Article

The Bill of Rights in the Early State Courts

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A story familiar to most readers goes like this: In the beginning, the Constitution of the United States created the structures of national government and, in order to preserve the role of the states and to promote individual liberty, imposed limits on what that national government could do. To further prevent abuses by the new national government, the Bill of Rights added to the Constitution a series of additional protections. At its inception, the Bill of Rights did not apply to state governments because they were less likely to violate liberty, and if they did, there existed recourse in state constitutions and state laws. Reconstruction altered this basic equation: the Fourteenth Amendment transferred protections for individual liberties to the national constitutional level and, with the help of the courts, incorporated the provisions of the Bill of Rights against the states. While, therefore, the First Amendment ("*Congress* shall make no law . . . .")[1] once applied only to the national government, today First Amendment protections, like almost all of the other Bill of Rights provisions, constrain both state and national government, thereby better securing individual rights at all levels.

For legal scholars, a key chapter of this story is Chief Justice John Marshall's decision for the United States Supreme Court in 1833 in *Barron v. Baltimore*.[2] *Barron*, affirming the decision of the Maryland state court, rejected the claim of John Barron that the city of Baltimore violated the Takings Clause of the Fifth Amendment when it took his property for a public use without compensating him for the loss.[3] Today, *Barron* is universally understood as standing for the proposition that in the pre–Civil War era, the Bill of Rights simply did not constrain the states: the protections the Bill secured were held only against the federal government. On this account, an important effect of the Fourteenth Amendment was, therefore, to reverse the *Barron* decision. Today, in contrast to 1833, state

1. U.S. CONST. amend. I (emphasis added).
2. 32 U.S. (7 Pet.) 243 (1833).
3. *Id.* at 250.

government, like the federal government, is required to provide compensation if it takes an individual's private property for a public use.

This Article argues that the modern understanding of *Barron* is incorrect. The modern understanding misses what the Supreme Court did in the *Barron* case, how the case was understood at its time, and the impact of the Court's decision. Further, because the prevailing modern understanding of *Barron* is wrong, the story with which I began—the story of the transformation of the Constitution after the Civil War—is also deficient. *Barron,* this Article suggests, did not hold, as it is conventionally believed, that the Bill of Rights did not in any circumstances apply to state government. Rather, *Barron* simply affirmed the unremarkable proposition that the *federal courts* would not apply the Bill of Rights to constrain state government. Both before and after *Barron*, even with the decision in place as binding precedent, state courts were free to apply the Bill of Rights to the states.

In a series of cases that are largely forgotten or brushed aside today, early state courts regularly did apply the Federal Bill of Rights to invalidate state laws and otherwise constrain state government. Although, as a matter of federal constitutional law enforced by the federal courts, the Bill applied only to the national government, the state courts understood the Bill to set out general constitutional principles applicable to state legislatures and executives alike—even when no provision of the applicable state constitution imposed any such constraint on state government. The jurisdictional limits of the 1789 Judiciary Act protected these state court decisions applying the Bill of Rights from review by the United States Supreme Court.

This Article is, however, more than about how modern scholars have misunderstood a single Supreme Court case and its implications. The analysis presented here points to a more general and more serious misconception about the very nature of constitutional law in the early American Republic. Modern constitutional lawyers and scholars tend to give short shrift to the decisions of the earliest courts on constitutional issues. Few people could name early state court decisions resolving questions of federal constitutional law. The predominant view, reflected in the arrangement of virtually every casebook, is that with the exception of some landmark Supreme Court decisions

like *Marbury v. Madison,*[4] only in the mid-twentieth century did courts begin to produce a body of sophisticated constitutional law that merits serious engagement. In particular, the development of constitutional law in the courts to protect adequately the rights of individuals is considered a very recent innovation.

This Article challenges that modern perspective. In the antebellum era, four vibrant bodies of constitutional law protected the rights of individuals from government abuse. In addition to (i) the Federal Constitution and (ii) the constitutions of each of the states, the courts created and enforced two sets of general constitutional rules. Until the Supreme Court's decision in *Erie Railroad v. Tompkins,*[5] in diversity cases the federal courts crafted (iii) general constitutional laws that they applied to state government. As recounted in this Article, the state courts also developed and applied to state government (iv) general principles of constitutional law they derived from the Federal Bill of Rights. Early constitutional law was multifaceted, sophisticated, and innovative, with a diverse set of jurists invoking and applying an array of constitutional rules to keep government in check.

Setting the historical record straight leads to a normative assessment of constitutional law today. A full appreciation of the nature of constitutional practices in the early Republic points to an unsettling feature of the current state of constitutional law. We pride ourselves on the achievements of Reconstruction; we celebrate the Fourteenth Amendment and the new constraints it imposed on the states (and its reversal of *Barron*) as major advances in protecting rights. However, these modern victories may be at once bitter and sweet. Compared to the antebellum era, modern constitutional law is radically consolidated. While the post–Civil War Federal Constitution has enhanced individual liberties by placing limitations on how the states can treat their own citizens, two of the four original bodies of constitutional law have disappeared. Since the *Erie* decision in 1938, federal courts are no longer permitted to apply general principles of constitutional law in diversity cases, but rather must adhere to the prior decisions of state supreme

4. 5 U.S. (1 Cranch) 137 (1803).

5. 304 U.S. 64 (1938) (overruling Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)).

courts as to what state constitutions mean and require.[6] Abstention doctrine[7] and certification by federal courts of state issues[8] are designed to promote deference to state court proceedings when there are questions of state law. With the Fourteenth Amendment incorporating the Bill of Rights protections against the states, the early practice of state courts applying general principles of constitutional law embodied in the Federal Bill of Rights has also ended—notably, the Rehnquist Court's federalism revolution did not re-empower state courts to engage in this once prevalent practice.[9] Consolidation leaves individuals with fewer places to turn to protect their rights.

Beyond the implications for individual liberties, the modern consolidation of constitutional law has significant consequences for our legal system as a whole. Consolidation is inconsistent with federalism. Though they apply federal law, state courts are not lower federal courts anymore than the state legislatures are subunits of Congress or the state governors agents

6. *Id.* at 78 ("[T]here is no federal general common law."); *cf.* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505–25 (2006) (exploring the continued reliance on general law as providing rules of decision in cases involving interstate boundary disputes, the contractual rights and obligations of the federal government, customary international law, maritime law, and interpretations of federal statutes).

7. *See* R.R. Comm'n of Tex. v. Pullman, 312 U.S. 496, 498–99 (1941) (holding that federal courts may abstain from ruling on a federal constitutional issue in a case where the state's highest court has not given the challenged state statute a definitive interpretation, and the state court's construction of the statute may resolve the constitutional issue); Julie A. Davies, Pullman *and* Burford *Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases*, 20 U.C. DAVIS L. REV. 1, 6 (1986) (noting that *Pullman* abstention promotes "not only decisions on a state law ground, but also decisions by state courts").

8. In accordance with procedures provided under state law, lower federal courts may certify questions to a state's supreme court in diversity cases and when state action is challenged on federal constitutional grounds. UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 3, 12 U.L.A. 73 (1995). The United States Supreme Court has at times certified questions to a state supreme court. *See, e.g.*, Zant v. Stephens, 456 U.S. 410, 416 (1982) (per curiam) (certifying a question about aggravating circumstances in a death penalty case to a state supreme court). The Supreme Court has also indicated that lower federal courts should, before ruling on the constitutionality of a state statute, give the state's highest court an opportunity to interpret the statute. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 76–79 (1997). State courts are not required to accept certification. UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 1, 12 U.L.A. 71 & cmt. (1995).

9. *See* John C. Kilwein & Richard A. Brisbin, Jr., *U.S. Supreme Court Review of State High Court Decisions: From the Warren Through the Rehnquist Courts*, 89 JUDICATURE 146, 146 (2005).

of the federal executive branch. The historical practice of allowing state courts leeway to interpret independently the Federal Constitution reflected the importance of state courts in our constitutional design. Federalism works best when different political units are able to try different approaches and solve problems in different ways. Allowing state courts to adopt more expansive readings of constitutional rights generates information about how rights might be structured in various ways and the effects of different choices. Such experimentation produces systemic benefits: outcomes in one state can be watched by other states and federal courts can draw upon lessons developed locally. Consolidation undermines the capacity of our system to generate these benefits.

Consolidation has also weakened *state* constitutional law as developed and applied by the state courts. Requiring state courts to enforce the Federal Bill of Rights as defined and policed by the Supreme Court has left state constitutional law in the modern era relatively undeveloped. For one, the incorporation of federal constitutional protections, with the requirement that state courts apply those protections against state government, has displaced state constitutional law as the principal source of individual rights. In addition, rather than decide independently what provisions of their own state constitution mean, state courts, operating in the shadow of the Supreme Court, have tended to hew to the Court's understandings of analogous provisions in the Federal Constitution. State courts have lost their voices under the Federal Constitution and they are out of practice speaking under their state constitutions.

Finally, consolidation helps account for the enormous tension that is characteristic of our current regime. When federal constitutional rights are, ultimately, dependent upon a single court, the United States Supreme Court and its review of a very small number of cases, the stakes in any decision by that Court are exceedingly high. The Court's ruling sets the standards for the entire nation; there might not be another opportunity to revisit an issue for many decades. In this context, it is no surprise that modern confirmation battles are ferocious—there is so much at stake. Were federal constitutional rights less in the hands of the Court (or, as is sometimes the case, a single justice) some energy would shift away from this single institution.

Part I of this Article revisits *Barron v. Baltimore*, beginning with an analysis of the original state court records. It

makes the case for understanding the Supreme Court's decision in *Barron* to mean only that federal courts would not themselves apply the Bill of Rights to the states. Part II examines the practice of state courts, both before and after the *Barron* decision, in applying the Bill of Rights and its principles to state government. Part III locates this practice as one of four robust bodies of constitutional law that existed in the antebellum era. Part IV draws on the historical discussion to offer a normative assessment of constitutional law today.

I. *BARRON* REVISITED

Barron v. Baltimore is conventionally understood as establishing that in the antebellum era, the provisions of the Federal Bill of Rights did not apply to state government.[10] On this account, the Fourteenth Amendment overturned *Barron,* making the states subject to the Bill of Rights protections.[11] However, a close examination of *Barron*, and in particular of the decision in view of what the Maryland state courts had decided in the case, suggests a more precise and limited outcome than is conventionally assumed. This Part suggests that while in *Barron* the Supreme Court declined to apply the Takings Clause of the Fifth Amendment to invalidate the application of a state law, the decision did not establish the more sweeping rule that the

10. *See, e.g.*, PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 336 (2000) (describing *Barron* as "holding . . . that the Bill of Rights did not apply to the states"); Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 433 (2004) ("[*Barron*] held that the Bill of Rights applied only to the federal government and did not constrain the states."); David J. Bodenhamer, *Barron v. Baltimore*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 77, 77 (Kermit Hall et al. eds., 2d ed. 2005) ("Chief Justice John Marshall concluded that the first ten amendments restrained only the federal government . . . ."); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principle*s, 153 U. PA. L. REV. 1513, 1528 (2005) ("[*Barron*] famously held . . . that the proscriptions delineated in the Bill of Rights did not apply to the subfederal polities.").

11. *See, e.g.*, Adamson v. California, 332 U.S. 46, 72 (1947) (Black, J., dissenting) ("With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced."); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 173–74 (1986) (discussing the Fourteenth Amendment as overturning *Barron* by preventing the states from abridging the privileges of citizens); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1146 (1994) (describing the Fourteenth Amendment as overturning *Barron*).

protections of the Bill of Rights could never constrain state law. Instead, *Barron* should be understood to mean only that the federal judiciary, as a matter of federal constitutional law, would not itself apply the protections of the Bill of Rights against the states. State courts were, however, entirely free to apply the Bill of Rights protections as a matter of state law—including state law as interpreted by the state court to include the provisions of the Federal Constitution. If a state's supreme court declined to apply the Bill of Rights, *Barron* demonstrated, the United States Supreme Court would not override that state court decision and impose the Bill against the states. Likewise, the Court would not overrule a state court decision applying the provisions of the Bill of Rights to state government, but would accept that decision as a matter of state law. Subsequent parts of this Article will examine the larger importance of *Barron* when the decision is understood in this manner. For now, the task is to get the original story straight.

A. JOHN BARRON'S WHARF

To understand *Barron* properly, one should begin not with Chief Justice John Marshall's holding for the United States Supreme Court in 1833, but with the dispute as it began in the Maryland state court. The case involved the efforts of John Barron, who, with his partner John Craig,[12] operated a wharf along the Patapsco River in the Fell's Point region of Baltimore Harbor, to recover economic damages from the city of Baltimore.[13] The city's street-paving program, by diverting streams and dumping silt in the harbor, had lowered the water level around the wharf, rendering it too shallow for many ships, and therefore diminishing the wharf's economic value.[14] Barron and Craig filed a lawsuit in Baltimore County Court alleging that the mayor and city council of Baltimore, through their paving project, had "wrongfully and unjustly" deprived them of the "use, benefit, and full enjoyment" of their property. They sought damages in the amount of $20,000.[15]

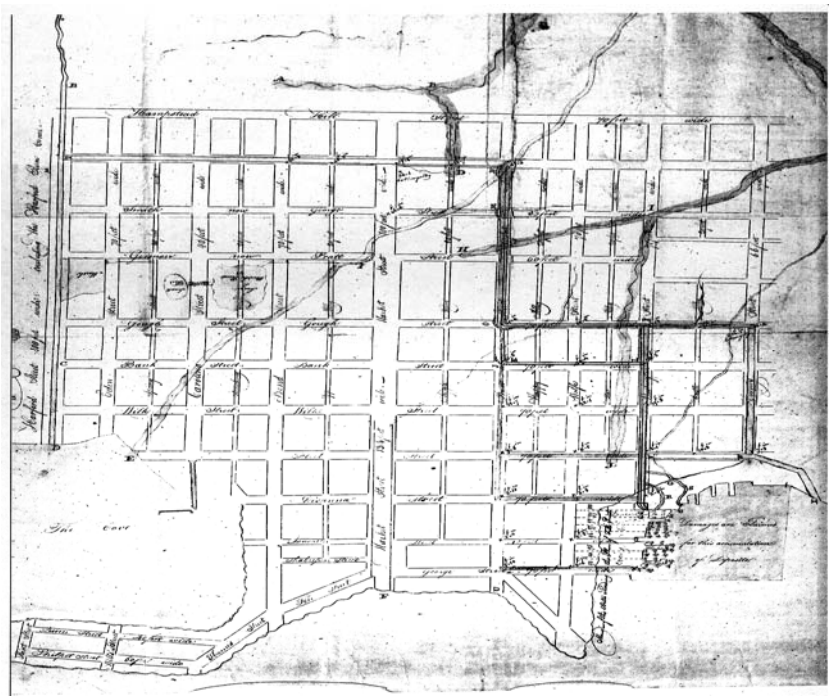
12. John Craig died before the litigation was concluded and his estate continued as a party. For ease, I refer to Barron and Craig as the plaintiffs throughout the litigation.

13. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 244 (1833).

14. *Id.*

15. Transcript of Plaintiffs' Declaration at 7, Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (No. 26), *reprinted in* U.S. SUPREME COURT, TRANSCRIPTS OF RECORDS 336 (Jan. Term 1833).

Figure 1: Map from Plaintiffs' Complaint Showing Fell's Point



The text at the right edge reads: "Damages are Claimed for this accumulation of Deposits."

In their original lawsuit, the plaintiffs did not invoke the Fifth Amendment as a basis for relief.[16] The Maryland Constitution contained a general due process clause, but like most other early state constitutions, it did not explicitly give citizens a right to compensation when their property was taken for public use.[17] Nonetheless, at the trial, at the plaintiffs' behest, Judge Stevenson Archer instructed the jury that

16. *Id.* at 336–37.

17. MD. CONST. of 1776, Declaration of Rights, art. XXI ("[N]o freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land."); *see* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 & n.20 (1993) (reporting that, aside from the constitutions of Vermont and Massachusetts, the original state constitutions contained no compensation requirement).

> the plaintiff is entitled to damages for the injury the jury shall find the plaintiff may have sustained, in as much as this general improvement [by the city's paving scheme] would . . . be made for the benefit and advantage of the inhabitants of Baltimore, and it would be unjust that the property of the plaintiff shall be deteriorated, (and to the extent of such injury,) deprived of his property without remuneration.[18]

The jury returned a verdict in the plaintiffs' favor and awarded them $4500 plus costs.[19]

Judge Archer thereafter denied the city's motion to arrest the judgment.[20] He took the view that if the city did something "for the public benefit of the inhabitants of Baltimore" which resulted in "the permanent injury and sacrifice of the plaintiff's property," then "justice . . . demand[s] that he whose property has fallen a victim to the public service should be compensated in some way."[21] Citing the due process clause of the Maryland Constitution, Archer declared that the plaintiffs had a right to profit from their wharf and this right could not be taken away except "by the judgment of . . . [their] peers or the law of the land."[22] Archer, therefore, read the due process clause of the state constitution to include a compensation requirement: "[W]hen it is said that a man may be deprived of his property by the law of the land, it does not . . . mean that the legislature may deprive him of it at their pleasure and without compensation . . . ."[23] All government powers, Archer reasoned, "are subject to the salutary restraints of our constitutions and of such laws as lie at the foundation of all social order."[24] While stating

18. Transcript of Defendant's Second Bill of Exceptions at 26, Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (No. 26), *reprinted in* U.S. SUPREME COURT, TRANSCRIPTS OF RECORDS 345 (Jan. Term 1833).

19. Transcript of Verdict at 25, Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (No. 26), *reprinted in* U.S. SUPREME COURT, TRANSCRIPTS OF RECORDS 335 (Jan. Term 1833).

20. Transcript of Judgment of County Court at 10, Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (No. 26), *reprinted in* U.S. SUPREME COURT, TRANSCRIPTS OF RECORDS 337 (Jan. Term 1833).

21. Stephenson [sic] Archer, C.J., *Opinion*, Barron v. Baltimore, *reprinted in* 2 AM. JURIST 205, 206 (1829).

22. *Id.* at 207.

23. *Id.* at 211.

24. *Id.* at 210. Archer explained this fundamental feature of government in the following way:

> The power of the state to compel the alienation of private property, is the law of force springing from necessity. The right in the citizen to indemnity for such force, is the law of natural equity and justice; the one is consequent upon the other, and like the shadow follows the substance. This restriction upon all legislation has a deeper founda-

that he did not "deny to [government] the power to take or appropriate private property to public use," Archer took the view that the city had "no right . . . to take private property for the public service without providing a just indemnity."[25]

On Judge Archer's account, the state constitution's due process provision was only "declaratory" of a fundamental rule derived from the common law.[26] To buttress this conclusion, Archer invoked the Fifth Amendment. Archer recognized that there existed "doubt" as to whether the provisions of the Federal Bill of Rights applied directly to the states: "[t]he great object [of the amendments] . . . was a limitation of the powers of [the federal] government" and "some of [the amendments] are . . . in terms confined to [the federal government]."[27] Nonetheless, Archer reasoned, beyond constraining the federal government, "another object of the framers of the [Federal C]onstitution . . . was to secure to the people of the Union, as one nation, certain rights essential to their existence as a free government, and the infringement of which, in any one state, would hazard its durability as a free state."[28] These "essential" rights, Archer argued, were contained in the Federal Bill of Rights. Specifically, the Second, Third, Fourth, Fifth, and Eighth Amendments contained broad liberties held against all government, constraining the states in the same way as state constitutions.[29] Accordingly, the Maryland Constitution, the Federal Constitution, and principles of fundamental law all required compensation when private property was taken for public use.[30]

B. THE COURT OF APPEALS AND THE FIFTH AMENDMENT

Represented by local lawyer John Scott and Maryland Attorney General Roger Brooks Taney, the city of Baltimore appealed to the Court of Appeals for the Western District, the state's highest court. The city argued that it could not be held accountable for injuries that resulted when the city discharged

> tion in all free governments than constitution or laws; it rests upon the universal sense which all mankind feel of its equity and justice. . . . It is peculiarly applicable to free governments, instituted to protect the life, liberty, and property of the citizen.

Id.

25. *Id.*
26. *Id.* at 211.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*

a "public duty."[31] Property rights, the city contended, were not "absolute" but were instead held "subject [to] the use[s] of the public."[32] Moreover, there was an important economic issue at stake: requiring the city to compensate Barron and Craig would make it liable "whenever it does anything" to improve local conditions.[33]

Taking a cue from Judge Archer's opinion, the plaintiffs specifically argued to the appellate court that they had suffered a Fifth Amendment violation.[34] Their argument, though, was not a simple takings claim. Instead, the plaintiffs argued that the city exceeded its legitimate powers. Pursuant to its municipal charter, the plaintiffs argued, the city was "prohibited from doing any thing against the Constitution of the State or of the United States,"[35] and in this regard the city's "power . . . is to be interpreted with reference to the common law."[36] While recognizing the right to take property as "an incident of Sovereign power," the plaintiffs contended that such power entailed a duty of compensation.[37] "[C]ommon honesty," the plaintiffs urged, "requires that the invasion of private property should be paid for."[38] Invoking the Fifth Amendment,[39] the plaintiffs argued that to allow the city government to take property without making compensation would be an "encroachment on natural justice," from which "it is the business of the court to protect the citizen."[40] Accordingly, "eminent domain can only [ever] be exercised . . . upon occasions of great public emergency, and for the public good, and upon making just compensation."[41] "[E]ternal principles of truth and justice" entitled Barron and Craig to relief when the city diminished the value of their wharf.[42]

In response, the city argued that nothing in the state constitution required compensation: according to the state consti-

31. Notes on Argument for the Appellee at 136–38, Baltimore v. Barron, Nos. 129–30 (Md. Dec. 17, 1830).

32. *Id.* at 157.

33. *Id.* at 160.

34. *Id.* at 145.

35. *Id.* at 142.

36. *Id.* at 143.

37. *Id.*

38. *Id.* at 144.

39. *Id.* at 145.

40. *Id.*

41. *Id.* at 151.

42. *Id.* at 141.

tution, takings of property were subject only to the law of the land and the judgment of the property owner's peers.[43] The common law rule, the city argued, was that Parliament could take property for public purposes without compensating the owner; all property rights were held subject to this possibility.[44] The Maryland Constitution did not affect the common law standard.[45] In contrast to other state constitutions, the city contended, "[t]he constitution of Maryland gives to the legislature the power to take private property for public use," "there is no restraint upon the power," and "the courts certainly cannot . . . regulate [the legislature's] discretion."[46] Accordingly, "when for public purposes a [taking] is necessary, it may be done without entitling the party to compensation."[47] As for the Fifth Amendment, it was, the city argued, "intended as [a] restriction[] upon the general government and not on the states."[48] It was not, therefore, a basis for granting Barron and Craig relief.

The court of appeals reversed the judgment of the trial court. The appellate court's one-paragraph opinion did not make clear the precise basis for the reversal. In particular, the court of appeals's opinion made no specific mention of whether or not the Fifth Amendment applied in the case.[49]

43. *Id.* at 140.
44. *Id.* at 159.
45. *Id.* at 138.
46. *Id.* at 158–59.
47. *Id.* at 155.
48. *Id.* at 159.
49. Baltimore v. Barron, Nos. 129–30 (Md. Dec. 1830). The opinion stated only that the court disagreed with the trial judge's rejection of the city's first and second bills of exceptions. In the first bill of exception, the city argued that (i) it had acted within the scope of its legal authority and the plaintiffs were not entitled to compensation from acts performed in discharging public duties; (ii) the defendant was in reality the inhabitants of Baltimore who were not liable; (iii) the city was not liable for exercising discretionary powers over the harbor; and (iv) the city was not liable for committing a public nuisance. *See* Transcript of Defendant's First Bill of Exceptions at 24–25, Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (No. 26), *reprinted in* U.S. SUPREME COURT, TRANSCRIPTS OF RECORDS 345 (Jan. Term 1833). In the second bill of exceptions, the city asserted that (v) unless there had been permanent injury to the wharf, the plaintiffs were only entitled to recover lost income. Transcript of Defendant's Second Bill of Exceptions at 26–27, Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (No. 26), *reprinted in* U.S. SUPREME COURT, TRANSCRIPTS OF RECORDS 346 (Jan. Term 1833).

C. THE SUPREME COURT'S DECISION

John Barron, joined by the executor of John Craig's estate, filed a writ of error with the United States Supreme Court under section 25 of the 1789 Judiciary Act.[50] Now represented by prominent Baltimore lawyer Charles F. Mayer, Barron initially included in his appeal several arguments involving the construction and application of state law.[51] But in his opinion for the Court, Chief Justice John Marshall narrowed things down to a single question: whether the Fifth Amendment "ought to be so construed as to restrain the legislative power of a state, as well as that of the United States."[52] For "[i]f this proposition be untrue," Marshall explained, "the court can take no jurisdiction of the cause."[53] Once Barron's claims were parsed down to that issue, Marshall, a member of the 1788 Virginia committee that proposed a federal bill of rights, had no difficulty dismissing the case.[54]

The starting point for analyzing the issue, Marshall thought, was to recognize that the Federal Constitution was principally directed at the federal government: "[t]he [C]onstitution [of the United States] was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states."[55] Conversely, "[e]ach state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated."[56] Accordingly, "the limitations on power, if expressed in general terms [in the Federal Constitution], are . . . applicable to the government created by the instrument," and do not apply to "distinct governments, framed by different persons and for different purposes."[57] True, Marshall noted, Article I, Section 10 of the Federal Constitution limited the states.[58] But this only buttressed the conclusion that the Federal Bill of Rights did not apply to state gov-

50. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 243 (1833).

51. *Id.* at 246.

52. *Id.*

53. *Id.*

54. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 141–42 (1996).

55. *Barron*, 32 U.S. (7 Pet.) at 246.

56. *Id.*

57. *Id.* at 247.

58. *Id.* at 249.

ernment.[59] Marshall observed that the provisions of Article I, Section 10 "directly express" an intention to limit state government.[60] By contrast, the provisions of the Bill of Rights contained no specific language making them applicable to the states.[61] Accordingly, the "safe and judicious course,"[62] from the starting point that the Constitution limited the federal government, was to conclude that the Fifth Amendment was "intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states."[63] Whether a state had to provide compensation for taking property was, therefore, exclusively a function of the state's own constitution and laws.[64] On this analysis, Barron's claim did not involve the city doing anything that was "repugnan[t]" to any applicable provision of the Federal Constitution.[65] Therefore, Marshall held, the Court lacked jurisdiction under section 25 of the Judiciary Act to hear the case, and it was dismissed.[66]

59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 250–51.
64. *Id.* at 247–48.
65. *Id.* at 251.
66. *Id.* The Court reaffirmed *Barron*'s rule in subsequent cases. *See, e.g.*, Brown v. New Jersey, 175 U.S. 172, 174 (1899) (rejecting a constitutional challenge to a state struck-jury law, citing, inter alia, *Barron* and noting that "[t]he first ten Amendments to the Federal Constitution contain no restrictions on the powers of the State, but were intended to operate solely on [the] Federal Government"); Twitchell v. Commonwealth, 74 U.S. (7 Wall.) 321, 325 (1868) (finding a lack of jurisdiction and denying a writ of error involving a challenge to a state court conviction under the Fifth and Sixth Amendments because, after *Barron*, "the scope and application of these amendments are no longer subjects of discussion"); Fox v. Ohio, 46 U.S. (5 How.) 410, 434–35 (1847) (holding that the Fifth Amendment Double Jeopardy Clause is "exclusively [a] restriction[] upon federal power, intended to prevent interference with the rights of the States, and of their citizens" and explaining that "it is neither probable nor credible that the States should have anxiously insisted to ingraft upon the [F]ederal [C]onstitution restrictions upon their own authority"); Permoli v. New Orleans, 44 U.S. (3 How.) 589, 610 (1845) (declining to apply the First Amendment Free Exercise Clause to a municipality); Livingston v. Moore, 32 U.S. (7 Pet.) 469, 551–52 (1833) (holding, in a diversity case challenging the constitutionality of a state law imposing a lien against and sale of land to satisfy debts owed to the state, that the Fourth Amendment search and seizure provision and the Seventh Amendment right to a jury trial "do not extend to the states").

D. *BARRON* RECONSIDERED

Rather than seeing *Barron* as establishing that the Bill of Rights did not apply to state governments, let me suggest a more limited understanding of the case. *Barron* should be understood as establishing only that where the state's highest court had held that a state law did not violate a provision or principle of the Federal Bill of Rights, the United States Supreme Court would not reverse that decision and apply the Bill of Rights to state government. At the same time, nothing about the *Barron* decision indicated that state courts could not themselves apply the Bill of Rights to state government.

This understanding fits with the trajectory of the *Barron* litigation. Maryland's highest court rejected the trial court's holding that state constitutional law, fundamental law, and the Fifth Amendment required state government to pay compensation when it took private property for a public purpose.[67] The only issue before the United States Supreme Court was the Fifth Amendment question. Given that Maryland's highest court had ruled no compensation was required for the taking, the United States Supreme Court would not itself impose on state government the Fifth Amendment requirement of just compensation.[68] The Fifth Amendment would not be "construed" by the United States Supreme Court so "as to restrain

67. *See Barron*, 32 U.S. (7 Pet.) at 244 (reciting lower court history).

68. *Id.* at 247. A central component of federalism and its commitment to states' authority in the original Constitution was, of course, slavery. *Barron* did not present any issue involving slaves and Chief Justice Marshall makes no mention of slavery in his opinion. But the justices must have understood that were the federal courts to apply provisions of the Bill of Rights against the states, there would be significant consequences for state laws that protected the interests of slave owners and suppressed abolitionist activities. In this light, Roger Taney's role in *Barron* is of particular interest. Taney became Chief Justice in 1836, just three years after the Supreme Court's *Barron* decision. Two decades later, Taney's opinion in the Dred Scott case, *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), which included sweeping statements about there being a federally protected constitutional right to own slaves, produced fears that, notwithstanding *Barron*, the Court was laying the groundwork for extending slavery throughout the nation. *See, e.g.*, ABRAHAM LINCOLN, "House Divided" Speech at Springfield, Ill. (June 16, 1858), *in* SPEECHES AND WRITINGS 1832–1858: SPEECHES, LETTERS AND MISCELLANEOUS WRITINGS 426, 432 (Library of Am. ed., 1989) (warning that "such decision is probably coming, and will soon be upon us" and that "[w]e shall lie down pleasantly dreaming that the people of Missouri are on the verge of making their State free, and we shall awake to the reality instead, that the Supreme Court has made Illinois a slave State" (emphasis omitted)).

the legislative power of a state."[69] Yet state courts remained free to construe the Fifth Amendment to constrain state government.[70]

69. *Barron*, 32 U.S. (7 Pet.) at 247–48.

70. This is a good place to mention Justice William Johnson's opinion for the Supreme Court in *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 240 (1819). The case involved a 1793 Maryland statute giving the Bank of Columbia a summary procedure against debtors who had executed instruments drawn by them negotiable at the bank. *Id.* at 235. In 1801, Congress made the laws of Maryland then in force applicable to the District of Columbia. *Id.* at 238. A debtor subject to the summary procedure argued that he was entitled to a jury trial under the Maryland Constitution and the Constitution of the United States. *Id.* at 240. In a somewhat cryptic opinion, Justice Johnson held that the state law was constitutional. *Id.* at 246. Johnson reasoned that because the 1801 congressional statute only continued the laws of Maryland in force, it was necessary to determine whether the summary procedure was void under Maryland law. *Id.* at 242. "If it was [void]," Johnson wrote, "it must have become so under the restrictions of the State, or of the United States." *Id.* On that issue, Johnson concluded, "[b]y making the note negotiable at the [B]ank of Columbia, the debtor chose his own jurisdiction" and relinquished the right to a jury trial. *Id.* at 243. This construction, Johnson wrote, "is giving full effect to the [S]eventh [A]mendment of the [C]onstitution" because where the "right" to a jury trial is preserved, that right can also be voluntarily relinquished. *Id.* at 244. So, too, under the Maryland Constitution the right to a jury trial can be given up. *Id.* There are two possible interpretations of Justice Johnson's opinion. One, adopted by William Crosskey, is that Johnson thought the issue of whether the statute was valid under Maryland law (if it were not valid it could not have been continued by the later congressional act) included the question of whether it was valid under the Seventh Amendment; therefore, Johnson believed the Bill of Rights applied to the states. *See* William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 129 (1954) (concluding that because Johnson's opinion drew no dissents, "the whole Court membership, in 1819, were of the opinion the civil-jury provision of the Seventh Amendment applied to the states as well as the nation" (footnotes omitted)). A second interpretation is that Johnson invoked the Seventh Amendment only to determine whether the statute could be enforced in the District of Columbia, where the Seventh Amendment did apply. Charles Fairman took this position. *See* Charles Fairman, *The Supreme Court and the Constitutional Limitations on State Governmental Authority*, 21 U. CHI. L. REV. 40, 76 (1953) ("Of course the test of the Seventh Amendment must be met; the question was as to the applicability of the Maryland Constitution to a statute to be enforced in the District of Columbia—*not* as to the applicability of the Seventh Amendment to Maryland legislation in Maryland."). The very next year Justice Johnson, in holding that the power of Pennsylvania to punish in a court martial militiamen who failed to report for federal duty did not conflict with any exclusive congressional power, wrote that "[i]n cases affecting life or member, there is an express restraint upon the exercise of the punishing power[,] . . . a restriction which operates equally upon both governments." Houston v. Moore, 18 U.S. (5 Wheat.) 1, 34 (1820). Crosskey concluded that Johnson considered the Fifth Amendment to apply to the states. Crosskey, *supra*, at 129–30. Fairman thought the meaning was not clear. Fairman, *supra*, at 77.

The Supreme Court's subsequent decision in *Permoli v. Municipality No. 1 of New Orleans*[71] also makes sense from this perspective. In *Permoli*, the Louisiana Supreme Court had held that a municipal ordinance prohibiting display of corpses in churches did not violate the Free Exercise Clause of the First Amendment and that a Catholic priest could be fined for performing funeral rites in violation of the ordinance.[72] On review, the United States Supreme Court, holding that it lacked jurisdiction under section 25 of the 1789 Judiciary Act, dismissed the appeal.[73] Justice John Catron explained: "The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states."[74] Like *Barron*, *Permoli* can be understood to leave open the possibility that a state court might apply the Federal Bill of Rights to state government. As Justice Catron put it, "the question . . . is exclusively of state cognizance."[75] State cognizance might include the view that the Federal Bill of Rights constrained state government.[76]

E. ONE-WAY REVIEW

My reading of *Barron* best explains the numerous state court decisions, both before and after *Barron*, applying provisions and principles of the Federal Bill of Rights to constrain state government. The next Part of this Article explores in detail those state court decisions. Before getting to the specific state court cases, there is more to say up front about why they were consistent with the Supreme Court's holding in *Barron*. The problem comes down to this: how could a state court review and invalidate state laws or executive actions on the ground

71. 44 U.S. (3 How.) 589 (1845).

72. *See id.* at 609.

73. *Id.* at 610.

74. *Id.* at 609.

75. *Id.* at 610.

76. So, too, in *Fox v. Ohio*, 46 U.S. (5 How.) 410, 435 (1847), in rejecting a defendant's argument that a state conviction for counterfeiting coins was invalid under the Double Jeopardy Clause of the Fifth Amendment, Justice Peter Daniel for the Court observed that in understanding the Bill of Rights, "it is neither probable nor credible that the States should have anxiously insisted to ingraft upon the [F]ederal [C]onstitution restrictions upon their own authority." *Fox* also left open the possibility that under the operations of state law, double jeopardy might apply. *Id.* at 420.

that they violated the Federal Bill of Rights when the United States Supreme Court, authoritative on matters of federal law, had held the Bill of Rights did not apply?

The state courts relied upon the limited power Congress had given the Supreme Court to review state court decisions. The 1789 Judiciary Act, central to the *Barron* decision itself, gave the United States Supreme Court authority to review a decision of a state court "where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the [C]onstitution . . . of the United States, and the decision is in favour of such their validity."[77] In other words, the Supreme Court could review state court cases that upheld state laws and executive actions against federal constitutional challenge. However, there was no review in the United States Supreme Court if the state court agreed that the challenged state law or conduct violated a provision of the Federal Constitution.[78] The Supreme Court's review power was therefore one-way. At least this is how the early courts understood the Judiciary Act—a necessary qualification given recent disputes over the correct reading of the Act.[79] This basic distinction remained in place when the

77. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73. *See generally* Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421 (discussing the creation of the federal judiciary); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923) (describing the enactment of the Judiciary Act of 1789).

78. Section 25 of the Judiciary Act of 1789 stated in relevant part:

> [A] final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.

Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86.

79. Akhil Amar has presented an unconventional reading of section 25 of the 1789 Judiciary Act. *See* Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990). In his view, properly construed, section 25 would never have prevented the Supreme Court from

Judiciary Act was amended in 1867[80] and reenacted in 1873[81] and 1911.[82] Only in 1914 did Congress give the United States Supreme Court jurisdiction over state court decisions holding that a state law or action did not violate the Federal Constitu-

considering any issue of federal law decided in a state's highest court. *See id.* at 1530–32. According to Amar, if the state court wrongly enforced a federal right, the losing party could present the appeal to the Supreme Court as involving the state court's failure to protect that party from application of the federal right enforced. *Id.* at 1531–32. Amar contends that the third clause of section 25, which allowed either party to contend that a federal "right, privilege, or exemption" was denied, "could easily have been read to uphold the Supreme Court's appellate jurisdiction" in cases where the state had lost in state court. *Id.* (internal quotations omitted). "Thus, in virtually every case in which a state court errs in adjudicating a federal law, appellant can plausibly package her claim of error as one deriving from a violation of her own federal 'right, privilege, or exemption' under the precise language of section 25." *Id*. at 1530. Amar gives an example: "[A]n overexpansive state court interpretation of . . . the attainder clause of [A]rticle I, [S]ection 10—that is, one that gives the individual more than her due and the state less—can be seen as a state court denial of the state's [T]enth [A]mendment rights, rights arising under federal law." *Id*. at 1531. Thus, Amar says, the state could appeal. *Id*. at 1530. The one-way review the language of section 25 suggests was, therefore, an "optical illusion," though an illusion that deceived even the early Supreme Court, which declined improperly to exercise jurisdiction over appeals brought by state government. *Id*. at 1531 (citing Commonwealth Bank of Ky. v. Griffith, 39 U.S. (14 Pet.) 56 (1840)).

I join other commentators who are not persuaded by Amar's reading of the 1789 Act. *See, e.g.*, Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990) (critiquing Amar's approach). I see no plausible understanding of section 25 that would allow a state to appeal to the United States Supreme Court where the state court had held the state violated a federal constitutional right. The language of the second clause of section 25 clearly distinguishes between cases where the state court has and has not held a state statute or executive action unconstitutional. Judiciary Act of 1789, ch. 20, § 25. As for the third clause of section 25, which bears much of the weight of Amar's theory, I read the "either party" language to reflect the unremarkable notion that both parties in a case might be private parties, and as private parties, might have a federal "right, privilege or exemption" at stake rather than the more convoluted notion that state government had a "right, privilege or exemption" against enforcement of federal constitutional provisions. Judiciary Act of 1789, ch. 20, § 25. In any event, for purposes of the present Article, what matters ultimately is that, as Amar and his critics agree, the Supreme Court (and the state courts), at the time, believed section 25 allowed for only limited review. *See* Amar, *supra*, at 1532–33 (adopting this understanding); Meltzer, *supra*, at 1589 & n.68 (showing that cases in line with Amar's reading did not appear until 1908); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 422 n.129 (1995) (noting that even if Amar's reading is correct, "the [Supreme] Court apparently did not perceive § 25 as reaching claims of overvindication of federal rights").

80. Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385.

81. Act of Dec. 1, 1873, ch. 11, § 709, 18 Stat. 1, 132.

82. Act of Mar. 3, 1911, ch. 231, § 237, 36 Stat. 1087, 1156.

tion.[83] By operation of the 1789 Judiciary Act, there was also necessarily no review if the United States Supreme Court did not consider a state court decision to raise an issue under any *applicable* provision of the Federal Constitution—regardless of how the state court had actually ruled on the plaintiffs' claim. Thus, in *Barron*, the Supreme Court dismissed the plaintiffs' appeal for lack of jurisdiction: though the state court had rejected the plaintiffs' claim that the city had violated the Federal Constitution, the United States Supreme Court saw no applicable constitutional provision at stake. In short, where a plaintiff in state court had challenged state law or action as violating the Federal Constitution, the Supreme Court lacked jurisdiction if either the state court had accepted the plaintiff's argument (and invalidated the state law or action) or the state court's decision did not involve any constitutional provision the United States Supreme Court considered applicable to state government.

The 1789 Judiciary Act therefore left state courts free to extend constitutional protections beyond those the United States Supreme Court recognized—by expanding on the Supreme Court's own understandings of applicable constitutional provisions or applying provisions of the Federal Constitution that the Supreme Court itself did not apply to state government. State courts took the position that, with respect to the Federal Constitution, they were only required to follow the rulings of the United States Supreme Court where it had "jurisdiction" to review what the state court had done.[84] By jurisdiction, the state courts did not mean all of the cases to which the federal "judicial Power . . . extend[ed]" under Article III of the Constitution.[85] Instead, the state courts meant the jurisdiction of the Supreme Court as provided for under the 1789 Judiciary Act. Accordingly, state courts concluded they did not need to follow prior rulings of the United States Supreme Court on fed-

83. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790. In a comparable manner, while the 1789 Act gave the federal courts diversity jurisdiction, *see* Judiciary Act of 1789, ch. 20, § 11, Congress did not assign the federal courts general federal question jurisdiction until 1875. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (codified as amended at 28 U.S.C. § 1331 (2000)) (assigning federal trial courts' jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States").

84. Under Article III, the Supreme Court's "appellate Jurisdiction" is subject to "such Exceptions [and] Regulations as the Congress shall make." U.S. CONST. art. III, § 2.

85. *Id.*

eral constitutional issues if the state court decision was not subject to later review.[86] State courts could not deny or narrow protections the Supreme Court had recognized under the United States Constitution—that could trigger review—but state courts could impose more stringent constitutional requirements on state government than the Supreme Court elected to impose.[87] In dozens of cases, state courts articulated this difference between cases in which they were and were not bound to follow the United States Supreme Court on issues of federal constitutional law.[88] The principle paralleled the notion that

86. *See, e.g.*, Skelly v. Jefferson Branch of the State Bank of Ohio, 9 Ohio St. 606, 614 (1859), *rev'd*, 66 U.S. (1 Black) 436 (1861).

87. In a clear statement of this principle, one state court (though concluding that it was not bound by the United States Supreme Court's understanding of whether a legislative act was a contract for purposes of the Constitution's Contract Clause) emphasized how section 25 allowed for nonuniform rulings by the state courts in one direction but not the other:

> [T]he limited and qualified character of the appellate jurisdiction, conferred by the 25th section of the [J]udiciary [A]ct, does not countenance the idea . . . that Congress had in view a uniformity of decisions upon questions arising under the [C]onstitution and laws of the United States, and that the Supreme Court was the common arbiter for the decision of such questions. To place the arbiter in a proper position, care should have been taken that either party to a case in which a question arose, might call for its interposition. The object in view appears to have been the enforcement of the [C]onstitution and laws, rather than a uniformity of decisions. The provisions of the section look entirely to the extension, and not to the restriction, of the operation of the [C]onstitution and laws of the United States. The steps which are permitted all point in one direction. The jurisdiction of the Supreme Court can only be invoked when the decision of a case is in one way—that is, when it is against the validity of a provision of the [C]onstitution or laws, and not when it is in favor of the validity.

Id. at 612–13.

88. *See, e.g.*, Linn v. President of the State Bank of Ill., 2 Ill. (1 Scam.) 87, 89 (1833) (holding that bills issued by the Bank of Illinois were unconstitutional bills of credit and stating that "the Supreme Court of the United States is the proper and constitutional forum to decide and finally to determine all suits where is drawn in question the validity of a statute . . . on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such validity" and, therefore, "[w]hen the Supreme Court of the United States have decided that a State law violates the Constitution of the United States, the judges of the respective States have no right to overrule or impugn such decision" but must "simply . . . ascertain what the Supreme Court of the United States has decided" (internal quotation marks omitted)); Braynard v. Marshall, 25 Mass. (8 Pick.) 194, 196–97 (1829) (explaining that Supreme Court decisions on the Contract Clause of the Constitution are "binding upon this Court" where a contrary holding "may be carried to [the Supreme Court] by writ of error, and our judgment be reversed; it being a question, of which, by section 25 of the [J]udiciary [A]ct of the United States . . . that court has jurisdiction"); Bailey v. Fitzgerald, 56 Miss. 578, 586–

where there was only an issue of construing state law or a state constitution, the state court did not need to defer to the United States Supreme Court, because it had no jurisdiction to review the state court's holding.[89]

II. STATE COURTS AND THE FEDERAL BILL OF RIGHTS

Consistent with the understanding of the Supreme Court's decision in *Barron* I have presented, the early state courts regularly invoked and applied the Federal Bill of Rights to limit the powers of state government. This Part examines these state court practices.

A. OVERVIEW

State court reliance on the Federal Bill of Rights was an important mechanism for protecting individual rights in the antebellum era. State courts regularly applied to state government the Federal Bill of Rights protections, particularly the

88 (1879) (recognizing, in a Contracts Clause case, that the state court was obligated to follow Supreme Court precedent where the Supreme Court could review the decision under the Judiciary Act provision allowing for review of a state ruling upholding the validity of a state statute against a federal constitutional challenge); Susquehanna Canal Co. v. Commonwealth, 72 Pa. 72, 78 (1872) (stating, in a Contracts Clause case, that "[w]e are not bound by the decisions of our Supreme Court, except in cases arising under the Constitution of the United States, or where the Federal judiciary has superior jurisdiction. Should these courts hold that . . . [the challenged statute] impairs the obligations of the contract . . . our judiciary must give way"); *see also* Thurston v. Fisher, 9 Serg. & Rawle 288, 293 (Pa. 1823) (writing, in a case involving an interpretation of a statute of limitations, that "all the decisions of [the United States Supreme Court] are entitled to great respect; but unless in cases where it has appellate jurisdiction, and may revise and correct the decisions of the state courts, its opinions are not conclusive").

89. *See, e.g.*, Doe *ex dem.* Shelton v. Hamilton, 23 Miss. 496, 498 (1852) (stating in a land sale dispute that "[w]hile we entertain a proper respect for the opinions of the [United States Supreme Court], and are willing to yield . . . the deference [to] which [it is] due . . . when its decisions . . . conflict with those of this court, . . . [on] questions, over which the jurisdiction of this court is ample and its decisions final, we feel bound to adhere to our own decisions"). Some state courts drew a distinction between the entire approach to judicial review under a state constitution and under the Federal Constitution. In 1825, Justice John Gibson of the Pennsylvania Supreme Court urged that, because the 1789 Judiciary Act did not allow the United States Supreme Court to review state court decisions invalidating state laws on federal constitutional grounds, state courts should be especially careful in striking down state legislation as violating the Federal Constitution. Eakin v. Raub, 12 Serg. & Rawle 330, 335–57 (Pa. 1825) (Gibson, J., dissenting). Some state courts expressed the view that the Federal Constitution was "enabling" while state constitutions were restraining. *See, e.g.*, *In re* Dorsey, 7 Port. 293, 400–02 (Ala. 1838).

Second, Fourth, Fifth, and Sixth Amendments; state courts also applied with less frequency the First and Seventh Amendments.[90] In scores of other cases, lawyers (perhaps unaware even of *Barron*)[91] argued the state had violated their clients' rights under the Federal Bill of Rights.[92] To be sure, there were

90. *See infra* Parts II.C.1–7.

91. Crosskey, *supra* note 70, at 141 (writing that *Barron* was "a little-known case" in the antebellum era).

92. *See, e.g.*, Elliott v. Mayfield, 4 Ala. 417, 420 (1842) (summarizing the lawyer's argument that a state statute governing execution of bonds violated the Seventh Amendment civil jury provision); Davis v. Tuscumbia, Courtland & Decatur R.R. Co., 4 Stew. & P. 421, 427, 433 (Ala. 1833) (noting the lawyer's argument that the Fifth Amendment Takings Clause required that when a state exercised its eminent domain power, the property owner should receive compensation equal to the value of the property at the time of the taking as determined by a jury); People v. McNealy, 17 Cal. 332, 333 (1861) (outlining the argument that a second trial following dismissal because of error in indictment violated the Fifth Amendment Double Jeopardy Clause); Rowe v. Yuba County, 17 Cal. 61, 62 (1860) (setting forth an argument invoking the Sixth Amendment right to counsel in a case involving a lawyer seeking fees when appointed to represent an indigent state defendant); Jones v. Cent. R.R. & Banking Co., 21 Ga. 104, 106 (1857) (presenting a lawyer's argument that a state statute imposing liability when railroads injured livestock violated the Eighth Amendment); Sanders v. Iowa, 2 Iowa 230, 231, 251–70 (1855) (laying out an argument citing the Fourth Amendment warrant requirements in challenging prosecution for liquor possession); Fortier v. McDonogh, 4 Mart. (o.s.) 718, 731 (La. 1817) (summarizing the lawyer's argument that if the state requisitioned slaves to perform work on a levee, the Fifth Amendment required compensating the slave owner); Charles River Bridge v. Warren Bridge, 23 Mass. (6 Pick.) 376, 380–81, 386–88 (1828) (describing the legal argument in a complaint by a bridge operator for compensation under the Fifth Amendment when the legislature authorized a second bridge across the same river); *In re* Ross, 19 Mass. (2 Pick.) 165, 168 (1824) (presenting the argument that a statute increasing a criminal sentence when information showed that the defendant was convicted of a prior offense violated the Fifth Amendment right to a jury trial and the Sixth Amendment right to call and confront witnesses); Lambeth v. Mississippi, 23 Miss. 322, 337–38 (1852) (outlining the lawyer's argument that the admission of a dying declaration violated the Sixth Amendment right to confront witnesses); McGunnegle v. State, 6 Mo. 367, 367 (1840) (setting forth the legal argument invoking the Seventh Amendment civil jury provision in a case involving the constitutionality of a statute exempting fire company members from jury service); *In re* Prime, 1 Barb. Ch. 340, 342–43 (N.Y. Ch. 1847) (summarizing the argument that imprisonment of a debtor violated the Eighth Amendment); Specht v. Commonwealth, 8 Pa. 312, 317 (1848) (laying out the lawyer's argument that a statute prohibiting work on Sunday violated the First Amendment); Philips v. Gratz, 2 Pen. & W. 412, 413 (Pa. 1831) (noting the lawyer's argument that a trial court's failure to grant a continuance to accommodate a Jewish witness's observance of the Sabbath violated the First Amendment); Conner v. Commonwealth, 3 Binn. 38, 40 (Pa. 1810) (presenting the argument that an arrest pursuant to a warrant not supported by an oath or affirmation violated the Fourth Amendment); Harding v. Goodlett, 11 Tenn. (3 Yer.) 41, 42 (1832) (noting the lawyer's argu-

plenty of cases, prior to and after *Barron*, in which state courts held that the Federal Bill of Rights did *not* apply to state government.[93] For example, in 1824, the Supreme Court of New York, rejecting a claim that an anti-dueling statute violated the Eighth Amendment prohibition on cruel and unusual punishments, explained that the point of the Bill of Rights was "not to limit the power of the states, but to limit the power of the union, and by new provisions to give security to rights, which were supposed to be in danger from the new and untried system of national government."[94] The court noted that the states remained free to include liberty-protecting provisions in their own state constitutions—and most states had elected to do so.[95] To read the provisions of the Federal Bill of Rights to operate on the states would "render nugatory and null, the like provi-

ment that a taking of property to establish a mill was not a taking for a "public use" and therefore violated the Fifth Amendment even though compensation was paid); Brainard v. Stilphin, 6 Vt. 9, 10 (1834) (providing the lawyer's argument that the power of militia officers to assess and collect fines violated the Sixth Amendment jury trial right); Hood v. Maxwell, 1 W. Va. 219, 223, 231 (1866) (providing a legal argument based on the Second Amendment in a case involving liability for wheat taken for use by the militia); *see also* Crosskey, *supra* note 70, at 142 n.266 (collecting additional cases).

93. *See, e.g.*, Colt v. Eves, 12 Conn. 243, 251–52 (1837) (holding that the Seventh Amendment did not apply in state courts); Reed v. Rice, 25 Ky. (2 J.J. Marsh.) 44, 45 (1829) (holding that the Fourth Amendment applied only to the federal government); Renthorp v. Bourg, 4 Mart. (o.s.) 97, 130 (La. 1816) (holding that the Fifth Amendment Takings Clause did not apply to states); Barker v. People, 3 Cow. 686, 701 (N.Y. Sup. Ct. 1824) (holding that the Eighth Amendment, like the other provisions of the Bill of Rights, applied only to the federal government); Murphy v. People, 2 Cow. 815, 818 (N.Y. Sup. Ct. 1824) (holding that the Fifth and Sixth Amendments did not apply to the states); State v. Newsom, 27 N.C. (5 Ired.) 250, 251 (1844) (holding, in a case challenging a statute prohibiting free blacks from carrying firearms, that the Second Amendment applied only to the federal government); James v. Commonwealth, 12 Serg. & Rawle 220, 221 (Pa. 1825) (reporting that at oral argument the court rejected plaintiff's claim that the Eighth Amendment applied to a state law providing for punishment by ducking, the practice of securing an offender to a stool and, in view of the public, submerging the offender a prescribed number of times in a pond or other body of water); State v. Paul, 5 R.I. 185, 195 (1858) (holding that the Fifth and Sixth Amendments did not apply to the states); State v. M'Lemore, 20 S.C.L. (2 Hill) 680, 681 (S.C. 1835) (reasoning that the Double Jeopardy Clause applied only in federal courts); Commonwealth v. Murray, 4 Va. (2 Va. Cas.) 504, 507 (1826) (writing that the Fourth Amendment "was intended to afford security to the people of all the States, against the encroachments of their Federal Legislature, Executive and Judiciary, and all of the officers created by, or dependent on them" and is "not . . . a rule for the State authorities").

94. *Barker*, 3 Cow. at 701.

95. *Id.* at 701–02.

sion[s] in the constitutions of very many of the states; and at the same time, to force upon all the states which have not adopted such . . . provision[s], a rule which they may think inexpedient, and which they at least, have thought unnecessary, in their own internal economy."[96] Similarly, in 1858, the Supreme Court of Rhode Island explained in detail why the Federal Bill of Rights did not apply to state government.[97] Nonetheless, as explored in this Part, state courts applied the Bill of Rights to state government with sufficient frequency that the practice, largely overlooked in modern times, was a significant element of the judicial landscape of antebellum America.[98]

B. TEXTUAL SUPPORT

Before examining the practices of the state courts, it is useful to note how the text of the Bill of Rights facilitated their application of the Bill of Rights to state government. Textually, the First Amendment is limited to the national government: "*Congress* shall make no law . . . ."[99] However, the subsequent

96. *Id.* at 702.

97. In *State v. Paul*, the court wrote:

> From the history of these amendments, as well as from the necessary import of most of them, they have no reference to the state governments, but are restricted in their operation to the government of the United States. The states had already provided, or could provide, by their local constitutions, for the preservation of the rights . . . and the articles in question originated in the well-known jealousy of the power of the general government which so nearly prevented the adoption of the [F]ederal [C]onstitution.

5 R.I. at 196.

98. Modern commentators have not entirely ignored how state courts applied the Bill of Rights to state government. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 145–62 (1998) [hereinafter AMAR, CREATION AND RECONSTRUCTION] (discussing the "*Barron* contrarians"); CURTIS, *supra* note 11, at 22–56 (collecting early cases and discussing the emergence of arguments by congressional Republicans, at the time of consideration of the Fourteenth Amendment, that the Bill of Rights already bound the states). The practice, however, was more widespread and more reflective of a serious theory of constitutional government than is commonly acknowledged. Akhil Amar, the commentator who has made the most serious modern attempt to understand these antebellum state courts, calls them "*Barron* contrarians." AMAR, CREATION AND RECONSTRUCTION, *supra,* at 22–56. Yet that label, treating as it does these state courts from the perspective of the United States Supreme Court (as mavericks, essentially) does not adequately capture the phenomenon. In applying the Federal Bill of Rights, antebellum state courts did not see themselves as doing something contrary to *Barron* or inconsistent with any other applicable ruling of the United States Supreme Court.

99. U.S. CONST. amend. I (emphasis added).

provisions of the Bill do not contain the same limiting language. The Second through Eighth Amendments, taken alone, appear to be free-floating, generally applicable protections for individual liberties. Thus, the Second Amendment says that "the right . . . to keep and bear Arms, shall not be infringed," but does not specify who may not infringe the right.[100] The Fifth Amendment ensures that "[n]o person shall" be prosecuted without grand jury indictment or put in double jeopardy, but the Amendment gives no indication that it constrains only the federal government.[101] The Eighth Amendment says "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," but it does not explain who may not require, impose, or inflict these things.[102] In applying the Bill of Rights provisions to constrain state government, antebellum state courts were at least not defying specific language *against* application; they could even invoke the ambiguous text of the Bill in support of application.[103]

100. *Id.* amend. II.

101. *Id.* amend. V.

102. *Id.* amend. VIII.

103. State courts were not alone in this understanding. The author of a prominent early treatise on the Constitution also took the view that the states were bound by at least some provisions of the Bill of Rights. *See* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 115–38 (Philadelphia, Nicklin 2d ed. 1829). Rawle wrote that while the First Amendment

> expressly refers to the power of [C]ongress alone . . . some of those [amendments] which follow are to be more generally construed, and considered as applying to the state legislatures as well as that of the Union. The important principles contained in them are now incorporated by adoption into the instrument itself; they form parts of the declared rights of the people, of which neither the state powers nor those of the Union can ever deprive them.

Id. at 124–25. Rawle identified the Second and Fourth Amendments as applicable equally to state government. *Id.* at 125, 127. More recently, University of Chicago law professor William Winslow Crosskey took the view that in the House, "there was sentiment . . . for extending all of the amendments to the states" and that "the decision in the Senate was to extend to the states all the amendments, save . . . the matters dealt with in the First Amendment." Crosskey, *supra* note 70, at 123. In his view, while the early Supreme Court was receptive to the view that the Bill of Rights constrained the states, by the time of *Barron*, it feared Congress might impose further limitations on the Court's appellate powers were it to review aggressively state court decisions. *Id.* at 131 n.238; *see also* 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1057–64 (1953) (arguing that the text and historical origins of the Bill of Rights indicate that the First Amendment and the Seventh Amendment prohibition on re-examining in any court of the United States facts tried by juries except in accordance with the common law applied only to the federal government but that the oth-

The blame for the ambiguous text of the Bill of Rights lies with the House of Representatives.[104] When originally offered on June 8, 1789, James Madison's proposed amendments were to be integrated into the existing Constitution in a way that would make clear which government they were limiting.[105] By August 18, 1789, the House Committee of the Whole had approved an initial version of amendments that took this textually clear form.[106] However, Roger Sherman of Connecticut and Thomas Tudor Tucker of South Carolina, aghast at the prospect of altering any of the original language of the Constitution, led an opposition movement that ultimately resulted in the representatives' grudging decision to tack the amendments onto the end of the original Constitution.[107] While that concession (necessary to muster the two-thirds vote in the House in favor of approving the slate of proposed amendments)[108] preserved the Constitution's original language, it came at the cost of textual clarity. Simply reading the provisions did not immediately reveal that the Second through Eighth Amendments applied only to the federal government.[109]

er amendments applied also to the states); *id.* at 1081 (calling *Barron* a "sham" and "one of the most extensive and indefensible of all the various failures of the Court to enforce the Constitution against the states as the document is written").

104. *See generally* Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1774–94 (2005) (describing congressional debates on where to place the amendments within the Constitution).

105. 1 ANNALS OF CONG. 437–42 (Joseph Gales ed., 1789).

106. *Id.* at 707–63.

107. *Id.* at 757–66.

108. *See* Letter from James Madison, Member, U.S. House of Representatives, to Alexander White, Representative, Va. State Legislature (Aug. 24, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 287–88 (Helen E. Veit et al. eds., 1991) ("It became an unavoidable sacrifice to *a few* who knew their concurrence to be necessary . . . to give up the form by which the amen[dmen]ts when ratified would have fallen into the body of the Constitution, in favor of the project of adding them by way of appendix to it.").

109. A very close reading of the amendments in conjunction with the Constitution, however, does so reveal. Reading the amendments in connection with Article I provides a textual clue: each of the Second through Eighth Amendments are of the same passive syntax as Article I, Section 9. Thus, just as in Section 9, "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended" and "[n]o Bill of Attainder or ex post facto Law shall be passed," so too in the Second Amendment, "the right of the people to keep and bear Arms, shall not be infringed" and in the Third Amendment, "[n]o Soldier shall . . . be quartered in any house." *Compare* U.S. CONST. art I, § 9, *with id.* amends. II & III. By contrast, the prohibitions on the states in Article I, Section 10 take the active form: "No State shall . . . ." U.S. CONST. art. I, § 10. A very careful

Moreover, in the entire scheme of things, it was not preposterous for state courts to read the Bill of Rights as general prohibitions on all government. Modern commentators, emphasizing the dramatic reconfiguration that occurred with the Reconstruction amendments, contend that, as a historical matter, in the early Republic the Federal Constitution did not protect individual rights from infringement by the states.[110] Yet this view exaggerates the divide between the pre– and post–Civil War Federal Constitution and it overlooks the degree to which early Americans viewed all government, federal and state, with suspicion.[111] Article I, Section 10 of the Constitution already contained, among its slew of prohibitions on the states, three provisions specifically protecting *individuals*: the states were prohibited from passing bills of attainder and ex post facto laws (both also prohibited by Section 9 to the federal government) and from impairing contractual obligations.[112] Early state courts routinely invoked these Section 10 prohibitions in reviewing state laws and limiting the actions of state government.[113] If the Federal Constitution so clearly prohibited the

reader, who did not know beforehand that the Second through Eighth Amendments belonged with the Section 9 prohibitions on the national government, would reach the proper conclusion from the syntax. Chief Justice Marshall saw the point. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 249 (1833) ("[I]n every inhibition [in the 1789 Constitution] intended to act on state power, words are employed, which directly express that intent."). Significantly, the Fourteenth Amendment, which clearly does constrain the states, uses the same "No state shall" language of Article I, Section 9. *Compare* U.S. CONST. art I, § 9, *with id.* amend. XIV. Note, though, that Article IV of the Constitution applies to the states but it uses the indirect language of Section 10. *Compare* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State . . . ."), *and id.* art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities . . . ."), *and id.* art. IV, § 2, cl. 2 (stating that fugitives and runaway slaves "shall be delivered up"), *with id.* art. I, § 10. Perhaps the distinction is that Article IV imposes obligations on the states (rather than restricts them).

110. *See, e.g.*, AMAR, CREATION AND RECONSTRUCTION, *supra* note 98; CURTIS, *supra* note 11, at 23 (describing how, with the decision in *Barron*, "states [were] free to nullify basic rights"); Denise C. Morgan & Rebecca E. Zietlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. 1347, 1367 (2005) ("[P]rior to the Civil War, with few exceptions, only states protected [citizens' individual] rights.").

111. *See generally* MARC W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 49–53, 155–63 (1997) (discussing structural mechanisms in state constitutions to constrain legislatures and executive officials).

112. U.S. CONST. art. I, § 10.

113. *See, e.g.*, Alridge v. Tuscumbia, Courtland, & Decatur R.R. Co., 2 Stew. & P. 199, 205 (Ala. 1832) (holding that, in affirming a state's power to

states from passing bills of attainder and ex post facto laws, it was not harebrained to understand the Constitution also to protect individuals from double jeopardy, conviction without a jury trial, and self-incrimination.[114] If the Federal Constitution limited states from interfering with contracts, it was not impossible to imagine the Constitution also limited the ability of states to take a person's property.[115] Indeed, in recognizing the

grant eminent domain authority to a railroad, while ex post facto state laws were unconstitutional, the ban applied only in criminal prosecutions); Randel v. Shoemaker, 1 Del. (1 Harr.) 565, 576 (1835) (holding that an attachment of tolls in satisfaction of judgment did not violate prohibitions on ex post facto laws or laws impairing contractual obligations); Doe *ex dem.* Gaines v. Buford, 31 Ky. (1 Dana) 481, 509–10 (1833) (explaining state-level application of the prohibition on bills of attainder in a case holding a forfeiture statute unconstitutional); Lapsley v. Brashears, 14 Ky. (4 Litt.) 47, 51–65 (1823) (holding that a state statute extending retroactively the period for payment of judgment was a law impairing the obligation of contracts and therefore void under Section 10); Boston Water Power Co. v. Boston & Worcester R.R., 40 Mass. (23 Pick.) 360, 394 (1839) (holding that the state charter authorizing a railroad across land that the state had previously granted to a water power company did not violate the contracts provision of Section 10); *In re* Ross, 19 Mass. (2 Pick.) 165, 169–70 (1824) (explaining that if a statute is ex post facto, it is the court's duty under the Federal Constitution to invalidate the statute, but a law subjecting a repeat offender to an additional penalty is constitutional even though the law was passed after the defendant's commission of the first offense); State v. Cummings, 36 Mo. 263, 272 (1865) (holding that while the Ex Post Facto Clause of Section 10 applied to state laws, state constitutional prohibition on attorneys practicing in state courts without having taken a loyalty oath was constitutional); Shepherd v. People, 25 N.Y. 406 (1862) (invalidating a state law altering the penalty in capital cases as violating the Ex Post Facto Clause); Hartung v. People, 22 N.Y. 95 (1860) (similar); Jones v. Crittenden, 4 N.C. (1 Car. L. Rep.) 55, 57 (1814) (striking down a state law suspending enforcement of a judgment against a debtor as a violation of the Contracts Clause and explaining that "the restrictive clause in the [C]onstitution . . . annul[s] every act of a State legislature which . . . produces . . . [the prohibited] effect"); State v. Antonio, 7 S.C.L. (2 Tread.) 776, 785 (1816) (holding that although Section 10 prohibited states from "coin[ing] money," states retained power to prosecute counterfeiting); Byrne v. Stewart, 3 S.C.Eq. (3 Des. Eq.) 466, 477 (1812) (upholding a state law regulating lawyers as consistent with the Ex Post Facto Clause); Von Baumbach v. Bade, 9 Wis. 559, 575–82 (1859) (holding that while states were bound by the Contracts Clause of Section 10, a statute prohibiting a mortgagee from selling mortgaged property for six months following judgment in the mortgagee's favor in a foreclosure action was constitutional).

114. U.S. CONST. amends. V & VI.

115. *Id.* amend. V. *But see* Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 283–93 (1988) (exploring why, in light of the perceived risks and predicted consequences, it made sense for the ratifying generation to prevent the federal government, but not the states, from taking property without just compensation, and to prevent

existence of rights beyond those specifically enumerated, the Ninth Amendment referred not to rights enumerated in the Bill of Rights, but to "[t]he enumeration *in the Constitution* of . . . rights."[116] Besides the Bill of Rights, rights, including rights held against the states, were enumerated in the Constitution in Article I.[117] In this context, the ambiguities of the Bill of Rights provisions were resolved in favor of the reading that they, like the Article I provisions, operated as a constraint on state government.[118]

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state governments, but not the national government, from interfering with contracts).

116. U.S. CONST. amend. IX (emphasis added). Commentators sometimes overlook this point. For example, Laurence Tribe and Michael Dorf write of the Ninth Amendment:

> It tells each reader: whatever else you're going to do to explain why "liberty" does not include the grandmother's right to live with her grandchild—whatever else you're going to say to conclude that the "privileges or immunities" of national citizenship do not include the right to use contraceptives—you cannot advance the argument that those rights are not there just because they are not enumerated in the Bill of Rights.

LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 54 (1991).

117. Article IV, Section 2 can also be read as enumerating rights—to enjoy equally privileges and immunities within the states and to recover fugitive slaves. *See* U.S. CONST. art. IV, § 2 (stating that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" and that escaped slaves "shall be delivered up on Claim of the [slave owner]").

118. *See, e.g.*, Paxson v. Sweet, 13 N.J.L. 196, 199 (1832) (assuming that the Takings Clause of the Fifth Amendment would apply to state government). Notably, many abolitionists ignored *Barron* or stated explicitly that the decision was incorrect. JACOBUS TENBROEK, EQUAL UNDER LAW 128 (1965). Republican leaders in Congress in 1866, including John Bingham, the author of Section 1 of the Fourteenth Amendment, would come to assert that, notwithstanding *Barron*, the states had always been bound by the Bill of Rights and that what the Fourteenth Amendment changed was to give Congress authority to enforce this requirement. *See* CURTIS, *supra* note 11, at 46–56. Without exaggerating the similarities, some of Bingham's statements suggest an understanding of *Barron* that fits with the approach I have offered in this Article. For example, on February 28, 1866, Bingham described *Barron* as "involving the question whether [the Takings Clause of the Fifth Amendment was] binding upon the State of Maryland and to be enforced in the Federal courts." CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866). Bingham's description of *Barron* as involving, in addition to the issue of whether the Fifth Amendment applied to the states, whether it would be "enforced in the Federal courts" fits nicely with how I have presented *Barron*. Emphasizing the difference between state court and federal court enforcement of the Bill of Rights also renders other statements by Bingham less cryptic. For instance, Bingham stated on February 28, 1866, that "although as ruled [in *Barron*] the existing amendments are not applicable to and do not bind the States, they are nevertheless

C. APPLICATIONS OF THE BILL OF RIGHTS

The remainder of this Part examines cases in which state courts applied the provisions and principles of the Bill of Rights to state government.

1. Second Amendment

Early state courts applied the Second Amendment to state legislation. Justice Joseph Henry Lumpkin of the Georgia Supreme Court[119] provided the most extensive explanation as to why the Second Amendment applied to state government in the 1846 case of *Nunn v. State*.[120] Writing for the court in *Nunn*, Justice Lumpkin held unconstitutional a state statute, "An Act to guard and protect the citizens of this State against the unwarrantable and too prevalent use of deadly weapons," that made it a misdemeanor to sell or carry knives, pistols, and other weapons.[121] The defendant had been indicted for carrying a pistol.[122] A section of the statute exempted certain weapons if carried openly, but the exemption did not apply to pistols.[123] No provision in the state constitution protected a right to carry arms.[124]

Justice Lumpkin held that while the state legislature could prohibit the carrying of concealed weapons, a general prohibition on possessing weapons violated the Second Amendment.[125] Without mentioning *Barron* by name, Lumpkin recognized that

to be enforced and observed in [the] States . . . ." *Id.* at 1090. He described the Fourteenth Amendment as "giv[ing] . . . to the People of the United States the power, by legislative enactment to punish officials of States for violations of the oaths enjoined upon them by their Constitution." *Id*. He also claimed that

> [t]he adoption of the proposed amendment will take from the States no rights that belong to the States . . . but if . . . [the state legislatures] . . . enact laws refusing equal protection to life, liberty, or property, the Congress is thereby vested with power to hold them to answer before the bar of the national courts for the violation of their oaths and the rights of their fellow-men.

Id.

119. Lumpkin became Georgia's first Chief Justice when the position was created in 1864. PAUL DEFOREST HICKS, JOSEPH HENRY LUMPKIN: GEORGIA'S FIRST CHIEF JUSTICE 3 (2002).

120. Nunn v. State, 1 Ga. 243 (1846).

121. *Id.* at 243.

122. *Id.*

123. *Id.* at 246.

124. *See* GA. CONST. of 1798; *cf*. GA. CONST. of 1861, art. I ("The right of the people to keep and bear arms shall not be infringed.").

125. *Nunn*, 1 Ga. at 251.

"it has been decided, that this, like other amendments adopted at the same time, is a restriction upon the government of the United States, and does not extend to the individual States."[126] Lumpkin noted, however, there remained "disagreement" on this issue—Lumpkin cited with approval New York Chief Justice Ambrose Spencer's view in 1820, in *People v. Goodwin,* that the Fifth Amendment "'extend[s] *to all judicial tribunals*, whether constituted by the Congress of the United States or the States individually'" because "'[t]he provision is general in its nature and unrestricted in its terms; and the sixth article of the [Federal] Constitution declares, that that Constitution shall be the supreme law of the land.'"[127] State courts were, in other words, required to enforce the Federal Constitution and it included the Bill of Rights. Textually, Lumpkin observed, "[t]he language of the [*S*]*econd* [A]mendment is broad enough to embrace both Federal and State governments," and there is "[nothing] in its terms which restricts its meaning."[128] Moreover, as a historical matter, the right to bear arms was part of the English Constitution and, therefore, among the "'rights and liberties of English subjects'—whether living 3,000 or 300 miles from the royal palace."[129]

As for the argument that, historically, the Federal Bill of Rights was ratified as a constraint only on the federal government, Lumpkin was not impressed. While true that the Bill of Rights "originated in the fear that the powers of the general government were not sufficiently limited," it was, Lumpkin thought, wrong to read the Bill as therefore supporting a power of the state governments to restrict individual rights.[130] The fact that "the people refused to delegate to the general government the power to take from them the right to keep and bear arms" did not mean that "they designed to rest it in the State governments."[131] Rather, even after the ratification of the Second Amendment, the right to bear arms remained where it had begun: with the people. Lumpkin wrote:

> Is it not an unalienable right, which lies at the bottom of every free government? . . . This right is too dear to be confided to a republican

126. *Id.* at 250.

127. *Id.* (quoting People v. Goodwin, 18 Johns. Cas. 187, 201 (N.Y. Sup. Ct. 1820)).

128. *Id.*

129. *Id.* at 249.

130. *Id.* at 250.

131. *Id.*

> legislature. . . . If a well-regulated militia is *necessary* to the *security* of the State of Georgia and of the United States, is it competent for the General Assembly to take away this security, by disarming the people? What advantage would it be to tie up the hands of the national legislature, if it were in the power of the *States* to destroy this bulwark of defence? In solemnly affirming that a well-regulated militia is necessary to the *security* of a *free State*, and that, in order to train properly that militia, the unlimited right of the *people* to *keep* and *bear* arms shall not be impaired, are not the sovereign people of the State committed by this pledge to preserve this right inviolate? Would they not be recreant to themselves, to free government, and false to their own vow, thus voluntarily taken, to suffer this right to be questioned?[132]

Bearing arms, in other words, was a "*natural* right,"[133] a right "inestimable to freemen,"[134] "one of the fundamental principles, upon which rests the great fabric of civil liberty."[135] Therefore, "any law, State or Federal, is repugnant to the Constitution, and void" if it "contravenes this *right*."[136] The same principle extended, Lumpkin concluded, to the other provisions of the Bill of Rights.[137]

The Georgia Supreme Court was not alone in considering the Second Amendment applicable to state government. The Arkansas Supreme Court applied the Second Amendment to a state law prohibiting concealed weapons.[138] Chief Justice Daniel Ringo reasoned that the Second Amendment applied because it "provides an additional security for the public liberty and the free institutions of the State."[139] Nonetheless, because the Second Amendment did not "operate as an immunity to those, who should . . . keep or bear their arms as to injure or endanger the private rights of others, or in any manner prejudice the common interests of society," Ringo concluded that the concealed weapons law was constitutional.[140] In the same case,

132. *Id.* at 250–51.

133. *Id.* at 251.

134. *Id.* at 249 (internal quotation marks omitted).

135. *Id.*

136. *Id.* at 251.

137. *Id.* (stating that other rights of the Bill of Rights are "*as perfect under the State as the national legislature, and cannot be violated by either*"). Perhaps Lumpkin's unusually cosmopolitan biography explains his expansive view of federal constitutional principles constraining state government. *See generally* HICKS, *supra* note 119 (describing, among other things, Lumpkin's speeches and other activities in the northern states and his travels in Europe).

138. State v. Buzzard, 4 Ark. 18, 28 (1842).

139. *Id.* at 24.

140. *Id.* at 25.

Justice Townsend Dickinson thought the Second Amendment applied to the state for reasons of supremacy. He viewed the Second Amendment as limiting state laws that interfered with federal powers to organize, arm, and discipline the militia.[141] In his opinion, state laws that "weaken the arm of the Federal Government, impair its power, or lessen its means to protect and sustain itself, and preserve inviolate the freedom of the States" were void.[142] However, since the concealed weapons law was "a mere police regulation of the State for the better security and safety of its citizens, having reference to weapons and arms of a wholly different character from such as are ordinarily used for warlike purposes," it was not within the Second Amendment's scope.[143]

The Supreme Court of Louisiana in 1856, and again in 1858, also took the view that the Second Amendment applied to the states but it too upheld concealed weapons laws against Second Amendment challenges.[144] In 1859, in a challenge to a state statute imposing a heightened penalty for homicides committed with a bowie knife or dagger, the Texas Supreme Court applied a line of reasoning similar to Lumpkin's Second Amendment analysis in *Nunn* but ultimately held that the Texas statute did not infringe the right to bear arms.[145]

2. Fourth Amendment

Dozens of antebellum state court decisions applied the Fourth Amendment to state laws and state executive action.[146]

141. *Id.* at 29–30.

142. *Id.* at 31.

143. *Id.* at 32. Justice Thomas Lacy took a similar approach but concluded that carrying concealed weapons was within the scope of the Second Amendment protection, and the state statute was therefore unconstitutional. *See id.* at 39–43.

144. *See* State v. Jumel, 13 La. Ann. 399 (1858); State v. Smith, 11 La. Ann. 633 (1856).

145. Cockrum v. State, 24 Tex. 394, 401–04 (1859).

146. *See, e.g.*, Rohan v. Swain, 59 Mass. (5 Cush.) 281, 285 (1850) (concluding that when a police officer with probable cause arrested a suspect without obtaining a warrant there was no "violation of the great fundamental principles of our national and state constitutions, forbidding unreasonable searches and arrests . . . [because] these provisions . . . had another and different purpose, being in restraint of general warrants"); Stone v. Dana, 46 Mass. (5 Met.) 98, 102 (1842) (observing that an arrest warrant that does not name the subject is inconsistent with the state constitution and the Fourth Amendment); Wells v. Jackson, 17 Va. (3 Munf.) 458, 474 (1811) (invoking the particularity requirement of the Fourth Amendment in finding terms of a warrant inadequate); *see also* Hodgson v. Millward, 3 Grant 406, 409, 410 (Pa. 1863)

Decisions from Massachusetts, Louisiana, and New Hampshire, all after *Barron,* demonstrate the pattern.

In 1838, the Supreme Judicial Court of Massachusetts vacated a directed verdict for the plaintiff in a trespass action.[147] The trial judge had held that the defendant acted unlawfully when, pursuant to a warrant, he broke into the plaintiff's shop and seized allegedly stolen goods.[148] Reviewing the judgment, the court held that the trial judge had failed to apply the correct standard regarding searches and seizures.[149] Both the Fourth Amendment and an analogous provision of the state constitution imposed a reasonableness requirement on searches and seizures: "these provisions [of the Federal and state constitutions] are intended to shield [personal rights] from the effects of arbitrary power and to secure to them the protection of equal and uniform laws."[150] Under this standard, "[a] warrant, founded upon oath, duly describing the person to be arrested, the place to be searched, or the property to be seized, and issued with the formalities and in cases prescribed by law, is in exact conformity with both constitutional provisions."[151] The trial judge's error was the failure to recognize that under the Fourth Amendment and under the state constitutional analog, "any seizure of person or property made in pursuance of such warrant, would manifestly be legal and valid."[152]

The Supreme Court of Louisiana also understood the Fourth Amendment to limit searches and seizures by state government. In 1847, that court affirmed a jury award of $2000 in damages to the owner of a cigar shop searched during the execution of a warrant that authorized a search only of a neighboring cabaret.[153] The court reasoned that sanctioning the search of the cigar shop would violate the Fourth Amendment prohibition on unreasonable searches and seizures.[154] The court

(in a case involving a federal statute requiring the President to seize property, describing the Fourth Amendment as "the written expression of the unwritten or customary law of the people, known to everybody, descended through a long line of ancestry and of popular disturbances, and recognized by everybody in times when a quiet reason holds the control of the passions").

147. Banks v. Farwell, 38 Mass. (21 Pick.) 156, 157, 159–60 (1838).
148. *Id.* at 157.
149. *Id.* at 158.
150. *Id.*
151. *Id.* at 159.
152. *Id.*
153. Larthet v. Forgay, 2 La. Ann. 524, 525 (1847).
154. *Id.*

viewed the Fourth Amendment as an expression of preexisting common law protections. It was "an affirmance of a great constitutional doctrine of the common law, which had nevertheless been occasionally violated by general warrants; and to prevent this abuse the solemn written prohibition was framed."[155] Accordingly, it was the court's duty to apply the Fourth Amendment to the state: "A principle so indispensable to the full enjoyment of personal security and private property, should be enforced in its full spirit and integrity."[156]

In 1852, the justices of the Superior Court of New Hampshire issued an advisory opinion to the state senate concluding that a proposed state statute "for the suppression of drinking houses and tippling shops" would violate the Federal Bill of Rights.[157] The statute allowed for the conviction of a principal based on the conviction of the principal's agent.[158] This, the justices concluded, violated the Sixth Amendment right of confrontation.[159] In addition, the justices concluded, provisions of the proposed statute allowing for searches without a warrant based on probable cause and sworn to under oath violated the Fourth Amendment.[160]

3. Fifth Amendment—Takings

Although in *Barron* the United States Supreme Court rejected John Barron's claim against the city of Baltimore under the Takings Clause of the Fifth Amendment, state courts applied the Clause to limit the actions of state government. In 1847, the Supreme Court of Georgia held that a property owner was entitled to compensation when the state built a bridge over his property,[161] even though the state constitution provided no such right.[162] Writing for the court, Justice Hiram Warner reasoned that while the Fifth Amendment may have applied directly only to the federal government, it stated a general principle applicable also to state government. Warner wrote:

155. *Id.*

156. *Id.*

157. Opinion of the Justices of the Superior Court of Judicature, 25 N.H. 537, 541–42 (1852).

158. *Id.*

159. *Id.*

160. *Id.* at 542.

161. Young v. McKenzie, 3 Ga. 31, 45 (1847).

162. *Id.* ("Most of the states have embodied [the Takings Clause] in their State Constitutions; but the State of Georgia has not . . . ."); *see also* GA. CONST. of 1798.

> [S]ome of the amendments [to the Federal Constitution] create new restrictions upon the general government, and are applicable to Congress alone, while others are *declaratory* of great fundamental principles, then existing and recognized. The amendments were proposed and adopted, because a number of the States had expressed a desire, to prevent misconstruction or abuse, that further *declaratory* and *restrictive* clauses should be added. The clauses to be added were not all *declaratory* nor were they all *restrictive;* but some of the clauses to be added were *restrictive*, and some *declaratory;* of which latter class is the [Takings Clause of the Fifth Amendment].[163]

Warner explained that the Bill of Rights did not create any new protections because the requirement that the government provide compensation when it took property "was distinctly asserted, as a part of the common law, long *anterior* to its adoption into the amended [C]onstitution of the United States."[164] Indeed, Congress's resolution transmitting the Bill of Rights to the states recognized as much by stating that "[t]he convention of a number of States having . . . expressed a desire . . . that further *declaratory* and restrictive clauses should be added."[165] That is, the Bill of Rights simply "declared" rights that already existed—the Fifth Amendment recognized "the existence of a great common law principle, founded in natural justice."[166] Since this very principle was already "applicable to all republican governments," it "derived no additional force . . . from being incorporated into the Constitution of the United States"[167] through an explicit amendment. On this logic, even without a state constitutional provision, the principle declared by the Fifth Amendment imposed a compensation requirement upon state government. The Bill of Rights was a "plain" and "simple declaration" of the "great constitutional principle[s]," the "fundamental" rules that applied "universal[ly]."[168] This did not mean that if a state took private property without compensating the owner, the state violated the Fifth Amendment per se—only that the taking violated the underlying principle expressed in the Fifth Amendment's Takings Clause. "[W]e only say," Warner explained, that an uncompensated taking "is a violation of the fundamental law of the land, as *asserted or declared*

163. *Young*, 3 Ga. at 44.

164. *Id.* at 42.

165. *Id.* at 44 (internal quotation marks omitted) (quoting U.S. CONST. amends. I–X pmbl.).

166. *Id.*

167. *Id.*

168. *Id.* at 45.

by the Constitution of the United States."[169] On this logic, the state court was not doing anything inconsistent with *Barron*: state courts were permitted to impose more stringent requirements on state governments.

Thus, it made perfect sense for the Georgia Supreme Court in 1851 to strike down a state law allowing public roads to be built across unenclosed private land without compensating the landowner.[170] Although no state constitutional provision mandated compensation when the state exercised its power of eminent domain, Justice Eugenius Nisbet, writing for the court, explained that the compensation requirement was a common law principle, affirmed by the Magna Carta and made "true by the special ordainment of the Constitution of the United States."[171] As to *Barron*, Nisbet acknowledged that "[t]he Constitution of the United States upon this point . . . has been held to be a restraint upon federal legislation alone, and not to apply to the States."[172] But that did not end the matter: even when "that [holding] be admitted . . . [the Constitution] is still authority, most significant, for the application of the rule in the States."[173]

According to Nisbet, the Takings Clause was merely a statement of the principle that when government took property it had to compensate the owner—the Fifth Amendment was "affirmation of the rule in the most solemn form," a "declaration of the opinion of the American people, that the governmental right of appropriating property, is subject to that limitation."[174] It was, therefore, consistent with *Barron* for the Georgia Supreme Court to follow the Fifth Amendment's declaration and impose on the state a compensation requirement.

Moreover, Justice Nisbet thought there was an even better justification for his decision. According to Nisbet, the Bill of Rights only contained preexisting principles of the common law.[175] Nisbet reasoned that it would be odd to read a compensation requirement in the Federal Constitution as excusing state government from a similar obligation. That would require the "weak reasoning . . . that because the people of the States

169. *Id.*
170. Parham v. Justices of Inferior Court, 9 Ga. 341, 348 (1851).
171. *Id.* at 344.
172. *Id.* at 351.
173. *Id.*
174. *Id.*
175. *Id.*

have denied to the Federal Government the right to assume private property for public use without compensation, they have thereby conceded it to the State Governments."[176] In other words, emphasizing that the Federal Bill of Rights limited only the federal government risked putting individual rights at the mercy of the states. Indeed, Nisbet reasoned, the fact that the Fifth Amendment Takings Clause originated as a limit only on the federal government was proof that the states were *already* under a preexisting obligation to compensate property owners: "[T]he people, feeling protected in the States by this limitation on the power of the State Governments, were induced to make sure of the same protection from the Federal Government."[177] That is to say, the Fifth Amendment made clear that the federal government faced the same restrictions as did the states: the Takings Clause was "a solemn avowal, by the people, that a power to take private property, without compensation, does not belong to *any* government."[178]

From a modern perspective, Nisbet's argument easily seems outlandish. To accept his claim—that the very fact that the provisions of the Bill of Rights did not originally constrain the states demonstrates that the states were already constrained by the very same provisions—would turn the Bill of Rights on its head and make a mockery of *Barron*. Yet if *Barron* is understood in the way I have suggested, Justice Nisbet is on more solid ground. Nothing about *Barron* precluded a state court from extending any or all of the provisions of the Bill of Rights to state government. The Georgia Supreme Court was entitled to take a more expansive view of the Federal Bill of Rights than did a federal court.

New Jersey courts also considered the principles of the Fifth Amendment Takings Clause to constrain the state government. The 1776 New Jersey Constitution did not provide specifically for a right of compensation when the government took private property.[179] In 1832, however, in a case involving a city ordinance requiring lot owners to create a footway in front of their lots, the New Jersey Supreme Court held that a jury was required to determine the amount of compensation due to the owners under the Fifth Amendment.[180] Also in 1832, in ac-

176. *Id.*
177. *Id.*
178. *Id.* (emphasis added).
179. *See* N.J. CONST. of 1776.
180. Paxson v. Sweet, 13 N.J.L. 196, 199 (N.J. 1832).

cordance with this understanding, the New Jersey Court of Chancery applied the Fifth Amendment in reviewing a governmental taking of farmland to permit a corporation to build a waterpower system.[181] The decision in *Barron* the very next year did not significantly alter the New Jersey courts' view about the applicability of the Takings Clause. In 1839, in a case involving a statute authorizing the construction of a dam that ended up overflowing onto a neighboring meadow, New Jersey Supreme Court Justice William Dayton rejected the argument that, in the absence of a compensation provision in the state constitution, the state was entitled to take property without compensating the owner.[182] Dayton explained:

> Th[e] power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law, that the right to compensation, is an incident to the exercise of that power: that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle . . . . This principle . . . has been made by express enactment, a part of the Constitution of the United States; . . . but it has been decided [in *Barron*] that as a *constitutional* provision, it does not apply to the several States. Still[,] . . . it is operative as a principle of universal law; and the legislature of this State, can no more take private property for public use, without just compensation, than if this restraining principle were incorporated into, and made part of its State Constitution.[183]

Whether bound directly by the Fifth Amendment or by the amendment's underlying principles, state government could not take property without compensating the owner for the loss.

New York courts also invoked the Fifth Amendment to require the state government to compensate property owners for takings. In 1816, the New York Court of Chancery held that, even in the absence of a state constitutional provision, the Takings Clause of the Fifth Amendment required the state to compensate a landowner deprived of the use of a stream.[184] The requirement was "of high[] authority,"[185] included in the Federal Bill of Rights because it was "decisive of the sense of the people of this country,"[186] and it existed as an "indispensable atten-

181. Scudder v. Trenton Del. Falls Co., 1 N.J. Eq. 694, 720–29 (N.J. Ch. 1832).

182. Sinnickson v. Johnson, 17 N.J.L. 129, 144–46 (N.J. 1839).

183. *Id.* at 145–46 (citations omitted).

184. Gardner v. Trs. of Newburgh, 2 Johns. Ch. 162, 163–64 (N.Y. Ch. 1816).

185. *Id.* at 167.

186. *Id.*

dant on the due and constitutional exercise of . . . [government] power."[187] To deny compensation, the court reasoned, would be "unjust"[188] and "contrary to the first principles of government."[189] Other New York courts also imposed a compensation requirement when the government took property.[190] For example, in holding in 1851 that the government could not retain title to land taken without compensating the owner and not used for public purposes, the New York Supreme Court described the compensation and public use principles as aspects of "unwritten constitutional law."[191]

In addition to these practices in Georgia, New Jersey, and New York, the highest courts in South Carolina and Iowa took the view that the Takings Clause reflected fundamental principles applicable to state government.[192] Other state courts read the due process clause of their state constitutions in light of the Fifth Amendment—and held that even in the absence of a more specific state constitutional requirement, due process gave property owners a right to compensation when the government took their property.[193] This practice—reading due process to include substantive limitations—paralleled the United States Supreme Court's own later incorporation of the

187. *Id.* at 167–68.

188. *Id.* at 168.

189. *Id.*

190. *See, e.g.*, Stuyvesant v. Mayor of New York, 7 Cow. 588, 606 (N.Y. Sup. Ct. 1827) (citing the Fifth Amendment as expressing "a fundamental principle of civilized society, that private property shall not be taken even for public use, without just compensation"); Bradshaw v. Rodgers, 20 Johns. 103, 106 (N.Y. Sup. Ct. 1822) (holding that while the Fifth Amendment Takings Clause "relate[s] to the powers of the national government, and was intended as a restraint on that government . . . [it is] declaratory of a great and fundamental principle of government; and any law violating that principle must be deemed a nullity, as it is against natural right and justice").

191. People v. White, 11 Barb. 26, 30 (N.Y. Gen. Term 1851) (stating that while *Barron* held that the Fifth Amendment applied only to the federal government, "the clause . . . was only declaratory of a previously existing and universal principle of law; and it was recognized by the courts of this country long before it was incorporated into our state constitution" (citation omitted)).

192. *See* Hall v. Wash. County, 2 Greene 473, 478 (Iowa 1850) (holding that the Takings Clause required the state government to compensate an attorney appointed to defend an indigent defendant); L.C. & C.R.R. Co. v. Chappell, 24 S.C.L. (Rice) 383, 387, 389 (1838) (upholding a lower court decision applying the Takings Clause, a "principle of universal law," when property was taken to build a railroad).

193. *See, e.g.*, State v. Glen, 52 N.C. (7 Jones) 321, 330–31 (1859) (holding that the government could not take a mill without compensating the owner).

Takings Clause against the states via the Due Process Clause of the Fourteenth Amendment.[194]

4. Fifth Amendment—Double Jeopardy

Antebellum state courts held that Fifth Amendment double jeopardy rules applied in state criminal proceedings. In 1849, the Georgia Supreme Court, in an opinion by Justice Nisbet, refused on Fifth Amendment double jeopardy grounds to hear the state's appeal from a judgment (representing a final disposition of the case) to quash an indictment.[195] Nisbet explained that, under the English common law, following the acquittal of a criminal defendant, the Crown was entirely precluded from seeking a new trial, even on the basis of errors of law committed in the trial process.[196] So too, when a state indictment was quashed, there could be no new trial, because the Fifth Amendment, "for greater caution and in stricter vigilance over the rights of the citizen," applied the common law rule "against the State."[197]

In 1838, the Virginia General Court also applied the Double Jeopardy Clause to the state.[198] The case involved the government seeking a second criminal trial when on the ninth day of deliberations one of the jurors fell ill and the trial judge ended the proceeding.[199] Explaining why the Double Jeopardy

194. *Chicago Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226 (1897), is conventionally thought of as incorporating the Fifth Amendment Takings Clause against state government. In a recent article, however, Professor Karkkainen makes the persuasive case that the decision (which did not overrule *Barron*) was based on Fourteenth Amendment due process restraints on state police powers. Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle"*, 90 MINN. L. REV. 826 (2006). After *Chicago Burlington*, he observes, just compensation law proceeded on two tracks: Fifth Amendment just compensation (applicable to the federal government) and Fourteenth Amendment due process (applicable to state government). *Id.* at 855. On this view, not until *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), did the Court actually apply the Fifth Amendment Takings Clause directly to the states. *Id.* at 875–78; *see also* Michael G. Collins, *October Term, 1896—Embracing Due Process*, 45 AM. J. LEGAL HIST. 71, 77, 88–92 (2001) (discussing how through incorporation, "[t]he Court wound up applying constitutional principles and a methodology that, for the most part, it was already quite used to applying as a matter of general constitutional law in diversity cases").

195. Georgia v. Jones, 7 Ga. 422, 423–24 (1849).

196. *Id.* at 424.

197. *Id.*

198. Commonwealth v. Fells, 36 Va. (9 Leigh) 613, 619 (1838).

199. *Id.* at 613–14.

Clause applied to state proceedings, the court noted that "this provision of the [Federal C]onstitution is no more than the adoption, in that instrument, of a well-established principle of the common law."[200] As a common law rule, the prohibition on double jeopardy applied even if there was no double jeopardy provision in the state constitution.[201]

Similarly, in 1823, the Mississippi Supreme Court held that the Double Jeopardy Clause applied in state court but that the Clause did not prohibit a new trial following a hung jury.[202] The Tennessee Supreme Court reached the same conclusion in 1827.[203] The following year, the Supreme Court of North Carolina applied the Double Jeopardy Clause and ruled that it prevented a second trial in a capital case when the trial court's term expired and the jury had not reached a verdict.[204]

The New York Supreme Court applied the Fifth Amendment Double Jeopardy Clause in 1820 in *People v. Goodwin*.[205] In that case, the jury declared it had reached a verdict and the foreperson pronounced the defendant guilty, but when the jurors were polled one of them disagreed with the verdict and the judge declared a mistrial.[206] The defendant argued that to retry him would violate the Fifth Amendment.[207] The state contended that the Fifth Amendment applied only to the federal government and no corresponding state constitutional provision barred a new trial.[208] Though ultimately finding that a second trial following a mistrial did not violate double jeopardy, Chief

200. *Id.* at 619.

201. *Id.* Nonetheless, there was no double jeopardy violation because the case had not been tried to a jury verdict. *Id.*

202. State v. Moor, 1 Miss. (1 Walker) 134, 138–39 (1823) ("[T]his provision of the [C]onstitution was binding in the United States, as well as the state courts of the Union, for . . . the [C]onstitution of the United States is the paramount law of the land, any law usage or custom of the several states to the contrary notwithstanding.").

203. Tennessee v. Waterhouse, 8 Tenn. (Mart. & Yer.) 278, 279–80 (1827) (applying the Double Jeopardy Clause but holding that a second trial following a hung jury was constitutional); *id.* at 283–84 (Catron, J., concurring) ("[The Double Jeopardy Clause] is binding entirely upon all the State courts in the Union, and secures the privilege of not being twice put in jeopardy, to every citizen of every State, notwithstanding the State Constitution may have no such provision . . . . [The Federal Constitution] is the paramount law of every State, over the Constitution and laws of the States.").

204. *In re* Spier, 12 N.C. (1 Dev.) 491 (1828).

205. 18 Johns. 187 (N.Y. Sup. Ct. 1820).

206. *Id.* at 187.

207. *Id.* at 189–93.

208. *Id.*

Justice Ambrose Spencer rejected the state's position that the Fifth Amendment had no application.[209] Spencer stated at the outset that he did not think "it material whether . . . [the Fifth Amendment Double Jeopardy] provision be considered as extending [specifically] to the state tribunals or not."[210] Even if the Fifth Amendment did not apply "upon state courts *proprio vigore*,"[211] Spencer wrote, the "principle is a sound and fundamental one of the common law, that no man shall be twice put in jeopardy of life or limb for the same offence."[212] That said, Spencer was "inclined to the opinion, that the . . . [Fifth Amendment] *does* extend to all judicial tribunals in the United States, whether constituted by the Congress of the United States, or the states individually."[213] In reaching that conclusion, Spencer noted that "[t]he provision is general in its nature, and unrestricted in its terms."[214] In addition, the Supremacy Clause of the Federal Constitution consisted of "general and comprehensive expressions" that "extend the provisions of the [C]onstitution of the United States to every article which is not confined, by the subject matter, to the national government, and is equally applicable to the states."[215] Nevertheless, Spencer reasoned that there was a more general rule in play: "the principle is undeniable, that no person can be twice put in jeopardy of life or limb, for the same offence."[216] Accordingly, a criminal defendant was "entitled to the protection afforded by the [Fifth Amendment], whether we regard it as binding upon us by its own force, or as an acknowledged axiom of the common law."[217] The Fifth Amendment stated a "maxim"[218] that was "universally acknowledged."[219] That the Bill of Rights originated as a limit on the federal government was of no significance. The Bill arose out of "a jealousy or extreme caution, on the part of the state governments, as to require an explicit avowal in that instrument, of some of the plainest and best established principles in relation to the rights of the citizens, and

209. *Id.* at 201.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* (emphasis added, emphasis omitted).
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.* at 202.
219. *Id.*

the rules of the common law."[220] The Bill's provisions reflected the "apprehension that . . . fundamental rights might be impugned";[221] those rights were explicitly protected in order to "leave no doubt that . . . no new principle was intended to be introduced."[222] In other words, the Bill of Rights represented a belt and suspenders approach—making explicit restrictions that already bound all government.

In 1863, the highest court in Maryland also held that the Double Jeopardy Clause applied to state proceedings.[223] According to that court, the Clause merely embodied the common law principle applicable to all government that there could be no second prosecution following a conviction or acquittal.[224] In scores of cases, other antebellum state courts likewise took the view that the Double Jeopardy Clause, or the underlying principles it embodied, applied in state proceedings.[225]

220. *Id.*

221. *Id.*

222. *Id.*

223. Hoffman v. Maryland, 20 Md. 425, 430–32 (1863).

224. *Id.* at 434. However, the court concluded double jeopardy did not bar a second prosecution when, following the failure of the state's witness to appear, the trial court discharged the first jury. *Id.* at 435.

225. *See, e.g.*, State v. Slack, 6 Ala. 676, 677 (1844) (describing the Double Jeopardy Clause as expressing a "humane maxim of the common law"); State v. Seay, 3 Stew. 123, 129 (Ala. 1830) (holding that a statute criminalizing the transportation of stolen property into Alabama did not violate the Double Jeopardy Clause but voiding the conviction on other grounds); *id.* at 132 (Crenshaw, J., concurring) (concluding also that the prosecution violated the Double Jeopardy Clause); People v. Olwell, 28 Cal. 456, 462 (1865) (describing the Double Jeopardy Clause as reflecting "a maxim of the common law for centuries"); State v. Ellis, 3 Conn. 185, 188 (1819) (Peters, J., dissenting) (reasoning that a prosecution for transporting to Connecticut a horse stolen outside of the state violated the Double Jeopardy Clause); Reynolds v. State, 3 Ga. 53, 59–61 (1847) (discussing the Double Jeopardy Clause of the Fifth Amendment as enacting a common law principle); State v. Redman, 17 Iowa 329, 331 (1864) (assuming, but not deciding, that the Double Jeopardy Clause applied but upholding a second trial after an imprecise verdict in the first trial); State v. Cheevers, 7 La. Ann. 40, 41 (1852) (stating that while the Double Jeopardy Clause "is not, perhaps, applicable, as a constitutional principle, to offences against a State; yet, it is but the enunciation of a well established common law principle, and, as such, is expressly adopted by [a state statute]"); State v. Hornsby, 8 Rob. 583, 588 (La. 1845) (holding that the Double Jeopardy Clause did not prohibit a second prosecution after the entry of a *nolle prosequi* before the jury had been empanelled); Commonwealth v. Roby, 29 Mass. (12 Pick.) 496, 501 (1832) (describing the Double Jeopardy Clause as "equivalent to a declaration of the common law principle, that no person shall be twice tried for the same offence" and applying the principle although the state constitution contained no prohibition on double jeopardy); Commonwealth v. Purchase, 19 Mass. (2 Pick.) 521, 522–24 (1824) (applying the Fifth Amendment and com-

Consistent with the notion that the Fifth Amendment expressed broad principles of universal law, some state courts viewed the risk of prosecution in *another* state to bar a trial. In 1848, the Alabama Supreme Court held that a defendant could not be convicted under a state law prohibiting the transportation of stolen goods into Alabama from another state—in this case, slaves from Florida—without proof that the stolen goods were transported across the state line.[226] Otherwise, the court reasoned, the conviction would be for stealing goods, and, since this was subject to prosecution in Florida, it would run afoul of the Double Jeopardy Clause.[227]

5. Fifth Amendment—Due Process and Self-Incrimination

On occasion, early state courts applied the other provisions of the Fifth Amendment to state government. In 1838, the Delaware Court of Errors and Appeals held that a slave who had been illegally exported was entitled to freedom (as were the slave's children) and that the Fifth Amendment Due Process Clause prohibited state government from refusing to recognize this freedom on the ground that the slave had failed to assert a timely claim.[228] In 1845, the Supreme Court of Illinois held that a summary sale of land to recoup taxes did not violate the Fifth Amendment Due Process Clause, but stated that the Clause was "obligatory upon all the States of the Union."[229] In 1851, the Supreme Court of Pennsylvania applied the Due Process Clause, along with an analogous state constitutional provision, to invalidate a state law directing the sale of a testator's land.[230] The Wisconsin Supreme Court also thought the Due Process Clause applied to the state.[231] The Georgia Supreme

mon law principles of Double Jeopardy but holding valid a new trial after a mistrial resulting from a hung jury).

226. State v. Adams, 14 Ala. 486, 490–91 (1848).

227. *Id.*

228. Allen v. Sarah, 2 Del. (2 Harr.) 434, 436–37 (1838).

229. Rhinehart v. Schuyler, 7 Ill. (2 Gilm.) 473, 522 (1845). This court hedged its bets, suggesting that even if the Fifth Amendment did not apply directly to the states, it applied in Illinois because a state constitutional provision that "[n]o freeman shall be . . . deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land" corresponded to Fifth Amendment Due Process. *Id.* at 517–18, 522.

230. Ervine's Appeal, 16 Pa. 256, 263–68 (1851).

231. State v. Bielby, 21 Wis. 206, 206–09 (1866) (applying the Due Process Clause but holding constitutional a statute allowing for an arrest without a demonstration of actual guilt).

Court thought that the Fifth Amendment privilege against self-incrimination applied in state proceedings.[232]

6. Sixth Amendment

Early state courts applied Sixth Amendment provisions and principles to state proceedings. Georgia was active in this regard. In 1846, the Georgia Supreme Court ordered a new criminal trial on the ground that a defendant's right to an impartial jury was violated where one of the jurors had stated under oath that he had formed an opinion about the defendant's guilt.[233] Six years later, the Georgia Supreme Court considered whether a defendant's right to confront witnesses was violated because a victim's dying declaration identifying the defendant was admitted into evidence.[234] While holding that, under the circumstances, there was no violation of the defendant's right, Justice Lumpkin provided an extensive discussion of the applicability of Sixth Amendment principles to the states. Lumpkin conceded that the Sixth Amendment did not explicitly bind the states: "[L]ike the other nine [amendments] adopted at the same time, [the Sixth Amendment] was primarily introduced for the purpose of preventing an abuse of power by the Federal Government."[235] At the same time, in a now familiar argument, Lumpkin thought the Federal Bill of Rights embodied universal standards applicable to all government. "The principles embodied in these [Constitutional A]mendments," he explained, "for better securing the lives, liberties, and property of the people, were declared to be the 'birthright' of our ancestors, several centuries previous to the establishment of our government."[236] Accordingly, every court was bound to abide by them: "It is not likely . . . that any Court could be found in America of sufficient

232. *See* Higdon v. Heard, 14 Ga. 255, 259 (1853) (holding that a state statute compelling disclosure of gaming transactions did not violate the Fifth Amendment privilege against self-incrimination and stating that "literally, the Constitution does not go as far as the Common Law; but its spirit and intent covers the whole ground").

233. Reynolds v. Georgia, 1 Ga. 222, 229 (1846). While the court here refers to "the Constitution," it does not specifically reference the United States Constitution or the Sixth Amendment, but the language the court quotes is exactly the language of the Sixth Amendment and the state constitution did not contain a parallel provision. *See* GA. CONST. of 1798.

234. Campbell v. Georgia, 11 Ga. 353, 364 (1852).

235. *Id.* at 365.

236. *Id.*

hardihood to deprive our citizens of these invaluable safeguards."[237]

In Lumpkin's view, the addition to the Federal Constitution of rights that were preexisting was made in order to underscore the importance of these protections. "[O]ur patriotic forefathers, out of abundant caution, super-added these amendments to the Constitution, so as to place the matter beyond doubt or cavil, misconstruction or abuse."[238] In other words, the federal government, like every government, was already bound by the protections in the Bill of Rights—the Bill simply made explicitly clear what everyone assumed. Accordingly, the issue became "whether it is competent for a State Legislature, by virtue of its inherent powers, to pass an Act directly impairing the great principles of protection to person and property, embraced in these amendments?"[239] That is to say, accepting that with the ratification of the Bill of Rights, "the power to pass any law infringing on these principles, is taken from the Federal Government," the question was whether "it [is] a part of the reserved rights of a State to do this?"[240] Framed that way, the answer suggested itself: if the enumeration of the Bill of Rights to limit the federal government were to mean that the states had reserved powers to infringe those protections, then "of what avail . . . is the negation of these powers to the General Government?"[241] The underlying commitment to individual liberty would be thwarted.[242] State governments had no "right to do wrong";[243] authority to violate the protections of the Bill of Rights was not "a part and parcel of the original jurisdiction of the State governments, reserved to them in the distribution of power under the Constitution."[244] The Federal Bill of Rights, then, was declaratory of the underlying protections citizens held against all government—including the governments of the states.[245] Simply put, the Bill of Rights was "our American Magna Charta,"[246] and the task of courts was to en-

237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.* at 366.
242. *Id.*
243. *Id.* (emphasis omitted).
244. *Id.*
245. *Id.* at 367.
246. *Id.* at 368 (emphasis omitted).

force vigorously those protections against federal as well as state government.[247]

The fact that many state constitutions included prohibitions echoing those in the Bill of Rights did not alter Lumpkin's conclusion.[248] In Lumpkin's view, what the states included in their own constitutions was a poor guide to construing the Federal Constitution.[249] Moreover, Lumpkin thought, a written constitution did not set out every way in which government was constrained or specify every individual liberty, because natural limits constrained all governments.[250] Lumpkin recognized that in some instances principles of "natural justice" might be "vague and uncertain, regulated by no fixed standard,"[251] thereby making difficult a reliance on the judiciary to enforce them. But in his view, there was no such concern when it came to preventing the states from violating the principles specifically embodied in the Federal Bill of Rights. Lumpkin wrote:

> The people of the several States, by adopting these amendments, have defined accurately and recorded permanently their opinion, as to the great principles which they embrace; and to make them more emphatic and enduring, have had them incorporated into the Constitution of the Union—the permanent law of the land.[252]

In other words, the Bill of Rights was a clear statement as to the contours of "justice" and "liberty," setting out in precise terms the "vital truths [that] lie at the foundation of our free, republican institutions," and the basis of "our social compact."[253] Whatever the outer scope of natural rights, the Bill of Rights represented the core.[254]

247. *Id.*

248. *See id.* (citing Barker v. People, 3 Cow. 686 (N.Y. 1824)).

249. *Id.* at 369.

250. *Id.*

251. *Id.* at 371.

252. *Id.* at 372.

253. *Id.*

254. That said, Lumpkin concluded in the case that admitting a victim's dying declaration did not violate the Sixth Amendment confrontation right because dying declarations have always been treated as an exception to hearsay and, therefore, outside the Sixth Amendment protection. *Id.* at 373–75; *see also* State v. Chapin, 17 Ark. 561, 564 (1856) (invoking the jury provisions of Article III and the Sixth Amendment in holding an out-of-state defendant could be tried in Arkansas court); Williams v. Georgia, 19 Ga. 402, 403 (1856) (holding that the Sixth Amendment did not prohibit introduction of written testimony from an absent witness because "[t]he practice intended to be prohibited by that provision, was the secret examinations, so much abused during the reign of the Stuarts, and was not intended to disturb any general rule of crim-

The Georgia Supreme Court was not alone in believing Sixth Amendment principles applied to state proceedings.[255] The courts of Iowa and Pennsylvania are two additional examples. In 1848, the Supreme Court of Iowa, in an opinion by Chief Justice Joseph Williams, thought that the Sixth Amendment's requirement that a defendant be informed of the nature and cause of the accusation governed state proceedings.[256] Applying that requirement, the court went on to hold constitutional a state statute allowing an accessory before the fact to be deemed a principal and charged in the indictment with having committed the principal offence.[257] Two years later, in a decision holding that the Fifth Amendment Takings Clause required the state government to compensate an attorney appointed to defend an indigent defendant, the Iowa Supreme Court again expressed the view that Sixth Amendment protections applied to the states.[258]

In 1865, the Supreme Court of Pennsylvania applied the Sixth Amendment in upholding a double-murder conviction by a jury that included two jurors who were also witnesses for the prosecution on incidental matters.[259] The defendants argued that allowing jurors to testify violated their Sixth Amendment right to an impartial jury.[260] The defendants also contended that because of the obvious risk in aggressively challenging the testimony of a witness who would also sit in judgment, their rights of confrontation under the Sixth Amendment and the

inal evidence"); Durham v. Georgia, 9 Ga. 306, 308 (1851) (describing a state statute as carrying into effect Sixth Amendment speedy trial requirement).

255. *See, e.g.*, Iowa v. Nash, 7 Iowa 347, 377 (1858) (holding that admission of dying declarations did not violate the right of confrontation under the Sixth Amendment and the Iowa Constitution); Hall v. Wash. County, 2 Greene 473, 478 (Iowa 1850) (writing that the Sixth Amendment gives a defendant in state court rights to assistance of counsel and a speedy trial); *In re* Yates, 4 Johns. 317, 326–29 (N.Y. Sup. Ct. 1809) (suggesting that the jury requirements of Article III and the Fifth Amendment, as the "constitution[] and laws of the land," and the Sixth Amendment provision for compelling witnesses to testify, applied to state criminal defendants), *rev'd sub. nom.* Yates v. People, 6 Johns. 337 (N.Y. 1810). Some confederate state courts also applied the analogous speedy trial right contained in the Confederate Constitution. *See, e.g.*, *Ex parte* Turman, 26 Tex. 708, 709–13 (1863); *Ex parte* Turner, Robards 8 (Tex. 1863).

256. Bonsell v. United States, 1 Greene 111, 115 (Iowa 1848).

257. *Id.* at 114.

258. *Hall*, 2 Greene at 477–78.

259. Howser v. Commonwealth, 51 Pa. 332 (1865).

260. *Id.* at 334.

state constitution had been infringed.[261] Writing for the court, Chief Justice George Woodward held that, under the circumstances presented, there was no constitutional violation.[262] The state's jury selection procedures allowed for examination of and challenge to prospective jurors and, therefore, fully protected a defendant's right to impartiality.[263] Further, while "material witnesses, those . . . upon whose testimony the event is essentially dependent," should not also serve as jurors, there was no general requirement that jurors not be witnesses; they could be cross-examined like any other witness.[264] Though the Sixth Amendment therefore applied in state court, it was not violated by this conviction.[265]

7. First and Seventh Amendments

The First Amendment is explicitly directed at Congress.[266] However, at least one antebellum state supreme court applied the First Amendment in considering the validity of a state law. In 1844, the Tennessee Supreme Court reasoned that the religion clauses of the First Amendment protected a testator's right to bequeath property to a church.[267]

State courts also occasionally took the position that the Seventh Amendment civil jury provision applied to the states. In 1822, the Supreme Court of Indiana applied the Seventh Amendment to hold unconstitutional a state statute that allowed for a summary nonjury proceeding against sheriffs and sureties.[268] Justice Lumpkin of Georgia applied the Seventh Amendment jury trial provision to the state, though in the case before him he upheld a summary proceeding for steamboat employees to recover lost wages.[269] In other instances, courts in Louisiana and Massachusetts also took the position that the

261. *Id.* at 334–35.
262. *Id.* at 338.
263. *Id.* at 337.
264. *Id.*
265. *Id.*
266. U.S. CONST. amend. I ("Congress shall make no law . . . .").
267. Green v. Allen, 24 Tenn. (5 Hum.) 170, 214 (1844) (invoking the religion clauses of the First Amendment in support of a testator's authority to bequeath property to a church, but ultimately concluding that under state law the bequest was void for lack of specificity).
268. Dawson v. Shaver, 1 Blackf. 204, 204–07 (Ind. 1822) (per curiam) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).
269. Flint River Steamboat Co. v. Foster, 5 Ga. 194, 204, 217 (1848).

Seventh Amendment jury trial right governed state proceedings.[270]

8. The Broader Influence of the Bill of Rights

Even when early state courts did not apply the Federal Bill of Rights to state law, they regularly relied upon its provisions to determine the meaning of analogous provisions in their own state constitutions.[271] The practice further illustrates the close connection the courts perceived between federal and state constitutional law.

270. *See* City of New Orleans v. Cannon, 10 La. Ann. 764, 764–65 (1855) (applying the Seventh Amendment but upholding a state tax proceeding); O'Neil v. Glover, 71 Mass. (5 Gray) 144, 160 (1855) (applying the Seventh Amendment but upholding a state insolvency proceeding).

271. *See, e.g.*, Atkins v. State, 16 Ark. 568, 575 (1855) (citing the Fifth Amendment in explaining the state constitution's double jeopardy provision); Jackson v. Bulloch, 12 Conn. 38, 43 (1837) (describing a state constitutional provision as "almost a transcript" of the Fourth Amendment); Reynolds v. State, 3 Ga. 53, 63 (1847) (comparing the state double jeopardy provision to the federal provision); State v. Cummings, 5 La. Ann. 330, 331 (1850) (comparing the state constitutional provision providing for the right to counsel to the Sixth Amendment); State v. Hornsby, 8 Rob. 554 (La. 1844) (explaining that compulsory process provisions in the state and federal constitutions both originated as a response to English practices); Jones v. Robbins, 74 Mass. (8 Gray) 329, 346 (1857) (explaining that while the Fifth Amendment Grand Jury Clause only applies to the national government, it informs the "less precise and explicit terms of our own declaration of rights"); Kohlheimer v. State, 39 Miss. 548, 552–53 (1860) (invoking the Fifth Amendment in construing the state constitution's double jeopardy provision); Polly v. Saratoga & Wash. R.R. Co., 9 Barb. 449, 458 (N.Y. Gen. Term 1850) (describing the takings clause of the state constitution as borrowed from the Federal Constitution); Griffin v. Martin, 7 Barb. 297, 300 (N.Y. Gen. Term 1849) (describing the takings clause of the state constitution as derived from the Fifth Amendment); Work v. State, 2 Ohio St. 296, 303 (Ohio 1853) (construing a state jury trial provision in light of the Sixth Amendment); State v. Mount, 1 Ohio Dec. Reprint 89, 95 (Ohio Comm. Pl. 1844) (holding a state constitutional provision providing "nor shall he be twice put in jeopardy for the same offence" to be "identical in meaning" to the Fifth Amendment double jeopardy clause so that a state provision applied to death as well as to lesser penalties); Green v. Allen, 24 Tenn. (5 Hum.) 170, 214 (1844) (citing the First Amendment in construing a state constitutional provision protecting religious freedom); Aymette v. State, 21 Tenn. (2 Hum.) 154, 156 (1840) (explaining that a provision of the state constitution providing "that the free white men of this State have a right to keep and bear arms for their common defence," like the Second Amendment to the United States Constitution, was a response to restrictions on arms-bearing under English law and the oppressions of standing armies); Lincoln v. Smith, 27 Vt. 328 (1855) (explaining that the state and federal constitutional provisions against unreasonable searches respond to the problem of general warrants); *In re* Keenan, 7 Wis. 695, 696–98 (1859) (invoking the Federal Double Jeopardy Clause in explaining a state constitutional provision).

For example, in 1826, the General Court of Virginia, in rejecting a prisoner's challenge to a warrant of commitment, invoked the Fourth Amendment to construe the analogous state constitutional provision.[272] The court recognized that the Fourth Amendment applied only to federal officials and that state constitutions existed to prevent abuses by state government.[273] Nonetheless, the court thought the underlying principle was universal: like its federal counterpart, the state constitutional provision derived from the *Wilkes* cases[274] and "establishe[d] a most important safeguard to the rights of the people, against the abuse of power by our own State officers."[275] The court noted that the Fourth Amendment did not extend to warrants of commitment.[276] Similarly, the court found that the state constitutional provision should be understood to apply only to searches and seizures.[277]

In 1846, the Court of Appeals of South Carolina held that a Charleston ordinance prohibiting the sale of goods on Sundays did not violate a Jewish merchant's free exercise rights under the state constitution.[278] In construing the state constitutional provision—protecting a "privilege to worship"—to reach that result, the court invoked the First Amendment and the shared history of the federal and state constitutional protections.[279] Similarly, in 1854, in holding void under state law a deceased man's bequest to his niece on the condition that she remain a member of the Society of Friends (including by marrying

272. Commonwealth v. Murray, 4 Va. (2 Va. Cas.) 504, 507–08 (1826).

273. *Id.*

274. In a series of decisions between 1763 and 1769, English courts held that officers of the Tory government had violated English law and had become liable in civil actions by executing general warrants to search the homes of outspoken opposition politician John Wilkes and his supporters. *See, e.g.*, Wilkes v. Wood, (1763) 98 Eng. Rep. 489 (K.B.). The cases were celebrated in the American colonies as a protection of free speech and a condemnation of general warrants. *See generally* Powell v. McCormack, 395 U.S. 486, 527–29 (1969) (discussing the impact of the *Wilkes* cases); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772 n.54 (1994) ("The *Wilkes* case was a cause célèbre in the colonies, where 'Wilkes and Liberty' became a rallying cry for all those who hated government oppression.").

275. *Murray*, 4 Va. (2 Va. Cas.) at 507–08.

276. *Id.* at 508.

277. *Id.*

278. City Council of Charleston v. Benjamin, 33 S.C.L. (2 Strob.) 508, 521–29 (1846); *see also* Gabel v. City of Houston, 29 Tex. 335, 346–47 (1867) (holding that a city ordinance prohibiting business on Sundays did not violate the federal or state constitutional protections for religious freedom).

279. *Benjamin*, 33 S.C.L. (2 Strob.) at 524–26.

another Friend), the Supreme Court of Appeals of Virginia explained how the provisions protecting religious freedom in both the state and federal constitutions had a common origin.[280] More generally, state courts frequently emphasized how state constitutions served to prevent abusive government at the state level, just as the Federal Constitution prevented abuses at the national level.[281] In particular, courts viewed state constitutions as a check on a potentially abusive state legislative branch, just as the Federal Bill of Rights constrained Congress.[282]

D. SUMMARY

Early state courts applied the provisions and principles of the Federal Bill of Rights to limit state government. Though in *Barron* the United States Supreme Court held that states were not subject to the Takings Clause of the Fifth Amendment, state courts considered themselves free to apply the Bill of Rights to their states. Where a ruling was not subject to subsequent review—because the ruling favored a federal constitutional right—the state courts were free to enforce the Federal Constitution more vigorously than did the United States Supreme Court.

III. BODIES OF CONSTITUTIONAL LAW

This Part locates the practice of state courts in invoking the Bill of Rights to limit state government within the constitutional landscape of the antebellum United States.

A. OVERVIEW

In the era prior to the Civil War, four vibrant bodies of constitutional law protected the rights of individuals from government abuse. These bodies of constitutional law are summa-

280. Maddox v. Maddox's Adm'r, 52 Va. (11 Gratt.) 804, 813 (1854).

281. *See, e.g.*, State v. Waters, 39 Me. 54, 64 (1854) (describing state and federal constitutional provisions as designed to "mark distinctly the line between the legitimate powers of the government, and the personal rights of the citizen").

282. For example, in explaining why it had authority to review the constitutionality of a taking of property, a judge of the New Jersey Chancery Court wrote: "The legislature, in this state, is not omnipotent, as was the British parliament. It is subordinate to the [C]onstitution; and if it transcend its power, its acts are void, and it is the duty of the judiciary to declare them so." Scudder v. Trenton Del. Falls Co., 1 N.J. Eq. 694, 727 (N.J. Ch. 1832).

rized in Table 1. The first body of constitutional law was derived from the Federal Constitution, the supreme law of the United States.[283] The states also had their own state constitutions, the source of a second body of constitutional law. A third body of constitutional law consisted of the general constitutional rules that federal courts applied in diversity lawsuits, in which the Federal Constitution itself did not apply. The fourth body of constitutional law consisted of the practices of state courts examined in this Article: a set of constitutional rules that the state courts derived from the Federal Bill of Rights and applied to their state governments.

Table 1: The Four Bodies of Constitutional Law in the Early United States

	SOURCE	APPLIED TO	ENFORCED BY
1.	Federal Constitution	Federal government & state governments	Federal courts & state courts
2.	State constitutions	State governments	Federal courts in diversity & state courts
3.	General constitutional law	State governments	Federal courts in diversity
4.	Federal Bill of Rights	State governments	State courts

B. FEDERAL AND STATE CONSTITUTIONS

The first two of these four bodies of constitutional law require only brief treatment. The place of the Federal Constitution in the early Republic is well known. For present purposes it is important to note only that, in addition to Chief Justice Marshall's assertion in *Marbury v. Madison*[284] that the federal judiciary had power to review congressional legislation, state courts also enforced the Federal Constitution's limitations on the powers of the federal government.[285] Likewise, both federal

283. U.S. CONST. art. VI, § 2.

284. 5 U.S. (1 Cranch) 137 (1803).

285. *See, e.g.*, Ferris v. Coover, 11 Cal. 175, 178–79 (1858) (holding section 25 of the 1789 Judiciary Act constitutional); Griffin v. Wilcox, 21 Ind. 370, 397 (1863) (holding unconstitutional a federal statute prohibiting actions for wrongful imprisonment); Wetherbee v. Johnson, 14 Mass. (14 Tyng) 412, 421 (1817) (holding that the federal statute allowing for removal of cases from

and state courts enforced the Contracts Clause[286] and other provisions of the Federal Constitution that limited state governments.[287] Where, under the provisions of section 25 of the 1789 Judiciary Act, the United States Supreme Court had ultimate authority, state courts viewed themselves to be bound by the Supreme Court's rulings[288] (though there was occasional opposition to this notion).[289]

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state court after final judgment violated the Seventh Amendment); Commonwealth v. Lewis, 6 Binn. 266, 270–71 (Pa. 1814) (upholding the 1797 federal public debt statute). Unsurprisingly, southern state courts vigorously invalidated federal laws during the Civil War era. *See, e.g.*, Corbin v. Marsh, 63 Ky. (2 Duv.) 193, 193 (1865) (holding the federal emancipation statute unconstitutional); Norris v. Doniphan, 61 Ky. (4 Met.) 385, 400–01 (1863) (holding that the federal statute providing for the seizure of rebels' property violated the Fifth Amendment).

286. U.S. CONST. art. I, § 10.

287. *See, e.g.*, State v. Fullerton, 7 Rob. 219, 224–25 (La. 1844) (holding that a Louisiana tax on passengers arriving in New Orleans from out of state did not interfere with Congress's Commerce Clause power). Because the federal courts lacked general federal question jurisdiction until 1875, they most often confronted constitutional claims against the states in diversity cases. *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827) (applying the Contracts Clause of Article I, Section 10, in a diversity case). *See generally* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 89–99 (1997) (tracing the Supreme Court's expansive reading of diversity jurisdiction in Contracts Clause cases).

288. *See, e.g.*, *Ex parte* Bushnell, 9 Ohio St. 77 (1859) (upholding the Fugitive Slave Act of 1850). Chief Justice Joseph Swan wrote that where there are "decisions of the Supreme Court of the United States settling the power of Congress . . . the judges of a state court have no judicial right to interpose their own individual opinions" and, therefore, cannot assume independent authority "over the interpretation of the [C]onstitution of the United States." *Id.* at 191. At the same time, Swan suggested that it would be "the duty of a state to deny the authority of the Supreme Court of the United States to enforce upon a state an interpretation of the [C]onstitution which palpably and clearly violated reserved rights or state sovereignty." *Id.* at 197.

289. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), upheld section 25 of the 1789 Judiciary Act, which empowered the Supreme Court to review the final judgments of the highest state courts on federal statutes and treaties and state decisions upholding a state law against a claim of a federal constitutional violation, and affirmed that state courts are obliged to follow Supreme Court precedent on federal issues. However, state courts sometimes rejected outright the idea that they were required to follow rulings of the United States Supreme Court. For example, Justice Henry Benning of the Supreme Court of Georgia took the view that "the Supreme Court of Georgia is co-equal and co-ordinate with the Supreme Court of the United States, and . . . as a consequence, the Supreme Court of the United States has no jurisdiction over the Supreme Court of Georgia; and cannot, therefore, give it an order, or make for it a *precedent*." Padelford, Fay & Co. v. Mayor of Savannah, 14 Ga. 438, 506 (1854) (holding, contrary to the Supreme Court's ruling in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), that a state sales tax on imported

Many authors have also dealt with the second body of constitutional law: state constitutions and their role in structuring and limiting state governments.[290] State courts enforced state constitutional provisions[291]—as did federal courts when they reviewed challenges to state laws in diversity cases. State courts took the position that with respect to an issue of state law, they were authoritative and, therefore, did not need to follow the United States Supreme Court's rulings and interpretations of state constitutional law issues.[292] Indeed, as a matter of comity, state courts considered their view of state law to bind the federal courts: if a state court was required to adhere to the Supreme Court's interpretation of the Federal Constitution, then federal courts should follow the state court on state constitutional issues.[293]

goods did not violate the Commerce Clause); *see also* Johnson v. Gordon, 4 Cal. 368, 371–74 (1854) (holding that the Supreme Court does not have authority to exercise appellate jurisdiction over state courts); Weatherbee v. Johnson, 14 Mass. 412 (1817) (expressing doubts about constitutionality of section 25 of the 1789 Judiciary Act); *In re* Booth, 3 Wis. 1, 66 (1854) (stating that the state courts have the right to decide independently of federal courts whether laws are constitutional and holding unconstitutional the 1850 Fugitive Slave Act), *rev'd sub. nom*. Ableman v. Booth, 62 U.S. (21 How.) 506, 526 (1858).

290. *See generally* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (Rita & Robert Kimber trans., Univ. of N.C. Press 1980) (1973); KRUMAN, *supra* note 111.

291. *See* McClure v. Owen, 26 Iowa 243, 249–50 (1868).

292. *See, e.g.*, *id.* ("We can not . . . be expected to conform our rulings to the opinion of [the United States Supreme Court] upon questions of [state law] when they are in conflict with the adjudications of this court."); Deans v. McLendon, 30 Miss. 343, 361 (1855) ("The right to expound, definitively and conclusively, their statutes . . . belong[s] exclusively to the state courts."); Towle v. Forney, 14 N.Y. 423, 429 (1856) (reasoning that "[i]f a question [of state law] is found to have been settled by the highest appellate court of a state, that decision is binding upon the courts of the United States to the same extent as upon the courts of the state in which it was made" and finding that in addressing such questions, "the highest court of the Union has no legal preeminence over any of the courts of this state"); Wilkins v. Philips, 3 Ohio 49, 50 (1827) ("Highly as we respect the opinions of [the United States Supreme Court], we can not adopt them, in the construction of our own statutes, where they are at a variance with our own judgments."); Peck v. City of San Antonio, 51 Tex. 490, 493 (1879) ("Although we entertain the very greatest respect for the opinions of [the United States Supreme Court] . . . we feel it our duty, upon a question which involves the proper construction of a local statute under the Constitution of Texas, to follow the latest decisions of this court.").

293. *See, e.g.*, Bailey v. Fitz-Gerald, 56 Miss. 578, 588–89 (1879) (holding unconstitutional a statute allowing guardians and trustees to invest in Confederate bonds). Writing for the court in *Bailey*, Chief Justice Horatio F. Simrall explained that while "[t]his court has been prompt to follow the judicial

C. GENERAL CONSTITUTIONAL LAW

The third body of constitutional law was derived from the practice of early federal courts applying general constitutional law in diversity cases. In accordance with *Swift v. Tyson*,[294]

leadings of the Supreme Court of the United States" on federal constitutional questions, "it will maintain . . . its right to declare the rules of law on all subjects arising under the Constitution, statutes, and customary laws of the State . . . [even when] at variance with the Federal judiciary." *Id.* at 588–89. Likewise, the Supreme Court of Nebraska understood itself to be a peer of the United States Supreme Court. *See* Franklin v. Kelley, 2 Neb. 79, 85 (1872) (rejecting the federal court construction of a state deed statute). Therefore, it was bound by United States Supreme Court "decisions upon questions arising out of the Federal [C]onstitution and Federal statutes" but "decisions upon questions . . . of [Nebraska's] State constitution and . . . statutes" similarly bound the United States Supreme Court. *Id.* Further, in *Levy v. Mentz*, 23 La. Ann. 261, 262 (1871), the Louisiana Supreme Court held that "in construing local statutes respecting real property, the federal courts are governed by the decisions of the State tribunals." Also, the Supreme Court of Pennsylvania stated that the United States Supreme Court "has no more right to overrule a judgment of a state court, on a question of state law, than the state court has to overrule the United States court on a question of United States law." Mott v. Mott, 30 Pa. 9, 32 (1858). State courts also rejected the Supreme Court's prior interpretation of state statutory law when the interpretation would be inconsistent with the state constitution. *See, e.g.*, Mayor of Balt. v. Balt. & Ohio R.R. Co., 6 Gill 288, 298–99 (Md. 1848) (refusing to follow the Supreme Court's understanding that banking franchises were subject to a special tax where the state constitution prohibited such taxes).

At the same time, some state courts occasionally suggested that on some questions, state courts and federal courts operated equally. *See, e.g.*, Franklin v. Kelley, 2 Neb. 79, 85 (1872) (after noting that state supreme court is authoritative on state constitutional law while the United States Supreme Court is authoritative on federal constitutional law, stating that "upon that wide domain which is presented by general jurisprudence, the Federal Supreme Court and the State Supreme Court hold an equal and divided jurisdiction. Our opinions are not binding upon it, nor its opinions on us").

A further issue was the interaction between a state court's construction of state law and the Supreme Court's adjudication of the constitutionality of the law under the Federal Constitution. The issue arose in Contracts Clause cases, with some state courts taking the view that whether there was a contract was solely a question of state law. *See, e.g.*, Skelly v. Jefferson Branch of the State Bank of Ohio, 9 Ohio St. 606, 609–10 (1859) (holding that a state court is not required to follow Supreme Court precedent on whether a statute creates a contract within the meaning of the United States Constitution). The Supreme Court eventually rejected this position. Jefferson Branch Bank v. Skelly, 66 U.S. (1 Black) 436 (1861) (holding that the Supreme Court has the power to determine independently whether a contract exists for purposes of the Constitution's Contracts Clause).

294. 41 U.S. (16 Pet.) 1 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). *Swift* was a private law case in which New York defendants were sued in federal court in New York by out-of-state defendants on a bill of exchange. *Id.* at 14. Although the bill was defective under the decisions of the New York state courts, Justice Joseph Story held that those decisions were not

nineteenth-century federal courts, sitting in diversity and asked to rule on the validity of state legislation or state executive action under a state constitutional provision, generated and applied general principles of constitutional law, rather than simply adhering to the state courts' interpretation of state constitutional law.[295]

This body of general constitutional law stood apart from the simple application of state constitutional provisions. For example, although the 1776 Virginia Constitution permitted uncompensated takings of property if approved by the legislature,[296] in the 1815 case of *Terrett v. Taylor*, Justice Joseph Story for the United States Supreme Court invoked the "fundamental laws of every free government" to prohibit the state of Virginia from confiscating lands of the Episcopal Church.[297] In 1829, just four years before *Barron*, the Supreme Court heard a diversity case in which the plaintiff challenged a Rhode Island statute as working an impermissible transfer of property

binding on federal courts. *Id.* at 18–19. Construing section 34 of the 1789 Judiciary Act (the Rules of Decisions Act), which provided that "the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States," but did not specify the source of state law, Story reasoned that the decisions of the New York courts were not "law" but only the courts' interpretations of "general commercial law," applicable to interstate commercial transactions. *Id.* at 18. Accordingly, federal courts were not bound by the state court decisions Story considered incorrect, but were instead free to apply their own understanding of the "general principles and doctrines of commercial jurisprudence." *Id.* at 19. While *Swift* authorized federal courts to develop substantive rules in private law matters, the decision also set the stage for federal courts to develop and apply their own principles of public law in diversity cases. *See* Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1264–65 (2000).

As Ann Woolhandler and Michael Collins have traced, early federal judges also developed independent federal standards with respect to other aspects of diversity cases, including standards used to determine whether a right to civil juries was "preserved" under the Seventh Amendment, rather than simply following existing state laws. Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 612–13 (2001).

295. Collins, *supra* note 294, at 1265. Note that general constitutional principles did not create federal question jurisdiction, but rather were applied in cases in which the federal courts had diversity jurisdiction, and, therefore, the Supreme Court could not hear a case on this basis on direct appeal from a state court. *See id.* at 1304–06.

296. VA. CONST. of 1776, Bill of Rights, § 6 (stating that persons cannot be "deprived of their property for public uses, without their own consent, or that of their representatives so elected").

297. 13 U.S. (9 Cranch) 43, 52 (1815).

from the owner to another private party.[298] In his opinion for the court, Justice Story, determining that the statute did not divest the plaintiff of any protected rights, rejected the plaintiff's challenge.[299] However, Justice Story also made clear that even in the absence of any applicable state constitutional provision[300] or application of the Federal Constitution, a state legislature would be prohibited from transferring private property from one person to another.[301] Such a transfer, Story reasoned, would be "inconsistent with the great and fundamental principle of a republican government,"[302] "repugnant to the common principles of justice and civil liberty,"[303] and an "[un]constitutional exercise of legislative power."[304] So too, in 1871, in *Pumpelly v. Green Bay Co.*, Justice Samuel Miller for the Court held that under the Wisconsin Constitution, a plaintiff whose land had been flooded by a dam authorized by state law had suffered a taking of property and was entitled to compensation.[305] Although the decisions of the Wisconsin state courts pointed against compensation where the plaintiff, following the alleged taking, had retained title to the land,[306] the *Pumpelly* Court invoked decisions from other states to independently interpret the Wisconsin Constitution in light of "settled principle[s] of universal law," and held that, under those standards, the plaintiff was entitled to relief.[307]

In dozens of other diversity cases federal courts relied upon general principles of constitutional law when asked to interpret and apply provisions of state constitutions.[308] Defending this

298. Wilkinson v. Leland, 27 U.S. (2 Pet.) 627 (1829).

299. *Id.* at 658–61.

300. Rhode Island did not replace its Royal Charter of 1663 with a constitution until 1842. R.I. CONST. of 1842.

301. *See Wilkinson*, 27 U.S. (2 Pet.) at 656–58.

302. *Id.* at 657.

303. *Id.*

304. *Id.* at 658.

305. 80 U.S. (13 Wall.) 166, 181 (1871).

306. *See id.* at 180.

307. *Id.* at 178 (quotation omitted).

308. *See, e.g.*, Yates v. Milwaukee, 77 U.S. (10 Wall.) 497, 506–07 (1870) (holding that notwithstanding contrary state court decisions, general common law required compensation for takings of property); Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 205–06 (1863) (construing independently the Iowa Constitution in a federal diversity bond issuance case); Rowan v. Runnels, 46 U.S. (5 How.) 134, 137 (1847) (rejecting binding nature of state court decision that state constitution barred import of slaves for sale); Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 499–503 (1841) (maintaining an independent under-

practice, Justice Noah Swayne, in a case upholding the validity of a municipal bond issuance, explained why the Supreme Court was not bound to follow a state supreme court's contrary interpretation of state constitutional provisions:

> With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. . . . The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself.[309]

In other words, because state constitutions needed to be construed against generally recognized principles, a state court's construction was not the last word on what the state constitution required. So too, where a state constitution was entirely silent on an issue, federal diversity courts invoked general principles of constitutional law to limit the activities of state government.[310]

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standing of a provision of the Mississippi Constitution regulating importation of slaves for sale); Hollingsworth v. Parish of Tensas, 17 F. 109, 116–18 (C.C.W.D. La. 1883) (rejecting contrary state court decisions and holding that the state constitution required compensation for property takings); Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 766–69 (C.C.D.N.H. 1814) (Nos. 16,919–20) (departing from state court decisions and invalidating a state statute under a state constitutional provision prohibiting retrospective laws).

309. Twp. of Pine Grove v. Talcott, 86 U.S. (19 Wall.) 666, 677 (1873).

310. *See, e.g.*, Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 663–65 (1874) (invoking "limitations on [government] power which grow out of the essential nature of all free governments" to hold in a diversity case that even without a specific provision, the state constitution implied that taxation must be for public purposes and therefore cities could not impose taxes to subsidize private corporations); Commercial Natl'l Bank v. Iola, 6 F. Cas. 221, 223 (C.C.D. Kan. 1873) (No. 3061) (stating that even where a state constitution is silent on the issue, "[t]he courts everywhere have agreed that taxes can lawfully be imposed for public purposes only," and therefore a bond issuance paid by taxation to benefit a private enterprise is void), *aff'd*, 154 U.S. 617 (1875); Cole v. City of La Grange, 19 F. 871, 873 (C.C.E.D. Mo. 1884) (stating that even though the state constitution was silent on the matter, "the elemental thought underlying American constitutional law [is] that an attempt, through the guise of the taxing power, to take one man's property for the private benefit of another is void, an act of spoliation, and not a lawful use of legislative or municipal functions" and voiding bond issuance paid by taxation to benefit private enterprise); *cf.* Davidson v. New Orleans, 96 U.S. 97, 105 (1877) (affirming the decision of the state supreme court that tax assessment against a land owner for swamp drainage did not violate the Fourteenth Amendment Due Process Clause but noting that unequal state taxation, while not specifically prohibited by the Federal Constitution, "may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States, as we were in *Loan Association v. Topeka*").

Importantly, these general principles applied by federal diversity courts were not *federal* principles. That is, the principles did not apply because they reflected norms underlying the Federal Constitution, which had no bearing on these cases. Rather, federal courts applied general constitutional principles as a matter of *state* law—the law that was applicable in diversity cases.[311] The practice, therefore, also stood apart from the notion that the Federal Constitution, in addition to its specific provisions, imposed limitations on state government based on natural rights or other unwritten sources,[312] a view associated with Justice Samuel Chase in *Calder v. Bull*,[313] with Justice

311. Ann Woolhandler and Michael Collins have usefully documented how the Supreme Court in the nineteenth century generously interpreted federal diversity requirements so as to create opportunities for federal courts to apply general constitutional law principles, particularly in cases involving the interests of out-of-state investors. Woolhandler & Collins, *supra* note 294, at 606–08.

312. The notion of unwritten federal constitutional limitations on government has a long pedigree. *See, e.g.*, CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 16–18 (New York, G.P. Putnam's Sons 1890). More generally, natural law as a limitation on all government has long been a feature of American legal thought (and was given expression in the Declaration of Independence). *See generally* STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 49–74 (2000); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993); Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171 (1992). Early state courts invoked natural law in construing their own state laws and constitutions. *See, e.g.*, *In re* Albany St., 11 Wend. 149, 150 (N.Y. Sup. Ct. 1834) (construing a state constitution's compensation clause as limiting takings to public uses because otherwise the clause would be "in violation of natural rights"); Currie's Adm'rs v. Mut. Assurance Soc'y, 14 Va. (4 Hen. & M.) 315, 346 (1809) (writing that state laws are "limited . . . by considerations of justice").

313. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (invoking, in a case challenging a state law that granted a new hearing in a probate trial as violating the Ex Post Facto Clause of Article I, Section 10, "the great first principles of the social compact" as limiting the "rightful exercise of legislative authority" and writing that even without constitutional limitations, some legislative actions, including ex post facto laws and taking private property to give to another person, would be invalid). The extent to which Justice Chase thought that judges had authority to apply natural principles to invalidate legislative action is unclear. Chase, who did not apply those principles in his opinion in *Calder*, was in the Court's majority holding that the Ex Post Facto Clause did not apply in the case because the clause was limited to retroactive criminal punishments. *Id.* at 388. Justice James Iredell in the same case seemed to understand Chase to mean judges *could* invalidate laws on the basis of natural

Marshall in *Fletcher v. Peck,*[314] and also expressed by some modern commentators.[315] The practice was further distinct from a straight-up application of a state constitutional provision—our second body of constitutional law—because the general principles that federal courts applied in diversity cases were derived from sources outside of the state constitution itself.

D. THE FOURTH BODY

The practice, discussed in this Article, of state courts invoking the Federal Bill of Rights to limit state government rounds out a diverse set of sources for protecting the rights of individuals in the pre–Civil War period. Together, the four bodies of constitutional law represented quite different ways in which government was restrained and liberty secured.

The United States Supreme Court's decision in *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*[316] nicely illustrates some of the relevant differences. The case concerned the 1785 Massachusetts charter granted to the Charles River Bridge Corporation to create and operate a bridge and charge tolls to passengers crossing between Boston and Char-

rights, a notion Iredell himself rejected. *See id.* at 399. For a useful perspective on *Calder* and other cases involving federal court invocation of natural principles, see Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127–77 (1987).

314. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810) (holding unconstitutional a Georgia law rescinding the Yazoo land grant and stating that in addition to the Contracts Clause of Article I, Section 10, a law revoking land titles violates the "general principles which are common to our free institutions"). Inasmuch as the *Lochner*-era decisions invoked general principles of rights rooted in contract and other common law doctrines, those decisions too might be considered part of this tradition. *See* James A. Gardner, *The Positivist Revolution that Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 120–21 (1998). Note also that *Fletcher* was a diversity case. *See Fletcher*, 10 U.S. (6 Cranch) at 87–88. Nine years later in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 624–54 (1819), a Contracts Clause case on appeal from state court, Marshall, in holding for the Court that Dartmouth College's corporate charter, though commissioned by the state, was a contract between private parties with which the legislature could not interfere, hewed to the text of the Federal Constitution and placed no reliance on general principles.

315. For a modern perspective, see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 259 (2004) (presenting the view that the Ninth Amendment is a source of individual liberties beyond those specifically protected under other constitutional provisions).

316. 36 U.S. (11 Pet.) 420 (1837).

lestown.[317] In 1828, the Massachusetts legislature authorized the Warren Bridge Corporation to build a competing, toll-free bridge.[318] Writing for the Supreme Court, Chief Justice Roger Taney rejected the argument by the proprietors of the Charles River Bridge that the Warren Bridge charter violated the Contracts Clause of the Federal Constitution.[319] Taney's conclusion rested on his understanding that the Charles River Bridge charter was an instrument for economic growth, rather than a contract creating vested rights.[320] If the Court were to construe the first charter to prohibit a second, he reasoned, "[w]e shall be . . . obliged to stand still, until the claims of the . . . corporations shall be satisfied; and they shall consent to permit these states to avail themselves of the lights of modern science."[321] Affirming the state supreme court's decision, Taney held that no impairment of a contract had occurred.[322]

As in *Barron*, focusing only on what happened in the United States Supreme Court in *Charles River Bridge* misses the full import of the case. In the state supreme court, the plaintiffs had argued that, in addition to violating the Constitution's Contract Clause, the charter granted to the competing bridge company was also a taking of the plaintiffs' property without just compensation in violation of the Fifth Amendment Takings Clause and the analogous provision of the state constitution that prohibited uncompensated appropriations of property.[323] Writing for the state court, Chief Justice Isaac Parker rejected the plaintiffs' takings argument. While the provisions of both the federal and state constitutions "are to have a . . . liberal construction,"[324] and it was clear that the state had not provided compensation to the Charles River Bridge proprietors,[325] Parker concluded that no property had been taken.[326] Parker explained:

> The claim of the plaintiffs is, in reality, to a mere naked right; to the exclusion of the public from the use of the navigable waters of the

317. *Id.* at 428.
318. *Id.* at 427–28.
319. *Id.* at 458–59, 539.
320. *Id.* at 547–50.
321. *Id.* at 553.
322. *Id.*
323. Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 24 Mass. (7 Pick.) 344, 400–05 (1829), *aff'd*, 36 U.S. (11 Pet.) 420 (1837).
324. *Id.* at 401.
325. *Id.* at 400–01.
326. *Id.* at 405.

> commonwealth for the purpose of transportation. Such a right cannot be property, within any known or practical meaning of the term, nor, if infringed, is there a taking or appropriating of *property* within the intent of either constitution. The community, in their sovereign capacity, being the owners of these navigable waters, possess the right of using them at their pleasure.[327]

In their appeal to the United States Supreme Court, brought under section 25 of the Judiciary Act, the plaintiffs dropped the argument that there had been a Fifth Amendment violation, asserting that "the only . . . [issue] of which this Court has jurisdiction, is, whether the . . . act [granting the second charter] . . . does, or does not, impair the obligation of a contract."[328] The defendants agreed that the Court lacked jurisdiction to decide any takings claim: "[T]he question whether a state law violates a state constitution, is not to be raised in this Court";[329] the claim did not present a ground "for the interference of this Court; but it is only a ground of application to the commonwealth of Massachusetts."[330] Further, "[i]f Massachusetts has taken the property of the plaintiffs for public use, her honour is solemnly pledged in her constitution, to make adequate compensation."[331] The Supreme Court itself also saw no basis for deciding the Fifth Amendment question.[332] *Charles River Bridge*, therefore, followed the same general approach as *Barron*:[333] under the operation of the Judiciary Act, the United States Supreme Court would not review a state court denial of a claim under a provision of the Federal Constitution the Court thought inapplicable to state government.

There was, therefore, a basic difference between diversity cases, where the Supreme Court could rule on the basis of general principles of constitutional law, and nondiversity cases, where the Court accepted the holdings of the state courts on

327. *Id.*

328. *Charles River Bridge*, 36 U.S. at 429 (syllabus reporting plaintiffs' argument).

329. *Id.* at 471 (syllabus).

330. *Id.* at 470.

331. *Id.* at 473.

332. *Id.* at 553.

333. However, *Barron* was not mentioned in any of the opinions in *Charles River Bridge*, nor raised by any of the lawyers in the case—even though the case, initially argued in March 1831, was reargued in January 1837, after *Barron* had been decided. *See* Elizabeth B. Monroe, *Charles River Bridge v. Warren Bridge, in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 10, at 158 (reporting that the case was reargued because the decision was delayed as a result of the Justices' divergent views and because of illnesses and vacancies on the bench).

whether to extend to state government the Bill of Rights and its underlying principles. As the defendants in *Charles River Bridge* argued: "[T]he legislature is limited by the principles of natural justice; . . . and . . . it ought not to take property without compensation: but the [C]onstitution of the United States no where gives this Court a right to inquire whether the legislature, *and the state courts* have disregarded the principles of natural justice."[334] In other words, while in a diversity case the Supreme Court could apply principles of natural law and extend Fifth Amendment-type protections, in a nondiversity case the Court deferred to the rulings of the state courts unless the state court's ruling had denied or narrowed a Supreme Court holding as to what the Federal Constitution protected.[335]

IV. MODERN DEVELOPMENTS

In the preceding parts of this Article, I have sought to demonstrate the richness of constitutional decision making in the early American republic. In this final Part, I draw on this history to assess the current state of constitutional law. I argue that the modern consolidation of constitutional decision making and the accompanying disappearance of practices of state courts described in this Article leave constitutional law today less vibrant than it might otherwise be—with significant costs to individuals and to the legal system as a whole.

A. CONSOLIDATION

For much of this nation's history, constitutional law was multifaceted and constitutional decision making was dispersed. The Federal Constitution and the constitutions of each state existed as separate bodies of constitutional rules, interpreted and applied by federal judges and their state counterparts. In addition, federal courts sitting in diversity crafted and applied to the states general rules of constitutional law; state courts also applied the provisions of, and principles derived from, the Federal Bill of Rights. Accordingly, citizens could invoke the Federal Constitution in federal court and in state court to prevent the federal government or (where applicable) state government

334. *Charles River Bridge,* 36 U.S. (11 Pet.) at 503 (emphasis added).

335. *Cf.* Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305, 307 (1988) (stating that *Charles River Bridge* "eviscerated the concept of natural law as an element of federal constitutional constraints on state action").

from interfering with their liberties. Citizens could seek relief from state government under the state's constitution in state court and, in diversity cases, in federal court—where general constitutional law principles also applied. State courts could invalidate state laws and executive actions by invoking the provisions and principles of the Federal Bill of Rights.

Today, things look very different. While the Federal Constitution and state constitutions exist as distinct bodies of constitutional law, constitutional law has otherwise been consolidated. In place of the four bodies of constitutional law that existed in the early Republic, there are now just two. Since *Erie*, federal courts are no longer permitted to apply general principles of constitutional law in diversity cases, but must defer to state courts on the meaning of state constitutional provisions.[336] While this development, described favorably as producing a "judicial federalism,"[337] may represent greater respect for state courts, it can also result in aggrieved citizens losing out. If the state court rejects a constitutional claim, a federal court cannot later accept the claim under principles of general constitutional law. The converse is also true—a federal court cannot reject a claim accepted by the state court—but the overall effect might be to narrow constitutional rights, because a federal diversity court can never expand on what the state court has done.[338]

336. *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) (noting the Court's deference to state interpretations of state law); Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."). On occasion, federal courts have rejected state court interpretations of state law where they seemed incredible or conflicted with federal interests. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 115 (2000) (declining "[t]o attach definitive weight to the pronouncement of a state court . . . when the very question is whether the court has actually departed from the statutory meaning"); Henry v. Mississippi, 379 U.S. 443, 447–54 (1965) (overriding a state court's ruling on procedural default under state law when a federal claim was at issue). *See generally* Henry Paul Monaghan, *Supreme Court Review of State–Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919 (2003).

337. Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974). *See generally* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1462 (1997) (exploring the principles of judicial federalism in *Erie* and discussing how to protect those principles when state law fails to provide determinate answers to particular legal questions faced by federal courts).

338. For a recent argument in favor of more frequent federal court adjudication of state constitutional law claims in order to protect state constitutional rights and encourage a dialogue between the federal and state courts, given the historical reluctance of state courts to give expansive interpretations to

Similarly, incorporation through the Fourteenth Amendment of most of the protections of the Bill of Rights against the states entails a consolidation of constitutional law. Incorporation means plaintiffs can now bring claims under the Federal Bill of Rights against state government[339]—a federal court today would have jurisdiction to hear John Barron's Fifth Amendment claim against the city of Baltimore. However, incorporation can also operate to curtail other kinds of claims. Because the protections of the Bill of Rights apply equally—"with full force"[340]—to the states as they apply to the federal government,[341] state courts no longer interpret the Bill independently[342] or interpret it to derive general principles of constitutional law applicable to their state governments.[343] Instead, state courts are bound by whatever the United States Supreme Court says the Bill of Rights requires—no more, no less.[344] If, for example, the Court holds that the death penalty

state constitutional provisions, see Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1411 (1999).

339. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 740 (5th ed. 2005).

340. Lee v. Weisman, 505 U.S. 577, 580 (1992).

341. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992) ("We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States."). The only provisions of the Bill of Rights the Supreme Court has not incorporated against the states are the Second Amendment, the Third Amendment, the Fifth Amendment grand jury requirement, and the Seventh Amendment civil jury requirement. STONE, *supra* note 339, at 740.

342. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 795 (1969) ("Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' the same constitutional standards apply against both the State and Federal Governments." (citation omitted)). For the case for tailoring constitutional protections to different levels of government, see Rosen, *supra* note 10.

343. There is, therefore, a displacement of what Professor James Gardner calls "constitutional universalism," the tradition of belief by the state courts (and to a lesser extent the federal courts) that all American constitutions reflect a common set of general principles. *See* Gardner, *supra* note 314, at 117–28.

344. *See, e.g.*, Osborne v. Commonwealth, 43 S.W.3d 234, 241 (Ky. 2001) (noting that in light of the requirements of the Sixth Amendment Confrontation Clause, "we are bound by the United States Supreme Court's interpretation of what constitutes an admissible out-of-court 'statement' under the hearsay exception for statements against penal interest"); Commonwealth v. Bryant, 390 Mass. 729, 741 (1984) ("[W]e are bound by the Supreme Court's construction of *Miranda's* scope . . . ."); People v. Kin Kan, 574 N.E.2d 1042, 1045 (N.Y. 1991) ("All courts are, of course, bound by the United States Supreme Court's interpretations of . . . the Federal Constitution." (citations omit-

does not violate the Eighth Amendment, a state court is not free to hold that the death penalty is, as a matter of federal constitutional law, unconstitutionally cruel and unusual punishment.[345] Similarly, there is little doubt that if the Court were to decide that some provision of the Bill of Rights did *not* constrain state government, states courts would not be free to hold otherwise, and the Court would reverse them if they did. "[A] state court can neither add to nor subtract from the mandates of the United States Constitution"[346] as it is interpreted by the Court.

Consolidation has been facilitated by the radical change in the modern era in the United States Supreme Court's statutory authority to review state court decisions. Under the 1789 Judiciary Act, the Court could only review the holding of a state supreme court rejecting a federal constitutional claim against state government. Today, the Court is authorized to hear any decision by a state supreme court presenting a federal issue.[347] The Court's formerly limited jurisdiction permitted state courts to expand federal constitutional rights beyond those recognized by the federal judiciary. The modern Court's plenary jurisdiction means that any inconsistent state court decision—expanding or contracting federal rulings—is subject to correction.[348]

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ted)); State v. Gomez, 163 S.W.3d 632, 651 (Tenn. 2005) ("Like all Tennessee courts, this Court is bound by the United States Supreme Court's interpretation of the United States Constitution . . . ."), *vacated on other grounds*, 127 S. Ct. 1209 (2007).

345. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (affirming a state court conviction and holding that the death penalty imposed on juveniles does not violate the Eighth Amendment), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005); Gregg v. Georgia, 428 U.S. 153, 187, 207 (1976) (affirming a state court conviction and holding that the death penalty is not a per se violation of the Eighth Amendment).

346. North Carolina v. Butler, 441 U.S. 369, 376 (1979) (citation omitted).

347. 28 U.S.C. § 1257(a) (2000). The statute provides that decisions of a state's highest court may be reviewed by the Supreme Court:

> where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Id.

348. *Id.*

Within this general pattern, the Warren Court played a particularly significant role in consolidation, with expanded readings of constitutional rights, especially rights of criminal defendants, and aggressive incorporation of those rights against the states,[349] backed up by broad understanding of federal jurisdiction.[350] Though the Burger Court and the Rehnquist Court pruned some of the Warren Court's innovations[351] (and the Roberts Court will likely prevent new growths),[352] the overall legacy is state governments which are bound by an array of constitutional rules articulated and enforced by the Supreme Court. Significantly, even though it now reviews only a very small number of cases, the Court has remained effective in monitoring state courts to ensure they adhere to the Court's own interpretations of the Federal Constitution.[353] Perhaps most strikingly, where there is doubt about whether a state court has based its decision on state law (over which the state court is authoritative) or on federal law, the Court presumes the latter, and the decision is subject to review.[354] Early state

349. On these Warren Court developments, see DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 47–69 (2003); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 254–56 (1968).

350. *See* Ann Althouse, *Tapping the State Court Resource,* 44 VAND. L. REV. 953, 957 (1991) ("Many legal scholars believe that the Warren Court increased access to federal courts to give an advantage to the individual who claims a violation of her rights and the Burger-Rehnquist Courts have restricted access to federal courts to cut back on those rights." (footnote omitted)); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary,* 36 UCLA L. REV. 233, 234–35 (1988) (discussing how the Warren Court expanded habeas corpus for state prisoners and the scope of relief under 42 U.S.C. § 1983, limited the circumstances in which federal courts should abstain, and minimized the preclusive effect of state court judgments).

351. *See* David J. Bodenhamer, *Reversing the Revolution: Rights of the Accused in a Conservative Age, in* THE BILL OF RIGHTS IN MODERN AMERICA: AFTER 200 YEARS 101, 102 (David J. Bodenhamer & James W. Ely, Jr. eds., 1993); Chemerinsky, *supra* note 350, at 235 (discussing how the Burger Court had greater confidence in state processes and so narrowed the scope of federal jurisdiction); Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 13, 29–30, 36, 43 (1995).

352. *See* Owen Fiss, *Between Supremacy and Exclusivity*, 57 SYRACUSE L. REV. 187, 192 (2007).

353. Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 359 (2002) ("Whether under an expanded or shrunken docket . . . the Supreme Court has been able, to a tolerable degree, to carry out the monitoring function.").

354. *See* Michigan v. Long, 463 U.S. 1032, 1040–41 (1983) (holding that in order for the Court to deny jurisdiction on the ground that a state court decision rested on an independent and adequate state law ground, the state court

courts worked independently with the Federal Constitution. Modern state courts are, and are expected to be, "faithful agents of the Supreme Court in applying federal law."[355]

B. INDIVIDUAL AND INSTITUTIONAL COSTS

To be sure, there are benefits to these modern developments. Individual rights are more secure with the incorporation of the Bill of Rights against the states; with courts, especially federal courts, holding state government accountable for violating the Bill of Rights; and with Congress empowered to enforce the Fourteenth Amendment's requirements. Still, even with constitutional rights better secured overall in the modern era, *some* rights are probably less protected than they might be. In settling constitutional rights for the entire nation, the United States Supreme Court typically proceeds with unique caution. Studies show, for example, that the Court is not often ahead of political changes.[356] While recent work on the Rehnquist Court indicates it was more likely to correct "liberal errors" than "conservative errors" by the state courts,[357] the Court's generally cautious approach is likely independent of the justices' own political leanings. Within the range of results they find satisfactory, Supreme Court justices, across the spectrum, can be expected to opt for narrow rather than broad outcomes. The justices understand that they are setting rules for a diverse nation, that those rules impose costs on state and local government,[358] and that it is normally better to postpone deciding

must make clear in its opinion independent reliance upon state law).

355. Solimine, *supra* note 353, at 363.

356. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 338 (1991) (arguing that the Supreme Court's decisions in the areas of segregated schooling, reproductive freedom, and women's rights were at most a recognition of the ways in which society was already evolving and concluding that "courts can *almost never* be effective producers of significant social reform").

357. Kilwein & Brisbin, *supra* note 9, at 183 (reporting that the Warren and Burger Courts were more likely to correct "conservative errors" and the Rehnquist Court more likely to correct "liberal errors" by state courts and concluding that, as a result, "at the beginning of the twenty-first century, criminal defendants, minorities, seekers of expressive freedom, and unions might find less relief than they might have secured from state courts three decades earlier").

358. *See* Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1042 n.115 (1985) ("Due to the size and diversity of the country, the Court must limit its decisions to constitutional norms capable of achievement nationwide.").

more than is necessary for the satisfactory disposition of the case at hand.[359]

In the antebellum era, state courts could apply federal constitutional protections more stringently in light of local conditions and needs. The United States Supreme Court, with power to review a denial of a federal constitutional right, set a national floor, but state courts could exceed that floor and impose stronger constraints on state government. Today, state courts are no longer free to take into account whether and how local conditions require more expansive protections than the Supreme Court is inclined to enforce. For example, although a state may have a long history of abusive searches and seizures by the police, the state court cannot today insist the police follow more stringent procedural requirements under the Fourth Amendment and impose more severe remedies if the police violate the rules. If a state has a religious minority that has experienced disadvantages, the state court cannot apply First Amendment protections that exceed what the Supreme Court has adopted. In deciding whether a state's punishment is cruel and unusual under the Eighth Amendment, a state court cannot look to the views and sensibilities of that state's own residents and invalidate laws the Supreme Court would uphold.[360] An expansion made in light of a state's own needs and conditions is subject to correction.

Consolidation is, of course, designed to produce uniformity. From a modern perspective, a deficiency of the early courts was that individual federal constitutional rights varied around the country—turning uniform law into what Justice Antonin Scalia has recently referred to as a "crazy quilt."[361] Today, a single body of federal constitutional law, generated by the United States Supreme Court through power to review all state court

359. *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

360. The Court has not ignored the possible benefits of states applying different requirements above a national floor. *See, e.g.*, Meachum v. Fano, 427 U.S. 215, 229 (1976) (holding that, absent some misconduct on the part of prison officials, the Due Process Clause of the Fourteenth Amendment does not entitle a state prisoner to a hearing when transferred to a prison in which conditions are less favorable, and writing that "[t]he individual States . . . are free to follow another course, whether by statute, by rule or regulation, or by interpretation of their own constitutions" if they "decide that prudent prison administration requires pretransfer hearings" and that "[o]ur holding is [merely] that the Due Process Clause does not impose a nationwide rule mandating transfer hearings").

361. Kansas v. Marsh, 126 S. Ct. 2516, 2531 (2006) (Scalia, J., concurring).

decisions on federal constitutional issues, means that citizens do not live with different federal constitutional rights depending on the decisions of their state courts. Uniformity is also promoted when, rather than generating their own rules, federal diversity courts today determine how a case would be adjudicated under state law in state court.[362]

Still, the value of uniformity should not be exaggerated. Even today, though uniformity may be touted as an important value, our legal system tolerates a good deal of inconsistency and nonuniform outcomes even as to matters of federal constitutional interpretation. Everyone knows that the Fourth Circuit is not the Ninth Circuit—it is, for example, no coincidence that, in the war on terror, enemy combatants have been held in Charleston and Norfolk rather than in San Francisco.[363] The United States Supreme Court, which now controls its own docket, reviews only a tiny fraction of cases.[364] Therefore, a conflict among the holdings of circuit courts does not necessarily

362. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law."); *see also* Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945) ("[I]n all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a [s]tate court."); *Erie*, 304 U.S. at 75 (explaining that the defect of applying general law in diversity cases was that "[i]n attempting to promote uniformity of law throughout the United States, [it] prevented uniformity in the administration of the law of the State").

363. *See* Susan N. Herman, *Yasser Hamdi and the Fourth Circuit's Legal No-Man's Land*, JURIST, Jan. 13, 2003, http://jurist.law.pitt.edu/forum/forumnew84.php (suggesting, in a discussion of the detention of Yasser Hamdi at a naval brig in Norfolk, Virginia, that "the government . . . anticipated that this most conservative [F]ederal Court of Appeals would defer to its claim of executive prerogative").

364. JOHN G. ROBERTS, JR., 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (2006), *available at* http://www.supremecourtus.gov/publicinfo/year-end/year-endreports.html (reporting that during the Supreme Court's 2004 Term, 7496 cases were filed; 87 cases were argued; and 85 were disposed of in 74 signed opinions); David M. O'Brien, *A Diminished Plenary Docket: A Legacy of the Rehnquist Court*, 89 JUDICATURE 134, 134 (2005) ("A major legacy of the Rehnquist Court . . . will remain a sharply diminished plenary docket."); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 35–36 (2005) (estimating that the Supreme Court reviewed 0.12% of the potentially reviewable state and federal decisions reached in 2003 and concluding that "the extraordinary growth in the ratio of lower court to Supreme Court decisions" means that "it is no longer feasible for the Court to control the lower courts by means of narrow, case-by-case determinations . . . [and, i]nstead, it must perforce act legislatively").

lead to Supreme Court review; when circuit conflicts are not resolved, or not resolved promptly, federal constitutional law varies around the nation.[365] So too, even in our current system, differences among state supreme courts in their interpretations of the Federal Constitution might not be immediately resolved.[366] Members of the Supreme Court have themselves recognized this feature of the modern judicial system.[367]

Viewed from a different perspective, the consolidation of constitutional law is in fact inconsistent with federalism. Consolidation displaces the role of state courts, a part of state government, in the federalist scheme. Though they apply federal law, state courts are not lower federal courts any more than the state legislatures are subunits of Congress[368] or the state governors agents of the federal executive branch.[369] The historical practice of allowing state courts some leeway to interpret inde-

365. *See* John Harrison, *Federal Appellate Jurisdiction Over Questions of State Law in State Courts*, 7 GREEN BAG 353, 356 (2004) ("Federal law is notoriously non-uniform among the different circuits, and the Supreme Court is apparently sufficiently indifferent to this fact that it leaves many inter-circuit conflicts unresolved."); Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1483 (2005) (stating that "[e]ven narrowly focused federal rights often have nonuniform application, simply by virtue of various federal district courts, and federal appellate courts . . . coming to different conclusions on the same issue" and "[c]ircuit splits on federal law are not an uncommon phenomenon, and not all such splits are . . . resolved by[] the Supreme Court"). *But see* JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 46 (1995) ("Current empirical data . . . indicate that intercircuit inconsistency is not a problem."); Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 792 (1995) (concluding, based on an analysis of 210 cases of circuit conflicts that the Supreme Court did not review during the 1988, 1989, and 1990 terms, that most conflicts were eventually resolved by subsequent decisions or litigation or otherwise do not persist).

366. *See* LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 98 (1994) ("[T]he Supreme Court no longer has the capacity to sit as a court of error in routine cases."); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1241 (2004) (noting "the Supreme Court's limited capacity to superintend the fifty state court systems").

367. *See, e.g.*, Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting) (writing that the United States Supreme Court "cannot even come close to 'doing the whole job'" of "correct[ing] erroneous state-court decisions").

368. *See* New York v. United States, 505 U.S. 144, 177 (1992) (invalidating a provision of the Federal Low-Level Radioactive Waste Policy Amendments Act because the Constitution prohibits commandeering state legislatures).

369. *See* Printz v. United States, 521 U.S. 898, 933 (1997) (invalidating provisions of the Brady Handgun Violence Prevention Act because the Constitution prohibits requiring state executive officials to enforce federal law).

pendently the Federal Constitution reflected the importance of state courts in our constitutional design. In addition, consolidation undermines the benefits of experimentation that are a feature of American federalism. Allowing state courts to adopt more expansive readings of constitutional rights would generate information about how rights might be structured in various ways and the effects of different choices. There would be, therefore, gains to the system as a whole: approaches and outcomes in one state could be watched by other states, and federal courts could also draw upon the lessons of localized experimentation.[370]

Consolidation has also weakened *state* constitutional law as developed and applied by the state courts. Requiring state courts to enforce the Bill of Rights as defined and policed by the Supreme Court has left state constitutional law in the modern era relatively undeveloped. This is for two reasons. First, the incorporation of federal constitutional protections has displaced state constitutional law as the principal source of individual rights.[371] Second, rather than decide independently what provisions of state constitutions mean, modern state courts have tended to hew to the Supreme Court's understandings of analogous provisions in the Federal Constitution.[372] The trend is

370. *See, e.g.*, Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1505 n.116 (1987) ("[D]isuniformity created by various judges applying federal law . . . inform[s] and enrich[es] the uniform interpretation ultimately supplied by the Supreme Court."); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1251 (1978) ("A number of 'reforms' in criminal procedure imposed as a matter of federal constitutional law by the Warren Court were already well established as a matter of state law in a significant number of states.").

371. *See, e.g.*, Althouse, *supra* note 370, at 1490 ("As long as state courts were engaged in absorbing these new standards [incorporated by the Fourteenth Amendment], they left analogous provisions in state constitutions unexplored.").

372. *See, e.g.*, Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1, 322 (1996) (describing as "disturbingly inadequate" the approach to search and seizure of the New York courts under the state constitution); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1017 (1997) ("[M]any state courts . . . collapse state and federal constitutional analysis, and . . . decide cases as though the two constitutions were the same."); Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?,* 46 WM. & MARY L. REV. 1499, 1502 (2005) (reporting that, in the "clear majority of cases," state courts inter-

not entirely in one direction. State courts have, on occasion, read state constitutional provisions more generously than the United States Supreme Court understands coordinate federal provisions.[373] Notably, in very recent years, state courts have invoked state constitutional provisions to invalidate state laws prohibiting same-sex marriages.[374] The Minnesota Supreme Court also deserves special mention. In a 2005 voting rights decision,[375] the court set out a roadmap for interpreting provi-

preting state constitutions follow federal constitutional doctrine). Justice Hans Linde of the Oregon Supreme Court has been especially critical of state court decisions on state constitutional issues that merely track Supreme Court decisions on federal constitutional issues. *See* State v. Kennedy, 666 P.2d 1316, 1322 (Or. 1983) (writing that state courts' adoption of federal constitutional doctrine represents the "non sequitur that the United States Supreme Court's decisions under such a text not only deserve respect but presumptively fix its correct meaning also in state constitutions").

373. *See, e.g.*, State v. Sullivan, 74 S.W.3d 215, 222 (Ark. 2002) (invalidating under the state constitution pretextual arrests and noting that "[w]e depart from the standards established by the federal courts and rely instead on independent state grounds to determine what, in Arkansas, constitutes unreasonable police conduct warranting suppression"); People v. Haley, 41 P.3d 666, 672–77 (Colo. 2001) (relying on a state constitutional search and seizure provision as providing broader protections than the Fourth Amendment and invalidating as unreasonable a "dog sniff" of an automobile); Powell v. State, 510 S.E.2d 18, 21–26 (Ga. 1998) (striking down a state sodomy law on state constitutional privacy grounds, interpreted more broadly than federal protections); Ascher v. Comm'r of Pub. Safety, 519 N.W.2d 183, 186–87 (Minn. 1994) (holding that random sobriety checkpoints, without the police having an objective individualized articulable suspicion of criminal activity before stopping a driver, violate the state constitutional protection against unreasonable searches and seizures, although the Supreme Court, in *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 447 (1990), had held such checkpoints do not violate the Fourth Amendment).

374. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961, 969 (Mass. 2003) (holding that the state's ban on same-sex marriage did "not meet the rational basis test for either due process or equal protection" under the Massachusetts Constitution and redefining civil marriage to allow two persons of the same sex to marry); Lewis v. Harris, 908 A.2d 196, 220–21 (N.J. 2006) (holding that New Jersey's statutory ban on same-sex marriage violates equal protection guarantees of the state constitution but that this violation could be cured by the state's authorizing same-sex civil unions instead of same-sex marriages); Baker v. State, 744 A.2d 864, 870, 886 (Vt. 1999) (holding that same-sex couples are entitled "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples" under the Common Benefits Clause of the Vermont Constitution, "its counterpart [to] the Equal Protection Clause of the Fourteenth Amendment"). Not all state courts have held a ban on same-sex marriage to violate the state constitution. *See, e.g.*, Hernandez v. Robles, 855 N.E.2d 1, 18, 20 (N.Y. 2006) (holding that the New York ban on same-sex marriage does not violate the due process or equal protection provisions of the New York state constitution).

375. Kahn v. Griffin, 701 N.W.2d 815 (Minn. 2005). In this case, the federal

sions of the state constitution more broadly than the Federal Constitution.[376] The decision emphasized federalism's "double source of protection for . . . rights,"[377] cited the role of "the highest court of this state"[378] in providing "'the first line of defense for individual liberties,'"[379] and invited litigants to aid in the development of state constitutional law.[380] Yet these examples of state court independence are notable because they are un-

district court certified the question: "Does the Minnesota Constitution provide greater protections to the right to vote than does the United States Constitution such that failure to hold prompt elections following decennial redistricting violates . . . the Minnesota Constitution . . . [or state statutory law]?" *Id.* at 818. The Minnesota Supreme Court answered the certified question in the negative. *Id.* at 836.

376. *See id.* at 828–29. The court summarized its approach as follows:

> [W]e will not, on some slight implication and vague conjecture, depart from federal precedent . . . . But, when we reach a clear and strong conviction that there is a principled basis for greater protection of the individual civil and political rights of our citizens under the Minnesota Constitution, we will not hesitate to interpret the constitution to independently safeguard those rights. . . . [W]e are most inclined to look to the Minnesota Constitution when we determine that our state constitution's language is different from the language used in the U.S. Constitution or that state constitutional language guarantees a fundamental right that is not enumerated in the U.S. Constitution. . . . We take a more restrained approach when both constitutions use identical or substantially similar language. But we will look to the Minnesota Constitution when we conclude that the United States Supreme Court has made a sharp or radical departure from its previous decisions or approach to the law and when we discern no persuasive reason to follow such a departure. We also will apply the state constitution if we determine that the Supreme Court has retrenched on Bill of Rights issues, or if we determine that federal precedent does not adequately protect our citizens' basic rights and liberties.

Id. at 828 (footnotes and citations omitted). It is too soon to gauge the effects of the court's articulation of its commitment to state constitutional principles and of the circumstances under which it will depart from federal case law. For a useful analysis of the Minnesota Supreme Court's approach and some optimism about its likely effects (coauthored by one of the court's members), see Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865 (2007).

377. *Kahn*, 701 N.W.2d at 824 (internal quotations omitted) (quoting 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, 552 (1986)).

378. *Id.* at 828.

379. *Id.*

380. *Id.* at 829 ("[O]ur recent focus on our state constitution has increased the possibility that it may be relevant to any given case. Litigants who appear before our court can and should be of significant assistance when we address a provision of the state constitution.").

usual. As Michael Solimine reports, "systematic studies demonstrate that most state courts, when presented with the opportunity, have chosen not to depart from federal precedents when interpreting the rights-granting provisions of state constitutions. . . . [T]he majority of state courts, on most issues, engage in an analysis in lockstep with their federal counterparts."[381] Not only have state courts lost a voice under the Federal Constitution—they are out of practice speaking under their state constitutions as well.[382]

In light of a growing recognition of these concerns, there is expanding interest in enhancing the constitutional roles of entities besides the Supreme Court. Commentators have explored and debated the potential of state constitutions for protecting individual rights;[383] the possibilities of dual enforcement of federal constitutional norms by federal and state courts;[384] and the

381. Solimine, *supra* note 353, at 338.

382. *See, e.g.*, Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1481 & n.4 (1990) (writing that a hurdle for Texas courts to begin reading the protections for criminal defendants in the state constitution more expansively is that "for more than 100 years the Texas criminal courts have interpreted the state and federal constitutions identically").

383. Justice William Brennan, for example, thought that in the post–Warren Court period, state constitutions existed as important sources for protecting individual liberty. *See* Brennan, *supra* note 377; William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). By contrast, Professor Gardner takes a more pessimistic view of the possibilities of state constitutions. *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992) ("[S]tate constitutional law today is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements."); *see also* Schapiro, *supra* note 338, at 1415 ("State court experience . . . has demonstrated the unfortunate, but unsurprising, truth that elected [state] judiciaries have difficulty protecting individual rights against majoritarian forces."). In an argument that resonates with the themes of this Article, Kermit Hall contends that the decline in the vibrancy of state constitutions coincided with the rise of federal constitutional law in the post–Civil War era. *See* Kermit L. Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions, in* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 388, 402–03 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

384. Solimine, *supra* note 365, at 1457 ("In the dual enforcement of constitutional norms in the United States, state governmental institutions, and particularly state courts, are entrusted with adjudicating federal constitutional and statutory rights."). Invoking the concept of parity, scholars have vigorously debated whether federal and state courts are equally well suited to enforcing federal constitutional rights. *See, e.g.*, MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM 34–62 (1999) (arguing that empirical evidence shows that federal rights are as likely to be protected in state court as in federal court); Burt

prospect of the nonjudicial branches of government interpreting and enforcing constitutional provisions,[385] particularly when the courts do not fully enforce constitutional norms.[386] These programs, each motivated by pessimism about the modern state of constitutional practices, are, in a general sense, congruent with the historically vibrant system of constitutional law I have explored in this Article. Each seeks to create a site of constitutional decision making that will stand strong and apart from the Supreme Court and its understanding of the Federal Constitution. However, none of these other approaches takes sufficient account of the modern consolidation of four bodies of constitutional law into just two. Until *this* development and its implications are fully understood, reform remains doubtful. In particular, efforts to push state courts to work independently in deciding state constitutional law issues are likely to fail in a context in which state courts, deciding federal constitutional issues, follow so closely in step with the United States Supreme Court.

Finally, consolidation helps account for the enormous tension that is characteristic of our current regime. When federal constitutional rights are ultimately dependent upon the United States Supreme Court, and it reviews a very small number of cases, the stakes in any decision by that Court are exceedingly high. The Court's ruling sets the standards for the entire nation; there might not be another opportunity to revisit an issue for many decades. In this context, it is no surprise that modern confirmation battles are ferocious. Were federal constitutional rights less in the hands of the Court (or, as is sometimes the

Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that state courts do not protect federal constitutional rights as forcefully as do federal courts).

385. *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (arguing against the courts having a monopoly on constitutional law and in favor of giving the Constitution to Congress to interpret and protect).

386. Lawrence Sager argues that valid yet underenforced constitutional norms exist: institutional constraints prevent the federal courts from enforcing otherwise valid and enforceable constitutional rights to their fullest extent. *See* Sager, *supra* note 370, at 1213–28. It, therefore, falls on both Congress and the state courts to enforce these rights more completely. *See id.* at 1242–63. The Supreme Court should defer to congressional judgments recognizing expanded constitutional rights and refrain from reviewing state court decisions construing constitutional rights more broadly than corresponding federal interpretations. *See id.* at 1242–43; *see also* LAWRENCE G. SAGER, JUSTICE IN PLAIN CLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 84–128 (2004).

case, a single justice),[387] some energy would shift away from this single institution. Similarly, a more active role for state courts (or other entities) in federal constitutional interpretation would temper the oft-heard criticism that judges, particularly federal judges, are unaccountable and undermine democracy. Such criticisms are less salient if responsibility for applying the Federal Constitution is, as it once was, shared by state court judges who are elected to office for fixed terms.[388]

CONCLUSION

The familiar story of the Constitution—its "biography"[389]—is one in which freedom marches forward. Less than perfect at inception and requiring some fundamental transformations to fulfill its promises, the Constitution has over time deepened its liberties and expanded their reach.[390] It is impossible to deny that the Constitution is today a better document and the nation a better place with the end of slavery,[391] with the requirement that the states accord people equal protection and respect due process,[392] with increased access to voting,[393] and with a commitment to the political equality of women.[394] At the same time, the modern consolidation of constitutional law produces costs: once-robust sources for protecting rights and for producing constitutional innovations have disappeared. Our predecessors protected freedom by dividing up and dispersing power

387. *See* Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1 (reporting that in the Court's 2007 Term, Justice Anthony M. Kennedy, who dissented only twice in the 68 cases with signed opinions, and who was in the majority in all 24 of the 5-4 cases, "assumed Justice Sandra Day O'Connor's former position at the Court's center").

388. The benefit should not be exaggerated. *See* Michael E. Solimine & James L. Walker, *State Court Protection of Federal Constitutional Rights*, 12 HARV. J.L. & PUB. POL'Y 127, 161 (1989) (writing that "state courts are, like federal courts, ultimately anti-majoritarian political institutions" and that under *Long* "[t]he Supreme Court can [usefully] serve as an appropriate check on excessive and unsound decisions on federal law by state courts").

389. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005).

390. *See, e.g.*, Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) ("[S]everal amendments, a civil war, and momentous social transformation [were needed after 1789] to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today.").

391. U.S. CONST. amend. XIII.

392. *Id.* amend. XIV.

393. *Id.* amends. XV, XIX, XXIV.

394. *Id.* amend. XIX.

rather than by centralizing it in a single entity. Recognizing the important place of the Bill of Rights in the early state courts allows for a more complete assessment of the different choices we have made and for a richer conversation about the possibility of reform.