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### ***ESSAY***

#### MCDONALD'S OTHER RIGHT

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#### INTRODUCTION

AS is widely known, in June 2010 the Supreme Court issued its opinion in *McDonald v. City of Chicago*, holding that the Due Process Clause of the Fourteenth Amendment makes the Second Amendment binding on the states.<sup>1</sup> The strong public and scholarly interest in the case is due, in large part, to the controversial nature of the right that was incorporated, but also to excitement (at least among scholars) over the first incorporation in roughly forty years.<sup>2</sup> Despite this broad interest, one feature of *McDonald* appears to have gone so far unnoticed:<sup>3</sup> the right to keep and bear arms is not the sole provision of the Bill of Rights that the opinion incorporates, for

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<sup>1</sup> 130 S. Ct. 3020, 3026 (2010).

<sup>2</sup> The last incorporation case was *Benton v. Maryland*, 395 U.S. 784 (1969), which applied the prohibition against double jeopardy to the states. *Id.* at 794.

<sup>3</sup> This incorporation remains unnoticed even by those who have written about *McDonald*. See, e.g., Dale E. Ho, *Dodging a Bullet: McDonald v. City of Chicago and the Limits of Progressive Originalism*, 19 *Wm. & Mary Bill Rts. J.* 369, 380–81 (2010) (stating that “the Court has yet to analyze only two (relatively insignificant) individual rights found in the Bill of Rights for the purposes of incorporation: the Third Amendment prohibition on the quartering of soldiers in private homes and the Eighth Amendment right against excessive bails and fines”); Richard J. Hunter, Jr. & Hector R. Lozada, *A Nomination of a Supreme Court Justice: The Incorporation Doctrine Revisited*, 35 *Okla. City U. L. Rev.* 365, 382–83 (2010) (stating that “the Court has yet to rule on the applicability of the Eighth Amendment’s bar on ‘[e]xcessive bail’ to the states”).

the first time, against the states. This oversight is understandable, however, because while the incorporation of the Second Amendment prompted over two hundred pages of opinions, the incorporation of the second provision, the Excessive Bail Clause of the Eighth Amendment, required only a footnote.

#### I. THE INCORPORATION OF THE EXCESSIVE BAIL CLAUSE

To be fair, scholars' oversight with respect to Eighth Amendment incorporation is also understandable because the distinction being drawn here is a fine one. Whereas previously the Court had gone no further with respect to the Excessive Bail Clause than to say that it had "been assumed" to apply to the states through the Fourteenth Amendment,<sup>4</sup> *McDonald*—citing a case in which neither party had even raised an Eighth Amendment issue—unequivocally places the prohibition against excessive bail among the incorporated rights rather than among those still in constitutional limbo.<sup>5</sup> If there is any meaningful difference between these statuses—and most,<sup>6</sup> though

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<sup>4</sup> *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (finding that "the Eighth Amendment's proscription of excessive bail has been assumed to have application to the states through the Fourteenth Amendment"); see also *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 284 (1989) (O'Connor, J., concurring in part and dissenting in part) (citing *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971)) ("In addition, the Court has assumed that the Excessive Bail Clause of the Eighth Amendment applies to the States."); *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) ("We of course agree with the dissent's quotation of the statement from [*Schilb*] that 'the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment.'"); *Galen v. County of Los Angeles*, 477 F.3d 652, 659 (9th Cir. 2007) ("Neither the Supreme Court nor we have held that the Clause is incorporated against the states."); cf. *Kennedy v. Louisiana*, 554 U.S. 407 (2008). In discussing cruel and unusual punishment in 2008, the Court in *Kennedy* found that the entire Eighth Amendment applied to the states, finding, "The Eighth Amendment, applicable to the States through the Fourteenth Amendment, provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'" *Id.* at 419. This appears to have been judicial sloppiness rather than an accurate statement of the law, however, because just under two decades earlier, the Court in *Browning-Ferris* stated that it had never determined whether the excessive fines portion of the Eighth Amendment applied to the states and specifically declined to decide whether it did. See *Browning-Ferris*, 492 U.S. at 262–64. The *McDonald* court confirms this, recognizing the Court's previous failure to decide the incorporation issue for excessive fines in *Browning-Ferris*. 130 S. Ct. at 3035, n.13.

<sup>5</sup> *McDonald*, 130 S. Ct. at 3034–35, nn.12–13 (citing *Schilb*, 404 U.S. at 365). This is dicta, certainly, but dicta from which return seems extremely unlikely.

<sup>6</sup> See Joshua Dressler & George C. Thomas, *Dressler & Thomas' Criminal Procedure: Principles, Policies, and Perspectives* 793 (4th ed. 2010) (stating that incorporation of

certainly not all<sup>7</sup> scholars appear to have thought that there was—then, after pausing to solemnly mark the explicit guarantee of an-

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the right remains in question); Stephen G. Calabresi & Sarah E. Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?, 87 *Tex. L. Rev.* 7, 82 (2008) (“It can be argued that the Supreme Court signaled its willingness to incorporate this right against the states through the Fourteenth Amendment in 1971, *although it has not technically done so thus far.*”) (emphasis added); Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction, 42 *Hastings L.J.* 1325, 1383 n.298 (1991) (observing that “the Court has assumed that the excessive bail clause of the same amendment also applies to the states”); Nancy J. King, Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties, 144 *U. Pa. L. Rev.* 101, 155, n.155 (1995) (noting that the Bail Clause “has been assumed” to apply to the states and citing *Schilb*); Joseph L. Lester, Presumed Innocent, Feared Dangerous: The Eight Amendment’s Right to Bail, 32 *N. Ky. L. Rev.* 1, 22 (2005) (arguing that “[t]he incorporation of the Eighth Amendment as applicable to the states has occurred indirectly, if at all”); Nelson Lund, The Past and Future of the Individual’s Right to Arms, 31 *Ga. L. Rev.* 1, 49 n.112 (1996) (describing *Schilb* as “apparently assuming that [the] Excessive Bail Clause is incorporated”); Jeremy M. Miller, The Potential for an Equal Protection Revolution, 25 *Quinnipiac L. Rev.* 287, 294 (2006) (explaining that “[t]hose guarantees of the Bill of Rights still *not* enforced against the states by the Fourteenth Amendment are the Second Amendment right to bear arms, the Fifth Amendment right to an indictment by a grand jury, the Eighth Amendment excessive fines clause, [and] the Eighth Amendment bail clause”); Peter Preiser, Rediscovering a Coherent Rationale for Substantive Due Process, 87 *Marq. L. Rev.* 1, 19, n.122 (2003) (stating that “[t]he Eighth Amendment prohibition on excessive bail and excessive fines has never been addressed as a due process concern”); cf. Bryan H. Wildenthal, The Road to *Twining*: Reassessing the Disincorporation of the Bill of Rights, 61 *Ohio St. L.J.* 1457, 1524 (2000) (“With regard to excessive bail and excessive fines under the Eighth Amendment, it seems hard to believe that the Court would not incorporate those rights if ever confronted with the issue, especially given that the remaining Eighth Amendment guarantee, against cruel and unusual punishments, has long been incorporated. The Court has, in fact, expressed in dicta an assumption that the Excessive Bail Clause applies to the states through the Fourteenth Amendment.”).

<sup>7</sup> See, e.g., Erwin Chemerinsky, *Constitutional Law* 545–46 (3d. ed. 2009) (briefly listing the unincorporated rights, and not including the Excessive Bail Clause); Akhil Reed Amar, Hugo Black and the Hall of Fame, 53 *Ala. L. Rev.* 1221, 1230 & n.33 (2002) (not including the Excessive Bail Clause among the list of the “only major exceptions” to incorporation); Robert R. Baugh, Applying the Bill of Rights to the States: A Response to William P. Gray, Jr., 49 *Ala. L. Rev.* 551, 569 n.80 (1998) (listing excessive bail as applicable to the states and citing *Schilb*); Stephen Gardbaum, New Deal Constitutionalism and the Unshackling of the States, 64 *U. Chi. L. Rev.* 483, 549–50 (1997) (stating that “the Warren Court incorporated against the states every right of the criminally accused contained in the Bill of Rights except the Fifth Amendment’s requirement of a grand jury indictment”); Lewis R. Katz, *Mapp* After Forty Years: Its Impact on Race in America, 52 *Case W. Res. L. Rev.* 471, 479 (2001) (stating that “the Court made . . . the Eighth Amendment right to be free from excessive bail applicable to the states”); Christopher J. Peters, Assessing the New Judicial Minimalism, 100 *Colum. L. Rev.* 1454, 1524, n.285

other of our constitutional liberties against infringement by state and local governments, it remains to wonder how the Court could have been so cavalier.

## II. EXPLANATIONS

### *A. A Quiet End to Years of Presumed Incorporation*

Part of the answer to the footnote puzzle, of course, must surely be that after years of assuming it to be the case, the Court felt it so obvious that the Fourteenth Amendment applies the Excessive Bail Clause to the states that it was unnecessary to wait for the issue to be presented. Such a feeling would be understandable: employing the standards reaffirmed in *McDonald*, the issue seems nearly free from doubt. If “the presumption of innocence, secured only after centuries of struggle, would lose its meaning” unless the “right to bail before trial is preserved,”<sup>8</sup> then the prohibition against excessive bail would certainly seem to be “fundamental to our scheme of ordered liberty and system of justice,” and “deeply rooted in this Nation’s history and tradition.”<sup>9</sup> A skeptic might question whether a right that only forty-two percent of felony defendants are able to exercise<sup>10</sup> can truly be fundamental, but if more proof were needed, then the fact that “[a]ll thirty-seven state constitutions in 1868—every last one—provided that excessive bail shall not be required in criminal cases” should suffice.<sup>11</sup>

### *B. A Matter of Indifference*

Another, less happy part of the explanation of the *McDonald* Court’s incorporation-by-footnote, though, may be that the issue largely escaped the Court’s attention because the Excessive Bail Clause, as interpreted by the Court, has so little force that it simply

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(2000) (describing *Schilb* as “incorporating Eighth Amendment prohibition of excessive bail”).

<sup>8</sup> *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

<sup>9</sup> *McDonald*, 130 S. Ct. at 3034, 3036.

<sup>10</sup> Thomas Cohen & Tracey Kyckelhahn, Bureau of Justice Statistics: Felony Defendants in Large Urban Counties 7 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf>.

<sup>11</sup> Calabresi & Agudo, *supra* note 6, at 81.

does not matter very much whether it applies to the states or not. Even for the Bill of Rights, the Clause is a model of succinct ambiguity. As Representative Samuel Livermore of New Hampshire said in the congressional debate over the Bill of Rights, “The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges?”<sup>12</sup> Livermore, of course, did not carry the day; it fell to the courts, and ultimately the Supreme Court, to provide answers to these very basic questions: how are we to determine what amount of bail is “excessive” (or appropriate) for a particular defendant? With reference to what principles or objectives?

On one hand, the Clause could be read as a check on both the judiciary and the legislature, guaranteeing that bail will not be excessive in light of some implicit conception of the legitimate uses of pretrial detention—perhaps only in capital cases,<sup>13</sup> or when necessary to the functioning of the judicial process.<sup>14</sup> On the other hand, the Clause may also be read as leaving the legislature free to determine whether and under what circumstances bail should be allowed. Under such a construction, the Clause serves only to prevent judges from setting bail higher than necessary to achieve whatever goal the legislature has sought to achieve.<sup>15</sup>

The Supreme Court largely resolved these questions in 1987 in *United States v. Salerno*, when it considered a facial challenge to the provisions of the Bail Reform Act of 1984 allowing detention for

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<sup>12</sup> 1 Annals of Cong. 754 (Joseph Gales & William Seaton eds., Washington, 1834), reprinted in 5 The Founders' Constitution 377 (Philip B. Kurland & Ralph Lerner eds., 1987), quoted in Samuel Wiseman, Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause, 36 Fordham Urb. L.J. 121, 128 (2009).

<sup>13</sup> Caleb Foote, The Coming Constitutional Crisis in Bail: I, 113 U. Pa. L. Rev. 959, 989 (1965). For a fuller discussion of these scholars' views, see Wiseman, supra note 12, at 135–36 and accompanying footnotes; see also infra notes 13 through 15 and accompanying text.

<sup>14</sup> See Laurence H. Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va. L. Rev. 371, 404 (1970).

<sup>15</sup> William F. Duker, The Right to Bail: A Historical Inquiry, 42 Alb. L. Rev. 33, 86 (1977); see also *Carlson v. Landon*, 342 U.S. 524, 545–46 (1952); Hermine H. Meyer, Constitutionality of Pretrial Detention, 60 Geo. L.J. 1139, 1179 (1972); John N. Mitchell, Bail Reform and the Constitutionality of Pretrial Detention, 55 Va. L. Rev. 1223, 1225 (1969).

dangerousness.<sup>16</sup> The Court, after a brief textual and historical analysis, declined to decide whether the Eighth Amendment puts any limit on “Congress’ power to define the classes of criminal arrestees who shall be admitted to bail,” but concluded that “[t]he only arguable substantive limitation of the Bail Clause is that the Government’s proposed conditions of release or detention not be ‘excessive’ in light of the perceived evil.”<sup>17</sup> It then held that “when Congress has mandated detention on the basis of a compelling interest” such as preventing crime by arrestees, “the Eighth Amendment does not require release on bail.”<sup>18</sup> While it may be an overstatement to say that the Court’s interpretation has left the Excessive Bail Clause “below the level of a pious admonition,”<sup>19</sup> it is not merely coincidental that it remains “one of the least litigated provisions in the Bill of Rights.”<sup>20</sup>

With respect to challenges to legislative restrictions on pretrial release (assuming they exist), the goal blessed by *Salerno*—ensuring the safety of the community (including, perhaps, safety from economic harm)<sup>21</sup>—is broad enough by itself to allow detention for most felonies. After all, if the government’s interest in averting danger can help justify imprisoning the convicted for years,<sup>22</sup> it would seem, in most cases, to justify detaining the presumptively innocent. Put another way, it is difficult to put a value—whether measured in dollars or in days of pretrial detention—on the prevention of crime, and courts seem unlikely to second-guess a legislature on such a calculation except in extremely unusual cases. Nor does the Eighth Amendment appear to impose many limits on how dangerousness is determined: under the Bail Reform Act of 1984, judges must consider a wide range of factors when determining whether to detain a defendant pretrial, including, among others, “the person’s character, physical and mental condition, family ties, employment, financial re-

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<sup>16</sup> 481 U.S. 739 (1987).

<sup>17</sup> *Id.* at 754.

<sup>18</sup> *Id.* at 754–55.

<sup>19</sup> *Carlson v. Landon*, 342 U.S. 524, 556 (1952) (Black, J., dissenting).

<sup>20</sup> *Galen v. County of Los Angeles*, 477 F.3d 652, 659 (9th Cir. 2007).

<sup>21</sup> See, e.g., *United States v. Madoff*, 316 F. App’x 58, 59–60 (2nd Cir. 2009); *United States v. Reynolds*, 956 F.2d 192, 192–93 (9th Cir. 1992) (order).

<sup>22</sup> *Ewing v. California*, 538 U.S. 11, 30 (2003) (affirming, under a proportionality analysis, a sentence to twenty-five years in prison for stealing golf clubs because the crime was a third offense).

sources, length of residence in the community, community ties,” and “the nature and seriousness of the danger to any person or the community that would be posed by the person’s release.”<sup>23</sup> And while the Bail Clause may still prevent individual judges from imposing conditions greater than necessary to accomplish the legislature’s goal, normal avenues of appellate review already serve this purpose. Thus, as things stand, the Excessive Bail Clause protects the accused-but-not-yet-convicted from only the most extreme legislatures and courts, and the most careless.<sup>24</sup>

#### CONCLUSION

Given the relative lack of controversy surrounding the Excessive Bail Clause of the Eighth Amendment, even the most optimistic of bail scholars would not have expected the Supreme Court to produce two hundred pages of opinion when the issue of its incorporation was settled. But even Eeyore would have confidently predicted the question would receive a paragraph or two—in a case actually presenting the question. The fact that it did not tells us much about its present status.

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<sup>23</sup> Federal Bail Reform Act of 1984, 18 U.S.C. § 3142(g) (2010).

<sup>24</sup> For a careless legislative action struck down by a court under the Bail Clause, see *United States v. Torres*, 566 F. Supp. 2d 591, 601 (W.D. Tex. 2008) (holding that release restrictions on sex offenders violate Excessive Bail Clause when the restrictions are specifically mandated—including a mandate when the restrictions are unnecessary to protect the community).