

RECENT CASES

CONSTITUTIONAL LAW — EIGHTH AMENDMENT — FIFTH CIRCUIT HOLDS THAT DISENFRANCHISEMENT OF INCARCERATED PEOPLE IS CRUEL AND UNUSUAL PUNISHMENT — *Hopkins v. Hosemann*, 76 F.4th 378 (5th Cir.), *vacated and reh'g en banc granted*, 83 F.4th 312 (5th Cir. 2023) (per curiam).

*Hopkins v. Hosemann*¹ was a rare win for racial justice advocates and the formerly incarcerated in the South. In *Hopkins*, the Fifth Circuit held that permanent disenfranchisement of people convicted of a felony, who are often formerly incarcerated, violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.² However, alongside this win lies a potentially striking interpretation of the incorporation doctrine — the application of the Bill of Rights to the states — that threatens to severely erode this freedom and others.

The dissent in *Hopkins* seemed to present a strained reading of the incorporation doctrine that calls for specific interpretations constraining the Fourteenth Amendment's reach — or substantive limits — to apply to the first eight amendments.³ The defendants have echoed the dissent's incorporation argument in their petition for rehearing en banc, which the Fifth Circuit accepted.⁴ If the dissent's approach is embraced en banc, this interpretation promises to run roughshod over robust incorporation jurisprudence and a rare win for civil rights in the South.

Two provisions of the Mississippi Constitution are at issue in *Hopkins*: section 241 and section 253.⁵ Section 241 strips, for life, the right to vote from anyone convicted of “murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy.”⁶ Section 253 is a restoration clause: it provides an opportunity for reenfranchisement based on a two-thirds vote of both houses of the state legislature.⁷ Section 253 has scarcely been used; on average, only seven people per year have had their voting rights restored.⁸

¹ 76 F.4th 378 (5th Cir.), *vacated and reh'g en banc granted*, 83 F.4th 312 (5th Cir. 2023) (per curiam).

² *Id.* at 411.

³ *Id.* at 419 (Jones, J., dissenting).

⁴ Defendant-Appellant's Petition for Rehearing En Banc at 5, *Hopkins*, 76 F.4th 378 (No. 19-60662).

⁵ *Hopkins*, 76 F.4th at 387.

⁶ MISS. CONST. art. 12, § 241.

⁷ *Id.* art. 12, § 253.

⁸ Sam Levine, *Mississippi: Felon Disenfranchisement Is a Racist Labyrinth Worthy of Kafka*, THE GUARDIAN (Jan. 13, 2022, 10:03 AM), <https://www.theguardian.com/us-news/2022/jan/13/mississippi-felon-disenfranchisement-is-a-racist-labyrinth-worthy-of-kafka> [https://perma.cc/TMP3-QKW7].

These provisions were explicitly crafted in 1890 to subjugate the newly enfranchised Black population.⁹ After regaining control of the legislature, Mississippi's white political leadership wanted a constitution that would ensure "a home government, under the control of the white people of the State."¹⁰ The offenses listed as triggers for disenfranchisement were curated to target Black people.¹¹ A 1965 federal Civil Rights Commission report issued around the time of the provision's reenactment makes this apparent; it condemned Mississippi's racist voting practices and the 1890 state constitutional convention's racist methods used to "accomplish the same result" that "an express denial of the franchise" to Black people would have accomplished.¹² And that goal, most clearly embodied in sections 241 and 253, seems to have been realized¹³: of approximately 235,150 disenfranchised people, or ten percent of Mississippi's population, over 130,500 are Black.¹⁴

In 2017 and early 2018, two formerly incarcerated Black men, Roy Harness and Dennis Hopkins, separately filed class actions against Mississippi Secretary of State Delbert Hosemann in the United States District Court for the Southern District of Mississippi to mount a new challenge against these provisions.¹⁵ Harness argued that section 241 violated the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment.¹⁶ Hopkins targeted both section 241 and section 253. He argued that section 241 violated not only the Equal Protection Clause, but also the Eighth Amendment's Cruel and Unusual Punishment Clause and section 2 of the Fourteenth Amendment for excessive abridgement of voting rights, and that section 253 violated the

⁹ *Hopkins*, 76 F.4th at 388; see U.S. COMM'N ON C.R., VOTING IN MISSISSIPPI 3 (1965), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12v94.pdf> [<https://perma.cc/XK6D-3SF4>] (noting that Mississippi Constitutional Convention delegates expressed their "avowed purpose" in organizing the Convention was "to restrict the [Black] vote").

¹⁰ *Senator J.Z. George: He Addresses a Large Audience at His Old Home*, CLARION-LEDGER (Jackson), Oct. 24, 1889, at 1.

¹¹ See *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896) (describing the purpose of the Convention's enactment of section 241 as to "obstruct the exercise of the franchise" of Black people by disenfranchising people for actions "to which [the Black community's] weaker members were prone"); see also Pippa Holloway, "A Chicken-Stealer Shall Lose His Vote": Disfranchisement for Larceny in the South, 1874-1890, 75 J.S. HIST. 931, 941 (2009) (describing the racist motivations behind Pig Laws criminalizing petty theft, which increased disenfranchisement of Black people under section 241).

¹² U.S. COMM'N ON C.R., *supra* note 9, at 3-4.

¹³ Levine, *supra* note 8 ("Mississippi has the highest felon disenfranchisement rate in the country.").

¹⁴ THE SENT'G PROJECT, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 16-17 (2020), <https://www.sentencingproject.org/app/uploads/2022/08/Locked-Out-2020.pdf> [<https://perma.cc/92ZH-Y6SF>].

¹⁵ Complaint for Declaratory and Injunctive Relief ¶ 1, *Harness v. Hosemann*, No. 17-CV-791 (S.D. Miss. Aug. 7, 2019); Class Action Complaint for Declaratory and Injunctive Relief ¶¶ 7-9, *Hopkins v. Hosemann*, No. 18-CV-188 (S.D. Miss. Aug. 7, 2019); *Harness*, 2019 WL 8113392, at *1.

¹⁶ *Harness*, 2019 WL 8113392, at *1.

Equal Protection Clause.¹⁷ The cases were consolidated; a class was certified.¹⁸ Both parties sought summary judgment.¹⁹

In August 2019, the district court granted the defendant's motion for summary judgment as to the Harness plaintiffs and partially granted the defendant's motion for summary judgment as to the Hopkins plaintiffs (denying the defendant's motion as to section 253).²⁰ Judge Jordan III considered the claims separately.²¹ The court found Harness's Fourteenth and Fifteenth Amendment claims hamstrung by *Richardson v. Ramirez*²² and *Cotton v. Fordice*,²³ and held that Mississippi would have passed section 241 "without racial motivation" and thus it did not violate the civil rights amendments.²⁴ The court then returned to *Richardson* to strike Hopkins's section 2 Fourteenth Amendment claim, reasoning that "because [section 2] 'affirmative[ly] sanction[ed]' a state's right to deny the franchise based on a criminal conviction, doing so cannot violate [section 1] of that same amendment."²⁵ Hopkins's cruel and unusual punishment argument was dismissed swiftly; again, the court reasoned that if *Richardson* found this disenfranchisement constitutional under a substantive interpretation of one clause, another clause cannot find that same practice unconstitutional.²⁶

Harness's Fourteenth and Fifteenth Amendment claims on section 241 were separated and appealed to the Fifth Circuit in 2021, which affirmed.²⁷ Harness successfully petitioned for a rehearing en banc,²⁸ but the court again affirmed.²⁹ In dissent, Judge Graves noted the court's loss: "Handed an opportunity to right a 130-year-old wrong, the majority instead upholds it."³⁰ A final effort to undo the ruling ended when the Supreme Court denied Harness's writ of certiorari.³¹

Hopkins also appealed his claims. On August 4, 2023, a Fifth Circuit panel reversed on Hopkins's cruel and unusual punishment claim.³² Writing for the panel, Judge Dennis dismissed Hopkins's section 253 claims on standing.³³ The panel then rejected reading *Richardson* as a

¹⁷ Class Action Complaint for Declaratory and Injunctive Relief, *supra* note 15, ¶¶ 98–127.

¹⁸ *Harness*, 2019 WL 8113392, at *1.

¹⁹ *Id.*

²⁰ *Id.* at *14.

²¹ *Id.* at *5.

²² 418 U.S. 24 (1974).

²³ 157 F.3d 388 (5th Cir. 1998).

²⁴ *Harness*, 2019 WL 8113392, at *10; *see id.* at *5–10.

²⁵ *Id.* at *11 (quoting *Richardson*, 418 U.S. at 54) (first and last alterations added).

²⁶ *Id.*

²⁷ *Harness v. Hosemann*, 988 F.3d 818, 820 (5th Cir. 2021).

²⁸ *Harness v. Hosemann*, 2 F.4th 501, 502 (5th Cir. 2021) (mem.) (per curiam).

²⁹ *Harness v. Watson*, 47 F.4th 296, 300 (5th Cir. 2022) (en banc).

³⁰ *Id.* at 318 (Graves, J., dissenting).

³¹ *Harness v. Watson*, 143 S. Ct. 2426, 2426 (2023) (mem.).

³² *Hopkins*, 76 F.4th at 388.

³³ *Id.* at 393.

substantive limit on plaintiffs' Eighth Amendment claims.³⁴ Instead, the panel applied Eighth Amendment case law, using an "intents-effects" test³⁵ to determine if the provisions were punitive and surveyed "national consensus"³⁶ and "objective factors"³⁷ to inform its independent judicial determination³⁸ of the cruel and unusual factors.³⁹ It looked to section 241's legislative history to make this choice, grappling directly with its racist and punitive intent.⁴⁰ Lifetime disenfranchisement, the panel held, did not accord with "society's evolving standards of decency"; it deemed voting too fundamental a political right to deny.⁴¹

Judge Jones dissented.⁴² Accusing the majority of usurping the legislative process, Judge Jones echoed the district court in finding *Richardson* foreclosed an Eighth Amendment analysis.⁴³ Unlike the district court, however, Judge Jones found *Richardson* dispositive because of an incorporation doctrine argument.⁴⁴ She argued that since *Richardson* broadly allows for disenfranchisement of formerly incarcerated people under section 1 of the Fourteenth Amendment, and the Due Process Clause is in section 1, then the "Eighth Amendment right asserted by plaintiffs cannot exceed the scope of the Due Process Clause."⁴⁵ Thus, instead of applying Eighth Amendment jurisprudence, the dissent argued that this substantive limit on the Fourteenth Amendment must carry over to an interpretation of a state-based Eighth Amendment claim because the right is incorporated.⁴⁶ The dissent also supported this argument by suggesting "the majority's interpretation [of the Eighth Amendment] renders the section 2 proviso meaningless" and statutory canons of interpretation should favor her *Richardson* reading.⁴⁷ Though her argument rested on *Richardson*, Judge Jones dispatched an Eighth Amendment analysis as an afterthought; she did not find a lifetime ban from voting cruel or unusual, as she could not locate a national consensus that society's mores have evolved past stripping formerly incarcerated people of their voting rights.⁴⁸

Judge Jones's incorporation argument flies in the face of decades of settled and effective practice. Under incorporation doctrine, certain

³⁴ *Id.* at 399–401.

³⁵ *Id.* at 402 (quoting *Does 1–7 v. Abbott*, 945 F.3d 307, 314 (5th Cir. 2019)).

³⁶ *Id.* at 404 (quoting *Graham v. Florida*, 560 U.S. 48, 62 (2010)).

³⁷ *Id.* (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002)).

³⁸ *Id.* (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

³⁹ *Id.* at 404–11.

⁴⁰ *Id.* at 402.

⁴¹ *Id.* at 411.

⁴² *Id.* at 416 (Jones, J., dissenting).

⁴³ *Id.* at 417.

⁴⁴ *Id.* at 418–19.

⁴⁵ *Id.* at 419.

⁴⁶ *See id.*

⁴⁷ *Id.*

⁴⁸ *See id.* at 420–25.

rights guaranteed in the first eight amendments are applied to the states through the Fourteenth Amendment's Due Process Clause.⁴⁹ Rights were incorporated through a piecemeal approach.⁵⁰ Through selective incorporation, only fundamental constitutional rights whose denial would "shock[] the conscience" were interpreted to apply to the states.⁵¹ Over time, many Bill of Rights provisions were deemed to be "among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'" and were incorporated.⁵²

Jurisprudence for incorporated amendments traditionally does not vary between a federal or state claim. Take the Eighth Amendment. Determining what constitutes cruel and unusual punishment under the Eighth Amendment has a robust history. Before incorporation, courts had already begun to develop legal tests for understanding what was cruel and unusual, and what constituted such punishment.⁵³ Since the Eighth Amendment was incorporated in *Robinson v. California*,⁵⁴ courts have interpreted the doctrine using the same legal tests developed before incorporation.⁵⁵ In fact, the *Hopkins* majority did just that: it relied heavily on decades of cruel and unusual punishment case law.⁵⁶

⁴⁹ Scholars disagree as to the origins of incorporation doctrine. Some posit that the Fifth Amendment was first incorporated against the states in 1897 in *Chicago, Burlington & Quincy Railway Co. v. City of Chicago*, 166 U.S. 226 (1897). James Y. Stern, *First Amendment Lochnerism & the Origins of the Incorporation Doctrine*, 2020 U. ILL. L. REV. 1501, 1511. Still, others suggest the doctrine was first explored in Justice Black's dissent in *Adamson v. California*, 332 U.S. 46 (1947), in which he wrote: "[O]ne of the chief objects that . . . [the Fourteenth Amendment] was intended to accomplish was to make the Bill of Rights applicable, to the states." *Id.* at 71-72; see Jay S. Bybee, *The Congruent Constitution (Part One): Incorporation*, 48 BYU L. REV. 1, 14-16 (2022).

⁵⁰ Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 232-33 (2006).

⁵¹ *Id.* at 232 (citing *Rochin v. California*, 342 U.S. 165, 172 (1952); *Powell v. Alabama*, 287 U.S. 45, 67-68 (1932)).

⁵² *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968) (quoting *Powell*, 287 U.S. at 67).

⁵³ Early attempts to apply tests still in use today for cruel and unusual punishment claims, such as a proportionality test, can be found in *Weems v. United States*, 217 U.S. 349, 377-78 (1910). Applications of the "evolving standards of decency that mark the progress of a maturing society" framework existed in the 1950s. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

⁵⁴ 370 U.S. 660 (1962); *id.* at 667; see CARY FEDERMAN, *THE BODY AND THE STATE: HABEAS CORPUS AND AMERICAN JURISPRUDENCE* 99 (2006).

⁵⁵ See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 291-93 (1976) (plurality opinion) (invalidating a state death penalty scheme as inconsistent with evolving national standards of decency). Note that Congress has erected certain barriers to vindicating Eighth Amendment rights not relevant in *Hopkins*. For example, the Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626, 28 U.S.C. § 1932, imposes procedural "speed limits" for currently incarcerated people seeking injunctive relief under the Eighth Amendment. See generally Andrew W. Amend, Note, *Giving Precise Content to the Eighth Amendment: An Assessment of the Remedial Provisions of the Prison Litigation Reform Act*, 108 COLUM. L. REV. 143 (2008).

⁵⁶ *Hopkins*, 76 F.4th at 408 (using a proportionality test that is applied to federal- and state-based Eighth Amendment claims). The majority relied on many leading Eighth Amendment cases in its assessment. See, e.g., *Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding a sentence of life

While the dissent's grappling with *Richardson* was expected, its incorporation argument sweeps too broadly. Even if an analysis via the incorporation doctrine was called for — which it isn't — the dissent's broad assumptions about how substantive limits on the Fourteenth Amendment influence incorporated case law were underdeveloped. Suggesting that incorporated amendments must be analyzed first by looking at substantive limits on the Fourteenth Amendment instead of going straight to the Eighth Amendment's typical case law adds procedural obstacles and risks eroding Eighth Amendment rights.

Unpacking the dissent's analysis places its potential impact in perspective. The dissent argued that any non-*Richardson* view of the Eighth Amendment would “void the power entirely”⁵⁷ of section 2 of the Fourteenth Amendment. In doing so, the dissent suggested that simply because an action is not found unconstitutional (thus “allowed”) under one part of the Fourteenth Amendment (that is, the Equal Protection Clause under *Richardson*) it cannot be barred under another part of the Fourteenth Amendment (that is, the Due Process Clause).⁵⁸ But some parts of the Constitution allow conduct that other parts make unconstitutional.⁵⁹ Embracing the dissent's view would challenge this process.

Even assuming that the dissent's incorporation argument was appropriate, there are deep, underdeveloped presuppositions lining its analysis that the en banc Fifth Circuit should avoid. In suggesting that substantive interpretations of the Fourteenth Amendment must limit incorporated amendments, the dissent makes a larger assumption of the directionality of these limitations. There are two ways that one might consider the interaction between Fourteenth Amendment interpretations and incorporated amendments. One may argue (as the dissent does here) that these limitations must bind incorporated amendments retroactively.⁶⁰ In other words, since the Fourteenth Amendment is newer to the Constitution, its meaning should constrain any interpretation of earlier amendments. Another compelling read could go in the opposite

imprisonment without the possibility of parole for a juvenile's nonhomicide offense was cruel and unusual); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (finding the subjection of mentally disabled people to the death penalty was cruel and unusual); *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (finding a death penalty sentence for juveniles was cruel and unusual); *Kennedy v. Louisiana*, 554 U.S. 407, 446–47 (2008) (holding the death penalty for the rape of a child was cruel and unusual).

⁵⁷ *Hopkins*, 76 F.4th at 420 (Jones, J., dissenting).

⁵⁸ One may argue that the dissent leans on adjectives like “plainly” or “explicit,” *id.* at 418, which narrows the argument to solely contradictions between these sections of the amendment on these facts. But Judge Jones's analysis reveals the wide-ranging nature of her claim: it's not the plainness of section 2's guarantees, but the fact that it's an amendment made later in time that constrains reading of earlier incorporated amendments. *Id.* at 420.

⁵⁹ Take the First Amendment. It guarantees the right to free speech, which includes the right to speak freely about issues and people involved in public trials. But this conduct may be prohibited under the Sixth Amendment, which guarantees the right to a fair trial. Pretrial publicity, if pervasive and prejudicial, may influence a jury and place at risk one's right to a fair trial. Thus, conduct that the First Amendment might allow can be made unconstitutional under the Sixth Amendment.

⁶⁰ *Hopkins*, 76 F.4th at 420 (Jones, J., dissenting).

direction. The Bill of Rights can be understood as setting the floor; any substantive reading of the Fourteenth Amendment must first be in accordance with earlier amendments. Thus, the implied guarantees of section 2 of the Fourteenth Amendment must comport with what is already constitutionally impermissible in earlier provisions. Scholars have wrestled with how to best assess the interactions between newer and older amendments, platforming various antagonistic conclusions.⁶¹ In the dissent, Judge Jones seemed to offer a potential response to this tension. She suggested the amendment “more specific and later in time” should triumph, citing statutory canons to support this reasoning.⁶² Yet this analysis was at best terse, and at worst dismissive of a body of competing interpretations that has an unclear favorite. Other statutory canons can always cut in the opposite direction⁶³ — a key aspect of statutory analysis that Judge Jones failed to contend with. “[A] fair construction of the whole instrument”⁶⁴ would have accounted for the countervailing interpretation and offered reasoning against it. Instead, this argument not only transposed an incorporation analysis improperly onto an Eighth Amendment analysis, but also waded into this deep interpretation divide without offering much support for its claims. The Fifth Circuit en banc should be careful to avoid these pitfalls.

Despite what the dissent’s approach may imply, hewing close to the case law of incorporated amendments matters. Though certainly Eighth Amendment case law is imperfect,⁶⁵ the dissent’s process does not

⁶¹ See Stern, *supra* note 49, at 1505–06; Heinz Klug, *Constitutional Amendments*, 11 ANN. REV. L. & SOC. SCI. 95, 96–97 (2015) (discussing different modes of analyzing constitutional amendments and their sociohistorical contexts as either limiting or expansive).

⁶² *Hopkins*, 76 F.4th at 420 (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 183, 330 (2012) (“[If] there is a conflict between a general provision and a specific provision, the specific provision prevails.” *Id.* at 183. “While the implication of a later enactment will rarely be strong enough to repeal a prior provision, it will often change the meaning that would otherwise be given to an earlier provision that is ambiguous.” *Id.* at 330.)).

⁶³ A provision enacted later in time does not necessarily suggest it trumps older forms of law. “If Congress intends one statute to repeal an earlier statute or section of a statute *in toto*, it usually says so directly in the repealing act.” LARRY M. EIG, CONG. RSCH. SERV., 97-589, *STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS* 31 (2014), [https://perma.cc/VES2-RCFB](https://sgp.fas.org/crs/misc/97-589.pdf).

⁶⁴ *Hopkins*, 76 F.4th at 419 (Jones, J., dissenting) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819)).

⁶⁵ Eighth Amendment case law has failed to protect large swaths of populations through its failure to bar certain conditions, its deficient view on punishment, and its often-narrow focus on the death penalty. See Carrie Leonetti, *Comparative Cruelty: A Comparative Analysis of the Eighth Amendment to the United States Constitution and Section Nine of the New Zealand Bill of Rights Act*, 47 HASTINGS CONST. L.Q. 533, 545–46 (2020); Carl N. Frazier, Note, *Removing the Vestiges of Discrimination: Criminal Disenfranchisement Laws and Strategies for Challenging Them*, 95 KY. L.J. 481, 493 (2007); *Green v. Bd. of Elections*, 380 F.2d 445, 450 (2d Cir. 1967) (“Depriving convicted felons of the franchise is not a punishment but rather is a ‘nonpenal exercise of the power to regulate the franchise.’” (quoting *Trop v. Dulles*, 356 U.S. 86, 97 (1958) (plurality opinion))). The Eighth

address these failings. Instead, it implicitly creates a hierarchy between federal- and state-based Bill of Rights claims, which disregards the goals of incorporation. At the core of incorporation is a belief that “states [are] to receive no greater deference than the federal government in adjudicating the Constitution.”⁶⁶ Historically, incorporation has been seen as an expansion of, rather than a limitation to, rights enshrined in the first eight amendments.⁶⁷ But the dissent’s reading risks creating daylight between federal and state claims. The dissent would require a state-based claim to go through an analysis of substantive limits on the Fourteenth Amendment before going to Eighth Amendment case law, whereas a federal claim would go straight to the case law. By requiring fewer stages of review, courts would effectively grant the federal government greater deference than the states. This arrangement poses federalism concerns as well.

Were the Fifth Circuit en banc court to endorse the dissent’s view of incorporation doctrine, its impact outside of legal analysis would be antithetical to the legislative intent behind the passing of these amendments. Enacted in the Reconstruction Era, these amendments were meant to address this country’s racism and take steps to build a multi-racial democracy.⁶⁸ Relevant here, the Fourteenth Amendment was designed to expand civil liberties and protect against state infringement on fundamental rights.⁶⁹ Yet the dissent’s interpretation risks precluding litigants from accessing remedies by treating state- and federal-based claims differently. This dynamic most starkly takes shape in *Hopkins*. Were a future court to embrace the dissent’s reading of incorporation, hundreds of thousands of people — predominantly Black people subject to laws crafted by white supremacists — would be subject to “civil death,” stripped of a “‘fundamental political right’ . . . ‘preservative of all rights.’”⁷⁰

As the Fifth Circuit’s decision en banc imminently approaches, it’s unclear whether the dissent’s view will carry water. But the prospect of overhauling incorporated amendment case law by first looking to substantive Fourteenth Amendment interpretations should be troubling to this court — and to any other court considering this view.

Amendment’s failure to limit sentence terms has also led to rapid expansion of life without parole sentences in the United States. See Christopher Seeds, *Bifurcation Nation: American Penal Policy in Late Mass Incarceration*, 19 PUNISHMENT & SOC’Y 590, 598 (2016).

⁶⁶ Justin F. Marceau, *Un-incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1236 (2008).

⁶⁷ See *id.* at 1232–33.

⁶⁸ See Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 980–81 (2012).

⁶⁹ See Bernice B. Donald & Pablo J. Davis, “*To This Tribunal the Freedman Has Turned*”: *The Freedman’s Bureau’s Judicial Powers and the Origins of the Fourteenth Amendment*, 79 LA. L. REV. 1, 43 (2018).

⁷⁰ *Hopkins*, 76 F.4th at 408 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).