adopted Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

264. The ICESCR does not state explicitly that one has a right to receive just compensation when the government takes private property. That right is recognized as a matter of customary international law whenever a government takes the property of a foreign investor. It is debatable whether customary international law requires just compensation when a government takes the property of its own citizens, but most national constitutions include that right. *See* Table Three.

265. *See* David Sloss and Wayne Sandholtz, *Universal Human Rights and Constitutional Change*, 27 WM. & MARY BILL OF RIGHTS J. 1183, 1184 (2019).

> exercised primary or exclusive regulatory authority for only 26% (18 of 68).[266]

Incorporation doctrine, as it developed between 1948 and 1971, was one element of the broader process of the federalization of human rights. During this period, Congress, the President, and the Supreme Court acted cooperatively to transfer decision-making authority over internationally recognized human rights from the states to the federal government.[267] They did so for two reasons. First, they generally shared a normative commitment to ensure robust protection in the United States for fundamental human rights. Second, in the context of Cold War politics, the United States had a geopolitical imperative to show the world that it was a champion of human rights, and it was impossible to fulfill that foreign policy mission as long as states retained primary regulatory authority over internationally recognized human rights.[268] Thus, both moral and practical justifications supported the federalization of human rights, including the incorporation of the Bill of Rights.

Referring back to Table Three, the moral and practical reasons for the federalization of human rights provide a compelling justification for 13 of the Court's 16 incorporation decisions between 1947 and 1971. The three exceptions are *Duncan v. Louisiana* (1968, the right to a jury trial),[269] *Mapp v. Ohio* (1961, the Fourth Amendment exclusionary rule),[270] and

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266. *Id.* at 1185-86.

267. *See id*. at 1216-32.

268. *See generally* DUDZIAK, *supra* note 247.

269. 391 U.S. 145 (1968). In *Duncan*, the Court relied primarily on a historical rationale to support its conclusion that the right to a jury trial "in criminal cases is fundamental to the American scheme of justice." *Id*. at 149. However, for the reasons explained previously (*see* section III.A), the Court's historical justification for incorporation of the Sixth Amendment right to a jury trial is theoretically incoherent and fundamentally at odds with principles of constitutional federalism.

270. 367 U.S. 643 (1961). In *Mapp*, the Court issued a deeply fractured opinion in which only three other Justices joined Justice Clark's plurality opinion. Justices Frankfurter and Whittaker joined a vigorous dissent, written by Justice Harlan. Justice Stewart concurred in the result, but he would have based the decision on the First Amendment, not the Fourth. Justice Black also agreed with the result, but he would have grounded the exclusionary rule in a combination of the Fourth and Fifth Amendments. Also, Justice Black supported incorporation because he favored total incorporation. The plurality opinion rested largely on practical considerations. Justice Clark reasoned that the right to be free from unreasonable searches and seizures is "implicit in the concept of ordered liberty," *id*. at 655, as the Court had previously held in *Wolf v. Colorado*, 338 U.S. 25 (1949). Contrary to *Wolf*, though, Justice Clark reasoned that the exclusionary

Everson v. Board of Ed. (1947, the Establishment Clause).[271] The Court should overrule all three decisions. All three constitute arbitrary exercises of judicial power. None of the three can be justified by a natural law, human rights rationale.[272] None of the three presents a principled justification for the Court to seize control of an area of law that had previously been reserved to the states under the Tenth Amendment for more than 150 years.[273]

Similarly, the Court's three incorporation decisions between 2010 and 2020—*Ramos v. Louisiana*[274] (2020, unanimous jury verdicts), *Timbs v. Indiana*[275] (2019, excessive fines), and *McDonald v. City of Chicago*[276] (2010, right to bear arms)—also constitute arbitrary exercises of judicial power. None of the three can be justified by a human rights rationale,[277] or by any other principled rationale.[278] The Court should overrule all three decisions and return decision-making authority to the states, as required by the Tenth Amendment and our system of constitutional federalism.

If the Court does apply the proposed human rights test, and overrules the six decisions highlighted in the two preceding paragraphs, the results would be neither liberal nor conservative. Liberals would celebrate the decision to overrule *McDonald* and criticize the decision to overrule *Mapp*.

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rule was "an essential ingredient of the right newly recognized by the *Wolf* case." *Mapp*, 367 U.S. at 656.

271. 330 U.S. 1 (1947). In *Everson*, the Court attempted to justify incorporation of the Establishment Clause as follows: "The First Amendment, as made applicable to the states by the Fourteenth, commands that a state shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."; *Id.* at 8 (internal citations and quotations omitted). The Court cited *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1943), as authority. *Murdock* involved the Free Exercise Clause, not the Establishment Clause. Apart from the single sentence quoted above, the Court offered no justification whatsoever for its decision to use the Establishment Clause as a vehicle to impose newly minted federal constitutional restrictions on state laws implicating religion.

272. *See* Table Three (showing that neither international human rights law nor comparative constitutional law supports a conclusion that the rights at issue qualify as fundamental rights).

273. *See supra* notes 269-71.

274. 140 S. Ct. 1390 (2020).

275. 139 S. Ct. 682 (2019).

276. 561 U.S. 742 (2010).

277. *See* Table Three (showing the lack of support from either international human rights law or comparative constitutional law).

278. Insofar as all three cases purport to rely on historical justifications, that historical rationale is theoretically incoherent. *See supra* section III.A.

Conservatives would celebrate the decision to overrule *Mapp* and criticize the decision to overrule *McDonald*. Ideological support for *Everson*, *Duncan*, *Timbs*, and *Ramos* is neither liberal nor conservative. However, a Supreme Court decision to overrule all six cases would return power to the states in six discrete areas of law that were constitutionally reserved to the states under the Tenth Amendment for most of our constitutional history. Indeed, a decision to overrule all six cases would be a much more powerful mechanism to promote state autonomy than the sum total of all of the cases comprising the Rehnquist Court's so-called "federalism revolution."[279] Finally, such a decision would leave most of the Court's incorporation doctrine intact, but the surviving doctrine would rest on a much more secure theoretical foundation.

C. Applying the Test to SDP Cases

Application of the human rights test to incorporation cases yields fairly consistent, predictable results. In contrast, application to SDP cases is more debatable. For incorporation cases, judges can compare specific clauses in the Bill of Rights to specific articles in the UDHR and ICCPR.[280] For SDP cases, though, the Fourteenth Amendment Due Process Clause is the only relevant constitutional text. Moreover, if one examines the text of key Supreme Court decisions that initially recognized new rights under SDP doctrine, reasonable people may disagree about how broadly or narrowly to describe the right at issue. That decision—regarding the appropriate level of generality at which to describe a particular right—has an important influence on the conclusion as to whether a right qualifies as a fundamental right under the human rights test. Similarly, any judge deciding whether a particular right is fundamental must balance the importance of that right against the importance of state autonomy, because the conclusion that a right is fundamental necessarily limits state autonomy. The human rights test provides guidance for such balancing, but it does not yield mechanical answers.

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279. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); Alden v. Maine, 527 U.S. 706 (1999); Printz v. United States, 521 U.S. 898 (1997); City of Boerne v. Flores, 521 U.S. 507 (1997); Seminole Tribe v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992).

280. *See* cases cited in Table Four.

The columns in Table Four are similar to the columns in Table Three, except that there is no column for the Bill of Rights (because none of the specific rights at issue are included in the Bill of Rights). The first two rows in Table Four, respectively, address the rights to privacy and equality. Both privacy and equality qualify as fundamental rights because they are included in the UDHR and the ICCPR,[281] and they are included in the texts of most national constitutions.[282]

After the first two rows, the left-hand column includes a short description of particular rights that the Court has recognized under SDP doctrine, along with an abbreviated reference to the Supreme Court decision that first recognized the right.[283] All of the particularized rights identified in the left-hand column can reasonably be described as aspects of privacy, equality, or both, but the concepts of privacy and equality are too general to provide definitive answers to the more granular questions raised in the cases referenced in the left-hand column. Aside from the rights to privacy and equality, none of the other rights listed in Table Four meets the 60 percent threshold for the comparative component of the human rights test. However, many countries provide legislative or judicial protection for some or all of those rights, even if they are not codified explicitly in constitutional text.[284] The right-hand column in Table Four summarizes my conclusions about whether particular rights qualify as fundamental under the human rights test; reasonable people could disagree with those conclusions. The remainder of this section analyzes the seven rights listed in Table Four by comparing the key SDP decisions with the language in the UDHR and ICCPR.

281. Article 12 of the UDHR says: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence." Article 17(1) of the ICCPR is almost identical. Article 2 of the UDHR says: "Everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind such as race, colour, sex . . . or other status." Article 2(1) of the ICCPR is substantially equivalent.

282. *See* Table Four.

283. As noted above, reasonable people could disagree about how to characterize the right at issue in particular cases. My shorthand description is not the only possible way to describe the rights at issue.

284. *See infra* note 295 (on same-sex marriage).

Table Four

	UDHR	**ICCPR**	**CCP All**	**CCP Lib. Dem.**	**Fundamental Right?**
Privacy	12	17	86%	71%	Yes
Equality	2	2(1), 26	98%	94%	Yes
Parents' Right to Direct Child's Education *Meyer* (1923)	No	18(4)	n.a.	n.a.	Yes
Right to Procreate *Skinner* (1948)	16(1)	23(2)	30%	20%	Yes
Right to use Contraception *Griswold* (1965)	16(1)	23(2)	30%	20%	Maybe
Inter-racial Marriage *Loving* (1967)	16(1)	2(1), 23(2)	20%	11%	Yes
Right to live together with non-nuclear family *Moore* (1977)	16(3)	23(1)	28%	20%	Probably
Right to Engage in Private Sexual Activity *Lawrence* (2003)	2, 12	17, 26	4%	0%	Yes
Same-Sex Marriage *Obergefell* (2015)	2, 16(1)	2(1), 23(2)	.5%	3%	Yes

Both *Meyer v. Nebraska*[285] and *Pierce v. Society of Sisters*[286] recognized the "liberty of parents and guardians to direct the upbringing and education of [their] children."[287] Article 18(4) of the ICCPR recognizes "the liberty of parents . . . [and guardians] to ensure the religious and moral education of their children in conformity with their own convictions."[288] The CCP database does not contain a variable for this right. Regardless, I conclude that the right qualifies as a fundamental right because the language of the ICCPR is almost identical to the central holding of *Meyer* and *Pierce*.

Articles 16(1) of the UDHR and 23(2) of the ICCPR recognize the right "to found a family." Variable 596 in the CCP database asks: "Does the Constitution provide the right to found a family?" In *Skinner v. Oklahoma*, the Court invalidated an Oklahoma law that mandated compulsory sterilization of certain criminals.[289] *Skinner* is widely understood to stand for the proposition that the right to procreate is a fundamental right. Since the right to procreate is an essential feature of the right "to found a family," I conclude that the right to procreate qualifies as a fundamental right under the human rights test. In *Griswold v. Connecticut*, the Court invalidated a state law that criminalized the use of contraceptives by married couples.[290] *Griswold* is widely understood to stand for the proposition that the right to use contraceptives to avoid procreation is a fundamental right. It is debatable whether the right to use contraceptives is an essential element of the right "to found a family." Therefore, I conclude that the right to use contraceptives may or may not qualify as a fundamental right under the human rights test.[291]

In *Loving v. Virginia*, the Court invoked both the Equal Protection and Due Process Clauses to invalidate a state law

285. 262 U.S. 390 (1923).
286. 268 U.S. 510 (1925).
287. *Id.* at 534-35.
288. ICCPR, *supra* note 25, art. 18(4).
289. 316 U.S. 535 (1942).
290. 381 U.S. 479 (1965).
291. Those who favor strong constitutional protection for state autonomy could reasonably argue that the text of the UDHR and ICCPR is not sufficiently specific to support a conclusion that the right to use contraceptives is a fundamental right. On the other hand, the right to found a family necessarily involves a right to procreate, and one could argue that the right to procreate logically includes a right to avoid procreation.

prohibiting interracial marriage.[292] Articles 16(1) of the UDHR and 23(2) of the ICCPR recognize "the right to marry." Article 16(1) of the UDHR specifically recognizes the right to marry "without any limitation due to race." Article 2(1) of the ICCPR guarantees all "the rights recognized in the present Covenant [including the right to marry] without distinction of any kind, such as race." Since both the UDHR and the ICCPR explicitly recognize the right to marry, and both instruments bar racial discrimination regarding marriage rights, I conclude that the right of inter-racial marriage qualifies as a fundamental right.[293]

In *Obergefell v. Hodges*, the Court invoked both the Equal Protection and Due Process Clauses to invalidate a state law prohibiting same-sex marriage.[294] Variable 595 in the CCP database asks: "Does the constitution provide the right for same sex marriages?" Table Four shows that very few states provide explicit constitutional protection for same sex marriage. However, the vast majority of states provide explicit constitutional protection for equality.[295] Moreover, most liberal democracies recognize the right of same-sex marriage through statutes and/or judicial rulings.[296] Articles 16(1) of the UDHR and 23(2) of the ICCPR recognize "the right to marry." Article 2 of the UDHR provides: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . other status." Article 2(1) of the ICCPR is almost identical. Therefore, I conclude—based on the combination of the "right to marry" and the non-discrimination provisions in the UDHR and ICCPR—that the right of same-sex marriage is a fundamental right.

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292. 388 U.S. 1 (1967).

293. Variable 594 in the CCP database asks: "Does the Constitution provide for the right to marry?" The CCP database does not specifically track constitutional provisions on inter-racial marriage. The figures in Table Four show the percentage of states that provide constitutional protection for the right to marry.

294. 576 U.S. 644 (2015).

295. *See* Table Four.

296. There are thirty-four countries in the world that recognize same-sex marriage. *See* The HRC Foundation, Marriage Equality Around the World, WWW.HRC.ORG, https://www.hrc.org/resources/marriage-equality-around-the-world. Twenty-three of those countries qualify as "liberal democracies" under the criteria specified in note 233. As indicated in note 233, thirty-six countries in the world qualify as liberal democracies. Therefore, when one accounts for statutory provisions and judicial rulings, about sixty-four percent of the world's liberal democracies (23/36) recognize the right of same-sex marriage.

In *Moore v. East Cleveland*, the Court invalidated a local zoning ordinance that effectively barred a grandmother from living with her two grandsons because they were cousins, not brothers.[297] Thus, *Moore* affirms that the Due Process Clause provides constitutional protection for family relationships, including the right of grandchildren to live with their grandparents. Article 16(3) of the UDHR states: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state." Article 23(1) of the ICCPR repeats that language verbatim.[298] Article 12 of the UDHR states: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence." Article 17 of the ICCPR is almost identical. In my judgment, any law that prevents a grandmother from living in the same home as her grandchildren constitutes arbitrary interference with privacy, family, and home. On the other hand, cases of this type present difficult line-drawing problems. State and local governments need some leeway to regulate the number of unrelated (or distantly related) people who may live together in one home.[299] Thus, on balance, I conclude that the right at issue in *Moore* probably qualifies as a fundamental right, depending upon how broadly or narrowly one defines the right at issue.

In *Lawrence v. Texas*, the Court relied primarily on the Due Process Clause to invalidate a Texas law that regulated private, sexual activity between consenting adults.[300] Article 12 of the UDHR states: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence." Article 17 of the ICCPR is almost identical. In *Lawrence*, the State imposed criminal penalties on an adult male for engaging in consensual sexual activity with another adult male in the privacy of his own home.[301] Given the facts in *Lawrence*, it is difficult to imagine a more prototypical example of arbitrary interference with privacy in the home. Thus, if one describes the right at issue in *Lawrence* narrowly as a "right of adults to

297. 431 U.S. 494 (1977).

298. The CCP database uses comments to variable 596 to track similar constitutional provisions. The percentages in Table Four are drawn from those comments.

299. *See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding a local zoning ordinance that restricted the number of unrelated people who could live together in one home).

300. 539 U.S. 558 (2003).

301. *See Lawrence*, 539 U.S. at 562-63.

engage in private, consensual sexual activity with other adults in their own homes," the right at issue clearly qualifies as a fundamental right under the human rights test.

One could also describe *Lawrence* as a non-discrimination case, because the criminal defendants were gay men. Article 2 of the UDHR and article 26 of the ICCPR prohibit discrimination based on "other status." International human rights bodies have construed those provisions to prohibit discrimination based on sexual orientation.[302] Variable 553 in the CCP database tracks constitutional provisions that prohibit discrimination based on sexual orientation. Only four percent of states, and zero percent of liberal democracies, have constitutional provisions that explicitly prohibit discrimination based on sexual orientation.[303] Regardless, I conclude that the right to be free from discrimination based on sexual orientation qualifies as a fundamental right because it is codified explicitly in the "other status" language in the UDHR and ICCPR.

D. Abortion Rights

The proposed natural law test that this article applies to other rights does not yield a clear answer when applied to a woman's right to terminate her pregnancy. In other words, from an international human rights perspective, if one asks whether a woman's right to terminate a pregnancy qualifies as a "fundamental right," the best answer is: "it's debatable."

Both the UDHR and the ICCPR explicitly prohibit gender-based discrimination.[304] Both also explicitly protect the right to privacy,[305] and the right to "liberty and security of person."[306] All of these provisions, read together, arguably protect a woman's right to terminate her pregnancy. However, both the

302. *See* Toonen v. Australia, U.N. GAOR, Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/488/1992 (1994); *see also* Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149 (1981) (holding that U.K. law criminalizing gay sex between consenting adults violated the European Convention on Human Rights).

303. *See* Table Four.

304. *See* UDHR, *supra* note 22, art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex . . . ."); ICCPR, *supra* note 25, art. 2, para. 1 (substantially the same).

305. *See* UDHR, *supra* note 22, art. 12 ("No one shall be subjected to arbitrary interference with his privacy, family, home . . . ."); ICCPR, *supra* note 25, art. 17, para. 1 (substantially the same).

306. UDHR, *supra* note 22, art. 3; ICCPR, *supra* note 25, art. 9, para. 1.

UDHR and the ICCPR also protect the right to life.[307] Neither document specifies when life begins, but the American Convention on Human Rights—another important human rights treaty—specifies that the right to life "shall be protected by law and, in general, from the moment of conception."[308] Thus, international human rights law protects both the rights of pregnant women and the rights of unborn fetuses, but neither the UDHR nor the ICCPR tells us how to balance those rights.

The jurisprudence of international human rights bodies provides some support for the claim that a woman's right to terminate her pregnancy qualifies as a fundamental human right.[309] Even so, if one focuses exclusively on the text of the UDHR and international human rights treaties, the claim that such a right is a fundamental human right is difficult to sustain.

The CCP database does not specifically code for constitutional provisions related to abortion rights, or the rights of fetuses. However, the Center for Reproductive Rights has compiled a very helpful summary of the world's abortion laws.[310] The Center divides national abortion laws into five categories, from the least restrictive to the most restrictive.[311] States in Category I prohibit abortion altogether. States in Category V permit abortion on request, subject to gestational limits that range from eight weeks to twenty-four weeks. States in Category IV "permit abortion under a broad range of circumstances," but are less permissive than Category V. States in Categories II and III are fairly restrictive, but do permit abortions in some cases.[312] The United States is one of only two countries in the world classified as "mixed," because there is

307. *See* UDHR, *supra* note 22, art. 3 ("Everyone has the right to life . . . ."); ICCPR, *supra* note 25, art. 6, para. 1 ("Every human being has the inherent right to life.").

308. American Convention, *supra* note 200, art. 4, para. 1.

309. *See* Martha Davis, *In Context: Foreign and International Law in Abortion Litigation*, 64 SANTA CLARA L. REV. (forthcoming 2024).

310. Center for Reproductive Rights, The World's Abortion Laws, available at https://reproductiverights.org/maps/worlds-abortion-laws/ (last visited June 30, 2023). Readers may download a map of the world's abortion laws from this site as a PDF file. The analysis in this section relies on both the website and the PDF file.

311. It bears emphasis that the Center's classification system does not rely exclusively on constitutional law. It also accounts for statutes, regulations, and judicial decisions. *See id*. (section on methodology).

312. *See id*. (explanation of categories of abortion laws).

no uniform federal rule, and the right to obtain an abortion varies greatly according to state law.

Table Five shows the distribution of states by categories. The column for "all states" (n=201) includes all states that are covered in the "World Abortion Map" published by the Center for Reproductive Rights. The column for "liberal democracies" (n=35) includes all states other than the United States that are classified as liberal democracies in accordance with the criteria specified in section IV.A.[313]

Table Five: The World's Abortion Laws

	All States (n=201)	**Liberal Democracies (n=35)**
Category I	23 (11%)	0
Category II	42 (21%)	2 (6%)
Category III	47 (23%)	5 (14%)
Category IV	13 (6%)	5 (14%)
Category V	76 (38%)	23 (66%)

Several points merit comment here. First, if one considers all 201 states in the "all states" column, only about 44% of states have permissive abortion laws (categories IV and V).[314] If the relevant benchmark for comparative analysis is "all states," then the right to terminate a pregnancy does not qualify as a fundamental right (and the United States does not appear to be an outlier after the Supreme Court decision in *Dobbs*).

On the other hand, if one focuses solely on the 35 states in the "liberal democracy" column, it is evident that about 80 percent of liberal democracies have permissive abortion laws (categories IV and V).[315] If the relevant benchmark is the group of states that qualify as liberal democracies,[316] then the right to terminate a pregnancy should be deemed a "fundamental

313. *See supra* note 233.
314. *See* Table Five.
315. *See* Table Five.
316. Recall that, under the traditional natural law test, a right is fundamental if it implicates "immutable principles of justice which inhere in the very idea of free government." Twining v. New Jersey, 211 U.S. 78, 102 (1908). The choice to focus exclusively on liberal democracies as a benchmark for comparative analysis is consistent with *Twining*'s emphasis on "free government."

right" because the 80 percent figure derived from Table Five greatly exceeds the 60 percent threshold that forms a key ingredient of the human rights test.[317] Moreover, the United States does appear to be an outlier among liberal democracies after the Supreme Court decision in *Dobbs*.

Comparing Table Five to Tables Three and Four, it is evident that the right to terminate a pregnancy is the only right covered in any of the three tables where the percentage of liberal democracies that protect the right is substantially higher than the comparable percentage for states as a whole. In other words, the right to terminate a pregnancy is the only right where the choice whether to use "all states" or just "liberal democracies" as a benchmark for comparison has a significant effect on the ultimate conclusion as to whether a right qualifies as "fundamental."

VI. CONCLUSION

The Supreme Court decided *Dobbs v. Jackson Women's Health Organization*[318] and *New York State Rifle and Pistol Ass'n. v. Bruen*[319] during a single week in June 2022. *Bruen,* which deals with gun rights, is ostensibly based on incorporation doctrine, whereas *Dobbs*, which deals with abortion rights, is ostensibly based on substantive due process (SDP). However, the doctrinal distinction between SDP and incorporation evaporates upon close analysis. Both doctrines are ultimately rooted in the Fourteenth Amendment Due Process Clause, but neither doctrine can be justified by reference to the text or original understanding of the Fourteenth Amendment.

The Court currently applies a historical test to determine which rights are protected under the Due Process Clause; it applies essentially the same test for both SDP and incorporation cases. Both doctrines address areas of law in which states traditionally exercised broad autonomy, free from federal constitutional constraints. The Court's current historical test fails to provide a theoretically coherent justification for the central feature of both doctrines: the decision to jettison a consistent historical tradition of state autonomy and replace it with a new federal constitutional rule that mandates national uniformity.

317. *See supra* notes 232-35 and accompanying text.
318. 142 S. Ct. 2228 (2022).
319. 142 S. Ct. 2111 (2022).

Before World War II, the Court treated both SDP and incorporation as a single doctrine; the Court justified that doctrine by invoking natural law. This article has shown that the traditional natural law justification is the only theoretically coherent rationale for SDP and incorporation doctrines. The article has also explained and defended a natural law test linked to the human rights principles expressed in the Universal Declaration of Human Rights.

My proposed human rights test offers three principle advantages over the Court's current historical test. First, the human rights test is more compatible with the core constitutional principles of dual sovereignty and legislative primacy. Second, the human rights test is less subjective and less prone to manipulation than the Court's historical approach. Third, the human rights test is rooted in a natural law theory that actually provides a principled justification for the decision to replace a historical tradition of state autonomy with a constitutional rule that requires federal uniformity.

Under the human rights test, there is no doubt that *McDonald v. City of Chicago*[320]—the case in which the Supreme Court transferred decision-making authority over gun rights from state legislatures to federal courts—was wrongly decided. There is no plausible natural law rationale for the claim that the right to bear arms is a fundamental human right. In contrast, it is debatable whether *Roe v. Wade*[321]—the case that first recognized a woman's right to terminate her pregnancy—was wrongly decided. There is a plausible argument that a woman's right to terminate her pregnancy qualifies as a fundamental human right, but that argument is far from a slam dunk.

320. 561 U.S. 742 (2010).
321. 410 U.S. 113 (1973).

Appendix: Comparing Texts

U.S. Constitution	**UDHR**	**ICCPR**	**CCP Database**
Congress shall make no law respecting an establishment of religion (First Am)	No	No	V562, offrel
Or prohibiting the free exercise thereof (First Am)	Everyone has the right to freedom of thought, conscience and religion (Art. 18)	Everyone shall have the right to freedom of thought, conscience and religion (Art. 18)	V564, freerel
Or abridging the freedom of speech (First Am)	Everyone has the right to freedom of opinion and expression (Art. 19)	Everyone shall have the right to freedom of expression (Art. 19)	V611, express
Or of the press (First Am)	This includes the freedom . . . to seek, receive and impart information and ideas through any media (Art. 19)	This right shall include freedom to seek, receive and impart information . . . through any other media of his choice (Art. 19)	V615, press
Or the right of the people peaceably to assemble (First Am)	Everyone has the right to freedom of peaceful assembly and association (Art. 20)	The right of peaceful assembly shall be recognized (Art. 21)	V618, assembly

And to petition the government for a redress of grievances (First Am)	No	No	V612, petition
The right of the people to keep and bear arms (Second Am)	No	No	V624, arms
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures (Fourth Am)	No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence (Art. 12)	No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence (Art. 17)	V513, evidence
No warrants shall issue, but upon probable cause (Fourth Am)	No one shall be subjected to arbitrary arrest (Art. 9)	No one shall be subjected to arbitrary arrest (Art. 9(1))	n.a.
[Exclusionary rule] (Fourth Am)	No	No	n.a.
Nor shall any person be subject for the same offence to be twice put in jeopardy (Fifth Am)	Everyone charged with a penal offence has the right to . . . all the guarantees necessary for his defence (Art. 11)	No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted (Art. 14(7))	V532, doubjeop

Nor shall be compelled in any criminal case to be a witness against himself (Fifth Am)	Everyone charged . . . all the guarantees necessary for his defence (Art. 11)	Not to be compelled to testify against himself or to confess guilt (Art. 14(3)(g))	V533, Miranda
Nor shall private property be taken for public use, without just compensation (Fifth Am.)	No one shall be arbitrarily deprived of his property (Art. 17)	No	V570, exprcomp
The accused shall enjoy the right to a speedy [trial] (Sixth Am.)	Everyone charged with a penal offence has the right to . . . all the guarantees necessary for his defence (Art. 11)	To be tried without undue delay (Art. 14(3)(c))	V526, speedtri
And public trial (Sixth Am.)	Everyone is entitled . . . to a fair and public hearing by an . . . impartial tribunal (Art. 10)	In the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing (Art. 14(1)	V527, pubtri
By an impartial [tribunal] (Sixth Am.)	Everyone is entitled . . . to a fair and public hearing by an . . . impartial tribunal (Art. 10)	By a competent, independent and impartial tribunal (Art. 14(1))	V525, fairtri

Right to jury trial in criminal cases (Sixth Am.)	No	No	V509, jury
[Unanimous jury verdict] (Sixth Am.)	No	No	n.a.
To be confronted with the witnesses against him (Sixth Am.)	Everyone charged with a penal offence has the right to . . . all the guarantees necessary for his defence (Art. 11)	To examine, or have examined, the witnesses against him (Art. 14(3)(e))	V522, examwit
To have compulsory process for obtaining witnesses in his favor (Sixth Am.)	Everyone charged with a penal offence . . . all the guarantees necessary for his defence (Art. 11)	And to obtain the attendance and examination of witnesses on his behalf (Art. 14(3)(e))	n.a.
And to have the Assistance of Counsel for his defence (Sixth Am.)	Everyone charged with a penal offence . . . all the guarantees necessary for his defence (Art. 11)	To defend himself in person or through legal assistance of his own choosing (Art. 14(3)(d))	V534, couns
[State appointed counsel] (Sixth Am.)	Everyone charged with a penal offence. . . all the guarantees necessary for his defence (Art. 11)	To have legal assistance assigned to him . . . without payment by him . . . if he does not have sufficient means (Art. 14(3)(d)	V535, counscos

Excessive bail shall not be required (Eighth Am.)	No	It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial (Art. 9(3))	V514, prerel **
Nor excessive fines imposed (Eighth Am.)	No	No	n.a.
Nor cruel and unusual punishments inflicted (Eighth Am.)	No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Art. 5)	No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Art. 7)	V607, cruelty

V514 asks: "Does the constitution provide for the right/possibility of pre-trial release?" The instructions say: "If 'excessive bail is prohibited,' . . . please code "Yes" and comment on the provision."

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