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# FIRST AMENDMENT LOCHNERISM & THE ORIGINS OF THE INCORPORATION DOCTRINE

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*The 20th century emergence of the incorporation doctrine is regarded as a critical development in constitutional law, but while issues related to the doctrine's justification have been studied and debated for more than fifty years, the causes and mechanics of its advent have received relatively little academic attention. This Essay, part of a symposium on Judge Jeffrey Sutton's recent book about state constitutional law, examines the doctrinal origins of incorporation, in an effort to help uncover why the incorporation doctrine emerged when it did and the way it did. It concludes that, for these purposes, incorporation is best understood as having three basic components, of which First Amendment incorporation predominated. It goes on to show how First Amendment incorporation drew in important ways from existing doctrine, including important strands of "Lochnerian" jurisprudence, and was structured in a way that in turn facilitated subsequent incorporation of criminal procedure protections. Finally, it notes that in its critical beginning moments, incorporation decisions did not consider, much less adjudicate, the kinds of issues that are today central to discussions of judicial federalism.*

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Ever a shrewd operator, Justice Brennan could see what was coming. From the beginning of his tenure on the Supreme Court in 1956, Brennan had helped midwife a transformation in constitutional law centered on an aggressive expansion of certain individual rights against the government.<sup>1</sup> But by the mid-1970s, after four Nixon appointments to the Court, Brennan's only steadfast remaining ally was Justice Thurgood Marshall.<sup>2</sup> Recognizing the need for a Plan B, Brennan used the occasion of a public speech to make a simple suggestion. States have their own constitutions, he observed, which often contain similar or even textually identical provisions to those in the federal constitution, and the states were free to interpret their own constitutions to provide more expansive restrictions on state power than those recognized as a matter federal constitutional law.<sup>3</sup> That, he suggested, was precisely what they should do. Brennan published his proposal in the *Harvard Law Review*.<sup>4</sup> Though only sixteen pages long, the article helped spur a significant expansion in state constitutional law by state courts and gave rise to a hefty literature on what came to be called "judicial federalism."

More than forty years later, Sixth Circuit Judge Jeffrey Sutton has taken up Brennan's themes with almost missionary zeal, though a different focus. This work has culminated in a book-length treatment of the dynamics of judicial federalism that is lively, sophisticated, and penetrating.<sup>5</sup> It describes nuances in the development of constitutional rights over the twentieth century with subtlety and complexity that defies simple reduction, but so far as there is an overarching theme or thesis, it is to encourage a measure of skepticism about the expansion of federal rights by federal courts. Such expansion, he argues, may have the effect of foreclosing or stunting the expansion of rights as a matter of state constitutional law, and federal constitutional rights may turn out to be less protective or less well suited to local conditions than state constitutional rights. In this sense, Sutton's work bookends Brennan's. Where Brennan encouraged the expansion state-law rights beyond the domain of federal protection, Sutton's work suggests federal rights might be pressed less vigorously in recognition of the protective capacity of state constitutional law.<sup>6</sup>

Viewed in historical perspective, this judicial conversation is a remarkable thing. Our contemporary "rights-talk," our understanding of the Constitution as a set of individual rights, and our view of the judiciary as the institutional embodiment of both—in short, our implicit notion that rights, constitution, and courts are one and the same—is a relatively recent development. This outlook is

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1. John Fox, *William Joseph Brennan*, THIRTEEN: THE SUPREME COURT (Dec. 2006), [https://www.thirteen.org/wnet/supremecourt/rights/robes\\_brennan.html](https://www.thirteen.org/wnet/supremecourt/rights/robes_brennan.html).

2. *Id.*

3. *Id.*

4. See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); see also William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986).

5. See generally JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

6. Compare *State Constitutions and the Protection of Individual Rights*, *supra* note 4, at 491, with SUTTON, *supra* note 5.

almost certainly sustained in part by a loose, unarticulated assumption that there is really only one constitution and one body of courts to interpret it, itself headed by a single tribunal with ultimate authority to pronounce upon its meaning. State constitutions and state courts are at most an afterthought; the federal Constitution and the federal courts—especially the Supreme Court—are where the action is.

For much of American history, such an assumption would have been transparently untenable. In his discussion of state constitutional law, Brennan considered various transformations ushered in by the Supreme Court after the New Deal, and concluded that the most significant of these, at least from the standpoint of state courts, was neither the Court's equal protection, fundamental rights or procedural due process decisions—exemplified by cases like *Brown v. Board*,<sup>7</sup> *Reynolds v. Sims*,<sup>8</sup> *Roe v. Wade*,<sup>9</sup> and *Goldberg v. Kelly*.<sup>10</sup> Rather, in his estimation it was the Court's decisions making virtually all the provisions of the Bill of Rights binding on the states that would prove most significant “in preserving and furthering the ideals we have fashioned for our society.”<sup>11</sup> The first eight amendments to the federal Constitution originally applied only to the federal government,<sup>12</sup> and the possibility that the Fourteenth Amendment changed this structural principle was understood to have been rejected by the Supreme Court not long after the Amendment had been ratified.<sup>13</sup> The so-called incorporation doctrine reversed that result and was by any measure one of the Warren Court's major legacies.<sup>14</sup> It was the incorporation doctrine that necessitated Brennan's intervention and the incorporation doctrine that underlies the pathologies Sutton seeks to uncover. It is only because federal constitutional rights have expanded to cover a wide array of state conduct that there is any need to contemplate state constitutional law as an alternative avenue of protection.

The literature on incorporation is vast, but at heart its orientation, if not its goal, is almost universally prescriptive.<sup>15</sup> Although the question is asked from a

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7. See *Brown v. Bd of Educ.*, 347 U.S. 483 (1954).

8. See *Reynolds v. Sims*, 377 U.S. 533 (1964).

9. See *Roe v. Wade*, 410 U.S. 113 (1973).

10. See *Goldberg v. Kelly* 397 U.S. 254 (1970).

11. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, *supra* note 4, at 493.

12. *Barron v. Baltimore*, 32 U.S. 243, 250 (1833).

13. This conclusion is generally associated with the *Slaughter-House Cases*, 83 U.S. 36, 77–78 (1873), but it is unclear whether that is correct. It can more plausibly be traced to *United States v. Cruikshank*, 92 U.S. 542, 554–55 (1875).

14. See Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH & LEE L. REV. 5, 9 (1993).

15. See, e.g., RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989); KURT LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* (2014); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993); Winslow Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); William Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); Charles Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954); Philip Hamburger, *Privileges or Immunities*, 105 NW. L. REV. 61 (2011); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, (1992); Philip B. Kurland, *The Privileges or Immunities Clause: “Its Hour Come Round at Last?”*, 1972 WASH. U. L.Q. 405 (1972); Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117 (2009); Bryan H. Wildenthal,

wide range of methodological perspectives, treatments of incorporation generally center on the question of whether incorporation was justified or unjustified, a good thing or a bad thing. By contrast, relatively little attention has been given to the question of how incorporation came about and the conditions that gave rise to this transformation in American constitutional law. The origins of incorporation may also have prescriptive implications, of course; knowing what has been done may well offer some insight into what ought to be done. The aim of this Essay, however, is merely descriptive. Apart from situating the question of origins within the context of the larger set of issues raised by Brennan, Sutton, and others, the goal here is simply to trace out some important pieces of the story—though by no means all of them.<sup>16</sup> The focus, it should be noted, is on the doctrinal context, rather than personal, political, intellectual, or social factors. While such external considerations were almost certainly critical causal factors, the assumption here is that the legal context mattered as well, both in facilitating incorporation of any sort as well as shaping the form that incorporation eventually took. To give a blunt example, it is less likely the Constitution's rights guarantees would have been made applicable to the states were it not for the ratification of the Fourteenth Amendment. The discussion that follows is centered on this facet of the incorporation story.

Before going further, it may be useful to provide a quick sketch of the four principal conclusions that this Essay reaches. First, the Twentieth Century incorporation story has three basic doctrinal pieces: the Takings Clause, the First Amendment, and the various rights generally associated with the enforcement of criminal law. Second, the most central player was the First Amendment, and especially the right to freedom of speech. Among other things, the structure of constitutional free speech protection allowed for strategic shifts between informalism and formalism that helped to enable the subsequent incorporation of the criminal procedure guarantees. And since states, not the federal government, were the central focus in the development of these rights, understanding the origins of incorporation largely means understanding the origins of modern free speech doctrine itself.

Third, the view of incorporation as a progressive or left-liberal project is only half-right. Incorporation grew out of existing doctrine that developed in the period preceding the New Deal constitutional transformation and was supported in important ways by those members of the Supreme Court least disposed to that transformation. Had it not been for the jurisprudential developments associated with the so-called *Lochner* Era in American constitutional history, it is doubtful incorporation would have occurred.<sup>17</sup> While it would not be accurate to view

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*Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-73*, 18 J. CONTEMP. LEGAL ISSUES 153 (2009).

16. See *supra* notes 4, 5, 15 and accompanying text.

17. Fears that incorporation was vulnerable to the now-familiar criticisms leveled against *Lochner* in turn helped shape the development of incorporation doctrine. See Richard Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 MD. L. REV. 309, 317 (2017).

incorporation as “Lochnerian,” discontinuities between the pre- and post-New Deal Courts are easily overstated.

Finally, as the foregoing may hint, the origins of the incorporation doctrine have little or nothing to do with the considerations that drive the analysis today. The beginnings of incorporation were not rooted in any sustained analysis of the text or history of the Fourteenth Amendment. Nor did those beginnings involve any significant contemplation of the role states, state constitutions, or state courts might play in the development of the law of individual rights. The federalism values highlighted by Justice Brennan and Judge Sutton did not enter the calculus in any serious way. And while later stages in the life of the incorporation doctrine appear to have been driven in significant part the attractions of its acquired formalism—which tended to force the expansion of constitutional rights in some ways and to contract it in others—incorporation in its early years did not serve either of these formalist aims.

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One threshold conceptual and linguistic issue should be addressed before embarking on a discussion of constitutional “incorporation.” While many variations are possible, broadly speaking incorporation can be thought about in either of two basic ways. The first is what will be referred to here as an *overlap theory* of incorporation. This is the view that the Fourteenth Amendment, while not making the amendments comprising the Bill of Rights operative on the states, nevertheless limits state action in ways that coincide with the constraints on federal action imposed by the Bill of Rights, at least to a considerable extent. On this view, the Fourteenth Amendment has its own inner logic, and while this may result in some degree of parallelism with the Bill of Rights, it is only because they share a common source, whether as a matter of legal tradition or natural justice. An overlap conception might still treat the content of the Bill of Rights as relevant to the interpretation of the Fourteenth Amendment, but would reject the notion that the Fourteenth Amendment imports protections of the Bill of Rights in any formal or direct sense.

In contrast to an overlap theory, a *cross-reference theory* of incorporation treats the Fourteenth Amendment as commanding the states to obey provisions of the Bill of Rights, essentially nullifying the doctrine of *Barron v. Baltimore*.<sup>18</sup> In effect, such a view treats the Fourteenth Amendment as having amended the text of first eight amendments themselves by inserting language declaring that the rights they specify bind the state and federal governments alike.<sup>19</sup> A cross-reference theory strongly implies that legal doctrines implementing these various rights should be the same for the states and the federal government, “jot-for-jot and case-for-case.”<sup>20</sup> To a lesser degree, it also tends to favor the “total incorporation” approach advocated by Justice Hugo Black, in which all of the provisions of the Bill of Rights are binding on the states. And while it does not necessarily

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18. *Barron v. Baltimore*, 32 U.S. 243, 247–51 (1833).

19. *E.g.*, U.S. CONST. amend. XIV, § 1 (“[Neither Congress nor any] state shall make any law which shall abridge the privileges or immunities of citizens of the United States.”).

20. *See Duncan v. Louisiana*, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting).

preclude the possibility that the Fourteenth Amendment restricts the states in other, more open-ended ways apart from the enumerated protections in the Bill of Rights, it may also be thought to have some tendency to do that as well.<sup>21</sup>

The word “incorporation” might seem to imply a cross-reference conception, but in the discussion that follows, it refers to either type of understanding, so long as the result is to subject the states to constraints substantially akin to those to which the federal government is subject under the enumerated provisions of the Bill of Rights.<sup>22</sup> The language of incorporation is itself a bit strange, reflecting shifts in conceptions of how the doctrine operates. In ordinary speech, the verb incorporate means something like include or bring within. Normally, one doesn’t speak of incorporating something *against* someone else. Numerous Supreme Court opinions have used this phrasing, however—though, tellingly, none prior to the mid-1980s<sup>23</sup>—and some of these have spoken in terms not of the Fourteenth Amendment but of *the Court* incorporating a particular provision.<sup>24</sup> These patterns of usage reflect a metamorphosis over time in which a doctrine that began as one anchored to an overlap understanding evolved into a cross-reference theory—indeed, the Court itself has on occasion referred only to the Bill of Rights provision at issue in a challenge to a state law, omitting mention of the Fourteenth Amendment altogether.<sup>25</sup> But while today it may be natural to equate incorporation with a cross-reference conception, treating the verb “incorporate” as a synonym for the verb apply, the term here should be understood to include the overlap understanding as well, for it was the overlap understanding that guided the earliest incorporation cases.

In characterizing different approaches, the question is how much weight is given to the inclusion or omission of a given constitutional protection in the Constitution’s first eight amendments. A view of the Fourteenth Amendment as nominally independent but that nevertheless gives dispositive weight to the contents of the Bill of Rights provisions is operationally a cross-reference approach operating under a fig-leaf of talk about overlap. The nature of the distinction and of the ambiguities that may arise in borderline cases is important to understand because gradual increases in the presumptive weight given to the Bill of Rights in the application of the Fourteenth Amendment seem to have helped bring about a transition from an overlap to a cross-reference approach over time.

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21. Compare, e.g., *In re Winship*, 397 U.S. 358, 377–86 (1970) (Black, J., dissenting) with *Adamson v. California*, 332 U.S. 46, 66, 89–92 (1947) (Frankfurter, J., concurring) (due process “has an independent potency” and the Fourteenth Amendment “neither comprehends the specific provisions by which the founders deemed it appropriate to restrict by federal government nor is it confined to them.”).

22. At one point, this it was also referred to as the “absorption” theory.

23. See, e.g., *Gamble v. United States*, 139 S. Ct. 1960, 1979 (2019); *Kelo v. City of New London*, 545 U.S. 469, 508 n.1 (2005).

24. See, e.g., *Baze v. Rees*, 553 U.S. 35, 48 (2008); see also *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1875 (2017) (Breyer, J., dissenting). The distinction is also elided at times through passive constructions. See, e.g., *Kelo*, 545 U.S. at 508 n.1; *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 716 (1999).

25. See, e.g., *Am. Tradition P’ship, Inc. v. Bullock*, 567 U.S. 516, 516 (2012) (per curiam).

In other cases, an overlap approach can be harder to identify since it does not require an explicit reference to a provision of the Bill of Rights, and, moreover, it might entail a somewhat different (generally narrower)<sup>26</sup> scope of protection than the federal enumerated right. Many constitutional provisions could be said to overlap to some degree, but that does not necessarily amount to incorporation. For example, a federal statute purporting to bestow the hereditary title of “Defender of the Faith” might be considered a violation of both the Title of Nobility and the Establishment Clauses, but that confluence does not establish any meaningful linkage between the two clauses for purposes of this analysis. While perfect congruity isn’t necessary, incorporation on an overlap understanding arises only where the core elements of the right recognized under the Fourteenth Amendment generally align with those of a specific constitutional right set out in the first eight amendments. The limits of what can reasonably be counted as incorporation are important to have in focus because the Supreme Court in the days before explicit incorporation at times intervened in criminal prosecutions to invalidate grossly unjust proceedings in ways that to some extent paralleled the enumerated criminal procedure rights, but these were generally too sporadic and individualized to support a claim that a particular federal guarantee was also applicable to the states.<sup>27</sup>

#### I. THE THREE PRE-*HELLER* INCORPORATIONS

It is common to speak in terms of the incorporation of the Bill of Rights or of the Constitution’s first eight amendments.<sup>28</sup> This tends to give the impression that there are eight distinct guarantees and to suggest a diverse array of constitutional concerns—not to mention an extended time period over which incorporation gradually unfolded, given the Supreme Court’s stated adoption of a piecemeal “partial incorporation” analysis.<sup>29</sup> This isn’t really accurate, however, particularly when it comes to understanding how the historical development of incorporation came about. Second Amendment incorporation did not occur until 2010, long after the central incorporation battle was a *fait accompli*—indeed, it was justified in substantial part by the argument that non-incorporation would be

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26. Where incorporation is grounded in the Fourteenth Amendment’s Due Process Clause, the Amendment’s protections against state action will not exceed protections against federal action under the Bill of Rights, provided the Fifth and Fourteenth Amendment Due Process Clauses are interpreted identically. *But see* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *YALE L.J.* 408, 415 (2010).

27. *See, e.g.*, *Powell v. Alabama*, 287 U.S. 45 (1932); *Brown v. Mississippi*, 297 U.S. 278 (1936).

28. *E.g.*, *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243–44 (1936); Richard Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 *MD. L. REV.* 309, 315 (2017). Or “the first ten Amendments.” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

29. *See* Boldt & Friedman, *supra* note 28, at 323–24.

anomalous given how much else had been incorporated decades earlier.<sup>30</sup> The Third and Seventh Amendments, meanwhile, have never been incorporated.<sup>31</sup>

The five remaining amendments contain multiple clauses articulating distinct rights, but they can be grouped into three basic categories, both in terms of subject-matter and historical sequence: (1) the Fifth Amendment's Takings Clause, (2) the First Amendment, which contains four major operative provisions and two more minor ones, and (3) the dozen or so protections generally associated with criminal prosecution set out in the Fourth, Fifth, Sixth, and Eighth Amendments.<sup>32</sup> Each of the three domains of constitutional protection originated in an overlap conception and each eventually transmuted into one based on a cross-reference understanding. Takings protection was the first to be applied to the states, but the last to be recognized as incorporated in the modern, cross-reference sense. It will be discussed in greater detail shortly, but it is for the most part orthogonal to the larger incorporation story.

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30. See *McDonald v. Chicago*, 561 U.S. 742, 780–81, (2010). In addition, the Court formally held that the Eighth Amendment's excessive fines clause was applicable to the states in 2019. See *Timbs v. Indiana*, 139 S. Ct. 682, 686–87 (2019).

31. The Supreme Court has had no occasion to consider incorporation of the Third Amendment, since the right it protects appears to be in no danger of infringement. The Supreme Court held that the Seventh Amendment's civil jury trial right does not apply to state court proceedings as recently as 1916, and this decision has been treated as rejecting incorporation, although by its terms the case discussed whether the Seventh Amendment applied directly of its own force. See *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217–18 (1916); see also *McDonald*, 561 U.S. at 784 n.30. Besides the Third and Seventh Amendments, incorporation of the Fifth Amendment right to indictment by grand jury has been rejected. See *Hurtado v. California*, 110 U.S. 516, 538 (1884).

32. While at least some of these provisions, most notably the Fourth Amendment, have some significant implications in other contexts, see *City of Ontario v. Quon*, 560 U.S. 746, 755–56 (2010), their roles in the enforcement of criminal law have largely driven their modern development generally and their application to the states specifically.

The criminal procedure rights, while numerous, fell like dominoes so that it is accurate to speak of their incorporation as essentially a single historical phenomenon.<sup>33</sup> Virtually all of the enumerated criminal procedure rights were incorporated in the eight years between 1961<sup>34</sup> and 1969,<sup>35</sup> during which period the Court accepted every incorporation claim it considered and repeatedly overturned prior decisions—most of which had been handed down after the Court's New Deal transformation—expressly rejecting incorporation of the rights at issue.<sup>36</sup>

The First Amendment also contains multiple clauses, but, for the most part, these too were largely incorporated in one swoop. Incorporation of the rights of freedom of speech and freedom of press occurred somewhere between 1925 and

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33. There are a handful of either clear or possible exceptions to the incorporation of the criminal procedure rights during this period. First, Fourteenth Amendment incorporation of the Fifth Amendment Grand Jury right was explicitly rejected in the Court's 1884 *Hurtado* decision, and the Court did not decide any cases either affirming or overturning that decision during the period, although in dictum it spoke of the case as settled law in *Beck v. Washington*. See 369 U.S. 541, 545 (1962); see also *id.* at 579 (Douglas, J., dissenting). Second, while the Sixth Amendment criminal jury right has been applied to the states, a unique decision resulting from an unusual alignment among the Court's members held that states are not subject to the rule that this right implicitly requires unanimous verdicts. See *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972); see also *McDonald*, 380 U.S. at 766 n.14 (discussing *Apodaca*). Third, the Court appears not to have decided any cases squarely addressing the incorporation of the Excessive Fines Clause of the Eighth Amendment during this period, an issue recently addressed by the Court. See *Timbs*, 139 S. Ct. 682 at 687; see also *supra* note 31. Finally, while the Court today says that the Excessive Bail Clause was incorporated in *Schilb v. Kuebel*, 404 U.S. 357 (1971), see *McDonald*, 380 U.S. at 764 n.12, that view rests on an ambiguous dictum in *Schilb* that a right against excessive bail "has been assumed to have application to the States through the Fourteenth Amendment." *Schilb*, 404 U.S. at 357.

34. Certain earlier cases accepted narrower constitutional rights that to some extent overlapped with federal protections. See *Cole v. Arkansas*, 333 U.S. 196, 200–02 (1948); *Powell v. Alabama* 287 U.S. 45, 72–73 (1932); see also *In re Oliver*, 333 U.S. 257, 267–78 (1948) (public trial in criminal contempt proceeding). Dictum in the Court's 1949 decision in *Wolf v. Colorado* has been construed to say that the Fourth Amendment's protection against unreasonable searches and seizures applied to the states, though the case expressly held that the exclusionary rule did not. 338 U.S. 25, 33 (1949); see also *Louisiana ex rel Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality) (stating in dictum that the Fourteenth Amendment "would prohibit by its due process clause execution by a state in a cruel manner").

35. See *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (Eighth Amendment excessive bail); *Duncan v. Louisiana*, 391 U.S. 145, 149–50 (1968) (Sixth Amendment criminal jury trial); *Washington v. Texas*, 388 U.S. 14, 22–23 (1967) (Sixth Amendment compulsory process); *Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967) (Sixth Amendment speedy trial); *Pointer v. Texas*, 380 U.S. 400, 407–08 (1965) (Sixth Amendment confrontation clause); *Aguilar v. Texas*, 378 U.S. 108, (1964) (Fourth Amendment warrant requirement); *Malloy v. Hogan*, 378 U.S. 1, 11 (1964) (Fifth Amendment privilege against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (Sixth Amendment assistance of counsel); *Robinson v. California*, 370 U.S. 660, 675 (1962) (Eighth Amendment cruel and unusual punishment); *Mapp v. Ohio*, 367 U.S. 643, 659–60 (1961) (Fourth Amendment exclusionary rule).

36. See *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (Fifth Amendment double jeopardy applies to states, despite *Palko v. Connecticut*, 302 U.S. 319 (1937)); *Duncan*, 391 U.S. 145, 154–55 (1968) (Sixth Amendment jury trial right applies to states, despite *Maxwell v. Dow*, 176 U.S. 581 (1900)); *Malloy*, 378 U.S. 1, 11 (1964) (Fifth Amendment privilege against self-incrimination applies to states, despite *Adamson v. California*, 332 U.S. 46 (1947), and *Twining v. New Jersey*, 211 U.S. 78, 99 (1908)); *Gideon*, 372 U.S. 335, 345 (Sixth Amendment right to counsel in all criminal cases applies to states, despite *Betts v. Brady*, 316 U.S. 455 (1942)); *Mapp*, 367 U.S. 643, 658–59 (Fourth Amendment exclusionary rule applies to states, despite *Wolf*, 338 U.S. 25).

1931<sup>37</sup>—exactly when is somewhat ambiguous. Freedom of assembly was explicitly incorporated in 1937, though this was rooted in the earlier speech cases.<sup>38</sup> Similarly, the Free Exercise Clause was explicitly incorporated in 1940 in *Cantwell v. Connecticut*,<sup>39</sup> though the case for incorporation can be made as early as 1923<sup>40</sup> and, moreover, there were hints of free exercise concerns in the early speech and press incorporation cases.<sup>41</sup>

The only arguable outlier was the Establishment Clause, which did lag somewhat behind the rest, at least operationally.<sup>42</sup> The Supreme Court first applied the Establishment Clause to a state law in 1947,<sup>43</sup> and struck down a state law on Establishment Clause grounds the year after.<sup>44</sup> This may have been the real significance of the 1940 *Cantwell* decision, which declared that the “fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment” and that “[t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress” to enact the kinds of laws prohibited by both of the First Amendment’s religion clauses.<sup>45</sup> *Cantwell*’s broad pronouncements not only shifted away from the language of overlap and toward that of cross-reference but did so with reference to the First Amendment as a single provision, rather than to any single clause, while at the same time also referring explicitly to the Establishment Clause itself.<sup>46</sup> While free exercise incorporation, or something approaching it, had antecedents in the

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37. See *Near v. Minnesota*, 283 U.S. 697, 707 (1931); *Stromberg v. California*, 283 U.S. 359, 368 (1931); *Fiske v. Kansas*, 274 U.S. 380, 382, 385, 387 (1927); *Whitney v. California*, 274 U.S. 357, 371–72 (1927); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

38. See *De Jonge v. Oregon*, 299 U.S. 353, 364–65 (1937) (invalidating conviction under state criminal syndicalism statute as violating right of assembly); see also *Whitney*, 274 U.S. 357, 370–71; *Fiske*, 274 U.S. 380, 384–87. Cf. *Herndon v. Lowry*, 301 U.S. 242, 263–64 (1937).

39. See *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940).

40. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (Fourteenth Amendment liberty “[w]ithout doubt” includes such protections as the right “to worship God according to the dictates of his own conscience”); see also *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 262 (1934); *Pierce v. Soc’y of the Sisters*, 268 U.S. 510 (1925).

41. Compare *Cantwell*, 310 U.S. 296 at 311 (striking down state licensing requirements applicable to religious solicitation and breach-of-the-peace conviction for playing audio recording produced by Jehovah’s Witnesses organization containing attacks on Roman Catholicism) with *Lovell v. City of Griffin*, 303 U.S. 444, 450–53 (1938) (striking down municipal licensing requirements for distributors of circulars, handbooks, advertising, or literature in case involving distribution of Jehovah’s Witness pamphlets and magazines); compare also *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 593 (1940) with *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 654 (1943).

42. Cf. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 254 (1963) (Brennan, J., concurring) (stating that compared with the Free Exercise Clause, incorporation of the Establishment Clause “has, however, come later and by a route less easily charted”). The Petition Clause was not explicitly incorporated until *Edwards v. South Carolina*, 372 U.S. 229, 234 (1963), though this was likely because its role is significantly eclipsed by freedom of speech, see *Bridges v. California*, 314 U.S. 252, 263 n.6 (1941), and perhaps also by a view that states could not interfere with federal petition rights irrespective of the Fourteenth Amendment’s due process clause, see *Slaughter-House Cases*, 83 U.S. 36, 79 (1872); or even the Fourteenth Amendment itself, see *Gilbert v. Minnesota*, 254 U.S. 325, 337 (1920) (Brandeis, J., dissenting) (citing *Crandall v. Nevada*, 73 U.S. 35, 44 (1867)).

43. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 508 (1947).

44. See *Illinois ex rel McCollum v. Bd. of Educ.*, 333 U.S. 203, 466 (1948).

45. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

46. *Id.*

early 1920s, *Cantwell*'s broad dicta laid the groundwork for the later incorporation of the Establishment Clause, which was a less straightforward undertaking, given its more contested historical basis<sup>47</sup> and its propensity to attract political controversy.<sup>48</sup> At any rate, First Amendment incorporation took place within a relatively compressed period of time and, with some caveats, can largely be thought of as a unitary phenomenon.

## II. THE CENTRALITY OF THE FIRST AMENDMENT

Each of these three “incorporations” was significant to a degree, but in terms of impact on the other two, it is First Amendment incorporation that proved the most central to the constitutional story.

### A. Takings Incorporation

Incorporation of Takings Clause protection largely stands apart from the wider incorporation phenomenon. In 1978, the Supreme Court remarked that the Fifth Amendment's Takings Clause is “of course . . . made applicable to the States through the Fourteenth Amendment,” citing its eighty-year-old decision in the 1897 case of *Chicago, Burlington, & Quincy Railroad v. Chicago*.<sup>49</sup> It has largely become conventional wisdom that *Chicago, Burlington* was the case that incorporated the Takings Clause,<sup>50</sup> and thus the first incorporation case. In fact, the Supreme Court had not previously treated *Chicago, Burlington* as an incorporation case in the cross-reference sense, although it undoubtedly established a right that paralleled federal protection under the Fifth Amendment Takings Clause.<sup>51</sup>

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47. See *Schempp*, 374 U.S. at 309–10 (1963) (Stewart, J., dissenting) (accepting that “the Fourteenth Amendment has somehow absorbed the Establishment Clause,” but stating that the history of the adoption “strongly suggest[s]” that the Clause “was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments.”); see also *id.* at 254 (Brennan, J., concurring) (“It has been suggested, with some support in history, that absorption of the First Amendment’s ban against congressional legislation ‘respecting an establishment of religion’ is conceptually impossible because the Framers meant the Establishment Clause also to foreclose any attempt by Congress to disestablish the existing official state churches.”).

48. Compare *McCullum*, 333 U.S. 203, at 211 with *Zorach v. Clauson*, 343 U.S. 306, 309 (1952). See James E. Zucker, *Better A Catholic Than A Communist: Reexamining McCollum v. Bd. of Ed. and Zorach v. Clauson*, 93 VA. L. REV. 2069, 2080 (2007); see also *Engel v. Vitale*, 370 U.S. 421, 424 (1962); *Schempp*, 374 U.S. 203, 215–16 (1963); BRUCE J. DIERENFIELD, *THE BATTLE OVER SCHOOL PRAYER: HOW ENGEL V. VITALE CHANGED AMERICA 187–88* (2007); John Norton Moore, *The Supreme Court and the Relationship Between the “Establishment” and “Free Exercise” Clauses*, 42 TEX. L. REV. 142, 144 n.11 (1963).

49. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978); *Chicago, B. & Q R. Co. v. Chicago*, 166 U.S. 226 (1897).

50. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 860 n.369 (1995) (*Chicago, Burlington* is the “standard citation” for Takings incorporation).

51. *Id.* at 860.

Actually, in terms of primacy, *Chicago, Burlington* is arguably one year too late. As a formal matter, modern Takings doctrine entails two distinct protections:<sup>52</sup> a requirement that a taking be for public use<sup>53</sup> and a requirement to provide just compensation for a taking,<sup>54</sup> and a federal right that a state not take private property for non-public use was first recognized in the Court's 1896 *Missouri Pacific* decision.<sup>55</sup> While that decision did not purport to make any portion of the Fifth Amendment applicable to the states, the requirement it imposed can certainly be thought to coincide with the public use prong of takings doctrine.<sup>56</sup> Nevertheless, its claim to be the first incorporation case is contestable. For one thing, even prior cases applying a public use limitation to the federal government—cases relied upon by *Missouri Pacific*—did not trace that limitation to the Takings Clause of the Fifth Amendment, but rather to general principles of law.<sup>57</sup> At the time, in other words, the right against non-public takings was not linked with the text of the Takings Clause.<sup>58</sup> Second, the limitation does not seem to have been associated with exercises of eminent domain in particular. Rather, the public purpose requirement *Missouri Pacific* recognized was a relatively early manifestation of a more general principle in federal constitutional doctrine that government action must be public-regarding.<sup>59</sup> It therefore did not and frankly could not serve as precedent that would have supported incorporation in its own time. It could not even serve to dispel the inference later drawn in *Hurtado v. California* that whatever else “due process” might entail, the one thing it did *not* reach was the specific rights set out in the first eight amendments since due process protection was itself one of those rights.<sup>60</sup> Finally, it bears noting that the “public use” limitation has been interpreted to have very little bite today.<sup>61</sup> At most, therefore, the case stands as a formal progenitor<sup>62</sup> of a rarely-successful modern doctrine that it did not itself purport to apply.

But there is one important respect *Missouri Pacific* did have a larger impact on the development of incorporation. The decision helped lay the foundations for

52. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231 (2003).

53. *See Kelo v. City of New London*, 545 U.S. 469, 496 (2005).

54. *See United States v. 50 Acres of Land*, 469 U.S. 24, 25 (1984).

55. *See Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 416–17 (1896); *see also* *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112, 158 (1896); *cf. Cole v. City of La Grange*, 113 U.S. 1, 7 (1885) (interpreting state takings provision to impose such a requirement). A claim for a still earlier application of the takings protection can be made on the basis of *Reagan v. Farmers' Loan and Trust Company*, which, in the context of railroad rate regulation, linked just compensation principle with the Equal Protection Clause. *See* 154 U.S. 362, 399 (1894) (“The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public.”).

56. *See Missouri Pac.*, 164 U.S. at 416–17.

57. *See, e.g., Cole*, 113 U.S. at 6–7; *Loan Ass'n v. Topeka*, 87 U.S. 655, 662 (1874).

58. *See* cases cited *supra* note 55.

59. *See Apodaca v. Oregon*, 406 U.S. 404, at 410–11 (1972).

60. *See generally* *Hurtado v. California*, 110 U.S. 516 (1884) (describing the concept and history of “due process”).

61. *See Kelo v. City of New London*, 545 U.S. 469, 479–80 (2005).

62. The case served as an authority in *Cincinnati v. Vester*, which declared it “well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.” 281 U.S. 439, 446 (1930).

important aspects in the development of constitutional law in the pre-New Deal jurisprudence later associated with *Lochner*.<sup>63</sup> This was true in both substance, insofar as it lent force to the wider principle that state measures would be invalidated if they were insufficiently public-regarding, and in form, insofar as it represented a willingness to invalidate state action on grounds not clearly pertaining simply to whether a person has been deprived of liberty or property “by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case,” as the Court had earlier put it.<sup>64</sup>

The same can also be said of *Chicago, Burlington*, particularly with respect to the non-procedural reading of due process.<sup>65</sup> As it happens, *Chicago, Burlington* was handed down the very same day as *Allgeyer v. Louisiana*,<sup>66</sup> which held that the word “liberty” used in the Due Process Clause extended to a much broader range of individual rights than freedom from confinement, establishing another critical piece in the development of what today would be regarded as Lochnerian substantive due process.<sup>67</sup> *Allgeyer*’s reference to the “common occupations of life” and the “privilege of pursuing an ordinary calling or trade” represented a major curtailment, even repudiation, of the *Slaughter-House Cases*,<sup>68</sup> albeit under the heading of due process rather than privileges or immunities.<sup>69</sup> The quoted language was borrowed from Justice Bradley, one of the *Slaughter-house* dissenters, and from Justice John Marshall Harlan, who authored *Chicago, Burlington* and who would consistently advocate incorporationist positions in the years to come.<sup>70</sup>

Apart from generally advancing principles that would lead to the expansion of review of state law under the Due Process Clause, the *Chicago, Burlington* decision would contribute to incorporation in one more direct way, by implicitly sidestepping the interpretive logic of the Supreme Court’s 1884 *Hurtado* decision.<sup>71</sup> *Hurtado* had rejected the argument that the Due Process Clause required indictment by grand jury, reasoning that the explicit articulation of such a right in the Fifth Amendment precluded the possibility it could be considered a requirement of due process, given that the Fifth Amendment contained its own Due Process Clause.<sup>72</sup> The implication was that specification in the Bill of Rights precluded recognition under the Fourteenth Amendment.<sup>73</sup> The *Chicago, Bur-*

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63. *Lochner v. New York*, 198 U.S. 45 (1905).

64. *Davidson v. New Orleans*, 96 U.S. 97, 105 (1877).

65. See *Chicago, B. & Q. Ry. Co. v. Chicago*, 166 U.S. 226, 235 (1897).

66. See *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *id.*

67. *Allgeyer*, 165 U.S. at 590.

68. *Allgeyer* essentially vindicated a position Justice Harlan had argued in dissent in a similar case two years earlier. See *Hooper v. California*, 155 U.S. 648, 662–63 (1895) (Harlan, J., dissenting).

69. See *id.* at 589–91.

70. *Allgeyer* essentially vindicated a position Justice Harlan had argued in dissent in a similar case two years earlier. See *Hooper*, 155 U.S. at 662–63 (Harlan, J., dissenting).

71. See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 241 (1897); *Hurtado v. California*, 110 U.S. 516, 534–35 (1884).

72. *Hurtado*, 110 U.S. at 520–21, 534–35.

73. See *id.*

*lington* decision laid a precedent that would be invoked against the *Hurtado* doctrine years later.<sup>74</sup> *Chicago, Burlington*'s author Justice Harlan, had dissented in *Hurtado*.<sup>75</sup>

These dimensions of the takings cases are not entirely insignificant, but their role in the larger incorporation story is fairly small. The *Chicago, Burlington* decision made it easier to avoid the logic of *Hurtado*, but so too did the Court's early free speech cases, which similarly ignored *Hurtado* without mentioning *Chicago, Burlington* or other Takings cases.<sup>76</sup> And the Takings cases certainly had no immediate effect on incorporation. Because they were at most a matter of overlap and were not understood as making the Fifth Amendment itself applicable to the states, their implications for further incorporation were limited. Not surprisingly, they do not seem to have had much, if any effect on the incorporation of other constitutional protections.<sup>77</sup> Recognition of federal speech and press rights against state action did not occur until several decades later and was not accomplished in any significant respect by relying on *Chicago, Burlington* or its progeny.<sup>78</sup> Indeed, whatever influence there may have been seems to have run in the opposite direction: it was not until 1978 that the Court retrofitted its earlier decisions into the general incorporation framework that governed in First Amendment and criminal procedure cases.

Even apart from the question of larger influence on incorporation of other constitutional rights, the impact of Takings incorporation never had an impact comparable to incorporation of the First Amendment or the criminal procedure rights. *Chicago, Burlington* broke relatively little new ground in its day.<sup>79</sup> Every state constitution contained provisions guaranteeing compensation for government takings, which tended to ensure some amount of compensation in cases of eminent domain, and the notion that a state measure restricting the permissible uses of property could constitute a Fifth Amendment taking—what are today referred to as regulatory takings claims—did not begin to emerge until at least 1922.<sup>80</sup> More generally, federal takings protection was less significant in the pre-New Deal period because of the outright restrictions on state power over property that developed under the Due Process Clause itself. And while Takings incorporation survived the New Deal transformation, the Takings Clause itself has provided relatively weak federal protection, “relegated to the status of a poor relation”<sup>81</sup> among constitutional rights in the post-*Carolene Products* constitutional order.<sup>82</sup> In short, federal protection against states under the Takings Clause,

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74. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 66 (1932).

75. See *Chicago, B. & Q.*, 166 U.S. at 226; *Hurtado*, 110 U.S. at 541 (Harlan, J., dissenting).

76. Thus, in *Powell*, the Court cited both *Chicago, Burlington* and three early free speech cases as authority for avoiding the reasoning of *Hurtado*. 287 U.S. at 66.

77. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

78. See, e.g., *id.*

79. See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 266 (1897).

80. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). It may have been that portions of the opinion today understood as addressing the structure of Takings protection were actually meant to address due process issues.

81. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

82. See *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

while significant, has not had anything like the impact of other incorporation decisions and did little if anything to facilitate them.

### B. *Criminal Procedure Incorporation*

Incorporation of the Constitution's criminal procedure provisions, the part of the incorporation story that attracted the most controversy, simply did not occur until long after First Amendment incorporation was well established. Prior to 1940, the Supreme Court intimated on four occasions that the Fourteenth Amendment protected against state action along lines potentially echoing the criminal procedure portions of the Bill of Rights, twice as holdings and twice as dicta in cases upholding convictions. The first and most significant of these cases, decided in 1932, involved a state criminal prosecution in which the Court concluded the defendants were entitled as a matter of Due Process to court-appointed counsel.<sup>83</sup> But the decision came several years before any recognition of a right to court-appointed counsel applicable to the federal government under the Sixth Amendment,<sup>84</sup> it was hedged by numerous narrowing caveats in light of circumstances of the case,<sup>85</sup> and the Court would subsequently hold that there was no general right to appointment of counsel in criminal prosecutions under the Due Process Clause.<sup>86</sup> At any rate, by the time it was decided, the Court had already struck down state laws on First Amendment-type grounds on at least three occasions,<sup>87</sup> and the decision explicitly relied on its First Amendment precedents in justifying its willingness to recognize a form of due process protection resembling one of the rights set out in the first eight Amendments.<sup>88</sup> In short, it was not really an example of incorporation, and even if it were, it did not endure and was the offspring, not the parent, of First Amendment incorporation.

Other due process criminal cases were similar. In 1936, the Court struck down a conviction based on a coerced confession.<sup>89</sup> Neither this case nor its progeny recognized any connection to the Fifth Amendment's Self-Incrimination Clause, and, moreover, in 1947, the Court reaffirmed its earlier ruling<sup>90</sup> that the privilege against self-incrimination recognized in the Fifth Amendment was not

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83. See *Powell v. Alabama*, 287 U.S. 45, 67–68 (1932).

84. See *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

85. See *Powell*, 287 U.S. at 71 (noting “the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives” and reserving the question whether such appointment would be necessary in other criminal prosecutions or other circumstances).

86. See *Betts v. Brady*, 316 U.S. 455, 473 (1942) (holding that “while want of counsel in a particular case may result in a conviction lacking in . . . fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.”).

87. See *Stromberg v. California*, 283 U.S. 359, 367–69 (1931); *Near v. Minnesota*, 283 U.S. 697, 735 (1931); *Fiske v. Kansas*, 274 U.S. 380, 384–87 (1927); see also *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923).

88. See *Powell*, 287 U.S. at 67.

89. See *Brown v. Mississippi*, 297 U.S. 278, 287 (1936).

90. See *Twining v. New Jersey*, 211 U.S. 78, 113–14 (1908).

applicable to the states under the Fourteenth.<sup>91</sup> In dicta, two other decisions rejecting constitutional claims by criminal defendants suggested that, in an appropriate case, some protection under the Fourteenth Amendment might be available analogous to, respectively, Double Jeopardy and Confrontation Clause protection.<sup>92</sup> Even if any of these cases are regarded as proto-incorporation cases, their effect was meagre and secondary. Prior to 1940, starting with the first arguable invalidation of a state law on free-speech grounds in 1927, the Court decided eleven cases involving speech or press claims and sided with the challenger in all but one.<sup>93</sup>

Moreover, although the Court's expressed theory in the First Amendment cases left room for a different—and presumably more generous—standard than that applied by the First Amendment to the federal government, there are no instances in which the Court's analysis of the constitutionality of state laws diverged from its analysis under the First Amendment.<sup>94</sup> If anything, its approach toward states was more searching, not less.<sup>95</sup> Certainly the Court brought First Amendment protections to bear on a range of problems it had not confronted at the federal level.<sup>96</sup> It is also worth noting that early on the Court drew from both First Amendment precedents and First Amendment history in reviewing state regulation without any apparent hesitation.<sup>97</sup>

In the criminal arena, by contrast, the Court continued to stress that it was wedded to an overlap theory,<sup>98</sup> and it explicitly curtailed earlier holdings in which incorporation had been found.<sup>99</sup> The Court repeatedly emphasized the narrowness and fact-bound nature of its holdings. Through the end of the 1950s, the

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91. See *Adamson v. California*, 332 U.S. 46, 51–52, 85 (1947).

92. See *Palko v. Connecticut*, 302 U.S. 319, 328 (1937); *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934).

93. See *Carlson v. California*, 310 U.S. 106, 112–13 (1940); *Thornhill v. Alabama*, 310 U.S. 88, 104–06 (1940); *Schneider v. New Jersey*, 308 U.S. 147, 165 (1939); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 526 (1939); *Lovell v. City of Griffin*, 303 U.S. 444, 452–53 (1938); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937); *Grosjean v. American Press Co.*, 297 U.S. 233, 250–51 (1936); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 262 (1934) (siding against the challenger); *Stromberg*, 283 U.S. at 269–70; *Near*, 283 U.S. 697 at 722–23; *Fiske*, 274 U.S. at 387. *Whitney v. California*, decided the same day as *Fiske*, would make a twelfth case, and a third in which the free speech claim failed. 274 U.S. 357, 371–72 (1927). It must be acknowledged that the posture of the cases complicates their clear categorization in some instances. This is especially so in *Hague*, in which at least two justices invoked a privileges or immunities rationale. See *Hague*, 307 at 501–32.

94. The 1940s marked a period of some retrenchment for both First Amendment and criminal procedure claims. On the First Amendment side, this included *Jones v. City of Opelika*, 316 U.S. 584 (1942) (licensing fees); *Valentine v. Christensen*, 316 U.S. 52 (1942); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (time, place, and manner restrictions). For criminal procedure, this included *Adamson v. California*, 332 U.S. 46 (1947); *Betts v. Brady*, 316 U.S. 455 (1942) (limiting right to counsel articulated in *Powell*). For the First Amendment arena, however, there is no reason to think these were limitations applicable only to states, and the Court did continue to find a variety of restrictions unconstitutional on First Amendment grounds. See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 116–17 (1943) (limiting *Opelika*). The criminal procedure decisions explicitly narrowed protections against states.

95. The first decision of the Supreme Court to invalidate a federal statute under the First Amendment's Speech or Press Clauses was *Lamont v. Postmaster General*, 381 U.S. 301, 306–07 (1965).

96. See *supra* notes 94–95 and accompanying text.

97. See *supra* notes 94–95 and accompanying text.

98. See *Palko v. Connecticut*, 302 U.S. 319, 323–35 (1937).

99. See *Betts*, 316 U.S. at 471–72 (1942); see also *Adamson*, 332 U.S. at 66–67.

Court did suggest some overlap between the Due Process Clause and the enumerated criminal procedure rights in a few additional areas, sometimes in holdings and sometimes in dicta, sometimes noting the Bill of Rights parallel and sometimes not, and often describing its reasoning quite cryptically.<sup>100</sup> The Court did not, however, suggest that the scope of protection under the Due Process Clause was identical to that of any clause or provision of the first eight amendments.<sup>101</sup> These decisions were not especially remarkable: the Court intervened in state criminal matters on a number of occasions on the basis of the Due Process Clause, and the cases involving potential overlap with Bill of Rights protection were a decided minority and were supported by the same basic framework of legal analysis applicable in due process cases generally.<sup>102</sup> The pace of invalidation under the Fourteenth Amendment increased from the 1930s onward, but not at a rate comparable to the Court's First Amendment docket and with nothing like the gusto and confidence of its First Amendment decisions.

The incorporation of the criminal procedure protections began in earnest with the Court's 1961 decision in *Mapp v. Ohio*,<sup>103</sup> which not only subjected states to the exclusionary rule regime applicable to federal searches and seizures, but also laid to rest the suggestion that the states would be subject to a more lenient standard than their federal counterparts in terms of the actual standard of conduct government agents must follow.<sup>104</sup> (Even then, however, one member of the Court concurred in the result only because he believed the statute under which the prosecution proceeded violated First Amendment rights.)<sup>105</sup> While the scope of First Amendment protection would continue to expand throughout the 1960s and beyond, incorporation was a well-established part of the landscape by the time *Mapp* was handed down.

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100. See generally *Cole v. Arkansas*, 333 U.S. 196 (1948); *Louisiana ex rel Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality); *In re Oliver*, 333 U.S. 257 (1948). *Wolf v. Colorado* rejected a challenge to conviction based on claim of unreasonable search and seizure, but remarked in the course of doing so that "security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society" and therefore enforceable against the states through the Due Process Clause. 338 U.S. 25, 27–28 (1949); cf. *Rochin v. California*, 342 U.S. 165, 172 (1952) (stating that conduct of police "shocks the conscience" where they were involved in "[i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's content.>").

101. *Chandler v. Fretag*, however, announced a seemingly absolute right to confer with counsel, 348 U.S. 3, 10 (1954), notwithstanding the limitations discussed in *Betts v. Brady*, on a right to appointed counsel under *Powell v. Alabama*. 287 U.S. 45, 10 (1932); *Betts*, 316 U.S. at 463–65.

102. See, e.g., *Mooney v. Holohan*, 294 U.S. 103 (1935) (knowing use of false testimony); *Tumey v. Ohio*, 273 U.S. 510 (1927) (right to impartial judge); *Moore v. Dempsey*, 261 U.S. 86 (1923) (mob-dominated trial). The Court also restricted criminal procedure under other constitutional provisions, particularly under the Equal Protection Clause in response to racial concerns. This, too, however, could find support in the pre-New Deal Court, going back to early years of the Fourteenth Amendment. See *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879).

103. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

104. See *id.* at 655 (reasoning that "[s]ince the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."). If there is conceivably a sliver of ambiguity in this statement by virtue of its citation to *Wolf*, it was fully resolved soon afterward in *Ker v. California*. See *Ker v. California*, 374 U.S. 23, at 30 n.7 (1963).

105. See *Mapp*, 367 U.S. at 672 (Stewart, J., concurring).

III. FIRST AMENDMENT INCORPORATION AND THE *LOCHNER* CONNECTION

The question, then, is where First Amendment incorporation came from, and since there was little preexisting First Amendment doctrine to incorporate—the Supreme Court would not actually hold a federal statute invalid under the Speech or Press Clauses until 1965<sup>106</sup>—the question is to some extent a matter of the origins of the modern First Amendment itself. The discussion that follows does not seek to explore subjective motivations of the various justices on the Court in any comprehensive way or to uncover deeper intellectual, social, or other influences on their decision-making. The focus is instead on doctrinal and to some extent thematic roots in the development of First Amendment incorporation.

Two cases will help set the stage. The first of these, decided in 1922, involved a challenge to a Missouri statute that required corporations licensed to do business in the state to provide any former employee a written statement of the reason for the employee's departure.<sup>107</sup> "Service letter" statutes like Missouri's had been enacted in several states in the early Twentieth Century, partly in response to concerns about businesses blacklisting their former employees, whether out of a desire to restrict labor market competition generally or to prevent union organization and membership more specifically.<sup>108</sup> Robert Cheek had worked as a life insurance agent for Prudential Insurance, but left the company for family reasons, and when the company refused his request for a letter pursuant to the statute, Cheek sued.<sup>109</sup> Three state supreme courts had previously declared their own states' service statutes unconstitutional under free speech provisions in their respective state constitutions, articulating what would today be viewed as compelled speech theories.<sup>110</sup> "Liberty of speech and of writing is secured by the Constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred," as one court put it, and the use of "statutory terror" to compel the provision of reference letters "is not allowable where rights are under the guardianship of due process of law."<sup>111</sup> Prudential's brief quoted extensively from these arguments in support of its contention that the Missouri statute invaded the company's Fourteenth Amendment liberties, particularly that of contract.<sup>112</sup>

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106. See *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965).

107. See *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 530–32 (1922).

108. See Harold Friedman & Sam G. Hopkins, *An Analysis of the Missouri Service Letter Statute*, 21 U. KAN. CITY L. REV. 102, 102 (1952); Creath S. Thorne, *Missouri's Service Letter Statute: Its Reach, Effect, and Constitutionality*, 52 UMKC L. REV. 641, 641–43 (1984).

109. *Cheek*, 259 U.S. at 531.

110. See *St. Louis Sw. Ry. Co. v. Griffin*, 171 S.W. 703, 707 (Tex. 1914); *Atchison, Topeka & Santa Fe Ry. Co. v. Brown*, 102 P. 459, 461 (Kan. 1909); *Wallace v. Georgia, C. & N. Ry. Co.*, 22 S.E. 579, 579 (Ga. 1894). A similar challenge was upheld in federal district court under modern free speech doctrine, but later reversed on appeal. See *Rimmer v. Colt Indus. Operating Corp.*, 495 F. Supp. 1217, 1228 (W.D. Mo. 1980), *rev'd*, 656 F.2d 323 (8th Cir. 1981).

111. *Griffin*, 171 S.W. 705; *Wallace*, 22 S.E. at 579.

112. See Brief for Plaintiff in Error, at 31–41, *Chicago, Rock Island & Pac. Ry. V. Perry*, 259 U.S. 548 (1922).

The Supreme Court in *Prudential Insurance v. Cheek* rejected the challenge by a vote of six to three.<sup>113</sup> Writing for the majority, Justice Mahlon Pitney distinguished the three state supreme court cases invalidating service letter statutes on the ground that they were construing their own state constitutions.<sup>114</sup> “[N]either the Fourteenth Amendment nor any other provision of the Constitution of the United States,” he declared, “imposes upon the States any restrictions about ‘freedom of speech’ or the ‘liberty of silence,’ nor, we may add, does it confer any right of privacy upon either persons or corporations.”<sup>115</sup> Pitney’s decision was joined by Justices McKenna, Holmes, Day, Brandeis, and Clarke. Chief Justice Taft, Justice Van Devanter, and Justice McReynolds dissented without opinion.<sup>116</sup>

The second decision to frame this discussion, decided fifteen years later, arose in a somewhat related context. Morris Watson, an “earnest, thin-thatched”<sup>117</sup> reporter and editor with the Associated Press had been fired for what his employer said was unsatisfactory job performance. Watson, however, was a dedicated labor organizer and vice president in the American Newspaper Guild, the leading labor union for newspaper journalists, and he alleged that his dismissal was actually driven by his union activities, in violation of the newly-enacted Wagner Act.<sup>118</sup> A complaint was filed with the National Labor Relations Board, which found in Watson’s favor and ordered his reinstatement.<sup>119</sup> The Associated Press challenged the constitutionality of the Act on First Amendment grounds, among others. The Supreme Court rebuffed the challenge, however, by a five-to-four vote in *Associated Press v. NLRB*<sup>120</sup>—one of the companions to the more famous decision in *Jones & Laughlin Steel*, handed down the same day.<sup>121</sup> In his opinion for the Court, Justice Owen Roberts declared that the freedom of the press did not give the AP immunity from general laws, and the AP

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113. *Prudential Ins. Co. v. Cheek*, 259 U.S. 530 (1922).

114. *Id.* at 538–43.

115. *Id.* at 543.

116. Dissents were less common at the time the decision was rendered than today, with nearly 78 percent of all decisions during the 1922 term being unanimous and dissenting votes comprising just 6 percent of all votes cast by members of the Supreme Court in merits cases. This analysis is based on records from *The Supreme Court Database*, WASH. U. L., <http://www.scdh.wustl.edu> (last visited Aug. 14, 2020). At least one contemporary commentator concluded that the holding in *Cheek* was justified only on the grounds that it was applied to an out-of-state corporation not admitted to do business at the time of enactment and that it would be “clearly unconstitutional” to apply such a law to a natural person. See Nelson Phillips Jr., *Note, Constitutionality of Service Letter Laws*, 9 VA. L. REV. 292, 295 (1922–23).

117. *AP v. Guild*, TIME (June 29, 1936).

118. See 29 U.S.C. § 157 (2018); *Associated Press v. NLRB*, 301 U.S. 103, 123 (1937).

119. *Associated Press*, 301 U.S. at 124.

120. *Id.* at 133.

121. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); see also *Washington, Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937). These decisions closely followed the decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 389, 400 (1937), upholding Washington state’s minimum wage law for women, and only slightly preceded the decisions in the Social Security Act cases, *Helvering v. Davis*, 301 U.S. 619 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937).

was free under the Wagner Act to dismiss an employee who was incompetent or threatened its policy of editorial impartiality.<sup>122</sup>

Justice George Sutherland dissented in an opinion joined by Justices Van Devanter, McReynolds, and Butler.<sup>123</sup> These were the justices referred to as the Four Horsemen because of their opposition to various New Deal measures and other Progressive legislation.<sup>124</sup> In his opinion for the four dissenters, Sutherland first noted that the federal government was restricted not only by the First Amendment but by the Due Process Clause of the Fifth Amendment, and he asserted that the liberty protected by the Due Process Clause itself would have protected the rights guaranteed by the First Amendment, although the text of the First Amendment made clear that the rights it specified were unqualified in a way that other rights like “liberty of contract” were not.<sup>125</sup> This was altogether fitting, he argued, for the “stern and often bloody struggles” by which the rights protected by the First Amendment were secured made it clear that vigilance was needed to protect against even the slightest infringement, a position reinforced with a quotation from Justice Brandeis’s dissent in *Olmstead v. United States*.<sup>126</sup> “Freedom,” Sutherland continued, “is not a mere intellectual abstraction; and it is not merely a word to adorn an oration upon occasions of patriotic rejoicing.”<sup>127</sup> Protection for First Amendment rights had to be understood in light of the content of the rights and the practical context in which they were to be applied, and where the Wagner Act’s application to a newsgathering organization was concerned, pre-textual firing was beside the point.<sup>128</sup> In Sutherland’s view, the AP had a constitutional right not to employ any person as an editor who was engaged in union organization, given that labor itself was a major political issue.<sup>129</sup> No one, Sutherland supposed, would doubt that a union that published a pro-labor journal would be constitutionally entitled to fire an editor who ceased to believe in the union cause and resigned union membership, and by parity of reasoning, the AP could not be required to employ reporters and editors who took a leadership role in the union.<sup>130</sup>

Sutherland hit on what would prove an enduring tension in First Amendment doctrine. The majority’s insistence that freedom of the press does not entail an exemption from generally applicable law draws on deep intuitions and continues to play a critical role in the structure of First Amendment doctrine.<sup>131</sup> But the application of formally neutral rules to the activities covered by the First Amendment is not always accepted, even in the absence of indications of unequal

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122. *Associated Press*, 301 U.S. at 132.

123. *Id.* at 133.

124. See Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 243 (1996) (book review).

125. *Associated Press*, 301 U.S. at 135 (Sutherland, J., dissenting).

126. *Id.* at 135–36 (quoting *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)).

127. *Id.* at 137.

128. *Id.* at 137–38.

129. *Id.*

130. *Id.* at 140.

131. See *Branzburg v. Hayes*, 408 U.S. 644, 685 (1972); *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941).

application or illicit governmental motive.<sup>132</sup> The speech-protective standard for sedition and incitement that is the foundation of so much First Amendment doctrine, both theoretically and historically, can itself be seen as a narrowing of generally applicable principles of criminal and civil liability based on causation and imminence. And where the First Amendment is concerned, laws affecting organizational participation and membership seem to trigger particular constitutional solicitude.<sup>133</sup> Of course, the distinction Sutherland evidently would have drawn between union leadership and mere union membership was, to put it mildly, under-theorized, and it is unclear how he envisioned a newspaper union being structured. More generally, one might accuse Sutherland and his fellow horsemen of First Amendment *Lochnering*—not by some latter-day analogy but as the real-live villains in the constitutional melodrama of the Lochnerian Supreme Court.<sup>134</sup>

But although Sutherland represented the Old Court and although his position in *AP* reflected an attack on the New Deal economic legislation, his dissent is remarkable in several decidedly forward-looking respects: its position that First Amendment guarantees occupy a preferred position in the scheme of constitutional rights, its apparent endorsement of some sort of absolutism in the application of these rights, its willingness to override general laws applicable to expressive and non-expressive conduct alike, its citations to history and use of soaring rhetoric of civil liberties, and its unequivocal assertion (unnecessary to decide the case) that First Amendment freedoms were fully protected under the Fourteenth Amendment.<sup>135</sup> This was a First Amendment opinion in the modern style, reflecting many of the core features of what would become, and remains, governing First Amendment doctrine.

Presented with only these two cases—*Cheek* in 1922 and *AP* in 1937—one might well conclude that the First Amendment freedoms of speech and press in their early years were primarily concerns of the Supreme Court's old guard, who were either brash, visionary, or stubborn in championing these civil liberties as a matter of constitutional due process interpretation. That would not be an accurate take on the larger picture of First Amendment development during this period, but what is true is that pre-*Lochner* jurisprudence does appear to have been essential to the emergence of modern free speech law and thus to the origins of the incorporation doctrine.

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132. *Cf. Gobitis*, 310 U.S. at 602–03 (Stone, J., dissenting).

133. *Compare Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp't Opportunity Comm'n*, 565 U.S. 171 (2012) with *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). *See also* *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Bos.*, 515 U.S. 557, 580 (1995); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). It is interesting in this regard to compare *Associated Press v. NLRB*, 301 U.S. 103 with *International News Service v. Associated Press*, 248 U.S. 215, 243–46 (1918), which held that non-member competitors were not entitled to reprint AP reporting, and *Associated Press v. United States*, 326 U.S. 1, 19–20 (1945), which found that AP's by-laws limiting membership violated the Sherman Antitrust Act, rejecting a First Amendment challenge not because the Sherman Act is a speech neutral general law but because the statute's pro-competitive aims were considered consistent with free speech guarantees.

134. *Lochner* itself was decided in 1905, before any of the horsemen had joined the Court.

135. *Associated Press*, 301 U.S. at 134.

Before going further, we should understand what the landscape looked like in the years preceding *Cheek*. Despite hundreds of Fourteenth Amendment decisions handed down in the pre-New Deal period, the Supreme Court was confronted with only a handful of cases presenting the possibility that a state had infringed the sorts of rights protected by the First Amendment. The 1873 opinion in the *Slaughter-House Cases* had declared cryptically that the “privileges or immunities of citizens of the United States” protected from state abridgment by the Fourteenth Amendment included the right to peaceably assemble and petition for redress of grievances,<sup>136</sup> and the opinion *United States v. Cruikshank* three years later had elaborated on this theme, adding that such rights are implied by “[t]he very idea of a government, republican in form.”<sup>137</sup> *Cruikshank* strongly hinted, however, that these protections were limited to rights of assembly and petition only to the extent they concerned federal action and policy.<sup>138</sup> On such a reading, the Privileges or Immunities Clause had extended these First Amendment guarantees to the states in a way, but only as a kind of derivative protection that barred states from interfering with the exercise of rights originating in an individual citizen’s relationship to the federal government.

It was not until 1897, two decades after *Cruikshank*, that the Court was first presented squarely with a Fourteenth Amendment claim that entailed First Amendment-type rights against state action. The case involved the prosecution of one William F. Davis, a charismatic and, it is safe to say, unyielding evangelical preacher, described by the *New York Times* as a “crank,” if a well-intentioned one.<sup>139</sup> The indictment against Davis charged him with making a public address on Boston Common without a permit, in violation of a city ordinance.<sup>140</sup> The occasion for his arrest, by no means his first,<sup>141</sup> was a sermon preached to a crowd of upwards of two hundred people on a Sunday morning in June. The officer who arrested him conceded that there was “no disorder or disturbance,” and Davis asserted that the permitting ordinance he was charged with violating had been adopted out of hostility to fervent denunciations of liquor in sermons that he and others preached.<sup>142</sup> This was not implausible, and it was bound up in larger religious and social tensions in Boston during the period.<sup>143</sup> By the time of his arrest, Davis had become one of the “standard bearers for the evangelical Protestant minority in a city populated, and increasingly governed, by a Roman Catholic majority.”<sup>144</sup>

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136. *Slaughter-House Cases*, 83 U.S. 36, 79–79 (1873).

137. *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

138. *Id.*

139. *See Davis v. Massachusetts*, 167 U.S. 43, 46 (1897).

140. *Id.* at 47.

141. Davis noted his various arrests and imprisonments in class reports to his fellow Harvard alumni. *See William Franklin Davis*, in 10 HARVARD COLLEGE CLASS OF 1867 SECRETARY’S REPORT, 22 (1897).

142. *See* MARGARET LAMBERTS BENDROTH, *FUNDAMENTALISTS IN THE CITY: CONFLICT AND DIVISION IN BOSTON’S CHURCHES, 1885–1950*, 53 (2005); William E. Lee, *Modernizing the Law of Open-Air Speech: The Hughes Court and the Birth of Content-Neutral Balancing*, 13 WM. & MARY BILL RTS. J. 1219, 1230–32 (2005).

143. BENDROTH, *supra* note 142, at 41–55.

144. *Id.* at 47.

Davis's case first reached Massachusetts's Supreme Judicial Court, where Justice Oliver Wendell Holmes rejected his claims with dispatch.<sup>145</sup> Though undoubtedly aware of the context of Davis's prosecution and the wider social dynamics that gave rise to it, Holmes declared that there was no reason to think the ordinance was intended to target open-air preaching.<sup>146</sup> It is not clear that it would have mattered if there had been. On Holmes's view, a state statute that restricted or even altogether banned public speaking in a highway or public park "is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."<sup>147</sup> At the U.S. Supreme Court, a unanimous court in *Davis v. Massachusetts* essentially adopted the same greater-power-includes-the-lesser rationale, making no mention of freedom of speech.<sup>148</sup> The case was argued just weeks after *Allgeyer* and *Chicago, Burlington* were handed down, but the *Davis* Court was unwilling to conclude that the Fourteenth Amendment restricted the state's police powers in substantive terms.<sup>149</sup>

It would be another decade before the Court faced another First Amendment-type claim. In 1907, the Court was asked to overturn a conviction for criminal contempt in *Patterson v. Colorado*.<sup>150</sup> Thomas M. Patterson—populist Democrat, sitting U.S. Senator, and publisher of the *Rocky Mountain News* and the *Denver Times*—had printed editorials and cartoons in his newspapers critical of recent decisions by the Colorado Supreme Court.<sup>151</sup> He accused various justices of being controlled by Republican and corporate interests, having issued a ruling setting aside various local elections on the seemingly extraordinary theory that the constitutional amendment permitting them was itself unconstitutional.<sup>152</sup> The Chief Justice of the Colorado Supreme Court promptly moved to have Patterson prosecuted for criminal contempt, a charge for which truth was not a defense, in contrast to Colorado libel law, and Patterson was duly convicted.<sup>153</sup> Reviewing the Colorado proceedings, by-then-Supreme Court Justice Holmes declared it unnecessary to decide "whether there is to be found in the Fourteenth

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145. *Commonwealth v. Davis*, 39 N.E. 113, 113 (1895) (Holmes, J.)

146. *Id.*

147. *Id.* Holmes cited as authority his own opinion in *McAuliffe v. City of New Bedford*, which declared that one may have "a constitutional right to talk politics, but he has no constitutional right to be a policeman." N.E. 517, 517 (Mass. 1892).

148. *See* 167 U.S. 43, 48 (1897) ("The right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser.")

149. *Id.* at 47; *see Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (1897); *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

150. *Patterson v. Colorado*, 205 U.S. 454, 458–59 (1907). The same term, the Court also decided *Halter v. Nebraska*, which upheld a ban on use of the American flag in beer advertising. 205 U.S. 34, 45 (1907).

151. *Patterson*, 205 U.S. at 458–59; *Patterson, Thomas M., OUR CAMPAIGNS*, <https://www.ourcampaigns.com/CandidateDetail.html?CandidateID=121964> (last visited Aug. 14, 2020).

152. *See Patterson*, 205 U.S. at 459–60; *see also* *People ex rel Miller v. Johnson*, 86 P. 233, 239 (Colo. 1905), *overruled in part by* *People ex rel Attorney Gen. v. Curtice*, 117 P. 357 (Colo. 1911). The amendment, providing for home rule, had been adopted in 1902 in part due to Patterson's agitation. *See* LUCAS A. POWE JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 2 (1991).

153. *See People ex rel Attorney Gen. v. News-Times Publ'g. Co.*, 84 P. 912, 956 (Colo. 1906).

Amendment a prohibition similar to that in the First,” since the “main purpose of such provisions” was simply to bar prior restraints and, moreover, the power to prevent statements during the pendency of trial was necessary to prevent “interference with the course of justice.”<sup>154</sup> And while Patterson pointed to the obvious conflict of interest in a case involving personal criticism of the very justices who convicted him, Holmes responded that the grounds for contempt are “impersonal” and that it would be perverse to hold that one who interferes with a judicial proceeding can claim exemption from punishment by making personal criticisms of the tribunal’s judges.<sup>155</sup> As in *Davis*, Holmes dealt in the broadest generalities about the scope of constitutional protection, reviewed the challenged legal regime in its most abstract form, and suggested its complete immunity from any free speech challenge.<sup>156</sup>

This time the Court’s decision did provoke a dissent. Justice Harlan argued that Fourteenth Amendment did protect freedom of speech and press, by virtue of both the Privileges or Immunities and the Due Process Clauses.<sup>157</sup> The First Amendment established those rights as “attributes of national citizenship,” and therefore they were among the Privileges or Immunities protected by the Fourteenth Amendment.<sup>158</sup> They were additionally protected by the Due Process Clause because they “constitute essential parts of every man’s liberty” and it was “impossible to conceive of liberty” secured against hostile action by the states which does not include speech and press rights.<sup>159</sup> That being so, he concluded, a state could not permissibly infringe those rights “whenever it thinks that the public welfare requires that to be done,” whether by legislative enactments or judicial action.<sup>160</sup> Beyond this and his rejection of Holmes’s suggestion that the only possible constitutional protection would be against prior restraints, Harlan did not further explain why this particular conviction was unconstitutional.<sup>161</sup>

In 1915, the Court again rejected a freedom of speech claim, this time involving prosecution under a state statute punishing the publication or distribution of any “written or printed matter” having “a tendency to encourage or incite the commission of any crime, breach of the peace, or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice.”<sup>162</sup> The defendant in *Fox v. Washington* had been convicted on the basis of an essay entitled “The Nude and the Prudes,” which advocated a boycott against certain members of an anarchist commune for having had other members

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154. *Patterson*, 205 U.S. at 462–63.

155. *Id.* at 463.

156. *Id.* at 461–63.

157. *Id.* at 464 (Harlan, J., dissenting).

158. *Id.* at 464–65 (Harlan, J., dissenting).

159. *Id.* at 465 (Harlan, J., dissenting).

160. *Id.* (Harlan, J., dissenting).

161. *See id.* at 464–65 (Harlan, J., dissenting). Justice David Brewer also dissented, concluding that the Court at least had jurisdiction to hear the claim. *See id.* at 465–66 (Brewer, J., dissenting).

162. *Fox v. Washington*, 236 U.S. 273, 275 (1915). The Court also rejected a free speech claim under the Ohio Constitution, concluding that films were unprotected. *See Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 243–45 (1915).

of the commune prosecuted for swimming in the nude.<sup>163</sup> Holmes concluded that the essay “unmistakably” encourages further violations of the state’s indecent exposure laws.<sup>164</sup> Holmes determined that the statute had thus far been construed to reach only publications encouraging actual breach of the law, and would not likely be extended to those that merely “tend to produce unfavorable opinions of a particular statute or of law in general.”<sup>165</sup> The latter, he implied, would be of at least “doubtful” constitutionality, though he seemed to suggest more on grounds of vagueness than freedom of speech.<sup>166</sup> There was no dissent, no discussion of the First Amendment, and no reference to freedom of speech apart from a statement that the state supreme court found that the Constitution of the United States guarantees freedom of speech but that there had been no violation.<sup>167</sup> Harlan had left the Court four years earlier, replaced by Mahlon Pitney, the eventual author of *Cheek*.

In 1920, incorporation came into slightly crisper focus in *Gilbert v. Minnesota*.<sup>168</sup> There the Court was faced with a state statute criminalizing draft interference that had been used to prosecute a man for a speech asserting that American conscription was democratically illegitimate.<sup>169</sup> This was the first time the Court had faced a challenge to a state law during the era of the so-called “Red Scare.”<sup>170</sup> The Court had confronted seditious speech at the federal level (including *Abrams v. United States*,<sup>171</sup> which signaled a turning point in Holmes’ and Brandeis’ approach to speech issues), but it is equally important to note that the Court sustained the convictions in every one of the cases that reached it—indeed, it would not strike down a federal law on free speech grounds until the mid-1960s.<sup>172</sup> The result in *Gilbert* was similar, both to the sedition cases and its earlier incorporation cases, avoiding the incorporation issue by rejecting the claim on the merits.<sup>173</sup> Notable for our purposes, Brandeis dissented. He principally maintained that the law invaded the federal government’s exclusive prerogative, which he argued included an important free speech element.<sup>174</sup> At the end of his dissent, however, he also added that while he would not decide whether the Fourteenth Amendment applied, he could not believe “that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property.”<sup>175</sup>

And so things stood at the time *Cheek* was handed down. *Cheek* thus seemed at long last to close the door that the earlier cases had left open. And

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163. *Fox*, 236 U.S. at 277.

164. *Id.* at 277.

165. *Id.*

166. *Id.*

167. *See id.*

168. *Gilbert v. Minnesota*, 254 U.S. 325 (1920).

169. *Id.* at 326–27.

170. *Id.* at 327–28.

171. 250 U.S. 616, 623 (1919).

172. *See Lamont v. Postmaster General*, 381 U.S. 301, 306 (1965).

173. *See Gilbert*, 254 U.S. at 333.

174. *Id.* at 337 (Brandeis, J., dissenting).

175. *Id.* at 343 (Brandeis, J., dissenting)

while Holmes and Brandeis had voiced support for speech rights, it was perfectly plausible to conclude that in *Cheek*, Brandeis—who had gone so far as to argue for repeal of the Fourteenth Amendment in order to end Lochnerian due process and equal protection constraints—had ultimately decided it was best not to add any fuel to the Fourteenth Amendment fire.<sup>176</sup> Yet by the time of the *AP v. NLRB* decision, the ideas he first began to articulate in *Gilbert* had become law, with support from across the Court.<sup>177</sup>

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Much, of course, had happened in the years between. One critical development occurred during the term immediately following *Cheek*. In *Meyer v. Nebraska*,<sup>178</sup> the Court was presented with a challenge to a Nebraska statute forbidding any school teacher to instruct a child in a foreign language.<sup>179</sup> The measure had been adopted in 1919, motivated largely by anti-German sentiment in the wake of the First World War, and especially by antipathy to Lutheran churches, where services were conducted in German.<sup>180</sup> Robert Meyer, an instructor at a Lutheran school, was arrested after being observed by state authorities teaching the story of Jacob's Ladder to a ten-year-old boy during a school recess period.<sup>181</sup> He challenged his conviction on a number of grounds, but in arguments to the U.S. Supreme Court, he primarily stressed the right to pursue a vocation, which had been the conceptual foundation for the Court's liberty-of-contract jurisprudence under the Fourteenth Amendment.<sup>182</sup> It was also argued that the statute infringed rights of property in private schools and that it violated equal protection by drawing arbitrary classifications—for example, because it did not extend to instruction in foreign languages at home or by tutors.<sup>183</sup> In short, the Court had before it numerous orthodox doctrinal routes to the conclusion that the act was unconstitutional.

At oral argument, however, the discussion took a somewhat different course. Arthur Mullen, Meyer's counsel, laid primary stress on "liberty of conscience" and "religious liberty," which he maintained were protected against state incursion by the Fourteenth Amendment's Privileges or Immunities Clause.<sup>184</sup> Chief Justice Taft pressed Mullen for clarification about doctrinal mechanics, asking him whether it was his position that the "liberty" protected by the Due Process Clause "includes in that 'liberty' the free exercise of religion."<sup>185</sup> Mullen assented. Taft followed up: "You incorporate that into that pro-

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176. See *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 548 (1922).

177. See *Associated Press v. NLRB*, 301 U.S. 103, 137 (1937).

178. *Meyer v. Nebraska*, 262 U.S. 390, 397–98 (1923).

179. The companion case, which includes Holmes's brief dissent, is *Bartels v. Iowa*, 262 U.S. 404 (1923).

180. William G. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 U. CINN. L. REV. 125, 132 (1988).

181. *Id.* at 146 n.110.

182. *Id.* at 173.

183. *Id.* at 156–57, 169.

184. *Id.* at 170–71.

185. *Id.* at 171.

vision?” Mullen replied with an emphatic yes, adding that “surely, religious liberty is a privilege and immunity guaranteed by our Constitution.”<sup>186</sup> Taft then inquired if free speech was also protected, to which Mullen replied that not only was free speech protected, but also “the right to study, and the right to use the human intellect as man sees fit.”<sup>187</sup>

It is difficult to know exactly what Taft and Mullen each meant or what thoughts their comments would have provoked in the minds of other members of the Court, but the colloquy does shed some light on the considerations that were in play. Taft’s comments suggest that the idea of substantive overlap between the First Amendment and the Due Process Clause was within the bounds of contemplation, though his use of the word “incorporate” does not necessarily imply that he was thinking in terms of a cross-reference theory, or even an approach in which protection afforded against federal and state action operated identically.<sup>188</sup> Mullen’s insistent Privileges or Immunities argument indicates that the idea of relying on the Privileges or Immunities Clause to protect against state action was still kicking around,<sup>189</sup> but it is unclear whether he was referring to protections of the First Amendment as such or more generally to rights the First Amendment itself might be said to incorporate or operationalize.

At any rate, the final result in *Meyer* was that the Court did indeed find the law unconstitutional, in an opinion by Justice McReynolds, a man whose parsimoniousness of spirit toward humanity merits an entire chapter in the general legend of the Four Horsemen.<sup>190</sup> Yet while McReynolds certainly could have confined himself to a theory grounded in rights of property, contractual freedom, or protection from what was called class legislation, hewing to the major doctrines of the period, he did not do so.<sup>191</sup>

The liberty protected by the Due Process Clause, he began, had not been defined in the Court’s cases with exactness—and, he implied, it would remain open-ended—but it indisputably entailed a number of more particular guarantees, which he proceeded to name.<sup>192</sup> His list included not only such Lochnerian staples as the rights to contract and to engage in common callings, but also the rights “to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of [one’s] own conscience, and, generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”<sup>193</sup> This was a strong, sweeping statement that touched on virtually every possible interest that had been invoked in opposition to the statute. McReynolds cited fourteen cases for this proposition, not one of which dealt with anything like these latter rights, or even mentioned

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186. *Id.*

187. *Id.* at 172.

188. *Id.* at 171–72.

189. A fact in some sense confirmed by *Hague*. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 517 (1939).

190. See Barry Cushman, *Clerking for Scrooge*, 70 U. CHI. L. REV. 721, 721–26 (2003).

191. See Ross, *supra* note 180, at 180–81.

192. *Id.* at 181.

193. *Id.*

them as dicta.<sup>194</sup> Apart from general assertions that the Fourteenth Amendment protects “fundamental” rights, that the rights of petition and assembly are, as *Slaughter-House* had said, privileges and immunities of national citizenship, and that liberty under the Due Process Clause includes “the right of the citizen to be free in the enjoyment of all his faculties” and “to be free to use them in all lawful ways,” the uniform thread through those cases was recognition of Fourteenth Amendment protection of the right to earn one’s livelihood by any lawful calling.<sup>195</sup> That principle would have been sufficient to decide the case, but McReynolds went well beyond it.

And the rest of his argument was curious too. The legislation would be invalid if it was “arbitrary or without reasonable relation to some purpose within the competency of the State to effect.”<sup>196</sup> McReynolds readily conceded the legitimacy of the state’s interests in adopting its ban on language instruction.<sup>197</sup> Even so, he wrote, “the individual has certain fundamental rights which must be respected,” and “a desirable end cannot be promoted by prohibited means.”<sup>198</sup> He concluded the legislation was indeed arbitrary and irrational, but in terms that suggest the problem had more to do with the clash with fundamental rights than with the measure’s efficacy.<sup>199</sup> Nowhere did McReynolds explain *why* the statute was arbitrary and irrational, and it would have been difficult to show that it was. (Holmes, joined by Sutherland, dissented on precisely this ground.)<sup>200</sup> McReynolds intimated that the measure might be justified in time of war or emergency, but that hardly implied it lacked rationality in any other situation.<sup>201</sup> One could readily imagine that the interests that would support such a restriction for war-making or defense purposes could also be said to support its extension to peacetime—for example, the concern expressed by the state that many World War I conscripts lacked English fluency. Nor did he explain why the measure could not be considered a reasonable means of furthering interests in promoting English fluency and in facilitating cultural assimilation more generally.<sup>202</sup> Indeed, he conceded that it might be “highly advantageous if all had ready understanding of our ordinary speech,” but even so, “this cannot be coerced by methods which conflict with the Constitution.”<sup>203</sup> We cannot know what, precisely McReynolds was thinking—if indeed he was thinking precisely—but that is beside the point. *Meyer*’s ruling that the Nebraska measure was arbitrary suggested something much more like a view grounded in individual rights that narrow the state’s police power than one concerned merely with policing reasonableness, vested rights, or legislative favoritism. This was in keeping with some of the

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194. Reynolds provided no pin-cites and did not refer to any concurrences or dissents. *Id.* at 181–82.

195. See *Allgeyer v. Louisiana*, 65 U.S. 578, 589 (1897).

196. *Meyer v. Nebraska*, 262 U.S. at 400–01.

197. *Id.* at 398.

198. *Id.* at 401.

199. *Id.* at 400–01.

200. See Ross, *supra* note 180 at 183–85; see also *Meyer*, 262 U.S. at 400–01, 403.

201. *Meyer*, 262 U.S. at 402–03.

202. See *id.* at 400–03.

203. *Id.* at 401.

Court's more aggressive Due Process decisions, like those invalidating wage regulation, but it was in serious tension with traditional doctrinal statements that Due Process restrictions did not affect the state's legitimate police power and that state legislation was entitled to great deference.<sup>204</sup> *Meyer*, in other words, had taken hold of the strongest treatment in the Lochnerian medicine chest and applied it in a case recognizing a slew of rights closely related to those named in the First Amendment.

*Meyer* received an encore two years later in *Pierce v. Society of Sisters*,<sup>205</sup> a case invalidating what was effectively a ban on private schools and which had an even more evident religious aspect than the measure challenged in *Meyer*.<sup>206</sup> Again, the Court's opinion was authored by McReynolds, and this time it was unanimous, characterized by the same view of fundamental rights that limit the state's police power.<sup>207</sup> But the more significant development in the Spring of 1925 came one week later, when the Court handed down its decision in *Gitlow v. New York*.<sup>208</sup> The case involved a challenge to the conviction of one Benjamin Gitlow, a socialist and former member of the New York State Assembly, under a state "criminal anarchy" statute, which forbade advocacy of the overthrow of organized government by force, violence, or any unlawful means.<sup>209</sup> Gitlow had been prosecuted for his role in bringing forth "Left Wing Manifesto," which had been printed in *The Revolutionary Age*, a newspaper he helped publish.<sup>210</sup> Gitlow's conviction was sustained, but in his opinion for the majority, Justice Edward Terry Sanford did not rest upon *Cheek's* seemingly forceful rejection of free speech protection under the Fourteenth Amendment.<sup>211</sup> Rather, he wrote, "we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."<sup>212</sup> Sanford declared that *Cheek's* "incidental" statement would not be regarded as determinative, and he cited a string of precedents in support, none of which contradicted

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204. *See id.* at 125–26.

205. 268 U.S. 510 (1925).

206. The legislation attacked in *Pierce* was the subject of an amicus brief in *Meyer*, which likened the measure to the Soviet Union. Brief for William D. Guthrie & Bernard Hershkopff as Amici Curiae Supporting Plaintiff in Error, *Meyer v. Nebraska*, 262 U.S. 390 (1932) (need docket number here).

207. The legislation was defective, McReynolds wrote, because it unreasonably interfered with parental liberty to control their children's upbringing and education—under what he called the fundamental theory of liberty supporting all American government, a child is "not the mere creature of the State." *Pierce*, 268 U.S. at 535. Having said this, McReynolds's opinion then invoked the property rights of the schools, presumably because they, not parents, were the parties in the case, and corporations had been held to possess only property, not liberty, rights under the Due Process Clause, and thus the property argument essentially served as a way to invoke third-party rights. *Id.* at 532–36.

208. *Gitlow v. New York*, 268 U.S. 652 (1925).

209. *Id.* at 654.

210. *Id.* at 655.

211. *Id.* at 670.

212. *Id.* at 672 (Holmes, J., dissenting).

*Cheek*'s declaration<sup>213</sup> and some of which had no obvious connection to the question at all.<sup>214</sup>

The majority upheld *Gitlow*'s conviction, however, reasoning that the legislature could well have concluded that statements advocating the overthrow of the government by unlawful means could be punishable as a class, without regard to whether they were dangerous in any particular case.<sup>215</sup> Justice Holmes, joined by Brandeis, dissented, and took no issue with the application of the Fourteenth Amendment to the case.<sup>216</sup> "The general principle of free speech," he wrote, "must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used," though he added that it might "perhaps" be accepted with a "somewhat larger latitude of interpretation" that the restrictions imposed on the national government by the First Amendment.<sup>217</sup>

What had changed since *Cheek*? For one thing, there was the doctrine laid down in *Meyer* and extended in *Pierce*, as well as the experience of working through the problems those cases presented.<sup>218</sup> Another was the Court's composition. In the three intervening years, four of the six justices who had endorsed a flat rejection of Fourteenth Amendment free speech rights in *Cheek* had left the Court, leaving only Brandeis and Holmes, both of whom had begun to embrace free speech principles in one form or another even before *Cheek*.<sup>219</sup> Besides Sanford, the three *Cheek* dissenters—Taft, McReynolds, and Van Devanter—were now joined by George Sutherland, Pierce Butler, and Harlan Fiske Stone.<sup>220</sup> This is not meant to suggest that votes of the *Cheek* dissenters or the *Gitlow* majority

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213. *Patterson, Fox*, and Brandeis's *Gilbert* dissent did not purport to resolve the question, although the *Gilbert* dissent made it clear where he stood on the question, at least insofar as Due Process would be used to protect commercial contractual interests. See *Gilbert v. Minn.*, 254 U.S. 325, at 334–43 (1920) (Brandeis, J., dissenting).

214. Citation to *Coppage* might have been sensible as an oblique support for rights of voluntary association had *Cheek* not expressly discussed its logic and implications at some length. Sanford's *Cheek*-distinguishing footnote also included a citation to the Fifth Edition of Story's Commentaries on the Constitution, published in 1891, declaring it "absurd" to suppose that rights such as freedom of speech and freedom of religious worship were unprotected by the due process guarantee. The language originated in fourth edition of Story's treatise, edited by Thomas Cooley and published in 1873.

215. *Gitlow v. New York*, 268 U.S. 652, 670 (1925).

216. See *id.* at 672 (Holmes, J., dissenting).

217. *Id.* (Holmes, J., dissenting).

218. See *Pierce v. Soc'y of Sister*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

219. See *Gilbert v. Minnesota*, 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting); *Schaefer v. United States*, 251 U.S. 466 (1920) (Brandeis, J., dissenting); *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting). Their assent to *Cheek*'s declaration is therefore somewhat puzzling. The most likely explanation would seem to be norms of acquiescence. See Barry Cushman, *Inside the Taft Court: Lessons from the Docket Books*, 2015 SUP. CT. REV. 345, 348 (2015). Even so, given Brandeis's statement in his *Gilbert* dissent, it is odd for him not to have sought and obtained a modification of the emphatic language in Pitney's opinion—particularly since the same sentence of the opinion repudiated any claim to a constitutional right of privacy, language that was likely to grab Brandeis's attention. Cf. *Olmstead v. United States*, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198–99 (1890).

220. See *Members of the Supreme Court of the United States*, SUP. CT. U.S., <https://www.supremecourt.gov/about/members.aspx> (last visited Aug. 14, 2020).

indicated in any way that these justices who cast them were free speech enthusiasts.<sup>221</sup> My point is that there remained no one on the Court besides Holmes and Brandeis who had signed onto *Cheek*'s rejection of free speech protection, and that three members of Sanford's majority had supported an outcome in *Cheek* that was at least consistent with the free speech theory that had been advanced in *Gitlow*.<sup>222</sup>

By 1927, two years after *Pierce* and *Gitlow*, it was déjà vu all over again. In the early spring, the Court handed down its decision in *Farrington v. Tokushige*,<sup>223</sup> another case following on *Pierce* and authored by McReynolds, this time invalidating an act of the Hawaii territorial legislature restricting foreign language instruction. Shortly afterward, the Court issued its decision in *Whitney v. California*,<sup>224</sup> upholding a conviction under a state criminal syndicalism statute. Again writing for the Court, Justice Sanford asserted "the freedom of speech which is secured by the Constitution does not confer an absolute right to speak," and that the legislature could reasonably punish conspiracy to advocate the use of violence or unlawful means to accomplish political changes, including by membership in the Communist Labor Party of California.<sup>225</sup> Justice Brandeis wrote a concurring opinion, joined by Holmes, which is today remembered as

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221. Justice Pitney also wrote the Court's opinion in *Chicago, R.I. & P. Ry. Co. v. Perry*, a companion case to *Cheek* involving a similar statute and handed down the same day, and there too Taft, Van Devanter, and McReynolds dissented without written opinion. *Chicago, R.I. and P. Ry. Co. v. Perry*, 259 U.S. 548 at 549–50, 556 (1922). It is unclear whether *Perry* involved a free speech claim or only a more general liberty of contract claim, and it could be argued that the three silent dissenters objected on grounds having nothing in particular to do with freedom of speech (or silence). Neither the Court's opinion nor the record of pleadings and proceedings in the case is entirely conclusive. In *Perry*, the employee, who had prevailed in state court, argued that his former employer had not seriously challenged the constitutionality of the statute at trial; Pitney's opinion concluded, however, that the Supreme Court could hear the case because the challenged state court decision had ruled on the federal claims for which the employer was seeking Supreme Court review. *See id.* at 550–52. But what were those claims? On the one hand, Justice Pitney's opinion only expressly mentioned free speech arguments in connection with arguments in state court under the state constitution. *See id.* at 555. On the other hand, the Court disposed of the entire due process argument in the case simply by referring to its due process discussion in *Cheek*, which explicitly did reject a claim of Fourteenth Amendment-based speech protection and distinguished *Lochner* and other seminal due process cases in doing so. *Id.* at 526. Moreover, the state court decision in *Perry* spoke generally of "the right of free speech guaranteed by the Constitution of the United States and the Constitutions of the various states" and quoted Holmes's famous falsely-shouting-fire dictum in *Schenck v. United States* in support of its rejection of the employer's claim. *See Dickinson v. Perry*, 181 P. 504, 512 (1919) (quoting *Schenck v. United States*, 249 U.S. 47, 53 (1919)). Equally significant, the brief of the employer seeking Supreme Court review in *Perry* quoted language from state free speech decisions in the course of advancing a general due process argument, blending the two. *See Brief of Plaintiff in Error*, at 11–12, *Chicago, R.I. & P. Ry. Co. v. Perry*, 259 U.S. 548 (1922) (No. 157). The argument for "liberty of silence" was premised in substantial part on the view that relations between employer and employee are "a matter of wholly private concern," and a rigid distinction between free speech arguments and liberty-of-contract and similar due process liberty doctrines may be anachronistic, or at least unnecessary to show an early concern for speech interests under the Fourteenth Amendment among justices broadly sympathetic towards pre-New Deal due process jurisprudence. *See Cheek*, 259 U.S. at 540–43.

222. *See Cheek*, 259 U.S. at 548; *see also* Justices 1789 to Present, SUP. CT. U.S., [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) (last visited Aug. 14, 2020).

223. *Farrington v. Tokushige*, 273 U.S. 284 (1927).

224. *Whitney v. California*, 274 U.S. 357 (1927).

225. *Id.* at 371–72.

one of the foundational texts in modern First Amendment law.<sup>226</sup> Echoing Holmes's statement in *Gitlow* and his own in *Gilbert*, Brandeis began by remarking that "[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure," and therefore "all fundamental rights comprised within the term liberty" are protected by the Fourteenth Amendment, including the right to freedom of speech.<sup>227</sup>

The same day *Whitney* was decided, the Court released its decision in *Fiske v. Kansas*,<sup>228</sup> another case involving prosecution under a state criminal syndicalism statute with yet another opinion by Sanford. This time a unanimous court voted to overturn the conviction.<sup>229</sup> The defendant had been charged under the statute by virtue of his membership in a branch of the Industrial Workers of the World.<sup>230</sup> The indictment recited various provisions from the preamble to the organization's constitution, such as that "there can be no peace" between capital and labor, that between the two classes "a struggle must go on until the workers of the world organize as a class, take possession of the earth, and the machinery of production," and that "we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system.'"<sup>231</sup> The Court concluded that none of these statements allowed an inference that the results they advocated were to be accomplished by anything other than lawful means, and thus while criminal syndicalism was in principle punishable under *Whitney*, conviction without proof that an organization advocated unlawful means was impermissible.<sup>232</sup> Brandeis and Holmes would have insisted upon a showing, at a minimum, that the organization advocated "immediate serious violence," but the full Court agreed that a clear showing that an organization advocated violence was needed in any particular case.<sup>233</sup>

*Whitney* and *Fiske* were followed four years later by *Stromberg v. California* and *Near v. Minnesota*, both authored by Chief Justice Hughes.<sup>234</sup> *Stromberg* invalidated a state statute banning the display of red flags "as a sign, symbol or emblem of opposition to organized government."<sup>235</sup> *Gitlow*, *Whitney*, and *Fiske*, wrote Hughes, had determined that the liberty under the Due Process Clause embraces the right of free speech.<sup>236</sup> He concluded that the statute's prohibition on use of flags to express political opposition was invalid on its face. Hughes offered little explanation except to say that "free political discussion" was "a fundamental principle of our constitutional system," ensuring that government was responsive to popular will and that changes could be accomplished without resort to

226. See generally *id.* at 373–79 (Brandeis, J., concurring).

227. *Id.* at 373 (Brandeis, J., concurring).

228. *Fiske v. Kansas*, 274 U.S. 380 (1927).

229. *Id.* at 387.

230. *Id.* at 382.

231. *Id.* at 382–83.

232. *Id.* at 386–87.

233. *Id.* at 376 (Brandeis, J., dissenting).

234. See *Near v. Minnesota ex rel Olson*, 283 U.S. 697 (1931); *Stromberg v. California* 283 U.S. 259 (1931).

235. *Stromberg*, 283 U.S. at 369–70.

236. *Id.* at 368–69.

revolution.<sup>237</sup> Butler and McReynolds both dissented on essentially procedural grounds, though Butler added that he considered it unnecessary to determine whether

The mere display of a flag as the emblem of a purpose, whatever its sort, is speech within the meaning of the constitutional protection of speech and press, or to decide whether such freedom is a part of the liberty protected by the Fourteenth Amendment or whether the anarchy that is certain to follow a successful “opposition to organized government” is not a sufficient reason to hold that all activities to that end are outside the ‘liberty’ so protected.<sup>238</sup>

It is unclear whether he was questioning whether the specific activities at issue were properly protected by the Fourteenth Amendment (flag displays as emblems of purpose or conduct intended to bring about opposition to organized government) or instead whether he was questioning whether the Fourteenth Amendment protected speech and press at all.

*Near* invalidated an injunction obtained by a state prosecutor pursuant to a state statute barring the publication of newspapers deemed to be “malicious, scandalous and defamatory,” unless to truth, good motives, and justifiable ends could be demonstrated.<sup>239</sup> Hughes again reiterated that it “was no longer open to doubt” that the Due Process Clause protected the freedoms of speech and press, the Court having found it “impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property.”<sup>240</sup> And while Hughes offered the usual statements that these freedoms were held subject to the police power and were not absolute, he used the same analytical framework deployed in *Meyer*, explicitly drawing from the Court’s liberty of contract cases: Contractual liberty is subject to the police power, but that power “stops short of interference with what are deemed to be certain indispensable requirements” of that liberty—wage and price restrictions.<sup>241</sup> Freedom of speech and press, too, entailed “indispensable requirements” that limited the police power itself. To this, he said that these were to be determined with reference to the “historic conception” of the freedom at issue, prompting a foray into English constitutional history, the American colonial experience, and the writings of Blackstone, Madison, and others.<sup>242</sup>

Once again Butler dissented on essentially procedural grounds, and this time all three of his fellow Horsemen joined his dissent.<sup>243</sup> Here, too, Butler included a somewhat cryptic comment about incorporation, stating that it wasn’t until 1925 (i.e., *Gitlow*) that the Court was called on to decide whether the Due Process Clause protects speech and press rights, but that the question “has finally

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237. *Id.*

238. *Id.* at 376 (Butler, J., dissenting).

239. *Near*, 283 U.S. at 702, 722–23.

240. *Id.* at 707.

241. *Id.* at 707–08.

242. *Id.* at 708–20.

243. *Id.* at 723–29.

been answered in the affirmative.”<sup>244</sup> Butler cited *Gitlow, Fiske, and Stromberg*, with additional references to *Patterson v. Colorado*, which had left the issue undecided, and to *Cheek*, seemingly implying that it had also purported to reserve the question, which it manifestly had not done.<sup>245</sup> At any rate, Butler, the only member of the Court to have so much as hinted at any resistance to free speech and free press incorporation, had signed on, at least in principle.

Finally, in 1936, the Court decided *Grosjean v. American Press*, ending this first chapter in the story of the First Amendment’s application to the states.<sup>246</sup> *Grosjean* involved a Louisiana tax on advertising revenue of high-circulation newspapers, essentially applicable only to large urban dailies.<sup>247</sup> These had generally been hostile to Huey Long, the legendarily demagogic Governor and Senator, and there was ample evidence the measure was intended to target his critics, with Long himself apparently describing it as “a tax on lying, 2¢ a lie.”<sup>248</sup> The tax was struck down, with Justice Sutherland writing for a unanimous Court.<sup>249</sup> Sutherland essentially dodged the objection that Fourteenth Amendment liberties excluded corporations, and avoided the related proposition that the right to withhold corporate recognition allowed a state to impose restrictions on corporate activity, which had so often been used to deny constitutional claims.<sup>250</sup> Sutherland declared speech and press freedoms to be fundamental and linked them to both the language of natural right and to curtailing “misgovernment.”<sup>251</sup> He relied extensively on English history, offering the first Milton citation in a speech or press case, as well as references to the more immediate circumstances surrounding the adoption of the First Amendment.<sup>252</sup> Like Hughes in *Near*, he also ended his historical inquiry there—if it was possible to conceive of any relevant antebellum developments, they went unmentioned.<sup>253</sup> And he read that history expansively, concluding that English common law protections did not go far enough, and interpreting the notion of “prior restraints” stressed by Blackstone to include taxation.<sup>254</sup>

After that, it was off to the races. The Court would invalidate the challenged provision in seven of the next speech and press cases that came before it, all handed down within the next four years. These would involve prosecutions for

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244. *Id.* at 723–24.

245. *Id.* at 723–24.

246. The Court appears to have received only one request for review presenting freedom of speech or press issues in the five years between *Near* and *Grosjean* in *Herndon v. Georgia*, in which the Court dismissed on procedural grounds, with Cardozo, joined by Brandeis and Stone, dissenting. *See Herndon v. Georgia*, 295 U.S. 441 (1935). A later iteration was decided on the merits. *See Herndon v. Lowry*, 301 U.S. 242 (1937).

247. *See Grosjean v. Am. Press Co.*, 297 U.S. 233, 240 (1936).

248. Brief for Appellee, *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) (No. 303), 1935 WL 32673 at \*9.

249. *Grosjean*, 297 U.S. at 250–51.

250. *See id.* at 244.

251. *Id.* at 244–50.

252. *See id.* at 245–46.

253. *See id.* at 245–49; *Near v. Minnesota ex rel Olson*, 283 U.S. 697 (1931).

254. *Cf. John Calvin Jeffries, Jr., Rethinking Prior Restraint*, 92 YALE L.J. 409, 418 (1983).

subversive activities,<sup>255</sup> injunctions against labor picketing and other union activity,<sup>256</sup> and restrictions on leafletting (including the first of many cases appearing in the U.S. Reports involving Jehovah's Witnesses).<sup>257</sup> Two of these were unanimous, two were decided by five-four votes, and the remainder garnered dissenting votes from Butler and McReynolds, or, after Butler's departure from the Court, McReynolds alone.<sup>258</sup> The single case upholding a challenged law was *Associated Press v. NLRB*, the only speech or press decision to consider a federal statute (to which the First Amendment directly applied) or to involve a challenge to progressive social legislation.<sup>259</sup>

Hughes's opinion for seven justices in *Stromberg* conclusively established the applicability of free speech principles to the states under the Due Process Clause, if indeed there were grounds for doubt after *Gitlow* or *Fiske* and *Whitney*.<sup>260</sup> And with Butler's unequivocal statement in *Near*, the entire Court was on record as having accepted the proposition.<sup>261</sup> No one on the Court opposed it at any point, unless Brandeis's join in *Cheek* is counted, much less argued against it.<sup>262</sup> The argument was implicit and simple: freedom of speech and press are "fundamental," and the fundamental liberties are those, as *Meyer* had said, are those protected by the Due Process Clause.<sup>263</sup> There was no serious appeal to the history of the Fourteenth Amendment, nor to the wider history of the due process.<sup>264</sup> It also bears noting that virtually none of the parties discussed the issue either. *Gitlow*'s brief did devote several pages to the matter, though it largely restricted itself to platitudes extracted from prior cases and avoided any First Amendment complications, such as the *Hurtado* principle.<sup>265</sup> The state mentioned the issue only in a short supplemental brief, its discussion consisting of two conclusory header sentences seemingly directed to the Privileges or Immunities question, followed by a short excerpt from a Supreme Court decision.<sup>266</sup> *Fiske*'s brief mentioned the issue only in the penultimate paragraph, stating that there was no need to discuss it in light of *Gitlow*, while the opposing state brief ignored the issue completely.<sup>267</sup> *Stromberg* took the applicability of speech

255. See *De Jonge v. Oregon*, 299 U.S. 353, 356–57 (1937).

256. *Thornhill v. Alabama*, 310 U.S. 88, 91–92 (1940); *Carlson v. California*, 310 U.S. 106, 109 (1940); *Hague v. Comm. for Industrial Org.*, 307 U.S. 496, 501–03 (1939).

257. *Schneider v. State of New Jersey*, 308 U.S. 147, 154–158 (1939); *Lovell v. City of Griffin*, 303 U.S. 444, 447–48 (1938).

258. See cases cited *supra* notes 256–57.

259. *Associated Press v. NLRB*, 301 U.S. 103, 122 (1937).

260. *Stromberg v. California*, 283 U.S. 359, 368 (1931).

261. See *Near v. Minnesota ex rel Olson*, 283 U.S. 697, 723–24 (1931) (Butler, J., dissenting).

262. See *Prudential Ins. Co. of America v. Cheek*, 259 U.S. 530 (1922).

263. *Meyer v. Nebraska*, 362 U.S. 390, 399–401.

264. See *id.*; *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

265. Brief of Plaintiff in Error at 11–18, *Gitlow v. New York*, 268 U.S. 652 (1925) (No. 19).

266. Brief of the State of New York in Support of the Constitutionality of Sections 160 and 161 of the Penal Law of the State of New York at 7–9, *Gitlow v. New York*, 268 U.S. 652 (1925) (No. 19).

267. Brief of Plaintiff in Error at 21, *Fiske v. Kansas*, 274 U.S. 380 (1927) (No. 48); Brief of Defendant in Error, *Fiske v. Kansas*, 274 U.S. 380 (1927) (No. 48). The states' briefs in *Whitney* and *Ruthenberg v. Michigan*, 273 U.S. 782 (1927), similarly did not contest Fourteenth Amendment protection for speech and related expressive activities. See Brief of Defendant in Error on Rehearing at 30–33, *Whitney v. California*, 274 U.S. 357 (1927) (No. 3); Brief of Defendant in Error at 13–23, *Ruthenberg v. Michigan*, 273 U.S. 782 (1927) (No. 44).

rights as a given, and the state made no attempt to contest the point.<sup>268</sup> Which made a lot of sense. Framed at a high level of generality, how could it not be true? In some sense, *Slaughter-House* itself had said as much, if authority was needed for the proposition.

What remained to be determined was whether the Due Process version of free speech and press would track the First Amendment. The most serious parallel to the First Amendment was drawn by Butler in his *Near* dissent, which undertook an examination of the history of the history of freedom of speech to match Hughes's.<sup>269</sup> Apart from a single passing reference in *Gitlow*, the First Amendment itself was never so much as mentioned in the Court's opinions in *Cheek*, *Gitlow*, *Whitney*, *Fiske*, *Stromberg*, or *Near*.<sup>270</sup> In terms of doctrinal conceptualization, Due Process speech and press rights were distinct and independent from the First Amendment: This was an overlap, not a cross-reference, view. Yet while Holmes had suggested in his *Gitlow* dissent that the principle of free speech might "perhaps" entail a "somewhat larger latitude of interpretation" than the First Amendment's federal prohibitions, that possibility was never explored as a formal doctrinal matter and does not appear to have been pursued informally either.<sup>271</sup> Indeed, if anything, the opposite occurred. The Court both reviewed far more state measures than federal ones and did not actually invalidate a federal law on First Amendment grounds until the mid-1960s.<sup>272</sup> There were also possibilities for bifurcated standards inasmuch as the liberty protected by the Due Process Clause had been held to apply only to natural persons, not to corporations. But McReynolds had suggested one pathway around the problem in *Pierce*, and the Court seemed willing just to ignore the issue.<sup>273</sup>

So far as Brandeis and Holmes, as leaders in the extension of the First Amendment, are concerned, this Study will not attempt to explore the underlying motives or thought processes, other than to note that both openly expressed the proposition that since the Due Process Clause had been used to strike down state laws, it might as well be used to protect freedom of speech. That is one sense in which the Lochnerian backstory of the Fourteenth Amendment proved important to the incorporation plot. It is difficult to imagine that they would have otherwise intervened on behalf of speech rights or sought to overturn *Barron* or *Cruikshank* without the pedigree those cases provided.

It is also difficult to imagine, moreover, that the decision would have been reached had it provoked a sharper division. The decision to make the states sub-

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268. Brief of Appellant at 14, *Stromberg v. California*, 283 U.S. 359 (1931) (No. 584).

269. *Near v. Minnesota, ex rel Olson*, 283 U.S. 697, 723–34 (1931) (Butler, J., dissenting).

270. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925). see generally *Near*, 283 U.S. 697, *Stromberg v. California*, 283 U.S. 359, 368 (1931); *Fiske v. Kansas*, 274 U.S. 380 (1927); *Whitney v. California*, 274 U.S. 357 (1927); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530 (1922).

271. *Gitlow*, 268 U.S. at 672 (Holmes, J., dissenting).

272. *Lamont v. Postmaster General*, 381 U.S. 301, 306 (1965).

273. See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936) (holding that corporations are persons under Fourteenth Amendment and not addressing whether they can invoke liberty protections). The issue did emerge in the rubble of fragmented opinions in *Hague v. CIO*. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

ject to the First Amendment was essentially unanimous, at each critical juncture.<sup>274</sup> In this, the general structure of substantive due process assisted in multiple ways. One was simply comfort with the deployment of the Due Process Clause to invalidate state law. So too was the language of Due Process, most especially as developed in cases like *Meyer* and the language of fundamental liberties.<sup>275</sup> The structure of the doctrine also played a role. The Court was accustomed to the police powers limitation on Due Process liberties, and could reasonably conclude that the application of the First Amendment to the states would not entail significant legal or social transformation. At the same time, the incipient sense of heightened protection for certain core aspects of constitutional liberty, evidenced by cases like *Coppage v. Kansas* and adopted in *Meyer*, provided a template that would turn First Amendment protections into more than that.<sup>276</sup> The same is true of other aspects of the limits on constitutional rights in the pre-New Deal period. In particular, the problem of conditional benefits, or the rights-privileges distinction, served to limit the scope of constitutional protection in myriad ways, a chief example being the state's power to control corporate behavior through its franchising power. It would require significant innovation to overcome these conceptual obstacles and unleash the modern First Amendment. All of these features would have been understood as inherent limits that would have made the adoption of speech and press protections easier to swallow. This was especially so given that the litigants themselves tended not to stress, or even acknowledge, the issue, as well as the Court's willingness to treat its own *arguendo* assumptions as definitive holdings. These palliating features themselves trace to the fact that First Amendment incorporation was possible only by establishing a relatively clear connection to existing doctrinal principles and practices.

What is also evident is that the incorporation decision was not undertaken on the basis of what today we would recognize as a serious inquiry into original meaning, nor was there any real attempt to grapple with the implications for the division of power between the states and the national government, particularly in terms of the dynamics of state constitutional law. Rather, the argument proceeded in terms of what might be called general principles, a kind of broad formalism, and, to a lesser degree, appeals to history and legal tradition. By the time incorporation of the criminal procedure rights had become a serious live issue, First Amendment incorporation was firmly established, and the transformation from an overlap to a cross-reference conception was well underway. When Hugo Black sounded his battle call in 1947 in *Adamson*, the foundations for the transformation he sought were in place and the doctrines and concepts originating in the now-repudiated jurisprudence of the pre-New Deal Court that had helped to enable them could be safely disregarded.<sup>277</sup>

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274. See, e.g., *Grosjean*, 297 U.S. 233 (1936) (unanimous).

275. See *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923).

276. See *id.* at 401; *Coppage v. Kansas*, 236 U.S. 1, 14 (1915).

277. See *Adamson v. California*, 332 U.S. 46, 90–92 (1947) (Black, J., dissenting).

Although this is somewhat more speculative, the precedence of First Amendment incorporation within the larger incorporation story is probably explicable on three principal grounds. First, the criminal procedure cases entailed higher stakes, at least initially. States are responsible for the overwhelming bulk of criminal prosecutions today, and the federal role was even smaller in the period when modern incorporation began. The Supreme Court would later court controversy in its First Amendment decisions with aggressive positions on more contentious topics like obscenity,<sup>278</sup> as well as its interpretation of the religion clauses,<sup>279</sup> by and large, however, its most controversial expansions took place after *Mapp*'s launch of the criminal procedure incorporation process, and, moreover, after the Court had already embarked on a string of other high-profile interventions, most notably *Brown v. Board*.<sup>280</sup> In the earliest years of First Amendment incorporation, the Court's most provocative decisions were almost certainly those invalidating laws targeted at subversive activity, but the decisions in those cases were themselves premised in part on a kind of obsolescence.<sup>281</sup> The Court mostly avoided issues that were likely to have widespread and immediate effects on large numbers of people. Its various interventions on behalf of local regulation of Jehovah's Witnesses did not begin to compare in their impact with, for instance, the conclusion that the exclusionary rule in *Weeks* now applied in every criminal trial in America.<sup>282</sup>

The second reason is related to the first but more fundamental. Doctrinal development under the First Amendment prior to incorporation was scant, and as a practical matter, the gap between a cross-reference and an overlap conception grounded in principles of fundamental justice was very slight. Even if the First Amendment were understood as directly binding on the states, it would have made very little difference in terms of the Court's discretion to fashion whatever doctrinal rules it saw fit and to retain flexibility for future cases in a way it simply could not have done with the criminal procedure clauses. Moreover, while a cross-reference view conception at least suggests the rules should apply the same way to both state and federal action, often enough, the sort of legislation being scrutinized—leafletting restrictions, for instance—was relatively unlikely to have much direct parallel at the federal level.

The fact that there was little practical difference between an overlap and a cross-reference understanding also had an important linguistic parallel. Even if a case made no mention of the First Amendment, it was at least likely to refer to rights of freedom of speech, press, or assembly, which is to say, the First Amendment's textual content.<sup>283</sup> This in turn made it easier to mention the First Amendment, once protection of those rights had been recognized. Under the orthodoxy

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278. See *Roth v. United States*, 354 U.S. 476, 484–94 (1957).

279. See *Engel v. Vitale*, 370 U.S. 421, 430–35 (1962).

280. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

281. *Gitlow* and *Whitney* came some years after the first “red scare” had subsided. See *Whitney v. California*, 274 U.S. 357, 371–72 (1927); *Gitlow v. New York*, 268 U.S. 652, 667–76 (1925).

282. See *Mapp*, 367 U.S. at 655–56; *Weeks v. United States*, 232 U.S. 383, 398 (1914); see, e.g., *Prince v. Massachusetts*, 312 U.S. 158, 170–71 (1944).

283. E.g., *Stromberg v. California*, 283 U.S. 359, 369 (1931).

of overlap, the Court through the 1940s tended to speak in terms of the Fourteenth Amendment protecting the same underlying right that the First Amendment protects,<sup>284</sup> which in theory might leave some room for differences in the way the right was protected at the state and federal level. But in a relatively short span of time, a relatively simple shift took place from speaking of rights “secured by the First Amendment against abridgment by the United States” that are “similarly secured to all persons by the Fourteenth against abridgment by a state,”<sup>285</sup> to speaking of rights “guaranteed by the First and Fourteenth Amendments,”<sup>286</sup> and from there to speaking in terms of “[t]he First Amendment, which the Fourteenth makes applicable to the states,”<sup>287</sup> as Justices Douglas, Black, and Rutledge conspicuously began to do.

The upshot is that the very structure of First Amendment was conducive to incorporation first because freedom of speech and its relatives were likely to entail a smaller impact both qualitatively and quantitatively, at least in the short term. First Amendment incorporation was less disruptive than criminal procedure incorporation would be and it gave the Court far more discretion than it would have had. And this proved critical to the larger incorporation process, facilitating a longer-term shift from an overlap model grounded in a more fluid concept of fundamental justice to a more uncompromising cross-reference model—since at the start there was very little difference. In this way, the First Amendment cases could draw from existing doctrines and traditions while at the same time laying the groundwork for an eventual transformation of those doctrines in the criminal procedure context, where that transformation would make the most difference.

#### IV. CONCLUSION

The incorporation controversy is surrounded in myth that tends to obscure its basic nature. As it unfolded during the Twentieth Century, incorporation consisted of essentially two pieces, First Amendment and criminal procedure incorporation, with a small supporting role for the Takings Clause. First Amendment incorporation preceded and enabled criminal procedure incorporation, not only by establishing a precedent for incorporation but because, unlike in the criminal procedure context, there was little difference between a due process-centered

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284. *E.g.*, *Lovell v. City of Griffin*, 303 U.S.444, 450 (1938) (“Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.”).

285. *See Schneider v. New Jersey, Town of Irvington*, 308 U.S. 147, 160 (1939); *see also Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 n.3 (1942) (First Amendment protection is “mirrored” in Fourteenth.).

286. *See Jamison v. Texas*, 318 U.S. 413, 414 (1943); *Martin v. City of Struthers*, 319 U.S. 141, 142 (1943).

287. *See Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943); *see also Follett v. Town of McCormick*, 321 U.S. 573, 574 (1944); *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944); *Douglas v. City of Jeannette*, 319 U.S. 157, 162, (1943) (“We have repeatedly held that the Fourteenth Amendment has made applicable to the states the guaranties of the First.”); *Jones v. City of Opelika*, 316 U.S. 584, 600, (1942) (Stone, J., dissenting), *vacated*, 319 U.S. 103 (1943); *cf. Thomas v. Collins*, 323 U.S. 516, 518 (1945) (referring to “Fourteenth Amendment, as it incorporates the First.”); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 593 (1940) (referring to the protections of “the Fourteenth [Amendment] through its absorption of the First.”).

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view in which the Fourteenth Amendment of its own force entailed rights that overlapped with the First Amendment and a view in which the Fourteenth Amendment directly applied the First Amendment to the states.

First Amendment incorporation, at least of speech and press protections, took shape during the 1920s and was cemented by the late 1930s, prior to *Caroline Products*.<sup>288</sup> It was supported in substantial ways by Lochnerian strands in the court's jurisprudence and found support from the justices who most vigorously opposed the New Deal transformation in constitutional law. The shift from an overlap to a cross-reference conception of incorporation may have been inevitable, but it seems to have been calculated at some level to leverage lawyers' formalism to expand federal constitutional supervision of state criminal processes. From the standpoint of constitutional politics, this formalism has come a somewhat ironic full circle, resulting in both the incorporation of the Second Amendment and otherwise tending to limit direct free-form supervision of state criminal process on grounds of general miscarriage of injustice.

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288. See *United States v. Carolene Prods., Co.*, 204 U.S. 144, 152 n.4 (1938); *supra* Part I; *supra* Section II.B.