TEACHING THE TRANSFORMATIVE FOURTEENTH AMENDMENT

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If the constitutional law casebooks are a reliable guide, most teach the Fourteenth Amendment, like other parts of the Constitution, by presenting separately the various doctrinal topics it has raised.[1] The principal clauses of the Amendment, or really those in the second sentence of Section 1[2]—the Equal Protection, Due Process, and Privileges or Immunities Clauses—are generally extracted from its text and classes are structured around the leading cases decided under each and the resulting doctrine. Cases under the Equal Protection or Due Process Clause may be further separated. Based on the class of claimants, for instance, the cases involving racial and gender equality and affirmative action may be presented as distinct topics. Further subdivision may group the cases involving education, employment, and voting, for instance. Sometimes equal protection and due process both appear, either because claimants raised, or opinions addressed, each constitutional hook or because an equal protection claim against the federal government was necessarily brought under the Fifth Amendment's Due Process Clause. Incorporation receives some, although much briefer, treatment, casebook page allocation suggests.[3]

Some such conceptual approach is common and sensible. It is important for students to learn something about the history, doctrine, and analytical approaches regarding the various distinct clauses of the Fourteenth Amendment, to read the important cases and understand the arguments the Court found convincing and those it rejected. And it is impossible to begin to understand the Fourteenth Amendment without studying its principal clauses.

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1. *See, e.g.*, JESSE CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, AND QUESTIONS (12th ed. 2013); NORMAN REDLICH, JOHN ATTANASIO & JOEL K. GOLDSTEIN, CONSTITUTIONAL LAW (5th ed. 2008); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (7th ed. 2013); KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW (18th ed. 2013).

2. U.S. CONST. amend. XIV, §1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

3. *See, e.g.*, CHOPER ET AL., *supra* note 1, at 396–414; REDLICH ET AL., *supra* note 1, at 380–85; STONE ET AL., *supra* note 1, at 729–35; SULLIVAN & FELDMAN, *supra* note 1, at 446–65.

Yet the danger always exists, in studying constitutional law or anything else, that paying the necessary attention to the particulars may interfere with grasping the general, that a focus on specific clauses may hide wider truths, that examining the trees of constitutional law might obscure the forest. That's certainly, and perhaps especially, true of the Fourteenth Amendment. The focus on the Equal Protection and Due Process Clauses separately certainly and appropriately signals their importance as discrete constitutional provisions, yet unless the lens is pulled back a bit to allow a panoramic view it may not capture the extraordinary way that the Fourteenth Amendment has transformed the Constitution.

That would be a huge loss. The Fourteenth Amendment has made the Constitution much more rights-focused and rights-protective, restructured the relationship between national and state government,[4] and changed the role and work of branches of the national government, among other things. And it gave equality and fairness a more exalted and prominent place in American constitutional ideals, thereby recognizing and celebrating American pluralism as among the Constitution's strengths and intrinsic and enduring commitments. The transformation occurred largely through the process of incorporation of rights as against the states and through the development of the Equal Protection and Due Process Clauses over time, and these three Fourteenth Amendment streams together have made the theory and practice of American constitutional government quite different from what previously existed.

It is certainly not novel to recognize the transformative quality of the Fourteenth Amendment. Writing nearly three decades ago, the distinguished constitutional scholar and federal judge Louis H. Pollak observed that during the twentieth century, "the scope of the fourteenth amendment has been, and remains, the most actively controverted complex of constitutional issues,"[5] and nothing has undermined the truth of Judge Pollak's judgment in the intervening years. William Araiza in his masterful study of the Fourteenth Amendment Enforcement Clause recently wrote that "it is nearly impossible to exaggerate the importance of the Fourteenth Amendment. It constitutes the central text of the second framing of the Constitution, in which federal constitutional rights were granted to Americans not just as against the federal government but also against their own states."[6]

4. Duncan v. Louisiana, 391 U.S. 145, 173 (1968) (Harlan, J., dissenting) ("The Civil War Amendments dramatically altered the relation of the Federal Government to the States."); *see also* ERNEST A. YOUNG, THE SUPREME COURT AND THE CONSTITUTIONAL STRUCTURE 192 (2012) (noting grants of power to Congress but arguing that "the more important shift was along the dimension of federalism").

5. Louis H. Pollak, *"Original Intention" and the Crucible of Litigation*, 57 U. CIN. L. REV. 867, 878 (1989).

6. WILLIAM D. ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW 1–2 (2015); *see also* BERNARD

Yet recognition may not lead to classroom communication, especially since the need to study various clauses and associated doctrine and the pressures of curriculum coverage may distract from larger themes about constitutional interpretation and structure implicit in the Fourteenth Amendment. Unless constitutional law courses consider not simply the individual clauses of the Fourteenth Amendment but the way together they transformed the subject more generally, the courses may leave students with a distorted view of constitutional interpretation and an understated sense of the role of that Amendment.

Constitutional amendments come so rarely that all are special but even within that rarified group the Fourteenth Amendment has had an exceptional impact. It is a nice coincidence that it occupies the exact midpoint of the twenty-seven constitutional amendments. That fortuity regarding its current constitutional placement symbolizes the pivotal role it plays in the constitutional structure.

This Essay will begin with some general background in Part I to place the Fourteenth Amendment in some historical context. Part II will sketch how incorporation, substantive due process, and the Equal Protection Clause changed the Constitution in ways that went beyond the doctrine they introduced. Part III will extract some larger lessons regarding the way in which these doctrines transformed constitutional interpretation and government more generally which are worth sharing with students.

I. THE FOURTEENTH AMENDMENT IN HISTORICAL CONTEXT

The Constitution as initially ratified specifically protected relatively few rights. It was, of course, amended twelve times during roughly the first fifteen years following its adoption to include, among other provisions, the Bill of Rights, but these guarantees protected individuals against certain actions by the national, not by state, government. Indeed, the Supreme Court held in *Barron v. Mayor & City Council of Baltimore*, one of Chief Justice John Marshall's last opinions, that constitutional clauses which use general language only protect individual rights as against federal, not state, action.[7] The Constitution only constrained state action when it so specified, for instance, by enjoining "No state shall . . ." as it does repeatedly in Article I, Section 10. Accordingly, the pre-Civil War Constitution protected very few rights, most of which ran as against the federal government only, and state governments had relatively great latitude

SCHWARTZ, FROM CONFEDERATION TO NATION: THE AMERICAN CONSTITUTION, 1835–1877, at 190 (1973) ("From a legal point of view, the changes [from the Civil War Amendments] were fundamental, for they made for a nationalization of civil rights that was completely to transform the constitutional system. The protection of life, liberty, and property now became a national responsibility—federalizing, as it were, the vindication of individual rights throughout the land.").

7. 32 U.S. 243, 250–51 (1833).

to regulate except to the extent that state laws conflicted with federal legislation or state constitutions.

And, of course, most significantly, the Constitution accepted African-American slavery, an institution and practice which treated African Americans as property while denying their equal humanity. The Court gave voice to that view in the infamous *Dred Scott* decision.[8]

So things remained until the Civil War. That traumatic event was, of course, a monumental turning point in American history, and not surprisingly the constitutional structure that emerged after it was quite different from the prior regime. The aftermath produced new constitutional texts that reflected, allowed, and inspired changed arrangements. As Justice Thurgood Marshall put it in a May 1987 speech marking the Constitution's bicentennial, while "[T]he Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the 14th Amendment, ensuring protection of the life, liberty, and property of all persons against deprivations without due process, and guaranteeing equal protection of the laws."[9] Whereas the Bill of Rights had restrained national, not state, government, the three Civil War amendments imposed restraints on state, and in some cases national, government. Moreover, each empowered Congress to enforce its terms, a radical departure from the prior twelve amendments which had explicitly or implicitly limited Congress.

Yet even among the three Civil War amendments, the Fourteenth Amendment stands out. The Thirteenth and Fifteenth Amendments each rather succinctly addressed one specific, although highly significant, subject: prohibiting slavery and conferring the right of African Americans to vote, respectively. By contrast, the Fourteenth Amendment is striking in the number of topics covered and its combination of specific problem-solving and articulation of more abstract concepts.

The Fourteenth Amendment is the wordiest amendment and much of its length comes in the three middle clauses of the Amendment which now receive little attention. Section 2 replaced the Three-Fifths Clause in the original Constitution with a provision that counted blacks as full persons for purposes of determining representation in the House of Representatives so long as twenty-one-year old male citizens were not disenfranchised in federal or state elections except for participation in rebellion or crime. That provision became necessary especially, ironically, after the Thirteenth Amendment converted southern slaves to free persons. That highly-desired outcome, coupled with the possibility that southern blacks, though free, would be denied the vote, had one potentially

8. Dred Scott v. Sandford, 60 U.S. 393 (1857).

9. Remarks of Thurgood Marshall at the Annual Seminar of the San Francisco Patent and Trademark Law Association (May 6, 1987), *in* THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 284 (Mark V. Tushnet ed., 2001).

dire consequence. It threatened to give the South a windfall in representatives and presidential electors without making its electorate more inclusive. Section 2 was designed to obviate that threat by linking increased southern political power to enfranchisement of African Americans.[10] Section 3 excluded from federal or state office anyone who had violated an oath to support the Constitution unless Congress removed the disability. Section 4 guaranteed the national debt and prohibited Congress from assuming the Confederacy's debt or compensating slave owners for the emancipation of slaves.

Although much of the debate regarding the Fourteenth Amendment focused on these intermediate sections,[11] the Amendment's first section provided the new constitutional provisions that transformed constitutional doctrine going forward. The first sentence of Section 1 contains the Citizenship Clause which makes U.S. citizenship a function of birth or naturalization and bases state citizenship simply on the residence decision of a U.S. citizen, thereby overturning the infamous *Dred Scott* decision.[12] The second sentence contains three clauses inhibiting state action abridging the privileges or immunities of U.S. citizens, or depriving any person of life, liberty, or property without due process of law or the equal protection of the laws. Section 5 grants Congress legislative power to enforce the rest of the Amendment, including Section 1.

The Fourteenth Amendment is relatively unique. Unlike most other amendments, it addresses multiple topics. Unlike the first twelve amendments, it confers rights as against the states. And especially in the second sentence of Section 1, it confers rights in language that is more general and more abstract than is otherwise common.

The trilogy of rights in Section 1's second sentence might have been viewed as a package of rights, sort of a belt-and-suspenders approach to ensure that African Americans would enjoy the benefits of equal treatment going forward.[13] The Privileges or Immunities Clause seems to confer certain unspecified substantive rights,[14] the Due Process Clause seems to assure procedural regularity before a person is deprived of something important, and the Equal Protection Clause seems to guarantee identical treatment at law absent some appropriate basis for discriminating.[15]

10. U.S. CONST. amend. XIV, § 2.

11. BERNARD SCHWARTZ, FROM CONFEDERATION TO NATION: THE AMERICAN CONSTITUTION, 1835–1877, at 197–98 (1973).

12. *Dred Scott*, 60 U.S. at 454.

13. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 23–24 (1980).

14. *See* ARAIZA, *supra* note 6, at 31 ("Today, many scholars believe that any substantive rights the drafters intended the amendment bestow were granted by the Privileges or Immunities Clause.").

15. ELY, *supra* note 13, at 24.

That was not, however, the path constitutional doctrine traveled. In the *Slaughter-House Cases*[16] in 1872, the Court rendered the Privileges or Immunities Clause essentially a constitutional nullity.[17] There, white butchers claimed that a butchering monopoly Louisiana's state government established violated their rights under the Thirteenth and Fourteenth Amendments to practice their lawful trade.[18] The plaintiffs' argument carried the implication that the Constitution limited state legislative power to encumber their right to practice their trade (and presumably many other rights), thereby suggesting a dramatic shift of power from the states by virtue of a new constitutional norm and the aggrandizement of the Court as constitutional interpreter and Congress as its enforcer. Justice Miller emphatically rejected[19] the premise that the Fourteenth Amendment "radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."[20] Writing for a five-justice majority, he interpreted narrowly each of the three clauses in the second sentence of Section 1 of the Fourteenth Amendment. He essentially limited the Equal Protection Clause to claims by

16. 83 U.S. 36 (1873).

17. RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW 81 (2004); *see also* Saenz v. Roe, 526 U.S. 489, 521 (1999) (Thomas, J., dissenting) ("[T]he Court all but read the Privileges or Immunities Clause out of the Constitution in the *Slaughter-House Cases*.").

18. *Slaughter-House*, 83 U.S. at 43.

19. *Id.* at 77–78 ("All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people, the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.").

20. *Id.* at 78. For an interesting set of questions regarding *Slaughter-House* and federalism, see YOUNG, *supra* note 4, at 226–27.

disadvantaged African Americans,[21] apparently viewed the Due Process Clause as simply affording fair procedures,[22] and held that the sort of claim the butchers made was not within the limited set the Privileges or Immunities Clause protected against state action.[23]

Justice Miller's narrowing strategies were inconsistent with the history of the framing and ratification of the Fourteenth Amendment, at least in limiting Section 1 to African Americans and confining the Privileges or Immunities Clause as he did.[24] This Essay is not the occasion to do more than sketch with a broad brush the subsequent developments with general reference to some of the constitutional historians whose work provides a closer look.[25] Although the Court has adhered to a narrow view of the Privileges or Immunities Clause, it has rejected Justice Miller's definitions of the Fourteenth Amendment's Due Process and Equal Protection Clauses and, in so doing, has allowed the Amendment to become transformational somewhat in the way the majority feared in the *Slaughter-House Cases.*

II. THE FOURTEENTH AMENDMENT'S STREAMS OF TRANSFORMATION

The expansion of the Due Process and Equal Protection Clauses was consequential, but the changes did not happen immediately once the Fourteenth Amendment was added to the Constitution. Nor did they follow in a linear fashion. The changes occurred through a) the application of rights against state government which were previously recognized only as existing against the federal government; b) the growth of the Equal Protection Clause; and c) the expansion of the Due Process Clause.

A. Incorporation

Although the Privileges or Immunities Clause seemed the most logical vehicle to incorporate substantive rights as against the states,[26] the *Slaughter-*

21. *Slaughter-House*, 83 U.S. at 81 ("We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other.").

22. *Id.* at 80–81.

23. *Id.* at 73–78.

24. *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 163–64 (1988).

25. *See, e.g.*, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 56 (1998); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); RICHARD KLUGER, SIMPLE JUSTICE (1975); NELSON, *supra* note 24, at 165–200.

26. ELY, *supra* note 13, at 18, 22–30.

House Cases were deemed to eliminate that option notwithstanding some occasional judicial suggestions to the contrary.[27]

Yet largely during the twentieth century the Court has, with few exceptions, made virtually all provisions of the Bill of Rights applicable as against the states through the Due Process Clause of the Fourteenth Amendment. The process began in 1897 when the Court effectively held that the Clause applies the Fifth Amendment's Takings Clause as against state action[28] and continued most recently in *McDonald v. City of Chicago*[29] where the Court held, 5-4, that the individual Second Amendment right recognized two years earlier,[30] through the Fourteenth Amendment, limited state and local government. There, only a plurality thought the Due Process Clause was the vehicle of incorporation and Justice Thomas relied on the Privileges or Immunities Clause.[31]

Incorporation of rights as against the states did not occur immediately or inexorably. The subject provoked much debate along the way.[32] During the early twentieth century, the Court applied the Due Process Clause to make the First Amendment's protections of speech and press applicable to the states.[33] Justice Brandeis observed in 1927 in *Whitney v. California* that "[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus, all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States."[34] The Court confirmed within two decades that the Due Process Clause

27. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, J., concurring) ("I can say only that the words 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' seem to me an eminently reasonable way of expressing the idea that, henceforth, the Bill of Rights shall apply to the States."); McDonald v. City of Chicago, 561 U.S. 742, 806 (2010) (Thomas, J., concurring) ("Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause."). *Cf. Duncan*, 391 U.S. at 166 n.1 (Black, J., concurring) ("My view has been and is that the Fourteenth Amendment, *as a whole*, makes the Bill of Rights applicable to the States. This would certainly include the language of the Privileges and Immunities Clause, as well as the Due Process Clause.").

28. Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897).

29. 561 U.S. 742, 791 (2010).

30. *See* District of Columbia v. Heller, 554 U.S. 570 (2008).

31. *McDonald*, 561 U.S. at 806.

32. *See* Adamson v. California, 332 U.S. 46, 47–125 (1947) (opinions of Reed, Black, Frankfurter, and Murphy); s*ee also* AKHIL REED AMAR, THE BILL OF RIGHTS 137–40 (1998).

33. Near v. Minnesota, 283 U.S. 697, 707 (1931); Fiske v. Kansas, 274 U.S. 380, 387 (1927); Gitlow v. New York, 268 U.S. 652, 666 (1925).

34. 274 U.S. 357, 373 (1927).

incorporated the First Amendment,[35] yet as John Raeburn Green pointed out at the time, the process was slower in cases dealing with criminal procedure.[36]

The Court rejected the idea that the Fourteenth Amendment applied the Bill of Rights as against the states in *Palko v. Connecticut*.[37] Ten years later, the Court concluded that the Fifth Amendment's privilege against self-incrimination did not apply as against the states.[38] Writing for the majority, Justice Reed embraced the conclusion of the *Slaughter-House Cases* and restated Justice Miller's distinction that the Fourteenth Amendment prohibited states from infringing privileges or immunities of federal, but not state, citizenship, a dichotomy that safeguards federalism[39] in addition to its other consequences. Moreover, the majority rejected the argument that the Fourteenth Amendment's Due Process Clause made the Fifth Amendment's privilege against self-incrimination applicable as against the states.[40] *Adamson*, however, triggered a judicial discussion between the New Deal Justices regarding how to determine what rights the Fourteenth Amendment incorporated against the states and the appropriate methodology for incorporating those rights.[41] Whereas Justice Black argued for incorporation of the entire Bill of Rights, Justice Frankfurter argued that approach undermined state experimentation that could lead to greater protection of liberty.[42]

Yet some of the guarantees of the Bill of Rights regarding criminal procedure had been selectively applied as against the states by mid-century[43] and the Warren Court embraced and accelerated the project during the 1960s.[44] In all, the Court has held that the Fourteenth Amendment includes and protects as against state action every right in the first eight amendments except the no quartering of soldiers protection of the Third Amendment, the grand jury indictment provision of the Fifth Amendment, the civil trial jury right of the Seventh Amendment, and the Excessive Fines Clause of the Eighth

35. Everson v. Bd. of Educ., 330 U.S. 1, 7–8, 15, 17–18 (1947); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Schneider v. State, 308 U.S. 147, 160 (1939). *See generally* John Raeburn Green, *The Bill of Rights, the Fourteenth Amendment and the Supreme Court*, 46 MICH. L. REV. 869 (1948).

36. Raeburn Green, *supra* note 35, at 876–95.

37. 302 U.S. 319, 323 (1937).

38. Adamson v. California, 332 U.S. 46, 54 (1947).

39. *Id.* at 53 ("It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship. . . . This construction has become embedded in our federal system as a functioning element in preserving the balance between national and state power.").

40. *Id.* at 53–55.

41. *See id.* at 47–125 (opinions of Reed, Black, Frankfurter, and Murphy).

42. *Id.* at 67–68 (Frankfurter, J., concurring).

43. *See generally* Raeburn Green, *supra* note 35, at 876–78.

44. PHILIP B. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 73–82 (1970).

Amendment.[45] Writing in 1968, Justice Black noted that through selective incorporation the Court had almost reached the total incorporation destination he had prescribed twenty-one years earlier in *Adamson*, making him a "happy" Justice regarding the outcome, if not the methodology. [46]

Justice Harlan saw less reason for joy. He complained of the near total incorporation on the centennial of the Fourteenth Amendment. Such extensive incorporation "put the States in a constitutional straitjacket with respect to their own development in the administration of criminal or civil law," he wrote.[47] Justice Harlan thought imposition of a uniform national constitutional norm interfered with the states' ability to function as laboratories of democracy.[48] Justice Black dismissed these concerns that incorporation "interferes with our concept of federalism in that it may prevent States from trying novel social and economic experiments" since he "never believed that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the Bill of Rights."[49] More recently, Justice Alito, speaking for himself, Chief Justice Roberts, and Justices Scalia and Kennedy, rejected a federalism-based argument against incorporating the Second Amendment. He acknowledged that:

> [I]ncorporation of the Second Amendment right will to some extent limit the legislative freedom of the States, but this is always true when a Bill of Rights provision is incorporated. Incorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights.[50]

He wrote that under the Court's precedents, "if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values."[51]

Incorporation has had an enormous impact. Federal constitutional rights that once existed only against the national government now apply as against the states. This new set of rights as against state government covers an area virtually as broad as the Bill of Rights—speech, press, assembly, religion, gun possession, police conduct in connection with searches and seizures and interrogation, the

45. McDonald v. City of Chicago, 561 U.S. 742, 765 n.13 (2010).

46. Duncan v. Louisiana, 391 U.S. 145, 164 (1968) ("I am very happy to support this selective process through which our Court has since the *Adamson* case held most of the specific Bill of Rights' protections applicable to the States to the same extent they are applicable to the Federal Government.").

47. *Id.* at 175–76.

48. *Id.* at 193.

49. *Id.* at 170.

50. *McDonald*, 561 U.S. at 790 (footnote omitted).

51. *Id.* at 784–85.

criminal justice system, and state and local confiscation, invasion, and regulation of private property. A wide assortment of state and local conduct is now subject to federal constitutional norms to be applied by federal, as well as state, jurists.

Space does not allow a full survey of the cases but a better appreciation of the impact of incorporation may come from taking a brief, closer look at one area. The incorporation of the religion clauses has subjected public schools to the requirements of the Free Exercise and Establishment Clauses, which have inhibited activities that would otherwise occur in some jurisdictions. Public schools cannot, for instance, require a religious objector to salute the flag in violation of his or her religious beliefs,[52] or present a school-sponsored prayer whether the prayer is prepared by the school[53] or is a Bible reading,[54] or, at graduation.[55] They cannot offer a moment of silence for voluntary prayer,[56] or display religious symbols in the classroom.[57] States are limited regarding the use of public monies to support religious activity.[58] These decisions are simply a subset of those relating to public schools. Other cases involving one or both religion clauses address public display of religious symbols,[59] prayer at the state legislature and local government meetings,[60] religious belief as a basis for exemption from employment obligations,[61] and exempting religious organizations from reporting requirements imposed on other charities.[62] Even when the Court has upheld challenged behavior, incorporation has made state and local officials subject to constitutional norms set forth in the Bill of Rights that formerly applied only to the federal government.

B. Substantive Due Process

The expansion of the Fourteenth Amendment has also occurred through the development of the doctrine of substantive due process. John Hart Ely famously described substantive due process as "a contradiction in terms—sort of like 'green pastel redness.'"[63] But the oxymoronic quality of substantive due process has not destroyed its constitutional significance. Perhaps allowance has been made for the Due Process Clause to do some of the work the Fourteenth

52. West Virginia v. Barnette, 319 U.S. 624, 641–42 (1943).
53. Engel v. Vitale, 370 U.S. 421, 430–32, 436 (1962).
54. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963).
55. Lee v. Weisman, 505 U.S. 577, 599 (1992).
56. Wallace v. Jaffree, 472 U.S. 38, 59–61 (1985).
57. Stone v. Graham, 449 U.S. 39, 42–43 (1980).
58. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 690, 693 (1994); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 397 (1985).
59. County of Allegheny v. ACLU 492 U.S. 573, 578–79 (1989).
60. Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).
61. Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 717–18 (1981).
62. Larson v. Valente, 456 U.S. 228 (1982).
63. ELY, *supra* note 13, at 18.

Amendment's Privileges or Immunities Clause was supposed to do before Justice Miller sidelined it or, as Richard H. Fallon Jr. suggests, perhaps "some outcomes . . . are so substantively unfair that no process that produced them could count as 'due.'"[64]

Although the Court rejected the idea that the Due Process Clause encompassed plaintiffs' substantive claims in the *Slaughter-House Cases*, a few years later it accepted the idea that the Due Process Clause limited the states' regulatory power.[65] It embraced the idea that the Clause protected substantive rights of liberty of contract and property rights at the end of the nineteenth century.[66] In *Lochner v. New York*, the Court signaled a willingness to scrutinize police power legislation to determine whether liberty of contract or property rights were violated.[67] Only Justice Oliver Wendell Holmes Jr. dissented[68] from the idea that the Clause conferred substantive protection.[69] The jurisprudence of the *Lochner* period made the Due Process Clause an instrument whereby the Court could subject state police power regulations to strict review under the constitutional norm of liberty of contract.[70] Writing in 1930, Professor Felix Frankfurter recognized the end of slavery and "the participation of the Negro in the free life of the nation" as "political changes of stupendous meaning" but thought "even more important consequences, perhaps, flow from the new subjection of the states to national control through the effectual veto power exercised by the Supreme Court over state legislation" thanks to the Fourteenth Amendment.[71] During the first third of the twentieth century the Court used substantive due process to strike down state (and occasionally federal) legislation regulating economic matters until it effectively abandoned *Lochner* in *Nebbia v. New York*[72] and *West Coast Hotel v. Parrish*[73] during the mid-1930s. *Nebbia* announced a more deferential standard of review[74] and *West Coast Hotel* retreated from recognition of liberty of contract as a robust constitutional right.[75] "The day is gone when this Court uses the Due Process

64. FALLON, *supra* note 17, at 81–82.

65. Munn v. Illinois, 94 U.S. 113, 125, 134 (1877).

66. *See* Allgeyer v. Louisiana, 165 U.S. 578, 589–90 (1897).

67. 198 U.S. 45, 56 (1905).

68. *Id.* at 74–76.

69. *See* CUSHMAN, *supra* note 25, at 56.

70. *See, e.g.*, *Lochner*, 198 U.S. at 56.

71. FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 43 (1930).

72. 291 U.S. 502, 537–38 (1934). *See generally* CUSHMAN, *supra* note 25, at 80–83.

73. 300 U.S. 379 (1937).

74. *Nebbia*, 291 U.S. at 537 ("If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . .").

75. *Parrish*, 300 U.S. at 391–92 ("What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and

Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought," declared Justice William O. Douglas for a unanimous Court in 1955.[76]

Substantive due process was widely disparaged especially by New Deal Justices like Black[77] and Douglas.[78] Douglas's extreme aversion to the doctrine led to some creative outcomes. In *Skinner v. Oklahoma*, he excoriated a law providing for sterilization of certain repeat criminals in language suggestive of a substantive due process analysis but decided the case instead under the Equal Protection Clause.[79] Douglas's resistance to substantive due process made his penumbras approach more appealing to him in *Griswold v. Connecticut*[80] since it allowed him to construct an argument more consonant with Justice Black's total incorporation approach. He found the right of marital privacy in the penumbras of various parts of the Bill of Rights, and these were applied as against the states by the Fourteenth Amendment.[81] Others, however, found the right of marital privacy a protected Fourteenth Amendment "liberty" interest without reference to the Bill of Rights.[82] The Court soon embraced substantive due process more directly, first in *Loving v. Virginia*[83] as an alternative ground of decision and then in *Roe v. Wade*.[84]

uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. This essential limitation of liberty in general governs freedom of contract in particular.").

76. Williamson v. Lee Optical Inc., 348 U.S. 483, 488 (1955).

77. Ferguson v. Skrupa, 372 U.S. 726, 728–30 (1963) (rejecting substantive due process).

78. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 481–82 (1965) ("[W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York*, should be our guide. But we decline that invitation . . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." (citations omitted)).

79. 316 U.S. 535, 541 (1942) ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race . . . . He is forever deprived of a basic liberty.").

80. *Griswold*, 381 U.S. at 484.

81. *Id.* at 484–85; *see also id.* at 499 (Harlan, J., concurring) (recognizing, but objecting to, Justice Douglas's argument); Roe v. Wade, 410 U.S. 167–68 (1973) (Stewart, J., concurring) (accusing *Griswold* majority of purporting to avoid substantive due process).

82. *See, e.g.*, *Griswold*, 381 U.S. at 500 (Harlan, J., concurring); *id.* at 502 (White, J., concurring); *see also id.* at 511–16 (Black, J., dissenting) (criticizing Harlan and White for accepting substantive due process).

83. 388 U.S. 1, 12 (1967).

84. 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is . . . .").

The Court proceeded to recognize more categories of fundamental rights protected against state action by the Due Process Clause. In addition to the right of a married[85] or unmarried couple[86] to use contraceptives, the right to marriage,[87] and a woman's right to terminate her pregnancy,[88] the Court found rights relating to certain family relationships,[89] and the rights of a same-sex couple to engage in consensual intimate sexual conduct[90] and to marry.[91] Although some Justices have tried to cabin the reach of the doctrine,[92] it has most recently been the primary constitutional basis for the Court's holding striking down state laws that limit marriage to a man and a woman.[93]

The Fourteenth Amendment Due Process Clause has accordingly provided a basis for the Court to extend substantive protection to a number of "liberty" interests without reference to the Bill of Rights. In doing so, various areas once viewed as within state regulatory power are now subject to federal constitutional norms. The categories sketched above include some basic areas including marriage, family life, and sexual behavior. Many of these areas raise controversial matters and yet local communities must now comply with national norms and are subject to federal judicial review to police compliance.

C. Equal Protection

The *Slaughter-House Cases* gave the Equal Protection Clause, like the Due Process Clause and Privileges or Immunities Clause, a narrow definition, concluding that it was essentially limited to cases challenging state action adverse to African Americans.[94] Although the Court had occasion to apply the Clause in nineteenth-century cases alleging race discrimination,[95] toward the end of the nineteenth century the Court restricted its use by regarding racial segregation as not a per se violation.[96] When the Court struck down a state

85. *Griswold*, 381 U.S. at 481.

86. Carey v. Population Servs. Int'l, 431 U.S. 678, 686–87 (1977).

87. Zablocki v. Redhail, 434 U.S. 374, 384 (1978); *Loving*, 388 U.S. at 12.

88. *Roe*, 410 U.S. at 163–64.

89. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 753–54 (1982); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977).

90. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

91. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

92. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (stating that the Court will only recognize new liberty interests if the interest, carefully described, is deeply rooted in the United States' history and tradition); Michael H. v. Gerald D., 491 U.S. 110, 122–27 & n.6 (1989) (examining whether asserted liberty interest is consistent with American traditions after describing interest at most specific level). *But see Obergefell*, 135 S. Ct. at 2602 (rejecting *Glucksberg* approach).

93. *Obergefell*, 135 S. Ct. at 2604–05.

94. 83 U.S. 36, 81 (1872).

95. Strauder v. West Virginia, 100 U.S. 303 (1879); *Ex parte* Virginia, 100 U.S. 339 (1879).

96. Plessy v. Ferguson, 163 U.S. 537 (1896).

statute prohibiting certain interracial sales of real property among white and black persons it did so by invoking substantive due process, not equal protection.[97] In the mid-1920s Holmes derided an argument based on inequality as "the usual last resort of constitutional arguments."[98]

Yet a decade later the Court recognized in dicta that courts might need to scrutinize more carefully statutes discriminating against racial, religious, or ethnic minorities, especially if they had been subject to past prejudice.[99] That idea represented an implicit association of the Equal Protection Clause with pluralism and an acceptance of a judicial responsibility to scrutinize more closely measures which denied various minorities their equal place in America. The Court developed more robust doctrine in a common law fashion[100] in cases brought challenging racial segregation,[101] initially in education[102] and then in other areas[103] as well.

Brown was a turning point not merely because the Court jettisoned "separate but equal" in the context of education, but also because it effectively eliminated the doctrine from other areas, too. In so doing, the Court associated the Equal Protection Clause with the idea that America should be one community, not two, and that majorities should be sensitive to the messages their actions send to minorities.[104] The equal protection norm was so powerful that the Court unanimously held that the same outcome was required as against the federal government even though the Constitution states no Equal Protection Clause applicable to it.[105] "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government,"[106] wrote Chief Justice Warren.

The Warren Court proceeded to implement a more robust equal protection norm in race discrimination cases by formulating a more rigid approach to govern classifications adverse to African Americans during the mid-1960s.[107]

97. Buchanan v. Warley, 245 U.S. 60, 82 (1917).

98. Buck v. Bell, 274 U.S. 200, 208 (1927).

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

100. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 85–92 (2012).

101. *See, e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Okla. State Regents, 339 U.S. 637 (1950); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 345 (1938).

102. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

103. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 184 (1964) (striking down law criminalizing cohabitation between white and black opposite-sex couples); Anderson v. Martin, 375 U.S. 399, 401–02 (1964) (striking down state law requiring statement of race of candidate for political office).

104. *See* Joel K. Goldstein, *Approaches to* Brown v. Board of Education: *Some Notes on Teaching a Seminal Case*, 49 ST. LOUIS U. L.J. 777, 790 (2005).

105. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

106. *Id.* at 500.

107. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 U.C.L.A. L. REV. 1267, 1278 (2007).

The Court's declining patience with discriminatory practices against African Americans was reflected in its rhetoric. Whereas the early Warren Court decided *Brown* based on the harmful effect of public school segregation on black children without specifically criticizing the makers of the laws compelling separation,[108] the late Warren Court castigated laws forbidding whites and blacks to marry as impermissible vestiges of White Supremacy in *Loving v. Virginia*.[109] During the last sixty or seventy years, the Court has applied the Equal Protection Clause to address discrimination against African Americans in a range of contexts formerly within the exclusive purview of state and local government.[110]

Once the Equal Protection Clause developed in cases reviewing state practices discriminating against African Americans, claimants in other contexts successfully brought equal protection claims. Cases involving gender discrimination produced a full set of cases,[111] which introduced a new level of scrutiny.[112] Cases alleging gender discrimination were brought successfully by men,[113] as well as women.[114] The Court rejected the propriety of archaic gender stereotypes that limited economic and leadership opportunities for women.[115] Many of the gender discrimination cases challenged action by the federal government and thereby provided the Court occasion to further embed an equal protection component into the Fifth Amendment's Due Process Clause.[116] Courts interpreted the Equal Protection Clause to regulate other forms of discrimination including that based on alienage,[117] mental ability,[118] birth outside of wedlock,[119] and sexual orientation[120] among other categories.

108. *Brown*, 347 U.S. at 494.

109. 388 U.S. 1, 11 (1967).

110. *See, e.g.*, Anderson v. Martin, 375 U.S. 399, 401–02 (1964); *Brown*, 347 U.S. at 483; Sweatt v. Painter, 339 U.S. 629 (1950).

111. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982); Orr v. Orr, 440 U.S. 268 (1979); Stanton v. Stanton, 421 U.S. 7 (1975); Reed v. Reed, 404 U.S. 71 (1971).

112. Craig v. Boren, 429 U.S. 190, 197 (1976).

113. *See, e.g.*, *Hogan*, 458 U.S. at 731; *Craig*, 429 U.S. at 204.

114. *See, e.g.*, *Stanton*, 421 U.S. at 8; *Reed*, 404 U.S. at 73.

115. *See, e.g.*, United States v. Virginia, 518 U.S. at 533; Weinberger v. Weisenfeld, 420 U.S. 636, 643 (1975).

116. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199, 201–02 (1977); Weinberger, 420 U.S. at 638 & n.2; Frontiero v. Richardson, 411 U.S. 677, 679, 691–92 (1973).

117. *See, e.g.*, Bernal v. Fainter, 467 U.S. 216, 217–18 (1984); Graham v. Richardson, 403 U.S. 365, 376 (1971).

118. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985).

119. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 765–66 (1977).

120. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 635 (1996).

More recently, whites have utilized the Equal Protection Clause to challenge state programs using racial classifications to extend educational,[121] employment,[122] or electoral opportunities[123] to disadvantaged minorities and to add diversity to public schools[124] and universities.[125] All Justices have viewed race classifications as requiring some elevated level of scrutiny.[126] Although the Court has struck down some affirmative action plans,[127] a majority of the Justices have recognized diversity as a compelling state interest that can sometimes justify considering race to benefit disadvantaged minorities.[128]

Under the Equal Protection Clause, the Court accordingly scrutinized, and often struck down, state and local behavior regarding a wide range of institutions. Indeed, it even became the vehicle by which the Court resolved the 2000 presidential election.[129] The Clause became the provision through which the Court addressed a range of societal practices that mistreated African Americans, women, non-citizens, and other minorities based on religious or sexual identities or practices, national origins, or various other characteristics.

III. THE SUM OF THE TRANSFORMATIVE STREAMS

The Fourteenth Amendment has clearly had a dramatic impact. Even if one disagrees with particular outcomes and concludes that the Amendment's promise has not yet been fully redeemed, it is clear that it has transformed the Constitution and the way government operates. The impact of incorporation, substantive due process, and equal protection doctrine has been sweeping, as the preceding summary suggests. Many constitutional law students probably underestimate the effect of the Amendment, in part because much of the incorporated material from the Bill of Rights is generally covered in courses on criminal procedure, and in part because many of us probably fail to explore the

121. *See, e.g.*, Fisher v. Texas, 136 S. Ct. 2198, 2205 (2016); Grutter v. Bollinger, 539 U.S. 306, 316–17 (2003); Gratz v. Bollinger, 539 U.S. 244, 249–51 (2003).

122. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 476–77, 485–86 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 269–70 (1986).

123. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 633–34 (1993).

124. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 709–11 (2007).

125. *See, e.g.*, *Fisher*, 136 S. Ct. at 2205–06, 2208; *Grutter*, 539 U.S. at 311–17; *Gratz*, 539 U.S. at 249–51.

126. *See, e.g.*, Joel K. Goldstein, *Beyond* Bakke: Grutter-Gratz *and the Promise of* Brown, 48 ST. LOUIS U. L.J. 899, 910–11, 920–24 (2004) (demonstrating that the Justices who addressed the issue agreed in *Bakke*, *Grutter*, and *Gratz* that some form of elevated scrutiny applied to race-based affirmative action).

127. *See, e.g.*, *Gratz*, 539 U.S. 244; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

128. *See, e.g.*, *Grutter*, 539 U.S. at 325 (majority opinion holding that student body diversity is compelling state interest that can justify use of race); *id.* at 387, 395 (Kennedy, J., dissenting) (agreeing that student body diversity can be compelling state interest that can justify use of race but dissenting on other grounds).

129. Bush v. Gore, 531 U.S. 98 (2000).

Amendment's overall effect and its implications with our students. And the cumulative impact of the Fourteenth Amendment is much greater than, and different from, the sum of the doctrinal changes in those three areas.

First, the Fourteenth Amendment has proliferated rights as a means to protect individuals. It tilts the constitutional arrangement from one that relied heavily on structure to limit government tyranny to one that emphasizes a widely applicable more capacious set of rights. Some of that shift began with the addition of the Bill of Rights to the Constitution but those guarantees initially only constrained behavior of the national government and accordingly had a modest impact. The addition of the rights set forth in the Fourteenth Amendment and their development, and the incorporation of virtually the entire Bill of Rights as against the states, proliferated the constitutional rights Americans enjoyed as against government and extended those rights to more people over more subjects. And whereas interactions with the federal government were relatively rare, the newly-conferred rights applied as against state and local government, against the officials and institutions with which people were in regular contact. The Fourteenth Amendment is, in Bill Araiza's words, "the primary source for the constitutional rights Americans enjoy against state misconduct."[130]

Second, the Fourteenth Amendment profoundly changed America's constitutional structure. Most constitutional theories include structural argument as an accepted mode of constitutional interpretation. Arguments based on federalism, separation of powers, democratic accountability, pluralism, and so forth are among the Constitution's foundational concepts even though the document does not use those words or terms. There is a tendency, however, to consider constitutional structure in many areas as based exclusively upon the original Constitution. Such an approach is problematic in failing to consider the way that constitutional text added by amendment affects the overall structure. It is particularly problematic when it ignores the transformational impact of the Fourteenth Amendment in reshaping the meaning of many of these structural concepts.

Constitutional arguments which extract themes from the Constitution's design must consider the structure as it now is, not as initially ratified or even simply as supplemented by the Bill of Rights. The Fourteenth Amendment imposed constitutional limits on state power and authorized Congress to legislate to enforce those limits. Shortly after Justice Miller lamented any sweeping shift of authority from state to federal government, the Court recognized that the Fourteenth Amendment had just such an effect in *Ex parte Virginia*, where it upheld a federal indictment against a state judge for excluding blacks from jury service in violation of federal law.[131] In so doing, it recognized that the Fourteenth Amendment diminished state authority:

130. ARAIZA, *supra* note 6, at 15.

131. 100 U.S. 339, 340, 347 (1879).

> Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are, to a degree, restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact . . . . But, in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.[132]

Nearly a century and one-half of further development has further shifted the balance from state to national government. Although the Fourteenth Amendment has certainly not been the sole driver of that change, it has played an important part and it has provided textual support for some aspects of the shift.

To be sure, the Constitution's structure still envisions an important role for the states but one which is now heavily constrained in many areas by the Fourteenth Amendment. The Court has recognized that the Fourteenth Amendment changed the prior balance of power between federal and state government.[133] It limited the sovereignty of the states by, for instance, allowing Congress to override the states' sovereign immunity pursuant to Section 5 of the Fourteenth Amendment.[134] Accordingly, Congress's power to enforce the Fourteenth Amendment added to its arsenal and allowed it to hold states accountable in ways not permitted under Article I powers.

In addition to the Fourteenth Amendment's significance for the meaning of federalism, it has important implications for the constitutional roots of pluralism. It has strengthened and made more visible that commitment. The equal protection norm commands not simply acceptance but equal treatment of persons of different races, nationalities, genders, religions, sexual orientations

132. *Id.* at 346.

133. Seminole Tribe v. Florida 517 U.S. 44, 65–66 (1996) ("*Fitzpatrick* was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment.").

134. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) ("When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.").

among other groups, and this commitment to pluralism is reinforced by the incorporation through the Fourteenth Amendment of the Establishment and Free Exercise Clauses. The power of the equal protection norm is reflected in the Supreme Court's decisions reading equal protection into the Fifth Amendment to apply as against the federal government, in the cases showing respect for religious practices of small religious groups, and of the expanding protection for the rights of gay, lesbian, and transgender persons.

Third, the application of the Bill of Rights to state and local government and the development of substantive due process and equal protection doctrine have given litigants much greater opportunity to subject state and local officials and institutions to federal constitutional review and have presented the Court with greater opportunity to shape the meaning of those provisions. The pool of potential cases is no longer limited to those coming from national government. They now may come from state and local officials and institutions as well.

Fourth, the content of constitutional rights has largely developed in cases involving behavior of state and local, not national, government. It was, perhaps, not surprising that the equality norm developed primarily in a state and local context,[135] since the concept of equal protection is set forth in the Fourteenth Amendment, not in the Bill of Rights. Yet the leading cases in many areas of the Bill of Rights and regarding substantive due process have also been cases involving state or local, not national, action.[136] Think of the school prayer cases,[137] of *Roe v. Wade*,[138] of *Obergefell*,[139] of *Miranda*.[140] One can easily add to the list.

Fifth, constitutional norms shaped in cases involving state and local behavior have also largely defined the constitutional rights against, and duties of, the federal government. Some of this phenomenon has occurred through incorporation.[141] Incorporation is an important, though certainly not the exclusive way that state cases have produced constitutional norms applicable to the federal government. Although the Court used to note the absence of an Equal

135. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); Loving v. Virginia, 388 U.S. 1 (1967); Grutter v. Bollinger, 539 U.S. 306 (2003); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007). There are, of course, some exceptions where federal cases have played a prominent role. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

136. *See* AMAR, *supra* note 32, at 290.

137. Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

138. 410 U.S. 113 (1973).

139. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

140. Miranda v. Arizona, 384 U.S. 436 (1966).

141. *See* AMAR, *supra* note 32, at 290 ("In area after area, incorporation enabled judges first to invalidate state and local laws—and then, with this doctrinal base thus built up, to begin to keep Congress in check.").

Protection Clause applicable to the federal government,[142] in *Bolling v. Sharpe*, the companion to *Brown* involving segregated schools in Washington, D.C., the Court stated:

> [T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and therefore we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[143]

The Court went on to reason that the decision in *Brown* compelled the same result in *Bolling* even though no Equal Protection Clause limited the federal government.[144] Over time, the Court has recognized an implicit equal protection component in the Fifth Amendment.[145] In other contexts, the Court has announced a congruence principle mandates that equal protection analysis is identical under the Fifth and Fourteenth Amendments.[146] Perhaps this reverse incorporation is a response to the invitation of the Ninth Amendment. In any event, it is striking to see rights enumerated in the Fourteenth Amendment against the states now applied equally as against the federal government.

Sixth, the creation of new constitutional norms limiting states promoted greater uniformity in state conduct regarding individuals. States could still function as laboratories of democracy as Justice Brandeis envisioned, but not in ways that interfered with newly recognized rights. To the extent constitutional norms govern, state and local behavior must be uniform, whether regarding school population, school prayer, police practice, or marriage, among other topics.

The incorporation and reverse incorporation jurisprudence involving the Fourteenth Amendment serve as important reminders of the limits of textual interpretation. Justice Frankfurter observed in his *Adamson* concurrence that "[i]t ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth,"[147] yet judicial decisions have produced just that result. The incorporation of various rights—speech, free exercise, double jeopardy, self-incrimination, takings, and

142. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 151 (1938) ("The Fifth Amendment has no equal protection clause . . . .").

143. 347 U.S. 497, 499 (1954) (footnote omitted).

144. *Id.* at 500 ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.").

145. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

146. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995).

147. Adamson v. California, 332 U.S. 46, 66 (1947).

so on—through the Fourteenth Amendment's Due Process Clause meant, in essence, that the Clause has a different meaning in the Fourteenth Amendment than in the Fifth since its Fifth Amendment version presumably did not include the protections that the Bill of Rights stated elsewhere. Similarly, the recognition of an equal protection component in the Due Process Clause of the Fifth Amendment introduced into the earlier provision content absent from the Fourteenth Amendment's Due Process Clause.

The point is not that the text has no significance or that it can cavalierly be disregarded. It is rather that the Fourteenth Amendment experience has indicated that the Court often will allow other types of constitutional argument to prevail over textual argument when necessary in view of the consequences or the morality of the outcomes.

Last, and certainly not least, the Fourteenth Amendment has transformed America by providing the basis for the creation of a much more just and inclusive society. One need not agree with every decision issued in its name to conclude that the Amendment has helped America better achieve its highest ideals of equality, liberty, and justice through the outcomes its text has allowed and inspired.

Surely much work remains to be done. The constitutional journey the Fourteenth Amendment redirected continues. But the transformation that has occurred is something to applaud this sesquicentennial of the Fourteenth Amendment. And it is something worth sharing with constitutional law students, too.