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CONSTITUTIONAL INCORPORATION: A CONSIDERATION OF THE JUDICIAL FUNCTION IN STATE AND FEDERAL CONSTITUTIONAL INTERPRETATION

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ABSTRACT

When constitutional courts are called upon to construe generally phrased provisions in the federal or a state's constitution, they necessarily exercise interpretive agency. This judicial agency is thought by some to be in tension with the values of democratic governance. One strategy for dealing with this perceived problem is to institute a preference for incorporating prior judicial interpretations as a way of reducing the overall incidence of new judicial decisionmaking. This strategy was pressed particularly in the mid-twentieth century by Justice Hugo Black, who called on the U.S. Supreme Court to incorporate the Court's prior interpretation of the Bill of Rights as a means of interpreting Section One of the Fourteenth Amendment.

In instances in which a state supreme court is asked to construe a state constitutional provision that is analogous to a parallel federal constitutional provision, some have urged the state court to systematically defer to the prior interpretation of the parallel federal provision by the U.S. Supreme Court. This position, styled the "lockstep" approach, involves a kind of incorporation of a prior judicial interpretation, as do both the selective and total incorporation approaches to interpreting the Fourteenth Amendment.

This Article reviews the competing conceptions of the judicial role and function articulated in the context of the Fourteenth Amendment incorporation cases, and evaluates the background assumptions and broader calculations that energized that debate both on the Court and among mid-twentieth century constitutional law scholars. It then traces the somewhat parallel debate that has taken place over the past several decades among state supreme court Justices and academics interested in state constitutional interpretation. The Article concludes by explaining why a passive spectator's role for constitutional courts, which is as-

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sumed by arguments for incorporation in the Fourteenth Amendment context and for a rule requiring automatic or presumptive deference by state courts to the prior judicial interpretation of parallel provisions in the federal constitution by the U.S. Supreme Court, is both undesirable in our democratic system and unrealistic. The Connecticut Supreme Court's recent decision in State v. Santiago *is offered instead as an example of how a state court should proceed with appropriate agency in interpreting state constitutional text.*

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INTRODUCTION

The practice of constitutional judicial review raises both interpretive and institutional questions. Interpretive questions go to methodology, exploring the ways in which decisionmakers either construct or discover constitutional meaning. Institutional questions focus on the proper role of courts in interpreting a constitution, and seek to locate judicial decisionmakers within the larger context of democratic government. Within constitutional theory, these two lines of inquiry intersect. One's views about who should decide constitutional meaning logically influence an understanding of how the interpretive process should be undertaken. So too, a commitment to a particular interpretive approach implies a related set of ideas about what role judicial decisionmakers should have vis-à-vis other government actors.

A prominent theme within the institutional debate, at least since the court-packing controversy,[1] has been the notion that judicial review is, to

1. In the years leading up to Franklin Roosevelt's landslide reelection in 1936, a conservative majority on the Supreme Court issued a series of decisions resisting legislative and executive

use Alexander Bickel's famous phrase, "a deviant institution in the American democracy."[2] Concerns over the legitimacy of judicial review are said to derive from the "counter-majoritarian" nature of the practice, at least in those cases in which the policy commitments of the elected branches are limited or undermined by a judicial decision that they conflict with the Constitution.[3] Embedded within this concern over the legitimacy of judicial review is a related controversy over whether constitutional legal analysis is or can be made distinct from ordinary political decisionmaking.[4] Thus, to the extent that courts exercising the power of judicial review do so pursuant to formal objective legal principles that are independent from the judges' own personal policy preferences and value judgments, the problems of illegitimacy are thought to be ameliorated.[5]

Within the realm of state constitutional law, both the interpretive and institutional dimensions of constitutional theory have received considerably less attention than they have within federal constitutional law scholarship and case law. One topic within state constitutional law, however, has stimulated significant thinking about these questions generally and about the le-

branch efforts to intervene in the market for goods and labor. Following the 1936 election, Roosevelt sought to leverage his political victory by calling on his majority coalition in Congress to reorganize the judicial branch through the appointment of additional judges to the federal courts, including the U.S. Supreme Court. While this "court-packing plan" was not enacted, the Court's approach became much less oppositional to the Administration's agenda and a number of the most resistant Justices resigned. In the era following these events, the dominant narrative was that the Court had engaged in judicial activism, which led to the President's heavy-handed response and severely undermined the institutional legitimacy of the Supreme Court. For a good overview of these events, see generally William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347 (1966).

2. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 18 (2d ed. 1986). One can trace this theme back even further to James Bradley Thayer. *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 130 (1893).

3. *See* BICKEL, *supra* note 2. This conclusion, of course, depends upon according majoritarianism a position of primary importance in the hierarchy of constitutional values. Some constitutional theorists, such as Rebecca Brown, have challenged that premise and by extension the very notion that judicial review is inherently suspect. *See* Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998).

4. Justice Black addressed this concern explicitly in his concurrence in *Duncan v. Louisiana*. 391 U.S. 145, 168 (1968) (Black, J., concurring) ("Thus due process, according to my Brother Harlan, is to be a phrase with no permanent meaning, but one which is found to shift from time to time in accordance with judges' predilections and understandings of what is best for the country.").

5. *See, e.g.*, Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67, 70 (1988) ("[T]he doctrine of precedent reduces the potential politicization of the Court. It moderates ideological swings and thus preserves both the appearance and the reality of the Court as a legal rather than a purely political institution.").

gitimacy of judicial decisionmaking more particularly.[6] That topic involves the interpretation of state constitutional provisions that are identical to or nearly alike provisions in the U.S. Constitution. In instances in which a state supreme court is asked to construe a state constitutional provision that is either analogous to a parallel federal constitutional provision or that is said to include a constitutional principle that has a close federal analog, the institutional question arises regarding whether the state court should defer to a prior interpretation of the parallel federal provision by the U.S. Supreme Court.[7] Interpretive questions are also presented in these cases, at least to the extent that historical, textual, structural, or other interpretive strategies offer the state court an opportunity to draw conclusions that diverge from those reached by the prior federal interpretation.[8]

It is fundamental that the federal constitution, as interpreted by the U.S. Supreme Court, provides a uniform floor throughout the United States for the recognition of those individual rights that have been incorporated through Section One of the Fourteenth Amendment.[9] This Article takes up the problem of whether state supreme courts should, on occasion, construe analogous state constitutional provisions as providing rights beyond those recognized in federal constitutional law and, if so, how the possibility of that excess legal protection should be evaluated in constitutional litigation undertaken in state courts.[10] One position, which some writers have styled the "lockstep" approach, would require a state supreme court to defer entirely to the prior interpretation of the U.S. Supreme Court with respect to an analogous federal constitutional provision.[11] The lockstep approach

6. *See generally* Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015 (1997).

7. *See infra* text accompanying notes 10–15.

8. For a general discussion of these issues, see G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 173–209 (1998).

9. *See* Michigan v. Long, 463 U.S. 1032, 1040 (1983) (stating that "there is an important need for uniformity in federal law" which goes "unsatisfied" when the Court fails to review a state court decision that "rests primarily upon federal grounds").

10. Former Justice Ellen Peters of the Connecticut Supreme Court offers one approach: "the question of state-federal constitutional overlap" can be subdivided into three "component" questions. Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583, 587 (1986). The first is whether the federal judicial construction of a federal constitutional provision either may or must be binding on a state court's interpretation of its constitution. *Id.* The second is whether a state court can require parties to "exhaust" all possible state law remedies, including state constitutional law theories, before resorting to federal constitutional claims of right. *Id.* The third is whether a federal court interpretation of federal constitutional law is ever relevant to a state court's construction of its own state constitution. *Id.* at 587–88.

11. *See* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993); Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98 (1988) [hereinafter Maltz, *Lockstep*]; Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 996 (1985) [hereinafter Maltz, *The Dark Side*]; *cf.*, George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review*

would, in effect, incorporate federal constitutional law and make it function as state constitutional law as well.[12]

A second approach, which has come to be associated most directly with Former Oregon Supreme Court Justice Hans Linde, would require a state supreme court to address fully all state law issues fairly raised in litigation, including both constitutional and non-constitutional rights claims, before turning to federal constitutional law.[13] This "first things first" approach derives from the premise that the federal constitutional floor that applies to the states only comes into play after a state, including its state judicial actors, has acted, and that final judicial action cannot be said to have occurred until the state court has considered state law claims.[14] An intermediate approach is also possible; specifically, a method which presumes state court deference to federal constitutional standards unless one or more criteria are established permitting the state court to interpret its state constitutional provision as being at odds with a U.S. Supreme Court interpretation of a coordinate federal individual rights provision.[15]

Under the California Constitution, 6 HASTINGS CON. L.Q. 975, 975–76 (1979); *see also* Kahn v. Griffin, 701 N.W.2d 815, 825 (Minn. 2005); Rachel E. Fugate, *The Florida Constitution: Still Champion of Citizens' Rights?*, 25 FLA. ST. U. L. REV. 87, 100–01 (1997); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 823–32 (1992) [hereinafter Gardner, *The Failed Discourse*]; James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1054–64 (2003) [hereinafter Gardner, *State Constitutional Rights*]; Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927, 928–43 (1993); David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274 (1992); Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 207–08 (1998).

12. *See* TARR, *supra* note 8, at 180–82.

13. *See, e.g.*, Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, U. BALT. L. REV. 379, 392–96 (1980); *see also* Caesar v. Campbell, 336 P.3d 775, 778 (Ariz. Ct. App. 2014); State v. Horwitz, No. SC15-348, 2016 WL 2586307, at *8 (Fla. May 5, 2016); State v. Letalien, 985 A.2d 4, 28 (Me. 2009) (Silver, J., concurring); State v. Addison, 87 A.3d 1, 41 (N.H. 2013); R Commc'ns, Inc. v. Sharp, 875 S.W.2d 314, 315 (Tex. 1994); State v. Poole, 232 P.3d 519, 523 (Utah 2010); State v. Hinton, 319 P.3d 9, 12 (Wash. 2014); RANDY HOLLAND ET AL., STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE 151 (2016); Rex Armstrong, *State Court Federalism*, 30 VAL. L. REV. 493, 493–95 (1996); John W. Shaw, *Principled Interpretations of State Constitutional Law—Why Don't the 'Primacy' States Practice What They Preach?*, 54 U. PITT. L. REV. 1019, 1027 (1993); Van Cleave, *supra* note 11, at 215.

14. Linde, *supra* note 13.

15. *See, e.g.*, State v. Geisler, 610 A.2d 1225, 1232–34 (Conn. 1992), *abrogated on other grounds by* State v. Brocuglio, 826 A.2d 145 (Conn. 2003); Doe v. Wilmington Hous. Auth., 88 A.3d 654, 662–63 (Del. 2014); Traylor v. State, 596 So.2d 957, 961–63 (Fla. 1992); State v. Wheaton, 825 P.2d 501, 504–06 (Idaho 1992) (Bistline, J., concurring); People v. Fitzpatrick, 960 N.E.2d 709, 713–14 (Ill. 2011); People v. Tisler, 469 N.E.2d 147 (Ill. 1984); People v. Catania, 398 N.W.2d 343, 351 n.12 (Mich. 1986); Kahn v. Griffin, 701 N.W.2d 815, 825 (Minn. 2005); State v. Williams, 459 A.2d 641, 650–51 (N.J. 1983); State v. Hunt, 450 A.2d 952, 962–67 (N.J. 1982) (Handler, J., concurring); Stephenson v. Bartlett, 562 S.E.2d 377, 389 (N.C. 2002); State v. Flores, 570 P.2d 965, 968 (Or. 1977); Commonwealth v. Edmunds, 586 A.2d 887, 894 (Pa. 1991); State v. Schwartz, 689 N.W.2d 430, 440 (S.D. 2004); State v. Vineyard, 958 S.W.2d 730, 733–34

For the most part, the arguments in favor either of a lockstep approach or an approach that places a strong presumption on the side of following federal constitutional precedent are prudential. Some have urged state courts to adopt parallel federal constitutional interpretations to promote uniformity, to simplify the implementation of legal requirements by law enforcement officials and others, and to minimize litigation costs and legal uncertainty.[16] Others have argued that because federal constitutional law is more mature than most state constitutional law, and because U.S. Supreme Court constitutional jurisprudence is more evolved and nuanced than the case law developed by individual state supreme courts, a rule of deference ordinarily is best.[17] More abstract arguments about the nature of federalism and the need for local variation in constitutional standards have been offered both for and against the most deferential approach.[18] But perhaps the most energetically argued grounds offered in favor of the interpretation of state constitutional provisions in lockstep with their analogous federal counterparts relate to concerns about the legitimacy of the judicial function itself and the exercise of judicial review.[19]

When a state supreme court's interpretation of its state constitution departs from the position adopted by the U.S. Supreme Court on an identical or substantially similar provision in federal constitutional law, the divergence makes possible an argument that the state judges have effectuated their personal preference instead of implementing neutral principles in reaching their decision.[20] When the provision subject to judicial construction is abstract or general—for example, a guarantee of due process or equal protection, or a prohibition against cruel and unusual punishment—the decision of the state supreme court to depart from the U.S. Supreme Court's position is even more suspect on these grounds. In these terms, advocates

(Tenn. 1997); State v. Gunwall, 720 P.2d 808, 811–13 (Wash. 1986); Saldana v. State, 846 P.2d 604, 622 (Wyo. 1993).

16. *See* Kahn v. Griffin, 701 N.W.2d 815, 825 (Minn. 2005); People v. Gonzalez, 465 N.E.2d 823, 825, 826 (N.Y. 1984); State v. Florance, 527 P.2d 1202, 1209 (Or. 1974); State v. Arias, 752 N.W.2d 748, 755 (Wis. 2008); TARR, *supra* note 8, at 181; Gardner, *State Constitutional Rights*, *supra* note 11; Gardner, *The Failed Discourse*, *supra* note 11.

17. *See* State v. Gomez, 932 P.2d 1, 7 (N.M. 1997) (quoting *Developments in the Law—The Interpretation of State Constitutional Right*s, 95 HARV. L. REV. 1324, 1357 (1982)) ("[W]hen federal protections are extensive and well-articulated, state court decisionmaking that eschews consideration of, or reliance on, federal doctrine not only will often be an inefficient route to an inevitable result, but also will lack the cogency that a reasoned reaction to the federal view could provide . . . ."); *see also* Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1511–12 (1990).

18. *See* TARR, *supra* note 8, at 180–84; s*ee also infra* notes 149–151 and accompanying text.

19. *See* G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 853 & n.55 (1991) (discussing scholarship on the legitimacy issue).

20. As Alan Tarr puts it: "When two sets of interpreters reach the same outcome in a constitutional case, this increases confidence that the result is rooted in law rather than in will." TARR, *supra* note 8, at 175.

of the lockstep approach argue that state court deference to federal constitutional understandings operates as a kind of judicial restraint, and therefore as a hedge against judicial overreach.[21]

A good point of reference for thinking about the legitimacy consequences of deferring (or failing to defer) to a prior judicial interpretation derives from the efforts to constrain the interpretation of the Fourteenth Amendment to the U.S. Constitution by incorporating some or all of the first eight amendments and the case law decided pursuant to those provisions against the states.[22] In effect, the lockstep approach to state constitutional law interpretation involves a kind of incorporation of a prior judicial interpretation, as do both the selective and total incorporation approaches to interpreting Section One of the Fourteenth Amendment.[23] Although considerable scholarship has been developed on the question of the interpretation of parallel state and federal constitutional provisions,[24] it has not analyzed the embedded issue of judicial legitimacy by comparing the arguments for a lockstep approach to state constitutional interpretation with the arguments offered by Justices of the U.S. Supreme Court (and by federal constitutional scholars off the bench) for and against the use of incorporation in the interpretation of the Fourteenth Amendment's Due Process and Privileges or Immunities clauses. The elaborate judicial conversation in the incorporation cases between Justice Black on one side and Justices Harlan and Frankfurter on the other, particularly with respect to the value of common law judicial decisionmaking in a constitutional democracy,[25] can shed significant light on the question of lockstep interpretation of state constitutional provisions.

Part One of this Article reviews the competing conceptions of judicial role and judicial function articulated by Justices of the U.S. Supreme Court in the context of the Fourteenth Amendment incorporation cases, and evaluates the background assumptions and broader calculations that energized

21. *See id.*

22. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 162–71 (1968) (Black, J., concurring).

23. *See generally* Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963) (describing and examining the foundations of the selective incorporation doctrine and contrasting it with the total incorporation approach). Some critics of the lockstep approach to state constitutional interpretation, recognizing that it functions as a form of incorporation, argue that "[i]t is beyond the state judicial power to *incorporate* the federal Constitution and its future interpretations into the state constitution" because "it is not within the state judicial authority to receive, wholesale, the law of a different sovereign as a part of its domestic law to be applied in the future." ROBERT WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 225 (2009) (citing Doe v. State, 189 P.3d 999, 1005 (Alaska 2008)). Professor Lawrence Sager refers to this as "prospective incorporation." Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

24. *See generally* WILLIAMS, *supra* note 23.

25. *See* Paul A. Freund, *Mr. Justice Black and the Judicial Function*, 14 UCLA L. REV. 467, 467–69 (1967); *see also* Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 324–26 (1957).

that debate both on the Court and among mid-twentieth century constitutional law scholars.[26] Part Two traces the somewhat parallel debate that has taken place over the past several decades among state supreme court justices and academics interested in state constitutional interpretation.[27] Part Three concludes by explaining why a passive spectator's role for constitutional courts, which is assumed by arguments for incorporation in the Fourteenth Amendment context and for a rule requiring automatic or presumptive deference by state courts to the prior judicial interpretation of parallel provisions in the federal constitution by the U.S. Supreme Court, is both undesirable in our democratic system and unrealistic. The Connecticut Supreme Court's recent decision in *State v. Santiago*[28] is offered instead as an example of how a state court should proceed with appropriate agency in interpreting state constitutional text.[29]

I. THE FOURTEENTH AMENDMENT AND THE INCORPORATION DOCTRINE

In *Barron v. Mayor and City Council of Baltimore*,[30] the U.S. Supreme Court held that the guarantees of the Bill of Rights do not apply directly to individual claims against a state or its political subdivisions.[31] *Barron* was decided in 1833, well before the Civil War and the subsequent ratification of the Fourteenth Amendment in 1868.[32] This later amendment, of course, expressly applies to the states. The rights-granting provisions in Section One of the Fourteenth Amendment, however, are cast in general terms that call on the Court's interpretive function. The precise meanings of the phrases "privileges or immunities," "due process of law," and "equal protection of the laws" are not self-evident or particularly obvious, and considerable pressure was placed on the Court's interpretation of the Due Process and Equal Protection clauses after the Court's majority in the *Slaughter-House Cases*[33] rendered the Privileges or Immunities Clause a largely ineffective instrument for regulating the states' exercise of their police powers.[34]

Beginning in the late nineteenth century and continuing throughout the twentieth century, the Court struggled to find a methodology upon which the Justices could agree for interpreting the broad language of the Four-

26. *See infra* Part II.
27. *See infra* Part III.
28. 122 A.3d 1 (Conn. 2015).
29. *See infra* Part IV.
30. 32 U.S. (7 Pet.) 243 (1833).
31. *Id.* at 247–51.
32. U.S. CONST. amend. XIV.
33. 83 U.S. (16 Wall.) 36 (1872).
34. *See id.* at 80 (noting that the rights claimed by the plaintiffs in error "are not privileges and immunities of citizens of the United States within the meaning of the . . . fourteenth amendment").

teenth Amendment's rights guarantees, especially the Due Process Clause. In *Davidson v. New Orleans*[35] in 1877, the Court held that the meaning of due process must be determined by a "gradual process of judicial inclusion and exclusion," of individual cases as they come up for review.[36] Sixty years later, in *Palko v. Connecticut*,[37] Justice Cardozo famously observed that this incremental process had yielded a "line of division [that] may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other."[38] But, he concluded, "Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence."[39]

Justice Cardozo and his colleagues on the Court sought to capture this rationalizing principle through a variety of related formulations, including whether a challenged state practice was consistent with "the very essence of a scheme of ordered liberty," whether the state's approach violated "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," and whether "a fair and enlightened system of justice" could operate without the claimed constitutional protection.[40] Notwithstanding Cardozo's brave optimism that a coherent doctrine could be articulated, from the *Palko* case in 1937 until the Court's decision in *Adamson v. California*[41] in 1947, these various formulations yielded a body of due process case law that described anything but a clear line of demarcation between acceptable and unacceptable state practices.[42]

While some Justices remained content with this traditional, common law-informed approach to due process analysis, the lingering legacy of the *Lochner* era and the challenge of FDR's court-packing plan caused others to question whether the Court could manage a consistent doctrinal approach that would adequately cabin the subjective personal preferences of the Justices.[43] The crisis of legitimacy occasioned by *Lochner v. New York*[44] triggered a variety of reactions.[45] As Paul Freund put it, "[d]ifferent minds, re-

35. 96 U.S. 97 (1877).

36. *Id.* at 104.

37. 302 U.S. 319 (1937).

38. *Id.* at 325.

39. *Id.*

40. *Id.*; Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

41. 332 U.S. 46 (1947).

42. *See* Kadish, *supra* note 25, at 319–20 (discussing and comparing due process cases, including Malinski v. New York, 324 U.S. 401 (1945), Betts v. Brady, 316 U.S. 455 (1942), and Adamson v. California, 332 U.S. 46 (1947)).

43. Justices Black and Douglas were the most explicit critics of the ordered liberty approach, as evidenced by Justice Black's extended dissent in *Adamson v. California*, 332 U.S. 46, 68–92 (1947) (Black, J., dissenting), which Justice Douglas joined.

44. 198 U.S. 45 (1905).

45. *Lochner* has come to symbolize the body of Supreme Court cases from the early twentieth century in which a conservative activist Court was seen to interfere with democratic innova-

pelled alike by the excesses of the Court, nevertheless responded in different ways."[46] Some adopted the stance that became crystallized in footnote four of the *Carolene Products* case,[47] according to which the deference the court owed the policy judgments of elected officials when exercising the power of judicial review turned on an assessment of majoritarian process and the fundamentality of the rights at stake.[48] Others, notably including Justice Hugo Black, turned to text and history in an effort to fix limits on the Court's reviewing function. For Black, "the lesson was that the judges lose the way when they put glosses on the Constitution, that they are safe, and the people secure, only when they follow the mandates of the Framers in their full and natural meaning."[49] Black believed that the incremental "ordered liberty" analysis of the traditional due process approach was an extra-constitutional gloss that provided little guidance to the Court, instead serving as an excuse for the Justices to impose their own views regarding the proper balance to be struck between the needs of state and local governments on the one side and the protections of individual liberty on the other.[50]

Justice Black argued that the meaning of the Fourteenth Amendment should conform to the intention of its framers and ratifiers, and asserted that the historical evidence from the Amendment's promulgation process supported total or "complete incorporation."[51] This theory had both a rights expanding and a rights limiting quality.[52] Black's position was that the Due Process Clause of the Fourteenth Amendment, together with the other clauses of the Amendment,[53] were meant to impose upon the states all of

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tion at the state and federal level. For a discussion of the reactions to *Lochner* among "New Dealers," see Keith E. Whittington, *Herbert Wechsler's Complaint and the Revival of Grand Constitutional Theory*, 34 U. RICH. L. REV. 509, 512 (2000). *See also* MICHAEL J. GERHARDT ET AL., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 9 (3d ed. 2007).

46. Freund, *supra* note 25, at 467.

47. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

48. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73–77 (1980).

49. Freund, *supra* note 25, at 467.

50. In *Adamson*, Justice Black declared:

> I further contend that the "natural law" formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power.

Adamson v. California, 332 U.S. 46, 75 (1947) (Black, J., dissenting).

51. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 165, 171 (1968) (Black, J., concurring).

52. Freund, *supra* note 25, at 469.

53. Justice Black's views evolved over time from an initial interest in reading substantive rights into the Privileges or Immunities Clause to a later preference for reading the various provisions of Section One of the Fourteenth Amendment together as importing the protections of the Bill of Rights. *See* Comment, *The Adamson Case: A Study in Constitutional Technique*, 58 YALE L.J. 268, 271 (1949) [hereinafter *The Adamson Case*] (recounting Justice Black's shift from his

the specific obligations that the federal government had under the Bill of Rights.[54] He argued first that this was the purpose of the Amendment's sponsors and the understanding of the public at the time of ratification. Black also asserted that total incorporation, thus understood, would limit the range of judicial decisionmaking by putting into place as governing precedent in claims against states under the Fourteenth Amendment previously decided cases interpreting the first eight amendments in the context of claims against the federal government.[55]

That Justice Black's theory of total incorporation had the potential to expand the range of rights recognized under the Fourteenth Amendment relative to the set of rights protected by way of the traditional ordered liberty approach can be seen in cases like *Adamson*. Black, in dissent, took issue with the majority's view that a California law permitting a prosecutor to comment on a criminal defendant's failure to take the stand did not violate the federal constitutional privilege against self-incrimination.[56] But, perhaps more important to Black, the total incorporation approach also had the potential to limit significantly the Court's discretion in interpreting the Due Process Clause of the Fourteenth Amendment and to limit the range of rights that might be recognized under that clause.[57] This limiting quality was also apparent in *Adamson*, particularly in the separate dissent by Justices Murphy and Rutledge, which departed from Justice Black's approach by arguing that the inclusion of rights by way of the incorporation doctrine should not limit the recognition of other rights in the Fourteenth Amendment beyond those set out in the Bill of Rights.[58] This "incorporation plus" approach clearly was inconsistent with Justice Black's theory precisely because it accorded the Due Process Clause of the Fourteenth Amendment independent constitutional significance, thus permitting the Court to recognize constitutional protections not specified in the first eight amendments or recognized by the Court's Bill of Rights precedents.[59] Black, by contrast,

views in *Hague v. CIO*, where he argued the privileges or immunities clause was a source of rights, to his views expressed in *Duncan v. Louisiana*, where he argued that all of the provisions within Section One of the Fourteenth Amendment should be read together to incorporate the Bill of Rights).

54. *Adamson*, 332 U.S. at 71–72.

55. *See* Freund, *supra* note 25, at 467–69.

56. *See Adamson*, 332 U.S. at 71.

57. *See* Freund, *supra* note 25, at 469, 472.

58. Justice Murphy explained: "I agree [with Justice Black] that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights." *Adamson*, 332 U.S. at 124 (Murphy, J., dissenting).

59. Freund, *supra* note 25, at 469 ("As far back as *Adamson v. California*, Justice Black made it clear that the Bill of Rights sets limits as well as horizons for him, while others on the

argued that "none of the separate clauses [of Section One of the Fourteenth Amendment] can have any independent meaning, for the section must be read as a whole to bring the Bill of Rights—and nothing more—to bear upon the states."[60] The Court's function, explained Black, was not to interpret the words "due process of law" in the context of specific disputes, but instead to cut-and-paste an already established body of judicial precedent into the space created by the Fourteenth Amendment to avoid the corrupting potential of any additional case-specific constitutional adjudication.

Justice Black's dissenting opinion in *Adamson* and his later concurrence in *Duncan v. Louisiana*[61] pressed the case for total incorporation on two separate grounds. The first was an original intention argument based on historical evidence; the second was an argument premised on the Justice's views respecting the properly limited role of the Court in a constitutional democracy. As noted in his dissent and in the elaborate appendix of historical materials he attached to his *Adamson* opinion,[62] Justice Black's position was that the meaning of Section One of the Fourteenth Amendment should be derived not from background principles or broad conceptions of "natural law," but rather from the clear intent of those associated with its formulation and adoption, most notably Congressman John Bingham of Ohio.[63] This strategy of nailing down the interpretive scope of the amendment by linking it to a particular historical narrative, however, had several inherent weaknesses. First, as pointed out by Justice Frankfurter in his response to Justice Black in *Adamson*, the "[r]emarks of a particular proponent of the Amendment, no matter how influential, are not to be deemed part of the Amendment. What was submitted for ratification was his proposal, not his speech."[64] More broadly, Justice Black's historical case for total incorporation turned on his willingness to generalize the intentions of one key actor and assign them to a diverse group of government officials and other supporters of the amendment whose purposes may not have

Court were unwilling to make this commitment and chose to regard the Bill of Rights as furnishing a minimal, not a preemptive, content to the fourteenth amendment.").

60. *The Adamson Case*, *supra* note 53, at 271.

61. 391 U.S. 145, 179–81 (1968) (Harlan, J., dissenting).

62. *See* Adamson v. California, 332 U.S. 46, 92 (1947) (Black, J., dissenting).

63. *See The Adamson Case*, *supra* note 53, at 273. Justice Black's historical argument, which is set out in detail in his Appendix in the *Adamson* case, relies heavily on public statements about the intended purpose of the Fourteenth Amendment that were made by John Bingham and Roscoe Conkling, two of the principle drafters of the Fourteenth Amendment, in support of the total incorporation view. *Id.* Historians who favor this position rely especially on a speech by Bingham in 1871 that linked his criticism of *Barron v. Baltimore* with the privileges or immunities clause of the Fourteenth Amendment. *See* WILLIAM D. GUTHRIE, LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1898); Louis B. Boudin, *Truth and Fiction about the Fourteenth Amendment*, 16 N.Y.U.L.Q. REV. 19, 22 n.5 (1938).

64. *Adamson*, 332 U.S. at 64 (Frankfurter, J., concurring).

aligned with Bingham's.[65] Finally, there is considerable evidence from the historical record that even Congressman Bingham's intentions may have been more complex than Justice Black allowed.[66]

The second ground offered by Justice Black in support of total incorporation was equally problematic. Mindful of the Court's excesses in the *Lochner* era, Black cautioned that the due process "formula also has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government."[67] To avoid the inevitable temptation of judicial policymaking presented by the vagueness of the ordered liberty formulation, Black urged his colleagues to adopt the fixed jurisprudence of total incorporation.[68] In so arguing, as Paul Freund pointed out, there was "more than a touch of Jeremy Bentham in Justice Black, a Bentham with an unmistakably American accent."[69] Bentham's target had been judge-made common law that, in his view, was an "excrescence" sullying the "clean instrument of popular will" represented by properly enacted legislation.[70] For Black, the enemy was the ordered liberty gloss that the

65. Other historians, who have focused on the antislavery origins of the Fourteenth Amendment, have developed research suggesting that a number of the proponents of the amendment within Congress were motivated primarily by a desire to constitutionalize human rights norms generally rather than to lock in specific protections enumerated in the Bill of Rights. *See, e.g.*, Howard Graham, *The Early Antislavery Background of the Fourteenth Amendment*, 1950 WIS. L. REV. 479 (1950); *see also* JACOBUS TENBROEK, EQUAL UNDER LAW: THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951).

66. *See The Adamson Case*, *supra* note 53, at 274 (discussing Bingham's position "as a railroad lawyer and a strong proponent of economic laissez-faire, which might have made him sympathetic to the very view of due process which is anathema to Justice Black"). There has been renewed interest among historians in Congressman Bingham in recent years. For a good overview of Bingham's life both before and during his service in Congress, see GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT (2013). It is clear from this new biographical information that Bingham's views evolved during his period of service in the House of Representatives. When he first returned to Congress, he aligned himself with moderate Republicans over issues of Reconstruction, and generally opposed the more extreme demands of the radical Republicans. Despite his central role in developing the language that eventually became Section One of the Fourteenth Amendment, Bingham did not initially support legislation guaranteeing voting rights for African Americans. *Id.* Over time, however, as Southern resistance stiffened, Bingham migrated toward the radical Republicans' Reconstruction measures. Bingham opposed early efforts to impeach President Andrew Johnson, but he eventually changed his position. In February of 1868, Bingham voted with the majority of Republicans in the House of Representatives to impeach the President, and he was subsequently selected to serve on the House Committee of Impeachment Managers that conducted the impeachment trial against President Johnson in the Senate. *Id.*

67. *Adamson*, 332 U.S. at 90 (Black, J., dissenting).

68. *See id.* at 89.

69. Freund, *supra* note 25, at 473.

70. *Id.* On Bentham's critique of the common law, see Dean Alfange Jr., *Jeremy Bentham and the Codification of the Law*, 55 CORNELL L. REV. 58, 63 (1969). Alfange notes that Bentham's adoption of the utility principle led him to the conviction that:

Court had developed to give content to the Due Process Clause, or, as he saw it, "judge-made law as an encrustation on the Constitution."[71]

By fixing the content of Section One of the Fourteenth Amendment so that it subsumed neither more nor less than the set of constitutional protections the Court had found to be guaranteed by the Bill of Rights, Black hoped "to minimize the vagrant propensities and biases of the thousands of judges, trial and appellate, who, over time, are called on to administer our constitutional order."[72] Referring to the flexible due process approach of the *Adamson* majority as "mush," Black preferred instead to lock in the settled legal understandings the Court had developed in its prior jurisprudence interpreting the first eight amendments to the Constitution.[73] But the incorporation theory's "limitation to the specific guarantees of the Bill of Rights [was unlikely to] pin the Amendment down to a precise and certain meaning."[74] In the first place, many of the key provisions within the first eight amendments are not particularly concrete or specific, and the Supreme Court's interpretations of these guarantees, in the First, Fourth, Fifth, Sixth, and Eighth Amendments especially, were not "derive[d] from a literal reading," but rather from the very sort of judicial extrapolation that so unsettled Justice Black in the Fourteenth Amendment context.[75] Indeed, this method of interpretation made it difficult to see how incorporating a flexible body of Supreme Court doctrine developed in the past would yield a fixed jurisprudence moving forward.[76]

In addition, of course, the Fifth Amendment contains a Due Process Clause of its own.[77] By incorporating the Supreme Court's Fifth Amendment due process jurisprudence into the Fourteenth Amendment, it was not

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> [L]aws should be drawn up by scientists like himself, who understood the principle of utility and who could determine what laws would do most to provide the greatest happiness of the greatest number. There could be no room for haphazard legal development. Laws drawn up by scientists would be placed in the form of a code, and nothing that did not appear in the code would be law. This would, of course, exclude all judge-made law, and at this point Bentham's theory came into direct conflict with the traditions of the English common law.

Id. For a classic statement of Bentham's position on judge-made law, see J. BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, *in* I WORKS 1 (Clarendon Press 1823) (1789).

71. Freund, *supra* note 25, at 473.

72. *Id.* at 472.

73. *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 562 (1962).

74. *The Adamson Case*, *supra* note 53, at 276.

75. *Id.*; *see, e.g.*, Chapman v. United States, 365 U.S. 610 (1961) (Fourth Amendment search and seizure); Trop v. Dulles, 356 U.S. 86, 101 (1958) ("evolving standards of decency" under the Eighth Amendment); Green v. United States, 355 U.S. 184, 198 (1957) (double jeopardy under the Fifth Amendment).

76. *See The Adamson Case*, *supra* note 53, at 276–77.

77. U.S. CONST. amend. V.

at all apparent that Justice Black's goal to limit judicial discretion would be advanced. As one commentator at the time put it:

> The Fifth Amendment is equally as capable as the Fourteenth of contraction and expansion to suit changing views of judicial policy. It would appear that the existence of so elastic a provision in the Bill of Rights is conclusively fatal to the theory that limitation to it would bring about a new certainty and predictability in the application of the Fourteenth Amendment.[78]

On the other hand, the incorporation approach urged by Justice Black did have two related characteristics that could advance the judicial legitimacy goals he returned to again and again. Presumably, if total incorporation were adopted by the Court, the overall volume of new judicial decisionmaking by the Justices would be reduced. For example, instead of deciding afresh whether due process required states to provide grand jury indictment or a twelve-person jury or the like, the Court could simply apply to the states whatever rules already were in place to govern the constitutional criminal procedure rights of federal criminal defendants. To the extent that Justice Black's Benthamite instincts treated the very act of judicial decisionmaking as inherently corrosive of democratic values, the less new case law the better. Moreover, by reducing the possibility that similar or identical legal claims would be resolved inconsistently by courts considering the rights of litigants under the Fourteenth Amendment versus under one of the first eight amendments, the adoption of total incorporation presumably would reduce the perception that these judicial outcomes were the product of individual judges' personal preferences rather than the result of formal legal doctrine being applied by neutral decisionmakers.[79] Thus, even if total incorporation was unlikely to eradicate the operation of judicial judgment by replacing open-ended text with fixed constitutional meaning, it still had the potential to bring "a desirable certainty by standardizing Supreme Court protection of personal liberties."[80]

The Supreme Court never adopted Justice Black's total incorporation approach. It did, however, eventually settle on the variant theory of "selec-

78. *The Adamson Case*, *supra* note 53, at 277.

79. *See* Freund, *supra* note 25, at 472–73. It is worth noting, however, that this argument, if taken to its logical conclusion, could be the basis for rejecting incorporation. Thus, one could argue that because the Fifth Amendment contains a due process clause, the identical Due Process Clause in the Fourteenth Amendment cannot be interpreted to include the other specific guarantees contained in other parts of the Bill of Rights, as that reading would render the original Due Process Clause surplusage. This argument was entertained for a period, but was ultimately rejected in *Powell v. Alabama*. 287 U.S. 45, 66–67 (1932); *see also* Kadish, *supra* note 25, at 324.

80. *The Adamson Case*, *supra* note 53, at 277. As Justice Brennan, a chief proponent of selective incorporation, put the point in *Cohen v. Hurley*: "I cannot follow the logic which applies [to the states] a particular specific [of the Bill of Rights] for some purposes and denies its application for others." 366 U.S. 117, 158 (1961).

tive incorporation."[81] Four Justices on the *Adamson* Court endorsed selective incorporation, and the compromise position commanded a clear majority by the time *Duncan v. Louisiana* was decided.[82]

To Justice Black, the selective incorporation compromise was an improvement over the ordered liberty approach of the earlier due process cases, although he continued to view it as less desirable than total incorporation.[83] In *Duncan*, he wrote:

> I believe as strongly as ever that the Fourteenth Amendment was intended to make the Bill of Rights applicable to the States. I have been willing to support the selective incorporation doctrine, however, as an alternative, although perhaps less historically supportable than complete incorporation. The selective incorporation process, if used properly, does limit the Supreme Court in the Fourteenth Amendment field to specific Bill of Rights' protections only and keeps judges from roaming at will in their own notions of what policies outside the Bill of Rights are desirable and what are not.[84]

This argument in favor of selective incorporation, particularly Justice Black's concern for judicial self-restraint, may have contributed to the doctrine's subsequent adoption by the Court's majority,[85] but in the final analysis, selective incorporation likely had a minimal effect in actually restraining the Court. It may, however, have advanced other administrability objectives related to uniformity and judicial efficiency.[86] Prior to the Court's embrace of selective incorporation, the Justices had gradually recognized certain "substantive" rights against the states that mirrored protections found in the First and Fifth Amendments and other "procedural" protections that qualified pursuant to the ordered liberty formulation.[87] Selective incorporation represented a departure from this approach, especially with respect to procedural rights, because a finding by the Court that a provision in the Bill of Rights was incorporated through the Fourteenth Amendment meant not only that the right applied generally to the states but that it applied "to the same extent and in the same ways as it does to the

81. *See* Henkin, *supra* note 23, at 74.

82. Duncan v. Louisiana, 391 U.S. 145, 163–64 (1968) (Black, J., concurring).

83. *See* Henkin, *supra* note 23, at 74, 76.

84. *Duncan*, 391 U.S. at 171.

85. *See* Henkin, *supra* note 23, at 77 (noting that selective incorporation "appears to avoid the impression of personal, ad hoc adjudication by every court which attempts to apply the vague contents and contours of 'ordered liberty' to every different case that comes before it").

86. *See id.* ("Similar standards for state and nation . . . would simplify constitutional jurisprudence, the administration of justice, and cooperation between state and federal agencies.").

87. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962); Brown v. Mississippi, 297 U.S. 278 (1936); Powell v. Alabama, 287 U.S. 45 (1932); *see also* Henkin, *supra* note 23, at 81–85.

federal government."[88] Justice Harlan, dissenting in *Duncan*, noted this very feature. He pointed out that, while the Court remained "unwilling to accept the total incorporationists' view," nevertheless, by adopting selective incorporation, it had turned its task from "determining whether denial of trial by jury in the situation before us, or in other situations, is fundamentally unfair," and instead had "simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored."[89]

The Court's embrace of selective incorporation achieved, effectively, the outcome that Justice Black had sought through total incorporation. Indeed, by the early decades of the twenty-first century, virtually all of the protections in the Bill of Rights had been incorporated against the states.[90] On the one hand, getting to this result piecemeal had the advantage of avoiding the debate over Justice Black's historical evidence and original intention position that some Justices and academics had vigorously challenged.[91] It also permitted the Court to avoid recognizing several Bill of Rights provisions, such as the right to a jury trial in virtually all civil cases, which would have imposed enormous costs on the states,[92] and to recognize

88. Henkin, *supra* note 23, at 76.

89. *Duncan*, 391 U.S. at 180–81 (Harlan, J., dissenting). The selective incorporation of prior Bill of Rights doctrine jot-for-jot not only impacted the development of the Court's Fourteenth Amendment jurisprudence, it also imposed a perhaps unintended influence on the prospective development of constitutional rights with respect to the federal government. *Id.* Thus, in *Williams v. Florida*, Justice Harlan, again complaining about the all-or-nothing quality of the selective incorporation approach, pointed out that its application in that case had diluted the scope of a federal jury trial right in order to accommodate its identical application to the states. 399 U.S. 78, 118 (1970). *Williams* involved a challenge to a state law that permitted criminal conviction in noncapital cases by a unanimous jury of six persons. *Id.* at 79–80. Justice Harlan recognized that states had good reason to experiment with the size and operation of criminal juries, even if the federal government did not. *Id.* at 133 (Harlan, J., concurring). But, he explained, the consequence of the Court's decision with respect to state jury practice was that the "federal guarantee [had been watered down] in order to reconcile the logic of 'incorporation,' the 'jot-for-jot and case-for-case' application of the federal right to the States, with the reality of federalism." *Id.* at 129.

90. *See* Jonathan D. Varat et al., *"Incorporation"—Its Current Scope*, *in* CONSTITUTIONAL LAW: CASES AND MATERIALS 548–50 (13th ed. 2009). Among the few exceptions are the Fifth Amendment's guarantee of indictment by grand jury. *See* Alexander v. Louisiana, 405 U.S. 625, 633 (1972) (holding that the Due Process Clause "does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury"). Another exception is the Eighth Amendment's prohibition of excessive fines. *See generally* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

91. *See* Justice Harlan's vigorous disagreement with Justice Black's historical argument in *Duncan v. Louisiana*, 391 U.S. 145, 180–81 (1968) (Harlan, J., dissenting). *See also* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 139 (1949).

92. *See* Walker v. Sauvinet, 92 U.S. 90, 92 (1875) (noting that the Fourteenth Amendment does not require juries in civil cases).

certain rights not within the original Bill of Rights as required by the Due Process Clause of the Fourteenth Amendment.[93]

On the other hand, once the analysis shifted from incorporation in its entirety to incorporation selectively, proponents were left without a justification based on history or original purpose and were faced with significant problems of doctrinal uncertainty. Unlike total incorporation, the adoption of selective incorporation still obligated the Court to identify a "principle of selection" to determine which rights were incorporated and which were not.[94] Thus, while the Justices may have avoided phrases like "ordered liberty" and the like, they were still forced to articulate the grounds upon which some rights in the Bill of Rights were applied against the states while others were left out.[95] In this respect, the new regime was more like the traditional approach to due process analysis than it was like total incorporation. As Louis Henkin put the point: "There is no constitutional language, no established doctrine, no old case, that can be invoked to avoid the inevitable question of ordered liberty."[96]

Prior to the adoption of selective incorporation, the Supreme Court's settled understanding regarding a provision of the Bill of Rights in the federal context was, perhaps, treated as some evidence of what the Due Process Clause of the Fourteenth Amendment might require of the states. In this sense, the cases interpreting individual rights within the first eight amendments had an "indirect relevance" to the Court's ordered liberty and fundamental fairness calculations under the Fourteenth Amendment, but were not themselves mandatory authority.[97] The Court's task in each case was to evaluate the requirements of fairness and the obligations inherent in evolving notions of due process rather than to identify and reapply existing doctrine whole cloth. Not only did the ordered liberty or "natural law" approach permit the Court to shape Fourteenth Amendment protections against the states to be either greater or more restrictive than those it had found under the Bill of Rights,[98] it also made possible the recognition of some rights that had been imposed against the federal government without imposing jot-for-jot the corresponding implementing procedures that had

93. *See, e.g.*, *In re* Winship, 397 U.S. 358, 364 (1970) (holding that due process protects a criminal defendant against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime").

94. Henkin, *supra* note 23, at 82–83.

95. *See, e.g.*, Alexander v. Louisiana, 405 U.S. 625, 633 (1972) (concluding that the Fifth Amendment right to indictment by grand jury is not binding in state criminal prosecutions).

96. Henkin, *supra* note 23, at 83.

97. *Id*. at 78.

98. Thus, the Court in *Adamson* held that the state did not violate due process if it permitted the prosecutor to comment on the defendant's failure to take the stand, but at the same time the Court did "repeatedly [hold] applicable to the states that part of the privilege not to be compelled to testify against oneself which bars the use of coerced confessions." *Id.* at 81.

been adopted in that context.[99] Moreover, without invoking the language of incorporation or absorption, the Court could have adopted any of the federal standards that ultimately were identified through selective incorporation simply by using the older ordered liberty approach, had it so chosen.[100]

Absent the anchoring of historical intention and unambiguous constitutional text, selective incorporation was incapable of eradicating judicial discretion in the development of the Fourteenth Amendment. In this sense, the doctrine fell well short of Justice Black's goal of a fixed jurisprudence that would leave fundamental questions of public policy to state and federal elected officials.[101] But selective incorporation did advance Justice Black's agenda by reducing the frequency with which the Court entered into the task of constitutional interpretation *ab initio*. Thus, rather than encountering each new claim for a procedural or substantive right by evaluating its merits from the ground up, the Court, once it had determined to selectively incorporate the asserted right, instead deferred to the prior adjudication of the parallel claim under one of the first eight amendments.[102] In this sense, the adoption of selective incorporation did serve to fix the constitutional meaning of due process by leveraging prior case law that it locked in for Fourteenth Amendment purposes, thereby reducing the total volume of new adjudications that the Court was obligated to entertain.

Whether one regards as a good outcome the Supreme Court's interpretation of the Fourteenth Amendment's Due Process Clause by defaulting to the work of prior adjudicators depends on one's assumptions about the relative costs and advantages of judicial decisionmaking. The question is whether the considerable advantages of a flexible due process jurisprudence can be realized without incurring too many of the costs to democratic governance associated with such judicial practice. In contrast to the efforts of Justice Black, the first Justice Harlan, and others to develop a fixed due process jurisprudence through total incorporation (or a partially-fixed version by way of selective incorporation), the alternative tradition of flexible

99. For example, in *Wolf v. Colorado*, the Court held the Fourth Amendment applicable to the states, but concluded that the exclusionary rule was not required in state cases involving warrantless and unreasonable searches or seizures. 338 U.S. 25, 33 (1949). By contrast, in *Weeks v. United States*, the Court had held that the exclusionary rule was enforceable in federal courts in similar circumstances. 232 U.S. 383, 398 (1914).

100. *See* Henkin, *supra* note 23, at 82 ("If the federal standard is indeed the goal in some instances, the Court can, without any difficult new doctrine, find the federal standard to be required by ordered liberty or by other elements in the Court's jurisprudence.").

101. Despite the purported goal of judicial restraint, some commentators have argued that Black's more pressing goal was to lock in the judicial activism of the Warren Court's civil rights jurisprudence while avoiding a return to the economic liberty jurisprudence of the *Lochner* Court. *See* Kadish, *supra* note 25, at 336.

102. *Id*. at 338 ("The consequence of requiring due process to be measured precisely by the provisions of the Bill of Rights is not to eliminate broad judicial inquiry, but rather to change its focus from due process to freedom of speech or freedom from double jeopardy, and the rest, and to disguise its essential character.").

due process that has also been present throughout much of our constitutional history has been based on the conviction that judges are capable of navigating the inevitable normative conflicts presented both by procedural and substantive rights claims without falling back entirely on subjective personal preference.[103] This tradition of flexible due process analysis can be traced from cases decided shortly after ratification of the Fourteenth Amendment,[104] to Justice Moody's opinion in *Twining v. New Jersey*,[105] to Justice Cardozo's ordered liberty formulation in *Palko*.[106] The effort was maintained by Justice Frankfurter in *Adamson*[107] and the second Justice Harlan in *Duncan v. Louisiana*, and one can discern elements of this tradition in more recent Supreme Court cases developing the substantive side of the Due Process Clause, including the line of privacy decisions starting with *Griswold v. Connecticut*.[108] Throughout these cases, proponents on the Court of a flexible approach to due process have maintained that such an analysis can be accomplished without the Justices essentially becoming ordinary political decisionmakers.[109] Justice Moody argued that the Court need not "import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limitations,"[110] and Justice Frankfurter explained that the Court's analysis should "move within the limits of ac-

103. *Id.* at 334–35.

104. *See, e.g.*, Hurtado v. California, 110 U.S. 516, 535 (1884) (holding that due process embraces "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"). These cases, in turn, built on an early nineteenth century decision interpreting the Due Process Clause of the Fifth Amendment. *See* Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819) (explaining that the Due Process Clause was "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice").

105. 211 U.S. 78, 106 (1908) (noting that due process effectuates "a fundamental principle of liberty and justice which inheres in the very idea of free government, and is the inalienable right of a citizen of such a government").

106. Palko v. Connecticut, 302 U.S. 319, 324–26 (1937).

107. Adamson v. California, 332 U.S. 46, 53–54, 65–66 (1947) (Frankfurter, J., concurring).

108. 381 U.S. 479, 503–04 (1965) (White, J., concurring); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Lawrence v. Texas, 539 U.S. 558 (2003).

109. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the authors of the Joint Opinion took just this position:

> Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. . . . [A]djudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. . . . Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.

505 U.S. at 848, 849, 850.

110. Twining v. New Jersey, 211 U.S. 78, 107 (1908).

cepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment."[111]

The chief argument for a flexible approach to due process is that the constitutional text sets out a "moral command" and is not a "strictly jural precept."[112] Operating alongside other guarantees within the Bill of Rights, the due process protections available under the Fourteenth Amendment can be understood to regulate the exercise of government power in an evolving cultural, economic, and technological environment.[113] Advances in technology, communications, and the structure of mediating social institutions put pressure on static understandings of constitutional liberty.[114] The flexible approach, by contrast, permits constitutional norms to remain nimble and responsive to exigencies that could not have been foreseen when the relevant text was developed and ratified.[115] As Justice Frankfurter explained, due process is "a standard for judgment in the progressive evolution of the institutions of a free society" and is not an immutable set of rules to be applied mechanically and without attention to the changing circumstances within which constitutional cases arise.[116]

Proponents of a flexible approach to due process analysis focus not only on the need to fit constitutional meaning to an evolving social, cultural, political, and economic context, but also on the danger that a static approach inevitably serves to obscure the exercise of moral judgment that is an essential feature of this interpretive task. They argue that "quests for fixed meanings" have "failed to accomplish more than to mask and drive from conscious recognition the subtle problems of value choosing inherent in due process adjudication"[117] and prefer instead to press to the surface and

111. Malinski v. New York, 324 U.S. 401, 417 (1945) (Frankfurter, J., concurring).

112. Kadish, *supra* note 25, at 341.

113. *Id*. ("Thus conceived, in the light of its ultimate relation to the preservation of the conditions of a free society, the residuary procedural guarantee of due process is readily seen to be incompatible with changeless meanings.").

114. *Id*. (stating that fixing the meaning of due process once and for all binds "[f]uture generations . . . to the perceptions of an earlier one; the experience that develops with changing modes of governmental power, unpredicted and unpredictable at an earlier time, as well as the deeper insights into the nature of man in organized society that are gained in continually changing social contexts, would become irrelevant").

115. In *Duncan v. Louisiana*, Justice Harlan put the point as follows: "[D]ue process is an evolving concept and . . . old principles are subject to re-evaluation in light of later experience." 391 U.S. 145, 183 (1968) (Harlan, J., dissenting).

116. *Malinski*, 324 U.S. at 414. This argument assumes that the direction of evolution within free societies is always progressive. By contrast, some, most prominently Justice Scalia, have taken the position that social evolution can just as easily be regressive, and thus that fixing constitutional liberties to their intended meanings at the founding is a better approach than other methods of constitutional interpretation. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 852–55 (1989).

117. Kadish, *supra* note 25, at 344.

then regulate the normative work that judges are called upon to perform when questions of constitutional fairness are raised.[118]

Mindful of this need to regulate the process by which values choices are made, so as to avoid the delegitimizing dynamics of plainly subjective policymaking, some have argued that the properly limited judicial role within a flexible system is to "passively apply[] moral judgments already made."[119] One source of established moral judgment to which judicial decisionmakers could defer is community consensus. But determining what the community's normative commitments are, and whether they are stable or merely the transitory result of a passing crisis, is a task potentially beyond the institutional competence of judicial actors.[120] The Court might consult public opinion polls or seek other objective measures of the community's preferences, although the difficulties of such a strategy seem apparent.[121] Or, the Court could apply moral judgments already made by particular recognized entities such as Congress or the relevant state legislatures, on the premise that moral judgment ought to be assigned to democratically responsive institutions.[122] Unfortunately, this approach "escapes rather than meets the problem" because it drains constitutional limits on democratic decisionmaking of "any independent integrity as a governing normative principle."[123]

Of course, a constitutional court can choose to defer to the moral decisionmaking of other courts, whether those of predecessor judges on the same court or other courts entirely. When the Justices on the Supreme Court accord significant precedential authority to prior decisions of that Court within a system of *stare decisis*, they are in effect adopting the em-

118. *See generally* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2–17 (1996); MICHAEL J. PERRY, MORALITY, POLITICS AND LAW 147–51 (1988). Justice Stevens makes a similar point in his dissenting opinion in *McDonald v. City of Chicago*, where he argues that "a rigid historical methodology . . . promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs, defined in what manner, are sufficiently 'rooted'" to count as protected liberty interests within the Due Process Clause of the Fourteenth Amendment. 561 U.S. 742, 875–76 (2010) (Stevens, J., dissenting).

119. Kadish, *supra* note 25, at 344. Of course, even the most subjective judgments made by courts in the course of constitutional adjudication are distinguishable from legislative policymaking in that judicial decisions necessarily are after-the-fact determinations based on a discrete set of facts.

120. *Id*.

121. *See id*. There has been intense debate on the Court in the Eighth Amendment area over whether to rely on "evolving standards of decency" and, if so, how to ascertain them. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 563 (2005).

122. *See* Deukmejian & Thompson, Jr., *supra* note 11, at 975–77.

123. Kadish, *supra* note 25, at 345. It also falls short because it fails to restrain the "undisciplined factors of taste and undemonstrable preference" that can drive the decisionmaking of elected officials and potentially "exclude[s] any resort to reason and scientific method." *Id.*

bedded value choices that animated those prior decisions.[124] And when judges weigh the decisions of other courts as persuasive authority,[125] they also may borrow those courts' judgments with respect to the normative issues at stake. In this respect, the common law tradition may have a constraining effect on constitutional adjudication by channeling the exercise of discretion within established paths and ensuring that new commitments ordinarily are consistent with the warp and weave of the constitutional fabric already in place.[126]

Deference to moral judgments contained within prior court decisions through a process of common law analogic reasoning can have a constraining effect on the exercise of discretion associated with the interpretation of open constitutional text such as the Due Process Clause. Such an approach, however, is still discretionary and flexible in comparison to the more mechanical effort to fix constitutional meaning by incorporating prior doctrine jot-for-jot, as selective incorporation seeks to do. This fundamental choice between a system of case-by-case judicial discretion operating within the strictures of precedent and *stare decisis* and a system of automatic deference to prior adjudication once the criteria for selective incorporation have been satisfied turns on one's views about whether the sort of moral reasoning required in constitutional adjudication is amenable to systematic regulation adequate to restrain judicial actors in a democracy.

On the one side are those, like Learned Hand, who take the position that the clash of values inherent in important questions of individual constitutional rights simply cannot be made to yield to objective standards. Such questions, said Hand, "demand the appraisal and balancing of human values

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124. *See* Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67, 67–68 (1988).

125. This could involve the decisions of an out-of-state court, a non-binding federal court decision, or the decision of a foreign court. The latter category has been subject to special controversy in recent years and was also the subject of dispute among some of the Justices in *Roper*. *See* Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and The Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 748, 909 (2005).

126. Justice Frankfurter captured this set of ideas in his concurrence in *Adamson* by explaining:

> We are called upon to apply to the difficult issues of our own day the wisdom afforded by the great opinions in this field . . . . This guidance bids us to be duly mindful of the heritage of the past . . . . As judges charged with the delicate task of subjecting the government of a continent to the Rule of Law we must be particularly mindful that it is 'a *constitution* we are expounding,' so that it should not be imprisoned in what are merely legal forms even though they have the sanction of the Eighteenth Century.

Adamson v. California, 332 U.S. 46, 65–66 (1947) (Frankfurter, J., concurring) (citations omitted) (citing Palko v. Connecticut, 302 U.S. 319 (1937); Twining v. New Jersey, 211 U.S. 78 (1908); Holden v. Hardy, 169 U.S. 366 (1898); Hurtado v. California, 110 U.S. 516 (1884); Missouri v. Lewis, 101 U.S. 22 (1879); Davidson v. New Orleans, 96 U.S. 97 (1877)).

which there are no scales to weigh."[127] Because the values in conflict often are incommensurable, the resolution of these questions must depend on the selection of one set of values over another, and thus must turn on the judge's own preferences.[128] On the other side are those who argue that the values often in competition in due process analysis and other similar questions of constitutional interpretation need not be treated as absolute or necessarily in collision, but instead can be managed through a careful process of accommodation.[129] Adherents of this view are more likely to be comfortable with the flexible common law system of adjudication and less inclined to seek the discipline of jot-for-jot incorporation.[130]

At the root of these divergent perspectives is a difference in understanding how values operate more generally in the process of moral decisionmaking. Drawing from the work of pragmatist thinkers like John Dewey, one might say that values are not fixed or intrinsic moral principles but rather are dynamic generalizations built out of past practice that inform ethical analysis moving forward.[131] Dewey's work emphasized that generalized ethical principles, while "intellectual instrumentalities in judgment of particular cases," are derived not from *a priori* first principles, but from experience itself.[132] As a product of the empirical assessment of the results of prior decisions, they ought to be treated as revisable, contingent guides to moral evaluation instead of fixed or immutable laws. Dewey emphasized that the process of "determining the true good cannot be done once for all," but must "be done, and done over and over and over again, in terms of the conditions of concrete situations as they arise."[133]

Once the competing values at stake in a question of constitutional rights are understood in this fashion to be contingent, contextual, and dynamic, one's conception of adjudication and decision can be moved from that of selecting one absolute moral preference over another to a process of accommodating competing claims through a gradual process of judgment and revision. So put, the judicial task becomes something quite apart from Learned Hand's ungovernable selection of incommensurable ethical choices and instead appears to be subject to reasonable regulation and review:

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127. Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, *in* SPIRIT OF LIBERTY 172, 178 (Irving Dillard ed., 1952).

128. *See* Kadish, *supra* note 25, at 348.

129. *See id.* ("[W]hat is demanded is not so much the resolution of conflicting values as the accommodation of values . . . .").

130. Perhaps the leading contemporary academic proponent of this view is Cass Sunstein, whose theory of "Burkean Minimalism" in constitutional decisionmaking is intended expressly to permit the accommodation of competing perspectives and positions. *See* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006).

131. *See* Richard C. Boldt, *Public Education as Public Space: Some Reflections on the Unfinished Work of Marc Feldman*, 61 MD. L. REV. 13, 45 (2002).

132. 13 JOHN DEWEY, THE LATER WORKS 230, 412 (Jo Ann Boydston ed., 1988).

133. 7 JOHN DEWEY, THE LATER WORKS 212 (Jo Ann Boydston ed., 1985).

> The impasse is at least partly a product of the way of stating the question. When the issue is put in terms of the collision of absolutely stated values, perhaps there is little room for other than a personally anchored like or dislike. . . . The insight of the pragmatic philosophers is a useful one; that is, that values are not once-and-forever-stated absolutes, but are, after the fashion of scientific law or principles, tentatively formulated generalizations which explain the resolution of past moral impasses and which serve to give direction to the solution of new ones. Stated values, therefore, are distilled formulations of wants discovered by examining past solutions to problems of choice. . . . So viewed, what is demanded is not so much the resolution of conflicting values as the accommodation of values . . . .[134]

In these terms, the common law system of gradual refinement and development of constitutional doctrine can be seen to operate as a flexible but constraining environment within which constitutional judges may be able to function consistent with the demands of democratic governance. As Justice Harlan put it in *Duncan*: "Apart from the . . . absolute incorporationists, I can see only one method of analysis that has any internal logic. That is to start with the words 'liberty' and 'due process of law' and attempt to define them in a way that accords with American traditions and our system of government."[135] Or, as Justice Frankfurter explained in *Adamson*:

> [The due process] standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment.[136]

While not a perfect parallel to the mid-twentieth century debate over the incorporation of the Bill of Rights through the Fourteenth Amendment's Due Process Clause, the competing positions regarding the appropriate role of state courts in interpreting state constitutional provisions with federal analogs do resonate with many of the essential arguments from that earlier era. At stake are similarly contested conceptions of the judicial function and the capacity of appellate courts to navigate a process of moral judgment

134. Kadish, *supra* note 25, at 348.

135. Duncan v. Louisiana, 391 U.S. 145, 176 (1968) (Harlan, J., dissenting).

136. Adamson v. California, 332 U.S. 46, 68 (Frankfurter, J., concurring). *Cf.* Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140 (1994) (discussing how the need for continuity and stability in constitutional law is derived not simply by following precedent but by attending to "doctrine").

within a system of constraining structures and doctrines. It is to that related field of debate that we now turn.

II. STATE CONSTITUTIONAL INTERPRETATION

One of the most important developments in American constitutionalism over the last thirty-five years has been a renewed focus on state constitutions as a source of individual rights. State courts have long been active in interpreting the structural provisions of their respective state constitutions and in providing independent interpretations of rights guarantees for which there are no analogous federal guarantees.[137] When state courts have been asked to interpret provisions of their state constitutions to which there are analogous provisions of the federal constitution, however, they have encountered significant questions of legitimacy.[138]

The selective incorporation of most of the Bill of Rights, coupled with the rights-expanding jurisprudence of the Warren Court in the 1960s and early 1970s, led advocates and judges to look almost exclusively to the federal constitution as the source of an expanding field of individual rights.[139] Beginning in the late 1970s, when the Burger Court threatened a constriction of constitutional rights, a new focus on state constitutions as an alternative source of rights emerged.[140] Almost from the start, this interest in a "new federalism," with its emphasis on state constitutional law, prompted skeptics to raise questions about whether (and, if so, when) it is appropriate for a state court to provide an independent interpretation of a state constitu-

137. In these areas of state constitutional law (structural provisions and rights for which there is no federal analog), there never has been a question of the legitimacy of a state court interpreting such a provision. *See generally* Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411, 418–19 (2012).

138. These questions of legitimacy arise most frequently in dissenting judicial opinions, in which the dissenting judge rejects the majority's decision to depart from the Supreme Court's interpretation of an analogous provision. WILLIAMS, *supra* note 23, at 138; *see also* People v. Disbrow, 545 P.2d 272, 284–85 (Cal. 1976) (Richardson, J., dissenting) ("[T]he newly discovered separate and independent state constitutional interpretations are . . . . not calculated to produce that kind of uniformity or harmony conducive to the logical and uniform development of constitutional law."); People v. Scott, 593 N.E.2d 1328, 1350, 1356 (N.Y. 1992) (Bellacosa, J., dissenting) (arguing that majority opinion reflected a "mere disagreement" with federal constitutional doctrine and reflected personal preferences); Davenport v. Garcia, 834 S.W.2d 4, 24–45 (Tex. 1992) (Hecht, J., concurring); H.C. Macgill, *Introduction—Upon a Peak in Darien: Discovering the Connecticut Constitution*, 15 CONN. L. REV. 7, 9 (1982) ("There probably remains some feeling on the bench as well as in the bar that a state constitutional holding is something of a cute trick, if not a bit of nose-thumbing at the federal Supreme Court, and not 'real' constitutional law at all.").

139. *See, e.g.*, JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES ¶ 1.01 n.10 (1995) ("A generation of overreliance by law professors, judges, and attorneys on the federal doctrines that grew out of Warren era has left state constitutional law in a condition of near atrophy in some states.").

140. *See* A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 874 (1976).

tional provision for which there is a federal analog.[141] The state constitutional law literature describes three choices open to state courts presented with claims that arise under state constitutional provisions for which there is a reasonable federal constitutional analog.[142]

A. The Primacy Approach

Justice Hans Linde, formerly of the Oregon Supreme Court, is the principal exponent of the primacy approach—the strategy that he terms "first things first."[143] Linde argues that it is the obligation of a state court, in every instance, to first consult the state constitution to determine if an activity is protected:

> The United States Constitution is the supreme law of the land. Nothing in the state's law or constitution can diminish a federal right. But no state court needs or, in my view, ought to hold that the law of its state denies what the Federal Constitution demands, without at least discussing the guarantees provided in its own bill of rights.[144]

Justice Robert F. Utter of the Washington Supreme Court has elaborated on the primacy model. He explains that a state's particular history, the structure of its constitution, and established doctrine in that jurisdiction all provide an appropriate basis for an interpretive outcome that may be distinct from federal law. Even when the specific state constitutional text is similar to the United States Constitution, and even when case law within the federal system is well developed, Justice Utter and other proponents of the primacy approach argue that state supreme courts ought to accord federal

141. *See generally* Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 961 (1982) (identifying critics of new federalism); David Margolick, *State Judges are Shaping Law That Goes Beyond Supreme Court*, N.Y. TIMES (May 19, 1982), http://www.nytimes.com/1982/05/19/us/state-judges-are-shaping-law-that-goes-beyond-supreme-court-courts-trial-last.html?pagewanted=all ("Not everyone, however, shares the present enthusiasm for the 'rediscovery' of state constitutions."). Professor Robert Williams has identified six categories representing varying degrees of similarity between state constitutional provisions and their federal analogs: (1) provisions that are "textually identical to their federal counterparts"; (2) provisions that "are only slightly different textually from their federal counterparts"; (3) provisions that are "substantially different from their federal counterparts"; (4) provisions "with no federal counterpart or federal 'analog'"; (5) provisions that are limitations on government but that are not contained within state declarations of rights; and (6) unenumerated rights provisions. WILLIAMS, *supra* note 23, at 115–18.

142. *See* WILLIAMS, *supra* note 23, at 140–77; *see also* Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 845–47 (2011).

143. Linde, *supra* note 13, at 380.

144. *Id*. at 383.

law persuasive authority but need not treat it as more persuasive than the interpretations of sister states with similar provisions.[145]

Professor Robert F. Williams has taken this approach one step further. He has argued that "[the United States] Supreme Court interpretations of similar or identical federal constitutional provisions are entitled to *less* weight than decisions of sister state jurisdictions. Horizontal federalism, or reliance upon decisions of other states, should be more persuasive."[146] Williams grounds this position in the observation that the U.S. Supreme Court has expressed an inclination to risk the under-enforcement of some federal constitutional rights guarantees to preserve room for state supreme courts to adopt alternative approaches. In *San Antonio Independent School District v. Rodriguez*,[147] for example, the Supreme Court decided that claims of unequal education funding should be subject to the least rigorous form of judicial review: rational basis review.[148] Among the justifications for the Court's decision was its view that one element of a healthy system of federalism is the maintenance of discretion within the states to enforce equality in varying ways, without a federally imposed, one-size-fits-all approach.[149] Williams refers to decisions like this as applying a "federalism discount."[150] In light of this federalism discount, he argues, state supreme courts have an obligation to engage in independent constitutional rights analysis within their state constitutional systems to ensure that the relevant individual rights protections are fully realized.[151]

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145. *See* Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1028 (1985). In Justice Utter's words:

> Under the primacy model, federal law and analysis are not presumptively correct. In fact, they are no more persuasive than the decisions of sister state courts. Consequently, even when a developed body of federal doctrine is available, and the state and federal texts are similar, the primacy model urges that the court look first to the state provision and to state history, doctrine, and structure. Its examination of these state-specific concerns may lead it to a result that diverges from the preexisting federal interpretation. Only if the result grounded in state law falls below the standards of the federal constitution should the court decide the case under federal law. In short, the primacy model relegates federal law to a secondary position.

Id.

146. Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 403 (1984).

147. 411 U.S. 1 (1973).

148. *Id.* at 55.

149. *See* Williams, *supra* note 146, at 390–91.

150. WILLIAMS, *supra* note 23, at 137; *see also* Jeffrey S. Sutton, San Antonio Independent School District v. Rodriguez *and Its Aftermath*, 94 VA. L. REV. 1963, 1979 (2008).

151. Williams, *supra* note 146, at 396–97. State supreme courts do not always make up the gap in rights enforcement created by the U.S. Supreme Court's federalism discounting. One such example is provided by the decision of the Court of Appeals of Maryland in *Hornbeck v. Somerset County*, 295 Md. 597, 458 A.2d 758 (1983). Ten years earlier, the U.S. Supreme Court had decided that claims of unequal education funding are subjected to rational basis review. *Rodriguez*, 411 U.S. 1. In *Hornbeck*, the Court of Appeals was asked to interpret a completely separate constitu-

In the end, perhaps the most convincing argument in favor of the primacy approach is that the alternatives are based on a mistaken premise. There is nothing in the federal constitution that demands or even seeks fealty in the interpretation of analogous state constitutional provisions.[152] It is therefore not disloyal to the federal constitution or the federal constitutional tradition independently to interpret state constitutions.[153]

Professor Robert Cover formulated a useful analogy to explain why the primacy approach is beneficial to the health of our system of rights-protection. Cover suggested that the primacy approach provides jurisdictional redundancy to ensure appropriate rights-protection.[154] Imagine a meta-due process guarantee that exists independently of its enforcement by courts. The U.S. Supreme Court's efforts to enforce due process might fall short of that meta-due process guarantee, either because of a federalism discount, willful under-enforcement, or a failure to appreciate the true scope of meta-due process. A state supreme court engaging in an independent review of a state constitutional due process analog gives the system a redundant opportunity for full enforcement of meta-due process. Although the state supreme court might also fall short of full enforcement of meta-due process, it might also succeed in full enforcement of the right.[155] In this way, independent state constitutional review provides a redundant but important check to increase the likelihood of full enforcement of a right.

The most important concerns with adopting a primacy approach center on questions of legitimacy. These legitimacy concerns are framed in three ways. First, at an earlier stage in the development of the new judicial federalism, some critics challenged the legitimacy of the entire project.[156] For these early critics, the very idea that a state constitution might be interpreted to have a different meaning than the federal constitution seemed potentially illegitimate. This concern was driven, at least in part, by the politics surrounding the shift from the Warren Court to the Burger and Rehnquist courts in the last decades of the twentieth century. Critics argued that the

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tional text (the "thorough and efficient" schools provision of the Maryland constitution) and, free from the need to take a federalism discount, the Court of Appeals, nonetheless adopted the Supreme Court's *Rodriguez* analysis. *Hornbeck*, 295 Md. 597, 458 A.2d. 758.

152. *See* Landau, *supra* note 142, at 847 ("The notion that a federal court decision about the federal Constitution somehow presumptively binds state courts in their construction of their own constitution seems to me especially difficult to defend. I have yet to see anyone explain by what mechanism the U.S. Supreme Court possesses the authority to determine the meaning of state constitutions.").

153. WILLIAMS, *supra* note 23, at 135–37.

154. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 661–62 (1981).

155. *See id.*

156. *See* Maltz, *Lockstep*, *supra* note 11; Maltz, *The Dark Side*, *supra* note 11, at 995; Deukmejian & Thompson, Jr., *supra* note 11, at 975; *see generally* WILLIAMS, *supra* note 23, at 127–30.

renewed interest in independent state constitutional interpretation at just this time had been stimulated by the desire of advocates to find alternative venues for the development of a more expansive constitutional rights regime in the face of conservative retrenchment on the U.S. Supreme Court.[157] In their view, the fact that "liberal" proponents were seeking to use state constitutions to evade "conservative" federal interpretations[158] rendered independent state constitutional analysis inherently suspect.[159] Thus, just as Justice Black may have been attracted to incorporation doctrine in the mid-twentieth century out of a desire to lock in negotiated doctrinal positions developed during the New Deal, so too the opponents of an independent state constitutionalism in the last portion of the century likely were drawn to call for incorporating federal constitutional interpretations into state constitutional law by their own desire to lock in the restrictive jurisprudence of the Supreme Court.[160]

Beyond the particular politics associated either with the ordered liberty approach of the Supreme Court at mid-century or with the primacy approach urged by some state supreme court justices beginning in the 1970s, two more subtle and durable legitimacy concerns have also been raised by the call for an independent constitutional interpretation approach. If, as some have argued, the U.S. Supreme Court's practice of judicial review is in tension with the majoritarian premise of our constitutional tradition,[161] and if its incidence should therefore be minimized or delayed, then a parallel practice of judicial review conducted by state judges (frequently although not always unelected) independently interpreting state constitutional rights should also be minimized or eliminated if possible. The primacy approach runs counter to this intuition, and therefore raises questions of judicial legitimacy, precisely because it encourages state supreme courts to engage in more, and not less, judicial review.[162] Moreover, even if judicial review were not regarded as inherently aberrant in our democratic system, the decision by a state court to offer interpretations of state constitutional

157. *See, e.g.*, Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 433–34 (1988).

158. *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

159. Professor Williams has labeled these legitimacy concerns an historical relic that "should not still be bothering state courts." Williams, *supra* note 6, at 1061.

160. *See, e.g.*, Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by The Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481 (1990).

161. *See* BICKEL, *supra* note 2, at 16.

162. Critics of the primacy approach sometimes put this point in terms of state separation of powers concerns. Earl Maltz, for example, has argued that the decision of a state court to interpret a state constitutional provision as providing individual rights protection in excess of that accorded by the federal constitution functions to invade the province of state legislative or executive branch judgments, at least in those instances in which the recognition of the state constitutional right requires that a state legislative or executive branch initiative be struck down. *See* Maltz, *The Dark Side*, *supra* note 11, at 1007–09.

provisions that differ from those provided by the U.S. Supreme Court with respect to similar or identical constitutional provisions in the federal constitution is said to undermine the claims of judicial neutrality upon which the review function rests. Worse still, it appears to highlight the idiosyncratic, personal nature of constitutional decisionmaking by courts.[163]

For the critics of the primacy approach, it is more important to have uniformity in constitutional interpretation than to have a system of adjudication in which courts derive an answer that is correct. In effect, this legitimacy concern presses toward the adoption of what David Strauss calls conventionalism, "the notion that it is more important that some things be settled than that they be settled right."[164] For example, in the late 1970s George Deukmejian, then-Attorney General of California,[165] criticized the California Supreme Court for its independent interpretation of the California Constitution.[166] Deukmejian argued both that independent interpretation is illegitimate and that consistency is more important than correctness.[167] Deukmejian, like Justice Black before him, was advocating for a system that would reduce the overall volume of judicial decisions requiring constitutional interpretation. If, however, the tension between democratic governance and judicial decisionmaking can be managed or dissolved, then the case for a robust system of independent state court interpretation of state constitutional law as a primary matter may be viable.

Another downside to the primacy approach is that it is apparently difficult to sustain. Although there is no significant scholarship describing this phenomenon, no state supreme court has consistently maintained a commitment to the primacy approach. This may be a result of succeeding judges not sharing the initial judges' enthusiasm for primacy, a view that the work of primacy is simply too difficult to sustain (or is insufficiently supported by the bar), or that legitimacy concerns mount and may be additive. Whatever the cause, the primacy approach has to answer for its practical failures.

B. The Factor Approach

In an effort to avoid the appearance that independent state constitutional decisionmaking is driven by individual policy preferences rather than

163. *Cf.* Landau, *supra* note 142, at 842–43 ("Critics contend that regarding state constitutions as independently significant has done little more than provide state courts with an opportunity to depart from federal constitutional principles and reach results more pleasing to those courts than the federal law would otherwise allow.").

164. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 907 (1996).

165. Deukmejian served as Attorney General from 1979 to 1983 and as Governor of California from 1983 to 1991.

166. Deukmejian & Thompson, Jr., *supra* note 11, at 996–97.

167. *See id.* at 1009–10.

dispassionate interpretation, some courts and commentators have suggested that state courts should engage in independent constitutional analysis only in certain circumstances. Thus, they have suggested the use of a number of factors to guide state supreme courts in determining when to decline to follow a federal interpretation.[168] One formulation of proposed factors was set out by the Washington Supreme Court:

> The following non-exclusive neutral criteria are relevant in determining whether, in a given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.[169]

Just as Justice Black suggested that selective incorporation, while less constraining than total incorporation, nevertheless provided more discipline than the ordered liberty approach,[170] supporters of the factor approach similarly suggest that by preventing state courts from engaging in independent state constitutional analysis unless certain conditions are met, courts can avoid (or at least minimize) claims of illegitimacy.[171] Criticism of the factor approach comes from both sides. Some argue that it is insufficiently deferential to federal Supreme Court interpretations,[172] while others assert that state courts too readily accede to the prior federal formulation, thereby creating an unwarranted presumption of correctness in the federal interpretation.[173] In practice, courts adopting the factor approach have been inconsistent in applying it, have squabbled about the governing factors, and have

168. This is referred to in the literature as the "interstitial," "criteria," or "factor" approach. *See* A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 934–44 (1976) (identifying seven factors to justify divergent state court interpretation); Robin B. Johansen, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 318–19 (1977) (listing four factors that a state should consider before engaging in an independent constitutional analysis).

169. State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986). Other states have adopted similar lists of factors, including Connecticut, Illinois, New Jersey, and Pennsylvania. *See* State v. Geisler, 610 A.2d 1225, 1232 (Conn. 1992); People v. Tisler, 469 N.E.2d 147, 156–57 (Ill. 1984); State v. Williams, 459 A.2d 641, 650–51 (N.J. 1983); State v. Hunt, 450 A.2d 952, 964–67 (N.J. 1982) (Handler, J., concurring); Commonwealth v. Edmunds, 586 A.2d 887, 894–95 (Pa. 1991).

170. *See supra* text accompanying note 83.

171. *See Geisler*, 610 A.2d at 1232; *Tisler*, 469 N.E.2d at 156–57; *Williams*, 459 A.2d at 650–51; *Hunt*, 450 A.2d at 964–67; *Edmunds*, 586 A.2d at 894–95; *Gunwall*, 720 P.2d at 811; *see also* WILLIAMS, *supra* note 23, at 146–60; Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723, 731–33 (1991).

172. *See* Barry Latzer, *Four Half-Truths About State Constitutional Law*, 65 TEMPLE L. REV. 1123, 1136–37 (1992) (criticizing *Commonwealth v. Edmunds* for including among its factors "case-law from other states" but not from the U.S. Supreme Court).

173. WILLIAMS, *supra* note 23, at 171; Williams, *supra* note 6, at 1023; Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMPLE L. REV. 637, 645–46 (1998).

allowed disagreements over the application of the factors to overtake analysis of the underlying disputes.[174] As Louis Henkin pointed out with respect to selective incorporation, a regime that only sometimes defaults to prior judicial interpretation, must rely on a "principle of selection" for determining when to incorporate existing doctrine and when to permit a new construction of constitutional text. The exercise of discretion regarding this principle is likely to be as much a source of judicial judgment as the underlying constitutional dispute itself.[175] Thus, almost by necessity, the promise of the factor approach as a means for cabining judicial decisionmaking has not been realized.

C. The Lockstep Approach

Finally, there are those who would bind the interpretation of state constitutions to the Supreme Court's interpretation of analogous federal constitutional provisions. Advocates of this approach believe that it is never—or, in its moderate form, rarely—appropriate for a state court to give a different meaning, or to provide a different interpretation to a state constitutional provision than the interpretation given by the U.S. Supreme Court to an analogous provision of the federal constitution.[176] This is generally described as "lockstepping," as the interpretation of the state constitutional provision is meant to travel in lockstep with the federal interpretation, expanding and receding as the Supreme Court modifies its interpretation.[177]

As an initial matter, it is important to distinguish the lockstep approach from "unreflective adoptionism," in which the state court does not even acknowledge the possibility of a divergent interpretation.[178] This position, which governed in many states from the 1960s until the early 1990s, simply ignores the state constitution and resolves claims of right by reference to the federal constitution only.[179] The lockstep approach also is different than

174. *See* State v. Hill, 675 A.2d 866, 875 n.23 (Conn. 1996); State v. Miller, 630 A.2d 1315, 1323 (Conn. 1993); People v. Krueger, 675 N.E.2d 604, 611–12 (Ill. 1996); People v. Washington, 665 N.E.2d 1330, 1336 (Ill. 1996); Commonwealth v. Swinehart, 664 A.2d 957, 961 n.6 (Pa. 1995); State v. Gocken, 896 P.2d 1267, 1270–72 (Wash. 1995); Sofie v. Fibreboard Co., 771 P.2d 711, 716–18 (Wash. 1989); State v. Wethered, 755 P.2d 797, 800–01 (Wash. 1988). These examples and others are discussed in WILLIAMS, *supra* note 23, at 150–62.

175. Henkin, *supra* note 23, at 82.

176. *See* Deukmejian & Thompson, Jr., *supra* note 11; Kahn, *supra* note 11; Maltz, *Lockstep*, *supra* note 11; Maltz, *The Dark Side, supra* note 11.

177. *See* WILLIAMS, *supra* note 23, at 200–05 (discussing State v. Robinette, 685 N.E.2d 762, 767 (Ohio 1997)).

178. *See* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2005); WILLIAMS, *supra* note 23, at 196–97 (attributing the phrase "unreflective adoptionism" to Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 864 (1991)).

179. For these courts, it is not a question, for example, of the privilege against self-incrimination, but rather one of "taking the Fifth."

"reflective, case-by-case adoption," in which a state court acknowledges the possibility of divergent outcomes, considers the arguments, and, on balance, decides to apply the federal analysis to a state constitutional provision.[180] Reflective, case-by-case adoption is essentially the treatment of federal constitutional law as persuasive authority, developed by competent judges (with better resources). Finally, we are not here concerned with state constitutional amendments requiring a forced linkage of the interpretation of the state constitution to that of the federal constitution.[181]

Instead, our focus is what might be called "prospective lockstepping."[182] This occurs where a state court announces that it will, in the future, tie its interpretation of a state constitutional provision to the U.S. Supreme Court's interpretation of a similar or analogous federal provision. The academic literature defending prospective lockstepping is sparse[183] and the academic criticism is nearly universal.[184] With the exception of the rare state constitutional amendment linking the interpretation of state provisions to the federal constitution, there are no formal requirements either in the federal constitution or in most state constitutions that compel the lockstep approach. Thus, the arguments for this form of incorporation are essentially prudential. The principal arguments revolve around perceived interests in uniformity and legitimacy.[185] Courts and commentators point out that uni-

180. *See* WILLIAMS, *supra* note 23, at 197–200 (citing State v. McLellan, 817 A.2d 309, 312–13 (N.H. 2003); State v. Stephenson, 878 S.W.2d 530, 544–47 (Tenn. 1994); State v. Scott, 183 P.3d 801, 829–30 (Kan. 2008)).

181. *See, e.g.*, FLA. CONST. art. I, § 12 ("[Th[e] right to be secure from unreasonable searches and seizures] shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."); FLA. CONST. art. I § 17 (forced linkage regarding cruel and unusual punishment); CAL. CONST. art. I, § 7(a) (forced linkage regarding school busing); Thomas C. Marks, Jr., *Federalism and the Florida Constitution: The Self-Inflicted Wounds of Thrown-Away Independence from the Control of the U.S. Supreme Court*, 66 ALB. L. REV. 701 (2003); Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. FLA. L. REV. 653 (1987); WILLIAMS, *supra* note 23, at 128–29.

182. WILLIAMS, *supra* note 23, at 200–09.

183. *See* Kahn, *supra* note 11; Maltz, *Lockstep*, *supra* note 11, at 100; Maltz, *The Dark Side, supra* note 11, at 995; Deukmejian & Thompson, Jr., *supra* note 11, at 975.

184. *See* Ronald K.L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095, 1097 (1985); John M. Devlin, *State Constitutional Autonomy Rights in an Age of Federal Retrenchment: Some Thoughts on the Interpretation of State Rights Derived from Federal Sources*, 3 EMERGING ISSUES ST. CONST. L. 195, 234–37 (1990); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 804–05 (1992); *see generally*, WILLIAMS, *supra* note 23, at 224–29.

185. *See, e.g.*, Deukmejian & Thompson, Jr., *supra* note 11, at 975. Paul Kahn takes a different approach. He argues that state constitutional law improperly focuses on unique state characteristics as a basis for independent state constitutional analysis. Kahn, *supra* note 11, at 1147. Instead, Kahn argues that state courts should ignore these unique state characteristics and focus on an "American constitutionalism." *Id.* The result of his analysis, however, is to establish a system of prospective lockstepping. A third proponent of prospective lockstepping is Professor Earl M. Maltz of Rutgers Law School. *See* Maltz, *Lockstep*, *supra* note 11, at 98–99; Maltz, *The Dark Side*, *supra* note 11, at 995.

formity needs are heightened in certain areas of constitutional analysis, including, particularly, search and seizure and other issues of criminal procedure.[186] In addition, prospective lockstepping is easier for the state court system and leaves the U.S. Supreme Court firmly in charge of the development of constitutional doctrine. With respect to legitimacy, a critical result of prospective lockstepping is that there are fewer opportunities for state constitutional courts to exercise judgment over the meaning of state constitutional provisions that are open textured or amenable to competing constructions. This systematic reliance on the prior judicial interpretation of the federal constitution, much like the systematic adoption of prior decisions by selective incorporation in the Fourteenth Amendment context, simply reduces the overall incidence of judicial judgment and diminishes the number of cases in which similar bits of constitutional text are given inconsistent effect.

On the other side, there are a number of criticisms of prospective lockstepping.[187] First, critics point out that, because prospective lockstepping changes the meaning of the state constitution to match the federal constitution, the adoption of this approach constitutes, as Justice Robert Utter of the Washington Supreme Court has put it, a virtual "rewrite" of the state constitution without the people's consent.[188] Similarly, Professor Ronald Collins has called it "[a]mending [w]ithout [a]mendments."[189] Second, critics of prospective lockstepping argue that it operates as an inappropriate or unnecessary "precommitment device," in that it commits a future court to decide a future case in a manner decreed by the current court.[190] Third, to the extent that jurisdictional redundancy is offered as a benefit of independent state constitutional interpretation,[191] prospective lockstepping deprives the system of that benefit.[192] And fourth, lockstepping in one case or with regard to one provision acts to inhibit the growth of state constitutional scholarship in other cases and with respect to other provisions. Thus, lockstepping encourages lockstepping.

186. *See, e.g.*, People v. Gonzalez, 465 N.E.2d 823, 825 (N.Y. 1984); State v. Florance, 527 P.2d 1202, 1209 (Or. 1974); State v. Arias, 752 N.W. 2d 748, 754–55 (Wis. 2008).

187. For a catalog of those criticisms, see WILLIAMS, *supra* note 23, at 224–29, and Williams, *supra* note 178, at 1520–27.

188. State v. Smith, 814 P.2d 652, 661 (Wash. 1991) (en banc) (Utter, J., concurring).

189. Collins, *supra* note 184, at 1116.

190. Williams, *supra* note 178, at 1522–23 (quoting Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 366 (2001)). The difference between this dynamic and traditional notions of *stare decisis* is that, in the application of *stare decisis*, the court commits itself to treat factually analogous cases in the same manner. Prospective lockstepping commits a court to follow federal interpretations in different factual scenarios and even when the federal Supreme Court changes its interpretation.

191. Cover, *supra* note 154.

192. Williams, *supra* note 178.

In the end, the claimed advantages in uniformity to be derived from a lockstep approach are far outweighed by the interests which can be derived from state supreme courts interpreting their individual state constitutions with due regard for the unique history, culture, constitutional structure, and legal tradition of their respective jurisdictions. These advantages in redundancy are structural features of our federalist system and militate against the abdication of interpretive responsibility by prospective lockstepping. As we explain in the next Section, the legitimacy concerns growing out of the very enterprise of judicial interpretation of constitutions are surmountable in this context, just as they were in the context of Justice Black's advocacy for total incorporation under the Due Process Clause of the Fourteenth Amendment. If the arguments for prospective lockstepping, the analog to incorporation in the state constitutional law context, are essentially prudential, it is apparent that state courts acting with prudence and with due regard for the broader matrix of social and government institutions within which they operate can engage in the practice of constitutional interpretation and still be responsible to the essential demands of democratic governance.[193]

193. Although the literature is clear in describing three methods of state constitutional interpretation (primacy, factor, and lockstep), the Court of Appeals of Maryland uses a different label, frequently describing a provision of the Maryland Declaration of Rights as being "*in pari materia*" with an analogous provision of the federal constitution. WILLIAMS, *supra* note 23, at 197 (noting that the use of the phrase *in pari materia* by the Court of Appeals of Maryland is "not entirely clear" but the term appears to indicate an "'unreflective adoptionism' approach"). The phrase obscures more than it illuminates. First, the courts use it inconsistently. Friedman, *supra* note 173, at 682 n.111. Sometimes, the phrase is used to mean that two provisions arose to address the same or a similar problem, arose from the same origins, or developed contemporaneously. More frequently, the phrase is used as shorthand to mean that the provision is to be given the same interpretation that the U.S. Supreme Court gives to the identical provision of the federal constitution. Second, it improperly gives the impression that a current court can prospectively bind future courts to follow changes in U.S. Supreme Court constitutional jurisprudence. Williams, *supra* note 178, at 1520–27 (discussing the problems of "prospective lockstepping").

For example, the right of a criminal defendant to confront his or her accusers is protected both by the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. U.S. CONST. amend. VI; MD. CONST. DECL. RIGHTS art. 21. In 1980, the U.S. Supreme Court, in *Ohio v. Roberts*, said that out-of-court statements could be admissible without confrontation if they included "adequate 'indicia of reliability.'" 448 U.S. 56, 66 (1980). The Court of Appeals of Maryland then found that Article 21 of the Maryland Declaration of Rights was to be interpreted as *in pari materia* with the Sixth Amendment analysis, thereby agreeing to adopt the *Ohio v. Roberts* framework. Craig v. State, 322 Md. 418, 430, 588 A.2d 328, 334 (1991). In 2004, the U.S. Supreme Court reversed course, rejected *Ohio v. Roberts*, and adopted a new jurisprudence based on the "testimonial nature" of an out-of-court statement. Crawford v. Washington, 541 U.S. 36 (2004). Dutifully, the Court of Appeals changed its Article 21 jurisprudence to match—without any analysis indicating that *Crawford* in fact provided a better framework for understanding the provision. *See, e.g.*, State v. Snowden, 385 Md. 64, 74 n.9, 867 A.2d 314, 320 n.9 (2005). It was wrong for the pre-*Crawford* Court of Appeals to purport to bind itself to as-yet unseen jurisprudence, and it was wrong for the Court of Appeals to have reflexively followed the Supreme Court when it changed direction in *Crawford*. It should only have changed Maryland's jurisprudence if it thought that the *Crawford* method provided a better framework for understanding Article 21. Rather than continuing to use the phrase "*in pari materia*," Maryland

III. THE CONSTITUTIONAL COURT AS SPECTATOR AND AS AGENT

In its recent decision in *State v. Santiago*, the Connecticut Supreme Court held that the state's capital punishment scheme "no longer comports with contemporary standards of decency," and was therefore prohibited by the state's constitution.[194] The *Santiago* court paid considerable attention to the Eighth Amendment's prohibition against cruel and unusual punishment and the U.S. Supreme Court's cases interpreting that federal constitutional provision, but ultimately adopted an interpretation of the relevant state constitutional provisions that departs in important respects from the parallel federal constitutional doctrine. The choices the Connecticut court made in filling this space between the Eighth Amendment and the state's constitution provide a demonstration of the ways in which state constitutional courts can mitigate the concerns of Justice Black and contemporary proponents of the lockstep approach, that judicial decisionmaking based on open-textured constitutional rights provisions inherently tends to corrode the fabric of majoritarian democracy.

The case for incorporation in either the Fourteenth Amendment context or the state constitutional law context is based, in part, on the asserted illegitimacy of this sort of judicial function, which is the Benthamite critique of the common law applied to constitutional adjudication. In this respect, the premise that led Justice Black and that leads contemporary proponents of the lockstep view to urge constitutional courts to default to the work of prior adjudicators is that legitimate constitutional adjudication must, to use Catherine Wells's terms, be "structured" rather than "situated" decisionmaking.[195] Deferring to a prior adjudication is said to accomplish this end, because it permits the later-in-time court to function entirely as a "spectator," thereby avoiding the exercise of independent agency that "inevitably bring[s] [a court's] own distinctive perspective to [its] consideration of the case."[196]

Proponents of the lockstep approach argue that when a state supreme court interprets a state constitutional provision in a fashion that departs from the U.S. Supreme Court's interpretation of an analogous parallel federal constitutional provision, the overall legitimacy of the constitutional system is reduced. To these commentators, the inconsistency in interpretation stands as evidence that the respective courts have imposed their own preferences instead of applying those embedded in constitutional text and,

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courts should develop clearer ways to express the current relationship between the interpretations given to the state and federal constitutions.

194. 122 A.3d 1, 10 (Conn. 2015).

195. *See generally* Catharine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727 (1990).

196. *Id.* at 1729.

perhaps, tradition.[197] But this claim, that constitutional adjudication must avoid inconsistent results to guard against illegitimacy, has been challenged by other theorists on the grounds that a measured and prudentially managed indeterminacy does not necessarily threaten the basic legitimacy of the system.[198] Instead, it may open a space within which "a fact-responsive equity has room to operate."[199]

This sharp disagreement about the judicial function need not be the end of the discussion. In the next Section, we explore the relationship between structured and situated decisionmaking and the false dichotomy that is sometimes set up between these two ways of thinking about the work of constitutional courts. Then, to provide a concrete example of a more integrated perspective, we trace the analytic path taken by the Connecticut Supreme Court in its *Santiago* opinion. This Part concludes by drawing together the work of several theorists who have offered suggestions for managing the competing obligations imposed on judges adjudicating constitutional claims in a democracy. Taken together, the approach they offer, which we have termed pragmatic prudentialism, offers the promise of dissolving, at least to some degree, the tension between our understanding of constitutional courts as spectators and as agents.

A. Structured and Situated Decisionmaking

Professor Wells argues that normative decisionmaking, including constitutional adjudication of the type undertaken by the *Santiago* court, necessarily is a complex practice that engages both the agent's and the spectator's perspectives.[200] The distinction between the role of "agent" and "spectator" is familiar to students of ethics and epistemology. Agent-centered theories assess "the rationality of certain beliefs and values with reference not to an abstractly conceived philosophical foundation, but rather to a contingent web of experience and location that provides individual agents with their own particular point of view."[201] Applied to the judicial function, Wells suggests that adoption of the agent's role yields situated decisionmakers who bring their own particular subjective perspective to their consideration of individual cases, understood in context.[202] By contrast, the spectator's role yields a model of judicial decisionmaking characterized by a formalist commitment to objective first-principles and the application of stable rules

197. *See supra* text accompanying notes 19–22.

198. Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 439 (1990).

199. *Id.*

200. *See* Wells, *supra* note 195, at 1728–29.

201. *See id.*

202. *Id.* at 1745 ("Such judgments are relative to a perspective; they are situated in prior experience and affected by normative attitudes.").

for decision that essentially are closed to fundamental revision based on the specific circumstances presented in any given case.[203]

As critics of legal formalism have long observed, the judicial function is inconsistent with an unyielding form of structured decisionmaking.[204] The judge as pure spectator may be a popular trope deployed by some nominees to the Supreme Court in confirmation hearings,[205] but as Wells demonstrates, the very enterprise of decisionmaking requires courts—even those that aspire to a structured approach—to exercise discretion in characterizing a case by type and in selecting and applying the facts to the chosen rules for resolution of the legal question presented.[206] Moreover, as Wells points out, "the structures that are used to analyze cases are themselves situated in a particular history of adjudicating cases and in a particular set of purposes for engaging in adjudicatory activity."[207] On this account, those who would limit state constitutional adjudicators to the task of "resolving specific cases in accordance with previously established norms of judgment,"[208] offer a pinched, unrealistic agenda for state courts interpreting state constitutions.

Wells's more complex account of judicial decisionmaking demonstrates that neither structured nor situated decisionmaking can operate independently of the other.[209] Just as perspective and context necessarily inform the steps of structured decisionmaking, so too a commitment to situated decisionmaking requires "structuring methods such as reason, generalization, and abstraction."[210] It simply is an "oversimplification" to think of the spectator and the agent as two separate and distinct judicial roles.[211] For Wells, a given instance of adjudication is better described as a point on a continuum, in which one pole is marked out by the pure but unattainable-in-practice prototype of the judicial spectator and the other by an equally elusive form of situated judgment of the sort assumed by naïve realists.[212] The force of this observation is apparent in the *Santiago* case, to which we now turn.

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203. *See id*. at 1729.

204. *See id*.

205. A well-known variation of this is Chief Justice John Roberts's assertion in his opening statement at his Senate confirmation hearing that he viewed the role of a Supreme Court justice to be like that of an umpire calling balls and strikes. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

206. *See* Wells, *supra* note 195, at 1731–34.

207. *Id.* at 1742.

208. *Id.* at 1731.

209. *See id.* at 1738.

210. *Id.* at 1745.

211. *Id.*

212. *See id.* at 1731.

B. State v. Santiago: A Case Study

In 2012, the Connecticut legislature passed, and the Governor signed into law, a statute that prospectively repealed the state's death penalty.[213] Three years earlier, during the legislature's consideration of a virtually identical bill, the state's chief prosecutor and the state's Division of Criminal Justice provided testimony in which they advised the lawmakers that a prospective repeal would "effectively abolish the death penalty for anyone who has not yet been executed because it would be untenable as a matter of [state] constitutional law."[214] In 2015, an offender who had been sentenced to death sought to prevent his execution on these grounds (and others). In a wide-ranging opinion that offers considerable insight into the role that state courts can assume in construing state constitutional rights, the Connecticut Supreme Court in *State v. Santiago* granted him relief.[215]

The *Santiago* decision is a rich case study for considering the question of how state supreme courts ought to proceed when faced with a state constitutional issue that parallels federal constitutional doctrine. The court concluded that the application of the capital sanction against Santiago and others sentenced to death in Connecticut prior to 2012 and still on death row would violate the state's constitution.[216] On one hand, the *Santiago* court reached this conclusion by employing the "evolving standards of decency" analysis established by the U.S. Supreme Court in its Eighth Amendment proportionality case law—including its cases limiting the death eligibility of persons with intellectual disabilities and juveniles.[217] On the other hand, the Court acknowledged that Connecticut's constitution does not contain a distinct provision prohibiting cruel and unusual punishment—the operative language of the Eighth Amendment—and instead relied on two due process clauses in the Connecticut constitution as the textual foundation for its decision.[218] Nevertheless, the constitutional question in *Santi-*

213. 2012 Conn. Acts 12-5 (Reg. Session).

214. State v. Santiago, 122 A.3d 1, 10 (2015) (citing *Conn. Joint Standing Committee Hearings, Judiciary*, Pt. 9, 2009 Sess., p. 2716 (Conn. 2009)); *see also id.* at 9 n.1.

215. *Id.* at 10. Santiago's sentence had been set aside in an earlier ruling, *State v. Santiago*, 49 A.3d 566 (2012), but he faced re-sentencing, including the possibility of a death sentence, which his constitutional claim was designed to prevent.

216. *Santiago*, 122 A.3d at 9–10.

217. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 563–68 (2005) (prohibiting execution of individuals who were under eighteen years of age when they committed capital crimes); Atkins v. Virginia, 536 U.S. 304, 316, 321 (2002) (holding that the execution of intellectually disabled individuals is unconstitutional).

218. Article First, Section eight, of the Connecticut constitution of 1965, as amended by Article Seventeen of the amendments, provides in relevant part: "No person shall be . . . deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law . . . ." Article First, Section nine, of the Connecticut constitution of 1965 provides: "No person shall be arrested, detained or punished, except in cases clearly warranted by law."

ago, as understood by the Connecticut Supreme Court was whether the application of capital punishment would be "cruel and unusual," and, in those terms, the Eighth Amendment and the U.S. Supreme Court's death penalty case law cast a heavy shadow on the opinion.[219] Given that the language of the state's constitution, which the court viewed as reflecting the state's unique history and culture, is not identical, or even similar, to the federal constitution, the Connecticut Supreme Court was able to open up sufficient maneuvering room to articulate a substantive analysis that, while borrowing from federal constitutional law, departed from the bottom line conclusions established by the U.S. Supreme Court in this area.[220]

Well before it took up the *Santiago* case, the Connecticut Supreme Court had established that both structured and situated elements appropriately ought to play a role in its efforts to construe the state's constitution. In its 1990 decision in *State v. Lamme*,[221] the court had explained that "[t]he adoption of federal constitutional precedents that appropriately illuminate open textured provisions in our own organic document in no way compromises our obligation independently to construe the provisions of our state constitution."[222] Accordingly, the *Santiago* court explained, "We are not necessarily bound for state constitutional purposes, to reach the same conclusions as the United States Supreme Court . . . ."[223] Clearly, then, in resolving the claims raised by Mr. Santiago, the court could not simply default to a lockstep approach, and could not thereby avoid exercising adjudicatory agency over the question of the permissibility of ongoing executions in the state. At the same time, however, the court also made plain that its decision was the result of a process that had been carefully structured by the federal framework established by the U.S. Supreme Court in its Eighth Amendment cases. The court explained that it previously had "adopted, as a matter of state constitutional law, this federal framework for evaluating challenges to allegedly cruel and unusual punishments."[224] Thus, the *Santiago* court was at once tethered to an analytic path established by federal constitutional decisional authority and, at the same time, at liberty to adjust that course according to its best judgment under the circumstances.

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219. *Santiago*, 122 A.3d at 9.

220. It is worth noting that the Connecticut Supreme Court's consideration of the constitutionality of the death penalty came up in *Santiago* framed as a question that has not been addressed directly by the U.S. Supreme Court: the impact of a prospective abolition on the constitutionality of existing capital sentences in a state. The *Santiago* court employed the U.S. Supreme Court's evolving standards framework to find the death penalty in Connecticut unconstitutional, but one significant data point in its assessment of the state's evolving standards was the legislature's decision to prospectively abolish the capital sanction.

221. 579 A.2d 484 (Conn. 1990).

222. *Id.* at 490.

223. *Santiago*, 122 A.3d at 16 n.17.

224. *Id.* at 16.

To transverse this path as both a structured and a situated decisionmaker, the *Santiago* court relied on a template for analysis that it had set out in its prior opinions. In *State v. Geisler*,[225] the Connecticut Supreme Court had identified six "nonexclusive tools of analysis" to consider when determining "the scope and parameters of the state's constitution." Those factors are: "(1) persuasive relevant federal precedents; (2) historical insights into the intent of our constitutional forebears [sic]; (3) the operative constitutional text; (4) related Connecticut precedents; (5) persuasive precedents of other states; and (6) contemporary understandings of applicable economic and sociological norms, or, as otherwise described, relevant public policies."[226] The *Santiago* court explained that it had employed the *Geisler* factors to "inform" its application of the state's constitutional standards, which, in turn, it claimed, "derive from United States Supreme Court precedent concerning the Eighth Amendment."[227] The court further explained that it had utilized the *Geisler* factors "to flesh out the general nature and parameters of the state constitutional provision at issue," but had not "perform[ed] the substantive legal analysis under the somewhat artificial auspices of the six *Geisler* factors."[228]

Organized in this fashion, the *Santiago* opinion begins with a consideration of the federal constitutional standards for what constitutes impermissibly cruel and unusual punishment. After rehearsing the familiar categories, with a particular emphasis on the question of excessive and disproportionate punishment as measured both by an "objective" consideration of "contemporary standards of decency" and by the court's own "independent judgment[]," the court acknowledged that "a majority of the United States Supreme Court has continued to hold—in the face of persistent dissent—that capital punishment comports with contemporary American standards of decency, satisfies legitimate penological objectives, and is not imposed in an impermissibly arbitrary or discriminatory manner."[229] Noting, however, that the precise question in the instant case—a state's prospective-only repeal—had never been addressed by a federal court, the majority ultimately struck down the application of all death sentences still pending in the state, federal Eighth Amendment jurisprudence to the contrary notwithstanding.[230]

After concluding its assessment of federal constitutional doctrine governing capital punishment, the *Santiago* court proceeded to evaluate the re-

225. 610 A.2d 1225 (Conn. 1992) (citing *Lamme*, 579 A.2d 484).

226. *Id.* at 1232. In *Geisher*, the Court essentially adopted a variation of the factor approach to state constitutional interpretation discussed *supra* at notes 168–175 and accompanying text.

227. *Santiago*, 122 A.3d at 15.

228. *Id.* at 15 n.14.

229. *Id.* at 17, 20.

230. *Id.* at 20, 31, 85.

maining factors set out in the *Geisler* framework. Its consideration of the second factor, which it characterized as "Relevant State Constitutional History," proved to be especially consequential.[231] The court's analysis focused on two key periods in the state's history: the decade from 1662 to 1672, which it characterized as a "watershed in the early history of Connecticut;" and the years leading up to the adoption of the state's constitution of 1818, upon which the current Connecticut constitution is based.[232] With respect to the earlier period, the court concluded that Connecticut's first leaders bequeathed a legacy of "judicial moderation in the use of physical punishments" that ensured that "long before the adoption of either the federal or state constitution, Connecticut citizens enjoyed a quasi-constitutional freedom from cruel punishment . . . that reflected [the state's] unique social and political traditions," and that these protections were "enshrined in Connecticut's early constitutional, statues and common law."[233] With respect to the later period, the court explained that the "late eighteenth and early nineteenth centuries in Connecticut witnessed a pronounced liberalization in public, legislative, and judicial attitudes toward crime and punishment," and that the period was characterized by a "broader commitment to human rights, and the first serious public questioning of the moral legitimacy of capital punishment."[234] Lest there be any misunderstanding about the import of this historical account, the court concluded this section of its opinion with the observation that the state's particular history "warrants our scrupulous and independent review of allegedly cruel and unusual practices and punishments, and informs our analysis thereof."[235]

Next, the court took up the question of how the state's constitutional text affected its analysis. As noted, Connecticut's constitution does not have a direct analogue to the punishment provision contained within the federal Eight Amendment. The author of the *Santiago* opinion, Justice Palmer, pointed out that Connecticut was one of three states among the original thirteen that chose not to ratify the Bill of Rights, including the Eight Amendment.[236] He accounted for this position on the basis of the state's early Calvinist tradition of limited government, its common law enforcement of natural rights, and its broad commitment to an unenumerated set of individual rights protections that derived from natural law theory and from the very notion of an ordered society.[237] Consistent with this understanding, the Connecticut Supreme Court had previously recognized that

231. *Id.* at 20.

232. *Id.* at 20–27.

233. *Id.* at 22, 24 (quoting W. Holdsworth, Law and Society in Colonial Connecticut, 1636-1672, at 365 (1974) (unpublished Ph.D. dissertation, Claremont Graduate School)).

234. *Id.* at 24.

235. *Id.* at 27.

236. *Id.*

237. *Id.* at 28.

the state's two due process clauses reflect a broad commitment to individual rights, including the right to be free from cruel and unusual punishment. In *State v. Ross*,[238] the court had begun to define the boundaries of those rights in the death penalty context, and had sought to operationalize the prohibition on unconstitutionally cruel punishment by adopting the federal Eighth Amendment framework, with particular emphasis on the "evolving standards of human decency" analysis.[239]

Because of the "unique structure and text" of the Connecticut constitution, in which the state's prohibition on cruel and unusual punishment is "embedded in [its] dual due process clauses rather than in a distinct punishments clause," the *Santiago* court did not regard the case law from other state supreme courts to be of particular assistance in its assessment of the question it was addressing.[240] But the Connecticut court's consideration of its own precedents in the area, together with the decision of the Connecticut legislature and Governor prospectively to abolish capital punishment, proved to be important in rounding out its analysis.[241] In *State v. Rizzo*[242] ("*Rizzo I*"), the Connecticut Supreme Court had recognized an "overarching concern" in the state constitution "for *consistency and reliability* in the imposition of the death penalty," and on that basis had interpreted the relevant state statutes to require a capital sentencing jury to find beyond a reasonable doubt that the death penalty was the appropriate sentence.[243] And in its 2011 opinion in *State v. Rizzo*[244] ("*Rizzo II*"), the Connecticut Supreme Court employed an evolving standards of decency analysis to examine the permissibility of capital punishment under the state's constitution. While not reaching the conclusion that the death penalty was unconstitutional under all circumstances, the *Rizzo II* court did hold that the court has "an independent duty to determine that the penalty remains constitutionally viable as the sensibilities of our citizens evolve."[245] When the state's elected officials effectuated the prospective abolition of the practice in 2012, sufficient evidence of that ongoing moral evolution was available to the court, and its decision to strike down the application of all death sentences in the state ensued.[246]

238. 646 A.2d 1318 (1994), *cert. denied*, 513 U.S. 1165 (1995).
239. *Id.* at 1354–57.
240. *Santiago*, 122 A.3d at 30.
241. *Id.* at 31–40, 55.
242. 833 A.2d 363 (Conn. 2003).
243. *Id.* at 405–06.
244. 31 A.3d 1094 (Conn. 2011).
245. *Id.* at 1171.
246. *Santiago*, 122 A.3d at 39–40, 48, 55.

C. Pragmatic Prudentialism

The *Santiago* opinion is a good example of the kind of constitutional pragmatism that views the judicial task not as the selection of incommensurable absolutes but as the accommodation of competing values through a process of gradual refinement and development guided by the data of ongoing experience.[247] This sort of pragmatism need not be complacent. In *Santiago*, it is a "critical pragmatism" that seeks to promote justice and improve the law's regulation of social arrangements.[248] This pragmatic tradition offers an effective response to those, like Justice Black, who seek to limit the very enterprise of constitutional judicial review, and finds expression in the constitutional prudentialism urged by Anthony Kronman, among others.[249] Instead of regarding constitutional adjudication—even over abstract and imprecise portions of constitutional text—as inherently corrosive of democratic government, this perspective seeks to "dissolve" the tension between the exercise of judicial judgment and the broad commitment to responsive

247. *See* Kadish, *supra* note 25, at 348.

248. Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821, 1826 (1990). As Richard Rorty has explained, such pragmatism need not be "banal," it need not be just about "coherence theories of knowledge." Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1815–19 (1990). Instead, Rorty calls upon the tradition of John Dewey the "romantic"—the "prophet"—to suggest that pragmatism can provide an intellectual framework through which "the basic terms of social life" are negotiated in an inclusive and democratic fashion. *Id.*

249. Pragmatism and prudentialism are broad theoretical perspectives that overlap in important respects, but that are distinct in others. "While pragmatist theory contests the possibility of objective truth claims asserted outside of a particular context, it also contemplates that guiding generalizations or principles can be derived from the data of experience, and insists that these principles should be employed to shape and direct future practice." Richard C. Boldt, *Problem-Solving Courts and Pragmatism*, 73 MD. L. REV. 1120, 1131 (2014). Prudentialism, by contrast, is less concerned with the nature of truth claims or with the methodology by which governing principles are developed from experience. Instead, prudentialism is focused on the value of settled understandings and practices, the need for caution in developing prescriptions for problems of public policy, and the necessity for compromise and consensus. Thus,

> [A] prudent person . . . feels a certain "wonder" in the presence of complex, historically evolved institutions and a modesty in undertaking their reform[,] . . . has a high tolerance for accommodation and delay and is able to accept the final incommensurability between any system of ideas and the world as it is given to us with all its raggedness and inconsistency[,] . . . [and] values consent but is not demoralized by the process of irrational compromise that is often needed to achieve it.

Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1569 (1985) [hereinafter Kronman, *Philosophy of Prudence*] (citing ALEXANDER M. BICKEL, REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION AND THE PARTY SYSTEM 2 (1971)). One might question the association of Kronman's prudentialism with the broader tradition of pragmatism whose roots stretch back to William James and John Dewey. In some of his writing, Kronman adopts the perspective of Edmund Burke in arguing that we should respect the past "for its own sake." Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1036–37, 1047 (1990). In important respects, however, Kronman's prudentialism is grounded in a kind of instrumentalism that makes it entirely consistent with pragmatist thought. *See* Smith, *supra* note 198, at 423 n.70.

self-government in two ways. First, by calling on the special institutional competencies of judges and, second, by assigning to constitutional courts the particular obligation to mediate considerations of expediency with a longer-term project of refining the community's aspirational ideals, its "enduring general values."[250]

For Kronman, following the thinking of Alexander Bickel, prudentialism is both an "intellectual capacity and a temperamental disposition."[251] A prudentially pragmatic course of constitutional decisionmaking is one in which the court takes into account the "complexity of its human and institutional setting," to devise strategies for accomplishing an "evolutionary reconciliation of [the community's] principles and practices."[252] Suggesting an alternative methodology to Justice Black's incorporation approach to due process adjudication, Sanford Kadish's classic 1957 treatment called for a "method of rationality" in which "what is demanded is not so much the resolution of conflicting values as the accommodation of values—rendering our ultimate wants consistent with our action by ascertaining the common denominator of those tentative want formulations that have arisen from past solutions to other problems."[253] In Kronman's account, there is both a temporal and a substantive component to this judicial function. While elected officials often are inclined to act in the interest of short-term expediency, one responsibility of a court exercising constitutional review authority is to adopt a longer-term perspective. Substantively, the court's role is to emphasize "interests of a more 'general and permanent' sort" rather than "material needs."[254]

The temporal and substantive dimensions in this account come together in Kronman's discussion of the court as a "shaper" and "educator."[255] Kronman argues that a prudentialist jurisprudence of this sort must be rooted in our "moral and legal traditions."[256] But, he says, "it cannot simply restate them in an unchanged form; it must carry these traditions forward, in a principled way, by identifying their moral trajectory and the aspirational ideals toward which they are tending."[257] In effect, the constitutional court's role is to convene the various participants concerned with a question of constitutional obligation to assist in developing appropriate practices that are informed by the enduring normative commitments identified and articu-

250. Kronman, *Philosophy of Prudence*, *supra* note 249, at 1575–76, 1578.

251. *Id.* at 1569.

252. *Id.* at 1569–70.

253. Kadish, *supra* note 25, at 346, 348.

254. Kronman, *Philosophy of Prudence*, *supra* note 249, at 1575–77 (quoting BICKEL, *supra* note 2, at 24).

255. *Id.* at 1580–81. Kronman actually uses Alexander Bickel's phrase "shaper and prophet" in characterizing the court's role in this regard. *See* BICKEL, *supra* note 2, at 239.

256. Kronman, *Philosophy of Prudence*, *supra* note 249, at 1581.

257. *Id.*

lated by the court. The outcome of any individual case need not, on this account, stand as the final resolution of the problem. Pragmatic prudentialism contemplates a gradual project of refinement and progress, in which the court's interventions inform the work of others inside government and beyond, and in turn are informed by the subsequent actions of others taken in response to the court's decisions.[258]

Consistent with this understanding, it is notable that the Connecticut Supreme Court arrived at its decision in the *Santiago* case only after its earlier, more modest treatment of the constitutional question in *Ross* and *Rizzo*, and only after the state legislature and governor had weighed in. Moreover, functioning as a convener and a shaper of these ongoing deliberations over capital punishment, the Connecticut Supreme Court's framing of the state's enduring normative commitments, as evidenced by the *Santiago* decision's depiction of the state's early history with respect to punishment and human rights, served to organize and move forward the development of a comprehensive assessment of the moral obligations owed by the state.[259]

The description of pragmatic prudentialism advanced by Kadish and Kronman[260] resonates with the work of other writers who have sought to map at least one strain of the Burkean tradition onto contemporary constitutional theory. The notion of constitutional adjudication as the gradual development of a grounded normative project, a facilitated conversation over matters of enduring principle that sometimes requires courts to offer "narrow" and/or "shallow" decisions in individual cases in order to maintain the engagement of others in an ongoing moral conversation, is reflected as well in the work of Cass Sunstein.[261] While Sunstein claims a more consequentialist grounding for his form of prudentialism than that marked out by Kronman, there are important linkages between their accounts.[262] Particu-

258. *See id.* at 1586 ("Indeed, it is quite often the case that the Court itself is doubtful as to what the controlling principle is or ought to be, and postponing the moment of final judgment allows it to test its own evolving sense of the matter against the concrete facts of a series of specific cases . . . and to assess the public and governmental reactions that its provisional formulations provide.").

259. State v. Santiago, 22 A.3d 1, 24, 39 (Conn. 2015).

260. Kronman, in turn, attributes the perspective to the work of Alexander Bickel. *See* Kronman, *Philosophy of Prudence*, *supra* note 249, at 1569.

261. *See* Sunstein, *supra* note 130, at 362–65.

262. *See id.* at 359. Kronman quotes Burke to say that:

> The science of government being . . . a matter which requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be, it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purpose of society . . . .

Kronman, *Philosophy of Prudence*, *supra* note 249, at 1598 n.138 (quoting EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 152 (Conor Cruise O'Brien ed., 1969)). One can read this passage, and others from Burke that stress the importance of stable institutional arrangements and the dangers of precipitous change, as embedding an inherent or intrinsic authority in

larly with respect to shallow rulings, Sunstein argues that a cautious approach to constitutional adjudication that produces "rationales and outcomes on which diverse people can agree, notwithstanding their disagreement on or uncertainty about the most fundamental issues," permits judgments that can "attract shared support" from people who might otherwise find themselves in conflict.[263] By building constitutional doctrine gradually in this prudential or minimalist fashion, Sunstein suggests that courts limit the social costs of constitutional adjudication, are less prone to error, and reduce the intensity of social conflict.[264]

Importantly, this modest conception of constitutional adjudication helps to meet the Benthamite objection that judicial decisionmaking necessarily replaces the preferences of citizens with the preferences of judges. As Professor Kadish argued in the federal incorporation context, adjudication need not necessarily involve the selection of one set of values over another, but instead often can be an accommodation of competing perspectives, worked out over time and with the involvement of non-judicial actors.[265] It is consistent as well with Kronman's invocation of the "Whig tradition."[266]

Of course, such an accommodation is not always possible, and conflict is not always avoidable. Kronman suggests that the obligation of a prudent politician, or judge, in such circumstances is to "prevent the conflict from becoming too generalized or too deeply entrenched."[267] Kadish allows that those occasions, when "reason will have run itself out without reliably having indicated the grounds for choice[,]" the judge will be forced to recur to the "bedrock of personal choice solidly and unavoidably faced."[268] And Sunstein conditions his Burkean minimalist regime on the requirement that "long-standing traditions and practices are trustworthy, or at least trustwor-

historical practice and tradition. But this Burkean attention to social context and the authority of settled understandings can also be transposed, as Sunstein does, into a kind of rule consequentialist posture, in which decisionmaking that accords respect for tradition and longstanding institutions is understood not as valuable for its own sake but as likely to produce better outcomes, all things considered. *See* Sunstein, *supra* note 130, at 359.

263. Sunstein, *supra* note 130, at 364.

264. *See id.*

265. *See* Kadish, *supra* note 25, at 349 ("While absolutely viewed ethical principles in diametric collision leave room perhaps only for personal choice, accommodation of wants to new social context is more readily seen to be more an affair of reason and knowledge—reason, by way of reflection upon the ultimate distillate of the multiplicity of wants when their prior formulation appears to offer no handles for decision; knowledge, by way of an estimate of the alternative lines of conduct available and of their consequences.").

266. Kronman, *Philosophy of Prudence*, *supra* note 249, at 1603–04 ("[I]n the domain of values as the Whig conceives it, there are no absolutes, only commitments of different and shifting weight. . . . What the Whig values above all else, is a workable accommodation of existing interests and ideals, one to which those affected are willing to give their consent.").

267. *Id.* at 1604.

268. Kadish, *supra* note 25, at 349.

thy enough."[269] On each of these accounts, judges, exercising the power of judicial review, may be obligated to register a choice informed by their own subjective moral assessment of a constitutional conflict that is neither avoidable nor amenable to negotiation. Such instances need not, however, so eclipse the more frequent, constructive efforts of constitutional courts in a pluralist democracy as to require them systematically to abjure the judicial review function, as total incorporation would have required in the Fourteenth Amendment context or that the lockstep approach would demand of state supreme courts.

CONCLUSION

Federal constitutional law contains no doctrine that requires state courts to defer, absolutely or by way of a strong presumption, to the U.S. Supreme Court's interpretation of the federal constitution when construing analogous state constitutional provisions to provide individual rights in excess of those recognized under federal law. Aside from a few states that have adopted state constitutional amendments to require such state court deference,[270] there is also no formal doctrine under state law that requires lockstepping or its variations. Instead, the affirmative case for state court deference to prior federal interpretation must rest on prudential grounds, arguments that such an approach is likely to produce better results all things considered.

In considering the arguments for state court deference to Supreme Court interpretation, the debate surrounding Justice Black's call for total incorporation of the Bill of Rights through the Fourteenth Amendment provides a useful, if imperfect, analogy. In both instances, proponents have sought to minimize opportunities for judicial decisionmaking, by requiring or encouraging courts to defer to the work of prior adjudicators (and, to tie the future development of constitutional meaning to a distinct body of case law).

Both the call for total incorporation in the mid-twentieth century and the call for state court lockstepping more recently are subject to a realist account. Some have argued that Justice Black, the chief proponent of the former, wished to lock in a set of policy commitments that had been negotiated by the post-court-packing Supreme Court.[271] Similarly, others have suggested that advocates for state court lockstepping were motivated by a wish to restrain the interpretive work of state supreme courts to the political left of the Burger and Rehnquist Courts.[272] There may be significant ex-

269. Sunstein, s*upra* note 130, at 361.
270. *See supra* note 181.
271. *See supra* note 101.
272. *See supra* text accompanying notes 157–160.

planatory force in both of these accounts, although it is unlikely that either provides a complete explanation for the allure of these doctrines.

In addition, the call for state courts to incorporate the interpretive work of prior adjudicators rests on practical arguments with respect to the need for uniformity and consistency in the development of constitutional law and on the greater maturity and experience of the U.S. Supreme Court in developing abstract constitutional language with respect to individual rights.[273] But these considerations of uniformity and consistency must be weighed against the advantages offered by constitutional redundancy of the sort described years ago by Robert Cover and accomplished by state court decisions that fill in the gaps created by the possibility of a federalism discount in some areas.[274] And the advantages of jurisprudential maturity and experience that are claimed for federal constitutional doctrine likely are more than offset by the more specific knowledge and attention to local history and culture that state supreme courts can bring to their work.[275]

Finally, total incorporation in the Fourteenth Amendment context and state court lockstepping both share a motivating purpose, grounded in the conviction that constitutional adjudication is inherently corrosive of democratic self-governance, to transform constitutional courts into spectators. But the long history of practice in both the U.S. Supreme Court and in thoughtful state supreme courts demonstrates that these judicial actors can exercise interpretive agency in a fashion that dissolves, or at least ameliorates, these concerns. The pragmatic, prudentialist vision offered by Anthony Kronman, Cass Sunstein, and others provides a framework for addressing open-textured individual rights provisions in state constitutions that is close to the framework suggested by Justices Harlan and Frankfurter in response to Justice Black's concerns about the Court's development of the Due Process Clause. It is also an intellectual heir to the commentary of Sanford Kadish and others from the mid-twentieth century.[276] This vision conceives of constitutional courts as conveners, capable of drawing into a broad constitutional conversation the multiple institutional stakeholders entitled to contribute to the development of constitutional norms; as articulators of the longstanding normative commitments that a political community has embedded over the course of its history; and as guides assisting the various components of that community to make their way along a developing moral trajectory. The work of the Connecticut Supreme Court in *State v. Santiago* and the cases leading up to it provides but one example of the promise of state judicial actors in this regard. State supreme courts need

273. *See supra* text accompanying notes 16–17.

274. *See supra* note 154 and accompanying text.

275. The *Santiago* opinion is an especially good example of this capacity. *See supra* notes 232–235 and accompanying text.

276. *See supra* notes 103–118, 134–136 and accompanying text.

not surrender agency by systematically deferring to the interpretation of a prior federal adjudicator in order to safeguard the state's interests in democratic governance. Exercised with prudence and with pragmatic concern for the interests of corresponding state institutional actors, the practice of state constitutional judicial review can be accomplished responsibly, even when it results in the interpretation of a state constitution that departs meaningfully from an established interpretation of federal constitutional law.