

THE COURT SAYS NO TO “INCORPORATION REBOUND”

VIRGINIA V. MOORE

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I. INTRODUCTION

*Virginia v. Moore*¹ is one of those small gems that needs close attention, and maybe some special lighting, to appreciate fully. The question it answered could not have seemed simpler: Is an arrest in violation of state law, but still based on probable cause, unreasonable under the Fourth Amendment?² On the surface, its unanimous answer—no—was probably less surprising than the fact that the Court even bothered to hear the case.³

But the still waters of *Moore* hide the most famous constitutional torrent in our nation’s history: the perplexing question of whether, and on what textual or other basis, the Fourteenth Amendment incorporates the protections of the Bill of Rights, making them applicable against the states. What this little gem teaches us about that big question is that the Roberts Court, despite some noises in the academy⁴ and some uncertainty given the

¹ 128 S. Ct. 1598 (2008).

² *Id.* at 1601.

³ Justice Ginsburg concurred in the result, writing separately only to take issue with Justice Scalia’s opinion on a rather narrow, but interesting, point of legal history. *See id.* at 1608–09 (Ginsburg, J., concurring). *See infra* text accompanying notes 188–222.

⁴ There have been three notable calls for incorporation retrenchment. Akhil Amar’s argument for refined incorporation is discussed briefly in the text. *See infra* text accompanying note 97; *see also* Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1197 (1992). William Nelson has proposed a kind of remedial incorporation that would incorporate only those rights that a state did not provide equally to all its citizens. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT, FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 117–23 (Harvard University Press 1988); *see also* George C. Thomas, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 186–90 (2001) (discussing and defending Nelson’s arguments). Finally, there have been a series of articles arguing for the de-incorporation of the establishment clause of the First Amendment. *See, e.g.*, Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761, 767–68 (2005); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1191–92 (1990); Ira C. Lupa & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 22–42 (2006); Stuart D. Poppel, *Federalism, Fundamental Fairness and the Religion Clauses*, 25

Court's new members, is intent on keeping the lid on incorporation and maintaining its federal constitutional hegemony.

II. *VIRGINIA V. MOORE*

A Virginia statute forbids the arrest of people for Class 1 or 2 misdemeanors, unless: (1) they continue the illegal acts; (2) the officer believes they are likely to disregard a summons; or (3) the officer believes they will likely harm themselves or others.⁵ Unless suspects fit into one of those three exceptions, the officer must issue them a summons to appear in court and must forthwith release them pending that appearance.⁶ The offense of driving with a suspended license is a Class 1 misdemeanor in Virginia, and thus subject to this no-arrest statute.⁷

On February 20, 2003, a police detective in Portsmouth, Virginia, overheard two Portsmouth uniformed officers talking on the radio about a man they knew was nicknamed "Chubs," whom they saw driving in the area.⁸ The detective knew that a man named Christopher Delbridge sometimes called himself Chubs, and that Delbridge had just been released

CUMB. L. REV. 247, 250–54 (1995); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1700 (1992).

Interest in incorporation has also quickened as a result of *District of Columbia v. Heller*, 128 S. Ct. 2783, 2814 (2008), which held that the Second Amendment protects an individual right to keep and bear arms. See, e.g., Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 1 (2007); Note, *Applying the Incorporation Conundrum to the Second Amendment: Can States Infringe on the Individual Right to Keep and Bear?*, 23 QUINNIPIAC L. REV. 115, 115–17 (2005). Although *Heller* did not require the Court to address the question of incorporation, since the regulating government there was the federal District of Columbia, the issue in that case was a kind of textual version of the selective incorporation problem. *Heller*, 128 S. Ct. at 2788. To decide, as the Court did, that the right to bear arms is an individual right as a matter of the text of the Second Amendment, will almost surely mean that that individual right will be incorporated. See *id.* at 2791. But see *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (holding that the Second Amendment does not apply against states); David A. Lieber, *The Cruikshank Redemption: The Enduring Rationale for Excluding the Second Amendment from the Court's Modern Incorporation Doctrine*, 95 J. CRIM. L. & CRIMINOLOGY 1079, 1084 (2005) (arguing that even if the right to bear arms is an individual right, it is not "fundamental" within the meaning of selective incorporation).

⁵ VA. CODE ANN. § 19.2-74 (2008).

⁶ *Id.*

⁷ *Id.* § 46.2-301(c).

⁸ *Moore*, 128 S. Ct. at 1601.

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from federal prison and had a suspended license.⁹ The detective passed this information on to the officers, who then stopped the driver they knew as Chubs.¹⁰

It turned out the driver was not Delbridge, but a man named David Moore, who also used the nickname Chubs.¹¹ Coincidentally, Moore was also driving on a suspended license.¹² Once the officers confirmed the suspension, they arrested Moore, rather than issuing him a summons.¹³ At the suppression hearing, one of the officers, when expressly asked about this decision, testified that it was “[j]ust our prerogative, we chose to effect an arrest. Additionally, subsequent to that traffic stop, narcotics were eventually recovered.”¹⁴ When asked why they did not release Moore on a summons as required by the statute, the officer replied, “Well, we were still in the middle of the investigation; the investigation was not complete yet. We were, pursuant to the traffic stop . . . also conducting a narcotics investigation.”¹⁵

The officers arrested Moore, cuffed him, Mirandized him and placed him in their police car.¹⁶ Neither of the officers conducted a search incident to arrest at the time they first arrested Moore.¹⁷ One of them testified at the suppression hearing that this failure was the result of a miscommunication between them, and that each thought the other had conducted a pat down

⁹Brief of Petitioner at 4 nn.2–5, *Virginia v. Moore*, 128 S. Ct. 1598 (2008) (No. 06-1082).

¹⁰*Id.*

¹¹*Id.*

¹²*Moore*, 128 S. Ct. at 1601.

¹³*Id.* At first blush, it seems their decision to arrest rather than summon may have had something to do with the fact that Moore had a big dog with him, and the dog was very upset with the officers’ presence. See *Moore v. Commonwealth*, 609 S.E.2d 74, 76 (Va. App. 2005), *rev’d en banc*, 622 S.E.2d 253 (Va. App. 2005), *rev’d*, 636 S.E.2d 395 (Va. 2006), *rev’d*, 128 S. Ct. 1598 (2008). It is not clear how the presence of the dog could explain the arrest decision, since, even if the officers were worried about approaching the driver’s side of the car, they could have directed Moore out of the car, as they presumably did anyway, and then issued him a summons rather than arrest him. In any event, Virginia never argued that the officers’ subsequent search was the result of any good faith misunderstanding either of the no-arrest rule or its relationship to the Fourth Amendment. *Id.* at 80.

¹⁴*Moore*, 609 S.E.2d at 76

¹⁵*Id.*

¹⁶*Moore v. Commonwealth*, 622 S.E.2d 253, 255 (Va. App. 2005) (en banc), *rev’d*, 636 S.E.2d 395 (Va. 2006), *rev’d*, 128 S. Ct. 1598 (2008).

¹⁷*Id.*

search before Moore was placed in their patrol car.¹⁸

While in the patrol car waiting for animal control to pick up the dog Moore had with him, Moore agreed to talk with the officers, told them where he lived, and denied having any weapons or drugs on him.¹⁹ He signed a written consent to have his hotel room searched.²⁰ It took about forty-five minutes for animal control to arrive, at which point the officers drove Moore to his hotel room, conducted a pat down search of him there, and found some sixteen grams of crack in his coat pocket and more than \$500 in cash in his pants pocket.²¹

Moore was indicted on state charges of possession of cocaine with intent to distribute.²² He moved to suppress the drugs and money on the ground that the illegal arrest rendered the subsequent pat down search unreasonable within the meaning of the Fourth Amendment.²³ The trial court denied the motion, after a bench trial convicted Moore as charged, and sentenced him to five years in prison, with one year and six months suspended.²⁴

A divided panel of the Virginia Court of Appeals reversed the conviction,²⁵ but on rehearing the full court affirmed.²⁶ As a preliminary matter, both the divided and full panels rejected the Commonwealth's argument that the arrest was legal because it fit within the "continuing crime" exception to the no-arrest statute.²⁷ Relying on a line of Virginia cases addressing this exception,²⁸ the court of appeals concluded that on the

¹⁸ *Id.*

¹⁹ *See id.*

²⁰ *Id.*

²¹ *Id.* It is not clear from the record what happened to Moore's car (presumably it was impounded). It is also not clear whether the officers ever proceeded with a search of the hotel room pursuant to the consent, once they discovered the crack and cash on Moore's person. *Id.*

²² *See* Virginia v. Moore, 128 S. Ct. 1598, 1602 (2008).

²³ *See id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Moore v. Commonwealth, 622 S.E.2d 253, 257 (Va. App. 2005) (en banc), *rev'd*, 636 S.E.2d 395 (Va. 2006), *rev'd*, 128 S. Ct. 1598 (2008).

²⁸ *Id.* (citing Lovelace v. Commonwealth, 522 S.E.2d 856, 860 (Va. 1999) (concluding that because officer's ability to arrest must be based on offender's actual conduct, not a prediction of future conduct, an offender must actually have failed or refused to discontinue the unlawful act to qualify for this exception to the no-arrest rule)).

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record before it there was insufficient evidence to support any finding that Moore “fail[ed] or refuse[d] to discontinue the unlawful act” within the meaning of that exception.²⁹

The court of appeals therefore concluded that the no-arrest statute did indeed apply, and that Moore’s arrest was thus illegal under Virginia law.³⁰ However, it also concluded that the determinative federal constitutional inquiry was not whether the arrest was illegal under any state law, but rather whether it was supported by probable cause.³¹ Moore conceded the officers had reasonable suspicion to stop him, then probable cause to arrest him once they discovered his license was suspended.³² The full panel of the court of appeals therefore concluded that the arrest was constitutionally valid and that the search incident to that constitutionally valid arrest was likewise constitutional.³³

The Virginia Supreme Court reversed and dismissed the case.³⁴ It concluded, after an analysis of several of the United States Supreme Court cases discussed in Part V of this article, that because the officers were forbidden to arrest Moore under Virginia law, they could not constitutionally search him incident to that illegal arrest.³⁵

In an opinion written by Justice Scalia, in which seven Justices joined and Justice Ginsburg concurred but wrote separately, the Court reversed the Virginia Supreme Court and reinstated Moore’s conviction, concluding that the illegal search was nonetheless constitutional because it was based on

²⁹ *Id.*; VA. CODE ANN. § 19.2-74 (2008). It is not clear from the court of appeals’ opinions whether the trial court actually made any findings of fact in this regard. In any event, Virginia conceded in the United States Supreme Court that no exceptions to the no-arrest law applied, and therefore that the arrest was unlawful under Virginia law. *See* Transcript of Oral Argument at 9–10, *Virginia v. Moore*, 128 S. Ct. 1598 (2008) (No. 06-1082).

³⁰ *Moore*, 622 S.E.2d at 257.

³¹ *Id.*

³² Brief of Petitioner at 5, *Moore*, 128 S. Ct. 1598 (No. 06-1082).

³³ *Moore*, 622 S.E.2d at 260. But of course, this was hardly the garden variety search incident to arrest, even ignoring the Virginia no-arrest rule. Moore was not searched until some forty-five minutes after his arrest, after he had already been transported to his hotel room. *See id.* at 255. Indeed, at oral argument Justice Stevens questioned counsel on whether this delay rendered the search not incident to the arrest, and therefore unconstitutional quite apart from the legality of the arrest. Transcript of Oral Argument at 5, *Moore*, 128 S. Ct. 1598 (No. 06-1082). *See infra* note 226 and the accompanying text, for a discussion of whether a delay of this magnitude, and for this reason, would affect the constitutionality of the incident search.

³⁴ *Moore v. Commonwealth*, 636 S.E.2d 395, 400 (Va. 2006), *rev’d*, 128 S. Ct. 1598 (2008).

³⁵ *Id.*

probable cause.³⁶ Before I analyze that opinion, let me review the well-known history of incorporation and the much less well-known problem of Incorporation Rebound.

III. A BRIEF HISTORY OF INCORPORATION

The relationship between the Bill of Rights and the Fourteenth Amendment is an existential issue in American constitutional law.³⁷ The question of whether the rights set out in the first eight amendments³⁸ apply only to restrict federal power, or also to restrict the states' powers, goes to the heart of the constitutional settlement. The answers the Supreme Court has given over time have in large measure reflected, and sometimes even defined, the political and constitutional history of our nation.³⁹

³⁶ *Moore*, 128 S. Ct. at 1601, 1608–09.

³⁷ Judge Henry Friendly described incorporation as going “to the very nature of our Constitution” and as having “profound effects for all of us.” Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 934 (1965).

³⁸ The Ninth and Tenth Amendments enumerate propositions about residual rights, which are not themselves, at least on their face, articulated in a manner to implicate the incorporation issue.

³⁹ One indication of the significance of the debate is that the Court's main architects of the three modern competing views—non-incorporation (Frankfurter), total incorporation (Black), and selective incorporation (Brennan)—went to the unusual extremes of discussing their positions extra-judicially. Justice Frankfurter's last published work was a call to resist the siren of incorporation. See Felix Frankfurter, *Memorandum on “Incorporation” of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 746 (1965). Three years later, Justice Black chose as the topic for his Carpentier Lecture at Columbia Law School a defense of his view that the Fourteenth Amendment automatically incorporated the first eight amendments. HUGO L. BLACK, A CONSTITUTIONAL FAITH xvi–xvii, 34–42 (Alfred A. Knopf 1968). Justice Brennan argued for selective incorporation in two James Madison Lectures at NYU, one delivered during the heat of the controversy and one twenty-five years later, after selective incorporation had won out. William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761, 769–70 (1961); 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, 535–36 (1986).

Of course, the incorporation debate also drew the attention of giants in the academy. Although on balance it seems there was much more written against incorporation, at least total incorporation, than for it, this might simply reflect the academy's natural proclivity to be controversial in the face of a Court plurality that eventually settled on selective incorporation. See *infra* text accompanying notes 74–80. On the anti-incorporation side see, e.g., ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 102 (BOBBS-MERRIL CO. 1962); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine Lived Cat*, 42 OHIO ST. L.J. 435, 435–36 (1981); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 139 (1949); and Phillip Kurland, *The Irrelevance of the*

The first clue that this seemingly straightforward question might not be quite so straightforward comes from the strangely uneven language in the amendments themselves. The First Amendment is expressly aimed only at Congress,⁴⁰ but the rest, save the Sixth, are phrased in famously passive voices.⁴¹ Even the Sixth, though a bit more active, is still wholly objectless.⁴² Despite this textual dissonance, it seems that the dominant view of the framers and early interpreters was that the Bill of Rights restrained the federal government but not the states.⁴³ After all, the original state governments, and their constitutions and charters, were in place long before ratification of the federal Constitution, and the singular purpose of

Constitution: The Religion Clauses of the First Amendment and the Supreme Court, 24 VILL. L. REV. 3, 9–11 (1978). On the pro-incorporation side, see, e.g., WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1171, 1381 n.11 (University of Chicago Press 1953); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 67 (1993); William W. Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 1–2 (1954); and Michael K. Curtis, *Further Adventures of the Nine-Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89, 89 (1982).

⁴⁰U.S. CONST. amend. I (“Congress shall make no law . . .”). One scholar has also characterized the Seventh Amendment’s guaranty of a civil jury as expressly applying only in federal courts, but he comes to that conclusion by relying on the so-called re-examination clause of the Seventh Amendment, not the civil jury clause itself. Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253, 255 n.7 (1983).

⁴¹See, e.g., U.S. CONST. amend. II (“[T]he right of the people to keep and bear arms shall not be infringed.”); U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”); U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor cruel and unusual punishments inflicted.”).

⁴²See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”). The jury is to be provided by whom? The federal government in federal criminal cases or states in state criminal cases? Even the next sentence, referring to juries selected from the same state and district, does not make this clear. *See id.*

⁴³See DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 191–93 (University of Chicago Press 1985) (“[T]he subsequent actions of numerous members of Congress that had proposed the [Bill of Rights] were inconsistent with the notion that the Bill of Rights was applicable to the states. . . . [So too was] a respectable body of previous state court authority . . .”). Currie cites the following state court cases as rejecting the notion that the Bill of Rights restrained any government other than the federal government: *Maurin v. Martinez*, 5 Mart. (o.s.) 432, 436 (La. 1818) (civil jury); *Renthorp v. Bourg*, 4 Mart. (o.s.) 97, 131–32 (La. 1816) (taking); *Livingston v. Mayor of New York*, 8 Wend. 85, 100–01 (N.Y. 1831) (due process, taking and civil jury); *Murphy v. People*, 2 Cow. 815, 818 (N.Y. 1824) (grand jury and criminal jury); and *Huntington v. Bishop*, 5 Vt. 186, 193–94 (1932) (civil jury).

the constitutional settlement was to create a new but limited central government. Under these circumstances, it would not have been strange at all to assume that general constitutional language of governmental limitation, not expressly aimed at states, would be interpreted as being aimed exclusively at the new and suspicious central government.⁴⁴

And indeed, when the Court had its first opportunity to address the issue in 1833 in *Barron v. Baltimore*, Chief Justice Marshall, writing for a unanimous Court, gave short shrift (five pages) to the contention that the Fifth Amendment's takings clause applied against the states, labeling the issue as being "not of much difficulty."⁴⁵

Over the next thirty-five years, the Court repeatedly and consistently reaffirmed the *Barron* rule, specifically rejecting arguments that the guarantees of the First,⁴⁶ Fourth,⁴⁷ Fifth,⁴⁸ Seventh⁴⁹ and Eight⁵⁰ Amendments applied against the states. But of course what was happening in those thirty-five years was that the federal union was unraveling under geographic, cultural, political, economic and ideological pressures that

⁴⁴ Many anti-Federalists voted for ratification only on Madison's express promise that the Constitution would soon be amended to limit the powers of the new federal government. Madison himself proposed a constitutional amendment that would have explicitly applied the freedoms of religion, the press and trial as against the states. 1 ANNALS OF CONG. 452 (Joseph Gales ed., 1789). That failed amendment, and his kept promise, are powerful pieces of evidence that the Bill of Rights was originally intended to limit only the powers of the federal government. Joseph Story, writing in 1833, the very year in which the Supreme Court first confirmed that view, devotes his final chapter to the Bill of Rights, and does not mention or even suggest that any of those rights were meant to restrain the states. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 621-54 (5th ed., William S. Hein & Co. 1994) (1833); *see infra* text accompanying note 45. But this view was not completely universal. From the time the Bill of Rights was ratified in 1791 up to and beyond the ratification of the Fourteenth Amendment in 1868, several lawyers and scholars, including a few state and federal Supreme Court Justices, argued that some of the protections of the Bill of Rights did indeed limit the powers of the states. *See Amar, supra* note 4, at 1203-17.

⁴⁵ 32 U.S. (7 Pet.) 243, 247, 250-51 (1833).

⁴⁶ *Permol v. New Orleans*, 44 U.S. (3 How.) 589, 609 (1845).

⁴⁷ *Livingston's Lessee v. Moore*, 32 U.S. (7 Pet.) 469, 551-52 (1833).

⁴⁸ *Hartford v. Hartford Bridge Co.*, 51 U.S. (10 How.) 511, 539 (1850) (takings); *Fox v. Ohio*, 46 U.S. (5 How.) 410, 434-35 (1847) (double jeopardy); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 582 (1840) (Thompson, J.) (due process).

⁴⁹ *Livingston's Lessee*, 32 U.S. (7 Pet.) at 551-52.

⁵⁰ *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475, 476 (1866).

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continued to crackle across the original constitutional fissure.⁵¹ Looming in the foreground was the deepest blight, the unresolved blemish, of slavery.⁵² No regional difference went more to the heart of the Bill of Rights, or put more antebellum pressure on the rule of *Barron*.⁵³

The constitutional repairs that followed the Civil War included the Fourteenth Amendment, ratified in 1868, and its “privileges and immunities” and “due process” clauses.⁵⁴ The Civil Rights Amendments reflected a sea change in the federalism narrative. The experimental federal government stopped being the signal villain in the fight to preserve individual rights, and was replaced by state governments—state governments that had gone to war over a denial of those rights and some of which, even after capitulation and the beginnings of Reconstruction, doggedly clung to Jim Crow.⁵⁵

Despite this profound shift in the original settlement, and despite these two specific constitutional additions expressly phrased to restrain states, one of which raised the obvious question of whether any of the protections of the Bill of Rights overlapped with the newly protected “privileges and immunities” of citizenship, *Barron* remained intact.⁵⁶ When the Court

⁵¹ See Amar, *supra* note 4, at 1212–17.

⁵² See *id.* at 1215 (“[F]or we have yet to confront the issue that shattered the founders’ Union: slavery.”).

⁵³ As Akhil Amar has put it:

[N]o issues of geographic expansion posed by the new territories were as explosive as slavery and race Nor did any issue place the libertarian track record of federal versus state government in stronger light than did slavery. And on this question, states did not shine. Slavery was almost exclusively a creature of state law. . . . [T]he abject plight of blacks dramatized the danger to liberty posed by even majoritarian government.

Id.

⁵⁴ U.S. CONST. amend. XIV, § 1, cls. 2–3 (“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”).

⁵⁵ See Amar, *supra* note 4, at 1217 (“When the Thirty-ninth Congress convened in December 1865, various unrepentant Southern governments were in the process of resurrecting slavery de facto through the infamous Black Codes.”).

⁵⁶ In fact, almost immediately after the ratification of the Fourteenth Amendment the Court rejected, and continued to reject, claims that the Bill of Rights applied to the states. See *Twitchell v. Pennsylvania*, 74 U.S. (7 Wall.) 321, 326 (1869) (rejecting the argument that the Fifth and Sixth Amendments applied against the states, though neither the briefs nor the Court’s opinion mentioned the newly ratified Fourteenth Amendment).

famously drained almost all meaning out of the privileges and immunity clause in 1872 in *The Slaughter-House Cases*,⁵⁷ it left the due process clause as the only candidate to house a set of individual protections against the states. That was a fateful turn, because the due process clause's "spacious language," to use Justice White's restrained term, proved an unreliable vessel.⁵⁸

One of the biggest interpretive problems was self-reflection. Due process was itself a right already guaranteed by the Bill of Rights' Fifth Amendment, at least as against the federal government.⁵⁹ It seems inconceivable that the framers of the Fourteenth Amendment would have intended its new due process clause to incorporate silently a Bill of Rights that already had a due process clause.

As a result of this and other difficulties, some of the Court's greatest intellectuals, including Cardozo, Frankfurter and Harlan II, searched for decades for what Professor Jaffe has called "intermediate premises"⁶⁰—that is, some protection of individual rights against violation by the states based on something other than the empty privileges and immunity clause or the vague and self-reflective due process clause.⁶¹ These efforts failed in the end. The Court was unable to resuscitate the privileges and immunity clause, and it was impossible to give meaningful content to the due process

⁵⁷ 83 U.S. (16 Wall.) 36, 76–77 (1872). An entire academic cottage industry has developed arguing that the *Slaughter-House Cases* was wrong or did not really mean what it said. See Richard A. Epstein, *Of Citizens and Persons: Reconsidering the Privileges and Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J. L. & LIBERTY 334, 354 (2005) (arguing that privileges and immunity clause is better textual basis for protection of individual rights, but in end would likely have evolved same way as due process); Brian H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1063–64 (2000) (arguing, contrary to conventional wisdom, that the *Slaughter-House* justices had actually compromised on a version of selective incorporation, but that compromise was lost in the opinion's anti-total incorporation telling).

⁵⁸ *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

⁵⁹ See U.S. CONST. amend. V.

⁶⁰ See Louis L. Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 986 (1967).

⁶¹ See *Duncan v. Louisiana*, 391 U.S. 145, 183 (1968) (Harlan, J., dissenting) (suggesting the test should be whether a right is "analytically critical to procedural fairness"); *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (Frankfurter, J.) (discussing "eternal verities"), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961); *Palko v. Connecticut*, 302 U.S. 319, 328 (1937) (Cardozo, J.) (asking whether the state had violated "fundamental principles of liberty and justice"), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969).

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clause in doctrinal ways that on the one hand avoided incorporating the Bill of Rights but on the other hand did not leave the list of core due process rights a blank judicial slate.⁶²

This left a constitutional gap into which incorporation was born. But the birth was fitful. The Court applied some protections consonant with the Bill of Rights against the states but not other protections, often with no discussion either of incorporation, or, more subtly, of whether the Court was actually importing a protection from the Bill of Rights or simply reading the due process clause as independently requiring such protection.⁶³ Even after the Court began expressly to consider whether the Fourteenth Amendment was to be a vehicle of incorporation, it struggled with the question of which particular rights should be incorporated, and on what

⁶²The failure was due in no small part to the Court’s evolving due process jurisprudence, from *Lochner v. New York*, 198 U.S. 45 (1905), to *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), which essentially rendered unavailable the notion that the due process clause might be incorporating individual rights recognized by common law. See David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 654–61 (2000) (arguing that *West Coast Hotel*, by making the common law an unavailable object of due process incorporation, primed the Court for its move toward making the Bill of Rights the object of that incorporation). George Thomas argues that another important reason, one which no doubt itself underlay the transition from *Lochner* to *West Coast Hotel*, was our very un-English tradition of a written constitution, and how that tradition made it difficult for the Court to be as free-wheeling with the creation of non-textual rights as English courts were forced to be. See Thomas, *supra* note 4, at 147 n.13.

⁶³For example, incorporation enthusiasts, including several on the Court, often claim that the first incorporation case was *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897). But that opinion can plausibly be read as holding that due process in and of itself requires just compensation, without the need for any incorporation of the Fifth Amendment. See Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Beginnings of the “Takings” Muddle*, 90 MINN. L. REV. 826, 844–52 (2006). Eighty-one years after *Chicago, Burlington & Quincy Railroad Co.*, the Court expressly incorporated the takings clause through the Fourteenth Amendment, in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 122 (1978).

The same can be said for the Court’s other famous early incorporation case, *Twining v. New Jersey*, 211 U.S. 78 (1908), *overruled by* *Malloy v. Hogan* 378 U.S. 1 (1964). Here, though, things start to get really muddled. Though the Court held the Fifth Amendment’s right against self-incrimination was not incorporated by either of the two clauses of the Fourteenth Amendment, Justice Moody’s opinion planted the seeds of selective incorporation by suggesting that some rights might be applied against the states “not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.” *Id.* at 99–100.

basis.⁶⁴

The prospect of total incorporation was first fully articulated in the modern era by Justice Black in his famous dissent in *Adamson v. California*,⁶⁵ though even there he did not specify whether the incorporation rested on the discredited privileges and immunities clause or on due process, despite the fact that Justice Reed's majority opinion expressly rejected both.⁶⁶ Justice Frankfurter wrote a concurring opinion in *Adamson*, staking out non-incorporation ground he would hold for the next twenty years.⁶⁷ In addition to the self-reflection argument,⁶⁸ Frankfurter noted that total incorporation would mean the incorporation of the Fifth Amendment's grand jury clause, invalidating the complaint systems then in place in more than half the states.⁶⁹ He also noted that an incorporated Seventh Amendment would force states that had never recognized a right to civil juries to start providing them.⁷⁰

⁶⁴ See *Twining*, 211 U.S. at 99–100.

⁶⁵ 332 U.S. 46, 71–72 (1947) (Black, J., dissenting), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (U.S. 1964). It is worth remembering, especially after the topsy-turvy 1960s political world in which modern incorporation debate began to be settled, that Justice Black's principal policy argument in favor of total incorporation was that he feared an unrestrained Court binding states with a panoply of natural rights cut from whole cloth and untethered to any constitutional language: “[Non-incorporation] and the ‘natural law’ theory of the Constitution upon which it relies, degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise.” *Id.* at 70. That is, Black saw the Bill of Rights as a textual and restraining basis upon which to protect the individual from the excesses of both the state and federal governments. See *id.* at 71–72. He was not aiming for federal constitutional hegemony, but was willing to accept some as long as it was limited, restrained, and, above all else, textual, as opposed to the blank slate of fundamental fairness that he saw as a profound judicial threat to state sovereignty. See *id.* at 70–72.

⁶⁶ *Id.* at 53–54. This was not an oversight on Black's part. From his earliest days on the Court, Black refused to accept the death of the privileges and immunities clause, and in fact believed the plain and unambiguous language of that clause compelled total incorporation. But, as a tactical matter, he was loathe to attack the *Slaughter-House* result head-on. Even in his correspondence with Frankfurter he lumped the two clauses together, prompting Frankfurter to comment wryly on his “position on the ‘Fourteenth Amendment’ in its entirety.” Letter of October 21, 1939, Frankfurter Papers Box 25, *quoted in* TINSLEY E. YARBOROUGH, MR. JUSTICE BLACK AND HIS CRITICS 83 (Duke 1988). It would not be until his concurring opinion in *Duncan v. Louisiana*, 391 U.S. 145, 166–67 (1968), that Justice Black expressly grounded his call for total incorporation on the privileges and immunities clause.

⁶⁷ See *Adamson*, 332 US at 59–68 (Frankfurter, J., concurring).

⁶⁸ *Id.* at 63–64.

⁶⁹ *Id.* at 64–65.

⁷⁰ *Id.*

After *Adamson*, the Court began to decide a series of cases, in deeply divided opinions, that began rather haltingly to incorporate some of the Bills of Rights, or clauses in them, into the Fourteenth Amendment's due process clause and thus apply them against the states.⁷¹ The total incorporationists never numbered more than four at any one time,⁷² so these actual incorporation outcomes, especially in the late 1950s and early 1960s, were cobbled together by a few total incorporationists and those Justices, led by Justice Brennan, who took, or at least seemed to take, a somewhat more restrained approach to incorporation, an approach that came to be called selective incorporation.⁷³

Selective incorporation was officially articulated in *Malloy v. Hogan*, a case in which the Fifth Amendment's self-incrimination clause was incorporated not simply because it was in the Bill of Rights but rather, according to Justice Brennan's majority opinion, because it protected a fundamental right.⁷⁴ By the end of the 1960s, Justice Brennan's selective incorporation approach was entrenched as the plurality view.⁷⁵

In the years that have followed, the selective incorporation plurality almost never saw a right from the first eight Amendments it did not deem fundamental. To date, the only rights that have not been expressly incorporated are the Second, the Third, the grand jury clause of the Fifth, the Seventh, the Ninth and Tenth,⁷⁶ and of these only the Seventh has been expressly not incorporated, and that was done long before selective incorporation was a gleam in Justice Brennan's eye.⁷⁷ The Second (until

⁷¹ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (incorporating the Sixth Amendment's right to counsel clause); *Ker v. California*, 374 U.S. 23, 30–31 (1963) (incorporating the Fourth Amendment's search and seizure clause); *Robinson v. California*, 370 U.S. 660, 666–67 (1962) (incorporating Eighth Amendment punishment clause).

⁷² See Israel, *supra* note 40, at 286–90.

⁷³ See, e.g., *Washington v. Texas*, 388 U.S. 14, 18–19 (1967).

⁷⁴ 378 U.S. 1, 10–11 (1964).

⁷⁵ See, e.g., *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (incorporating the Fifth Amendment's double jeopardy clause); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (incorporating the Sixth Amendment's trial by jury clause); *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (incorporating the Sixth Amendment's speedy trial clause); *Washington*, 388 U.S. at 18–19 (incorporating the Sixth Amendment's compulsory process clause); *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (incorporating the Sixth Amendment's confrontation clause).

⁷⁶ See 16A AM JUR 2D *Constitutional Law* § 405 (1998).

⁷⁷ See *Walker v. Sauvinet*, 92 U.S. 90, 92–93 (1876) (stating that the Seventh Amendment only governs proceedings in federal court). *Accord* *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 & n.14 (1996).

lately⁷⁸) and Third have simply been dead constitutional letters, and the Ninth and Tenth are residual provisions not facially amenable to incorporation.⁷⁹

Having reached indirectly almost the same result that total incorporation would have had directly, selective incorporation has hardly been the hottest constitutional topic in the last ten years, either on the Court or in the academy.⁸⁰ Even among originalists and textualists, whom one would think might have the most difficulty with using due process as the formless metric of incorporation, the battle seems over. Justice Scalia has written that incorporation is “an extension I accept because it is both long established and narrowly limited”⁸¹ Of course, it is narrowly limited only because the Bills of Rights contains a limited number of amendments, and almost all of them have already been incorporated.⁸²

Arguably, incorporation is still a critically important topic to the Court, because it is part of a larger and even more contentious debate about substantive due process—that is, whether the framers, either in 1791 or 1868, intended the phrase “due process” to impose unstated limitations on government, whether state or federal, that might go beyond the express limitations in the Constitution.⁸³ Unlike incorporation, this broader debate about substantive due process remains somewhat unsettled, with Justice Thomas routinely calling for a re-examination of the earlier cases.⁸⁴

⁷⁸ See *supra* note 4 (discussing the renewed interest in Second Amendment incorporation caused by *District of Columbia v. Heller*, 128 S. Ct. 2783, 2814 (2008)).

⁷⁹ See *supra* note 38.

⁸⁰ Remarkably, a Westlaw search of the term “selective incorporation” in the TP-ALL database, limited to the titles field and for the period of the last ten years, produces a handful of treatises but no law review articles. Search done by author October 25, 2009.

⁸¹ *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring).

⁸² See *supra* text accompanying notes 76–79.

⁸³ See U.S. CONST. amend. XIV

⁸⁴ See, e.g., *MeadWestvaco Corp. v. Illinois*, 128 S. Ct. 1498 (2008) (Thomas, J., concurring). See also *Mays v. City of E. St. Louis*, 123 F.3d 999, 1001 (7th Cir. 1997) (Easterbrook, J.) (stating that “‘substantive due process’ is an oxymoron”). Compare ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 239–40 (1990) (arguing there is little textual or historical support for substantive due process), and John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 495 (1997) (same), with Toni M. Massaro, *Reviving Hugo Black? The Court’s “Jot for Jot” Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086, 1091–92 (1998) (arguing for an even broader interpretation of substantive due process), and Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 892 (2003)

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Especially with the Court’s recent change in membership, and the prospect of more changes soon, anything the Justices say about incorporation might be a foreshadowing of what they are not yet willing to say about substantive due process.

Even though the debate about whether there should be incorporation is largely over, there remains significant doubt about what exactly incorporation means. In all the titanic incorporation struggles between constitutional giants, an important practical problem was largely overlooked: What interaction might state law have with an incorporated federal right?⁸⁵

IV. INCORPORATION REBOUND

The problem, of course, is that on the one hand the very uniformity intended by incorporation would be quite illusory if the scope of an incorporated right were in any sense determined by state law. On the other hand, there are many areas where incorporated rights have little meaning without reference to the firmament of existing state laws into which those rights were so suddenly, and in many ways artificially, thrust. This is the phenomenon I will label Incorporation Rebound—the problem of gauging the extent to which existing state law might, and should, interact with an incorporated right in ways that might itself affect the nature of that incorporated right.⁸⁶

Let me distinguish between two kinds of Incorporation Rebound. The

(same).

⁸⁵Of course, federal law can also interact with federal constitutional protections in complex ways. The Seventh Amendment, for example, guarantees the right to a civil jury only in “suits at common law”. U.S. CONST. amend. VII. A complicated body of federal law has been constructed to instantiate the meaning of “suits at common law” and thus to define the reach of the Seventh Amendment. *See, e.g., Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348–49 (1998) (stating that action for damages under federal Copyright Act are akin to common law action for infringement, and thus right to jury attaches). Still, because there is only one federal legislature, this interaction, though sometimes complex, at least does not risk inconsistency across fifty separate jurisdictions.

⁸⁶I am hardly the first person to articulate this problem, though others have not used this term. *See, e.g., George E. Dix, Fourth Amendment Federalism: The Potential Requirement of State Law Authorization for Law Enforcement Activity*, 14 AM. J. CRIM. L. 1, 1–5 (1987). Professor Amar’s refined incorporation also deals tangentially with the effect state law might have on incorporated rights, though his central insight was to think about the transformative effect the Fourteenth Amendment itself might have on the Bill of Rights. *See infra* text accompanying note 97.

interaction of state law with an incorporated federal right might have the effect of broadening the scope of the federal right, an effect we might, in salute to the incorporation victors, call Positive Rebound. For example, a state might purport to define a search so broadly that the definition in effect expands the protections of the Fourth Amendment. On their face, the federalism implications of Positive Rebound do not seem too troubling, since of course a state is free to create its own, more protective, bill of rights.⁸⁷ Whether a state does that directly by setting its own higher state constitutional floor, or indirectly, by using state law to raise the federal floor, seems largely a matter of form and not substance. We will return to the question of whether Positive Rebound is as benign as it seems when we get to the incorporation undercurrents of *Virginia v. Moore*, which of course was a Positive Rebound case.⁸⁸

But if the Rebound goes the other way—purporting to lower the federal floor—then this is the kind of Negative Rebound that threatens the primacy of incorporation. If a state purported to narrow the definition of a search (for example, by defining a search as excluding any police activity done in public) that narrowing would compromise the incorporated protections of the Fourth Amendment.⁸⁹

At first blush, Incorporation Rebound may seem to be a label in search of a problem. After all, the easiest way to protect the full reach of an incorporated right is simply to announce that state law will have nothing to do with its reach, and that the constitutional text will be interpreted exclusively by way of a federal common law of sub-rules constructed to insure consistency in the incorporation. Although that is precisely what the Court has tried to do,⁹⁰ it is a task easier said than done.

This is because the shadow cast by Incorporation Rebound is much longer than a state merely purporting to define a word contained in the constitutional text of an incorporated right. As the Court has, through its interpretive decisions, expanded or occasionally contracted the reach of the Bill of Rights, the interaction of those expansions and contractions with existing state law raises all the same Rebound issues as if the state were attempting directly to impact express constitutional wording. Moreover, even without any apparent intention to change either the words of an

⁸⁷ See, e.g., *Soldal v. Cook County*, 506 U.S. 56, 63 (1992).

⁸⁸ See *infra* Part VII.

⁸⁹ See *Soldal*, 506 U.S. at 58–59, 72.

⁹⁰ See *Duncan v. Louisiana*, 391 U.S. 145, 148–49 (1968) (applying incorporation rebound).

incorporated right or the federal common law about its scope, the very ubiquity of state law, especially state law that pre-existed incorporation, sometimes makes its interaction with the incorporated federal right a complex collision.⁹¹

That collision itself can teach us deep lessons about the nature of the colliding objects. In the end, perhaps this is the most important lesson to draw from thinking about the way state law interacts with the Bill of Rights: the outcome of the interaction reflects in great part what is truly important about the incorporated right, its core, if you will.

For example, part of the Sixth Amendment guarantees the right to a jury in “all criminal prosecutions,”⁹² but of course whether to criminalize any particular behavior under state law is entirely a matter for the states. In this most rudimentary example, states could eliminate the reach of the incorporated Sixth Amendment entirely, simply by repealing all criminal laws.

But of course this would be a trivial example of Negative Rebound, because the right protected by the Sixth Amendment is not some abstract right to a jury, but rather the right to a jury in circumstances where a defendant’s liberty interests are at risk. No harm is done to the reach of the Sixth Amendment’s core when states simply decriminalize behaviors. Indeed, the Sixth Amendment was interpreted, pre-incorporation, as applying only to serious and not petty offenses, as a rough way of reflecting the notion that only substantial liberty risks require a jury.⁹³

After the incorporation of the Sixth Amendment in 1968, did states have any freedom to define what offenses were serious and what offenses were petty?⁹⁴ That is, was there any room for Positive Rebound (with an expansive definition of serious and a contracted definition of petty) or for Negative Rebound (with the reverse)? Alas, this question never ripened, because in 1970, just two years after incorporation, the Court adopted a bright line rule defining a “serious” offense as any offense that carried the

⁹¹ I thank George Thomas, whom I believe was the first scholar to describe this interaction between the Bill of Rights and state laws, particularly state rules of criminal procedure, as a collision. *See generally* Thomas, *supra* note 4.

⁹² U.S. CONST. amend. VI.

⁹³ *See, e.g.*, Schick v. United States, 195 U.S. 65, 68–69 (1904); *Natal v. Louisiana*, 139 U.S. 621, 624 (1891); *Callan v. Wilson*, 127 U.S. 540, 556–57 (1888).

⁹⁴ *See Duncan*, 391 U.S. at 149.

possibility of more than six months in prison.⁹⁵

There are other forces at play in this collision between incorporated federal rights and existing state law. The Fourteenth Amendment, of course, is the big gorilla, the accelerator itself, if you will. Without it, these two worlds of state law and federal rights would never interact at all.⁹⁶ But its effects may go beyond the role of mere inducer. Akhil Amar has argued forcefully that the Fourteenth Amendment is not simply the vehicle of incorporation, but rather that the Fourteenth Amendment itself changed, and was intended by its framers to change, the nature of some incorporated rights, in a model he calls refined incorporation.⁹⁷

George Thomas and others have argued that the interaction between the Fourteenth Amendment and some state law, especially criminal law and procedure, has had the effect of weakening some of the protections of the Bill of Rights.⁹⁸ By forcing a uniform level of protection on fifty very different sets of procedural worlds, incorporation has had the net effect, according to these scholars, of holding states (and of course the federal government) to standards less rigorous than the standards to which the federal government alone was held before incorporation.⁹⁹

The pedigree of state law might also affect the outcome of the interchange. For example, as we shall see, the doctrine of searches incident to arrest has a fairly spotty pre-constitutional history, as do many of the common law and now constitutionalized rules of criminal procedure, in large part because there were no professional police forces for most of the time the common law was developing.¹⁰⁰ This leaves constitutional scholars who try to pay at least some attention to text, original intent, and history in a triple bind. Not only must they imagine what the drafters of the

⁹⁵ *Baldwin v. New York*, 399 U.S. 66, 69 (1970). Indeed, one might argue that this bright line rule became necessary only after the right to a criminal jury became incorporated, and that what drove the *Baldwin* Court to draw its bright line was a fear of Negative Rebound, though the opinion does not refer to incorporation.

⁹⁶ See *supra* text accompanying notes 54–58.

⁹⁷ Amar, *supra* note 4, at 1197.

⁹⁸ Thomas, *supra* note 4, at 167; James B. White, *Forgotten Points in the Exclusionary Rule Debate*, 81 MICH. L. REV. 1273, 1280 n.25 (1983).

⁹⁹ The most notorious example is the warrant requirement of the Fourth Amendment, which, before incorporation, essentially prevented warrantless federal searches. After incorporation, the exceptions to the warrant requirement exploded and the requirement itself was functionally read out of the Fourth Amendment, to be replaced with probable cause. See *infra* Part VI.B.

¹⁰⁰ See *infra* Part VI.

Fourteenth Amendment intended about the intent of the framers of the Bill of Rights, they must imagine an intent about an intent about a state rule or procedure that was unknown in 1791 and perhaps even in 1868.

Our other example—the Sixth Amendment—sits at the other end of the continuum of state law pedigree. As of 1791, when the Sixth Amendment guaranteed the right of a jury trial in all federal criminal proceedings, every single state, by statute or constitutions, which in some cases had roots in colonial charters, recognized that same right.¹⁰¹ This of course illustrates one of the central paradoxes of selective incorporation. One of the settled metrics in deciding whether a right is fundamental is whether it was widely recognized by state law.¹⁰² But of course the more a right is widespread in the states the less understandable the need for active federal hegemony.¹⁰³

The density of state law can also have an impact on the outcome of the collision between state law and incorporated federal rights. In areas where state law is comprehensive and ubiquitous, there is more state detritus for

¹⁰¹Even as early as the Constitutional Convention, each of the eleven states that had constitutions guaranteed the right to a criminal jury. AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 83 (1998). The two states that had not yet adopted constitutions—Rhode Island and Connecticut—continued to recognize that right as it had been established by their colonial charters and common law. LLOYD E. MOORE, *THE JURY, TOOLS OF KINGS, PALLADIUM OF LIBERTY* 104 (1973).

¹⁰²The Court has indicated that wide-spread recognition of a right is important to incorporation:

The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,” whether it is “basic in our system of jurisprudence,” and whether it is “a fundamental right, essential to a fair trial”

Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968) (citations omitted). If a right is “basic in our system of jurisprudence,” one would naturally expect the right to be commonly recognized by the states. *Id.*

¹⁰³The traditional response is that the Fourteenth Amendment refocused on the states as the primary violators of individual rights. *See supra* text accompanying notes 54–55. That is, maybe all states recognize the right to a criminal jury trial, but we simply do not trust that they will continue to do so. Alas, the problem with all of these constructs, no doubt based on a reasonable narrative of how the Civil War wrenched the original constitutional settlement into a different shape, is that the Fourteenth Amendment just does not say any of that, unless the Court resuscitates the privileges and immunities clause.

the federal right to bump up against. There is no legal landscape more dotted with heterogeneous rules and practices than the law of criminal procedure. Moreover, the Warren Court's constitutionalization of much of that criminal procedure landscape coincided with the zenith of its willingness to incorporate those newly discovered federal rights.¹⁰⁴ This was a recipe for some pretty big collisions.

Yet the Court has had relatively few occasions to examine the nature of these collisions, even in the arena of criminal procedure, and on the few occasions it has done so it has, as in *Virginia v. Moore*, spoken with a restrained, and surprisingly indirect, voice.¹⁰⁵

V. THE SUPREME COURT'S LIMITED JURISPRUDENCE ON INCORPORATION REBOUND IN A CRIMINAL CONTEXT

A. *The Probable Cause Core of the Search and Seizure Clause*

The Fourth Amendment has provided the Court with a few early, and rather easy, post-incorporation opportunities to consider the problem of Incorporation Rebound, and thus to shed light on the true core of the Fourth Amendment's two clauses.

In *Cooper v. California*, the Court held that the lack of any positive state law authorizing the search of an impounded automobile was irrelevant to the constitutionality of the search under the Fourth Amendment.¹⁰⁶ That is, state law silence could not be the basis of any Rebound, even Positive Rebound.¹⁰⁷

The Court was much more aggressive in *California v. Greenwood*,¹⁰⁸ where it held that a search of the defendant's garbage did not violate the Fourth Amendment because, as a matter of federal constitutional and

¹⁰⁴ See William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2006–07 (2008).

¹⁰⁵ See 128 S. Ct. 1598, 1607–08 (2008).

¹⁰⁶ 386 U.S. 58, 61 (1967) (“Just as a search authorized by state law may be an unreasonable one under [the Fourth Amendment], so may a search not expressly authorized by state law be justified as a constitutionally reasonable one.”).

¹⁰⁷ But of course in the debate over whether the common law recognized an officer's inherent authority to arrest for minor misdemeanors—the debate between Justices Scalia and Ginsburg in their opinions in *Moore*—a state's silence in this regard could be critical if, as Justice Ginsburg argues, officers needed positive statutory authority before they could make such arrests. See *infra* Part VII.

¹⁰⁸ 486 U.S. 35, 43 (1988).

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common law, the defendants had no reasonable expectation of privacy in garbage, even though California’s constitution had been interpreted as prohibiting such searches.¹⁰⁹ The *Greenwood* Court had no difficulty rejecting the notion that the incorporated protections of the Fourth Amendment’s search and seizure clause could not depend on the vagaries of state law:

States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution. We have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs.¹¹⁰

We will return to this theme that states are free to construe their own state constitutions as being more protective than the federal floor, and even to arm those increased protections with the teeth of state exclusionary rules.¹¹¹ But the *Greenwood* majority was wrong to say the Court had never intimated that state law could affect whether a search was reasonable under the Fourth Amendment. It certainly intimated that proposition in *Di Re* and the so-called supervisory cases discussed in the section below.¹¹² But the Court has also done much more than intimate that proposition. It has expressly held that state law does affect, and indeed might even determine, the reasonableness of a search or seizure, at least when the search or seizure is not based on individualized probable cause.¹¹³

For example, in *Michigan Department of State Police v. Sitz*, the Court upheld state sobriety checkpoints by engaging in a balancing process by which it compared the extent of the intrusion with the reasons articulated by the state—to curb drunk driving.¹¹⁴ In finding that the proffered state justification outweighed the minimal intrusion, the Court was of course not only accepting some Rebound, it was accepting some Negative Rebound. The reach of the Fourth Amendment in these kinds of cases is, in effect, being left entirely to the states by way of articulating specific justifications

¹⁰⁹ See *People v. Krivda*, 486 P.2d 1262, 1268 (Cal. 1971).

¹¹⁰ *Greenwood*, 486 U.S. at 43.

¹¹¹ See *infra* Part VII.D.

¹¹² See *United States v. Di Re*, 332 U.S. 581, 589 (1948); see discussion *infra* Part V.B.

¹¹³ See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 453–54 (1990).

¹¹⁴ *Id.* at 455.

for what would otherwise be an unconstitutional stop.¹¹⁵

These kinds of collisions confirm in an odd way that probable cause—or to be more precise the right to be free of searches or seizures without probable cause—has become the core of the Fourth Amendment’s search and seizure clause, the core that must be protected against Incorporation Rebound, especially Negative Rebound.¹¹⁶ If everyone is randomly subject to the same minimal intrusion, and the state purpose is sufficiently compelling, there is no need to have probable cause be the touchstone that divides the reasonable from the unreasonable. That is, the real core of the search and seizure clause is the right to be free of more than minimal intrusions without probable cause.¹¹⁷

B. *The Supervisory Cases*

The Court has also decided a handful of federal cases which, on their face, appear to be shocking examples of both Positive and Negative Rebound, but which were explained retrospectively by Justice Scalia in his opinion in *Moore* as resting on the Court’s supervisory powers over lower federal courts.¹¹⁸

Like *Moore*, most of these cases involve a search incident to arrest, and that should not be too surprising.¹¹⁹ After all, as already mentioned¹²⁰ and as we shall see in more detail later, the doctrine of search incident to arrest has quite a sketchy common law history, and that sketchy past naturally admits to more state heterogeneity in this area, and of course that raises the

¹¹⁵ *See id.*

¹¹⁶ *See infra* Part VI.B. for a discussion of how the probable cause requirement of the warrant clause came to be imported into the search and seizure clause.

¹¹⁷ Indeed, this was the very point made by the *Sitz* dissenters—that the majority opinion might make some constitutional sense if it were expressly tied to the minimum nature of the intrusion. *See Sitz*, 496 U.S. at 457 (Brennan, J., dissenting). *See also* Nadine Strossen, Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights, 42 HASTINGS L.J. 285, 285–90 (1991). Since *Sitz*, appellate courts in a few states, including Michigan itself in *Sitz* on remand, have held that their state constitutions are more protective in this regard than the Fourth Amendment, and have held sobriety checkpoints violative of state constitutional guaranties against unreasonable searches and seizures. *See, e.g.*, State v. Church, 538 So. 2d 993, 997–98 (La. 1989); *Sitz v. Dep’t of State Police*, 506 N.W.2d 209, 225 (Mich. 1993); *Ascher v. Comm’r of Pub. Safety*, 519 N.W.2d 183, 187 (Minn. 1994).

¹¹⁸ *See Virginia v. Moore*, 128 S. Ct. 1598, 1605 (2008).

¹¹⁹ *Id.*

¹²⁰ *See supra* text accompanying note 100.

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specter of Rebound.¹²¹ Perhaps more importantly, the doctrine has traditionally required a lawful arrest,¹²² and it is the meaning of that one word—lawful—on which state law can arguably have great bearing, and risk big Rebound.

For example, in *United States v. Di Re*, a case eerily similar to *Moore*, state and federal officers collaborated in an investigation that led to Mr. Di Re’s federal arrest for and conviction of the then crime of knowingly possessing a counterfeit gasoline ration coupon.¹²³ Di Re argued that his warrantless arrest was illegal under New York statutory law that required police arresting people without warrants to inform them of the charges against them.¹²⁴ The Government conceded that neither state nor federal police informed Di Re of the charges when they arrested him.¹²⁵ The Court affirmed the Second Circuit’s reversal of the conviction, using this incredibly broad, Rebound-inviting language: “We believe . . . that in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity.”¹²⁶

If the *Di Re* opinion had ended there, Justice Scalia would have had difficulty distinguishing Mr. Moore from Mr. Di Re, and, more importantly, the floodgates of Incorporation Rebound would have been flung wide open for the last sixty years. Both *Moore* and *Di Re* were unlawfully arrested under state law, albeit with probable cause, and therefore could not be searched incident to a lawful arrest.¹²⁷ If state law determines whether an arrest was legal for Fourth Amendment purposes, the Fourth Amendment jurisprudence of both arrest and search incident to arrest would be subject to wholesale Rebound. Indeed, there would be no apparent reason why a state could not frustrate what has become the core of the search and seizure clause by dispensing with the requirement that warrantless arrests must be based on probable cause.

But the *Di Re* Court did not stop at the quoted language, and that

¹²¹ See *infra* Part VI.D.

¹²² *Moore*, 128 S. Ct. at 1607

¹²³ 332 U.S. 581, 582–83 (1948).

¹²⁴ *Id.* at 588.

¹²⁵ See *id.* (stating that “as the Government contends, lack of express declaration [of the charges against Di Re] was unnecessary because circumstances supplied the required information . . .”).

¹²⁶ *Id.* at 589.

¹²⁷ See *id.* at 588–89; *Moore*, 128 S. Ct. at 1601.

language was not in fact the actual holding of the case.¹²⁸ *Di Re* was charged and convicted of a federal crime, and so the Court proceeded to rely on a 1789 federal statute, repealed in 1980, that specifically provided that arrests on federal charges must comport with “the usual mode of process against offenders in such state.”¹²⁹ That is, the case’s rule that state law controls whether an arrest is deemed legal was itself a creature of federal statute, not of the common law or the Constitution.

Nonetheless, this broad language about the legality of arrests being a matter of state law seemed, until *Virginia v. Moore*, to take on a life of its own, independent of the 1789 federal arrest statute. It was repeated in at least three other Supreme Court cases since *Di Re*, and in none of these was the federal statutory source for the rule even mentioned.¹³⁰

In *Johnson v. United States*, decided just a year after *Di Re*, Seattle police officers entered the defendant’s home without a search or arrest warrant, on the strength both of a confidential informant’s tip and on the fact that the officers, as they approached the home, smelled a strong odor of burning opium.¹³¹ They entered the home, arrested the defendant, and in a search incident to that arrest found opium on her.¹³² She was charged and convicted of a federal drug crime.¹³³ The Court, relying on Washington law and citing *Di Re* for the proposition that it should rely on state law, found the incident search unconstitutional because the underlying arrest violated Washington law.¹³⁴ Though the Court cited *Di Re*,¹³⁵ it did not mention the

¹²⁸ See *Di Re*, 332 U.S. at 594–95.

¹²⁹ See *id.* at 589 (quoting 18 U.S.C. § 591 (repealed 1980)). The statute was part of the original Judiciary Act of 1789. See *id.* at 589 n.8.

¹³⁰ *United States v. Watson*, 423 U.S. 411, 421 n.8 (1976); *Giordenello v. United States*, 357 U.S. 480, 487–88 (1958); *Johnson v. United States*, 333 U.S. 10, 15 n.5 (1948).

¹³¹ *Johnson*, 333 U.S. at 12.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 15 & n.5. Under Washington law, warrantless arrests were permitted only if the crime was committed in the presence of the officer or for a felony for which the officer had probable cause. See *id.* at 15 n.5. The Government conceded there was no probable cause to arrest Ms. Johnson before police conducted the incident search. See *id.* at 16. Note that, since the illegality of the warrantless arrest in *Johnson* was at heart tied to the lack of probable cause, *Johnson* is not quite as compelling as *Di Re*, which involved a true state-law defect in the arrest—failure to inform the suspect of the charges—that had nothing to do with the probable cause core of the federal search and seizure clause. That is, even under federal law, untainted by the rebounding state rule, Ms. Johnson’s arrest would have been unconstitutional and therefore could not have supported the incident arrest. See *id.* at 11, 16–17.

federal arrest statute.

In *Ker v. California*, a state case that did not really raise the *Di Re* issue because it involved no federal charges, the Court nevertheless cited *Di Re*, and this time also *Johnson*, in announcing that it has “long recognized that the lawfulness of arrests for federal offenses is to be determined by reference to state law insofar as it is not violative of the Federal Constitution.”¹³⁶

Yet another strain of this language emerged in 1979 in *Michigan v. DeFillippo*, another non-federal case that simply held that officers with probable cause to believe a defendant violated an ordinance that was later ruled unconstitutional, could constitutionally arrest him.¹³⁷ In the course of that opinion, however, Chief Justice Burger re-phrased the *Di Re* rule this way: “Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law.”¹³⁸ We do not learn what exception the word ordinarily was meant to embrace, nor, after we consult state law in the “first instance,” what we are meant to do next.¹³⁹

In his majority opinion in *Moore*, Justice Scalia did not mention *Ker*, and quite properly labeled *DeFillippo* as dictum.¹⁴⁰ But rather than dispensing with *Di Re* and *Johnson* as also being dictum, based as they both were on the now-repealed federal arrest statute from 1789, Justice Scalia instead puzzlingly labels them as opinions based on the Court’s supervisory

¹³⁵ *Id.* at 15 n.5.

¹³⁶ 374 U.S. 23, 37 (1963) (citing *Johnson v. United States*, 333 U.S. 10 (1948); *United States v. Di Re*, 332 U.S. 581 (1948)). Notice the new “insofar as” embellishment. *Id.* This of course simply restates the Rebound problem without giving any guidance about it. When is state law “violative” of the Federal Constitution? *See id.* Any time it effects, via Negative Rebound, a constriction of federal protections? We can perhaps see, in this new restatement, either a weakening of the rule from *Di Re*, or at least a presaging of its ultimate abandonment in *Virginia v. Moore*. *See United States v. Di Re*, 332 U.S. 581, 589 (1948); *supra* Part II.

¹³⁷ 443 U.S. 31, 40 (1979). The *Di Re* language was lost for a time. In *Robinson v. United States*, 414 U.S. 218, 235 (1973), the Court described the inquiry into the lawfulness of an arrest supporting an incident search completely in probable cause terms: “A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.”

¹³⁸ *DeFillippo*, 443 U.S. at 36.

¹³⁹ *Id.* Though in the very next paragraph the Chief Justice announced that “the Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense.” *Id.* Well, which is it? Is it state law or the existence of probable cause that makes an arrest constitutional under the Fourth Amendment?

¹⁴⁰ *Virginia v. Moore*, 128 S. Ct. 1598, 1605 (2008).

authority over the lower federal courts.¹⁴¹ As Justice Ginsburg quite rightly points out in her concurrence, neither of these two cases even mentioned the supervisory power,¹⁴² and that's because neither had anything to do with it. They were simply cases in which the Court enforced Congress's determination that the lawfulness of arrests for federal crimes must be determined by state law. Amazingly, neither Justice Scalia nor (even more amazingly) Justice Ginsburg mentions that *Di Re* and *Johnson* involved arrests for federal crimes, and were therefore grounded on a federal statute that expressly required such arrests to comport with state law.¹⁴³

In any event, whether because they are supervisory cases or because they are federal cases grounded in the 1789 federal arrest statute, it is clear that the *Di Re* line of cases is not dispositive of cases like *Moore*, which involved an arrest on state criminal charges¹⁴⁴, and in any event occurred long after the repeal of the 1789 statute.

But the Court has decided a handful of state-based search incident to arrest cases, cases that Justice Scalia could not explain away with the supervisory label.¹⁴⁵

C. *Non-Supervisory Rebound Cases Dealing with Searches Incident to Arrest*

One of those cases, *Knowles v. Iowa*, was particularly important for Justice Scalia to distinguish because it was one of the principal cases relied on by the Virginia Supreme Court.¹⁴⁶ It is not a difficult case to distinguish. *Knowles* simply held that the Fourth Amendment did not authorize a full search of an automobile following the issuance of a citation for speeding.¹⁴⁷

¹⁴¹ *Id.* He simply says, rather conclusorily, that “those decisions rested on our supervisory power over the federal courts, rather than the Constitution,” and later that the rule announced in those cases “was plainly not a rule we derived from the Constitution. . . .” *Id.* The latter is of course true, but the former does not follow from it. The rule in *Di Re* and *Johnson* was a not a constitutionally-driven rule because it was a creature of federal statute, not the Court's supervisory power over federal courts.

¹⁴² *Id.* at 1608 (Ginsburg, J., concurring).

¹⁴³ See *Johnson v. United States*, 333 U.S. 10, 11 (1948); *United States v. Di Re*, 332 U.S. 581, 582 (1948).

¹⁴⁴ See *Moore*, 128 S. Ct. at 1601–02.

¹⁴⁵ See *infra* Part V.C.

¹⁴⁶ See *Moore v. Commonwealth*, 636 S.E.2d 395, 397–400 (Va. 2006), *rev'd*, 128 S. Ct. 1598 (2008).

¹⁴⁷ 525 U.S. 113, 118–19 (1998).

That is, the search incident to arrest doctrine actually requires an arrest. That near tautology says nothing about the interplay between a state law forbidding arrest and the constitutionality of a search incident to a forbidden arrest which officers nevertheless decide to effect.

Similarly, as we will discuss at some length in the following sections,¹⁴⁸ another case examined by the Virginia Supreme Court, *Atwater v. City of Lago Vista*,¹⁴⁹ held only that the Fourth Amendment did not prohibit a probable cause arrest for a minor crime (seatbelt violation).¹⁵⁰ It said nothing about whether a state law, like Virginia’s, expressly prohibiting such an arrest renders it unlawful for purposes of the incident search.

But a third case, and its implications, seems more difficult to distinguish. In *Whren v. United States*, plainclothes officers in the District of Columbia’s Metropolitan Police Department stopped a car because of a traffic violation, observed the passenger, Mr. Whren, holding what appeared to be two large bags of cocaine, arrested Whren and the driver, searched the car incident to the arrests and found many more drugs in the car.¹⁵¹ Whren and the driver were charged and convicted of several federal drug crimes.¹⁵²

At the time of the stop and arrests, the Metropolitan Police Department had a written regulation that allowed plainclothes police officers to make traffic stops “only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others.”¹⁵³ If the plainclothes officers had no authority to make the stop, then the arrest was arguably not lawful and therefore the search incident to arrest was not constitutional.¹⁵⁴

Unfortunately, Mr. Whren did not make this precise argument.¹⁵⁵ Instead, the thrust of his arguments on appeal were that the traffic stop was a pretext, and that the plainclothes officers’ violation of the no-stop regulation was an objective indication of their pretextual intent.¹⁵⁶ The

¹⁴⁸ See *infra* Part VI.C.

¹⁴⁹ 532 U.S. 318 (2001); See also *Moore*, 636 S.E.2d at 398 (discussing *Atwater*).

¹⁵⁰ *Atwater*, 532 U.S. at 323.

¹⁵¹ 517 U.S. 806, 808–09 (1996).

¹⁵² *Id.*

¹⁵³ See *id.* at 815 (quoting Metropolitan Police Department, Washington, D.C., General Order 303.1, pt. 1, Objectives and Policies (A)(2)(4) (Apr. 30, 1992)) (emphasis in original).

¹⁵⁴ See *id.* at 808.

¹⁵⁵ See generally Brief for the Petitioners, *Whren*, 517 U.S. 806 (No. 95-5841).

¹⁵⁶ *Id.*

Whren Court, in a unanimous opinion written by Justice Scalia, had no trouble rejecting that argument and the unstated Rebound assumption on which it was based:

[P]olice enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable and can be made to turn upon such trivialities.¹⁵⁷

But could the same have been said if the police regulation in *Whren* had instead been a state statute?

One can hardly imagine Justice Scalia labeling such a statute as trivial, and indeed in *Moore* he did not.¹⁵⁸ A state might very well have a legitimate and powerful interest in limiting the circumstances in which non-uniformed officers are allowed to arrest suspects for minor crimes, including avoiding dangerous confrontations between civilians and people who look like civilians, and whose attempt to effect an arrest might to the outside world look like assault and kidnapping. Likewise, in *Moore*, Virginia had a perfectly legitimate interest in not filling up its jails with traffic violators. Given these powerful purposes, and given a state's consequent decision to limit its officers' authority to arrest, it is difficult to understand why the Court would not recognize those self-imposed state limits, at least when they come in the form of statutes rather than police practices, in deciding whether an arrest was lawful.

One of the forces percolating below the surface of this question is a disagreement, reflected in the opinions of Justices Scalia and Ginsburg, about the historical pedigree of the warrantless arrest, and the relationship between that authority, probable cause, and the search incident to arrest.

VI. A BRIEF HISTORY OF PROBABLE CAUSE TO ARREST, THE ARREST POWER AND THE SEARCH INCIDENT TO ARREST

A. *Why History Matters*

The flippant answer to this question is that history matters in these Fourth Amendment cases because the Supreme Court has told us it matters.

¹⁵⁷ *Whren*, 517 U.S. at 815 (citations omitted).

¹⁵⁸ See *Virginia v. Moore*, 128 S. Ct. 1598, 1605–07 (2008).

Indeed, the Court has not just told us history matters, it has announced, in a series of opinions in the 1990s, mostly authored by Justice Scalia, that the question of what is a reasonable search or seizure is in fact determined, at least in the first instance, by an historical inquiry into whether a particular practice was regarded as proper under the common law or statutes at the time of the adoption of the Amendment.¹⁵⁹ If a practice was recognized by statutory or common law at the framing as proper, it is at least presumptively constitutionally reasonable; if it was improper, it is presumptively unreasonable.¹⁶⁰ It is only when this historical examination regarding a particular practice yields no answers that the Court is now willing to look elsewhere, at things like the degree of the intrusion balanced against the legitimate interests of government.¹⁶¹

There has been a lively debate about the extent to which history should, or even can, instantiate the words of the Fourth Amendment.¹⁶² The details

¹⁵⁹ See, e.g., *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999) (“In determining whether a particular governmental action violates this [search and seizure] provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed.”); See also *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (“In evaluating the scope of this right, we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of framing.”); *California v. Hodari*, 499 U.S. 621, 624 (1991) (“From the time of the founding to the present the word ‘seizure’ has meant a ‘taking possession’ . . .”).

¹⁶⁰ See *Payton v. New York*, 445 U.S. 573, 591 (1980). The Court has not articulated a complete, or even satisfactory, description of the nature of this presumption, or what might be required to overcome it. In various cases it has described the Fourth Amendment historical inquiry as being anything from mere guidance to “obviously relevant if not entirely dispositive.” Compare *id.* (stating that the historical inquiry is “obviously relevant, if not entirely dispositive”), with *Wilson*, 514 U.S. at 931 (stating that the court may be guided by the historical inquiry).

¹⁶¹ See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 450 (1990) (utilizing a balancing test instead of a historical examination in a case discussing drunk drivers). The sobriety checkpoint cases can be viewed as products of this analysis. See *supra* text accompanying notes 114–15. There were of course no drunk drivers of automobiles in 1791, and therefore no common law regarding sobriety checkpoints. This allowed the Court the freedom to balance the degree of intrusion against the forensic good.

¹⁶² Compare Peter Arenella, *Fourth Amendment*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1092–93 (Leonard W. Levy & Kenneth L. Karst eds., Macmillan Reference USA 2000) (1992) (rejecting historical method), and Samuel C. Rickless, *The Coherence of Orthodox Fourth Amendment Jurisprudence*, 15 *GEO. MASON U. CIV. RTS. L.J.* 261, 294–95 (2005) (same), and David A. Sklansky, *The Fourth Amendment and Common Law*, 100 *COLUM. L. REV.* 1739, 1741–43 (2000) (same), with Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *HARV. L. REV.* 757, 759 (1994) (supporting historical method), and Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical*

of that debate are beyond the scope of this article. Suffice it to say that the “should” part of the debate is, of course, a version of the deeper divide between interpretive schools. The “can” part of the debate has been enlivened by several recent additions to the historical scholarship,¹⁶³ additions that have challenged the traditional view that, as Anthony Amsterdam once famously said of the Fourth Amendment, “its language is no help, and neither is its history.”¹⁶⁴

In any event, this initial historical inquiry seems now to be the Court’s settled methodology for measuring a particular police search or seizure practice against the Fourth Amendment’s standard of “reasonableness.” This was exactly the analysis Justice Scalia seemed to perform in *Moore*.¹⁶⁵ He begins Part II of his opinion by looking to “the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve,” and departs from that inquiry only after finding the historical evidence lacking.¹⁶⁶

But he frames the historical question as being whether the drafters understood the Fourth Amendment “as a redundant guarantee of whatever limits on search and seizure legislatures might have enacted.”¹⁶⁷ So narrowly and rhetorically posed, the answer, of course, is that there is no such historical evidence. But surely this is not the right question. The question is not what the framers intended the constitutional relationship to be between one right guaranteed both by the Bill of Rights against federal intrusion and by a state against state intrusion, but rather whether the framers had a demonstrable intention to allow future state law to inform the word “unreasonable” in the search and seizure clause, analogous, perhaps, to the Court’s modern interpretation of the word “unusual” in the Eighth Amendment.¹⁶⁸

Knowledge, 72 ST. JOHN’S L. REV. 1149, 1169 (1998) (same).

¹⁶³ See, e.g., WILLIAM CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 578 (Oxford University Press 2009). See also Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 569–70 (1999); Tracy Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 913–14 (2002).

¹⁶⁴ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 395 (1974).

¹⁶⁵ *Virginia v. Moore*, 128 S. Ct. 1598, 1602 (2008).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 560–68 (2005).

On this point, alas, we are still in largely uncharted historical waters. Apart from an apparent desire to be ambiguous, nothing in the historical record suggests that the framers’ use of that single word, unreasonable, was intended either to freeze in time particular practices deemed disapproved as of 1791, or to codify the kind of forward-looking, relativistic, flexibility consonant with a living Constitution, let alone one that would allow Rebound.¹⁶⁹ In fact, Thomas Davies has rather convincingly traced the origins of the word unreasonable in the search and seizure clause to show it may well have been merely a colloquial and descriptive synonym for searches that were grossly illegal and unconstitutional.¹⁷⁰ That is, what we think of as the independently operative search and seizure clause of the Fourth Amendment may really have been just a recapitulation of the ban on general warrants.¹⁷¹

So the answer to our first and most general question—Does history provide any insight into whether the framers of the Fourth Amendment intended the word “unreasonable” to allow the line between permitted and prohibited police activities to change over time depending on the future legislative enactment of the states—is no. That’s not because the framers were uncertain of the answer, it is instead because they never contemplated the question. It is a very modern notion that the Fourth Amendment does anything other than prohibit general warrants. The framers did not consider whether a state law in Virginia withdrawing arrest authority might alter the day-to-day impact of the Fourth Amendment on searches and seizures in Virginia because they never imagined the Fourth Amendment would ever have any such day-to-day impacts. General warrants were forbidden, and except for a few well-recognized circumstances in which arrests could be accomplished without warrants, state “procedures” in this regard simply were not in play in the founding era.

That is not to say, however, that history has nothing to teach us about the relationship between the arrest power and the Fourth Amendment, even in its modern incarnation. The historical details of the power to arrest without a warrant, and the relationship between that power, probable cause and the search incident to arrest, are critical to put the Rebound problem in

¹⁶⁹Of course, Incorporation Rebound was not a historical consideration that troubled the framers, because they never anticipated incorporation.

¹⁷⁰Davies, *supra* note 163, at 668–93.

¹⁷¹*See infra* text accompanying notes 178–84 (discussing the modern cleaving of this search and seizure language from the prohibition against general warrants).

proper historical context.

B. Probable Cause

It is well-understood that at common law, at least for that relatively small pre-Revolutionary slice of time when there were English stirrings of professional police in the form of constables,¹⁷² and ignoring for the moment the difference between felonies and misdemeanors,¹⁷³ arrests could be effected in only three circumstances: (1) with a warrant; (2) without a warrant if the constable actually witnessed the crime; or (3) without a warrant if the constable was in hot pursuit after witnessing the so-called “hue and cry”—generally contemporaneous exultations by victims or witnesses indicating a recent crime.¹⁷⁴ For the great bulk of early English history, the warrant was the least common and certainly the newest of these three arrest conditions. After all, warrants were written documents, and therefore could not be used unless there were a reasonable number of officials able to read and write. It is not surprising that the earliest references to the power of arrest make no mention of written warrants.¹⁷⁵

The relative recency of the written warrant, both arrest and search, may have contributed to the new written procedures evolving into the kind of

¹⁷² Although evidence suggests that justices of the peace and other ancient magistrates had statutory authority to issue arrest warrants as early as the fourteenth century, they did not begin to exercise that authority until the middle of the sixteenth century. HARLOD POTTER, *HISTORICAL INTRODUCTION TO ENGLISH LAW* 201 (Sweet & Maxwell 1943) (1932). This corresponded to the emergence of the constable system, at least in larger population centers. By the seventeenth century constables were prevalent enough to be the object of written job descriptions. See WILLIAM SHEPPARD, *THE OFFICES OF CONSTABLES*, (London, ca. 1650), cited in TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 183 n.27 (Ohio State University Press 1969).

¹⁷³ Whether there was a difference in the common law warrantless arrest authority between felonies and misdemeanors is the debate in *Atwater v. City of Lago Vista*, 532 U.S. 318, 327–28 (2001), reprised by Justices Scalia and Ginsburg in *Moore*. See *infra* Part VI.C.

¹⁷⁴ See, e.g., 4 WILLIAM BLACKSTONE, *COMMENTARIES* *286; 2 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* *72. The “hue and cry” had its origins in the very earliest periods of English feudal law, when a lord could fine an entire village or hundred if a felony occurred there and the felon was not caught. 2 HALE, *supra*, at *104. Though the “hue and cry” remained well-recognized in the colonies, it appears to have fallen into disuse in America by the end of the 1700s. See Davies, *supra* note 163, at 622–23 n.198 (suggesting its modern vestige is the wanted poster).

¹⁷⁵ TAYLOR, *supra* note 172, at 27.

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general warrants that so offended our framers.¹⁷⁶ The idea of the written warrant at common law was never an idea of limitation, but rather an idea that expanded what would otherwise have been very limited powers of search and seizure. The written warrant, a late-comer, thus quite easily became the unrestrained vehicle of political oppression.

It was against that backdrop of general warrants that the framers explicitly required, in the warrant clause of the Fourth Amendment, that warrants could be issued only on probable cause.¹⁷⁷ It is clear that our founders and framers were less concerned, if they were even concerned at all, with warrantless arrests or seizures than with oppressive warrants.¹⁷⁸

But the central interpretive oddity about the Fourth Amendment is that the warrant clause¹⁷⁹ and the search and seizure clause¹⁸⁰ are textually disconnected.¹⁸¹ It is not at all clear from the text that searches or seizures

¹⁷⁶Most famously, crown officers continued to issue general search warrants under the expired Licensing Act, which dated from the Restoration, in an effort to ferret out seditious libel. *Id.* at 25.

¹⁷⁷U.S. CONST. amend. IV, cl. 2 (“[N]o warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.”).

¹⁷⁸The framers were primarily concerned with overly broad warrants:

[O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern. Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches. . . .

TAYLOR, *supra* note 172, at 41.

¹⁷⁹U.S. CONST. amend. IV, cl. 2. (“[N]o warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.”).

¹⁸⁰U.S. CONST. amend. IV, cl. 1. (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”)

¹⁸¹The Fourth Amendment consists of two clauses which are not explicitly connected:

The Fourth Amendment . . . is somewhat strangely constructed. It consists of two conjunctive clauses But the Amendment nowhere connects the two clauses; it nowhere says in terms what one might expect it to say: that all the searches without a warrant issued in compliance with the conditions specified in the second clause are *eo ipso* unreasonable under the first.

must also be based on warrants issued on probable cause, that is, that such searches or seizures are per se unreasonable unless supported by a probable cause warrant. Even a weaker form of connection is not clear: that searches and seizures, even if they don't have to be based on written warrants, must nevertheless be based on probable cause to be reasonable.

As discussed above, the most compelling historical evidence suggests that the framers never intended any constitutional limitation on the few categories of permitted warrantless searches and seizures, and that instead their focus was on insuring that the vast bulk of all other searches and seizures be supported by warrants based on probable cause.¹⁸² But the Court has had other ideas. By the end of the 1940s, a large and implacable majority had settled on the proposition that probable cause, not a warrant, was the touchstone of reasonableness under the search and seizure clause.¹⁸³ Thus, warrantless searches and seizures are not unreasonable simply because there is no warrant, but instead are generally unreasonable if they are not based on probable cause. This conflation of the two clauses has had profound ramifications for the law of criminal procedure, not the least of which has been an explosion of circumstances in which police officers may now constitutionally arrest suspects without warrants (essentially, whenever they have probable cause to do so) where, at common law, they would not have had that authority except in very narrow circumstances.¹⁸⁴ It is to that common law and those very narrow circumstances that we now turn.

1966), *quoted in* TAYLOR, *supra* note 172, at 23, 182 n.12. *Accord* Davies, *supra* note 163, at 551.

¹⁸² See *supra* text accompanying notes 172–78.

¹⁸³ See, e.g., *Harris v. United States*, 331 U.S. 145, 153 (1947); *Davis v. United States*, 328 U.S. 582, 592–93 (1946). Interestingly, Justice Frankfurter led the dissents in both cases, taking the position that the warrant requirement must be superimposed on the search and seizure clause, and therefore that, with a very few exceptions, warrantless searches and seizures were per se unreasonable. See *Harris*, 313 U.S. at 161–62 (Frankfurter, J., dissenting); *Davis*, 328 U.S. at 609–12 (Frankfurter, J., dissenting).

¹⁸⁴ This conflation was no doubt driven by an understandable recognition of the reality that policing had changed dramatically from the days of having to depend on constables witnessing crimes or citizens raising the hue and cry. See *infra* text accompanying notes 228–29. Proponents of a living constitution may want to keep this example in mind when they consider whether they really want the Constitution freed from its textual and historical moorings, and viewed instead as a license for whatever current policy seems right. The result is not always one more protective of individual rights.

C. The Arrest Authority

Both searches and seizures, of course, might be conducted in an unreasonable manner notwithstanding the existence of probable cause, and might therefore be unconstitutional for that reason.¹⁸⁵ But when the manner of the intrusion is reasonable, is the intrusion itself always reasonable if it is supported by probable cause? That is, has the Fourth Amendment’s probable cause core become both necessary and sufficient for a search or seizure to be deemed not unreasonable? The Court has issued a long line of decisions holding, often with little or no elaboration, that when an officer has probable cause to believe that a person has committed a crime in his presence, a warrantless arrest based on that probable cause is per se constitutionally reasonable.¹⁸⁶ *Moore* asks whether that rather mechanical calculus can be altered when a state withdraws the arrest authority.¹⁸⁷

The answer to that question may in turn depend on whether the general arrest authority was largely a creature of statute or of common law. This is the basis of the disagreement between Justice Scalia’s opinion in *Moore* and Justice Ginsburg’s concurrence,¹⁸⁸ and on its face this dispute seems important to the question of whether the framers intended the word “unreasonable” in the Fourth Amendment’s search and seizure clause to include “unlawful under state law.” After all, if the original source of the arrest power is state law, it is more difficult to construct an argument that the framers never intended state law to affect the constitutionality of an arrest, or, less directly, the constitutionality of a search incident to arrest. If arrest power must be given by the state, surely it may be taken away, and surely that state of affairs would have been appreciated by the framers, or so goes this argument.¹⁸⁹

This very issue was before the Court just seven years before *Moore*, in

¹⁸⁵ See, e.g., *Graham v. O’Connor*, 490 U.S. 386, 395 (1989) (holding that excessive force claims under § 1983 are governed by Fourth Amendment’s reasonableness standard).

¹⁸⁶ See, e.g., *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004); *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999); *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975); *Brinegar v. United States*, 338 U.S. 160, 164 (1949).

¹⁸⁷ See *Virginia v. Moore* 128 S. Ct. 1598, 1601–03 (2008).

¹⁸⁸ Compare *id.* at 1603 n.2, with *id.* at 1609 n.1 (Ginsburg, J., concurring).

¹⁸⁹ In fact, Justice Scalia raised this underlying issue of arrest authority at oral argument, inquiring of Virginia’s counsel whether a search by a state actor who has no law enforcement authority at all is unconstitutional. Transcript of Oral Argument at 7–9, *Moore*, 128 S. Ct. 1598 (No. 06-1082).

Atwater v. City Lago Vista.¹⁹⁰ In that case, local Texas police stopped Ms. Atwater for driving without her seatbelt fastened and for failing to fasten her two children's seatbelts.¹⁹¹ These offenses were not only misdemeanors, they were punishable only by a fine.¹⁹² Nonetheless, Texas statutes expressly authorized the warrantless arrest of anyone violating these laws, though officers were also permitted, in their discretion, to issue citations instead.¹⁹³

During the course of his stop of Atwater, the officer also discovered she had no driver's license with her or any proof of insurance, claiming her purse had been stolen the day before.¹⁹⁴ These newly discovered offenses were also all misdemeanors subject to discretionary arrest.¹⁹⁵ The officer decided to arrest Atwater rather than summons her.¹⁹⁶ She was placed in custody, booked into jail, and released on a \$310 bond.¹⁹⁷ Atwater pleaded no contest to driving without a seatbelt, the other charges were dismissed, and she was fined \$50.¹⁹⁸

Atwater and her husband then brought a civil rights action against the arresting officer and his department under 42 U.S.C. § 1983.¹⁹⁹ Their claims were dismissed by the trial court and that dismissal was affirmed by the Fifth Circuit.²⁰⁰ The Supreme Court granted certiorari on a single question: "[W]hether the Fourth Amendment, either by incorporating common-law restrictions on misdemeanor arrests or otherwise, limits police officers' authority to arrest without a warrant for minor criminal offenses."²⁰¹

In an opinion written by Justice Souter, the Court surveyed the common law and statutory history of the misdemeanor arrest, and concluded that a "decided majority" of authorities permitted warrantless arrests for minor

¹⁹⁰ 532 U.S. 318, 326 (2001).

¹⁹¹ *Id.* at 323–24.

¹⁹² *See* Tex. Transp. Code Ann. § 545.413(d) (Vernon Supp. 2008).

¹⁹³ *Id.* § 543.001 (Vernon 1999).

¹⁹⁴ *Atwater*, 532 U.S. at 324.

¹⁹⁵ *See* Tex. Code Crim. Proc. Ann. art. 14.01 (Vernon 2005); *Mendoza v. United States*, 365 F.2d 268, 274 (5th Cir. 1966).

¹⁹⁶ *Atwater*, 532 U.S. at 324.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 325.

²⁰⁰ *See Atwater v. City of Lago Vista*, 195 F.3d 242, 244 (5th Cir. 1999) (en banc).

²⁰¹ *Atwater*, 532 U.S. at 326.

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offenses.²⁰² Armed with that information, the Court refused to adopt any kind of balancing test for when officers may arrest for minor crimes, and returned instead to the probable cause core it had recognized many times before.²⁰³ As Justice Souter put it,

[W]e confirm today what our prior cases have intimated: the standard of probable cause “applie[s] to all arrests, without the need to ‘balance’ the interests and circumstances involved in particular situations.” If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.²⁰⁴

Moore, of course, takes this inquiry one step further: Does the Fourth Amendment’s modern probable cause safe harbor apply even when a state expressly withdraws its officers’ arrest authority?²⁰⁵ The Court in *Moore* begins to answer this question with the same historical inquiry it undertook in *Atwater*: Did officers at the relevant common law time have the authority to arrest even for minor crimes?²⁰⁶ There are several problems, however, with the assumption that this particular historical inquiry should, even in the first instance, determine the result in *Moore*.

First, and most apparent, as Justice Scalia himself points out, the framers never intended to impose any limitations on any state officer’s arrest authority, precisely because they never intended the Fourth Amendment to apply against the states.²⁰⁷ This gets back to the essential problem of constitutional interpretation with regard to an incorporated right: We must guess about what the framers would have intended had they realized the Bill of Rights would be applied against the states.²⁰⁸

Moreover, as Justice Souter himself conceded in *Atwater*, the historical

²⁰² *Id.* at 345. The legal historian Thomas Davies vigorously disputes Justice Souter’s characterization, and argues instead that the great weight of the common law was against the power to make an arrest for minor crimes that were not breaches of the peace. *See infra* text accompanying note 215.

²⁰³ *Atwater*, 532 U.S. at 354.

²⁰⁴ *Id.* (citation omitted).

²⁰⁵ *Virginia v. Moore*, 128 S. Ct. 1598, 1601 (2008).

²⁰⁶ *Id.* at 1602–04.

²⁰⁷ *Id.*

²⁰⁸ *See supra* Part IV.

record is mixed at best regarding the proposition that English constables at the time of the framing had the power at common law to arrest misdemeanants in the absence of a statute granting that power.²⁰⁹ In the first place, the universe of today's misdemeanors is very different than the misdemeanor in England at the time of the founding. Even as late as the mid-1700s, virtually every crime labeled petty or a misdemeanor today was not only a felony, but a capital felony,²¹⁰ and most of the crimes they called petty or a misdemeanor are today not crimes at all.²¹¹ This massive change in criminal scale should at least give us some pause about the historical approach.

More importantly, although it was well-settled at common law that English constables could make warrantless arrests for misdemeanors that were breaches of the peace, whether they had broader arrest authority in the absence of any authorizing statute is much less clear. Blackstone suggests the authority was limited to breaches of the peace,²¹² as do some founding-era justice manuals,²¹³ but Hale, Hawkins, and other commentators suggest that some arrest authority existed beyond narrow breach-of-the-peace

²⁰⁹ *Atwater*, 532 U.S. at 330.

²¹⁰ 4 BLACKSTONE, *supra* note 174, at *98. Charles Dickens famously lamented the wide application of the English death penalty as late as the time of the French Revolution:

[P]utting to death was a recipe much in vogue with all trades and professions, and not least of all with Tellson's [Bank]. Death is Nature's remedy for all things, and why not Legislation's? Accordingly, the forger was put to Death; the utterer of a bad note was put to Death; the unlawful opener of a letter was put to Death; the purloiner of forty shillings and six pence was put to Death; the holder of a horse at Tellson's door, who made off with it, was put to Death; the coiner of a bad shilling was put to Death; the sounders of three-fourths of the notes in the whole gamut of Crime were put to death.

CHARLES DICKENS, *A TALE OF TWO CITIES* 58 (Signet Classics 2007) (1859). Dickens' lament was only slightly exaggerated. Jury nullification, as a response to broad application of the death penalty, became so common in the seventeenth century that Blackstone dubbed it "pious perjury." 4 BLACKSTONE, *supra* note 174, at *238–39.

²¹¹ For example, the so-called "Nightwalker Statutes" not only permitted but compelled town night watchmen to arrest any strangers they saw pass by, and hold them until morning. *See, e.g.*, 1275, 3 Edw., c. 4, §§ 5–6 (Eng.).

²¹² 4 BLACKSTONE, *supra* note 174, at *292 ("[For non-felonies, the constable] may, without warrant, arrest anyone for breach of the peace . . . and carry him before a justice of the peace.").

²¹³ *See* Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 304–07 (2002) (discussing founding-era justice manuals).

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situations.²¹⁴ Thomas Davies makes a compelling case that the common law recognized the right to make a warrantless arrest only for a small set of serious non-felony crimes that in fact border on breaches of the peace, that there was no broadly recognized common law right to arrest for minor crimes, and, if forced to paint with a broad historical brush, saying the common law forbade such arrests is more accurate.²¹⁵

Many English statutes in the seventeenth and eighteenth centuries expressly permitted warrantless arrests for several kinds of crimes witnessed by police, both within and arguably beyond the category of breaches of the peace. For example, constables could, without a warrant, arrest people they saw gambling, swearing, lying, breaking the Sabbath, vagrant, intoxicated or operating a custom without a license.²¹⁶ But it is not at all clear why these particular kinds of crime were singled out for statutory treatment, or even that this treatment was generally shared in the colonies.²¹⁷

Most importantly, we must be careful in thinking about what the existence or non-existence of founding-era statutes might say about founding-era common law, especially here, where the question is whether certain kinds of warrantless arrests were allowed at common law in the absence of any statutory authority. A plethora of founding era statutes permitting certain categories of warrantless arrests might mean these statutes were simply codifications of the common law, or they might mean precisely the opposite—that the statutory authorization was necessary because without it the common law did not allow the arrest.²¹⁸

²¹⁴MATTHEW HALE, A METHODICAL SUMMARY OF THE PRINCIPAL MATTERS RELATING TO THE PLEAS OF THE CROWN *134; 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 60 (6th ed. 1787).

²¹⁵Davies, *supra* note 213, at 301–27.

²¹⁶See *Atwater v. City of Lago Vista*, 532 U.S. 318, 337–38 (2001) (discussing these statutes).

²¹⁷Davies, *supra* note 213, at 331–33.

²¹⁸As Justice Souter put this point in his opinion in *Atwater*:

The significance of these early English statutes lies not in proving that any common-law rule barring warrantless misdemeanor arrests that might have existed would have been subject to statutory override; the sovereign Parliament could of course have wiped away any judge-made rule. The point is that the statutes riddle *Atwater*'s supposed common-law rule with enough exceptions to unsettle any contention that the law of the mother country would have left the Fourth Amendment's Framers of a view that it would necessarily have been unreasonable to arrest without warrant for a misdemeanor

The central problem with an historical approach to this subject—policing practices—is that at the critical moment of the founding those practices were already beginning to undergo stresses that would soon result in massive institutional change. Constables were beginning to evolve from passive witnesses to active investigative agents, from mere conduits of observation and keepers of the peace to independent gatherers of information. The notion that probable cause could become a substitute for the warrant was not even thinkable until this institutional evolution from witness to investigator gained traction. Indeed, probable cause in large part has come to mean a way of summarizing the early results of an investigation, something our passive constable could never have imagined.

Finally, in the end, this *Atwater* redux over the common law roots of the power to arrest simply does not matter to the outcome in *Moore*, as Justice Ginsburg herself admits by joining in that outcome.²¹⁹ The historical inquiry in *Atwater* was a direct inquiry into whether the framers might have intended to adopt a common law that prohibited arrests for minor non-violent crimes.²²⁰ The historical inquiry in *Moore* is much more convoluted: Is there anything about the common law to suggest that the framers intended that arrests made illegal by states might also be unreasonable under the Fourth Amendment?²²¹ And *Moore* was even more indirect, because the precise question was not the constitutionality of an arrest made illegal by a state, but rather the constitutionality of a search incident to such an arrest.²²² Is there anything in the history of the search incident to arrest that may help us answer the question posed in *Moore*?

D. Searches Incident to Arrest

The idea that arresting officers may also conduct a search incident to the arrest is in one sense almost tautological. The very nature of an arrest means the arrested person is seized, and when the person is seized so are the clothes he is wearing and the belongings he is carrying. So the additional and obvious benefits to such a search—gathering evidence, officer safety,

unaccompanied by real or threatened violence.

532 U.S. at 335.

²¹⁹ See *Virginia v. Moore*, 128 S. Ct. 1598, 1608–09 (2008) (Ginsburg, J., concurring).

²²⁰ *Atwater*, 532 U.S. at 326–27.

²²¹ *Moore*, 128 S. Ct. at 1602.

²²² *Id.* at 1601–02.

inventorying an arrestee’s belongings so they may be returned to him, keeping weapons and contraband out of jails—all come at almost no cost in additional state intrusion. And indeed it was quite well-settled at common law, both in England and in the colonies, that the search of an arrestee’s person incident to a lawful arrest was an essential and necessary part of the arrest itself.²²³

But three important and more complex ideas are embedded in this well-settled notion: (1) the doctrine applies only to lawful arrests; (2) the search must be physically incident to the arrest, raising the question of whether the search may go beyond the confines of the arrestee’s person, to include, for example, his home or, in modern times, his car; and (3) the search must be temporally incident to the arrest, raising questions about how much time may pass between the arrest and the search.²²⁴ It is these complications, and especially the second one, that have so enriched the jurisprudence of the search incident to arrest.

I will not linger over that second, and traditionally most difficult area—the physical scope of the search incident to arrest—because that issue doesn’t have anything to do with *Virginia v. Moore*.²²⁵ Nor will I examine

²²³ See, e.g., TAYLOR, *supra* note 172, at 28 (stating that “[t]here is little reason to doubt that search of an arrestee’s person . . . is as old as the institution of the arrest itself”); JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 98 (1966) (“[T]he right to search as an incident of arrest is deeply rooted in the common law and is conceded . . .”). The search incident to arrest was first recognized by the United States Supreme Court, albeit in dictum, in *Weeks v. United States*, 232 U.S. 383, 392 (1914).

²²⁴ *Moore*, 128 S. Ct. at 1607.

²²⁵ See generally *id.* One reason this issue was so unsettled is that common law authorities themselves appeared to be in some disagreement about the state of the law. Some report that the search incident to arrest was restricted to the arrestee’s person. Most lumped together the search of an arrested person with the search of the general area where the arrest occurred, and, at least for felonies, still others claimed that as long as a suspect was arrested in his home, the entire home could be searched top to bottom. See Maclin, *supra* note 163, at 957 n.306. Some recent scholarship suggests that, although the idea of an extended search radius beyond the arrestee’s person may have been the earlier rule, by the time of the Revolution the doctrine was not applied to permit a general search of a home incident to a home arrest. CUDDIHY, *supra* note 163, at 578. In the end, it appears that “[t]he men who ratified the Fourth Amendment assumed some ambit of search-incident-to-arrest, but they neglected to announce its [constitutional] perimeter.” Maclin, *supra* note 163, at 957 n.306.

Despite this uncertainty at the time of the founding, by the late 1800s it became clear in England that a search incident to an arrest could include the entirety of the premises in which the arrest took place. See *Dillon v. O’Brien*, [1887] 20 I.L.R. 300, 309 (Exch. Div.) (Ir.); *Elias v.*

the temporal issue that was a small part of the case,²²⁶ because it has nothing to do with Incorporation Rebound.²²⁷

But whether an arrest is sufficiently “lawful” to support an incident search was of course the heart of the question in *Moore*, and to the extent state law might bear on whether an arrest is or is not “lawful” for this purpose, the lawfulness question poses a big Rebound risk. Precisely

Pasmore, (1934) 2 K.B. 164, 164–66 (Eng.). Our own Supreme Court took a very different path, instead holding that, with the exception of the automobile cases, the searchable area incident to an arrest is generally the area where a suspect could retrieve a weapon, tying the reach of the search to concerns about officer safety. See *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009); *Chimel v. California*, 395 U.S. 752, 763–64 (1969).

²²⁶At oral argument, Justice Stevens inquired of Virginia’s counsel whether the delay between the search and arrest had any constitutional significance. See *supra* note 33. But the law seems fairly clear: although a significant delay can matter, it will be overlooked as long as the circumstances justify it. Whether particular circumstances justify a particular delay seems largely unsettled. Compare *United States v. Edwards*, 415 U.S. 800, 804–05 (1974) (finding the search of defendant’s clothes valid though conducted ten hours after arrest because police could not remove and search clothes until substitute clothes were provided), and *United States v. Gwinn*, 219 F.3d 326, 333 (4th Cir. 2000) (finding the search and reentry of home valid to look for boots belonging to barefoot arrestee because of exigency “created by the substantial risk of injury” to defendant without shoes), and *United States v. Willis*, 37 F.3d 313, 318 (7th Cir. 1994) (finding the search of car valid as incident to arrest despite momentary delay caused by officer returning to police vehicle to look for camera to document position of gun in car), and *Curd v. City Court of Judsonia*, 141 F.3d 839, 843 (8th Cir. 1998) (finding the search of purse valid when conducted at police station 15 minutes after defendant was arrested at home), and *United States v. Weaver*, 433 F.3d 1104, 1106 (9th Cir. 2006) (finding the search of vehicle incident to arrest valid because ten to fifteen minute delay was caused by waiting for additional officer to arrive to conduct safe search), and *In re Sealed Case 96-3167*, 153 F.3d 759, 768–69 (D.C. Cir. 1998) (finding the search of second-floor bedroom in which defendant was arrested valid when conducted immediately after officer led defendant into hallway, patted him down, took him downstairs, and handed him to other officers), with *United States v. Wells*, 347 F.3d 280, 287 (8th Cir. 2003) (finding the search of vehicle unstated amount of time after incident arrest invalid where police drove car to precinct after arrest and searched it there), and *United States v. Vasey*, 834 F.2d 782, 787–88 (9th Cir. 1987) (finding the search invalid because it took place thirty to forty-five minutes after defendant was arrested, handcuffed, and placed in squad car), and *United States v. Chaves*, 169 F.3d 687, 689–91 (11th Cir. 1999) (finding the search of warehouse invalid partly because officers waited forty-five minutes after arrest before commencing search).

²²⁷One can easily construct a Rebound hypothetical about the delay between a search and an incident arrest. Imagine that Virginia had a statute that required an incident search to be conducted within ten minutes of a warrantless arrest, absent exigent circumstances, and assume the police officers’ negligence in thinking the other officer had conducted the search is not an “exigent circumstance” under Virginia law. Would the search in *Moore* have been unconstitutional?

because a search incident to arrest is rooted in the arrest itself, it seems natural to assume that a search is illegal if the arrest was illegal. But does this syllogism hold regardless of the reason the arrest was deemed “illegal”? And is “illegal” the same as “unreasonable,” and therefore the same as “unconstitutional”?

Unfortunately, the common law history of the search incident to arrest gives us little guidance on these questions, mainly because it appears that real searches incident to arrest—as opposed to the simple inventorying of an arrestee’s possessions—were rare.²²⁸ This was so for several reasons. The very notion of a “search” apart from inventory was largely unknown at common law. Physical evidence was a rare part of English trials during the pre-colonial and colonial periods, with the single notable exception of crimes of theft. There was no forensic science. Searches were therefore largely searches for suspects as part of written arrest warrants, not searches for evidence. If perchance authorities desired to conduct a broader search for evidence, they could obtain a search warrant along with the arrest warrant.

As we have already discussed, by the sixteenth and seventeenth centuries, general warrants made warrantless arrests themselves quite rare, limited largely to circumstances where a constable happened to witness a crime, was in hot pursuit, or the suspect was otherwise snared by the hue and cry. The search incident to arrest, just like the warrantless arrest to which it was incident, was rare to the point that the common law seems just not to have paid much attention to it.

Moreover, even if an incident search was deemed improper because the underlying arrest was improper, there was no exclusionary rule at common law.²²⁹ A constable who conducted an illegal arrest could be subject to lawful physical resistance, and may even have been subject to suits in trespass.²³⁰ But the fruits of the unlawful arrest were not suppressed.²³¹ If

²²⁸Wayne A. Logan, *An Exception Swallows the Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL’Y REV. 381, 386 (2001) (“As a practical matter, authorities had relatively little occasion to arrest persons in the absence of a warrant, and, as a result, had only limited resources to conduct searches incident to arrest.”).

²²⁹In fact, there was not only no search and seizure exclusionary rule at common law, but quite the opposite. The discovery of damning evidence cleansed any illegality associated with the initial arrest or search, and was a complete defense to any actions brought against the arresting officer. HAWKINS, *supra* note 214, at 77.

²³⁰*Queen v. Tooley*, (1709) 92 Eng. Rep. 349, 351 (K.B.) (right to resist); Joseph J. Stengel, *The Background of the Fourth Amendment to the Constitution of the United States*, 3 U. RICH. L.

one does not suppress the fruits of a search based on an illegal arrest, there is very little reason to wring one's hands about whether the search was also rendered illegal. Even the occasional English lawsuit over an illegal arrest could be resolved completely by inquiring into the legality of the arrest, with no need even to think about the search also being derivatively illegal.

As a result, there is simply no evidence that the framers cared one way or the other about searches incident to arrest, or that they intended the new Fourth Amendment to have any impact on what "legal" arrests could support incident searches. What, then, drove the outcome in *Moore*?

VII. *MOORE* AS A POSITIVE REBOUND CASE

Freed from a common law and statutory history with no answers, in Part III of his opinion Justice Scalia purports to move on to balance the degree of intrusion against the promotion of the state's interests.²³² But rather than doing any actual balancing, he instead reverts to the cover of probable cause, treating it as a presumptive proxy for any real balancing of interests.²³³ In this analysis, arrests based on probable cause, as *Moore*'s was, are presumptively constitutional.²³⁴ As Justice Scalia puts it, "[o]ur decisions counsel against changing this calculus when a State chooses to protect privacy beyond the level that the Fourth Amendment requires."²³⁵ The decisions he then discusses are most of the cases discussed in Subpart VI above, which of course do not at all answer the *Moore* question.²³⁶

Indeed, by framing the inquiry as being whether the probable cause proxy should be set aside for some real balancing merely when a state chooses to be more protective than the Fourth Amendment, Justice Scalia has of course assumed away the interpretive problem. The question assumes the reach of the Fourth Amendment itself could never depend on a state's definition of when an arrest is illegal.

But by outlawing arrests in certain circumstances, Virginia has made its

REV. 278, 290 n. 66 (1969) (citing *Samuel v. Payne*, (1780) 99 Eng. Rep. 230 (K.B.), for the proposition that an acquitted person who was arrested without a warrant could recover damages from the constable regardless of the quantum of proof that supported the arrest).

²³¹ HAWKINS, *supra* note 214, at 77.

²³² *Virginia v. Moore*, 128 S. Ct. 1598, 1604 (2008).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

own judgment that in these circumstances the traditional benefits of arrest (assuring a defendant’s presence at trial, allowing officers to investigate more thoroughly²³⁷) outweigh its costs (the costs and risks of jail, the inherent risks of any arrest). Another way to look at this is that Virginia has announced that in the end it has no governmental interest in arrests in these situations, but of course such arrests still come with all their inherent intrusions. It is not at all clear why it is not unreasonable under the Fourth Amendment to strike the balance in such a situation in a way that protects suspects from the intrusion of arrest in a state that formally announces that it has absolutely no countervailing interest in the arrest.²³⁸

In fact, *Moore* is the mirror image of the sobriety checkpoint cases discussed Subpart V.B above. In those cases, the Court was willing to allow considerable Rebound, and indeed Negative Rebound, by way of permitting a state to announce an interest in curtailing drunk driving and conducting sobriety checkpoints with no probable cause. Because the checkpoint intrusion was deemed “minimal,” the state’s self-described interest prevailed and the checkpoints were deemed reasonable. Significant state interest plus minimal intrusion equals reasonable. In *Moore*, the intrusion is significant—arrest—and the state has forfeited any interest.²³⁹ Zero state interest plus significant intrusion should equal unreasonable. It is difficult to understand, at least at first glance, why in such a circumstance the Court is so unwilling to step outside the probable cause safe harbor and find such an arrest unreasonable.²⁴⁰

²³⁷ Justice Scalia articulates a third benefit of arrest—ensuring that an offense does not continue. *Id.* at 1605. But of course the Virginia no-arrest rule has taken care of that problem by creating an exception for that circumstance. *See supra* text accompanying notes 5–6.

²³⁸ Justice Scalia responds, rather astonishingly, that Virginia does in fact continue to have the traditional interests in having arrests made in these circumstances. *See Moore*, 128 S. Ct. at 1605–06. It is difficult to imagine what more Virginia could have done to indicate otherwise. It did not just discourage arrests in the stated circumstances, it outlawed them. There is no small amount of federalism irony in Justice Scalia’s implied suggestion that the Court is in a better position than Virginia to articulate Virginia’s interests.

²³⁹ *See supra* text accompanying note 237–38. *Contra Moore*, 128 S. Ct. at 1605 (“*Moore* argues that a State has no interest in arrest when it has a policy against arresting for certain crimes. That is not so, because arrest will still ensure a suspect’s appearance at trial, prevent him from continuing his offense, and enable officers to investigate the incident more thoroughly.”).

²⁴⁰ Justice Scalia tries to turn this balancing act on its head, claiming that his outcome is in fact more protective of Virginia’s interests by allowing Virginia to prohibit these arrests without tying that prohibition to an exclusionary remedy. *Moore*, 128 S. Ct. at 1606. This argument is addressed in Subpart VII.D.

What is the source of the Court's hostility toward any result even smacking of Rebound? Certainly it is neither constitutional text nor constitutional history, since Incorporation Rebound was never a problem before Incorporation. Justice Scalia proffers a few reasons, and there are several others he did not mention but might have.

A. Claim 1: The Slippery Slope from Positive to Negative Rebound

One reaction to any putative Positive Rebound outcome might be fear that a Court fully embracing Positive Rebound would find it hard to draw the line there. Had the Court allowed the Positive Rebound Moore requested, and permitted the reach of the search and seizure clause to be extended based on Virginia's definition of what is and is not an "illegal" arrest, would the floodgates of Negative Rebound, with all its adverse implications for consistent incorporation, really have been flung open? Of course not.

The whole function of incorporation was to create a uniform federal constitutional floor below which states could not go. Nothing in its tortuous history suggests that the uniform floor was to be a ceiling as well. This is a profoundly important limitation of incorporation that cases like *Moore*, and indeed the whole of the Court's limited Rebound jurisprudence, have simply glossed over. It is one thing to argue that a suspect in Virginia should not be treated any less favorably than the Bill of Rights requires, but quite another thing to argue that he should also not be treated more favorably. Not more favorably as a result of expressly more protective state law, but more favorably because of the interaction of the Bill of Rights and state law defining such a fundamental and traditional subject of local control as the arrest power.

The kind of federalism embedded in the original settlement was not only perfectly consistent with not applying the Bill of Rights against the states, but its revised version reflected in the Fourteenth Amendment and the Court's early incorporation cases was also perfectly consistent with the notion that the newly applied Bill of Rights might be affected, at least positively, by state law. But in the revised narrative, we seem to have lost the distinction between federal hegemony at the floor and federal hegemony at the ceiling.

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B. Claim 2: The Need for Uniformity

What would a federalism model look like if the states were free to continue to make law in traditional areas that might nonetheless raise the federal constitutional floor? One might immediately and viscerally react to such an idea, especially as it applies to criminal procedure, as a recipe for a crazy quilt kind of constitutionalism inconsistent with incorporation. Do we really want to live in a system where an arrest in Virginia is unconstitutional under the Fourth Amendment but an arrest in Maryland is not? The modern policy answer may be no, but that answer is certainly not driven by constitutional text, history or any principles imbedded in selective incorporation.

Once we force our imaginary framers to imagine the unimaginable reality of incorporation, it is difficult to fathom that they would have had any problem with the notion that a state may make traditional legislative choices that could affect the reach of federal protections within the borders of that state, especially if we limited those effects to Positive Rebound. Indeed, the original settlement admitted to just the kind of crazy quilt this claim assumes is to be avoided. Modern, post-incorporation, national man’s crazy quilt was the framer’s federalism blanket.

Even the revised, post-Civil War federalism narrative is not inconsistent with Positive Rebound. States became the targets of constitutional suspicion because of the rights they were denying their citizens, not because their laws were making federal protections more robust.

C. Claim 3: Rebound Would Make the Rules Confusing

Justice Scalia observes that having a federal constitutional rule depend, whether at the floor or ceiling, on the vagaries of state law violates the principle that Fourth Amendment rules should be readily discernable by the street officers expected to follow them.²⁴¹ This criticism, at least of the Positive Rebound the Court faced in *Moore*, proves both too much and too little.

It proves too much because Justice Scalia’s suggestion that Virginia could achieve the same result with a state constitutional provision or exclusionary rule would suffer from the same alleged uncertainty.²⁴² Surely Virginia police officers are no more confused by their own state’s law

²⁴¹ *Moore*, 128 S. Ct. at 1606–07.

²⁴² *See infra* Part VII.D.

against arrests in these situations than the nation's police officers are confused by the myriad of constitutionalized procedures created by and since the Warren Court.²⁴³

It proves too little for the reasons discussed earlier in distinguishing *Whren v. United States*.²⁴⁴ It is one thing to worry about the vagaries of local police practices affecting incorporated federal rights, and quite another to treat fundamental state law withdrawing arrest power as if it were just one of those local vagaries. It is not. States have the right, indeed the obligation, to set out the powers with which they are willing to invest their police officers. There is nothing that emanates from the doctrine of incorporation that suggests that the generalized constitutional interest in predictability trumps those core state pronouncements. On the contrary, one can view Virginia's no-arrest statute as an attempt to inject more predictability into this area. It is not at all obvious that application of the Virginia no-arrest statute is any more difficult, less determinable or less predictable than the determination of probable cause.

D. Claim 4: States Can Always Adopt More Protective State Constitutional Provisions or Exclusionary Rules

Yes they can, but what exactly does their failure to do so say about the Rebound question? The unstated assumption behind this criticism is something akin to a Rebound version of selective incorporation, as if it were up to individual states to let the United States Supreme Court know whether it should allow or disallow Rebound based on the importance of the state law causing it. But of course this reasoning is completely circular. Had Virginia adopted its own constitutional provision stating that arrests in no-arrest circumstances are unreasonable, or had its courts created a rule excluding the fruits of such arrests, the outcome in *Moore* would have been exactly the same, but at the state level, and there would have been no need for Positive Rebound. That is, the real kernel of this criticism is not that Virginia's failure to act says something about whether the Court should allow Positive Rebound, but rather that Positive Rebound is never needed because states can always achieve the same results themselves.

²⁴³This is to be distinguished from Double Rebound, discussed in Subpart VII.E, where it might be too much to ask federal officials to become conversant with a federal constitutional system that differed between the states. See *infra* Part VII.E. Even there, though, the central problem is uniformity rather than predictability. *Id.*

²⁴⁴517 U.S. 806, 815 (1996); see *supra* text accompanying notes 151–57.

But this assumes that this deeply important constitutional issue—when should state law affect an incorporated federal right—is merely a matter of result and not driven by any principled application of constitutional doctrine. We might (or might not) all agree that the incorporated federal floor should also be a ceiling—that is, that the interest in federal uniformity requires us to be just as vigilant against Positive Rebound as Negative Rebound—but it would be nice to ground that axiom in some constitutional principles, or at least in some of the extra-constitutional principles behind incorporation.

Moreover, it is of course not the same result when the Court permits state law to raise the federal floor in a given state and when the state raises its own state floor. Indeed, thinking of this problem only by looking at outcomes, and ignoring the government levels out of which those outcomes emanate, itself bespeaks of a surprisingly stunted view of federalism, especially coming from the Court that only few years ago gave us the New Federalism. Mr. Moore may not care very much whether it is the Virginia Constitution or the United States Constitution that protects him from officers exceeding their arrest authority, but the United States Supreme Court should.

The Court’s reliance on the fact that Virginia has not created its own no-arrest exclusionary rule suffers from all the same difficulties. In addition, who could miss the irony that the *Moore* Court, in an opinion by Justice Scalia no less, should be counseling Virginia to create a state constitutional remedy out of the same whole cloth the Court itself so controversially used in *Mapp v. Ohio* to invent the Fourth Amendment exclusionary rule?²⁴⁵

This whole discussion of Virginia’s remedial choices misses the point, and puts the remedial cart before the horse of constitutional violation. If the *Moore* Court had been willing to accord constitutional significance to Virginia’s no-arrest rule, then the Court’s own invented exclusionary rule would have required suppression of the fruits of the incident search.

E. Double Rebound

There is one Rebound difficulty that is arguably more difficult than any of these others. If we allow the federal constitutional floor to vary state by state in its incorporated application against state officials, would that mean those same variances would apply to federal officials acting in those states,

²⁴⁵ See generally 367 U.S. 643 (1961).

or to federal arrests, whether by state or federal officials? It is one thing to allow Virginia to define the arrest authority of its own police for violations of its own laws, and to permit that definition to have federal constitutional implications, but quite another to embrace any system in which, say, an FBI agent's actions are federally constitutional in Maryland but not in Virginia.

And yet, strange as it may sound to our modern ears, this is exactly what Congress chose to do in its 1789 federal arrest statute, discussed above, and quite understandably so.²⁴⁶ In the early years of the Republic, there were virtually no federal criminal laws²⁴⁷ and no federal law enforcement officials.²⁴⁸ Those few recognized federal crimes—crimes on the high seas, treason, counterfeiting, and tax violations²⁴⁹—were enforced with arrests by local police. Congress quite naturally deferred to the local practices of those same police when setting out the arrest powers those police would have in effecting arrests for that handful of federal crimes.

The picture today, of course, could not be more different. The United States Code has exploded with criminal laws, and the Federal Bureau of Investigation is charged with investigating violations of those laws and arresting violators.²⁵⁰ Congress has not only repealed its rather quaint

²⁴⁶ See *supra* text accompanying note 129. In fact, what I have been calling the 1789 federal arrest statute contained only tangential language which the *Di Re* Court then interpreted as allowing all officials making federal arrests the same arrest powers as local officials. The statute was actually focused on the powers of federal judicial officers, and indeed was part of the Judiciary Act of 1789, and specifically authorized those newly created federal judicial officers to make arrests in any state for violations of federal law. See Judiciary Act of 1789, ch. 20, 1 Stat. 91 (repealed 1980). That is, the federal judiciary itself was the only federal institution authorized to make arrests for violations of federal law.

²⁴⁷ It was not until the early 1900s, and especially after the advent of Prohibition in 1919, that Congress began the explosion that has become the federalization of crime. Frank O. Bowman III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 313–14 (2000).

²⁴⁸ The only exception was federal judges. See *supra* note 246.

²⁴⁹ Franklin E. Zimring & Gordon Hawkins, *Legislating Federal Crime and its Consequences: Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 23 (1996).

²⁵⁰ The FBI was created administratively by the Attorney General in 1908, when Congress put a stop to the practice of allowing the Attorney General to borrow Secret Service agents for criminal investigations, although it was then known as the Bureau of Investigations (“BOI”). John J. Fox, *The Birth of the Federal Bureau of Investigation*, OFFICE OF PUB./CONG. AFFAIRS (2003), <http://www.fbi.gov/libref/historic/history/artspies/artspies.htm>. Its statutory authority did not follow until 1910, when the Mann Act specifically gave the BOI jurisdiction over interstate crimes. See Federal Bureau of Investigation, Timeline of FBI History,

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willingness to defer to local police powers, there is little doubt that it would be unacceptable from almost every perspective to have widespread Double Rebound. Quite apart from issues of federalism, no one who cares about predictability and the need for street officers to be able to understand constitutional rules could accept a system in which federal officers are governed by federal constitutional rules that vary state by state.

Indeed, perhaps this fear of Double Rebound—of the effect any Rebound might have not on state police but on federal police—is the silent heart of the Court’s opinion in *Moore*. It is probably no coincidence that at oral argument, when Justice Scalia questioned Virginia’s counsel about the relationship between the Fourth Amendment and central notions of a police officer’s arrest authority,²⁵¹ he posed the hypothetical using a federal official who had no arrest authority.²⁵²

In any event, although the problem of Double Rebound should give us pause when we consider whether any Rebound should be permitted, that problem alone seems insufficient to drive the result in *Moore*, at least in any principled way. Double Rebound may be something we must avoid as a matter of modern federal realities, but the Constitution does not command such avoidance. After all, as we have already seen, Congress has spoken before about powers of officers making federal arrests, and there is no reason why Double Rebound could not be completely prevented by Congress going back into the fray, but this time passing a kind of converse of its 1789 arrest statute—one that expressly provides that in effectuating arrests for federal crimes, no federal (or state) law enforcement officials shall be bound by any arrest limitations imposed by states.

VIII. CONCLUSION

Moore is a strange case in many ways. Justice Scalia’s opinion skims above the raging river of incorporation and Rebound with hardly a flutter. When members of the Court do glance down at the torrent, they pause to debate a rather obscure historical point about the common law arrest authority, a point that not only has little to do with the case’s outcome, but

<http://www.fbi.gov/libref/historic/history/historicdates.htm> (last visited Oct. 17, 2009).

²⁵¹ See Transcript of Oral Argument at 7–9, *Virginia v. Moore*, 128 S. Ct. 1598 (2008) (No. 06-1082).

²⁵² Specifically, Justice Scalia inquired, after some tête-à-tête about state action, whether a federal official who clearly had no authority to effect any kind of arrest violates the Fourth Amendment when he nevertheless does so. See *id.*

one that the Court had resolved seven years before. What are we to make of all of this?

One answer might be that the case is not about incorporation or Rebound at all, and that my handwringing otherwise is just another example in a long and proud academic tradition of building straw men then writing articles about their destruction. But I hope that our tour of incorporation, of the problem of Rebound and of the history of the arrest and its relationship to probable cause, all plausibly suggest that the Rebound bogeyman is real, and that thinking about it will not only enlighten our perspective about incorporation itself, but will also teach us something about which constitutional values are “core” and which are not when those values come to clash with indigenous state law.

If the problem of Incorporation Rebound is real, what does *Moore* teach us about it? Two things, I think.

First, the Court’s unwillingness even to acknowledge that it was backpedaling from the broad language in the so-called “supervisory cases,” and indeed even its willingness to label those cases as “supervisory,” confirms that its commitment to the uniform application of incorporated rights has moved into new, unshakable territory. If states want to be more protective than the Bill of Rights they are free to do so, but the Court is not willing to take even a negligible risk that Positive Rebound might lead to Negative Rebound and an unraveling of the incorporation canon. This should put paid to the critics calling for a new incorporation paradigm.

But there is something else about the case. The very adamancy of the Court’s rejection of any result even smacking of incorporation retrenchment—its almost reflexive incantation of the parade of modern federalism horrors that such a retrenchment might risk—speaks volumes about a lingering uneasiness with the underlying logic of incorporation. Thinking about Incorporation Rebound requires us to think about the very nature of incorporation. If these federal rights were meant to be applied to the states, how were they intended to be integrated into an existing legal milieu with roots that predated the federal settlement and, in some cases, such as in the case of the arrest power, run back to the earliest days of English common law? The real answer, of course, is that the framers never intended the Bill of Rights’ natural laws to be retrofitted onto the states’ preexisting legal systems. Instead, the Bill of Rights was a set of design guidelines for the new, suspicious, federal machine.

By the time post-Civil War suspicions turned to the states, the notion that the Fourteenth Amendment would mandate such a retrofit was itself so

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controversial that neither the framers of the Civil War Amendments nor the members of the Court, who struggled with the problem for the next century, devoted much time to the details of the retrofit. When Justice Brennan managed to cobble together his delicate but persistent plurality, the most detail they could give is that a right should be incorporated if it is “fundamental.” That command may or may not be an invitation for unfettered federal interference with state law, as Justice Black and the other total incorporationists argued, but in any event it is wholly uninformative about the details of that interference. Having spent a century having its best minds wrangle over whether the contraption should be bought at all, now the Court has come to realize that the contraption comes with no operating instructions.

With no guidance for the kind of detailed application of incorporation that would allow some Positive Rebound, the Court had an easy choice: abandon incorporation altogether, or apply it in a mechanical way tone deaf to the nuances of the first and second great constitutional settlements. *Moore* teaches us that the Court is so unwilling to reopen the wounds of the incorporation debate that it will not even consider that the resolution of that debate has missed some essential details.