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Publication: *Alabama Law Review*

Recommended Citation

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STRUCTURAL RIGHTS AND INCORPORATION

F. Andrew Hessick & Elizabeth Fisher

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STRUCTURAL RIGHTS AND INCORPORATION

F. Andrew Hessick* & Elizabeth Fisher**

Under the selective incorporation doctrine, provisions in the Bill of Rights are applied against the states if they are fundamental to the American scheme of ordered liberty or deeply rooted in this nation's history. By focusing solely on the importance of rights, this doctrine fails to account for the effect of incorporating a right on the states. This Article challenges this approach. It identifies a category of rights whose incorporation most deeply intrudes on state sovereignty. These rights do not simply create individual entitlements; they also have structural features by dictating which government institutions may exercise which government powers. These "structural rights" comprise the Fifth Amendment right to a grand jury, the Sixth Amendment right to a criminal jury, and the Seventh Amendment right to a civil jury. The Article argues that these rights should not be incorporated because the prerogative to allocate government powers is one of the core powers of state sovereignty, and the Fourteenth Amendment does not purport to strip the states of that power. In addition to protecting the state power to arrange government, adopting a theory against incorporating structural rights would explain the Court's refusal to incorporate the grand jury and civil jury rights, as well as doctrinal anomalies surrounding incorporation of the criminal jury right.

Adopting the theory against incorporating structural rights would have several implications. The most significant is that it would result in the deincorporation of the Sixth Amendment right to a criminal jury. The consequence of this deincorporation is not only that the U.S. Constitution would not oblige states to provide juries in criminal cases but also that the doctrine announced in Apprendi v. New Jersey, which prohibits sentencing schemes that allowed judges to make factual findings altering the range of punishment, would no longer apply against the states.

INTRODUCTION

Since the 1960s, the Supreme Court has said that the Fourteenth Amendment requires states to observe rights that are fundamental to our concept of ordered liberty or deeply rooted in our nation's history.¹ The prevailing view is that under this test, all the provisions in the Bill of Rights apply against the states, even if some of those rights have not yet been formally incorporated. After all, that a right is enumerated in the Bill of Rights is strong evidence that

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1. See *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010).

the right is fundamental and deeply rooted in our history.² Thus, as Justice Gorsuch asked last term: “[H]ere we are in 2018 . . . still litigating incorporation of the Bill of Rights. Really?”³

But the answer to Justice Gorsuch’s question is hardly obvious. Although the Fourteenth Amendment requires states to observe rights, it does not specify *which* rights the states must honor.⁴ This ambiguity has led to disagreement.⁵ Scholars and Justices over the years have proposed a variety of theories of incorporation, ranging from those that consider the Fourteenth Amendment to incorporate none of the provisions of the Bill of Rights to those that suggest the Amendment incorporates all of the provisions of the Bill of Rights.⁶ It was not until 100 years after ratification of the Fourteenth Amendment that the Court adopted the current “selective incorporation” test that asks whether the right is fundamental to our concept of ordered liberty or deeply rooted in our nation’s history.⁷

This selective incorporation doctrine is not based on the text of the Fourteenth Amendment. Nothing in the two provisions of the Amendment cited as the basis for incorporation—the Privileges or Immunities Clause⁸ and the Due

2. 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.5(a), at 797–98 (4th ed. 2015) (“[C]onsiderable weight is given to the very presence of a right within the Bill of Rights, since that presence in itself establishes that historically a substantial body of opinion viewed that right as essential to the fairness of the common law system.”).

3. Transcript of Oral Argument at 32, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091), 2018 WL 6200334, at *32. Justice Kavanaugh went even further, stating, “Isn’t it just too late in the day to argue that any of the Bill of Rights is not incorporated?” *Id.* at 33.

4. The two provisions that have been cited as a basis for incorporation are the Due Process Clause, U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”), and the Privileges or Immunities Clause, *id.* (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

5. The ambiguity in the text has led to a vast body of scholarship on the ratification history of the Fourteenth Amendment. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 181–214 (1998); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387 (1992); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 GEO. L.J. 1275, 1276 (2013); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 337 (2011); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: “Privileges and Immunities” as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1244 (2010); *see generally* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

6. *Compare, e.g.*, *Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting) (arguing for total incorporation), and CURTIS, *supra* note 5, at 219–20 (same), *with, e.g.*, *Twining v. New Jersey*, 211 U.S. 78, 98–99 (1908) (concluding that the Fourteenth Amendment does not extend the Bill of Rights against the states), and Fairman, *supra* note 5, at 138–39 (arguing against incorporation). *See also* AMAR, *supra* note 5, at 218 (pressing a theory of “refined incorporation” under which provisions designed to protect the states are not incorporated).

7. *See* 1 LAFAVE ET AL., *supra* note 2, § 2.5(a), at 795 (“During the 1960s, the prevailing due process position shifted . . . to the selective incorporation doctrine.”).

8. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

Process Clause⁹—singles out rights that are fundamental or historically important for special treatment. Nor is there any historical foundation for the doctrine.¹⁰ Instead, the doctrine is the product of Justices' efforts to implement the values that they believe underlie the Fourteenth Amendment.¹¹

But the set of values captured by the selective incorporation test is too narrow. By asking whether a right is fundamental or historically rooted, the test focuses on the importance of the right to individuals. The test does not account for the effect that incorporating a right would have on the states¹²—as the Court has explicitly acknowledged.¹³

The failure to account for the effect on the states is unwarranted. Under the dual-sovereignty system established by the U.S. Constitution, states are sovereign entities.¹⁴ They have all the powers of sovereignty except to the extent that the Constitution strips states of those powers. Recognizing the central importance of state sovereignty to our constitutional order, the Court has interpreted many constitutional provisions to include implicit exceptions to prevent interference with the operation of state government.¹⁵

Any judge-made doctrine of incorporation should likewise take pains to avoid trammeling on state power. Although the Fourteenth Amendment imposed significant new restrictions on the states, it did not abrogate state sovereignty. Because the incorporation of each provision of the Bill of Rights limits the states' ability to act, the intrusion on state interests should inform determinations about which rights are incorporated against the states.

9. *Id.* (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”).

10. See Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 934 (1965) (“Whatever one’s views about the historical support for . . . [the] wholesale incorporation theory, it appears undisputed that the selective incorporation theory has none.” (footnotes omitted)); Louis Henkin, “*Selective Incorporation*” in the Fourteenth Amendment, 73 YALE L.J. 74, 77–78 (1963) (“There is no evidence, and it is difficult to conceive, that anyone thought or intended that the amendment should impose on the states a selective incorporation.”).

11. Disagreement in the face of ambiguous text is unsurprising. Interpretations of ambiguous texts necessarily rest on the interpreter’s values, see Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 10 (2018) (noting that resort to principle is inevitable in the face of uncertainty); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 57–60 (1997) (discussing the role of value judgments in the formation of doctrine), and each individual has a personal hierarchy of values.

12. To be sure, the selective incorporation test protects state sovereignty to the extent it does not result in total incorporation, but it does not do so in a way that focuses on state sovereignty. It does not ask, for example, how incorporating a particular right would affect the states.

13. *McDonald v. City of Chicago*, 561 U.S. 742, 784 (2010) (“Throughout the era of ‘selective incorporation,’ Justice Harlan in particular, invoking the values of federalism and state experimentation, fought a determined rearguard action to preserve the two-track approach. Time and again, however, those pleas failed.” (citations omitted)).

14. See U.S. CONST. amend. X.

15. See *infra* notes 180–96 and accompanying text.

Accounting for the effect that incorporating a right would have on the states significantly changes the incorporation calculus.¹⁶ Not all provisions in the Bill of Rights equally impair state sovereignty if they are incorporated. Many provisions impose substantive limitations on the government—for example, the First Amendment limits the government’s ability to abridge the freedom of speech. Others require the government to observe particular procedures when taking actions—for example, the Fourth Amendment requires law enforcement ordinarily to obtain warrants before conducting searches. Incorporating these provisions does undermine state sovereignty because those provisions restrict the areas in which the state may act and dictate the procedures a state must follow when taking some actions.

The incorporation of other provisions, however, intrudes more significantly on state sovereignty. Chief among those provisions are the Fifth Amendment right to a grand jury, the Sixth Amendment right to a criminal jury, and the Seventh Amendment right to a civil jury. These provisions do not simply create individual entitlements to have a jury instead of a judge decide particular issues; they dictate *how* a state must organize its government. They direct that a state can exercise certain of its government powers only through these juries. We call these provisions “structural rights.”¹⁷

These structural rights are individual rights. They create entitlements in individuals to juries. But they also have structural features because they dictate which bodies of government can exercise particular powers. They accordingly operate much like the provisions in Articles I, II, and III of the Constitution that assign government powers to the various branches of the federal government.

Incorporating these structural rights deeply interferes with state sovereignty. One of the essential features of sovereignty is the ability to decide how to arrange a government and allocate power among its various bodies.¹⁸ How the people choose to arrange their government reflects the values and views of

16. Others have argued that federalism should limit incorporation, but they have offered different ways of operationalizing federalism in doctrine. *See, e.g.*, Friendly, *supra* note 10, at 935–36 (arguing that incorporated provisions should apply less rigorously to the states).

17. The way in which we use the term “structural rights”—individual rights that also entail allocations of government power—thus differs from the way in which Ozan Varol uses the term. Professor Varol uses the term to describe the concept that all rights confer government power. Ozan O. Varol, *Structural Rights*, 105 GEO. L.J. 1001, 1012 (2017). A possible fourth structural right derives from the Fourth Amendment’s Warrant Clause, which provides that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV. Although that Clause does not specifically assign the power to issue warrants, the Supreme Court has suggested in dicta that only a judge or magistrate may issue warrants. *See Katz v. United States*, 389 U.S. 347, 357 (1967). Because the Court has not resolved the issue, this Article does not address it.

18. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 132, at 73–74 (Thomas P. Peardon ed., The Liberal Arts Press 1952) (1690).

the people, and it can have significant effect on the decisions that the government makes. The Framers deliberately protected that power of the states. The only limitation they imposed is that states must have republican forms of government,¹⁹ but they deliberately left the states vast discretion in structuring their republican governments. As James Madison stated in *The Federalist No. 45*, the “powers reserved to the several States” under the Constitution included “the internal order . . . of the State.”²⁰

This Article argues that courts should not read the Fourteenth Amendment to incorporate these structural rights. Limiting incorporation in this way protects the state’s sovereign power to arrange its government. It also aligns with important federalism values. It allows states to serve as laboratories for experimentation for different forms of government.²¹ And it helps the states perform their function of checking federal power.²² Not incorporating structural rights affords states broader discretion in diversifying their forms of government. These variations reduce the chance of all state governments being ineffectual checks on the federal government.

Not incorporating structural rights also explains better the current state of the law. Although the prevailing view is that selective incorporation extends to the states the entirety of the Bill of Rights, the Court has not incorporated several provisions, despite having multiple opportunities to do so.²³ Most notably, the Court has refused to incorporate the Fifth Amendment right to a grand jury and the Seventh Amendment right to a civil jury.²⁴ The selective incorporation test does not provide a sound explanation for the exclusion of those rights because those rights are no less fundamental or deeply rooted than other rights that the Court has incorporated. But the theory of not incorporating structural rights readily explains the refusal to incorporate those provisions because they contain structural rights. The theory also provides an explanation for anomalies in Sixth Amendment law. Despite insisting that incorporated rights apply equally to the states, courts have applied the right to a criminal jury differently

19. U.S. CONST. art. IV, § 4.

20. THE FEDERALIST NO. 45, at 262 (James Madison) (Am. Bar Ass’n 2009).

21. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (describing states as “laborator[ies]”); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 493 (1954) (“The federal system has the immense advantage of providing forty-eight separate centers for [legislative] experimentation.”).

22. THE FEDERALIST NO. 28, *supra* note 20, at 151 (Alexander Hamilton) (stating that separate state governments provided a means to “check the usurpations” of the federal government).

23. The Court has never seriously entertained the possibility that the Fourteenth Amendment incorporates the Ninth and Tenth Amendments. Instead, it has simply assumed that only the first eight amendments may be incorporated. *See McDonald v. City of Chicago*, 561 U.S. 742, 759–61 (2010) (referring to the first eight amendments as the “Bill of Rights” in discussing incorporation).

24. The Court has also not incorporated the Third Amendment. But that is because the Court has not had an occasion to do so; it has never heard any Third Amendment cases. Because the Third Amendment confers a substantive right, the Court would almost certainly incorporate it. Indeed, the only circuit court to consider the issue has held the right incorporated. *See infra* text accompanying notes 63–64.

to the states than to the federal government.²⁵ The structural rights approach removes this anomaly by deincorporating the right.

This theory of unincorporated structural rights takes no position on whether other rights in the Bill of Rights should be incorporated. It argues only that structural rights should be excluded from incorporation. It is thus a theory of exclusion, not inclusion.²⁶

This Article proceeds in four parts. Part I describes the current theory of incorporation and identifies several shortcomings in the doctrine. Part II turns to developing the theory of structural rights. It explains that most provisions in the Constitution either allocate powers to government branches or protect rights of individuals. It argues that structural rights are an exception to this usual divide: they create entitlements in individuals to have particular government institutions make certain decisions, and at the same time, they empower those institutions to act. Part II then identifies the three structural rights in the text of the Bill of Rights: the right to a grand jury, the right to a jury in criminal cases, and the right to a jury in civil cases.

Part III argues against incorporation of structural rights. It explains that control over the organization of government is a core feature of state sovereignty deeply embedded in the Constitution. It then explains that nothing in the language or history of the Fourteenth Amendment provides a basis for ignoring this principle and requiring states to adopt jury structures. It further argues that not incorporating structural rights makes better sense of the decisions not incorporating grand juries and civil juries and explains why the right to a criminal jury applies differently to the states.

Part IV discusses the ramifications of not incorporating structural rights. Some of those consequences—such as maintaining the states' discretion to design systems for deciding civil cases and for charging crimes—are obvious. Others are less obvious but not less important. Perhaps the most significant consequence is that it would make *Apprendi v. New Jersey*,²⁷ which holds that the Sixth Amendment prohibits judges from making factual findings that are necessary to increasing the punishment range that an offender faces, inapplicable to the states. *Apprendi* rendered unlawful many state systems that authorized judges to make factual findings altering the range of punishment. Deincorporating the jury trial right on which *Apprendi* rests would allow states to reinstitute those sentencing schemes.

25. See *infra* notes 76–78 and accompanying text.

26. For another article discussing alternate theories of exclusion, see Suja A. Thomas, *Nonincorporation: The Bill of Rights After McDonald v. City of Chicago*, 88 NOTRE DAME L. REV. 159, 180–82 (2012) (articulating several possible theories after *McDonald*, including a theory that nonincorporated rights are not fundamental, a theory of stare decisis, total incorporation, and a jury theory of nonincorporation).

27. 530 U.S. 466, 490 (2000).

I. THE SELECTIVE INCORPORATION TEST

The incorporation doctrine is important because the Bill of Rights does not apply by its own terms to the states. In the 1833 decision *Barron v. City of Baltimore*,²⁸ the Court held that the Bill of Rights applied only against the federal government.²⁹ Writing for the Court, Chief Justice Marshall stated that the Constitution was not “ordained and established . . . for the government of the individual states,”³⁰ and likewise, the adoption of the Bill of Rights “contain[ed] no expression indicating an intention to apply [the amendments] to the state governments.”³¹

But the ratification of the Fourteenth Amendment in 1868 sparked a new debate about the applicability of the Bill of Rights to the states—a debate that continues today. That debate has focused on two clauses in the Fourteenth Amendment. The first is the Privileges or Immunities Clause, which declares, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”³² The second is the Due Process Clause, which states: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”³³

The text of neither clause obviously extends the Bill of Rights against the states. Although the Privileges or Immunities Clause prohibits states from abridging privileges or immunities, it does not define those privileges or immunities.³⁴ Key sponsors of the Fourteenth Amendment indicated that the provision meant to encompass the first eight amendments.³⁵ But that understanding was not uniform among the members of Congress considering the Amendment.³⁶ Moreover, the same terms “privileges” and “immunities” appear in Article IV of the Constitution,³⁷ and earlier court decisions defined those terms to encompass a small category of rights different from those in the Bill of Rights.³⁸ Less than five years after the Fourteenth Amendment’s ratifi-

28. 32 U.S. (7 Pet.) 243 (1833).

29. *Id.* at 250.

30. *Id.* at 247.

31. *Id.* at 250.

32. U.S. CONST. amend. XIV, § 1.

33. *Id.*

34. See *McDonald v. City of Chicago*, 561 U.S. 742, 758 (2010) (acknowledging that even those who disagree with the *Slaughter-House* opinion do not agree on what rights the Privileges or Immunities Clause actually covers).

35. See AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 157 (2012).

36. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866) (recounting statement of Senator Reverdy Johnson of Maryland that he did “not understand what [would] be the effect of” the Privileges or Immunities Clause).

37. U.S. CONST. art. IV, § 2.

38. See *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230) (“[C]onfining” the privileges and immunities of Article IV to “[p]rotection by the government; the enjoyment of life and liberty,

cation, the Court adopted that latter interpretation in interpreting the Amendment's Privileges or Immunities Clause.³⁹ Consequently, the Court has held that the privileges and immunities in the Clause did not include the rights enumerated in the Bill of Rights.⁴⁰ Despite facing criticism,⁴¹ the decision continues to be good law.⁴²

The Due Process Clause is even more obscure.⁴³ Although the Clause requires states to provide some sort of procedures prescribed by law in depriving a person of life, liberty, or property, it does not specify precisely which procedures must be followed. But unlike with the Privileges or Immunities Clause, the Court has held that the Due Process Clause does incorporate provisions of the Bill of Rights against the states.⁴⁴ The vague language of the term "due process," however, has resulted in significant disagreement about the extent to which the Clause incorporates the Bill of Rights. Some Justices, most notably Justice Black, have argued for complete incorporation of all of the provisions of the Bill of Rights.⁴⁵ Others have been significantly more hostile to the idea that the Due Process Clause requires states to observe the Bill of Rights.⁴⁶

with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised."); *see also* *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872) (applying this definition to the Fourteenth Amendment).

39. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 75 ("There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same . . .").

40. *United States v. Cruikshank*, 92 U.S. 542, 553 (1876).

41. The decision in *Slaughter-House* interpreted the Privileges or Immunities Clause so narrowly that it effectively rendered the Clause useless. *See, e.g., Saenz v. Roe*, 526 U.S. 489, 527 (1999) (Thomas, J., dissenting).

42. *McDonald v. City of Chicago*, 561 U.S. 742, 758 (2010).

43. *Twining v. New Jersey*, 211 U.S. 78, 99–100 (1908) ("Few phrases of the law are so elusive of exact apprehension as [due process of law].").

44. *See, e.g., McDonald*, 561 U.S. at 763.

45. *Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting) ("To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution."). Nine Justices other than Justice Black have also supported this view. *See Malloy v. Hogan*, 378 U.S. 1, 4 n.2 (1964) (noting that ten justices have supported total incorporation). The theory rests primarily on several statements from the legislative history of the Fourteenth Amendment suggesting that a major purpose of the Amendment was to ensure that the Bill of Rights was enforced against the states. *See Adamson*, 332 U.S. at 71–75 (Black, J., dissenting) (attaching a history that, in Justice Black's view, "conclusively demonstrates that the language of the first section of the Fourteenth Amendment" was explicitly intended to apply the Bill of Rights guarantees against the states).

46. *See, e.g., Twining*, 211 U.S. at 98 (concluding that the Fourteenth Amendment does not extend the Bill of Rights against the states).

Since the 1960s, the Court has taken an intermediate position of “selective incorporation.”⁴⁷ Instead of concluding that the Fourteenth Amendment automatically incorporates the entire Bill of Rights, the Court has held that whether a right is incorporated rests on a right-specific determination. A right applies against the states if it is “fundamental to our scheme of ordered liberty”⁴⁸ or is “deeply rooted in this Nation’s history and tradition.”⁴⁹

Although selective incorporation was adopted as an alternative to the total incorporation theory, the Court has suggested more recently that it extends all of the provisions of the Bill of Rights against the states. Through the doctrine, the Court has incorporated “almost all of the provisions of the Bill of Rights.”⁵⁰ The few provisions that are not incorporated are the Third Amendment right against quartering soldiers, the Fifth Amendment right to a grand jury, and the Seventh Amendment right to a civil jury.⁵¹ The Court has sought to justify the failure to incorporate the Third Amendment on the ground that the Court has not had an opportunity to determine whether the provision is incorporated, and the failure to incorporate the grand and civil jury rights on the ground that earlier decisions refusing to incorporate them predate the era of selective incorporation.⁵² The former is accurate, but as described below, the latter is not.

Under the theory of selective incorporation, a right incorporated against the states affords the same level of protection against the states as it does against the federal government.⁵³ According to the Court, it would simply be “incongruous” to apply different standards in protecting incorporated rights against the states and federal government.⁵⁴ Thus, as the Court has put it, it has “decisively held” that once a right is incorporated it applies to the states and federal

47. *McDonald*, 561 U.S. at 763.

48. *Id.* at 764 (emphasis omitted).

49. *Id.* at 767 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

50. *Id.* at 764.

51. *See id.* at 764 n.13. Although it has never held that the Excessive Bail Clause applies against the states, the Court has stated in dicta that it does. *See Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (“Bail, of course, is basic to our system of law, and the Eighth Amendment’s proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment.” (citations omitted)); *see also* Scott W. Howe, *The Implications of Incorporating the Eighth Amendment Prohibition on Excessive Bail*, 43 HOFSTRA L. REV. 1039, 1085 (2015) (discussing the assumption that the Eighth Amendment applies to the states).

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

53. *See Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964) (“The Court thus has 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.’” (quoting *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1960))). Instead, the Court decisively 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.” *McDonald*, 561 U.S. at 765 (quoting *Malloy*, 378 U.S. at 10); *see also* *Duncan v. Louisiana*, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting) (stating that the Court “has simply assumed that the question . . . is whether . . . [a provision] should be incorporated into the Fourteenth [Amendment], jot-for-jot and case-for-case, or ignored”).

54. *Malloy*, 378 U.S. at 11 (stating that it would be “incongruous” to apply different standards “depending on whether the claim was asserted in a state or federal court”).

government “according to the same standards.”⁵⁵ Incorporation therefore requires states not only to honor incorporated provisions but also to follow the various judicial doctrines implementing those provisions.⁵⁶

Despite being accepted by the Court for over fifty years, the selective incorporation doctrine has several major shortcomings. To start, the doctrine does not have any support in either the text or legislative history.⁵⁷ Nor has the Court offered any theoretical justification for it. Instead, as Judge Friendly observed, the doctrine is the product of cobbling together quotations from statements in older decisions that did not mean to establish a doctrine of incorporation.⁵⁸

Second, the doctrine has a singular focus on the importance of the rights to individuals. It does not account for the effect that incorporation might have on the states; the Court has explicitly rejected the argument that federalism should have any bearing on incorporation.⁵⁹ But under our federalist system, states are empowered to choose what behavior to regulate and the way in which to regulate it.⁶⁰ They also have the autonomy to fashion and regulate their own governmental systems, including those in their judicial branches.⁶¹ Each incorporated right limits the scope of this state power. The degree of intrusion on the state is not limited to requiring the states to observe the incorporated rights. States are also obliged to follow all the doctrines that the Court has fashioned to implement those rights—doctrines that plainly go beyond what is seemingly required by the text.⁶² The consequence is that the Court regulates areas that would otherwise fall within state control.

55. *McDonald*, 561 U.S. at 765.

56. See Friendly, *supra* note 10, at 935 (stating that an incorporated right “comes over to the states with all the overlays the Court has developed in applying it to the Federal Government”).

57. See Henkin, *supra* note 10, at 77–78 (“There is no evidence, and it is difficult to conceive, that anyone thought or intended that the amendment should impose on the states a selective incorporation.”).

58. Friendly, *supra* note 10, at 934 (“The theory takes off from judicial statements that certain provisions of the first eight amendments, especially the first, had been ‘absorbed’ in or ‘made applicable’ by the due process clause of the fourteenth—elliptical language quite obviously used as shorthand for earlier more careful delineations.” (footnotes omitted)).

59. *McDonald*, 561 U.S. at 783. The Court further highlighted its rejection of the “two-track approach” under which the guarantees were applied differently against the state and federal governments in order to allow more flexibility for the states. *Id.* at 784.

60. *United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring) (“The Constitution delegates limited powers to the National Government and then reserves the remainder for the States And the powers reserved to the States are so broad that they remain undefined. Residual power, sometimes referred to (perhaps imperfectly) as the police power, belongs to the States and the States alone.”).

61. This power, like others, is not absolute. The important point, however, is that the Fourteenth Amendment, under which the Bill of Rights is incorporated, does not explicitly limit this power. Thus, it should not be read to ignore state sovereignty. Indeed, as explained above, many constitutional provisions are actually read in the opposite direction. In other words, they are read to contain implicit exceptions that *avoid* infringing on state sovereignty.

62. *Dickerson v. United States*, 530 U.S. 428, 440 (2000) (concluding that, although it goes beyond the text of the Fifth Amendment, the *Miranda* doctrine is “constitutionally based”); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 19–20 (1975) (developing a theory that constitutional doctrine goes beyond the text).

Third, despite the Court's claims to the contrary, the selective incorporation test has not resulted in wholesale incorporation. It is true that the Court has not had an opportunity to determine whether to incorporate the Third Amendment. No reported case in the Supreme Court raises an argument that the Third Amendment should be incorporated,⁶³ and the one circuit case on the issue held that the right is incorporated.⁶⁴

But the Court's explanation for the refusal to incorporate the grand and civil jury rights⁶⁵—that the decisions refusing to incorporate those rights predate selective incorporation—does not ring true. The Court has had the occasion to consider the incorporation of both rights, and it has explicitly refused to do so as late as the 1970s, well after the Court adopted the current test for incorporation,⁶⁶ and it continues to deny petitions for certiorari seeking reconsideration of the issues.⁶⁷

It is hard to say that these rights are less fundamental to our scheme of ordered liberty or rooted in our history than other provisions in the Bill of Rights. In 1681, the future Lord Chancellor wrote, “[G]rand juries are our only security, inasmuch as our lives cannot be drawn into jeopardy by all the malicious crafts of the devil, unless such a number of our honest countrymen shall be satisfied in the truth of the accusations.”⁶⁸ The perceived importance of the grand jury only increased in the American colonies because of their refusal to

63. *McDonald*, 561 U.S. at 765 n.13 (“We never have decided whether the Third Amendment or the Eighth Amendment’s prohibition of excessive fines applies to the States through the Due Process Clause.”).

64. *Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982).

65. In addition to not incorporating the Seventh Amendment right to a jury trial, the Court has also not incorporated the Reexamination Clause of the Seventh Amendment, which provides that “no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.” U.S. CONST. amend. VII. The nonincorporation of this clause is a consequence of not incorporating the right to a jury. The right to a jury is a prerequisite to the right against second-guessing jury determinations.

66. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 431 (1996) (operating on the assumption that the Seventh Amendment jury trial right does not apply against the states); *Gerstein v. Pugh*, 420 U.S. 103, 118–19 (1975) (reaffirming nonincorporation of the right to a grand jury); see generally Michael J. Quinlan, *Is There a Neutral Justification for Refusing to Implement the Second Amendment or Is the Supreme Court Just “Gun Shy”?*, 22 CAP. U. L. REV. 641, 671 (1993) (discussing the Court’s adherence to nonincorporation of the rights to grand and civil juries).

67. See, e.g., *Recreational Data Servs., Inc. v. Trimble Navigation Ltd.*, 138 S. Ct. 1272 (2018) (mem.), *denying cert. to* 404 P.3d 120 (Alaska 2017) (seeking review of Seventh Amendment incorporation question); *Hye v. Mississippi*, 136 S. Ct. 267 (2015) (mem.), *denying cert. to* 131 So. 3d 577 (Miss. 2014) (seeking review of grand jury incorporation issue).

68. JOHN SOMERS, *THE SECURITY OF ENGLISHMEN’S LIVES: OR, THE TRUST, POWER, AND DUTY OF GRAND JURIES OF ENGLAND* 17 (Dublin, Sarah Cotter 1766); see also HENRY CARE, *ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT’S INHERITANCE* 207 (Boston, J. Franklin 1721) (“To preserve the Innocent from the Disgrace and Hazards which ill Men may design to bring them . . .”).

issue unwarranted indictments sought by the Crown.⁶⁹ At the time of the ratification of the Constitution, all states guaranteed the right to a grand jury,⁷⁰ and all but a handful of states still had similar guarantees by the time of the ratification of the Fourteenth Amendment.⁷¹

Civil juries were also common features in the colonies and early states. In 1791, twelve of thirteen states guaranteed the right to a civil jury.⁷² The absence of a guarantee for juries in civil cases tried by federal courts generated some of the most heated criticism of the proposed Constitution.⁷³ Thirty-six of the thirty-seven states in the Union in 1868—when the Fourteenth Amendment was adopted—guaranteed a right to civil jury trial.⁷⁴ Today, all states but Louisiana guarantee the right to jury trials in at least some civil cases.⁷⁵

The Court has also not universally adhered to its rule that incorporated rights apply jot-for-jot against the states. Despite claiming that the states should not be subject to “only a watered-down, subjective version” of the guarantees,⁷⁶ the Court has allowed certain incorporated rights to apply differently to the federal government than to state governments. For example, the Court has long held that the Sixth Amendment requires jury verdicts to be unanimous in federal court,⁷⁷ but it has said that this restriction does not apply to state criminal juries.⁷⁸

69. 4 LAFAVE ET AL., *supra* note 2, § 15.1, at 423; *see also* Wood v. Georgia, 370 U.S. 375, 390 (1962) (“Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.”).

70. 4 LAFAVE ET AL., *supra* note 2, § 15.1(c), at 449 (“[A]ll of the original states had their own laws giving defendants a right to insist upon a grand jury charge when being prosecuted for a serious offense.”).

71. *See* Donald Dripps, *The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure Revolution*, 18 J. CONTEMP. LEGAL ISSUES 469, 477–79 (2009).

72. Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1512 (2012) (“[I]n 1791 the number of states guaranteeing the right to a jury in a civil trial rose from ten to an impressive twelve . . .”).

73. *See* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 295 (1966) (“The almost complete lack of any bill of rights was a principal part of the Anti-Federalist argument [against ratification]; the lack of provision for civil juries was a prominent part of this argument . . .”).

74. Steven G. Calabresi et al., *Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted in a Modern-Day Consensus of the States?*, 94 NOTRE DAME L. REV. 49, 115 (2018).

75. *Id.*

76. *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010).

77. *See* *Maxwell v. Dow*, 176 U.S. 581, 586 (1900).

78. *See McDonald*, 561 U.S. at 766 n.14 (explaining how the Court reached this result). The Court has decided to revisit the incorporation of the unanimity requirement this term. *State v. Ramos*, 231 So. 3d 44 (La. Ct. App. 2017), *cert. granted*, 129 S. Ct. 1318 (2019) (No. 18-5924). The unanimity requirement is not the only aspect of the Sixth Amendment jury right not extended to the states. But the Court has also not applied the vicinage requirement to state juries. *See* 1 LAFAVE ET AL., *supra* note 2, § 2.6(b), at 831. Moreover, the discomfort with dictating how states arrange their juries resulted in the Court abandoning the requirement that juries consist of twelve people to uphold New York’s six-person jury. *See generally* *Baldwin v. New York*, 399 U.S. 66 (1970). Although the change applies to both federal and state juries, Justice Harlan explained that the reason for the change was to allow the states “elbow room in ordering their own criminal systems.” *Id.* at 118 (Harlan, J., dissenting).

II. STRUCTURAL RIGHTS

Developing a theory of excluding structural rights from incorporation requires first laying a groundwork about rights and structures. To that end, this Part develops two concepts. First, it distinguishes rights conferred by the Constitution and structures established by the Constitution. Broadly speaking, both types of provisions aim to protect individual liberty. To do so, rights-conferring provisions limit the ability of the government to act in certain areas or prescribe procedures through which the government must act. Structural provisions, on the other hand, establish specific governmental institutions and assign powers to those institutions. Structural provisions protect individual liberty by diffusing power among the branches and levels of government, which prevents undue concentration of power in the hands of one institution or the federal or state government.

Second, this Part defines and describes structural rights. These are a sort of hybrid between rights-conferring and structural provisions. They create individual entitlements, but they also allocate government power to a particular institution. Structural rights permit the government to act, but only through certain bodies. The three structural rights in the Bill of Rights are the Fifth Amendment right to a grand jury, the Sixth Amendment right to a criminal jury, and the Seventh Amendment right to a civil jury.⁷⁹

A. Rights Versus Structures

The Constitution contains two general types of provisions. The first confers rights; the second establishes government structures and assigns powers to those structures. Some rights in the Constitution limit the ability of the government to act in a specific area. The First Amendment, for example, prohibits the government from abridging the freedom of speech.⁸⁰ It marks speech as a restricted area that the government cannot freely regulate, guaranteeing to the people the right to freedom of speech. Other examples of rights-conferring provisions include the Fourth Amendment's restriction on unreasonable searches and seizures,⁸¹ the Second Amendment's recognition of the right to bear arms,⁸² and the Third Amendment's prohibition on quartered soldiers in time of peace.⁸³

Other rights entitle individuals to procedural protections. These rights do not prohibit the government from taking particular actions against individuals;

79. See *supra* note 17.

80. U.S. CONST. amend. I.

81. *Id.* amend. IV.

82. *Id.* amend. II.

83. *Id.* amend. III.

instead, they prescribe procedures that the government must follow before they take those actions. For example, the Fourth Amendment, as interpreted by the Court, requires the government ordinarily to obtain a warrant before conducting a search of a house,⁸⁴ and the Sixth Amendment requires the government to permit criminal defendants to confront witnesses, to subpoena witnesses, and to obtain the assistance of counsel.⁸⁵ Other examples include the right to due process⁸⁶ and the right to a speedy criminal trial.⁸⁷

These rights-conferring provisions, however, are the exception, not the rule. Most provisions in the Constitution are structural: provisions that assign powers to various government institutions and dictate the procedures that those institutions must follow to exercise that power. For example, the majority of Article I is devoted to assigning legislative power to Congress,⁸⁸ outlining how Congress shall be established,⁸⁹ enumerating the areas in which Congress may legislate,⁹⁰ and prescribing the procedures that Congress must follow to enact laws.⁹¹ Article II is similarly devoted to defining and assigning executive power,⁹² and Article III establishes and assigns federal judicial power.⁹³

Although it is commonly accepted that some provisions confer rights and others impose structures, the language of the Constitution does not always create a clear demarcation between structure and rights. For example, although it is understood to confer rights, the First Amendment speaks in terms of limiting government power, providing that “Congress shall make no law” limiting speech.⁹⁴ But history indicates that the Framers did distinguish between the structural and rights provisions in the Constitution.⁹⁵ For example, in *The Federalist No. 51*, Madison explained that the Constitution did not simply confer rights but also allocated powers between both the states and federal government and among the various branches of the federal government.⁹⁶ Alexander Hamilton expressed a similar view when he listed the few provisions in the

84. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016) (“[T]his Court has inferred that a warrant must [usually] be secured.” (alteration in original) (quoting *Kentucky v. King*, 563 U.S. 452, 459 (2011))).

85. U.S. CONST. amend. VI.

86. *Id.* amend. V.

87. *Id.* amend. VI.

88. *Id.* art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”).

89. *Id.* §§ 2–5.

90. *Id.* § 8.

91. *Id.* §§ 6–7.

92. *Id.* art. II (defining and assigning the “executive Power . . . of the United States”).

93. *Id.* art. III (assigning and defining the “judicial Power of the United States”).

94. *Id.* amend. I.

95. *Aziz Z. Huq, Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1449 (2013) (“[T]here is reason to think that the Framers did indeed distinguish individual rights from structure.”).

96. THE FEDERALIST NO. 51, *supra* note 20, at 293–97 (James Madison).

original Constitution that he understood to confer individual rights and contrasted them with the other provisions that he understood to define government powers.⁹⁷

Despite the distinction between the two types of provisions, both types of provisions limit the government's ability to act. Moreover, they share the overarching goal of protecting individual liberty by constraining government power. Rights protect liberty directly by creating individual entitlements limiting the types of actions the government may take. Structural provisions protect liberty more indirectly. They do not confer on individuals a personalized entitlement to the observance of these structures.⁹⁸ Instead, these structures protect liberties by distributing power among government institutions.⁹⁹ As Madison explained, the structural arrangements established by the Constitution provide "security . . . to the rights of the people."¹⁰⁰

Some structural provisions achieve this goal through separation of powers. For example, by separating the legislative and executive powers, the Constitution prevents one institution from determining both what is illegal and who should be prosecuted. This arrangement prevents concentrating undue power in the hands of one institution.¹⁰¹ Other structural features limit government power by restricting the ability of one government institution to act without the acquiescence of another government institution. For example, the bicameralism provision requires both the House and the Senate to approve a bill before it can

97. THE FEDERALIST NO. 84, *supra* note 20, at 495–96 (Alexander Hamilton) (listing as among these individual rights the limits on the consequences of impeachment, the right to habeas corpus, the right against bills of attainder and ex-post-facto laws, the prohibition on titles of nobility, the right to criminal juries, the right against broadly defined treason, and the right against corruption of blood); see also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 540 (1969) (noting James Wilson's statement that "[i]t would be very extraordinary to have a bill of rights, because the powers of Congress are expressly defined").

98. See Huq, *supra* note 95, at 1452 ("[I]here is little reason to think that the Constitution's structural provisions, properly glossed, engender individual entitlements in the same way as the First Amendment or the Fourteenth Amendment's Equal Protection Clause."); see also F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 687–89 (2017) (exploring the distinction between individual rights and provisions bearing on government organization). Of course, although these structural provisions do not confer rights on individuals, individuals can enforce these provisions when they otherwise have standing. See *Bond v. United States*, 564 U.S. 211, 217 (2011).

99. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) ("The declared purpose of separating and dividing the powers of government, of course, was . . . 'to secure liberty.'" (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))); THE FEDERALIST NO. 78, *supra* note 20, at 450 (Alexander Hamilton) ("For I agree that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" (quoting, e.g., MONTESQUIEU, *THE SPIRIT OF LAWS* 152 (Thomas Nugent trans., Hafner Pub'g Co. 1949) (1748))).

100. THE FEDERALIST NO. 51, *supra* note 20, at 295 (James Madison); see Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, 2012 CATO SUP. CT. REV. 117, 144 (2012–2013) (discussing Madison's structural arguments).

101. *Bowsher*, 478 U.S. at 721 (stating that "separating and dividing the powers of government . . . 'diffus[es] power'" (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring))).

become a law.¹⁰² Likewise, the Presentment Clause requires Congress to present the bill to the President for signature before it becomes law,¹⁰³ and if the President vetoes the law, it may become law only if both houses repass the bill by two-thirds votes.¹⁰⁴ Together, the separation of powers and these checks and balances raise substantial obstacles to the government's ability to act.

B. *Structural Rights*

Despite the tendency to divide the Constitution into structural and rights-conferring provisions, the line between the two is not always absolute. Some provisions are hybrids. Falling into this camp are provisions that confer individual rights to have one institution of government instead of another decide an issue. We call these provisions "structural rights." Like other rights, these structural rights confer entitlements on individuals. But they also have structural aspects. They permit the government to act, but only through certain bodies. They thus function like rights with power-allocating provisions, dictating which government bodies have the power to act.

Structural rights are different from the other substantive and procedural rights found in the Bill of Rights. They do not limit the areas in which the government may act. Nor do they simply prescribe the procedures that government institutions must follow. Structural rights *allocate* government power. They dictate which government institutions hold what power. And like structural provisions in the Constitution, the motivation behind these structural rights is to disperse power and check other branches of the government.

Structural rights are rare in the Constitution. Most rights in the Constitution are either substantive or procedural.¹⁰⁵ The first eight amendments—the body that the Court has said is incorporated—contain only three structural rights. They are the Fifth Amendment right to a grand jury,¹⁰⁶ the Sixth Amendment right to a jury in criminal cases,¹⁰⁷ and the Seventh Amendment right to a jury

102. U.S. CONST. art. I, § 7, cl. 2 (requiring "[e]very Bill" to "have passed the House of Representatives and the Senate . . . before it become[s] a Law").

103. *Id.*

104. *Id.*

105. *See supra* text accompanying notes 80–87. Of course, although many rights are in the Bill of Rights, other provisions of the Constitution also confer rights. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

106. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .").

107. *Id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."). The Sixth Amendment is not the only provision establishing a role for juries in criminal cases. Article III provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." *Id.* art. III, § 2, cl. 3. This Article III provision, however, applies only to federal prosecutions. *Id.*

in civil cases.¹⁰⁸ These rights assign the power to adjudicate to grand and petit juries instead of judges, and they confer an individual right to have those institutions determine whether they should be indicted,¹⁰⁹ convicted of a crime,¹¹⁰ or adjudged to be liable in a common law case.¹¹¹

By dictating which bodies may exercise judicial power, each of these provisions assigns government power.¹¹² Other provisions in the first eight amendments do not.¹¹³ To be sure, the right to counsel does require the government to appoint attorneys for criminal defendants. But providing counsel does not allocate the *government's* power to act because defense attorneys do not exercise government power. The right to counsel therefore is not a structural right.¹¹⁴

108. *Id.* amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”).

109. The Fifth Amendment requires a grand jury to indict individuals charged with capital or infamous crimes. *Id.* amend. V. The Supreme Court has held that infamous crimes include felonies. The Court has suggested, but not held, that a crime may be infamous even if it does not carry the punishment of a felony. *See generally* 4 LAFAVE ET AL., *supra* note 2, § 15.1(b), at 439–41. For noninfamous crimes, a prosecutor may proceed by a preliminary hearing, in which the prosecutor seeks to persuade a judge, as opposed to a grand jury, that there is a sufficient basis for charging the defendant.

110. Although the text states that the right applies to “all” criminal cases, the Supreme Court has held that it does not extend to crimes carrying a penalty of only six months of imprisonment. *Baldwin v. New York*, 399 U.S. 66, 73 (1970).

111. This right is also not absolute. It applies only for disputes that exceed \$20 and only if the suit is of the sort that would have been resolved by a jury at the time of the adoption of the Seventh Amendment in 1791. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (citing *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935)).

112. According to Professor Amar, these jury provisions were viewed more as “political” rights of the jurors at the founding and more as “civil” rights at Reconstruction. AMAR, *supra* note 5, at 271. That the shift in conception occurred without restructuring the jury further suggests that the jury has both structural and rights features.

113. The Ninth and Tenth Amendments may also be structural rights. The Ninth Amendment provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX. The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” *Id.* amend. X. Arguably, these provisions confer a right on the people and states to self-government and, accordingly, have the structural feature of allocating government power. *See* KURT T. LASH, *THE LOST HISTORY OF THE NINTH AMENDMENT* 285 (2009) (“[T]he founders adopted the Ninth and Tenth Amendments in order to reserve the ‘right of each state to determine for itself its own political machinery and its own domestic policies.’” (quoting *Hawk v. Smith*, 126 N.E. 400, 403 (Ohio 1919))).

114. The overarching concern with incorporating structural rights is the *allocation* of power. It is true that incorporating structural rights also requires the states to devote significant resources to funding juries. These forced expenditures, however, do not distinguish structural rights from other types of rights. The incorporation of many other rights results in state expenditures. Obvious examples include the costs borne by providing counsel to indigent defendants and facilitating compulsory process. The important difference between structural rights and other rights is that incorporating structural rights divests the states of the power to make determinations of how to organize their governments and distribute their sovereign powers.

1. *The Fifth Amendment Right to a Grand Jury*

The Fifth Amendment provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”¹¹⁵ Grand juries are bodies of twelve to twenty-three individuals who have the power to investigate and charge crimes. To indict an individual, the grand jury must find probable cause to believe that the individual committed a capital or infamous crime.¹¹⁶ For less serious offenses, a prosecutor may proceed by a preliminary hearing in which the prosecutor seeks to persuade a judge, as opposed to a grand jury, that there is a sufficient basis for charging the defendant.¹¹⁷

The Grand Jury Clause creates a structural right. It confers a right not to be charged with a significant crime except by a grand jury. At the same time, it allocates to grand juries the power of indictment for federal offenses. Indeed, the principal benefit of the right to grand juries consists of the structural limitations it imposes on the government. Allocating indictment power to the grand jury creates a check on prosecutorial overreach: a grand jury can refuse to indict a person if it believes the prosecution is unwarranted.¹¹⁸ It also acts as a check on Congress because the grand jury may refuse to indict if they believe the law alleged to have been violated is unjust or unconstitutional.¹¹⁹ Further, it limits the power of judges. Judges are employees of the government, and thus, they may simply be more inclined to support the government in criminal cases.¹²⁰ Moreover, despite Article III’s salary and job guarantees aimed at making judges independent, that independence is not complete. The judiciary depends on Congress for funding, and accordingly they may rule to please members of Congress even when the evidence does not support their conclusion. Likewise, judges aspiring for appointments by the President to higher positions may be inclined to support the prosecution.

115. U.S. CONST. amend. V. The Amendment contains an exception for military cases.

116. According to the Court, infamous crimes include felonies. *Mackin v. United States*, 117 U.S. 348, 354 (1886). And it may include other misdemeanors that carry a sufficiently stigmatizing punishment. *See* 4 LAFAYETTE ET AL., *supra* note 2, § 15.1(b), at 439–41; *see generally* Gabriel J. Chin & John Ormonde, *Infamous Misdemeanors and the Grand Jury Clause*, 102 MINN. L. REV. 1911 (2018) (discussing what constitutes infamous crimes). Under the Federal Rules of Criminal Procedure, a grand jury indictment is required only for felonies. *See* FED. R. CRIM. P. 7. A misdemeanor can be tried on an information. *See* FED. R. CRIM. P. 58(b). The conclusion must be that punishment of less than one year is not infamous.

117. *See* FED. R. CRIM. P. 5.1(a)(4).

118. Suja A. Thomas, *Blackstone’s Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195, 1231 (2014).

119. *Id.*

120. *Id.* at 1212–14 (detailing the importance of the grand jury being separate from the government).

2. *The Sixth Amendment Right to a Criminal Jury*

The Sixth Amendment states that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”¹²¹ By its terms, this provision confers a “right” on individuals to trial by a jury in criminal cases. But it also allocates power to juries to hear and decide criminal cases. Because it both creates an entitlement to a jury and allocates power to the jury, the provision is a structural right.¹²²

Although the Amendment states that the right extends to “all” criminal cases, the Supreme Court has held that it applies only to those criminal charges that carry a punishment of more than six months.¹²³ The Court, however, has extended the effect of the right beyond the criminal trial to criminal sentencing. In *Apprendi v. New Jersey*, the Court held that the Sixth Amendment prohibits judges from making factual findings that are necessary to increasing the punishment range that an offender faces.¹²⁴ Those determinations, the Court said, must be made by a jury.

As with the grand jury guarantee in the Fifth Amendment, assigning the power to decide criminal cases to juries checks the three branches of government. For the government to obtain a conviction against a person, it must convince a jury of lay citizens that the conviction is proper. Criminal juries can acquit those whom they believe to be unjustly prosecuted, and they can refuse to convict under a law that they perceive to be unjust.¹²⁵ And they may be more likely to do so than judges because, again, they do not have the same dependence on the government as judges.¹²⁶

No less important than checking the government, the structural aspects of the jury rights foster civic development. Participation on a jury provides an opportunity for individuals to learn about the law, the legal system, and the types of problems that plague society.¹²⁷ It also gives an opportunity for individuals

121. U.S. CONST. amend. VI.

122. See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1683 (2012) (discussing the “connection” between the “individual-rights” to juries and “the separation of powers”).

123. *Baldwin v. New York*, 399 U.S. 66, 73 (1970).

124. 530 U.S. 466, 490 (2000).

125. Although the Court has criticized jury nullification, it has acknowledged that juries have the power to nullify. See *Sparf v. United States*, 156 U.S. 51, 141 (1895).

126. Whether juries actually acquit more than judges is highly debatable. See Keith A. Findley, *Reducing Error in the Criminal Justice System*, 48 SETON HALL L. REV. 1265, 1279 (2018) (questioning conclusions about judges versus juries); Alexander Lundberg, *Sentencing Discretion and Burdens of Proof*, 46 INT’L REV. L. & ECON. 34, 40 (2016) (pointing to data to question “the conventional wisdom that a defendant is better off going before an unpredictable jury” than a judge).

127. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 364 (Francis Bowen ed., Henry Reeve trans., Sever & Francis 1862) (1835) (“The jury . . . serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free

to participate in government. As Tocqueville put it, the jury system “places the real direction of society in the hands of the governed . . . and not in that of the government.”¹²⁸

3. *The Seventh Amendment Right to a Civil Jury*

The Seventh Amendment provides that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”¹²⁹ Similar to the Sixth Amendment, this provision, by its terms, confers a “right” on individuals to demand a jury to resolve common law claims. It also allocates government power: it empowers juries to decide common law cases exceeding \$20.

The scope of the amendment is limited, however. It does not create a right to a jury in all cases. The Amendment preserves the right of trial by jury only for the sorts of claims that a jury would have resolved in 1791.¹³⁰ Thus, the Court has said, it entitles parties to juries to resolve common law and other legal actions whose historical counterparts were resolved by a jury, but it does not entitle parties to juries in equitable actions.¹³¹

Like other structural rights, the civil jury provision aims to check the exercise of government power.¹³² Civil juries historically played an important role in limiting executive power by potentially awarding damages against government officials who violate rights.¹³³ They also limit executive power by adjudicating civil suits brought by the government against individuals. To be sure, this check on executive power is less pronounced than the check imposed by criminal juries because, unlike in criminal suits, the executive is not a party to every civil suit.¹³⁴ Moreover, the ability of civil juries to impose liability on government officials has diminished because of qualified immunity. Nevertheless, the civil jury still has the potential to limit executive power.

institutions. It imbues all classes with a respect for the thing judged, and with the notion of right.”); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1186 (1991).

128. 1 *TOCQUEVILLE*, *supra* note 127, at 361; *see also* Amar, *supra* note 127, at 1185 (noting Tocqueville’s observation that “the overall jury system was fundamentally populist and majoritarian”).

129. U.S. CONST. amend. VII.

130. *Curtis v. Loether*, 415 U.S. 189, 193 (1974).

131. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830) (stating that the Amendment confers a right to a jury in “suits in which *legal* rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered”).

132. Indeed, “[f]or many purposes until the nineteenth century the civil and criminal jury were inseparable.” John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in *THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY, 1700–1900*, at 15 (Antonio Padoa Schioppa ed., 1987).

133. *See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389–98 (1971).

134. Blackstone noted that the criminal jury itself was more essential than the civil jury because of the possible influence of the executive on judges. *See* Thomas, *supra* note 118, at 1202.

Civil juries also check legislative power because they can refuse to enforce laws that they perceive to be unjust. They also limit the power of the judiciary. As Blackstone noted centuries ago, judges adjudicating civil cases may harbor “involuntary bias” in favor of parties of similar class and background as the judge.¹³⁵ Because they contain a cross section of society, juries are less likely to have that bias.¹³⁶

As with criminal juries, the right to civil juries also provides an opportunity for the public to participate in the governance.¹³⁷ As the Federal Farmer explained in criticizing the original Constitution for failing to include a right to civil juries, juries “secure to the people at large, their just and rightful controul [sic] in the judicial department.”¹³⁸ Indeed, the Anti-Federalists viewed the inability of the people to participate in the federal government, because of the lack of a right to a civil jury in the original Constitution, as more distressing than the failure to protect individuals through a jury in particular cases.¹³⁹

III. A STRUCTURAL RIGHT THEORY OF NONINCORPORATION

Two things should be clear from Parts I and II. First, selective incorporation is not grounded in the history or text of the Fourteenth Amendment and fails to consider adequately the effect of incorporation on the states. Second, not all rights in the Bill of Rights take the same form. Some provisions limit the substantive actions the government may take, others prescribe procedures the government must follow in taking those actions, and still others—structural rights—require the government to adopt and assign power to particular structures.

135. 3 WILLIAM BLACKSTONE, COMMENTARIES *379.

136. The Constitution protects this role for the jury by prohibiting courts from reexamining facts determined by the jury, except to the extent permitted by the ancient common law. *See* U.S. CONST. amend. VII.

137. 1 TOCQUEVILLE, *supra* note 127, at 364 (describing the virtues of “more especially the civil jury”); Amar, *supra* note 127, at 1186.

138. Letter from the Federal Farmer (XV) (Jan. 18, 1788), *reprinted in* RICHARD H. LEE, AN ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER 130, 138 (Quadrangle Books, Inc. 1962) (1788); *see also* 2 THE WORKS OF JOHN ADAMS 253 (AMS 1971) (1850) (reflecting that “the common people[] should have as complete a control” over the judiciary as over the legislature); Letters of Centinel (II) (Oct. 24, 1787) *in* 2 THE COMPLETE ANTI-FEDERALIST 149 (Herbert J. Storing ed., 1981) (a jury trial “preserves in the hands of the people, that share which they ought to have in the administration of justice”); Letter from Thomas Jefferson to L’Abbé Arnoux (July 19, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 282, 283 (Julian P. Boyd ed., 1950) (“[I]t is necessary to introduce the people into every department of government Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative.”).

139. *See* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 19 (The Univ. of Chi. Press ed., 1981) (“The question was not fundamentally whether the lack of adequate provision for jury trial would weaken a traditional bulwark of individual rights (although that was also involved) but whether it would fatally weaken the role of the people in the administration of government.” (emphasis omitted)).

This Part argues against incorporation of structural rights. As it explains, the power to organize government is a core feature of sovereignty, and the principle of preserving the states' ability to organize their governments is deeply embedded in our constitutional structure. The structural provisions in the Bill of Rights dictate the way that a state must structure its judiciary. Incorporating those structural rights interferes with the states' prerogative to structure their governments. Accordingly, the Fourteenth Amendment should be read not to incorporate structural rights against the states. This theory of not incorporating structural rights both justifies the Court's refusal to incorporate the grand jury and civil jury rights and sheds light on the anomalies surrounding the incorporation of the criminal jury right.

A. The Constitutional Principle of State Control of State Government

The Constitution created the national government but not the states' governments.¹⁴⁰ States were separate sovereigns that preexisted the Constitution,¹⁴¹ and they continued to exist under the Constitution. Thus, one of the core principles of the Constitution is dual sovereignty of the states and the United States. Under this framework, the states retained the sovereign power to arrange their own governments.¹⁴²

1. The Sovereign Power of Arranging Government

An essential feature of sovereignty in a democratic society is the power to arrange government.¹⁴³ This power belongs to the people who make up a sovereign entity and includes the prerogative to choose which form of government to adopt and to distribute power among those bodies.¹⁴⁴ The governmental structures that the people adopt reflect the values of those people. For example, people who value a government highly responsive to public sentiment may establish a government in which all offices are filled through annual elections. By contrast, people who more strongly value stability may prefer a government in which positions are filled for life. Similarly, people who value efficiency might prefer delegating significant power to one government institution, whereas people who fear too much power in the hands of one institution might prefer dividing power among different branches of government.

140. *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868).

141. *Id.*

142. *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973) (noting that each state has the "constitutional responsibility for the establishment and operation of its own government").

143. LOCKE, *supra* note 18, § 132, at 68.

144. *Id.* at 73 ("[T]he community may dispose of [power] into what hands they please . . .").

The different government structures can affect the way the government operates and the decisions it reaches.¹⁴⁵ Consider the two houses of Congress. Members of the House of Representatives are chosen through biennial elections in hundreds of districts that are allotted based on population.¹⁴⁶ Because the Representatives are up for reelection so frequently and each Representative is ultimately elected by a relatively small constituency, the House is more likely to act consistently with the current desires of a wide swath of the population.¹⁴⁷ By contrast, members of the Senate are chosen through statewide elections once every six years.¹⁴⁸ The Senate, accordingly, is less susceptible to current national pressures and is more likely to consider policies with an eye toward longer-term goals.

Different institutional structures within the government also lead to different levels of expertise and access to information.¹⁴⁹ For example, a standard justification for assigning policymaking to administrative agencies instead of leaving it to the courts is that agencies have better access to relevant information and more expertise in policymaking.¹⁵⁰ Agencies have large staffs with specialized education, and they may conduct studies, gather data, and widely solicit public input to inform their determinations. On the other hand, courts must rely on the information that the parties present to them or that they find through their limited independent research. If society values thoroughly informed policies, it makes sense to put policymaking authority in the hands of agencies that have the ability and expertise to make those decisions.

These same types of considerations apply to allocating power within the judiciary. For example, those who highly value efficiency might prefer that judges handle all cases, while those concerned about leaving too much power in the hands of judges might prefer to assign more responsibilities to juries. Judges and juries also have different institutional advantages. For example, judges are educated in the law, and their experience may make them better equipped than jurors for some aspects of adjudication, such as weighing the evidence in a particular case and balancing the benefits of a decision against its costs. Further, because they are repeat adjudicators, judges may be in a better position to evaluate harms by comparing cases.

145. F. Andrew Hessick & Carissa Byrne Hessick, *The Non-Redelegation Doctrine*, 55 WM. & MARY L. REV. 163, 201 (2013) (“[T]ransferring the power to set policy to a different body changes the process for establishing a broad range of substantive policy.”).

146. U.S. CONST. art. I, § 2.

147. See THE FEDERALIST NO. 52, *supra* note 20, at 300 (James Madison) (“[I]t is particularly essential that the [House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people.”).

148. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII.

149. See Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1279 (2001) (discussing how institutional design affects expertise and information flow).

150. See *generally* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938).

By contrast, juries are likely to be better than judges at reaching decisions that reflect the views of a broader cross section of the community,¹⁵¹ such as whether an alleged tortfeasor acted reasonably or unreasonably and how much to award for pain and suffering. But jurors are unlikely to be educated in the law, and they are unlikely to have prior experience in adjudications.¹⁵² Accordingly, if society values a judgment that reflects the views of the community in a particular circumstance, it should prefer providing a jury in that instance.

2. *The Constitution Preserves the State Power to Arrange State Government*

The Framers preserved in the Constitution the sovereign power of the states to arrange their own governments. Although the Constitution prescribed the allocation of power in the national government, it did not prescribe governmental institutions that the states must adopt.¹⁵³ Instead, it left that power to the states.¹⁵⁴ As James Madison stated in *The Federalist No. 45*, the “powers reserved to the several States” under the Constitution included “the internal order . . . of the State.”¹⁵⁵

The only provision in the original Constitution bearing on the organization of state government is the Guarantee Clause in Article IV, which provides that the United States must “guarantee” to the states “a Republican Form of Government.”¹⁵⁶ On its face, this Clause protects the state power to organize state

151. Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1775 (1999) (“The one task that juries indisputably perform better than judges is to reflect the ‘conscience of the community’ . . .”).

152. Criticisms of this sort led to a push for the abolition of juries in the nineteenth and early twentieth centuries. See Andrew Kent, *The Jury and Empire: The Insular Cases and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 S. CAL. L. REV. 375, 405 (2018).

153. *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) (“The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states.”); see also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549–50 (1985) (“[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments.” (alteration in original) (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938))).

154. *Mayor of Phila. v. Educ. Equal. League*, 415 U.S. 605, 615 n.13 (1974) (“The Constitution does not impose on the States any particular plan for the distribution of governmental powers.”); see also *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (“[T]he concept of separation of powers embodied in the United States Constitution is not mandatory in state governments.”).

155. THE FEDERALIST NO. 45, *supra* note 20, at 262 (James Madison).

156. U.S. CONST. art. IV, § 4. Although phrased in terms of a duty on Congress to guarantee a republican government in the states, the Clause has been understood to imply a duty on the part of the states themselves to provide such a government. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175 (1874). That reading corresponds with one of the major reasons for the Clause: the belief that maintaining a national republic depended on the states having republican governments. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 206 (Max Farrand ed., 1937) (noting Edmund Randolph’s statement of June 11, 1787, that “a republican government must be the basis of our national union; and no state in it ought to have it in their power to change its government into a monarchy”); see THE FEDERALIST NO. 43, *supra* note 20, at 245 (James Madison). But note that this was not the only reason for the Clause. Some argued that it was to require Congress to help the states to prevent tyranny. See also THE FEDERALIST NO. 43, *supra* note 20, at 245 (James Madison); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 47 (Max Farrand ed., 1937)

governments—so long as they are republican—by imposing an obligation on the United States to prevent efforts to displace state governments.¹⁵⁷ At the same time, the Clause effectively imposes an obligation on the states to adopt a republican government—one in which the people “choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves.”¹⁵⁸ But the Clause does not dictate the particular form of republican government that the states must adopt.¹⁵⁹ It instead leaves the precise form of republican government to the states.¹⁶⁰ As Madison stated in *The Federalist No. 43*, “Whenever the States may choose to substitute other republican forms, they have a right to do so The only restriction imposed on them is that they shall not exchange republican for anti-republican Constitutions”¹⁶¹

Confirming this conclusion is the variety of government arrangements in the states. For example, at its founding, Pennsylvania vested the legislative

(noting James Wilson’s statement of July 18, 1787, that “[t]he object [of the Clause] is merely to secure the States agst. [sic] dangerous commotions, insurrections and rebellions”).

157. See Ryan C. Williams, *The “Guarantee” Clause*, 132 HARV. L. REV. 602, 672 (2018) (concluding that the reason for the Clause was to “serve as a bulwark of state sovereignty against federal interference”). Professor Williams goes even further, arguing that the reason for the Clause was to prohibit the United States from displacing state governments with federal ones. *Id.*

158. *In re Duncan*, 139 U.S. 449, 461 (1891).

159. *Minor*, 88 U.S. (21 Wall.) at 175 (1874) (“No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated.”).

160. *Id.*; 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1811, at 681 (Da Capo Press 1970) (1833) (“Whenever the states may choose to substitute other republican forms, they have a right to do so The only restriction imposed on them is, that they shall not exchange republican for anti-republican constitutions”). Aside from setting outer constraints on the states’ forms of government, the original Constitution places various substantive limits on state power. For example, Article I, Section Ten prohibits states from taking particular actions, such as enacting ex post facto laws. These substantive limitations, however, do not dictate how the state must arrange its government.

161. THE FEDERALIST NO. 43, *supra* note 20, at 246 (James Madison). Professor Amar has argued that the Guarantee Clause took on a new meaning following Reconstruction because the proponents of the Reconstruction Amendments relied on the Republican Form of Government Clause as a sword to coerce states into ratifying the Amendments. See AMAR, *supra* note 35, at 80–81. In his view, the ratification of the Fourteenth Amendment effectively incorporated this new view of the Clause under which states no longer have the prerogative to arrange their governments. *Id.* But that argument has several faults. First, that the Clause was used in a new way to coerce acquiescence to the Fourteenth Amendment does not establish that the Clause was validly used, and it is highly contestable that we should read the Fourteenth Amendment, which does not speak in terms of government forms, as enshrining that new, invalid use. See Williams, *supra* note 157, at 678–79 n.472 (criticizing Amar’s method of interpreting the Guarantee Clause). Moreover, the Reconstruction practice has not resulted in the view that states no longer have the power to organize their governments. States today still maintain a variety of different forms of government. See *infra* text accompanying notes 162–74. In any event, the Reconstruction practice would not establish that the Republican Form of Government Clause stripped states of control over their governments; it shows only that Congress can opt not to recognize state governments. It therefore does not establish that the Fourteenth Amendment provides a sufficient basis to overcome the principle of preserving state sovereignty and to incorporate structural rights against the states.

power in a unicameral legislature and the executive power in an executive council.¹⁶² New York provided for a council of revision, which consisted of the governor, chancellor, and judges of the supreme court, that had authority “to revise all bills about to be passed into laws by the legislature.”¹⁶³ Connecticut maintained its royal charter, which dispersed executive power among fourteen elected officials and assigned both the legislative and judicial power to a general assembly.¹⁶⁴ The variety continues to this day. Although most states have bicameral legislatures, Nebraska has a unicameral legislature.¹⁶⁵ The executive arrangements are even more varied,¹⁶⁶ with the different states allocating executive power among a total of thirteen different offices.¹⁶⁷

State judiciaries are no less varied.¹⁶⁸ Each state has adopted different jurisdictional arrangements. They each have created their own structure of courts to handle torts, contracts, family matters, probate, and other matters.¹⁶⁹ More generally, many states have merged law and equity in their courts, but others—such as Delaware, Mississippi, and Tennessee—have separate courts for law and equity.¹⁷⁰ They have also varied in their appellate hierarchy. For example, Texas has two supreme courts. One handles criminal matters,¹⁷¹ and the other handles all other matters.¹⁷² Nine states do not have intermediate appellate courts.¹⁷³ And until 1845, Georgia did not have any appellate courts.¹⁷⁴

In addition to protecting a core feature of state sovereignty, leaving the design of state governments to the states aligns with the reasons for adopting a federal system in the first place. One frequently invoked benefit of federalism

162. PA. CONST. of 1776, §§ 2–3, 19. In 1790, Pennsylvania adopted a new constitution that established a bicameral legislature and governor. PA. CONST. of 1790, art. I, § 1; *id.* art. II, § 1.

163. N.Y. CONST. of 1777, art. III.

164. CHARTER OF CONNECTICUT (1662), avalon.law.yale.edu/17th_century/ct03.asp.

165. NEB. CONST. art. III, § 1.

166. *State & Local Government*, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/state-local-government/> (last visited Sept. 5, 2019) (“No two state executive organizations are identical.”).

167. *State Executive Offices*, BALLOTPEDIA, https://ballotpedia.org/State_executive_offices (last visited Sept. 5, 2019) (listing the different state offices).

168. Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1886–96 (2001) (providing examples of different state judicial structures).

169. See *State Court Structure Charts*, CT. STAT. PROJECT, http://www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts.aspx (last visited Sept. 5, 2019) (mapping all the state judicial structures).

170. DEL. CONST. art. IV, § 1; MISS. CONST. art. 6, § 152; TENN. CONST. art. VI, § 1.

171. TEX. CONST. art. V, § 5.

172. *Id.* § 3.

173. *Intermediate Appellate Courts*, BALLOTPEDIA, https://ballotpedia.org/Intermediate_appellate_courts (last visited Aug. 24, 2019).

174. *The Supreme Court of Georgia History*, SUP. CT. GA., <https://www.gasupreme.us/court-information/history/> (last visited Aug. 24, 2019). Before that time, appeals in the state consisted of a new trial in the same local court. *Id.*

is that it allows states to act as laboratories to experiment with different approaches to handling problems.¹⁷⁵ Preserving state control of their government structures allows states the flexibility to act this way because it provides an opportunity for states to experiment with different types of government.¹⁷⁶ But requiring states to adopt the same government structures would undermine this benefit. It would stifle state innovation and experimentation that may otherwise lead to improved methods for administering the states.¹⁷⁷

A second reason for federalism is that dividing power between state and federal governments acts as a check on those governments.¹⁷⁸ According to the Court, this checking function is the “principal benefit of the federalist system.”¹⁷⁹ Requiring states to adopt the same government structures imperils this function. The required government structure may turn out to be easily captured, to be too unwieldy, or to have some other defect that makes the states an ineffectual check on the federal government. Allowing states to diversify their forms of government reduces this risk.

To effectuate this principle of leaving control of state government to the states, the Court has often taken pains to interpret broad constitutional provisions in a way that avoids interfering with state sovereignty. An early example is *Barron v. City of Baltimore*.¹⁸⁰ There, the plaintiff sued Baltimore for rendering its wharf unusable, claiming that he was entitled to damages under the Fifth Amendment’s Takings Clause.¹⁸¹ The Court rejected the claim.¹⁸² It explained that the Constitution was established for the government of the United States, “not for the government of the individual states,” and that, while the Constitution could restrict state power, the Court would not construe the Constitution to limit state sovereignty except when the Constitution does so by “express words,”¹⁸³ which the Bill of Rights does not.¹⁸⁴

175. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (describing states as “laborator[ies]”); Hart, *supra* note 21, at 493 (“The federal system has the immense advantage of providing forty-eight separate centers for . . . [legislative] experimentation.”).

176. Preserving the ability of states to act as laboratories does not mean that states will, in fact, act as laboratories. See Hannah J. Wiseman & Dave Owen, *Federal Laboratories of Democracy*, 52 U.C. DAVIS L. REV. 1119, 1137–46 (2018) (raising doubts about state experimentalism). Even so, preserving the ability to experiment is valuable because it preserves the possibility of future experimentation.

177. See, e.g., Chapman & McConnell, *supra* note 122, at 1703–06 (discussing the importance of federalism for innovation).

178. THE FEDERALIST NO. 28, *supra* note 20, at 151 (Alexander Hamilton) (stating that separate state governments provided a means to “check the usurpations” of the federal government).

179. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

180. 32 U.S. (7 Pet.) 243 (1833).

181. *Id.* at 245–46.

182. *Id.* at 250–51.

183. *Id.* at 247–48.

184. The one proposed amendment in the original Bill of Rights that did explicitly regulate state governments—an amendment that would have required states to try criminal cases by juries—failed to garner enough votes in Congress to be sent to the states. Although the House passed the amendment, the Senate did not. See EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 215–19 (1957).

Following a similar rationale, the Court has often interpreted broad language in constitutional provisions to include implicit exceptions to prevent interference with the operation of state government. For example, Article IV authorizes Congress to admit new states.¹⁸⁵ In the exercise of that power, Congress can impose conditions on states for their admission.¹⁸⁶ But in *Coyle v. Smith*,¹⁸⁷ the Court held that Congress could not reserve to itself the power to dictate the location of Oklahoma's capital in the future as a condition of admitting Oklahoma as a state.¹⁸⁸ The rationale was that once the nation admits a state, Congress cannot interfere with that state's core sovereignty.¹⁸⁹ Although it acknowledged that the text of the Clause does not explicitly prohibit Congress from imposing this condition, the Court explained that the power to locate the capital is one of the "essentially and peculiarly state powers" that cannot be controlled by Congress.¹⁹⁰ How a state arranges its own republic form of government is no less essential or peculiar to the state.

The Court has read similar restrictions into the Commerce Clause. The Clause authorizes Congress to "regulate Commerce . . . among the several States."¹⁹¹ Nothing in the text of the Clause prohibits Congress from using the power to regulate the way in which states exercise government powers. But the Court has read an implicit exception of that sort into the Clause. For example, in *New York v. United States*,¹⁹² the Court held that Congress could not require state legislatures to adopt regulations relating to the disposal of radioactive waste, even though the disposal of waste is interstate commerce.¹⁹³ The Court explained that the Commerce Clause "confers upon Congress the power to regulate individuals, not States."¹⁹⁴ Accordingly, the Court stated, it does not authorize "Congress to command a state government to enact state regulation."¹⁹⁵

185. U.S. CONST. art. IV, § 3, cl. 1.

186. *Coyle v. Smith*, 221 U.S. 559, 568 (1911) ("Congress may require, under penalty of denying admission, that the organic laws of a new State at the time of admission shall be such as to meet its approval."); see Vasan Kesavan & Michael Stokes Paulsen, *Let's Mess with Texas*, 82 TEX. L. REV. 1587, 1604 (2004) (discussing Congress's power to condition consent to admission of states).

187. 221 U.S. 559.

188. As the Court noted, the only possible restriction on this admission power is that no new state shall be formed within the jurisdiction of any other state. *Id.* at 566.

189. *Id.* at 565–66.

190. *Id.* at 565; see also *Lane Cty. v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868) (holding that, even in the absence of explicit language protecting state taxation, Congress cannot use any of its powers to prohibit states from imposing taxes, reasoning that "the power of taxation is indispensable" to the existence of the states).

191. U.S. CONST. art. I, § 8, cl. 3.

192. 505 U.S. 144 (1992).

193. See *id.* at 159–60.

194. *Id.* at 166.

195. *Id.* at 178 (emphasis omitted); see also *Printz v. United States*, 521 U.S. 898, 935 (1997) ("The Federal Government may [not] command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

In other words, the Court held that despite its unequivocal language, the Commerce Clause contains an implicit exception that bars Congress from using that power to force state governments to implement federal programs.¹⁹⁶

To be sure, the Court has concluded that the Constitution permits some limited intrusions on the state power to manage state government. In *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁹⁷ for example, the Court held that the Commerce Clause authorizes Congress to impose minimum-wage requirements for state employees.¹⁹⁸ But that decision did not overturn the principle against federal interference with the states' power to arrange their governments. It is one thing for Congress to require that states pay a minimum wage to employees of existing state institutions. It is quite another for Congress to require the state to establish the institution in the first place. The former says only that the states must pay their employees enough; the latter dictates how the state must govern, and it is significantly more intrusive. The *Garcia* Court acknowledged this point, recognizing that there may be "limits" on Congress's power to arrange state government, and cited *Coyle* to suggest that Congress could not use its power to force states to relocate their capitals.¹⁹⁹

The upshot of these cases is that preserving state power to arrange government is an important background principle of the Constitution. When reading constitutional provisions that use broad language, courts have concluded that these broad provisions contain implicit exceptions protecting the states' power to organize their governments.

Of course, the presumption is not absolute. Several constitutional provisions explicitly restrict the way in which states may arrange their governments. For example, as noted earlier, the Guarantee Clause requires states to adopt

196. The Court has suggested similar exceptions for the Equal Protection Clause. In *Sugarman v. Dongall*, 413 U.S. 634, 647 (1973), the Court concluded that the Equal Protection Clause forbids states from imposing a blanket prohibition on hiring aliens in any state position. But in doing so, the Court suggested that states can discriminate against hiring aliens whenever they have any legitimate reason for doing so, including the interest in administering state government. *Id.* (recognizing a legitimate state interest in prohibiting aliens from "holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government"); see also *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970) ("In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States' powers over elections which they had before the Constitution was adopted and which they have retained throughout our history.").

197. 469 U.S. 528 (1985).

198. *Garcia* overturned *National League of Cities v. Usery*. *Id.* at 557. In *Usery*, the Court held that Congress could not use the commerce power to impose minimum wage requirements on state employees, stating that "[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions." *Nat'l League of Cities*, 426 U.S. 833, 845 (1976). Although *Garcia* overturned *Usery*, it did not hold that Congress has plenary power to interfere with state government.

199. *Garcia*, 469 U.S. at 556 (citing *Coyle v. Smith*, 221 U.S. 559 (1911)) ("These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause.").

republican forms of government.²⁰⁰ The Fifteenth Amendment also restricts the states' administration of their governments by prohibiting states from limiting the right to vote based on race.²⁰¹ Similarly, the Nineteenth Amendment requires states to permit women to vote in state elections.²⁰² But these express exceptions prove the rule.²⁰³ They suggest that except when the Constitution explicitly regulates the states' power to arrange their governments, one should not read the Constitution to curtail that state power.

B. *Against Incorporating Structural Rights*

Structural rights should not be incorporated against the states because they interfere with the principle of preserving state control over state government. Although there is broad consensus that the Fourteenth Amendment extends some rights against the states, there is disagreement about which rights fall in this category. This disagreement derives from the failure of the text and legislative history of the Fourteenth Amendment to specify *which* rights the Amendment does and does not apply against the states through incorporation. Accordingly, other principles must guide the determination whether to incorporate a right. One of those principles is that our Constitution establishes a system of dual government under which the states retain significant sovereignty, and a central feature of that sovereignty is a state's prerogative to organize its government. Structural rights, accordingly, should not be incorporated.²⁰⁴

1. *Against Reading the Fourteenth Amendment to Incorporate Structural Rights*

Courts and commentators have cited two clauses to support incorporation: the Privileges or Immunities Clause and the Due Process Clause. The text of neither Clause suggests that they were meant to displace the states' power to arrange their governments. Neither Clause mentions the distribution of power within the state—much less directs the states to adopt particular government structures. Instead, both Clauses seek to protect individual rights. They prohibit states from depriving citizens of privileges or immunities and from depriving individuals of life, liberty, or property without due process.

Highlighting that the aim of the Clauses is not to limit the states' ability to arrange their governments is that other sections of the Fourteenth Amendment

200. U.S. CONST. art. 4, § 4.

201. *Id.* amend. XV.

202. *Id.* amend. XIX.

203. See *Oregon v. Mitchell*, 400 U.S. 112, 125–26 (1970) (“Amendments Fourteen, Fifteen, Nineteen, and Twenty-four, each of which has assumed that the States had general supervisory power over state elections, are examples of express limitations on the power of the States to govern themselves.”).

204. See *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring) (stating that it would “make the deepest inroads upon our federal system for this Court [to] determine the appropriate distribution of powers and their delegation within the forty-eight States”).

do restrict that ability. Section Three of the Fourteenth Amendment does include an explicit provision affecting the states' ability to arrange their government themselves. It prohibits individuals from holding state office if they rebel against the United States while holding a public office in which they took an oath to support the Constitution.²⁰⁵ This express limitation on state control over governance highlights that Section One does not dictate to the states how to administer their governments. The Tenth Amendment buttresses this conclusion by expressly reserving to the states powers not prohibited by the Constitution.²⁰⁶ The absence in Section One of provisions requiring states to adopt particular structures suggests that the states should not be required to adopt those structures.

Nor does the history of the Fourteenth Amendment establish that the Amendment was meant to restructure state governments. As others have shown, the driving motivation for the Amendment was to prohibit the states from discriminating against and violating the rights of individuals.²⁰⁷ But nothing suggests that the drafters of the Fourteenth Amendment meant through the Privileges or Immunities Clause or the Due Process Clause to wrest from the states control over allocation of state government powers.²⁰⁸

At the same time, the history of the Fourteenth Amendment suggests that the drafters actively sought to avoid unduly interfering with state sovereignty. Even the drafters who most strongly favored incorporation of rights against the

205. U.S. CONST. amend. XIV, § 3; *see also, e.g., id.* amend. XV (prohibiting states from limiting the right to vote based on race); *id.* amend. XIX (requiring states to permit women to vote in state elections). Section Two of the Fourteenth Amendment prescribes how federal representatives and electors are to be apportioned among the states. *Id.* amend. XIV, § 2. It does not direct how the states must organize their own governments.

206. *Id.* amend. X.

207. Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 427 (1990) (“The dual purposes of the fourteenth amendment, permeating through *all* of its provisions, were (1) to provide constitutional protection for the fundamental or ‘God-given’ or ‘natural’ rights of all United States citizens by (2) radically altering the design of federalism underlying the Bill of Rights to invest the federal government with complete authority to punish the infringement of such rights by either state or private action.”); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 884–90 (1986) (gathering historical evidence to show that the motivation for the Amendment was to protect civil rights). Section 1983, passed pursuant to Section Five of the Fourteenth Amendment, provided individuals with a cause of action to enforce the individuals’ rights conferred by the Fourteenth Amendment. 42 U.S.C. § 1983 (2018).

208. *See, e.g.,* *Adamson v. California*, 332 U.S. 46, 62 (1947) (Frankfurter, J., concurring) (noting that a number of former Supreme Court Justices that “were alert in safeguarding and promoting the interests of liberty and human dignity through law” and “were also judges mindful of the relation of our federal system to a progressively democratic society and therefore duly regardful of the scope of authority that was left to the States even after the Civil War”).

states stated that the Amendment incorporated only the first eight amendments²⁰⁹—a view to which the Court still adheres today.²¹⁰ One explanation for the omission of the Ninth and Tenth Amendments, which reserve to the states and people the rights and powers not addressed by the Constitution, is that applying these provisions against the states would significantly distort our federal system. The purpose of those Amendments was to protect state power, yet to apply them against the state would curtail state power.²¹¹ And as noted earlier, a core feature of that state sovereignty was the power to arrange state government.²¹²

The text and history of the Fourteenth Amendment, therefore, do not provide an adequate basis to overcome the principle against interfering with the states' ability to arrange their governments. Accordingly, it should not be read to incorporate structural rights against the states. Incorporating those structural rights would require states to establish government structures and assign powers to those structures. Thus, the Fourteenth Amendment should not be read to require states to convene grand juries to issue indictments, to convene petit juries to try individuals accused of crimes, or to convene civil juries to try cases at common law.

To be sure, incorporating substantive and procedural provisions in the Bill of Rights also intrudes on state sovereignty. But the intrusion from incorporating structural rights is far greater. Incorporating substantive rights prohibits the states only from taking particular types of actions. The Free Speech Clause of the First Amendment, for example, prohibits the states from abridging the freedom of speech.²¹³ These rights do constrain state power by prohibiting some state actions. But the intrusion on the state is limited in the sense that it only prohibits certain substantive actions. The Free Speech Clause, for example, pertains to only those state decisions involving the regulation of speech—a small sliver of state actions.

209. Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801, 877 (2008) (stating that John Bingham, who drafted Section One of the Fourteenth Amendment, “left both the Ninth and Tenth Amendments off of his list of individual privileges or immunities protected against state action by the Fourteenth Amendment”).

210. See *McDonald v. City of Chicago*, 561 U.S. 742, 765 n.13 (2010) (omitting mention of the Ninth and Tenth Amendments as among those unincorporated through lack of decision, suggesting a view that they could not plausibly apply against the states).

211. *Town of Greece v. Galloway*, 572 U.S. 565, 606 (2014) (Thomas, J., concurring in part and concurring in the judgment) (“To incorporate [the Tenth Amendment] would be to divest the States of all powers not specifically delegated to them, thereby inverting the original import of the Amendment.”); accord *McDonald*, 561 U.S. at 897 (Stevens, J., dissenting); see also AMAR, *supra* note 4, at 158–57 (making a similar point). Some have made a somewhat analogous point about the Establishment Clause. They have argued that the Clause meant to protect the states from federal interference with state religions and therefore should not be incorporated against the states. See, e.g., *Galloway*, 572 U.S. at 606–07 (2014) (Thomas, J., concurring in part and concurring in the judgment).

212. See *supra* text accompanying note 143.

213. U.S. CONST. amend. I.

Procedural rights prescribe the procedures a state must follow when taking particular actions. For example, the Fourth Amendment requires the government ordinarily to obtain a warrant before conducting a search of a house.²¹⁴ These rights also constrain state power because they dictate the process the state must follow when it performs certain actions. But these intrusions on the state are also limited. They simply tell the state institutions that are empowered to act the process they must follow when they take particular actions.

The intrusion on the states by incorporating structural rights is significantly greater. Structural rights allocate government power. The structure of a government is the defining feature of its sovereignty. The adoption of a particular structure reflects the values of the people and can affect a wide variety of government actions. Requiring a state to adopt a unicameral legislature, for example, affects every piece of legislation adopted by the state. The importance of the Constitution itself reflects the centrality to sovereignty of the ability to arrange government power: its primary function was to define the allocation of power in the federal government.²¹⁵

Incorporating structural rights raises all of these concerns. Whether to assign a judicial decision to a jury or judge turns on a variety of value choices for the people about how to allocate the judicial power. Incorporation takes that decision away from the citizens of each state and replaces it with the mandates in the Bill of Rights. Incorporating structural rights requires states to establish particular government institutions before taking certain actions, such as requiring a jury to find facts necessary to increase a criminal defendant's punishment range at sentencing. But, if not for incorporation, the state might choose not to create those institutions to exercise those powers. Because of the different considerations that are important to laypeople versus judges, incorporating those rights can lead to different outcomes in different cases. Even though most defendants plead guilty and most parties settle civil cases, these effects are felt because those decisions are made in the shadow of a jury.

To be clear, none of this is to say that the Fourteenth Amendment does not limit state sovereignty. The Amendment *does* limit state sovereignty. But it does not eliminate the states as sovereigns. One of the core features of sovereignty is the power to arrange government. Section One of the Fourteenth Amendment does not strip states of that power. And while Section Three of the Amendment does intrude on this state prerogative to arrange government, it does so in an explicit, limited way.

Incorporating structural rights would also threaten the states' ability to check the federal government. As noted above, the potential for states to adopt different forms of government is an important aspect of preserving this role of the states. This argument equally applies to the states' ability to arrange their

214. *Id.* amend. IV.

215. *See, e.g., id.* arts. I–III.

judicial departments as to their ability to arrange other departments of state government.

One might argue that, even if permitting the states to adopt different government structures usually protects their ability to check the federal government, the argument does not extend to juries. After all, one reason for juries is to check the government, so requiring them should not impair the states' ability to check the federal government.

This argument misses the mark. Even if it were true that requiring juries would not hamper the states' power to check the federal government, the structural nature of juries would still counsel against incorporation. The important point is that, as a general matter, requiring states to adopt particular government structures does present a risk to the states' ability to check the federal government. One should not dispense with a principle simply because violating the principle in a single circumstance does not cause easily identifiable harm.

But it is not true that requiring juries poses no risk to the states' ability to check the federal government. One can easily imagine scenarios—be it because of an increasing drain on judicial resources as more federal criminal statutes are enacted or because of government shutdowns that close the federal courts—under which Congress decides to shunt prosecutions for federal offenses to state courts. Likewise, one can imagine a federal official playing on local populace's fears to encourage convictions within demographic groups that he opposes. In that situation, leaving criminal trials to state judges with more information than laypeople on juries could very well present a stronger bulwark against the federal government.²¹⁶

2. *Consistency with Precedent*

A doctrine of not incorporating structural rights also makes better sense of the state of the law than the current doctrine does. Under current doctrine, the Fourteenth Amendment incorporates rights that are fundamental or deeply rooted in our history. Under that standard, the Fourteenth Amendment should incorporate the rights to a grand jury and to a civil jury.²¹⁷ Those rights are no less rooted in our nation's history than other rights that have been incorporated against the states.²¹⁸ Nevertheless, the Court has refused to incorporate those

216. Of course, a state judge who knows that prejudice underlies a conviction can overturn that conviction. But the judge might not know why the jury convicted and, accordingly, would uphold the conviction so long as there was a reasonable basis for doing so.

217. See *supra* notes 65–75 and accompanying text.

218. See Thomas, *supra* note 118, at 1197–99. One argument to justify the nonincorporation of the Grand Jury Clause is that only eighteen states today require grand jury indictments for felonies. See, e.g., AMAR, *supra* note 35, at 166 n.*. But that current practice does not establish what is rooted in history, and history suggests that grand juries were regarded as essential. See *supra* notes 68–71 and accompanying text. All states

rights. A structural rights approach to incorporation explains the failure to incorporate those rights. Those rights are not incorporated because doing so would interfere with the states' prerogative to organize their governments.²¹⁹

Recognizing that structural rights should not be incorporated also helps explain the doctrinal anomalies surrounding the incorporated right to a jury in state criminal prosecutions. Although incorporated rights apply equally against the federal and state governments, the Court has not applied the right to a jury equally to the state and federal governments. For example, the Court has long held that the Sixth Amendment requires jury verdicts to be unanimous in federal court,²²⁰ but it has said that this restriction does not apply to state criminal juries.²²¹ One explanation for this conclusion is that the Court recognized that requiring unanimity unduly interfered with the states' ability to administer their judicial systems.²²²

A similar explanation underlies the Court's decision relating to the size of juries. Although the Court had long held that the Sixth Amendment guaranteed a twelve-person jury,²²³ in *Baldwin v. New York*, the Court upheld New York's law authorizing criminal trials by juries with six members.²²⁴ In his dissent, Justice Harlan explained that the reason the Court had modified the right was to allow the states "elbow room in ordering their own criminal systems."²²⁵ He further explained that, although the Court's decision permitted both the federal and state systems to have fewer than twelve jurors, the reason that the Court

required grand juries at the founding, and almost all states required grand jury indictments when the Fourteenth Amendment was ratified. Moreover, to the extent incorporation is meant to change state practices, justifying nonincorporation on current state practices turns incorporation on its head.

219. Professor Amar argued that one might justify the nonincorporation of the Seventh Amendment on the ground that the requirement was meant to require the federal government to follow the state rules of juries by giving a person a right to a jury whenever a state court would do so; thus, the argument goes, incorporating the Seventh Amendment is unnecessary because it would require only that states follow their own jury rules. AMAR, *supra* note 4, at 276. That is an interesting argument but ultimately one that is hard to square with the text. The Seventh Amendment does not say that the federal government must follow the state's practice on providing civil juries. It preserves the right to jury trial at common law. U.S. CONST. amend. VII. But as Amar acknowledges, the states did not follow a single common law practice; they varied on when a jury was required. AMAR, *supra* note 4, at 89. To avoid this problem, Amar suggests that state practice was the common law. *Id.* But decisions such as *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), suggest that the common law was not viewed simply as state law.

220. *Maxwell v. Dow*, 176 U.S. 581, 586 (1900).

221. *McDonald v. City of Chicago*, 561 U.S. 742, 766 n.14 (2010) (explaining how the Court reached this result).

222. There are, of course, good reasons not to require unanimity—such as accommodating ever-increasing diversity among jurors and avoiding mistrials because of recalcitrant jurors. *See* AMAR, *supra* note 35, at 442–43 (arguing that diversity of jurors counsels against unanimity). But these practicalities do not explain the differential treatment between state and federal juries.

223. *Thompson v. Utah*, 170 U.S. 343, 349 (1898).

224. 399 U.S. 66 (1970).

225. *Id.* at 118 (Harlan, J., dissenting).

modified the right was to avoid interfering with the state's administration of its government.²²⁶

Both of these anomalies reflect the discomfort with infringing on state sovereignty when the Court incorporates structural rights. Deincorporating the right to a criminal jury under a structural rights approach would avoid these difficulties altogether.

3. *Responding to Objections*

Although incorporating structural rights curtails the states' power to allocate government power, one might contend that the Fourteenth Amendment nevertheless requires incorporation of those rights. There are three major arguments to support that position. But none of them provides a sound basis for incorporating structural rights.

The first argument is that the goal of the Fourteenth Amendment is to protect rights, and protecting rights is more important than protecting the states' power to arrange their governments. But this argument begs the question. It rests on the assumption that the Fourteenth Amendment aims to protect rights, even if doing so interferes with the states' ability to organize their governments. That assumption is not warranted. The Fourteenth Amendment no doubt prohibits the states from interfering with some rights. But it does not prohibit the states from interfering with *all* rights. For example, the Court held only five years after the ratification of the Fourteenth Amendment that the Amendment does not prohibit states from interfering with economic rights, explicitly invoking the federalism reasoning that reading the Amendment to protect those rights would result in the Court becoming "a perpetual censor upon all legislation of the States."²²⁷ Although the Court temporarily reversed course during the *Lochner* era, it returned to its original position only a few decades later.²²⁸ Nor does the Amendment incorporate all common law rights against the states.²²⁹ If it did, states could not enact legislation modifying the elements of common law actions or capping damages in those actions. Nor is it any answer to say that the jury rights—especially the right to a criminal jury—should be incorporated because they are important. The question is whether the importance of the right trumps the states' prerogative to arrange their own governments. The principle of preserving state control over state government supports answering that question in favor of not incorporating structural rights.

226. *Id.* (characterizing the majority's decision as "diluting constitutional protections" to preserve state "elbow room").

227. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1872).

228. *See Nebbia v. New York*, 291 U.S. 502 (1934) (overturning the doctrine of economic rights).

229. *See McDonald v. City of Chicago*, 561 U.S. 742, 763 (2010) (stating the Court never adopted full incorporation and instead uses a process called "selective incorporation").

The second argument is that the Fourteenth Amendment prohibits states from depriving individuals of life, liberty, or property without due process, and providing a jury is a necessary component of due process. The argument is not that the Due Process Clause incorporates the jury clauses in the Bill of Rights; instead, it is that the Due Process Clause *independently* requires states to provide juries.²³⁰

But that conclusion rests on an uneasy interpretation of the Due Process Clause. To start, the term “due process” does not necessarily carry the idea of a jury. Historically, due process prohibited the government from arbitrarily acting against individuals, but it did not demand a jury.²³¹ The Supreme Court indicated in its 1855 decision in *Murray’s Lessee v. Hoboken Land & Improvement Co.*, decided only 13 years before the ratification of the Fourteenth Amendment, that it did not interpret the term that way.²³² There, the Court upheld the Treasury Department’s seizure of a customs collector’s property based on the Treasury’s determination that the collector owed the Treasury \$1 million.²³³ In doing so, the Court rejected the argument that due process required a jury, concluding that the Constitution “contains no description of those processes which it was intended to allow or forbid.”²³⁴

Further cutting against reading the Due Process Clause of the Fourteenth Amendment to contain a right to independent rights to juries is that the Clause mirrors the Due Process Clause of the Fifth Amendment. The similarity in language suggests that the two clauses should have the same meaning. The natural reading of the Fifth Amendment Due Process Clause is that it does not impose jury requirements; otherwise, the jury rights enumerated in the Fifth, Sixth, and Seventh Amendments would be redundant.²³⁵ To be sure, it is *possible* to read the Fifth Amendment Due Process Clause to require a jury.²³⁶ Attorney General William Wirt read the Clause this way, stating that it and the specific jury provisions were “positive and repeated provisions” guaranteeing the right to a jury.²³⁷ But given the presumption against redundancy, it is more natural to read

230. See Chapman & McConnell, *supra* note 122, at 1718 (making this argument).

231. LUCIUS POLK MCGEHEE, DUE PROCESS OF LAW 5–6, 233 (1906).

232. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855).

233. *Id.* at 285–86.

234. *Id.* at 276.

235. *Id.*; see *Hurtado v. California*, 110 U.S. 516, 534 (1884) (arguing that, to avoid rendering the Grand Jury Clause “superfluous,” the Court would not read the Due Process Clause to include a grand jury requirement).

236. See Chapman & McConnell, *supra* note 122, at 1718 (challenging the approach of “interpret[ing] ‘due process’ in such a way that it would not overlap with other, more specific procedural provisions”).

237. Cadets at West Point, 7 Op. Att’y Gen. 276, 276–77 (1819).

the clause not to require a jury. The virtually identical language in the Fourteenth Amendment's clause suggests that the same reading should be ascribed to both clauses.²³⁸

Moreover, to the extent the interpretations of the Fifth and Fourteenth Amendments *do* diverge, it should be in the direction of not reading the Fourteenth Amendment to include a jury requirement. Even if the Fifth Amendment were read independently to create rights to a grand jury, criminal jury, and civil jury, the Fourteenth Amendment should not be read that way. That reading of the Fourteenth Amendment better aligns with the background presumption against interfering with the state power to arrange government.²³⁹

The third argument against not incorporating structural rights is that incorporating the structural rights under the Fourteenth Amendment does not, by its own force, require the states to adopt those structures. Instead, the argument goes, it only incorporates the right not to have the states act unless they do so through those structures. Thus, one might argue, incorporating the right to a criminal jury does not *allocate* state judicial power to juries in criminal cases; instead, it merely *prohibits* states from trying individuals for crimes *unless* they provide juries. Thus, it is more like a right that prohibits the state from acting in a particular way than a structural right. On this view, incorporating the criminal jury right under the Fourteenth Amendment does not interfere with the states' prerogative to arrange their governments.

This objection misses the point. A state cannot allocate its power in a manner inconsistent with the incorporated right. So, even if incorporating the criminal jury right does not entail an affirmative allocation of power, incorporating that right still dictates how states may allocate that power. For example, even if incorporating the Sixth Amendment does not allocate power to juries, the incorporation of that right still prohibits states from allocating the power to decide criminal cases to judges instead of juries. Thus, even if incorporation of structural rights only prohibits states from adopting particular structures, as opposed to compelling them to adopt particular structures, that incorporation still infringes on the states' power to arrange their governments as they see fit.

Moreover, there is good reason to think that structural rights do affirmatively allocate power. The various jury provisions do not simply protect the interests of the individual parties. They also set forth the structure under which states are to adjudicate, and they provide opportunities for members of the

238. *In re Kemmler*, 136 U.S. 436, 448 (1890) (“[W]hen the same phrase was employed in the Fourteenth Amendment it was used in the same sense and with no greater extent.”).

239. This is not to say that the Due Process Clause places no limits on the way that states administer criminal justice. The Due Process Clause prohibits states from taking actions that “shock the conscience.” *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 849–50 (1998)). For example, authorizing a prosecutor to determine guilt would fail this standard. See David A. Suss, *Paternalism Versus Pugnacity: The Right to Counsel in Japan and the United States*, 72 *IND. L.J.* 291, 309 (1996).

community to participate in the adjudicatory process.²⁴⁰ This understanding underlies the Supreme Court's holdings into the twentieth century that defendants could not waive the right to criminal juries.²⁴¹

Treating structural rights as also affirmatively allocating power is most important for the right to a civil jury. Because civil suits vindicate individual rights, individuals choose whether to bring civil suits. Thus, states have no control over the filing of civil suits. If the right to a civil jury were incorporated against the states but states refused to provide juries, individuals could not vindicate their individual rights in civil suits through the method prescribed by law of a jury trial. Because states do not bring all civil cases, states could not avoid the obligation to provide civil juries simply by refusing to bring civil cases. The only ways that a state could prevent civil juries would be either to abolish all private rights or to abolish its state judicial system. The former is not an option because some rights are guaranteed by federal law or the Constitution; the latter is not an option because it would mean that the state has chosen to relinquish a core feature of what makes a government a government and may violate the Guarantee Clause and the Due Process Clause. Thus, because incorporating the civil jury right would mean that individuals have an entitlement to a jury to resolve their civil disputes, incorporation of that right must also implicitly confer power on juries to decide civil cases.

IV. IMPLICATIONS

Adopting a theory of not incorporating structural rights would have several important implications. First, it would justify the Court's decisions not to incorporate the Civil and Grand Jury Clauses. Preserving that status quo would ensure going forward that states have broad leeway to develop procedures for charging crimes and trying civil cases. Second, and much more significant, adopting this theory would result in the deincorporation of the Sixth Amendment right to a jury in criminal cases. That deincorporation would not only mean that states would no longer be obligated to provide a jury in criminal cases; it would also mean that decisions like *Apprendi* that restrict judicial fact-finding at sentencing would no longer apply to the states.

A. Civil Juries

None of the various incorporation theories addressed by the Court provides a sound justification for its consistent refusal to incorporate the Seventh Amendment right to a civil jury while incorporating other provisions of the Bill

240. See *supra* notes 127–28, 137–39 and accompanying text.

241. *Thompson v. Utah*, 170 U.S. 343, 353–54 (1898); *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874). The Court overturned this line of cases in *Patton v. United States*, 281 U.S. 276, 293 (1930).

of Rights.²⁴² Adopting a theory of not incorporating structural rights, however, would provide a legal foundation for that decision. Under the structural rights theory, incorporation would be inappropriate because it would require the states to create and empower a new government structure, usurping essential aspects of state sovereignty. Thus, the structural rights theory not only justifies but also aligns better with the Court's current precedent.

Not incorporating the Seventh Amendment against the states has the advantage of preserving their ability to experiment with different systems to resolve civil disputes. It is by no means obvious that the jury system in the Seventh Amendment represents the best way to resolve civil disputes. Commentators have raised various criticisms of juries. They have argued that, among other things, juries cause delays in the resolution of cases, are expensive, render decisions that are inconsistent with the law, and are generally unpredictable.²⁴³ Over the years, these concerns have led to several concerted efforts to abolish jury trials.²⁴⁴

Consistent with these criticisms, the Court has significantly curtailed the role of civil juries in federal cases over the years. It has expanded the role of summary judgment and judgments as a matter of law.²⁴⁵ Both devices diminish the role of the jury by allowing judges to enter verdicts based on their own evaluation of the evidence. Additionally, although the Constitution forbids judges from second-guessing jury verdicts, the Court has recognized exceptions to that prohibition. For instance, it has permitted judges to reduce jury awards through the process of remittitur.²⁴⁶

To be sure, even though the Seventh Amendment is not incorporated against the states, many states have enacted their own laws providing for civil

242. *McDonald v. City of Chicago*, 561 U.S. 742, 764–65, 765 n.13 (2010) (“Our governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment’s civil jury requirement long predate the era of selective incorporation.”). Justice Stevens, in dissent, noted that the Court has consistently denied certiorari to review incorporation of these provisions: “While those denials have no precedential significance, they confirm the proposition that the ‘incorporation’ of a provision of the Bill of Rights into the Fourteenth Amendment does not, in itself, mean the provision must have precisely the same meaning in both contexts.” *Id.* at 868 (Stevens, J., dissenting).

243. See DENNIS HALE, *THE JURY IN AMERICA: TRIUMPH AND DECLINE* 146–47, 162 (2016).

244. See, e.g., Kent, *supra* note 152, at 398–99 (recounting the early-twentieth-century efforts to abolish jury trials).

245. David R. Fine et al., *The “Vanishing” Civil Jury Trial*, 80 PA. BAR ASS’N Q. 24, 32–33 (2009).

246. The Court has also held that judges may set aside jury verdicts that are inconsistent with the law, so long as the movant moved for judgment as a matter of law before the verdict. See *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967). A similar process was recognized at common law, see *Balt. & Carolina Line v. Redman*, 295 U.S. 654, 660 (1935), though at common law the theory was that the judge reserved ruling on the motion until the verdict was entered, *id.*, while under the current practice a judge may enter a judgment *non obstante veredicto* even if he ruled on the earlier motion for judgment as a matter of law, see FED. R. CIV. P. 50(b).

juries. But those state rights are not identical to the rights conferred by the Seventh Amendment.²⁴⁷ More important, because those civil jury rights are the product of state law, states can choose to modify or abrogate them in the future.²⁴⁸

Not incorporating the civil jury right also preserves the ability of the states to develop equity. The law has long distinguished between legal and equitable proceedings. For example, the two traditionally involve different procedures, and courts have broader remedial discretion in suits at equity.²⁴⁹ The Seventh Amendment confers a right to a jury in suits that were heard by courts of law in 1791, not suits that were heard by courts of equity.²⁵⁰ Today, this means that courts employ a historical test, looking backward to the law of 1791, to determine whether a proceeding is legal or equitable and, thus, whether the Seventh Amendment requires a jury.²⁵¹

But the line between law and equity has not been static. Before the adoption of the Bill of Rights, actions occasionally crossed the line between law and equity, and that process has continued in some states.²⁵² It is unlikely that the line between law and equity in 1791 is optimal for today's world, but incorporating the Amendment would not fix that line in the states. Under the Court's current precedent and under the structural rights theory, the states are not constrained by the Seventh Amendment's historical test, even though they may have a similar constraint in their own state constitution. The difference is that not incorporating the Seventh Amendment right to a civil jury leaves the states free to modify that right under their own state constitutions, preserving essential features of state sovereignty.

Related, not incorporating the Seventh Amendment also provides states with broader flexibility to expand actions to address new types of harms. Under the Seventh Amendment, parties have a right to a jury if the parties would have

247. See Eric J. Hamilton, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 856 (2013) (noting that some states hold that their constitutions protect the right to a jury "as it was at the time the state constitution was adopted" as opposed to in 1791).

248. Subject to other independent constraints in the Constitution.

249. The importance of that discretion is reflected in the Court's conclusion that the *Erie* doctrine does not require federal courts to follow state law in fashioning equitable remedies. See *Guaranty Tr. Co. v. York*, 326 U.S. 99, 106 (1945) ("State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts.").

250. U.S. CONST. amend. VII ("In Suits at common law, . . . the right of trial by jury shall be preserved . . ."); *Katchen v. Landy*, 382 U.S. 323, 336–37 (1966) ("[I]n equity, there is no Seventh Amendment right to a jury trial . . .") (citations omitted);

251. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996). Under this test, the Court determines, "first, whether [it is] dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was." *Id.*

252. Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 658 (1963) ("Before the adoption of the constitutions the line between law and equity (and therefore between jury and non-jury trial) was not a fixed and static one."). Moreover, even under the Court's historical test, the line between law and equity is not always clear. The Court has had difficulty distinguishing between the two in several cases, and courts and commentators continue to disagree how to characterize various actions for restitution.

had a right to have that dispute heard by a jury in 1791.²⁵³ But changes in technology and resources have vastly increased the complexity of common law suits that were traditionally heard by juries. Even though a jury may have been well-suited to resolve a particular type of suit in the eighteenth century, that does not mean a jury is well-suited to resolve that suit in the twenty-first century. For example, a jury of individuals without technical expertise may be well-suited to resolve a dispute where the underlying claim is that Dan defrauded Paul in the sale of land. That same jury, however, may be significantly less well equipped to resolve a dispute where the underlying claim is securities fraud. Instead, the state might find it favorable to have a judge, especially one that is well versed in cases of securities fraud, decide that particular dispute. But if the Seventh Amendment is incorporated, then the states are obligated to provide a jury in that case. The obligation to provide a civil jury increases the cost to the states, which, in turn, decreases the states' incentive to expand actions to cover new types of harm.

B. *Grand Juries*

Adopting a theory of not incorporating structural rights would similarly justify the Court's decisions not to incorporate the Fifth Amendment right to a grand jury. As with the Seventh Amendment right to a civil jury, none of the incorporation theories propounded by the Court provides a sound justification for those decisions. Under the structural rights theory, however, not incorporating the Grand Jury Clause is justified because to incorporate that right would require states to create and assign power to the government structure of a grand jury.

Not requiring states to provide grand juries leaves states with discretion about how to administer their criminal justice system. As with the civil jury right, commentators have heavily criticized grand juries. They have argued that grand juries are no longer an effective check on prosecutorial overreach but instead have become a tool of the executive branch.²⁵⁴ These critics note that grand juries decide whether to indict based solely on evidence presented by the prosecutor²⁵⁵ and that grand juries almost always indict when prosecutors bring

253. *Markman*, 517 U.S. at 376 (“[T]he right of trial by jury . . . is the right which existed under the English common law when the Amendment was adopted.”). The dispute of course must also exceed \$20. U.S. CONST. amend. VII.

254. *See, e.g.*, *United States v. Mara*, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting).

255. Note, *Restoring Legitimacy: The Grand Jury as the Prosecutor's Administrative Agency*, 130 HARV. L. REV. 1205, 1208 (2017).

charges.²⁵⁶ Adding insult to injury, grand juries now function as a shield to protect prosecutors from public scrutiny because of the requirements that grand juries operate in secret.²⁵⁷

Of course, although the courts have not incorporated the Grand Jury Clause, grand juries are common in the states. All states rely on grand juries to some extent.²⁵⁸ But they also employ other means of charging crimes. Nearly two-thirds of states permit felonies to be charged by information.²⁵⁹ Additionally, the right to a grand jury under state law is not always identical to the Fifth Amendment right. Only eighteen states provide for the grand jury right in the state constitution.²⁶⁰ In some states, such as New York,²⁶¹ the right is the same right as the federal right. In other states the right is different. For example, the California constitution requires that each county convene grand juries, but it does not specify the functions of those grand juries, and those grand juries do not have the exclusive power to pass on any criminal charges.²⁶² Moreover, in most states, the right to a grand jury is statutory.²⁶³ This allows states not only to provide a grand jury right different from the Fifth Amendment grand jury right but also to more easily change their charging process if they find it ineffective.

Not incorporating the grand jury right also continues to leave the states with greater leeway in considering criminal justice reform. For example, the significant costs associated with imprisonment might lead states to consider new types of punishment for crimes. Under the Fifth Amendment, the federal government is required to empanel a grand jury to indict for capital or infamous crimes.²⁶⁴ If the Fifth Amendment were selectively incorporated, then the states would be obliged to do the same. The subjective nature of what constitutes a sufficiently stigmatic punishment makes it difficult to predict whether the Court would deem those new punishments infamous. Moreover, as the Supreme Court has made clear, what constitutes an infamous crime can change over time. Especially because those reforms are driven by cost concerns, the risk that new punishments might be deemed infamous and therefore require states to bear the costs of providing a grand jury may discourage these types of reforms.

256. *Id.* at 1210 (“Grand juries declined to indict in 11 out of 162,351 federal cases in 2010.”).

257. *Id.* at 1209.

258. Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL’Y & L. 67, 97–98 (1995).

259. 4 LAFAVE ET AL., *supra* note 2, § 14.2(d), at 341.

260. *Id.* § 14.2(c), at 337.

261. N.Y. CONST. art. I, § 6 (“No person shall be held to answer for a capital or otherwise infamous crime . . .”).

262. CAL. CONST. art. I, § 23 (“One or more grand juries shall be drawn and summoned at least once a year in each county.”).

263. See SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 1:1 (2d ed. 1997), Westlaw (updated Dec. 2018).

264. U.S. CONST. amend. V.

C. Criminal Juries

Undoubtedly, the most significant change resulting from the adoption of the structural rights theory is that it would require deincorporation of the Sixth Amendment right to a criminal jury. Unlike the implications discussed in the previous Subparts, this could significantly change the criminal justice system in many states. No longer applying this right against the states would mean that states are no longer obliged under the Constitution to provide a jury to try a person for a crime carrying more than a six-month sentence of imprisonment. States accordingly could authorize judges instead of juries to try all criminal charges. More important, it would significantly increase state discretion in designing their sentencing systems.

Although far from a trivial change, it is important not to overstate the effect of dispensing with the obligation to provide a jury for criminal trials. Currently, all fifty states have a right to a criminal jury in their own state constitutions.²⁶⁵ Most states have held that their respective jury-trial rights apply in the same situations as the Sixth Amendment right,²⁶⁶ though some states have differed. For example, Arizona and Hawaii have held that the state jury trial right applies to offenses historically deemed to be serious regardless of the punishment they carry.²⁶⁷ These state constitutional provisions would continue to require juries to try criminal cases even if the Sixth Amendment were deincorporated.

To be sure, it is possible that if the Sixth Amendment no longer applied, some states might amend their constitutions not to require juries in criminal cases. The theory is that those states retain the right to a jury in their constitutions only because they are already obliged to provide a jury under the Constitution. Following the structural rights theory, it is entirely possible that a state might remove the criminal jury right from its own constitution. But this seems unlikely, or at least unlikely to be widespread. One does not hear broad clamoring in the states for the eradication of juries in criminal cases. Instead, it may be true that states maintain a right to a jury in their constitutions—even though the Constitution already provides for one—because they view the criminal jury right as important. That seems especially so in states that confer broader jury rights than the Sixth Amendment.

Moreover, even if deincorporation did result in more state criminal cases being tried by judges instead of juries, that switch would not have a significant effect in the vast majority of criminal cases. Over 90% of criminal convictions

265. See Calabresi et al., *supra* note 74, at 111 n.305 (listing all fifty state constitutional provisions).

266. *Thomas v. State*, 331 A.2d 147, 150 (Del. 1975) (“The majority of states follow the guidelines of the United States Supreme Court in interpreting their respective state constitutional provisions regarding right to trial by jury in contempt proceedings.”).

267. *Derendal v. Griffith*, 104 P.3d 147, 150 (Ariz. 2005); *State v. O’Brien*, 704 P.2d 883, 885 (Haw. 1985). Some states have recognized additional procedural requirements for their juries. For example, Delaware’s constitution more strictly limits the use of alternate jurors in criminal cases. *Claudio v. State*, 585 A.2d 1278, 1298 (Del. 1991).

are the result of guilty pleas instead of trials.²⁶⁸ That rate is roughly the same for charges that would be tried by a judge and charges that would be tried by a jury²⁶⁹—though some jurisdictions vary.²⁷⁰ Thus, even if deincorporation of the Sixth Amendment shuttled more cases to judges instead of juries, that change would not significantly affect the process by which most convictions are obtained under the current system.

A much more significant effect of deincorporating the criminal jury right would be on sentencing law. According to the Supreme Court, the Sixth Amendment significantly limits the procedures courts may follow at sentencing. In a line of decisions beginning with the 2000 decision in *Apprendi v. New Jersey*,²⁷¹ the Court held that the Sixth Amendment prohibits judges from making factual findings that are necessary to increase the punishment range that an offender faces. The theory is that a fact that increases the penalty for a crime is an “element” of that crime and therefore must be submitted to the jury under the Sixth Amendment.²⁷² Judges accordingly cannot find facts necessary to increase the maximum possible sentence an offender can receive, nor can they find facts necessary to increase the minimum possible sentence an offender may receive.²⁷³ Only a jury can make those factual findings. This doctrinal development invalidated many state sentencing schemes that authorized sentencing-range increases based on judge-found facts,²⁷⁴ as well as a number of state schemes authorizing judges to impose the death penalty based on their own factual findings.²⁷⁵

Deincorporating the Sixth Amendment would remove this prohibition on state sentencing schemes because the Sixth Amendment would no longer apply against the states. States could authorize judges to find facts that alter the sen-

268. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

269. The state misdemeanor plea rate is slightly higher. *See* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1064 (2015) (noting that the “ninety-five percent plea rate generates millions of convictions without the kinds of procedural or evidentiary checks on which we typically rely to ensure accuracy and fairness”); *see also* Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049, 1052 (2013) (describing the petty offense system as a “speedy, low-scrutiny process in which outcomes are largely predetermined”).

270. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 732 (2017) (suggesting that the lower plea rate in Philadelphia misdemeanors is due to those charges being tried by judge instead of jury).

271. 530 U.S. 466, 489 (2000).

272. *Alleyne v. United States*, 570 U.S. 99, 103 (2013).

273. *Id.*

274. *See, e.g.*, *Cunningham v. California*, 549 U.S. 270 (2007); *Blakely v. Washington*, 542 U.S. 296 (2004); *Brown v. State*, No. SC18-323, 2018 WL 6696034, at *2 (Fla. Dec. 20, 2018) (invalidating portions of Florida’s sentencing laws); *see also* John F. Pfaff, *The Future of Appellate Sentencing Review: Booker in the States*, 93 MARQ. L. REV. 683, 700 (2009) (noting that the Court’s sentencing doctrines have “invalidated guideline systems in thirteen states”).

275. *See, e.g.*, *Hurst v. Florida*, 136 S. Ct. 616 (2016) (invalidating Florida’s capital sentencing scheme); *Ring v. Arizona*, 536 U.S. 584 (2002) (striking down Arizona’s capital sentencing scheme).

tencing range. Removing this limitation on sentencing would be extremely significant because judges must sentence all defendants, including those who plead guilty. Of course, states could interpret their own state constitutions to impose the same jury requirement as that imposed by the Sixth Amendment. But they would not be obliged to interpret their constitutions that way, and there is good reason to think at least some would not. Consider that the Court's interpretation of the Sixth Amendment is of recent vintage and has been highly contested.

This is not to say that the *Apprendi* doctrine would not impose any limits on state sentencing procedures. *Apprendi* suggested that, aside from the Sixth Amendment requirement that juries find sentencing facts, the Due Process Clause requires that facts increasing sentencing ranges be found beyond a reasonable doubt²⁷⁶—though later decisions suggest that the requirement derives from the Sixth Amendment itself.²⁷⁷ Assuming the requirement does derive from the Due Process Clause, then applying the structural rights theory to deincorporate the Sixth Amendment would not affect that requirement because the Due Process Clause applies to the states by its own terms. Thus, sentencing facts would still have to be proven beyond a reasonable doubt. But deincorporation would permit judges instead of juries to make those beyond-a-reasonable-doubt determinations.

CONCLUSION

Structural rights should not be incorporated through the Fourteenth Amendment. Although structural rights confer individual rights, forcing states to observe those rights dictates how the states must arrange their governments. One of the principles underlying the Constitution is that the states retain their prerogative to organize their governments. This principle informs many doctrines of constitutional law, leading courts to recognize implicit exceptions to otherwise unqualified provisions. Section One of the Fourteenth Amendment should not be read to overturn this principle implicitly. Although the amendment requires states to observe individual rights, it should not be read to dispense with the states' prerogative to arrange their own governments.

276. *Apprendi*, 530 U.S. at 477 (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged[.]” (first alteration in original) (quoting *In re Winship*, 397 U.S. 358, 364 (1970))); see, e.g., *Robinson v. State*, 215 So. 3d 1262 (Fla. Dist. Ct. App. 2017) (stating that the beyond-a-reasonable-doubt requirement does not derive from the Sixth Amendment).

277. *Alleyne*, 570 U.S. at 111 (“[T]he Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt.”); *State v. Dyson*, 360 P.3d 25, 29 (Wash. Ct. App. 2015) (“When coupled with the command of the due process clause of the Fourteenth Amendment, the *Sixth Amendment* demands that an impartial jury find beyond a reasonable doubt all elements of the charged offense for the defendant to be convicted.” (emphasis added) (citing *Apprendi*, 530 U.S. at 490; *Winship*, 397 U.S. at 364)).

No doubt, the biggest concern with refusing to incorporate the jury trial rights is the view that it will remove a critical mechanism for preventing abuses by state governments. But it is hardly obvious that this is so. Even leaving aside the fact that the laws of many states provide jury rights roughly comparable to those in the Bill of Rights, juries have not proven to be an essential protection against the government. Grand juries have notoriously become a tool of shielding prosecutors instead of a constraint on prosecutors. And one does not hear complaints about civil trials conducted by judges instead of juries.

And while criminal juries do sometimes pose a more significant check on the government, it is important to recognize the limited role they play. Few cases go to criminal juries because of plea bargaining. The principal function of the Sixth Amendment right to a criminal jury today is to prohibit sentencing schemes under which the maximum potential sentence depends on judicial fact-finding. But this doctrine does not guarantee an increased role for the jury. For example, the federal fix to accommodate this doctrine was not to enlarge the role of the jury but, instead, was simply to increase the discretion of sentencing judges. It is hardly clear that this regime, under which different judges with different views can impose different sentences on similarly situated offenders, is preferable to one in which they are obliged to impose particular sentences based on their factual findings.²⁷⁸ Nor would deincorporating the criminal jury give states unbridled discretion in the few cases that do go to trial. Other provisions that unquestionably do apply to the states, such as the Due Process Clause itself, aim to prevent the states from abusing their power.

278. See Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker*, 89 N.Y.U. L. REV. 1268, 1306–07 (2014) (concluding that sentencing disparity doubled after the sentencing guidelines became advisory). Indeed, the data suggests that the decision to render the guidelines nonbinding has resulted in more racially disparate sentences. See Patti B. Saris, *So Much Accomplished, So Much Left to Do: A Retrospective on Six Years as Chair of the United States Sentencing Commission*, 87 UMKC L. REV. 145, 156 (2018).