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I. INTRODUCTION

The Eighth Amendment prohibition on "excessive bail"[1] is perhaps the least developed of the criminal clauses in the *Bill of Rights*.[2] The reasons have nothing to do with a scarcity of complaints about excessive bail in the trial courts.[3] At any given time, about 500,000 criminally accused persons languish in jail in the United States,[4] and not only defense lawyers in individual cases, but legal scholars who have studied the broader spectrum of cases regularly contend that many of these detentions are unnecessary.[5] Yet, claims of excessive bail virtually never receive an airing in the Supreme Court,[6] unlike claims, for example, about unreasonable police invasions of privacy,[7] improper police interrogations,[8] or cruel and unusual punishments.[9] The Court has not

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1. U.S. CONST. amend. VIII. The full text of the Eighth Amendment provides: "Excessive Bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

2. Galen v. Cnty. of Los Angeles, 468 F.3d 563, 569 (9th Cir. 2006) (noting that the Eighth Amendment is "one of the least litigated provisions of the Bill of Rights"), *amended by* Galen v. Cnty. of Los Angeles, 477 F.3d 652 (9th Cir. 2007).

3. *See infra* Part II.A.

4. *See* Shima Baradaran, *The State of Pretrial Detention*, *in* 2011 A.B.A. ST. CRIM. JUST. 187, 190 (Myrna S. Raeder ed.).

5. *See, e.g.*, Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1351-63 (2014); Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, A.B.A. CRIM. JUST., Spring 2011, at 12, 17, *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/cjsp11_bail.authcheckdam.pdf.

6. *Galen*, 468 F.3d at 569 (noting that the Supreme Court has directly addressed the *Excessive Bail Clause* only three times).

7. *See generally* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (4th ed. 2012).

8. *See generally* YALE KAMISAR, ET AL., MODERN CRIMINAL PROCEDURE 222-69 (13th ed. 2012).

issued an opinion applying the *Excessive Bail Clause*[10] in more than 25 years[11] and has rendered only two others in its history, both in the early 1950s.[12]

Much has also happened since the 1960s that invites clarification about what the provision demands. Technological advances that permit electronic tracking of persons have reduced the need in many cases for governments to use bail or detention to help ensure that criminal defendants reappear at future court proceedings.[13] Proponents of electronic monitoring contend that the advent of cellular telephone networks and global positioning satellites make tracking of persons efficient and effective.[14] Electronic monitoring could raise concerns about invasions of the privacy of defendants and about the inequality that would arise if rich defendants could opt out by paying bail. Yet, the privacy claim weakens if the monitoring is not constant, and it fails if the alternative is jail.[15] Likewise, the inequality claim collapses if rich defendants are not allowed to choose bail.[16] While not a panacea, monitoring technology should affect the calculus favoring bail as the best way to promote reappearance for many defendants.[17]

At the same time, most states have retrenched from the bail reform movement of the 1960s that favored greater use of release on non-monetary conditions.[18] One reason traces to public concerns that erupted during subsequent crime waves about offenses committed by those on pretrial release.[19] In response, most legislatures passed preventive

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9. *See* MICHAEL B. MUSHLIN, 1 RIGHTS OF PRISONERS 12-16 (4th ed. 2009) (discussing Supreme Court cases applying the Cruel and Unusual Punishments Clause in prison-condition cases); Scott W. Howe, *The Eighth Amendment as a Warrant Against Undeserved Punishment*, 22 WM. & MARY BILL RTS. J. 91, 107-09 (2013) (summarizing Supreme Court cases applying the punishment clause in non-capital cases). *See generally* RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS (3d ed. 2006) (presenting various Supreme Court cases applying the punishment clause in capital cases).

10. U.S. CONST. amend. VIII.

11. United States v. Salerno, 481 U.S. 739 (1987). *Salerno* was the last case adjudicated. *Id.*

12. *See* Carlson v. Landon, 342 U.S. 524 (1952); Stack v. Boyle, 342 U.S. 1 (1951).

13. *See* Wiseman, *supra* note 5, at 1364-82.

14. *See id.* at 1373-74.

15. *See id.* at 1375.

16. *See id.* at 1380. There is also a potential concern that government use of monitoring for criminal defendants who would otherwise face bail orders, "will lead to the use of monitoring in other, more objectionable contexts." *Id.* at 1376. But, Professor Wiseman notes that there are several good counter-arguments to such "slippery-slope" contentions. *Id.* at 1376-81.

17. *Id.* at 1364. There is a "likelihood of entrenched opposition from the bail industry." *Id.* Yet, this practical obstacle should not matter for Eighth Amendment purposes.

18. *See* John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 15 (1985); Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 374 (1990).

19. *See* Goldkamp, *supra* note 18, at 15-16.

detention statutes and began requiring courts to consider public safety in deciding between release on non-monetary conditions, bail, or preventive detention.[20] Some states also required judges to consider public safety in determining how much bail to impose.[21] Even for many defendants not subject to preventive detention, the focus on safety inclined judges away from release and toward higher bail amounts.[22]

Likewise, states began relying more heavily on bail schedules, which also promoted more detentions.[23] Bail schedules provide standardized bail amounts, typically tied to the highest offense charged.[24] The schemes usually involve authorization to law enforcement officials to release arrestees on bail without the involvement of a judicial officer.[25] The perceived benefits are to enable many arrestees to obtain prompt release and to eliminate some of the time spent on bail hearings in court.[26] Yet, because "judges are reluctant to reduce bail unless circumstances have changed significantly,"[27] the schedules result in the continuing imposition of unattainable bail amounts for many defendants who would have gained release if they initially had received individualized consideration.[28] For indigents charged with minor offenses, the "practical effect . . . is to detain large numbers of arrestees on relatively low bonds."[29]

Whether these developments raise Eighth Amendment concerns depends on the meaning of the *Excessive Bail Clause*. Unfortunately, the outline of its mandate remains elusive in most respects. In what

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20. For a summary of state bail laws, see the Pretrial Justice Institute's Matrix of State Bail Laws [hereinafter *Matrix of State Bail Laws*], http://www.pretrial.org/download/law-policy/Matrix%20of%20State%20Bail%20Laws%20April%202010.pdf (last visited Sept. 2, 2015). When the movement to require consideration of public safety began in the early 1970s, some viewed the approach as supported by the decision in *Carlson v. Landon*. *See* Goldkamp, *supra* note 18, at 4 n.15. The *Carlson* opinion concluded that: (1) consistent with the Constitution, Congress could make bail unavailable at the discretion of the Attorney General for deportable aliens, and (2) the Attorney General had not acted arbitrarily regarding the particular defendants given evidence of their Communist beliefs and participation in Communist activities. Carlson v. Landon, 342 U.S. 524, 541-44 (1952).

21. *See, e.g.*, CAL. PENAL CODE § 1275(a) (West 2004) (specifying that "public safety" shall be "the primary consideration" in setting bail).

22. Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 7 n.43 (2008).

23. *See* Carlson, *supra* note 5, at 13-14.

24. *See id.* at 13, 15.

25. *Id.* at 14.

26. *Id.*

27. *Id.*

28. *See id.* at 14, 16-17; *see also* Karnow, *supra* note 22, at 14 (noting that "the evidence does not support the proposition that the severity of the crime has any relationship either to the tendency to flee or to the likelihood of re-offending").

29. Carlson, *supra* note 5, at 14.

circumstances, for example, can a state detain a criminal defendant without bail?[30] In 1987, in *United States v. Salerno*,[31] the Court upheld preventive detention under the federal Bail Reform Act of 1984,[32] underscoring that the clause does not always require bail in the face of public safety concerns.[33] However, the features of the statute and the federal system that the Justices confronted in *Salerno* are not ubiquitous, and the Court did not purport to clarify the minimum requirements that a state must meet to deny bail.[34] When, if ever, can public-safety concerns justify a bail amount that would otherwise be excessive? In 1951, in *Stack v. Boyle*,[35] the Court declared that the Eighth Amendment only allows bail to assure "the presence of an accused."[36] Nonetheless, there is widespread doubt that this declaration is still the law after *Salerno*, given its approval of preventive detention.[37] Other basic questions also remain about the nature of the proportionality test for assessing excessiveness that the clause demands.[38]

Another notable ambiguity about the *Excessive Bail Clause*, until recently, concerned its incorporation against the states through the *Due Process Clause* of the Fourteenth Amendment.[39] The Court has never decided a case that presents the question whether the clause governs the states through incorporation.[40] However, in dicta, the Court recently declared the clause incorporated.[41] In *McDonald v. City of Chicago*,[42] concerning incorporation of the Second Amendment,[43] the Court included the bail clause in a list of incorporated *Bill of Rights* protections.[44] The assertion was odd, not simply because the Court had

30. This article focuses on bail for criminal defendants. There are other circumstances in which persons in the United States face detention without bail. *See generally* Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT'L. SEC. J. 85 (2011). I do not address the application of the Eighth Amendment to those circumstances.

31. 481 U.S. 739 (1987).

32. 18 U.S.C. §§ 3141–3150, 3156 (2012).

33. *Salerno*, 481 U.S. at 755.

34. *See id.* at 750.

35. 342 U.S. 1 (1951).

36. *Id.* at 5.

37. *See infra* Part II.C.

38. *See infra* Part II.

39. *See* Samuel Wiseman, *McDonald's Other Right*, 97 VA. L. REV. IN BRIEF 23, 24 (May 30, 2011), *available at* http://www.virginialawreview.org/volumes/content/mcdonalds-other-right.

40. *See id.*

41. *See id.*

42. 561 U.S. 742 (2010).

43. *Id.* at 750.

44. *Id.* at 764 n.12; *see also id.* at 765 n.13 (omitting the *Excessive Bail Clause* from a list of the rights "not fully incorporated").

never decided the question,[45] but because it had provided so little guidance about the meaning of the *Excessive Bail Clause*.[46]

There were grounds to believe the *Excessive Bail Clause* did not confer the kind of important safeguard for accused persons that made sense to incorporate against the states.[47] In *Salerno*, the Court had suggested that the clause might not confer a right to bail even in limited circumstances.[48] The Court also had asserted that, if the legislature makes certain offenses bailable, the clause might only mean that a judicial officer must abide by any legislated limitations on the purposes to be served by bail when determining how much bail to impose.[49] If the clause only mandates respect for legislative judgment, it would not appear meant for federal courts to enforce against state judges. The mere interpretation and enforcement of state bail legislation would seem best left to state decision-makers.

This Article maintains, however, that incorporation implies that the *Excessive Bail Clause* imposes significant limits on government.[50] In *McDonald*, the Supreme Court emphasized that incorporation is "selective" among the *Bill of Rights* provisions,[51] and that the incorporated protection must be "fundamental" to our "scheme of ordered liberty and system of justice."[52] Based on this perspective, Part II of the Article urges that incorporation of the bail clause implies

45. In other dicta, the Court, many years earlier, had asserted that "[b]ail, of course, is basic to our system of law . . . and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment." Schilb v. Kuebel, 404 U.S. 357, 365 (1971). The Court also later had reiterated this assumption. *See* Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979). Several lower courts have concluded that the *Excessive Bail Clause* applies against the states through the *Due Process Clause* of the Fourteenth Amendment. *See, e.g.*, Wagenmann v. Adams, 829 F.2d 196, 211 (1st Cir. 1987) (affirming damage award under 42 U.S.C. § 1983 for violation of the clause by state actor); Sistrunk v. Lyons, 646 F.2d 64, 71 (3rd Cir. 1981). Other lower courts have assumed incorporation for the sake of argument but then rejected the Eighth Amendment claim on other grounds. *See, e.g.*, Galen v. Cnty. of Los Angeles, 477 F.3d 652, 659, 662-63 (9th Cir. 2007).

46. *See Schilb*, 404 U.S. at 365.

47. *See* United States v. Salerno, 481 U.S. 739, 752-54 (1987).

48. *See id.* at 752. The Court noted that the *Excessive Bail Clause* "of course, says nothing about whether bail shall be available at all." *Id.* The Court added, "[E]ven if we were to conclude that the Eighth Amendment imposes some substantive limitations on the National Legislature's powers in this area, we would still hold that the Bail Reform Act is valid." *Id.* at 754.

49. *See id.* at 754 (upholding preventive detention based on public-safety concerns expressed in the Act because "[n]othing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight" and excessiveness is determined by comparing the Government response "against the interest the Government seeks to protect by means of that response").

50. *See infra* Parts III–IV.

51. McDonald v. City of Chicago, 561 U.S. 742, 763-66 (2010).

52. *Id.* at 764.

answers to the two basic riddles about the definition of excessive bail that the Court noted in *Salerno*.[53] First, incorporation should mean that the clause confers an implicit right to bail for criminal defendants in broad circumstances.[54] Second, incorporation should mean that the clause defines the proper function of bail and, thus, the measure of excessiveness.[55] Without these basic premises, the clause is unworthy of incorporation.[56]

In Part III, this Article explains why incorporation also calls for the Court to resolve additional questions about the *Excessive Bail Clause* that it otherwise appropriately could avoid.[57] The first issue concerns the evidence to be weighed in reaching the bail decision.[58] Is the defendant entitled to individualized consideration of various aspects of his character, record, and crime, or can courts render categorical bail decisions based on the nature of the charged offense?[59] The second question concerns the nature of the "fit" test between a bail amount and the purpose of bail that courts reviewing bail decisions should apply.[60] Is the test stringent, such as whether the bail amount was essential to serve the government interest, relaxed, such as whether the bail amount was arbitrary, or somewhere in the middle?[61] Without incorporation, the Court could probably avoid answering these questions with precision,[62] because federal bail statutes[63] resolve them in ways that give at least as much protection as the *Excessive Bail Clause* likely would provide.[64] However, many state statutes do not confer the same level of protection, which, given incorporation, raises questions about the nature of the Eighth Amendment guarantee.[65]

Finally, Part IV of this Article contends that incorporation also heightens the importance of confronting problems of justiciability in the Supreme Court.[66] In part because of the view that claims under the

53. *See* discussion *infra* Part II.
54. *See* discussion *infra* Parts II.A.1, II.B.1.
55. *See* discussion *infra* Parts II.A.2, II.B.3.
56. *See* discussion *infra* Part II.B.1.
57. *See* discussion *infra* Part III.
58. *See* discussion *infra* Part III.A.
59. *See* discussion *infra* Part III.A.
60. *See* discussion *infra* Part III.B.
61. *See* discussion *infra* Part III.B.
62. *See infra* text accompanying notes 192-94.
63. *See, e.g.*, 18 U.S.C. § 3142 (2012).
64. *See infra* text accompanying notes 303-05.
65. *See infra* note 305 and accompanying text.
66. *See* discussion *infra* Part IV.

Excessive Bail Clause generally become non-justiciable upon conviction,[67] the Justices have had relatively few opportunities to interpret the provision.[68] This Article proposes a solution based on recognition that protection under the clause is not only substantive but procedural.[69] A procedural injury remains after conviction if an unjust detention helps produce the conviction.[70] On this view, the claim could be raised as a challenge to the conviction, and the remedy should be reversal. To facilitate and regulate review of such claims, the Court could adopt a presumption of procedural injury in limited circumstances while also allowing the government the opportunity to prove harmlessness beyond a reasonable doubt. This approach would increase the number of justiciable claims under the *Excessive Bail Clause* that reach the Court while foreclosing reversals of convictions where procedural harm to the defendant is demonstrably absent.

II. FOUNDATIONS OF THE BAIL CLAUSE AFTER INCORPORATION

In this Part, I argue that incorporation implies answers to two foundational questions that have long existed about the proper construction of the *Excessive Bail Clause*.[71] First, does the clause confer a right to bail?[72] And, second, when bail is required, are the permissible goals of bail defined by a construction of the clause itself?[73] I begin by summarizing the historical controversy over the answers to these questions and then discuss the importance of incorporation in resolving them.[74] I contend that the answers to both questions must be "yes" for the clause to merit incorporation.[75] I also contend that the fact of incorporation suggests that the rights to bail and to non-excessiveness should be fairly broad, although far from pervasive.[76]

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67. *See, e.g.*, Murphy v. Hunt, 455 U.S. 478, 481-82 (1982). In an action for declaratory and injunctive relief against a state court judge under 42 U.S.C. § 1983, the Court held that "Hunt's constitutional claim to pretrial bail became moot following his convictions in state court." *Id.* In *White v. Wilson*, 399 F.2d 596, 598 (9th Cir. 1968), the 9th Circuit held that a claim under the *Excessive Bail Clause* provides no basis for challenging a conviction.

68. *See* discussion *infra* Part IV.B.

69. *See* discussion *infra* Part IV.

70. *See* discussion *infra* Part IV.B.

71. *See* discussion *infra* Part II.A.

72. *See* discussion *infra* Part II.A.1.

73. *See* discussion *infra* Part II.A.2.

74. *See* discussion *infra* Part II.A–B.

75. *See* discussion *infra* Part II.B.2.

76. *See* discussion *infra* Part II.B.3.

A. Historical Uncertainty About Two Foundational Questions

The questions of whether there is a constitutional right to bail and whether the *Excessive Bail Clause* defines the permissible purposes of bail both ultimately focus on the proper role of the legislature in regulating bail. These questions ask whether it is up to the legislature to decide when to authorize bail and what goals the judicial officer should pursue in setting bail, or whether the Eighth Amendment itself imposes limits on both legislatures and judicial officers. Historically, serious debate has surrounded these issues.[77] As a prelude to exploring the implications of incorporation, this section explains the bases for the controversies.[78]

1. When, if Ever, Is There a Right to Bail?

The nature of any right to bail has long constituted the central enigma of the *Excessive Bail Clause*.[79] The provision does not explicitly confer a right to bail, and the relevant events preceding and surrounding its adoption do not establish that it was originally intended or understood to create such a right.[80] There was no legislative history from the First Congress revealing an intention to create a right to bail.[81] Indeed, the same Congress that approved the Eighth Amendment in 1789 passed federal legislation a few days later[82] specifying when bail was permissible—in all non-capital cases[83]—which suggested that the matter

77. *See* discussion *infra* Part II.A.1–2.

78. *See* discussion *infra* Part II.A.1–2.

79. *See* Donald B. Verrilli, Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 331 (1982).

80. Hermine Herta Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L.J. 1140, 1179 (1972).

81. *See, e.g.*, Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 398 (1970) (noting there was no recorded discussion of the clause in the First Congress beyond a few comments by one Congressman who declared the text indecipherable).

82. *See* Meyer, *supra* note 80, at 1179.

83. Congress had directed that bail be granted to non-capital defendants arrested for federal crimes:

> And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law.

Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (1789). Two years earlier, in the Northwest Ordinance, Congress also had directed that bail be granted to noncapital defendants. *See* Northwest Ordinance of 1787, art. II (stating "all persons shall be bailable unless for capital offences, where the proof shall be evident, or the presumption great").

was for future Congresses.[84] The notion that the legislature should decide when bail was authorized also coincided with the English view of the prohibition on excessive bail in the 1689 English Bill of Rights, from which the Eighth Amendment bail clause was derived.[85]

In support of an implicit right to bail, provisions granting such a right existed in several of the colonial charters and in two of the state constitutions passed before 1789,[86] and almost all states that entered the union after 1789 guaranteed a right to bail in their constitutions.[87] From this broader historical perspective, a consensus appears to have developed that a right to bail should protect most accused persons.[88] Moreover, if the *Excessive Bail Clause* allowed Congress to deny bail without limit, it would seem out of place among provisions of the *Bill of Rights* that have been interpreted "to protect the individual from governmental oppression,"[89] including abuses by Congress.[90]

Commentators before the late 1980s disagreed widely over the extent of any right to bail that the clause conferred.[91] On one side, some scholars urged that the clause implied a nearly pervasive right to bail.[92] On the other side, some scholars urged that the clause implied no restrictions on the power of Congress to deny bail, although it imposed some limits on judges in cases made bailable.[93] In the middle, some courts and commentators argued that the clause conferred a limited right to bail that would not extend to defendants who presented a serious risk of flight or a substantial danger to the community if released.[94]

In *United States v. Salerno*,[95] the Supreme Court repudiated the first of these three interpretations.[96] The Court upheld preventive detention

84. *See, e.g.*, Meyer, *supra* note 80, at 1179.

85. *See, e.g.*, William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 77 (1977); Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 968 (1965).

86. *See* Meyer, *supra* note 80, at 1191; Verrilli, *supra* note 79, at 351.

87. *See* Verrilli, *supra* note 79, at 351.

88. *See id.* at 351-52.

89. Carlson v. Landon, 342 U.S. 524, 556 (1952) (Black, J., dissenting).

90. *See* Tribe, *supra* note 81, at 400.

91. *See, e.g.*, *id.* at 399.

92. *See id.*

93. *See, e.g.*, Duker, *supra* note 85, at 86; Meyer, *supra* note 80, at 1179; John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1230 (1969).

94. *See, e.g.*, Verrilli, *supra* note 79, at 346-49; *see also* Roman L. Hruska, *Preventive Detention: the Constitution and the Congress*, 3 CREIGHTON L. REV. 36, 68 (1970) (arguing that bail could be denied under the clause to address public-safety concerns "if the standards and guidelines of the Congress are carefully drawn").

95. 481 U.S. 739 (1987).

96. *Id.* at 755.

under the federal Bail Reform Act of 1984,[97] rejecting the idea that there is a nearly pervasive right to bail.[98] The Court noted that, in addition to capital cases, there had long been consensus that "a court may refuse bail when the defendant presents a threat to the judicial process by intimidating witnesses."[99] Likewise, the Court concluded that the Bail Reform Act properly required the denial of bail[100] for several crimes beyond the capital context upon a finding that the accused posed a danger to others that no conditions of release could adequately eliminate.[101]

While rejecting a nearly pervasive right to bail, the *Salerno* decision left much uncertainty about when the *Excessive Bail Clause* forecloses the denial of bail.[102] The federal Bail Reform Act of 1984 allowed preventive detention, according to the Court, for only "the most serious of crimes,"[103] and there were several protections for the defendant.[104] He had a right to a prompt adversarial hearing at which he could testify, present witnesses, and cross-examine witnesses against him.[105] He was entitled to be represented by counsel.[106] The facts used to support a finding against him were to be supported by clear and convincing evidence[107] and were limited to certain specified considerations.[108] An order of detention required written findings of fact and reasons[109] and was appealable on an expedited basis.[110] The stringent time limitations of the federal Speedy Trial Act[111] governed the maximum length of pretrial detention.[112] Finally, the Bail Reform Act required that the government hold detainees in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being

97. 18 U.S.C. §§ 3141–3150, 3156 (2012).

98. *Salerno*, 481 U.S. at 750.

99. *Id.* at 753.

100. *Id.* at 754-55 (holding that "when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail").

101. *Id.* at 747. The list included "crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders." *Id.*

102. *Id.* at 752-55.

103. *Id.* at 747.

104. *Id.* at 751-52.

105. 18 U.S.C. § 3142(f) (2012).

106. *Id.*

107. *Id.*

108. 18 U.S.C. § 3142(g) (listing the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the defendant, and the danger to the community as factors to be considered).

109. 18 U.S.C. § 3142(i).

110. 18 U.S.C. § 3145(c) (2012).

111. 18 U.S.C. §§ 3161–3174 (2012).

112. *Id.*; United States v. Salerno, 481 U.S. 739, 747 (1987).

held in custody pending appeal."[113] While all of these limitations and protections together sufficed to meet any Eighth Amendment demands, the Court did not purport to clarify which, if any, were essential to its conclusion.[114]

Indeed, the *Salerno* decision did not clarify whether the *Excessive Bail Clause* ever conferred a right to bail in the face of legislation denying it.[115] The Court noted that the clause "says nothing about whether bail shall be available at all,"[116] and declined to decide whether the clause "speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail."[117] Consequently, the opinion left undisturbed the argument of scholars who urged that the clause implies no restrictions on the power of Congress to deny bail altogether.[118] Yet, it also did not foreclose the argument that the clause implies a fairly broad right to bail.[119]

2. What Are the Proper Purposes of Bail?

The second major historical puzzle about the *Excessive Bail Clause* concerns whether it restricts the purposes for which Congress or a federal court may require bail and, in that sense, limits bail amounts. In 1951, in *Stack v. Boyle*,[120] the Supreme Court declared that the clause only permits bail to assure "the presence of an accused."[121] However, after the Court upheld the federal preventive-detention statute in *Salerno*, widespread doubts arose that the *Stack* declaration was still true.[122] When, if ever, can a federal judicial officer impose a bail amount that would otherwise be excessive to prevent an accused from, for example, intimidating a witness, using illicit drugs, committing a property offense, or committing a crime of violence? The answer has remained uncertain.

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113. 18 U.S.C. § 3142(i)(2).

114. Also, the Court concluded only that the statute "on its face" did not violate the Constitution, which meant merely that the petitioner had failed to "establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745 & n.3.

115. *See id.* at 754-55.

116. *Id.* at 752.

117. *Id.* at 754.

118. *See, e.g.*, authorities cited *supra* in note 93.

119. *Salerno*, 481 U.S. at 752-55.

120. 342 U.S. 1 (1951).

121. *See id.* at 5.

122. Some doubt already existed based on the opinion in *Carlson v. Landon*, 342 U.S. 524 (1952), which was decided the year after *Stack*. *See supra* note 20. However, *Salerno* added to the doubt. *See, e.g.*, Karnow, *supra* note 22, at 8 (noting that, based on *Salerno*, California passed laws requiring that public safety be the primary consideration in bail decisions).

The idea that the amount of bail imposed will influence a released defendant regarding behaviors other than his reappearance is irrational unless he will forfeit all or part of the bail for those behaviors.[123] If the defendant will only forfeit bail when he does not appear, only bail designed to keep him incarcerated would seem to prevent him from engaging in other bad behaviors. Moreover, in many if not all jurisdictions, defendants typically only forfeit bail for failure to appear.[124] Yet, if the Eighth Amendment permits the use of bail to ensure incarceration, the reason to set limits on bail amounts evaporates. Bail set at slightly over what the defendant could satisfy would serve a permissible purpose, and bail set at any higher amount, although unnecessary, would amount to a form of harmless error. This perspective suggests that the declaration of the Court in *Stack*, that bail should only serve to promote reappearance, generally made sense as a way to give meaning to the provision.[125]

At the same time, a high bail designed to keep an accused incarcerated so that he cannot commit more crimes should not *always* violate the clause, if we accept the *Salerno* holding.[126] Suppose that, in accordance with the federal preventive-detention statute, a federal judge correctly concludes on the record that a defendant of modest means should have bail denied altogether. Instead, however, the judge imposes a bail of two million dollars, which the accused cannot satisfy. The bail amount is far more than necessary to ensure the defendant's reappearance, and, based on the *Stack* declaration, would seem excessive

123. *See, e.g.*, Karnow, *supra* note 22, at 23.

124. In federal court, Rule 46(f)(1) of the Federal Rule of Criminal Procedure provides that the court "must declare the bail forfeited if a condition of the bond is breached." FED. R. CRIM. P. 46(f)(1). However, federal courts commonly have concluded that only conditions actually listed in the appearance bond, as opposed to all conditions of release, justify forfeiture of the bond, and on this basis, have rejected forfeiture for the commission of new crimes while on release. *See, e.g.*, United States. v. Blankenship, No. 1:08—cr—10086—JDB, 2009 WL 3103789, *2 (W. D. Tenn. Mar. 27, 2009); United States v. Shah, 193 F. Supp. 2d 1091, 1095 (E.D. Wis. 2002). Moreover, Rule 46(f)(2) allows the court to set aside the forfeiture for any breach "if the surety later surrenders" the person, or if "it appears that justice does not require bail forfeiture." FED. R. CRIM. P. 46(f)(2). Federal courts have also used this provision to reject forfeiture after a defendant on bonded release commits a new crime. *See, e.g.*, *Blankenship*, 2009 WL 3103789, at *3. In state systems, statutes commonly provide for bail forfeiture only for failure to appear. *See, e.g.*, CAL. PENAL CODE § 1305 (West 2004); FLA. STAT. ANN. § 903.26 (West 2014); N.Y. CRIM. PROC. LAW § 540.10 (McKinney 2009); TEX. CODE CRIM. PROC. ANN. art. 22.01 (West 2009).

125. The American Bar Association has proposed pretrial release standards that explicitly reject consideration of public safety in setting bail amounts. ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE 10-5.3(b) (3rd ed. 2007) (stating that financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person).

126. *See supra* text accompanying notes 95-122.

under the Eighth Amendment.[127] Nonetheless, given that the *Excessive Bail Clause* would allow the denial of bail to this defendant to protect public safety, the clause could also comfortably allow an unaffordable bail amount designed to serve the same end. This hypothetical reveals that the *Stack* declaration does not always seem correct.

There are other scenarios involving bail designed to keep the defendant incarcerated, however, on which the *Eighth Amendment* answer is less clear. Assume, for example, that there were no preventive-detention statute, but a federal judge followed all of the limitations and protections discussed in *Salerno* in reaching a bail decision. Would a high bail intended to keep the defendant locked up satisfy the *Excessive Bail Clause*? Alternatively, assume that there were no applicable preventive-detention statute but Congress authorized the federal courts always to consider public-safety concerns in setting bail amounts, and without the sort of protections for the defendant that existed in *Salerno*.[128] Under that regime, would a bail amount designed to keep the defendant incarcerated to protect public safety pass muster? Finally, assume that there were no applicable preventive-detention statute and no legislative authorization to consider public safety in deciding on bail amounts. If a judge set a bail designed to be above the defendant's means out of legitimate concern for public safety, would it violate the Eighth Amendment? The answers to these kinds of questions depend on the core function of the *Excessive Bail Clause*, which the Supreme Court has never clarified.

Whether the Eighth Amendment sometimes itself guarantees bail should bear on the proper answers to these kinds of questions. If the clause defines when the government can deny bail, Congress or a federal judicial officer should not have power effectively to evade those limits by setting bail amounts designed to keep defendants incarcerated. This conclusion would mean that, where the clause would require bail, the test of excessiveness should focus on reappearance alone, unless behavior other than a failure to reappear spurs bail forfeiture. Otherwise, as we have seen, the notion of excessiveness disintegrates.[129] Likewise, it would mean that, where the clause would permit a denial of bail, a bail amount set to keep the defendant incarcerated should not violate the clause. On the other hand, if the *Excessive Bail Clause* creates no right to bail, the provision is simply a directive to federal courts to respect the separation of powers regarding federal bail legislation. Therefore, a

127. *See supra* text accompanying notes 120-21.

128. California has authorized this approach by statute and in its constitution. *See infra* notes 185-86 and accompanying text.

129. *See supra* text accompanying notes 123-25.

judicial officer should do whatever Congress has directed regarding the denial of bail and the setting of bail amounts; the Eighth Amendment has nothing more to say about how to resolve bail questions.[130] The Supreme Court has not clarified which of these perspectives best describes the meaning of the clause.

B. Implications of Incorporation for the Two Core Questions

The dicta from the Supreme Court in *McDonald v. City of Chicago*[131] declaring the *Excessive Bail Clause* incorporated[132] should help resolve the two core questions about the meaning of the clause.[133] The opportunity to draw this kind of inference—from incorporation to the meaning of an incorporated provision—is unusual, because the Supreme Court has not previously declared incorporated a *Bill of Rights* provision whose basic function is so unsettled.[134] The uncertainties about the *Excessive Bail Clause* concern not minor nuances but core questions that determine whether the provision has substantial significance or very little. In this context, even the simple proposition that an incorporated clause should embody an important right that warrants protection against state encroachment helps resolve the core questions.

1. The General Significance of Incorporation

Supreme Court decisions reveal that incorporation of a *Bill of Rights* protection against the states through the *Due Process Clause* of the Fourteenth Amendment carries three messages.[135] First, incorporation conveys that the protection is viewed as exceptionally important in protecting liberty or justice by our society.[136] When incorporating the Second Amendment in *McDonald*, the Supreme Court articulated the test as whether a *Bill of Rights* guarantee "is fundamental

130. *See* U.S. CONST. amend. VIII.

131. 561 U.S. 742 (2010).

132. *Id.* at 764 n.12 (including the *Excessive Bail Clause* in a list of "incorporated" provisions); *see also id.* at 765 n.13 (omitting the *Excessive Bail Clause* from a list of the rights "not fully incorporated").

133. *See* discussion *supra* Part II.A.

134. The Court incorporated the Second Amendment in *McDonald* having clarified more about what personal rights that amendment guaranteed than it had clarified about the protections provided by the *Excessive Bail Clause*. *See McDonald*, 561 U.S. at 767-87, 765 n.13. The Court had resolved that the Second Amendment provided an individual right to bear arms for purposes of self-defense that was violated by a law that banned the possession of handguns in the home. *See* District of Columbia v. Heller, 554 U.S. 570, 628-29, 635 (2008). The Court reiterated this view of the Second Amendment when it incorporated it in *McDonald*. 561 U.S. at 749-50.

135. *See infra* text accompanying notes 136-60.

136. *See infra* text accompanying notes 137-38.

to *our*[137] scheme of ordered liberty and system of justice."[138] Amplifying on this measure, the Court declared that due process embodies "those 'fundamental principles of liberty and justice which lie at the base of all *our* civil and political institutions.'"[139] These statements convey that a provision should accomplish something especially significant in the way of promoting liberty and justice to merit incorporation.[140]

Second, the incorporation decisions of the Court convey that the inclusion of a protection in the *Bill of Rights* does not make it "fundamental."[141] The Court has rejected the idea of total incorporation of the *Bill of Rights*.[142] While most of the protections in the *Bill of Rights* now restrict the states, the Court has considered each provision individually[143] and has rejected the incorporation of some of them.[144] In *McDonald*, the Court declared that some provisions among the first eight amendments also remain unincorporated through lack of decision,[145] and

137. The *McDonald* Court emphasized that the measure focuses on what is fundamental in our society, and that we may recognize as fundamental a protection not deemed essential in other modern, civilized nations. *See McDonald*, 561 U.S. at 764. Most European systems, for example, do not guarantee a right against self-incrimination. *See* Twining v. New Jersey, 211 U.S. 78, 113 (1908), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964). However, the Supreme Court has incorporated the Fifth Amendment privilege against the states. *See Malloy*, 378 U.S. at 3. Likewise, even a protection that appears in the *Bill of Rights* and that adheres in most other countries could be insufficiently fundamental in our society to warrant incorporation.

138. *McDonald*, 561 U.S. at 764.

139. *Id.* (citing Duncan v. Louisiana, 391 U.S. 145, 148 (1968)).

140. The test does not require that there be "a 'popular consensus' that the right is fundamental." *McDonald*, 561 U.S. at 788-89. The Court has at times considered the extent to which states honor a particular right in deciding whether to incorporate it. *See, e.g.*, Wolf v. Colorado, 338 U.S. 25, 28-29 (1949) (noting the "contrariety of views of the States" as a reason to initially reject incorporation of the Fourth Amendment exclusionary rule). Yet, the absence of popular consensus typically has not stopped incorporation. For example, when the Court incorporated the exclusionary rule for Fourth Amendment violations, "one half of the States still adhere[d] to the common-law non-exclusionary rule, and one, Maryland, retain[ed] the rule as to felonies." Mapp v. Ohio, 367 U.S. 643, 680 (1961) (Harlan, J., dissenting). The Court has also incorporated a variety of other protections, including the right to bear arms and the right to appointed counsel in all felony cases, without evidence of popular consensus. *See McDonald*, 561 U.S. at 750; Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (incorporating the right of defendants in felony cases to appointed counsel).

141. *See infra* text accompanying notes 142-50.

142. *See, e.g.*, *McDonald*, 561 U.S. at 761-63.

143. In its decision incorporating the Second Amendment, the Court included a list of protections from the *Bill of Rights* that it previously had held incorporated. *See id.* at 764 n.12.

144. The Court has held that the Fifth Amendment right to indictment by a grand jury should not bind the states. *See* Hurtado v. California, 110 U.S. 516, 538 (1884). Likewise, while concluding that the Sixth Amendment requires unanimous jury verdicts in federal criminal cases, the Court has rejected the incorporation of this right against the states. *See* Apodaca v. Oregon, 406 U.S. 404, 410-14 (1972); Johnson v. Louisiana, 406 U.S. 356, 359-63 (1972).

145. *See McDonald*, 561 U.S. at 765 n.13 (listing the Third Amendment protection against the quartering of soldiers and the Eighth Amendment prohibition on excessive fines).

the Court also omitted mention of the Ninth[146] and Tenth[147] Amendments,[148] apparently on the view that they could not plausibly apply against the states.[149] This history underscores that a protection is "fundamental" only because it is especially important in ensuring liberty or justice, not because it appears in the *Bill of Rights*.[150]

146. U.S. CONST. amend. IX. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.*

147. U.S. CONST. amend. X. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

148. The Court has long hinted that it does not contemplate incorporation for these two *Bill of Rights* amendments. *See, e.g.*, Twining v. New Jersey, 211 U.S. 78, 99 (1908) (limiting comments on the possibilities for incorporation to the rights safeguarded by "the first eight Amendments").

149. The core functions of these amendments remain in dispute among legal commentators. *See generally* Thomas B. McAffee, *Federalism and the Protection of Rights: The Modern Ninth Amendment's Spreading Confusion*, 1996 BYU L. REV. 351 (1996). The provisions may only emphasize that the federal government is one of enumerated powers and reserve to the states any authority not given by the Constitution to the federal government or proscribed by it to the states. *See, e.g.*, United Pub. Workers v. Mitchell, 330 U.S. 75, 95-96 (1947). On that view, by merely confirming space in unregulated areas for state governments to act, they could not plausibly limit the states. Similarly, on the view that the *Establishment Clause* originally was only a limit on federal congressional interference with state establishments of religion, Justice Thomas has argued, contrary to existing precedent, that its incorporation makes no sense. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45-54 (2004) (Thomas, J., concurring). On the other hand, these provisions, particularly the Ninth Amendment, may also imply that there are some inalienable rights held by individuals that do not specifically appear in the *Bill of Rights* and that limit what government could otherwise regulate. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring). Yet, even on this view, incorporation against the states is unnecessary and cumbersome. Rather than finding a non-enumerated right to arise under the Ninth or Tenth Amendment and incorporating it against the states through due process, the Court could simply find the right embodied in due process. The Court long ago began concluding that the notion of due process makes certain non-enumerated rights, whether procedural or substantive, applicable against both state and federal governments. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 74 (1985) (acknowledging the due process right to examination by psychiatrist when sanity is seriously in dispute); Roe v. Wade, 410 U.S. 113, 154 (1973) (acknowledging the privacy right of a woman to have an abortion in limited circumstances); Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966) (holding that there exists a due process right to protection from courtroom disruptions and prejudicial publicity); *Griswold*, 381 U.S. at 485-86 (holding that a due process right of a married couple to use contraception exists); Brady v. Maryland, 373 U.S. 83, 87-88 (1963) (holding that there is a due process right to discovery of exculpatory evidence); Griffin v. Illinois, 351 U.S. 12, 16-20 (1956) (finding a due process right to transcript on appeal); Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (holding that there is a due process protection against racial discrimination in the schools of the District of Columbia); Moore v. Dempsey, 261 U.S. 86, 91-92 (1923) (finding a due process right against a mob-dominated trial).

150. The incorporation inquiry is not about originalism. There is no basis to believe that the original understanding of the *Due Process Clause* contemplated what the Court has accomplished through incorporation. *See, e.g.*, *McDonald*, 561 U.S. at 809-13 (Thomas, J., concurring in part and concurring in judgment). Some originalists contend that the *Privileges or Immunities Clause* of the Fourteenth Amendment incorporated the first eight amendments against the states. *See, e.g.*, *id.* at 850 & n.19, 851. From the perspective of original public meaning rather than the intent of the congressional drafters, this alternative case for incorporation faces serious challenges. *See generally*

Third, incorporation means that a *Bill of Rights* provision will apply against the states according to the same standards by which it applies against the federal government.[151] The Court did not always follow this "identical-application" approach.[152] Before the 1960s, a majority of the Justices supported a view of due process that might only apply the "core" of a *Bill of Rights* provision against the states.[153] For example, the Court initially held[154] that due process required the appointment of counsel for certain defendants charged in state prosecutions with the most serious crimes,[155] but rejected the claim that the Sixth Amendment right to counsel applied in state court, as it did in federal court, to every felony prosecution.[156] However, by the 1960s, the Court had abandoned this view of incorporation[157] and declared that incorporated *Bill of Rights* provisions "are all to be enforced against the States under the Fourteenth

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Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361 (2009) (demonstrating that there is little evidence that the *Privileges or Immunities Clause* acquired any generally accepted public meaning regarding incorporation at the time of its adoption); George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1?*, 18 J. CONTEMP. LEGAL ISSUES 323 (2009) (focusing on newspapers during the era of adoption of the Fourteenth Amendment). Moreover, the Court recently endorsed the original-public-meaning form of originalism in constructing the Second Amendment. *See* District of Columbia v. Heller, 554 U.S. 570, 579-95 (2008). In any event, the Court has always followed an incorporation approach that focuses on the *Due Process Clause*. *See McDonald*, 561 U.S. at 758-59.

151. *See infra* text accompanying note 158.

152. *See infra* text accompanying notes 153-56.

153. *See, e.g.*, Wolf v. Colorado, 338 U.S. 25, 26-28, 33 (1949) (holding that the "core of the Fourth Amendment"—meaning "[t]he security of one's privacy against arbitrary intrusion by the police"—applied against the states, but not the exclusionary remedy applicable against the federal government).

154. This view, of course, was later rejected in *Gideon v. Wainwright*, 372 U.S. 335, 340-42 (1963).

155. *See* Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that right to appointed counsel arises "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like").

156. *See* Betts v. Brady, 316 U.S. 455, 461-62, 473 (1942).

157. The one exception to this general rule concerns the Sixth Amendment right to trial by jury. The Court has held that, while this provision requires a unanimous jury verdict for a conviction in federal court, a conviction in state court can rest on a non-unanimous verdict. *See* Apodaca v. Oregon, 406 U.S. 404, 406, 414 (1972) (holding that a ten to two verdict is permitted); Johnson v. Louisiana, 406 U.S. 356, 358, 365 (1972) (holding that a nine to three verdict is permitted). However, that outcome was the result of a dispositive concurring opinion by Justice Powell rather than support by a majority of the Court for a different-standards approach. A majority concluded that the trial-by-jury right should apply in the same way to the states as it does to the federal government. *See Johnson*, 406 U.S. at 395 (Brennan, J., dissenting). However, among the eight, four believed the right carried no implied right of unanimity and four believed that it did. *See Apodaca*, 406 U.S. at 406 (plurality opinion); *id.* at 414-15 (Stewart, J., dissenting). Justice Powell concluded that the implied right should only apply in federal court. *See Johnson*, 406 U.S. at 376-77 (Powell, J., concurring).

Amendment according to the same standards that protect those personal rights against federal encroachment."[158] The Court recently reaffirmed this identical-application approach when incorporating the Second Amendment in *McDonald*.[159] Adherence by the Court to this approach means that incorporation is improper for a *Bill of Rights* provision, such as the Tenth Amendment, that has no plausible application to the states, even if it could have some significance when applied against the federal government.[160]

2. Reconsidering the Two Core Questions

In light of the usual meaning of incorporation, the decision by the Court in *McDonald* to declare the *Excessive Bail Clause* incorporated should answer the two core questions regarding the basic function of the clause: Does it confer a right to bail? And, does it define the purposes of bail? Incorporation should mean that the clause confers an implicit right to bail in broad circumstances and that it regulates the permissible purposes of bail and, thus, the measure of excessiveness. Unless the clause provides those basic protections, it would not merit incorporation.

The two core questions call for corresponding answers. Each question ultimately asks about whether the Eighth Amendment limits the role of the legislature in regulating bail. If the legislature has the unlimited authority under the Eighth Amendment to decide when bail is granted, it should also have the authority under the Eighth Amendment to specify the purposes of bail, although this latter authority would allow it to legislate high bails—by mandating consideration of public safety—designed to keep defendants incarcerated.[161] Recall that ensuring public safety in setting a bail amount means setting an unattainable bail, at least when bail forfeiture occurs only for failure to appear.[162] Yet, if the

158. Malloy v. Hogan, 378 U.S. 1, 10 (1964).

159. *See* McDonald v. City of Chicago, 561 U.S. 742, 788 (2010) (asserting that a "two-track" alternative is now impractical).

160. *See supra* notes 145-49 and accompanying text.

161. Apart from the illogic of allowing the legislature to deny everyone bail but not allowing it to specify the purposes of bail, there is a second reason for why the answers to the two issues should correspond. If the function of the clause is not simply to ensure the separation of powers on bail issues, there is no good reason for the Court to articulate an Eighth Amendment right to bail but to allow inconsistency among states regarding how to judge when bail becomes excessive. In other contexts, the Court has rejected the notion that the meaning of a *Bill of Rights* provision changes from state to state by virtue of differing state legislation. For example, the Court has rejected the idea that expectations of privacy under the Fourth Amendment should depend on the laws of particular states affecting privacy. *See* California v. Greenwood, 486 U. S. 35, 43-44 (1988). Unless the bail clause is about separation of powers, the arguments for uniform national standards regarding bail excessiveness would seem as compelling as those for expectations of privacy.

162. *See supra* text accompanying notes 123-24.

Eighth Amendment prevents the legislature from denying bail in an array of cases, the legislature should not be able to direct judicial officers to consider factors such as public safety in setting bail in those cases, at least not if bail forfeiture only results from failure to appear. Bail should only find justification in those circumstances in promoting the defendant's reappearance.

These two competing views of the *Excessive Bail Clause*, both left in play after *Salerno*, say very different things about the importance of the clause in promoting liberty and justice. One view renders the clause insignificant. This view assumes that the Eighth Amendment does not limit the legislature and only requires that a judicial officer allow bail in accordance with any directions from the legislature. On that view, the clause is a mere reminder to judicial officers to honor the separation of powers on bail questions. The alternative view could make the clause an especially important safeguard for liberty and justice. This alternative view assumes that the Eighth Amendment limits the ability of both the legislature and judicial officers to deny bail or to set bail at a level designed to exceed the defendant's ability to pay and, thus, to incarcerate him.

The decision of the Court to incorporate the clause must mean that it limits both the legislature and judicial officers. Construing the clause as only a directive to judicial officers to respect the separation of powers by honoring bail legislation would not only make it insignificant when applied in federal cases,[163] but perverse when applied to the states. In state cases, this construction would mean that federal courts should require state judicial officers to honor state bail legislation. Yet, this view "assumes a separation of functions between legislature and judiciary" that states generally do not have to employ.[164] Judge Easterbrook of the Seventh Circuit wrote: "[s]o far as federal courts are concerned, states may apportion governmental powers largely as they please."[165] Indeed, on this view, the final arbiters of the meaning of state bail legislation should still be the state courts, even when the state court interpretation seems patently erroneous, and the clause should never have been incorporated, because it provides neither a "fundamental" protection nor one that would apply in the same way to the states as to the federal government.[166] To apply such a construction to the states

163. *See* Carlson v. Landon, 342 U.S. 524, 556 (1952) (Black, J., dissenting) (contending that on the separation-of-powers view, the clause "means just about nothing").

164. *See, e.g.*, United States *ex rel.* Garcia v. O'Grady, 812 F.2d 347, 357 (7th Cir. 1987) (Easterbrook, J., concurring).

165. *Id.* at 357.

166. *See supra* text accompanying notes 157-60.

would be akin to incorporating the Tenth Amendment,[167] which the Court has viewed as a federalism provision that does not make sense as a limitation on the states.[168] This incoherence underscores that the decision to incorporate the *Excessive Bail Clause* should mean that the alternative construction is correct. The clause confers a right to bail in some circumstances and regulates the permissible purposes of bail and, thus, the measure of excessiveness.

3. The Scope of the Rights To Bail and Non-Excessiveness

The notion that the *Excessive Bail Clause* embodies fundamental safeguards[169] also implies that the rights to bail and to non-excessiveness should apply in reasonably broad fashion rather than in a cramped or narrow way. The scope of these rights is harder to determine from the fact of incorporation than their mere existence. However, in general, we can safely say that a defendant should receive non-excessive bail—which may sometimes mean release without bail—unless there are no conditions of release that could reasonably assure his appearance, his non-interference with the judicial process, and his compliance with the criminal law. This standard should apply in a way that accommodates the decision of the Supreme Court in *Salerno* to allow for preventive detention in a significant number of cases but that also preserves the rights to bail and non-excessiveness for most criminal defendants.

Consistent with this standard, two kinds of pre-conditions must exist to deny a request for non-excessive bail. The first is substantive and focuses on when the defendant is likely to flee, impede the justice process, or pose a danger to others. Capital charges can meet the standard automatically. They have never been thought to carry an Eighth Amendment right to bail.[170] In other criminal cases, rejection of the defendant's request probably requires a particularized showing that goes beyond the nature of the charges against him. The Court in *Salerno* noted that, in any criminal case, a showing that the defendant has intimidated potential witnesses could suffice.[171] Likewise, in accordance

167. Similarly, on the view that the *Establishment Clause* originally was only a limit on federal congressional interference with state establishments of religion, Justice Thomas has argued, contrary to existing precedent, that its incorporation makes no sense. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45-46, 49 (2004) (Thomas, J., concurring in judgment).

168. *See supra* text accompanying notes 145-49.

169. In *Salerno*, while upholding preventive detention against an Eighth Amendment challenge, the Court conceded that "the individual's strong interest in liberty" is of a "fundamental nature." United States v. Salerno, 481 U.S. 739, 750, 755 (1987).

170. *Id.* at 753.

171. *Id.* For an argument supporting this exception to a right to bail, see Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 763 (2011). Professor Baradaran

with the Bail Reform Act of 1984, the Court approved the detention of persons charged with certain serious but non-capital crimes on a finding that they posed a danger to others that no conditions of release could eliminate.[172] There surely are other circumstances that could also justify the denial of bail, such as a prior act or history of bail-jumping or of violating conditions of release.[173] Where precisely is the Eighth Amendment line? The answer is not clear.[174] There may be additional circumstances that justify preventive detention, such as a serious current charge against a defendant with multiple, serious convictions.[175] But, the Court could also plausibly conclude that, apart from cases involving defendants with prior violations of release conditions, the Bail Reform Act of 1984 and the *Salerno* opinion revealed the circumstances required for a court to deny the criminal defendant's request for non-excessive bail.

The second kind of pre-condition is procedural, and the approval of the federal statute and related protections for the defendant in *Salerno* could also provide Eighth Amendment guidance on that score. The *Salerno* Court noted that federal law required, among other things, that the trial judge find against the defendant by clear and convincing evidence after an adversarial, evidentiary hearing involving various protections for the defendant.[176] The Court did not say that all of these protections were crucial to its decision to approve the federal preventive-detention system.[177] However, if the rights to bail and non-excessiveness are fundamental, minimum procedural rules should safeguard them, and the group of *Salerno* protections, or something very similar, could be the minimum. This conclusion would mean that, except in a capital case, a judicial officer would lack authority to order detention or a bond designed to be unaffordable, even if based on considerations of public safety, without those protections in place.

The scope of the Eighth Amendment right to non-excessiveness should track the scope of the Eighth Amendment right to bail. Whenever the defendant retains an Eighth Amendment right to bail, the non-

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writes, "[a]llowing a defendant to threaten witnesses or interfere with the criminal process unfairly advantages a defendant and does not protect the presumption of innocence." *Id.*

172. *See supra* text accompanying notes 95-101.

173. *See, e.g.*, TEX. CONST. art. 1, § 11b (amended 2007).

174. Perhaps the Court could conclude, for example, that the right to bail also disappears on a showing that the defendant poses a serious danger to himself if released. However, laws allowing for civil detention would usually seem to make the denial of bail in such cases unnecessary.

175. *See, e.g., id.* § 11a (authorizing pretrial detention of a person accused of a non-capital felony who has two prior convictions for separate felonies).

176. *See supra* text accompanying notes 104-14.

177. *See supra* text accompanying note 114.

excessiveness mandate should also adhere. However, where no Eighth Amendment right to bail exists, an exorbitant bail should not violate the *Excessive Bail Clause*, just as an order denying bail would not violate it. This conclusion remains true regardless of whether a statute purports to give the defendant a broader right to bail than the Eighth Amendment. The caveat is that both the substantive and procedural pre-conditions to rejection of the defendant's bail claim must exist to conclude that his Eighth Amendment right to bail does not exist.

Avoiding Eighth Amendment excessiveness requires identifying the maximum amount needed to reasonably assure the defendant's reappearance, at least if bond forfeiture typically will only occur for non-appearance.[178] In those circumstances, as we have seen, consideration of other factors as a basis to increase bail is a ruse for identifying an amount that the defendant cannot satisfy.[179] A defendant may not have the means to meet even a non-excessive bail.[180] However, when the Eighth Amendment requires non-excessiveness, a high bail set through a procedure designed to keep the defendant incarcerated is, like preventive detention, improper.

These conclusions mean that, after *McDonald*, some state bail systems may regularly infringe on the *Excessive Bail Clause*.[181] Many states now allow a denial of bail based on public safety concerns,[182] and some of these systems do not provide the substantive and procedural protections that the Court approved in *Salerno*.[183] If the *Excessive Bail Clause* only required state judges to follow state bail legislation, these systems would pose no Eighth Amendment problem. While some state legislatures may have assumed, based on the *Salerno* opinion, that the clause required no more, its incorporation should now imply a more

178. Stack v. Boyle, 342 U.S. 1, 5 (1951).

179. *See supra* text accompanying notes 123-24.

180. *See, e.g.*, Galen v. Cnty. of Los Angeles, 477 F.3d 652, 661 (9th Cir. 2007); White v. Wilson, 399 F.2d 596, 598 (9th Cir. 1968); Hodgdon v. United States, 365 F.2d 679, 687 (8th Cir. 1966).

181. *See infra* text accompanying notes 182-88.

182. *See Matrix of State Bail Laws*, *supra* note 20.

183. *See, e.g.*, GA. CODE ANN. § 17-6-1(e)(2) (2013) (requiring denial of bail based on a finding that the person poses a "significant threat or danger to any person, to the community, or to any property in the community" without specifying procedural protections similar to those present in *Salerno*); KY. REV. STAT. § 431.066(2) (2012) (directing denial of bail for an arrestee who is "likely to be a danger to the public if released," without specifying procedural protections similar to those that the *Salerno* Court approved); S.C. CODE § 17-15-10(A) (2014) (permitting added restrictions in the case of a non-capital offense based on finding that person presents an "unreasonable danger to the community" if released, without specifying *Salerno*-like procedures); VA. CODE § 19.2-120(A)(1) (2014) (mandating denial of bail on finding an "unreasonable danger to . . . the public" in a broad range of felony cases without specifying procedural protections similar to those before the Court in *Salerno*).

robust protection. If the clause now confers, as it should, a fairly broad right to bail, some of these systems may not pass muster.

Many state statutes also call for the consideration of public safety in setting bail amounts,[184] and some of these directives may also at times infringe the incorporated bail clause. The California scheme is a troubling example. Under both the California Constitution and California legislation, judicial officers considering bail amounts, in cases where bail is authorized, must make "public safety" and the "safety of the victim" the "primary considerations."[185] At the same time, California law provides that bail forfeiture occurs only for failure to appear.[186] As a result, in many cases, the only way to use bail to assure the public safety is by imposing a bail amount calculated to be unaffordable, which is like denying bail. This would not be a problem in cases where no Eighth Amendment right to bail exists. However, in many of the California cases, the charges are not, as in *Salerno*, for "the most serious of crimes,"[187] and, in most of them, the bail hearings do not involve all of the procedural protections for the defendant that were present in *Salerno*.[188] Absent these substantive and procedural pre-conditions, the defendant is not properly divested of his constitutional rights to bail and to non-excessiveness. In these circumstances, to deny him bail or deliberately impose unaffordable bail, even to assure public safety, should infringe the Eighth Amendment.

III. SECONDARY BAIL RULES AFTER INCORPORATION

In this Part, I explore two additional questions about the *Excessive Bail Clause* that the Court probably could have avoided in the absence of

184. *See, e.g.*, CAL. PENAL CODE § 1275(a)(1) (West 2004 & Supp. 2015) (requiring that in "setting, reducing, or denying bail . . . public safety shall be the primary consideration"); MICH. CRIM. P. CODE § 765.6 (2004) (requiring that, "in fixing the amount of the bail," the court "shall consider and make findings" regarding, among other factors, the "protection of the public"); TENN. CODE ANN. § 40-11-118(b) (2012) (requiring magistrate to set "the amount of bail" to "reasonably assure the appearance of the defendant while at the same time protecting the safety of the public").

185. CAL. CONST. art. 1, § 28(f)(3); *see also* CAL. PENAL CODE § 1275(a)(1) (requiring that "public safety shall be the primary consideration").

186. *See* CAL. PENAL CODE § 1305(a) (West 2004 & Supp. 2015).

187. United States v. Salerno, 481 U.S. 739, 747 (1987).

188. For example, California law, unlike under the system approved in *Salerno*, does not require the judge to find by "clear and convincing evidence" that an arrestee presents a threat to an individual or the community if released. *Compare* 18 U.S.C. § 3142(f) (2012), *with* CAL. PENAL CODE §§ 1270–1270.1(c) (West 2004). Likewise, in some cases, California law, unlike under the system at issue in *Salerno*, does not even provide for an adversarial hearing before an upward departure from the bail schedule. *See* CAL. PENAL CODE § 1270.1(e) (West Supp. 2015) (permitting an increase in certain domestic violence cases "without a hearing" based on "an oral or written declaration of facts" from a "sworn peace officer").

incorporation, but that it now should resolve.[189] First, in setting bail amounts, must states satisfy the clause through individualized consideration or is categorical resolution based largely on the nature of the charges sufficient?[190] And, second, how demanding is the proportionality test between a bail amount and ensuring reappearance that courts reviewing bail decisions should apply?[191] Before incorporation, the Court had little reason to answer these questions, because federal bail statutes[192] resolved them in ways that give at least as much protection as the *Excessive Bail Clause* likely would provide.[193] However, because many state statutes do not provide the same level of protection, there will now be more reason for the Court to clarify the answers.[194] Although the answers are not interrelated, I urge a solution for each problem that weighs the fundamental importance of the bail clause in protecting pretrial liberty against several competing interests of government.[195]

A. How Much Individualization Does the Clause Require?

After incorporation, an important unresolved question about the *Excessive Bail Clause* concerns the evidence that bears on the determination of bail amounts. Does the clause entitle a defendant to individualized consideration of various aspects of his character, record, and crime, or, can courts render categorical decisions based on the nature of the charged offense? The answer has implications for the use of bail schedules, which provide standardized bail amounts according to the charges leveled against the arrestee.[196] Because many state courts, unlike federal courts,[197] use bail schedules,[198] incorporation makes the validity of their use a significant issue. Several lower courts have upheld the use of bail schedules against Eighth Amendment challenges, although state courts have sometimes rejected their use under state constitutions or statutes.[199] After incorporation, I contend that reliance

189. *See infra* notes 190-91 and accompanying text.

190. *See infra* Part III.A.

191. *See infra* Part III.B.

192. *See, e.g.*, 18 U.S.C. § 3142 (2012).

193. *See infra* note 305 and accompanying text.

194. *See supra* notes 184-88 and accompanying text.

195. *See infra* Part.IV.

196. *See* Carlson, *supra* note 5, at 13.

197. In federal court, a statute governs bail decisions and provides for individualized consideration of a variety of factors regarding the defendant and the charged crimes. *See* 18 U.S.C. § 3142(g) (2012).

198. *See* Carlson, *supra* note 5, at 14.

199. *See, e.g.*, Fields v. Henry Cnty., 701 F.3d 180, 184 (6th Cir. 2012) (upholding judge's

on bail schedules can infringe the Eighth Amendment. However, I also contend that states can use bail schedules as long as the defendant has a prompt opportunity for individualized consideration of additional evidence that bears on whether he will reappear and the scheduled amount carries no presumption of correctness.

Bail schedules provide prompt, regularized, and efficient bail decisions that benefit courts and many defendants.[200] In some states, the legislature creates the schedules.[201] In some others, like California, each local court creates one according to legislative direction.[202] In some jurisdictions, local courts have created bail schedules without legislated authority.[203] In bailable cases, the schedules state the amount of bail required, typically according to the most serious pending charge.[204] Courts benefit because they can devote less time to bail hearings and decisions.[205] Arrestees benefit, assuming they have the funds to meet the bail amount, because they can gain release quickly, often at the police station or jail, without waiting for a court hearing.[206] Arrestees also benefit from a reduced fear that they will face a bail amount set arbitrarily higher than others charged with the same offenses.

The Eighth Amendment problem with bail schedules is that many factors beyond those associated with the charges against a defendant bear on whether he will reappear.[207] The federal bail statute defines as relevant, among others, the following factors: "the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and

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reliance on bond schedule); Terrell v. City of El Paso, 481 F. Supp. 2d 757, 766 (W.D. Tex. 2007) (noting that "exhaustive research" of § 1983 challenges revealed only one case in which a federal court had held that a bail schedule violated the Eighth Amendment); Pelekai v. White, 861 P.2d 1205, 1210 (Haw. 1993) (holding that reliance by a judge on a bail schedule without considering personal characteristics of defendant was abuse of discretion under the state bail statute); Clark v. Hall, 53 P.3d 416, 416-17 (Okla. Crim. App. 2002) (holding that statute requiring $15,000 bail for soliciting a prostitute violated due process protections in the Oklahoma Constitution because it did not allow "an individualized determination to bail").

200. *See* Carlson, *supra* note 5, at 14-15.

201. *See id.* at 13.

202. *See* CAL. PENAL CODE § 1269b(c) (West 2004).

203. *See, e.g.*, Woods v. City of Mich. City, Ind., 940 F.2d 275, 276 (7th Cir. 1991) (noting bail schedule created by local state judge); *Pelekai*, 861 P.2d at 1207 (noting bail schedule created by local state court).

204. *See* Carlson, *supra* note 5, at 13-15.

205. *See id.* at 14.

206. *Id.*

207. Karnow, *supra* note 22, at 14. Encouraging reappearance is the purpose of bail where forfeiture only occurs for failure to appear. *See supra* text accompanying notes 123-24.

record concerning appearance at court proceedings."[208] Bail schedules may articulate bail amounts that represent the estimated "standard" amount that courts would impose on persons charged with those crimes after individualized consideration.[209] Yet, because they are at best predictions about means or medians, they exceed what is needed to reasonably assure reappearance for many of those persons. We could appropriately call the amounts excessive in those cases.[210]

The opinion of the Supreme Court in *Stack v. Boyle*[211] also gives ground to argue that too much reliance on bail schedules violates the Eighth Amendment.[212] The trial judge in *Stack* had not used a bail schedule, but he had fixed bond uniformly at $50,000 for each of twelve communist party members charged with conspiring to advocate the overthrow of the government by force.[213] The Supreme Court rejected this decision under the Eighth Amendment, declaring that there was "no factual showing to justify" it.[214] The uniformity of the bail amounts reflected a failure to follow the "traditional standards" for setting bail "as expressed in the Federal Rules of Criminal Procedure."[215] Those standards were "to be applied in each case to each defendant,"[216] and the apparent failure to do so meant that bail had "not been fixed by proper methods."[217] The Court also noted that the bail amount was "much higher than that usually imposed for offenses with like penalties."[218] At one point, the Court also stated that if "bail in an amount greater than that usually fixed for serious charges of crimes is required" for any of the defendants, evidence presented at a hearing should support the decision.[219] Nonetheless, the Court's concern with the uniformity of the bail among the twelve defendants, and the failure to apply the federal rule separately to each one suggested that there was an unacceptable risk of excessiveness in setting even an average bail for a given charge in the

208. *See* 18 U.S.C. § 3142(g)(3)(A).

209. *See* Carlson, *supra* note 5, at 13, 15.

210. Bail schedules also articulate amounts that will allow many defendants to gain pretrial freedom without judicial review. *Id.* at 14. Individualized consideration by judicial officers in some of these cases might have resulted in a higher bail amount and the imposition of additional conditions designed to protect public safety. *Id.* at 16. This problem provides a serious argument against fixed-bail schedules, although not one grounded in the Eighth Amendment.

211. 342 U.S. 1 (1951).

212. *See infra* text accompanying notes 213-19.

213. Stack v. Boyle, 342 U.S. 1, 3 (1951).

214. *Id.* at 5.

215. *Id.*

216. *Id.*

217. *Id.* at 7.

218. *Id.* at 5.

219. *Id.* at 6.

absence of individualized consideration. This view conflicts with an over-reliance by courts on bail schedules.

The incorporation of the bail clause also supports the view from *Stack* that bail schedules can violate the Eighth Amendment.[220] Incorporation means that the rights granted by the clause are fundamental.[221] As Part II explained, to the extent that the *Salerno* opinion hinted that the clause conferred no rights beyond those granted by legislation, incorporation calls for a different perspective—that the rights to bail and to non-excessiveness are implicit in the clause itself.[222] On that view, bail schedules, whether created by legislation or by court rules approved by the legislature, cannot change the contours of those rights. Schedules are not automatically acceptable. Whether they can violate the Eighth Amendment depends on whether reliance on them can promote excessiveness, and the *Stack* opinion suggests that it can. Thus, incorporation matters because it undermines any suggestion in *Salerno* that the *Stack* perspective is no longer valid.

The use of bail schedules, however, should not always violate the Eighth Amendment. For example, a schedule that provides a range of bail amounts for each crime and requires a decision within the range based on individualized consideration could satisfy the bail clause, assuming the ranges for each offense were not too narrow. Such a schedule might allow for adequate individualized consideration. Yet, while this approach could help guide judges setting bond, it would not provide the major benefits of a schedule with fixed amounts, because it would require a hearing before a judicial officer and the exercise of judgment as to what bail amount to impose. The result would be delay between arrest and the hearing, the use of judicial and other litigation resources by the state, and some arbitrary and discriminatory or, at least, inconsistent decisions on bail by judicial officers. The major benefits of bail schedules arise when they include fixed amounts that even police officials can apply quickly and without the exercise of much discretion.

Although they do not provide for individualized consideration, the use of schedules with fixed amounts arguably could avoid infringing the Eighth Amendment in limited circumstances. The first caveat is that states should have to provide a defendant detained under a bail schedule with a prompt opportunity for individualized consideration. For a detained defendant arrested without a warrant, the Supreme Court has

220. *See infra* notes accompanying text 221-22.

221. *See supra* text accompanying notes 135-40; *see also* United States v. Salerno, 481 U.S. 739, 750 (1987) (acknowledging that the arrestee's "strong interest in liberty" is of a "fundamental nature").

222. *See supra* Part II.F.

required that the state provide a probable cause determination within a presumptively acceptable period of 48 hours.[223] The Court could impose the same time limitation for the bail-review decision.[224] The short delay involved before the hearing would occur whether or not the state used a bail schedule to allow some defendants to gain their freedom earlier. At the hearing, the defendant should have counsel, and the judicial officer should receive relevant information from the defendant and the prosecutor. A fairly wide array of information about the defendant's character, record, and crime would properly bear on the amount of any bail needed to reasonably assure that he would reappear.

The second caveat is that the amount specified in a schedule should carry no presumption of correctness at the bail-review stage. Currently, "the amount in the bail schedule typically becomes the automatic sum" or a sum that courts are reluctant to reduce or eliminate, even after receiving more information about the defendant.[225] This practice assumes a "one size fits all" approach that is patently false. For individual defendants, the scheduled amounts frequently would have little if any connection with the amount actually needed to reasonably assure reappearance. To avoid excessiveness, courts providing bail review should render a *de novo* decision based on all the information available that bears on whether the defendant would reappear.[226]

The view after incorporation that the *Excessive Bail Clause* calls for individualized consideration is hardly revolutionary, particularly given that some jurisdictions already require it.[227] This idea also coincides not only with the *Stack* opinion but with the holdings of the Court under the *Cruel and Unusual Punishments Clause*[228] regarding sentencing.[229] Generally, the punishment clause does not require individualized consideration at sentencing.[230] However, that is because the Court has concluded that states generally may impose a criminal sentence to deter other putative offenders, a purpose that does not hinge on the nuances of the sentenced offender's character, record, and crime.[231] In the capital

223. *See* Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 48, 56-57 (1991).

224. For a good start on the kind of information that would be relevant, see *supra* text accompanying note 208, detailing some of the factors listed in the federal bail statute.

225. Carlson, *supra* note 5, at 14, 16.

226. Some errors of this kind could be harmless, although the prosecution should have to prove beyond a reasonable doubt that the judge would have imposed at least an equally high bail amount after individualized consideration. *See infra* text accompanying notes 335-36.

227. *See supra* text accompanying note 215-16.

228. U.S. CONST. amend. VIII.

229. *See infra* text accompanying notes 230-34.

230. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 961, 995-96 (1991) (upholding mandatory sentence of life imprisonment without parole for possession of 672 grams of cocaine).

231. *See id.* at 1008 (Kennedy, J., joined by O'Connor, J., & Souter, J., concurring in part and

sentencing context, where the overriding question is not how best to deter others but whether the offender deserves the death penalty,[232] the Court has rejected mandatory death sentencing in favor of individualized sentencing.[233] Likewise, because the issue at the bail stage should focus on the defendant's reappearance, and the answer depends on various factors about his character, record, and crime, there is good reason for individualized consideration.[234]

B. How Stringent Is the Excessiveness Review Standard?

Another major ambiguity about the *Excessive Bail Clause* that the Supreme Court should resolve concerns the stringency of the test to be used for reviewing bail amounts set by trial courts. After a trial judge sets a bail of $100,000 in a robbery case, for example, how much deference is due that decision when a reviewing court decides whether it is excessive under the Eighth Amendment? While Part II explained why the inquiry should generally focus on the proportionality between the bail amount and the reappearance of the defendant, the appellate court also needs a standard of review.[235] The Court could apply a demanding test, such as whether, considered *de novo*, the bond imposed was the least amount necessary to reasonably assure[236] his reappearance in light of all the feasible alternatives. The court could apply a highly forgiving measure, such as whether the bond decision was arbitrary and

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concurring in the judgment) (concluding that the draconian Michigan sentencing statute might have some success as a deterrent to drug dealing and the dangers flowing from it); *see also id.* at 965 (Scalia, J., joined by Rehnquist, C.J.) (asserting that "the Eighth Amendment contains no proportionality guarantee"). For an explanation of why pursuit of general deterrence in sentencing allows "collectivist" judgments rather than individualized consideration, see Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 341-42 (1992).

232. *See* Howe, *supra* note 9, at 102-07 (discussing Supreme Court decisions and commentary by death-penalty scholars confirming that the function of regulation of capital sentencing under the Eighth Amendment is to ensure that only murderers who deserve the death penalty receive it).

233. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 605 (1978) (Burger, C.J.).

234. Even if considerations of public safety were properly part of determining the bail amount, the focus would not be on deterrence of others, but on deterring the defendant in light of his personal likelihood of recidivism, a question best answered through individualized consideration.

235. *See supra* Part II; *infra* text accompanying notes 235-70.

236. There is another question implicit in this statement of the issue, which is: How sure should the court be that the amount of bond imposed will cause the defendant to reappear at future proceedings? The court probably should not expect more than reasonable assurance given that bail will not guarantee reappearance. Defendants released on bail often still fail to appear, although, perhaps part of the explanation is that courts fail to set the bond amount sufficiently high. *See* THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 7-8 (2007) (noting the number of absconded defendants who remained in fugitive status after one year, according to the type of release).

capricious. Or, it could apply a standard that falls in the middle, such as whether the bail amount was substantially more than necessary to serve the governmental interest. The language of the clause and its original history do not reveal the review standard.[237]

The Supreme Court also has not provided clear guidance on this question.[238] In *Stack v. Boyle*,[239] the Court declared that "bail set at a figure higher than an amount reasonably calculated" to ensure the defendant's future appearance "is 'excessive' under the Eighth Amendment."[240] This statement could be taken to imply a review standard of reasonable *necessity* that gives only modest deference to the trial court's decision. Alternatively, it could imply one that focuses on reasonableness without regard to whether other alternatives, also plausible to ensure reappearance, would clearly impose less burdens. The *Stack* Court did not elaborate on the point, and the Court has not revisited the question in more than six decades.[241] Moreover, in applying mandates against excessive fines and punishments embodied in the other two clauses in the Eighth Amendment, the Court commonly has asked whether there was gross disproportionality, a more forgiving standard than any plausible interpretation of *Stack*.[242]

Lower courts and commentators are also widely divided over what review standard should apply under the *Excessive Bail Clause*.[243] Some have asked whether the bail amount serves a compelling interest of government.[244] Some have called for a standard involving "intermediate scrutiny" that asks whether the bail amount was substantially greater than necessary to achieve the permitted purpose.[245] Some courts have used the test applied by the Supreme Court for other Eighth Amendment clauses, asking whether the bail amount was grossly disproportional in

237. U.S. CONST. amend. VIII.

238. *See* Wiseman, *supra* note 5, at 1384 (asserting that there is not yet a "clear answer" to how "excessiveness is to be measured").

239. 342 U.S. 1 (1951).

240. *Id.* at 5.

241. The only two other cases involving the *Excessive Bail Clause* are *Carlson v. Landon*, 342 U.S. 524 (1952), and *United States v. Salerno*, 481 U.S. 739 (1987), neither of which provided an answer to this riddle. *See supra* note 20; *supra* text accompanying notes 95-101; *supra* text accompanying notes 10-12.

242. *See, e.g.*, United States v. Bajakajian, 524 U.S. 321, 334 (1998) (interpreting the *Excessive Fines Clause*); Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in judgment) (interpreting the *Cruel and Unusual Punishments Clause*).

243. *See infra* notes 244-47 and accompanying text.

244. *See, e.g.*, Campbell v. Johnson, 586 F.3d 835, 842-43 (11th Cir. 2009) (declaring that the test for excessiveness is "whether the terms of release are designed to ensure a compelling interest of the government").

245. *See, e.g.*, Wiseman, *supra* note 5, at 1349.

light of the end to be achieved.[246] Finally, some have employed a highly relaxed standard, asking only whether the bail amount was set in an arbitrary manner.[247] Especially after endorsing incorporation of the clause against the states,[248] the Supreme Court should resolve the conflict.

The incorporation of the clause not only increases the need for the Court to settle the question but helps to answer it. Incorporation does not imply a precise standard of review, but it should eliminate at least one option that some lower courts have pursued. To ask only whether a bail amount was set in an arbitrary manner is to provide the kind of illusory protection that would do nothing to prevent bail amounts that are higher than warranted. The due process mandate would prevent such arbitrary action even without the existence of the *Excessive Bail Clause*.[249] It would be incongruous "not to subject a deprivation" of a right to non-excessive bail "to meaningful review under a constitutional provision designed to protect it."[250] If the clause were understood only to prevent arbitrary action, there would have been no good reason to include it in the Constitution, and the Court should not have declared it incorporated.

Incorporation arguably calls for a demanding *de novo* review that asks whether the bond imposed was the least restrictive alternative among all the feasible options. Some commentators might contend that incorporation raises federalism concerns, and that enforcement by the federal courts of the Eighth Amendment against the states should involve more deference than that involved when federal appellate courts review decisions by federal trial courts under the federal bail statute.[251] After all, in addition to the federalism concerns at stake, determining a bail amount involves not a pure question of law but a mixed question of law and fact, and answers to mixed questions sometimes warrant deference from a reviewing court.[252] However, the Supreme Court has required *de novo* review of mixed questions where it would serve a law-clarifying function even when the issues would largely come from state

246. *See, e.g.*, Fields v. Henry Cnty., 701 F.3d 180, 184 (6th Cir. 2012) (citing *Bajakajian*, 524 U.S. at 334) (employing a "grossly disproportional" test).

247. *See, e.g.*, United States *ex rel.* Garcia v. O'Grady, 812 F.2d 347, 354 (7th Cir. 1987) (applying test of whether the bail amount was set arbitrarily).

248. McDonald v. City of Chicago, 561 U.S. 742, 750, 765 n.12 (2010).

249. *See* Wiseman, *supra* note 5, at 1390.

250. *Id.* at 1388.

251. *See* 18 U.S.C. § 3142.

252. *See* Salve Regina Coll. v. Russell, 499 U.S. 225, 233 (1991) (citing Miller v. Fenton, 474 U.S. 104, 114 (1985)) (asserting that "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine").

cases.[253] For example, the Court has required *de novo* review of determinations of the voluntariness of a confession under the *Due Process Clause*[254] and of the existence of probable cause or reasonable suspicion under the Fourth Amendment.[255] These are mixed questions that arise primarily in state criminal cases. Yet, the Court has emphasized that the "legal rules" governing them "acquire content only through application," so that "independent review is . . . necessary if appellate courts are to maintain control of, and to clarify, the legal principles."[256] These same declarations arguably apply when appellate courts review the excessiveness of bail decisions. While dependent on various facts in each case,[257] bail decisions involve patterns that repeat themselves and lead to generalization. Moreover, to give substantial deference to state trial court conclusions on bail, would "strip a federal appellate court of its primary function as an expositor of the law."[258]

The extent to which the inquiry should consider alternatives outside of fairly standard release conditions is a separate problem.[259] This difficulty concerns what should count as a "feasible alternative[]" in deciding whether a bond imposed was appropriate. Assume, for example, that electronic monitoring of pretrial defendants is not yet authorized and funded in a particular county, although it is available in some places.[260] When the trial court imposes a bail of $2000 that the defendant cannot meet, should the reviewing court evaluate excessiveness based on the options currently available in the particular county or those that are feasible in a larger sense?[261] One might contend that reviewing courts should evaluate only whether the trial judge acted improperly under the circumstances and options that she actually faced. However, the better view is that the Eighth Amendment should demand that local jurisdictions sometimes pursue what is feasible in a larger sense, recognizing that the reviewing court retains the ability to consider costs and benefits of approaches that are non-standard in the particular county.[262] Otherwise, a state could limit Eighth Amendment scrutiny and

253. *See infra* text accompanying notes 254-55.

254. *See, e.g.*, *Miller*, 474 U.S. at 115-18 (1985) (holding that whether a confession was voluntary under the due process clause merits *de novo* review in federal court).

255. *See* Ornelas v. United States, 517 U.S. 690, 699 (1996).

256. *Id.* at 697 (citing *Miller*, 474 U.S. at 114).

257. For example, consider the number of factors listed in 18 U.S.C. § 3142(g)(3)(A).

258. *Miller*, 474 U.S. at 114.

259. *See infra* text accompanying notes 260-64.

260. *See* Wiseman, *supra* note 5, at 1361. Regarding the current use of electronic monitoring of pretrial defendants in the United States and Europe, see *id.* at 1364-68.

261. *See id.* at 1384 (noting that "courts have not yet provided a clear answer" to this question).

262. While the propriety of electronic monitoring of pretrial defendants as a viable option is beyond the scope of this Article, Professor Samuel Wiseman has argued that it generally should be

enforcement by declining to fund even basic services that could facilitate release alternatives to bail.[263] And, as we have seen, the *Excessive Bail Clause* should control not only courts but legislatures, who may hold the authorization and funding power for pretrial release agencies.[264]

There also is no compelling reason for the Court to adopt the highly forgiving "gross disproportionality" test that it has applied to measure excessiveness under the punishment and fine clauses of the Eighth Amendment.[265] The use of that standard for the bail clause might sound symmetrical, but sentencing decisions differ from bail decisions.[266] Sentencing decisions can rest on consideration of multiple, competing goals, including retribution, incapacitation, general deterrence, and rehabilitation.[267] An effort by the Court to articulate a demanding test of sentencing proportionality that focuses, for example, only on an offender's deserts would conflict with its approval of those competing purposes. In contrast, in other than preventive-detention cases, determining whether an arrestee should receive bail and, if so, the amount, generally should concern only whether he will reappear.[268] Given this single overriding purpose, there is less reason to defer to trial court judgments on bail in the face of an excessiveness claim.[269]

In the end, the Court could plausibly move to the middle and impose a standard that asks whether a chosen bail amount is "substantially more burdensome than necessary" to reasonably assure the reappearance of the defendant.[270] This "intermediate" level of scrutiny would demand slightly more accuracy from the state than the

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required under the *Excessive Bail Clause* as an alternative to money bail for relatively low-risk defendants. *See id.* at 1368.

263. Consistent with this view, in the Fourth Amendment context, the Court has declined to suggest that a local jurisdiction could withhold training of police officers to reduce their knowledge of what the amendment requires to establish probable cause and thereby expand the coverage of the exception for reasonable mistakes about probable cause in warrant cases. *See* United States v. Leon, 468 U.S. 897, 922 n.23 (1984) (declaring that the test assumes a "reasonably well-trained officer").

264. *See supra* text accompanying notes 265-68.

265. *See supra* note 242 and accompanying text.

266. *See infra* text accompanying notes 267-69.

267. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring) (asserting that the "Eighth Amendment [*Cruel and Unusual Punishment Clause*] does not mandate adoption of any one penological theory").

268. *See supra* text accompanying notes 239-42.

269. There are other relevant distinctions between sentencing and bail decisions. For example, while sentencing concerns a substantive right to liberty that stands alone, bail concerns not only the substance of pretrial freedom, but the process of preparing one's defense. *See infra* Part IV.B. Consequently, protection of the non-excessive bail right can have an even greater tendency to promote justice than protection of the non-excessive punishment and fine rights. Professor Wiseman writes: "[T]he courts and other parts of the Constitution typically give far less leeway to legislatures in limiting criminal procedural rights." Wiseman, *supra* note 5, at 1389.

270. *See* Wiseman, *supra* note 5, at 1350.

"gross disproportionality" test from criminal sentencing. At the same time, its use would reflect that bail decisions are modestly more complicated than decisions about the voluntariness of a confession or the existence of probable cause or reasonable suspicion. Although this latter position seems doubtful, if there are more factors at play in a bail decision, the law-clarifying powers of close appellate review would diminish, which favors a modestly more deferential standard than whether the judge pursued the least restrictive option.

IV. JUSTICIABILITY OF CLAIMS AFTER INCORPORATION

Incorporation of the *Excessive Bail Clause* also calls for a remedy to problems regarding the justiciability of excessive-bail claims in reviewing courts, particularly the Supreme Court. The common perception is that these claims generally become non-justiciable upon conviction, which typically occurs before state prisoners can raise them in federal court. This perception helps explain why the Supreme Court has relatively few chances to interpret the clause. Yet, this Part argues that incorporation warrants a change in the understanding of excessive-bail claims both to accurately reflect the nature of the rights involved and to enable federal courts, and especially the Supreme Court, to develop the Eighth Amendment doctrine.[271] I begin by describing the basis for the view that these claims generally become non-justiciable on conviction.[272] I then present an alternative view that more accurately reflects the fundamental rights at stake and makes excessive-bail claims from state prisoners more often reviewable.[273]

A. The View of a Narrow Substantive Right

Although the case law and commentary on this question are sparse, the common perception apparently is that the *Excessive Bail Clause* confers at most only a purely substantive right that is quite narrow.[274] The right is purely substantive because it does not bear on whether the defendant received a constitutional adjudication of his criminal case.[275]

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271. *See infra* Part IV.

272. *See infra* Part IV.A.

273. *See infra* Part IV.B.

274. *See* Wiseman, *supra* note 5, 1385-86.

275. *See, e.g.*, White v. Wilson, 399 F.2d 596, 598 (9th Cir. 1968) (noting that, even assuming incorporation of the Eighth Amendment clause, there is no authority that an excessive-bail claim is a "basis for invalidation of a conviction"); *see also* Kett v. United States, 722 F.2d 687, 688, 690 (11th Cir. 1984) (holding that "claims of excessive bail are not cognizable" in an action challenging a federal conviction for lack of constitutionality); Traber v. United States, 466 F.2d 483, 484-85 (5th Cir. 1972) (holding, in an action challenging a federal conviction for lack of constitutionality, that

The state can detain an arrestee through his conviction and still properly conclude that the detention had no legal effect on the validity of the adjudicative process.[276] Likewise, the substantive right is narrow in that it exists merely during the limited period of uncertainty about the guilt of the detainee.[277] The right is only to be free of incarceration in violation of the *Excessive Bail Clause* while presumed innocent of the charges underlying the detention.[278]

This perspective helps explain why the clause would often not produce justiciable claims from state-court defendants on review.[279] First, if the right is purely substantive, a defendant cannot successfully claim its infringement in his appeals seeking reversal of his convictions, whether on direct appeal to the Supreme Court or on collateral attack under state or federal habeas statutes.[280] This notion that the right is purely substantive builds on the obviously correct view that pretrial release is not essential to a constitutional trial. After all, courts can deny bail altogether in capital cases and in cases where pretrial release would risk public safety, among others.[281] Likewise, some arrestees will properly remain in jail pending adjudication because they cannot meet even a non-excessive bail.[282] The clause does not guarantee pretrial release.[283] If pretrial freedom is non-essential to a constitutional trial, it perhaps is not important even when a court denies it in violation of the Eighth Amendment. From this perspective, one could plausibly see the right to non-excessive bail as purely substantive and, thus, not a basis for challenging a conviction.[284]

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the issue of an excessive bond "was an issue not appropriately raised").

276. *Wilson*, 399 F.2d at 598 (noting that "there is no indication" how being held under what plaintiff considered to be excessive bail "could have affected his conviction").

277. *See* Stack v. Boyle, 342 U.S. 1, 4 (1951) (noting that "[u]nless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning").

278. *See id.*

279. *See infra* text accompanying notes 280-305.

280. *See, e.g.*, *Wilson*, 399 F.2d at 597-98 (casting doubt that an excessive-bail claim is a ground for invalidating a conviction).

281. *See supra* text accompanying notes 170-75.

282. *See supra* text accompanying note 180.

283. In *Salerno*, the Court had suggested that the clause might not confer a right to bail even in limited circumstances. *See* United States v. Salerno, 481 U.S. 739, 752 (1987). The Court noted that the *Excessive Bail Clause* "of course, says nothing about whether bail shall be available at all." *Id.* The Court added: "[E]ven if we were to conclude that the Eighth Amendment imposes some substantive limitations on the National Legislature's powers in this area, we would still hold that the Bail Reform Act is valid." *Id.* at 754.

284. But, the argument that that pretrial release of the defendant is not *essential* to a constitutional trial does not lead ineluctably to a conclusion that compliance with Eighth Amendment doctrine should not matter in deciding whether a trial was constitutional. Indeed, I argue later that pretrial detention in violation of the Eighth Amendment can properly bear on

A defendant can, of course, challenge his bail amount or pretrial detention before he is found guilty, but a state court defendant will face problems getting into federal court under the federal habeas statute for state prisoners, 28 U.S.C. § 2254,[285] during this period.[286] First, the defendant will have to exhaust his claim in all of the state trial and appellate courts.[287] In theory, the pretrial defendant who loses after appeal to the state supreme court could pursue relief under the Eighth Amendment through a federal habeas claim. However, litigating the bail issues through the state trial and appellate courts will take time. Pursuing them further in federal court will take additional time. The bail litigation will also require resources that the defendant could direct at defending against the criminal charges. Moreover, almost all state court criminal defendants are indigent and have appointed counsel, who might not see their authorized representation to include litigating bail claims in federal court.[288] Moreover, the review-restraining standards in the federal habeas statute make gaining reversal of a state court ruling on appropriate bail difficult.[289] Most state court defendants will plead guilty or focus on preparing for trial rather than pursue pretrial claims of excessive bail in federal court.[290]

After conviction, a state court defendant who believes the state detained him on excessive bail or improperly denied him bail will also rarely have a claim in federal court for money damages or equitable relief under the federal civil rights statute, 42 U.S.C. § 1983.[291] As for money damages, the state and its "alter ego" will have absolute immunity,[292] as will the judge who set or denied the bail,[293] or a police

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whether the subsequent adjudication was constitutional. *See infra* text accompanying notes 306-13.

285. 28 U.S.C. § 2254 (2012).

286. *See infra* text accompanying notes 287-90.

287. *See* 28 U.S.C. § 2254(b)(1)(A); *see also* O'Sullivan v. Boerckel, 526 U.S. 838, 842, 847 (1999) (declaring that "[b]efore a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court" and announcing a rule "requiring state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State").

288. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, L. & CONTEMP. PROBS., Winter 2005, at 31, 31; *see* THE CONSTITUTION PROJECT NAT'L RIGHT TO COUNSEL COMM., DON'T I NEED A LAWYER?: PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL 26 (2015), *available at* http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf.

289. The statute forbids reversal of a state court decision unless it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2).

290. *See* THE CONSTITUTION PROJECT NAT'L RIGHT TO COUNSEL COMM., *supra* note 288, at 12.

291. 42 U.S.C. § 1983; *see infra* text and accompanying notes 292-302.

292. *See* Hans v. Louisiana, 134 U.S. 1, 21 (1889) (holding "sovereign States[s]" exempt

officer who set bail in accordance with a state statute.[294] State legislators will have immunity when they "act legislatively within a 'traditional legislative capacity.'"[295] The prosecutor who argued for the bail will also have immunity.[296] Any police officer who may have recommended an excessive bail amount will be immune as long as he acted in objective good faith.[297] A municipality or county will also not face liability, absent evidence that it had a policy or customary practice in favor of excessive bail.[298] In the end, the defendant claiming excessive bail will usually have no person or entity to successfully sue for damages. As for equitable relief, in addition to the many immunities that would apply,[299] conviction would render any claims by the defendant for an injunction or a declaratory judgment non-justiciable,[300] because his pretrial right under the Eighth Amendment would no longer apply,[301] and there would be no

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"from prosecution in a court of justice at the suit of individuals"); SHELDON H. NAHMOD, 3 CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, at 9-207 (4th ed. 2014).

293. *E.g.*, Lane v. Jenkins, No. 10-2149, 2011 WL 6425314, at *1-2 (E.D. Pa. Dec. 20, 2011); *see* Pierson v. Ray, 386 U.S. 547, 553-54 (1967) (stating that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction"); SHELDON H. NAHMOD, 2 CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, at 7-4 (4th ed. 2014).

294. *See, e.g.*, Walczyk v. Rio, 496 F.3d 139, 164 (2d Cir. 2007) (holding that police officers in this context serve a judicial function and, therefore, have absolute immunity).

295. *See* Supreme Court of Va. v. Consumers Union, Inc., 446 U.S. 719, 732-34 (1980) (citing Tenney v. Brandhove, 341 U.S. 367 (1951)); NAHMOD, *supra* note 293, at 7-4.

296. *See* Imbler v. Pachtman, 424 U.S. 409, 427-29 (1976); NAHMOD, *supra* note 293, at 7-3 to 7-4; *see, e.g.*, *Lane*, 2011 WL 6425314, at *2.

297. *See, e.g.*, Galen v. Cnty. of Los Angeles, 477 F.3d 652, 665-66 (9th Cir. 2007).

298. *See* Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 690-92 (1978); *Galen*, 477 F.3d at 667-68.

299. For example, the state and its "alter ego" entities would enjoy absolute immunity even from a claim for equitable relief. *See* NAHMOD, *supra* note 292, at 9-207.

300. Murphy v. Hunt, 455 U.S. 478, 481-82 (1982) (noting that a claim to bail becomes moot once convicted because "even a favorable decision . . . would not have entitled [plaintiff] to bail"). There is a very narrow method by which a plaintiff in a specific kind of excessive-bail case could pursue injunctive and declaratory relief under § 1983 to benefit others, but it would not work often. Assume that a plaintiff filed a class-action suit for an excessive-bail violation alleging, for example, adherence, in all the cases, to an improper bail schedule; filed the complaint before his conviction; and, eventually obtained class certification. Federal courts would retain the power to decide the case even after the conviction rendered his claim moot. *See, e.g.*, Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 47-49, 51-52 (1991) (involving failure of county to provide prompt determinations of probable cause for those arrested without warrants). The Supreme Court has held that "the termination of a class representative's claim does not moot the claims of the unnamed members of the class." Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975) (citing Sosna v. Iowa, 419 U.S. 393, 399-401 (1975)). Under the "relation back" doctrine, the federal courts could retain power to resolve the case even if certification of the class occurred after the claims of the named plaintiff became moot. *See, e.g.*, Swisher v. Brady, 438 U.S. 204, 213 n.11 (1978). However, this approach would not work even in theory, unless the county was employing a practice that applied across a class of cases to set bail in violation of the Eighth Amendment.

301. The Eighth Amendment right is apparently inapplicable to post-conviction bail pending

"reasonable expectation" or "demonstrated probability" that he would face detention based on excessive bail in the future.[302]

If we accept the view of the right to non-excessive bail as purely substantive, few constitutional claims of excessive bail from state court defendants could reach the Supreme Court. The dearth of state cases would leave the Court with little opportunity to develop the meaning of the Eighth Amendment clause and enforce it. While claims of excessive bail from federal defendants could more easily reach the Court,[303] the Justices usually would properly avoid the constitutional questions in those cases; federal bail statutes,[304] unlike some state systems, give at least as much protection as the *Excessive Bail Clause* generally would provide.[305] The general non-justiciability of excessive-bail claims is anomalous for a provision that the Court went out of its way to incorporate. The clause purportedly protects rights of fundamental importance in ensuring liberty and justice, but the absence of opportunities for the Court to construct and administer it largely neuters the protections.

B. Acknowledging the Procedural Aspect of the Right

The incongruity of understanding the right to non-excessive bail as purely substantive highlights the importance of conceptualizing it in a different way. The need is both to acknowledge the full significance of pretrial release for defendants and to make more claims brought under the clause justiciable in the Supreme Court. I contend that the solution

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appeal, although statutes may sometimes confer a right to bail in those circumstances. *See* Hudson v. Parker, 156 U.S. 277, 284-89 (1895). Yet, even were the Eighth Amendment to guarantee a right to bail on appeal, it would likely not be on the same terms as at the pretrial stage.

302. *See Murphy*, 455 U.S. at 482 (citing Weinstein v. Bradford, 423 U.S. 147, 149 (1975)); *see also* City of Los Angeles v. Lyons, 461 U.S. 95, 105, 111 (1983) (rejecting claim under § 1983, noting that "absent a sufficient likelihood that he will again be [subjected to a chokehold by police, plaintiff] is no more entitled to an injunction than any other citizen of Los Angeles").

303. This is true, at least during the pretrial stage while the defendant enjoys the presumption of innocence, simply because the federal defendant may directly appeal to the federal appellate courts an order denying a motion to reduce bail as a "final decision" of the District Court. *See* Stack v. Boyle, 342 U.S. 1, 6 (1951).

304. *See, e.g.*, 18 U.S.C. § 3142 (2012).

305. The issues presented in this Article as arising under the Eighth Amendment in state-court cases will not generally arise in federal cases. The Supreme Court already has resolved in the *Salerno* decision that the federal statute properly permits preventive-detention in certain circumstances. *See supra* text accompanying notes 95-101. The federal statute does not call for the consideration of public safety in the setting of bail amounts. *See* 18 U.S.C. § 3142(b). The federal statute does not contemplate reliance on bail schedules. *See* 18 U.S.C. § 3142(g). Further, during the pretrial stages, the federal appellate courts could easily interpret the federal statute, in accordance with the *Stack* decision, to call for a review standard of reasonable *necessity* that gives only modest deference to the trial court's bail decision. *See supra* text accompnying notes 240-41.

centers on recognizing the right as both substantive and procedural. The bail clause is important for defendants, not only to protect their freedom while the law presumes them innocent, but to assist them in receiving a fair adjudication of the charges.

This view of the right as procedural means that defendants could sometimes successfully raise claims of excessive bail to challenge their convictions. The challenges would assert that their pretrial detention in violation of the clause constitutionally undermined the adjudicative process. Convicted defendants could raise these claims on direct appeal in state collateral filings and in federal habeas petitions. At the end of each stage, the convicted person could petition the United States Supreme Court for a grant of certiorari. The Justices would have discretion whether to grant these petitions. Nonetheless, the Court would have more opportunities to examine bail claims than it has under a regime in which courts view the claims as purely substantive.

Does the right to non-excessive bail affect the adjudicative process? Commentators have acknowledged, with little dissent, that pretrial release can help the accused prepare for trial.[306] Professor Wiseman notes that "[t]he difficulty of preparing an adequate defense makes the likelihood of success at trial much lower for pretrial detainees than for those who have secured release and have avoided the stigma of a prison cell."[307] Detainees have more problems meeting with their lawyers and helping them find witnesses and evidence.[308] The defendant cannot meet at the lawyer's office, requiring the lawyer to travel to the jail. In addition to this basic deterrent to interaction, the state may detain the defendant a substantial distance away[309] and, if not, limited visiting hours may further impede lawyer visits.[310] Detainees must also try from jail to "recruit friends or family members to collect evidence and witnesses,"[311] which can be difficult and, even when the recruitment effort succeeds, may not produce the same results as if the defendant were able to pursue those tasks personally. Indeed, many empirical

306. The Vera Foundation conducted a famous early study in the mid-1960s, the Manhattan Bail Project, that revealed that persons held pretrial were more likely than those released pretrial to face conviction and prison, regardless of their prior record. *See* Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641, 641, 647-48 (1964).

307. Wiseman, *supra* note 5, at 1356.

308. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2493 (2004); *see also* Tribe, *supra* note 81, at 383 (asserting that the burdens of pretrial detention include "the diminished ability to prepare one's defense").

309. *See, e.g.*, Douglas J. Klein, Note, *The Pretrial Detention "Crisis:" The Causes and the Cure*, 52 WASH. U. J. URB. & CONTEMP. L 281, 294 & n.71 (1997).

310. *See* Wiseman, *supra* note 5, at 1355-56.

311. *See id.* at 1355.

studies, while controlling for various relevant factors, establish that the longer a defendant experiences pretrial detention, the more likely his conviction.[312] This outcome seems intuitive, and even the Supreme Court in the *Stack* case acknowledged it as reality, suggesting that the right to non-excessive bail was both procedural and substantive: "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction."[313]

To recognize a procedural aspect to the Eighth Amendment protection is not to claim that there is always a right to pretrial release. The state can still hold some defendants without bail and others where the bail is unaffordable but not excessive.[314] The authority of the state to detain persons pretrial does not necessarily conflict with the view that holding them can impair their defense.[315] The explanation for sometimes permitting pretrial detention need not deny that there is a potential impairment of the defense, just as it need not deny there is an impairment of the defendant's substantive liberty interest. Instead, the justification for pretrial detention is simply that a competing government interest—usually public safety or reappearance of the defendant—outweighs both the procedural and substantive concerns. Yet, when the competing government interest does not apply, the procedural and substantive aspects of the right warrant protection.

A violation of the bail clause also does not necessarily mean, as a factual matter, that the fairness of the adjudicative process was impaired. Some criminal defendants face only a short period of improper detention before gaining pretrial release, and in other cases, the Eighth Amendment violation might not affect the trial outcome. For example, some defendants held improperly have no plausible defense and, even if released pretrial, almost surely would still have faced conviction. Likewise, some defendants held illegally could not have afforded even non-excessive bail and, thus, would have remained detained even if there had been no bail-clause violation. Further, some defendants detained unconstitutionally are so irresponsible or low-functioning that, even if released, they would have done nothing to help prepare their defense and actually would have been harder for their lawyers to find and consult with than they were while in jail.

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312. *See* Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1972-73 & n.129 (2005).

313. Stack v. Boyle, 342 U.S. 1, 4 (1951) (citing Hudson v. Parker, 156 U.S. 277, 285 (1895)).

314. *See supra* text accompanying notes 95-101; *supra* note 180 and accompanying text.

315. This conclusion bears on earlier discussion in this Part. *See supra* note 284 and accompanying text.

In light of these possibilities for harmlessness, the difficulty in giving life to the procedural right lies in resolving how to allocate the burden of proving whether or not a bail-clause violation prejudiced the adjudicative process. Only defendants who actually face pretrial detention and who also are convicted should have such a claim. Moreover, the group becomes substantially smaller if a defendant who pleads guilty waives any challenge to his conviction based on his unconstitutional pretrial detention. Rejecting claims from those who plead guilty involves a major concession, because pretrial detention influences some defendants to accept plea bargains that they otherwise would not accept,[316] and the explanation may have something to do with the anticipation of adjudicative prejudice caused by the detention.[317] Yet, the explanation likely has much more to do in the vast majority of cases with the sentencing credit that defendants receive for pretrial detention.[318] The credit can reduce the disincentive to accept a plea bargain, which is arguably a more innocuous explanation since it does not relate to the ability of the detainee to receive a fair trial.[319] On this view, there is nothing odd in following the standard rule[320] that a bargained guilty plea generally requires the defendant to give up his challenges to the conviction.[321]

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316. *See* Bibas, *supra* note 308, at 2491-93 (explaining how pretrial detention produces incentives for plea bargains); Manns, *supra* note 312, at 1947-48 (asserting that "pretrial detention creates tremendous pressure for guilty pleas").

317. *See* Wiseman, *supra* note 5, at 1356 (noting the "stigma of a prison cell").

318. *See* Manns, *supra* note 312, at 1951 & n.18 (noting that "[t]he most common form of compensation" for pretrial detainees "is a set-off of time served in detention against criminal sentences"); *cf.* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2123 (1998) (noting that the period of pretrial detention may exceed the sentence that would result from a guilty plea).

319. This explanation is not always innocuous. For defendants who are not guilty of the charges or the more serious charges against them, for example, pretrial detention can still produce "great incentives to plea bargain to end or minimize the detention." Manns, *supra* note 312, at 1951. Especially for those kinds of cases, Professor Manns has urged that legislation should provide a system of monetary compensation to the detained defendants. *See id.* at 1996-97.

320. *See* Tollett v. Henderson, 411 U.S. 258, 267 (1973) (asserting that after a guilty plea, a criminal defendant generally may not "raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea").

321. *Id.* Could violation of the rights to bail and non-excessiveness also bear on the sentence received in a guilty-plea case? An affirmative answer might cause one to question whether there should be an opportunity to challenge the sentence based on a bail-clause violation in guilty-plea cases. But, courts should disallow the challenge as long as a bail-clause violation provides no basis to challenge the guilty-plea itself. In some plea-bargained cases, the parties will frequently agree on the sentence as part of the deal. *See, e.g.*, United States v. Wright, 291 F.R.D. 85, 86 (E.D. Pa. 2013) (noting that Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure "allows the Government and a defendant to enter into a plea agreement that provides for a specific sentence"). In other plea-bargained cases, the parties will at least agree on the charge or charges to which the defendant pled guilty, and, in such cases, a neutral agency, such as a probation department, generally prepares a

For trial-conviction cases involving defendants who faced unconstitutional detention, the substantial possibilities for procedural harmlessness weigh against applying a rule of automatic reversal, according to the Court's decisions regarding most other kinds of constitutional errors.[322] In a departure from this approach in the *Batson* cases, involving the improper excusal of a juror based on race or gender, the Court has ordered reversal on direct appeal without proof of harm to the adjudicative process.[323] The possibility that the outcome of the trial would have changed in such cases is minimal according to the Court.[324] Therefore, the explanation for applying the rule of automatic reversal in *Batson* cases cannot rest on the likelihood of prejudice. An alternative explanation is that "without the remedy of reversal, the Court's strong words about the egregiousness of race-based peremptories might be dismissed as merely idealistic or hortatory."[325] Yet, statistical studies and the views of many commentators indicate that there is much more than a minimal potential for an excessive-bail violation to prejudice a trial,

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sentencing report for the court. *See, e.g.*, United States v. Aguilar-Ibarra, 740 F.3d 587, 590-91 (11th Cir. 2014) (rejecting defendant's challenge to sentence after pleading guilty to agreed-upon charges where defendant did not timely object to presentence report prepared by probation officer pursuant to Rule 32 of the Federal Rules of Criminal Procedure); *see also* FED. R. CRIM. P. 11(c)(1)(A) (declaring that, in return for a guilty plea "to a charged offense or a lesser or related offense," a plea agreement "may specify that an attorney for the government will . . . not bring, or will move to dismiss, other charges"). Therefore, the post-guilty-plea release of the defendant may not, generally, be as important to the determination of the sentence as pre-adjudication release can be to the determination of guilt or innocence at trial. In any event, once the defendant pleads guilty, the law no longer presumes him innocent, which affects his Eighth Amendment rights going forward. *See, e.g.*, United States v. Deitz, 629 F. Supp. 655, 656 (N.D.N.Y. 1986) (concluding that, after guilty plea, defendants no longer "enjoyed the presumption of innocence").

322. The Court has stated that it will impose a *per se* presumption of prejudice only for certain constitutional violations where prejudice seems "so likely" that "the cost of litigating their effect" in case-by-case inquiry is "unjustified." United States v. Cronic, 466 U.S. 648, 658 (1984). One example, according to the Court, is the actual or constructive denial of the assistance of counsel. *See id.* at 659 & n.25. The Court also has asserted that such denial-of-counsel cases "involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *See* Strickland v. Washington, 466 U.S. 668, 692 (1984).

323. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 82-83, 96, 100 (1986); *see also* Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1158 (1993) (explaining that, while the Court has not mandated automatic reversal for *Batson* violations in habeas corpus, it "does not demand proof of harm to the jury's decision-making process before reversing judgments on the direct appeal of *Batson* cases").

324. *See, e.g.*, *Batson*, 476 U.S. at 87 (asserting that "a person's race" has nothing to do with "qualifications and ability to impartially consider evidence presented at trial"); *see also* Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 96 (1996) (asserting that "the Court has firmly rejected the idea that a juror's race or gender has any bearing on how that juror will view the evidence in a case or vote on the question of guilt or innocence").

325. Babcock, *supra* note 323, at 1158.

which may be reason enough, however ironic, to distinguish excessive-bail claims from *Batson* claims.[326] The more conventional view may apply: because there is a substantial possibility of procedural harmlessness from a bail-clause violation, a rule of automatic reversal should not adhere.

At the same time, the concern that animated the Court's approach in *Batson* suggests why the burden should not fall on the defendant claiming a bail-clause violation to prove procedural prejudice. Individual defendants may rarely have the ability after their conviction to muster much evidence of how their pretrial release would have changed the trial outcome. They generally will have trouble establishing what they would have done differently in the way of trial preparation on release. The reviewing court will generally also find it "difficult to measure the precise effect on the defense"[327] of assertions as to how the preparation would have differed.[328] A defendant would rarely have the proof to establish "a reasonable probability" that, but for his illegal detention, the outcome would have changed, which is the test applicable in cases of ineffective assistance of counsel.[329] Yet, if courts would almost always reject a conclusion of prejudice, a problem similar to that which could have existed in the *Batson* cases would arise.[330] The rare exhortations that might come from the Court about the importance of honoring the bail clause could appear "merely idealistic or hortatory."[331] This outcome would hardly honor as "fundamental" a safeguard that the Court went out of its way to incorporate in *McDonald*.[332]

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326. *See supra* note 312 and accompanying text.

327. *Strickland*, 466 U.S. 668, 692 (1984).

328. *Cf. id.* at 693-96 (discussing the difficulty involved in a counsel-error claim, noting that "[s]ome of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways").

329. *See id.* at 694; *see also* United States v. Bagley, 473 U.S. 667, 682 (1985) (noting that the test of materiality for failure of the prosecution to disclose exculpatory evidence should also focus on whether, had the evidence been disclosed to the defense, there is "reasonable probability" of a different outcome).

330. Application of the "reasonable probability" standard in cases like *Washington* and *Bagley* is also more justified than it would be in cases involving excessive bail. For cases of ineffective assistance, the state is not at fault in the same direct way that it is at fault for a decision of a state actor imposing excessive bail. Likewise, in cases involving the failure to disclose potentially helpful evidence to the defense, unlike for excessive-bail claims, the constitutional requirement itself focuses on trial fairness, and there must be room in the standard to acknowledge that prosecutors will frequently have difficulty deciding what is exculpatory. In the excessive-bail context, the corresponding room for error by judges setting bail comes in both limiting violations to bail amounts that are substantially more burdensome than necessary, *see supra* text accompanying note 270, and, in addition, applying a harmless error test. *See infra* notes 333-34 and accompanying text.

331. Babcock, *supra* note 323, at 1158.

332. *See supra* notes 42-45 and accompanying text.

The best approach would presume procedural prejudice from unconstitutional detention in a trial-conviction case but allow the prosecution the opportunity to prove harmlessness beyond a reasonable doubt. Under *Chapman v. California*,[333] this is the standard response to decisions of the trial court that violate the Constitution.[334] Placing the burden on the government to show harmlessness beyond a reasonable doubt would incentivize state judges and prosecutors to honor the *Excessive Bail Clause*. At the same time, this approach would foreclose reversals of convictions where procedural harm to the defendant is demonstrably absent.

The state surely could make the harmlessness showing in some cases. For example, the defendant might have faced improper detention for only a few weeks and have gained release well before trial. Likewise, the defendant might clearly have lacked the resources to meet even a non-excessive bail. Further, the evidence of the guilt of the defendant might have been overwhelming and the proof that his release could have changed the outcome nonexistent. Where the Eighth Amendment violation was from over-reliance on a bail schedule,[335] a showing of harmlessness might also rest on proof that the judge would have imposed at least as high a bail amount after individualized consideration.

Acknowledging the procedural aspect of the right and allocating the burden of proving harmlessness to the state would also enable the Supreme Court to do much more than it has in the past to develop the constitutional law of excessive bail. Most importantly, the losing party on an Eighth Amendment bail claim in the highest state court on direct appeal could immediately petition the high court for certiorari. Many criminal defendants, despite their lack of counsel at this stage, could use the pleadings and rulings from the state court litigation to present their bail claims in certiorari pleadings.[336] The complicated review-restraining doctrines in federal habeas law[337] would not apply. Application of the stringent *Chapman* harmless error standard would also mean that many petitions would present the Court with the merits of the bail claim. From the petitions presented, the Justices would have many more opportunities than they currently do to explain the meaning of the first clause in the Eighth Amendment.

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333. 386 U.S. 18 (1967).

334. *See id.* at 24 (holding that, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt").

335. *See supra* Part III.A.

336. The Supreme Court has never required states to provide counsel for criminal defendants beyond appeals of right in the state systems. *See* Ross v. Moffitt, 417 U.S. 600, 617-19 (1974).

337. *See supra* note 289 and accompanying text.

V. CONCLUSION

This Article has explored an unusual kind of question: What does the incorporation of the *Excessive Bail Clause* imply about its proper construction? This sort of inquiry is uncommon because, when incorporating other *Bill of Rights* provisions, the Supreme Court always has explained the core protections involved.[338] A previous or at least simultaneous explanation of the protections is essential to demonstrate why a clause meets the test of incorporation.[339] Nonetheless, the Court incorporated the bail clause only by including it in a list of incorporated provisions in a footnote in its opinion in *McDonald v. City of Chicago*,[340] where the question was whether to incorporate the Second Amendment.[341] The Court offered no explanation about why the bail clause met the test of incorporation.[342] There also had been little previous explanation from the Court about what core protections the bail clause conferred.[343]

Before *McDonald*, there was good reason to doubt that the bail clause, as interpreted by the Court, would guarantee any rights that were important enough to warrant incorporation. The core uncertainties centered on whether the clause conferred rights to bail and to non-excessiveness that existed apart from legislative direction. What little the Court had said did not encourage the notion that the provision gave much protection. In upholding preventive detention many years earlier in *United States v. Salerno*,[344] the Court had suggested that the clause might only mean that a judicial officer, when deciding between preventive detention and bail, should follow legislation about when bail was permissible[345] and, when setting a bail amount, should follow legislation about what purposes bail should serve.[346] On this view, the

338. *See supra* note 149 and accompanying text.

339. That test is whether the rights protected are "fundamental to our scheme of ordered liberty and system of justice." McDonald v. City of Chicago, 561 U.S. 742, 764 (2010); *see supra* text accompanying notes 136-40.

340. 561 U.S. 742 (2010).

341. *See supra* text accompanying notes 136-40.

342. *See supra* note 134 and accompanying text.

343. As for the Second Amendment, the Court spent many pages in its *McDonald* opinion explaining why that provision met the test of incorporation. *See McDonald*, 561 U.S. at 758-91. Also, the Court previously had explained at length the nature of the protection provided by the Second Amendment. Two years earlier, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court had discussed in detail why the Second Amendment confers an individual right to bear arms for purposes of self-defense that was violated by a law that banned the possession of handguns in the home. *See* 554 U.S. at 573-636.

344. 481 U.S. 739 (1987).

345. *See supra* text accompanying notes 47-50, 115-19.

346. *See supra* text accompanying note 49; *supra* Part II.C.

clause was only a directive to judicial officers to respect the separation of powers by honoring bail legislation. This interpretation would render the protection of little importance when applied in federal cases and perversely frivolous when applied to the states.[347] It would mean that state courts should honor state bail legislation on which the final arbiters would be state courts.[348]

The oddity of the Court's action in *McDonald* in declaring the bail clause incorporated in a footnote without explanation does not inspire confidence that the Justices had reached a momentous civil-rights decision. Yet, the alternative explanations are much more disconcerting. Could some or all five of the majority Justices in *McDonald* (and their clerks) have erred, believing that the Court previously had incorporated the clause when it never had done so? While Justices are fallible, someone would likely have noted this mistake before publication of the opinion. Could some of the Justices have supported incorporation precisely because they believed that it would impose no serious demands on the states? This is a disturbing notion, because it assumes that those Justices would also circumvent the requirement for incorporation that a clause grant fundamentally important protections. In the end, there is no explanation for what the Court did with the bail clause in *McDonald* that puts the Justices in a glowing light. Observers are left to choose between trusting that the Court knew what it was doing and will at least stay true to the implications in the future or concluding that the Court warrants our cynicism.

I have assumed that the *McDonald* Court incorporated the bail clause knowingly, and that the Justices are prepared to interpret the rights incorporated as fundamentally important for protecting liberty and justice. From this perspective, I have urged some basic propositions about the proper construction of the clause. First, I have contended that it must be more than a mere directive to courts to honor bail legislation.[349] The Court should construct the clause to grant a right to bail in broad circumstances and to define the proper function of bail and, thus, the measure of excessiveness. These rulings should govern both courts and

347. *See supra* text accompanying notes 163-68.

348. There could be some additional cases in which a federal court would find a state actor involved in setting a high bail to have acted so unreasonably as to violate due process. *See, e.g.*, Wagenmann v. Adams, 829 F.2d 196, 211-13 (1st Cir. 1987). However, such cases should come out the same way even if there were no *Excessive Bail Clause* or even if it had not been incorporated against the states. *See* Wiseman, *supra* note 5, at 1390 (noting that the clause becomes a "constitutional nullity" if it does not require more than what the *Due Process Clause* already would require).

349. *See supra* Part II.F.

legislatures. Absent this basic understanding, the clause accomplishes nothing worthy of incorporation.

I have also contended that incorporation calls for the Court to resolve two additional questions about the clause that it otherwise could likely have avoided.[350] The issues concern the nature of the evidence that trial courts should consider in deciding bail questions and the standard that reviewing courts should apply in passing on the decisions of trial courts setting bond.[351] On the first question, I have urged that individualized consideration of the character, record, and crime of an arrestee should generally inform bail decisions, which weighs against over-reliance on bail schedules.[352] On the second question, I have argued that the standard of review generally should ask whether a chosen bail amount is "substantially more burdensome than necessary" to reasonably assure the reappearance of the defendant.[353] These conclusions balance the fundamental importance of the bail clause in safeguarding liberty and justice against several competing interests of government.

Finally, I have argued that incorporation calls for rethinking the justiciability of excessive-bail claims on review of criminal convictions after trial.[354] The prevailing view apparently is that the rights to bail and non-excessiveness are purely substantive.[355] Denial is thought not to affect the validity of the trial.[356] Based on this view and the notion that the rights end at the point of conviction, few cases requiring interpretation of the *Excessive Bail Clause* survive for presentation to the Supreme Court.[357] I contend, however, that the rights are not only substantive but procedural, because improper pretrial detention can prejudice the defendant at trial.[358] Recognizing the procedural side of the protections would acknowledge the full significance of unlawful detention for arrestees and enable the Court to receive more cases through which it could construct and enforce a fundamentally important provision in the *Bill of Rights*.

350. *See supra* Part III.
351. *See supra* Part III.
352. *See supra* Part III.A.
353. Wiseman, *supra* note 5, at 1350; *see supra* Part III.B.
354. *See supra* Part IV.
355. *See supra* Part IV.A.
356. *See supra* Part IV.A.
357. *See supra* Part IV.A.
358. *See supra* Part IV.B.

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