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ARTICLE

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INTEREST-BASED INCORPORATION: STATUTORY  
REALISM EXPLORING FEDERALISM, DELEGATION, AND  
DEMOCRATIC DESIGN

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SHELDON A. EVANS<sup>†</sup>

*Statutory interpretation is a unique legal field that appreciates fiction as much as fact. For years, judges and scholars have acknowledged that canons of interpretation are often based on erudite assumptions of how Congress drafts federal statutes. But a recent surge in legal realism has shown just how erroneous many of these assumptions are. Scholars have created a robust study of congressional practices that challenge many formalist canons of interpretation that are divorced from how Congress thinks about, drafts, and enacts federal statutes. This conversation, however, has yet to confront statutory incorporation, which describes when Congress incorporates state law into federal statutes. Statutory incorporation is one of the most common legislative tools employed by Congress and has been used to enact hundreds of federal statutes that affect liberty and property rights across multiple areas of law. Traditional analyses of statutory incorporation argue that it allows Congress to achieve goals of federalism and/or delegation, both of which empower state governments to shape federal policies. But this traditional narrative falls short when held up to the scrutiny of statutory realism.*

*This Article offers an alternative explanation: specifically, that statutory incorporation is a tool that allows Congress to abdicate federal legislative responsibility and pass it on to the states, which in turn allows the politically motivated members of Congress to avoid political accountability. This theory of a more interest-based statutory incorporation is an important contribution that*

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*adds to the growing realism literature in the statutory incorporation field and carries important implications for the future of scrutinizing the fictions that dominate this space.*

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## INTRODUCTION

We live in a Republic of Statutes that is maintained by fictions.<sup>1</sup> If the Constitution is our foundation, statutes are the beams, walls, and roof that

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<sup>1</sup> See generally WILLIAM N. ESKRIDGE, JR. & JOHN A. FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010) (describing the shift from an American legal system dominated by common law to one dominated by statutes); see also Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2025-30 (2011) (listing scholars' criticisms of using legal fictions in statutory incorporation doctrine).

shape our democracy. They define modern notions of Our Federalism and our growing bureaucracy, all while bestowing thousands of federal rights to citizens and noncitizens alike. Yet the ways that statutes are interpreted have been acknowledged by many scholars as exercises of fiction.<sup>2</sup> Courts have had to contend with the complexities, confusions, and inconsistencies that embody statutory design, resulting in canons of interpretation to make sense of Congress's befuddlements. Formalists use these canons<sup>3</sup> to divine congressional intent, but these legal fictions are divorced from how Congress actually thinks about and drafts statutes. This has given rise to a new movement of legal realism within the statutory interpretation community that seeks to bridge the growing divide between how judges and scholars think about interpreting statutes and how Congress thinks about drafting statutes.<sup>4</sup> Through surveys, interviews, and careful research within the Capitol itself, Professors Victoria Nourse and Jane Schacter, Abbe Gluck and Lisa Schultz Bressman, and others have developed this new realist approach to statutory interpretation—referred to below as statutory realism—that challenges formalists and the canons they champion.<sup>5</sup>

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<sup>2</sup> See, e.g., Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 887, 921-22, 928 (2003) (arguing rules of interpretation should favor simple administrable rules because courts' institutional capacity is too limited to understand complexities of the inner workings of Congress); see also Bressman, *supra* note 1, at 2009-10, 2025-30 (discussing Congress's tendency to intentionally pass the burden of statutory interpretation to administrative agencies whenever it does not clearly explain the meaning of a statute).

<sup>3</sup> Compare Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 178-79 (2017) (describing formalism's reliance on canons as a "failure . . . that sacrifices accurate approximation of congressional practice in favor of efficient, and objective, system-coordinating rules"), with John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 176 (defending formalism's use of canons as "shared semantic conventions").

<sup>4</sup> I refer to these scholars as realists based on their dissatisfaction with formalist canons to explain how Congress drafts statutes. See generally Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1235-38 (1931) (outlining foundations of legal realism).

<sup>5</sup> See generally Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002) (conducting surveys and interviews of congressional staffers and committee staff on the Senate Judiciary Committee); see also Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) [hereinafter Gluck & Bressman, *Statutory Interpretation Part I*] (conducting surveys and interviews across several congressional staffers, committees, and support departments); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014) [hereinafter Gluck & Bressman, *Statutory Interpretation Part II*] (same); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 850 (2014) (outlining improvements and professionalism in congressional drafting practices); Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79 (2015) (providing typology of the different origins and drafting processes of congressional statutes); see generally Abigail R. Moncrieff, *Statutory Realism: The Jurisprudential Ambivalence of Interpretive Theory*, 72 RUTGERS U. L. REV. 39 (2019) (highlighting the formalism and realism presuppositions of modern interpretive theory); Max Radin,

This Article seeks to expand and contribute to statutory realism by applying it to a unique congressional drafting tool known as statutory incorporation. Congress has used statutory incorporation to incorporate state law into hundreds of federal statutes that result in a host of federal rights and liabilities being dependent on the myriad variations of state law. Scholars have contemplated that such diffusion of federal power to the states can be characterized as a form of federalism; others have studied this through the lens of it being a unique congressional delegation of power to state legislatures. This Article contributes to this conversation by developing further statutory realism theory and applying it to explain this odd statutory design. By drawing from the drafting realities that govern the legislative process, this Article argues that the federalism- and delegation-based justifications for statutory incorporation are mere legal fictions. While these legal fictions have their uses,<sup>6</sup> they are nevertheless divorced from the real justifications of *why* Congress chooses to incorporate state law into federal statutes.

In light of these practical realities, this Article presents a new justification that holds more explanatory power over this “why” question. While it does not benefit from the same qualitative research in the Capitol that gave rise to the statutory realism paradigm, this Article gains insight from law and economics and positive political theory to present a new theory of interest-based incorporation. Interest-based incorporation recognizes that congressmembers use statutory incorporation to maximize their individual political self-interests while minimizing political risk. Congressmembers are less concerned with ivory-tower theories of federalism and delegation and more concerned with pragmatic goals of promoting their self-interest of reelection.

This new realization is one of the primary contributions of applying statutory realism to statutory incorporation; it relieves judges from interpreting these statutes according to the fictitious congressional intent of promoting federalism or delegation. Instead, courts and scholars alike have a new tool at their disposal to interpret these statutes in ways that accurately track congressional design, which in turn is rooted in self-interest.

Statutory realism as a theoretical and practical school of interpretation has much to contend with from the vast literature and prominent advocacy of others

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*Realism in Statutory Interpretation and Elsewhere*, 23 CALIF. L. REV. 156 (1935) (arguing that a Supreme Court case interpreting a bankruptcy statute was interpreted according to the real life realities of rent collection and rent projection as opposed to formalist canons of interpretation).

<sup>6</sup> See Sunstein & Vermeule, *supra* note 2, at 928-31 (arguing that courts benefit from simple legal rules of interpretation by using agency interpretations of law as an example); Gluck & Bressman, *Statutory Interpretation Part I*, *supra* note 5, at 961-64 (stating that scholars and members of the judiciary justify the use of legal fictions because courts have a duty to ensure that the law is coherent).

in the field. Textualists, intentionalists, and purposivists<sup>7</sup> (to name a few) will likely have their own views that might explain statutory incorporation. Justifying statutory realism among its sister theories of interpretation is outside the scope of this Article. This scholarly conversation may indeed proceed with critique from other schools, and responses will follow in due course. Instead, this Article only seeks to bolster the qualitative research that has come before in the context of federal statutes that incorporate state law.

Part I gives an overview of the impactful frequency of statutory incorporation. Congress has used statutory incorporation in hundreds of statutes across criminal, immigration, bankruptcy, social security, tort, and other areas of federal law.<sup>8</sup> So when a federal criminal statute provides that both federal and state versions of “burglary” can carry a federal consequence,<sup>9</sup> or that state and local property regimes affect a debtor’s assets in federal bankruptcy court,<sup>10</sup> Congress intentionally incorporates the law of all fifty states into these federal statutes in outcome determinative ways. In other words, a person’s life, liberty, and property under hundreds of federal statutes depends on the application of state law.

Courts and scholars have long struggled with the moral and practical implications that arise from statutory incorporation, namely that it necessarily produces enormous disparities in federal rights based on the many variances of state law. Under the same federal statute, similar defendants, debtors, and even those struggling to apply for social security benefits enjoy different federal rights depending on the state of their domicile.<sup>11</sup> When the difference between a noncitizen being deported or a child getting survivorship benefits is largely dependent on the state in which they live, this creates a conundrum. How can the presumption of nationwide uniformity in federal law be reliable when such federal law seeks to prioritize state preferences?<sup>12</sup> Let’s consider Person A who lives in State A and Person B who lives in State B. Under federalism and the state’s

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<sup>7</sup> See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *Theories of Statutory Interpretation*, in LEGISLATION AND STATUTORY INTERPRETATION 219-56 (2d ed. 2006) (providing introduction to different schools of statutory interpretation).

<sup>8</sup> See Joshua M. Divine, *Statutory Federalism and Criminal Law*, 106 VA. L. REV. 127, 129 (2020) (overviewing the breadth of statutory incorporation).

<sup>9</sup> See *infra* Section I.A.

<sup>10</sup> See *infra* Section I.B.

<sup>11</sup> See, e.g., Sheldon A. Evans, *Categorical Nonuniformity*, 120 COLUM. L. REV. 1771, 1787-88, 1792-94 (2020) (surveying disparities caused by statutory incorporation in criminal and immigration law).

<sup>12</sup> See, e.g., *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979) (“Undoubtedly, federal programs that by their nature are and must be uniform in character throughout the Nation necessitate formulation of controlling federal rules . . . . Conversely, when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision.” (internal quotations and citations omitted)); see also Evans, *supra* note 11, at 1799-1811 (considering tensions between nationwide uniformity and principles of federalism).

sovereign police powers, we recognize that even if Person A and Person B commit the same crime, have the same property, or have other similarities between them, State A can treat Person A much differently than State B chooses to treat Person B. But when the situation changes to instead include the federal government, should this unitary sovereign treat Person A differently than Person B under federal law because they live in different states? Statutory incorporation triggers these difficult theoretical, moral, and economic questions because one incorporative federal statute is effectively fifty statutes that apply differently in each state. These questions have been difficult to answer among the judiciary who usually find themselves split between two ends of a spectrum. At one end, judges have tried to apply these paradoxical laws as faithful agents of congressional intent. At the other end, judges have complained about the moral problems, legal loopholes, and confusing interpretations they have had to create to make sense of statutory incorporation.<sup>13</sup>

Part II transitions from these judicial complaints by filtering them through the theoretical justifications of statutory incorporation. Federalism scholars have commented on how it offers insight into the modern era of federal and state relations that yield the benefits of diffusing power, experimentation, competition, and political engagement. This naturally dovetails with delegation and administrative law scholars that highlight statutory incorporation's contribution to delegation theory. These scholars argue that statutory incorporation is Congress's attempt to benefit from the expertise of the states while also ensuring superior political accountability, since state legislators may be more attuned and accountable to local constituents.

But these alleged benefits underappreciate the most important aspect of statutory incorporation: it is a one-way, unilateral transfer of power. Statutory incorporation cannot be likened to modern cooperative federalism regimes when states act as powerful agents to implement federal policy goals.<sup>14</sup> It is not a two-way partnership, negotiation, or exchange of power between the federal and state governments. Instead, Congress simply incorporates state law without any input from or notice to the states. If this is federalism, it could only be characterized as such in its weakest form. Consequently, statutory incorporation carries little of the traditional benefits associated with federalism. Further, the statutory realism literature has documented that congressional staffers, negotiators, and drafters consider

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<sup>13</sup> See *infra* notes 117–119 and accompanying text.

<sup>14</sup> See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1259–60 (2009) (describing power of states as agents when implementing federal policies).

federalism as a tangential theory that does not drive the legislative process for many statutes.<sup>15</sup>

Delegation theory also proves incomplete when explaining statutory incorporation. Congressional delegations are the subject of a vast literature that acknowledges the principal-agent relationship when Congress seeks to delegate lawmaking authority to executive agencies.<sup>16</sup> In such relationships, Congress benefits from the expertise that agencies can provide while still being able to keep these agencies accountable through rulemaking procedures, budget allocations, congressional hearings, and periodic reporting requirements. But these benefits of the principal-agent relationship are not present when Congress delegates federal lawmaking authority to a lesser state legislature. State legislatures have no superior expertise and enjoy far fewer resources and staff than Congress itself. Further, Congress cannot control state legislatures with the same tools they use to exercise supervision over administrative lawmaking processes. Once again, the unilateral transfer of power prevents any benefits of expertise and control that traditionally justify delegations to administrative agencies. Statutory realism surveys cast even more doubt on delegation theory, finding that congressional drafters rarely consider delegating lawmaking power to any other political actor other than executive agencies.<sup>17</sup> Thus, there is no evidence to suggest congressional drafters contemplate delegating to state legislatures at all. For all the purported benefits of federalism and delegation that statutory incorporation *might* embody, the existing literature has not fully accounted for these critiques and shortfalls.

Part III sidelines these incomplete theories of statutory incorporation by proposing another justification yet to garner serious consideration in the literature. It begins with the premise that politicians are self-interested economic actors, which is widely acknowledged across several political and legal fields of scholarship. Consequently, congressmembers are primarily motivated by reelection and their personal legislative legacy.<sup>18</sup> This incentivizes them to maximize legislative productivity while minimizing political risk. These realities are what makes statutory incorporation such an attractive legislative tool.

First, it allows congressmembers to pass laws and champion issues for their constituencies while also allowing them to pass blame for undesirable outcomes onto state officials. To federalism theorists, this might look like

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<sup>15</sup> See *infra* notes 171–175 and accompanying text.

<sup>16</sup> See Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2023 n.120 (2014) [hereinafter Gluck, *Our [National] Federalism*] (calling *Chevron* “one of the most cited cases in history” and outlining a small sample of the hundreds of commentators have weighed in).

<sup>17</sup> See *infra* notes 214–215 and accompanying text.

<sup>18</sup> See *infra* notes 220–221 and accompanying text.



diffusing power to the states. To delegation theorists, this might look like delegating lawmaking authority to the states. To interest-based theorists, this looks like taking credit for positive results while diffusing and delegating blame to the states in cases of negative results. Thus, congressmembers get the political benefits from passing impactful laws that are tough on crime, deport potentially dangerous noncitizens, reform social security, and provide second chances for debtors. And if a criminal or noncitizen gets off the hook, or a beneficiary fails to get needed social security benefits, or a debtor fails to keep up with their bankruptcy payment plan, the political backlash that might come from such negative results can be appropriately redirected to the shortcomings of state law and the state officials who apply it.

Second, statutory incorporation allows congressmembers to benefit from interest group politics. This interest group reasoning adopts the findings of statutory realism and other studies that confirm just how involved lobbyists and other interest groups are in the legislative drafting process. Given that congressmembers and legislative drafters can benefit from the research resources and policy expertise of these groups, it follows that congressmembers can also benefit by simultaneously fostering connections that can help their future political campaigns. In return, these interest groups enjoy incredible influence in the statutory drafting process. For their part, interest groups are interested in swaying congressional drafters to incorporate state law to benefit their national and regional clients. Crafting federal law to incorporate state law shifts power to state legislatures. This allows these powerful interest groups to efficiently target particular states according to their national or regional strategies without the expense and difficulty of lobbying Congress to pass laws that require much more time, resources, and the potential failure to garner the necessary legislative coalition to pass and enact laws.

Third, statutory incorporation empowers congressmembers to intentionally negotiate ambiguity into federal statutes. This is a longstanding legislative tradition that allows congressmembers to navigate the myriad of difficulties that might otherwise derail the drafting process. By intentionally drafting ambiguous terms into a statute, drafters can overcome time constraints, a lack of research, and can provide a means for two or more disagreeing negotiators to agree on language that may be interpreted in their favor by courts and agencies in the future. As applied to statutory incorporation, incorporating state law has many of the same benefits of ambiguity. Instead of doing the difficult work of legislating, congressional drafters can bypass the time-consuming tasks of negotiating difficult issues, researching those issues, and finding common ground by instead incorporating state law. Such an incorporation increases legislative

efficiency by allowing opposing negotiators to leave knowing that the federal law will be interpreted and applied differently in each state, thus satisfying each opposing negotiator that their constituents will be subject to their own preferred state laws.

While the interest-based theory of statutory incorporation is the main contribution of this Article, Part IV continues by discussing the judicial and legislative implications. Interest-based incorporation would allow courts to develop doctrine around the legal fictions of federalism- and delegation-based incorporation. Instead, courts would benefit from developing canons based in statutory realism that properly consider the self-interested goals of Congress. These canons would not faithfully apply Congress's self-interests but could rather serve as a check to congressional abdication of lawmaking authority. Ambiguity canons—such as the rule of lenity that already exists in criminal, immigration, and bankruptcy law<sup>19</sup>—could be repurposed to interpret federal incorporative statutes in the light most favorable of defendants, noncitizens, and debtors. Courts could also check congressional self-interests by developing a highest-denominator canon that applied a single state's law—the one that is most favorable to defendants, noncitizens, and debtors—to the entire country. This would carry the benefits of federal nationwide uniformity while also empowering states' laws based on their beneficial nature and expertise. Courts might also consider doctrinal lines with a federal–state interest canon, tailoring their interpretation of an incorporative statute based on whether it forwards a traditional federal interest or is a subject of law traditionally left to the states. On the one hand, such a canon would strictly interpret traditional federal interest, such as immigration, to mitigate variations of outcomes caused by differing state laws. On the other hand, courts would exercise much more leniency in interpreting incorporative laws that govern traditional state interests, such as criminal laws, to allow for variation of state preferences.

In addition to potential judicial interventions, interest-based incorporation can also guide how members of Congress might maximize their self-interests without the problems that arise from statutory incorporation. First, Congress might consider expanding its own institutional resources by increasing its budget and creating an additional legislative research department. This would diminish its dependence on interest groups while also empowering Congress itself to do the type of research and analysis to inform congressmembers of the potential disparate impacts statutory incorporation could have on their constituents. This could also be an opportunity to empower state legislatures by creating or including an existing council of state legislatures as an advisory agency to Congress. Thus, any future use of statutory incorporation would

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<sup>19</sup> See *infra* notes 262–272 and accompanying text.

benefit from the additional research and expertise of state law from the states themselves.

In light of the breadth of statutory incorporation and the problems it causes as highlighted in Part I, the theoretical shortcomings of federalism- and delegation-based justifications in Part II, the explanatory contribution of interest-based incorporation in Part III, and how this contribution can positively inform practical judicial and legislative interventions in Part IV, this Article stands at the crossroads of integrating statutory incorporation in practice, theory, and reform.

### I. INCORPORATIVE INCLUSIONS

Congress's use of statutory incorporation forms the bedrock of many federal statutory rights. Instead of being limited to niche areas, Congress has used statutory incorporation in hundreds of statutes across criminal, immigration, bankruptcy, social security, tort, and many other contexts in a one-size-fits all approach that raises questions as to its efficacy across such diverse subjects.<sup>20</sup> This Part is not meant to be an exhaustive account of all instances of statutory incorporation, but instead focuses on specific areas of law to achieve two goals. First, this Part illustrates the sheer breadth of statutory incorporation by highlighting the diverse subject matters that these statutes cover. Second, this Part highlights the inherent flaws of statutory incorporation. Because the myriad variations of state law are incorporated into federal statutes, these statutes produce nonuniformity, judicial confusion and critique, and moral dubiety. This Part displays these shortcomings and establishes the foundational problems that are necessary to understand the theoretical critiques of statutory incorporation in the later Parts of the Article.

At the outset, it is important to introduce the various types of statutory incorporation that are relevant for the discussion below. One important distinction is the difference between static and dynamic incorporation.<sup>21</sup> Static incorporation occurs when the incorporating jurisdiction incorporates another jurisdiction's law as it exists at the time of incorporation; thus, the law and its incorporation remains static. This is materially different from dynamic incorporation that seeks to incorporate another jurisdiction's law, as

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<sup>20</sup> See, e.g., Gluck, *Our [National] Federalism*, *supra* note 16, at 2008 (providing a brief overview of statutory incorporation's breadth across federal law).

<sup>21</sup> See John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655, 664-69 (2010) (discussing different types of incorporative statutes); see also Divine, *supra* note 8, at 138-43 (providing taxonomy of dynamic statutory incorporation statutes).

it might change *dynamically* over time.<sup>22</sup> If Jurisdiction A dynamically incorporates Jurisdiction B's law, whenever Jurisdiction B changes that law, so too does it change the law of Jurisdiction A.<sup>23</sup> This is materially different from static incorporation, whereas when Jurisdiction B changes its law, Jurisdiction A's law would not change since it incorporated Jurisdiction B's law based on a snapshot in time as it existed when the incorporation was enacted. Comparing the two, static incorporation maintains the lawmaking authority and accountability of the incorporating jurisdiction. Commentators have warned that dynamic incorporation, however, may improperly delegate lawmaking authority to other jurisdictions.<sup>24</sup> As a practical matter, dynamic incorporation gifts Jurisdiction B with the power to control impactful laws that govern the people of another jurisdiction; and to make matters more problematic, the people of Jurisdiction A cannot hold Jurisdiction B's lawmakers accountable through the political process.<sup>25</sup> Some states have found this so problematic that they have banned their legislatures from using dynamic incorporation.<sup>26</sup> While this Article discusses these important implications, it does so by covering the shortfalls of both static and dynamic incorporation.

In addition to dynamic vs. static incorporation, there are also tiers reflecting how much of another jurisdiction's law is being incorporated. Joshua Divine's work provides a useful categorical framework for federal statutes that dynamically incorporate state law.<sup>27</sup> These include opt-out statutes (when state legislatures provide safe harbor protections against the liabilities of federal law), opt-in statutes (when Congress provides a federal penalty for violations of state law), triggering statutes (when Congress provides a federal penalty that can only be triggered for violating certain state laws), and catch-all scope statutes (when

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<sup>22</sup> See Paul J. Larkin Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL'Y 337, 359-60 (2015) (describing differences between static and dynamic incorporation).

<sup>23</sup> See Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 126 (2008) (observing that dynamic incorporation includes both legislative changes to the law and judicial interpretations of the same).

<sup>24</sup> See, e.g., F. Scott Boyd, *Looking Glass Law: Legislation by Reference in the States*, 68 LA. L. REV. 1201, 1203, 1275-77 (2008) (discussing risks and unintended consequences of statutory incorporation for states and delegation doctrine requiring that legislatures delegate to agents over which they have sufficient oversight and control).

<sup>25</sup> See Larkin, *supra* note 22, at 360 ("[W]hen Congress gives someone else the power to define federal law, Congress is delegating federal lawmaking authority to an 'outsider,' someone not in one of those three categories of people [Representatives, Senators, and the President] elected to federal office.").

<sup>26</sup> See Boyd, *supra* note 24, at 1203 n.7 (detailing state courts that have declared delegations to other state laws unconstitutional); see also Jim Rossi, *Dynamic Incorporation of Federal Law*, 77 OHIO ST. L.J. 457, 471-72 (2016) ("[S]tate constitutional structural provisions, including separation of powers doctrines such as nondelegation, limited the authority of state lawmakers to use federal law to define future crimes . . .").

<sup>27</sup> See Divine, *supra* note 8, at 138-43 (explaining four types of dynamic incorporation).

Congress allows state law to determine how broadly or narrowly federal provisions might apply).<sup>28</sup> As discussed in this Part, all forms of statutory incorporation come with problematic aspects that necessitates intervention from the judiciary to interpret the statutes in an attempt to make sense of their difficult draftsmanship. But appreciating these different types of incorporation in different subject areas of the law informs later discussions about the justifications for different types of incorporation and potential solutions.

### A. Criminal & Immigration Law

The impact of statutory incorporation is perhaps most widely felt in the criminal law, which has ripple effects that deprive people of life and liberty across federal substantive law, sentencing, collateral consequences, and even immigration deportation. The federal criminal code alone incorporates state law in over a dozen places,<sup>29</sup> broadening the ever-imposing reach of the federal government in an area traditionally left to the police power of the states. Over the decades, these federal statutes have subjected tens of thousands of people to unique dilemmas and punishments that challenge notions of fairness, legitimacy, and efficiency in the criminal justice system.

The Assimilative Crimes Act (ACA) is one of the most visited examples of statutory incorporation in federal criminal law because it provides a digestible account of how statutory incorporation works in practice.<sup>30</sup> The ACA provides that any violation of state criminal law in a federal enclave (such as a federal park) that is not already a federal crime will be punished as a federal crime.<sup>31</sup> The punishment for this federal violation is “a like punishment” of the corresponding state law.<sup>32</sup> While courts and commentators have noted that this use of statutory incorporation is meant to respect state law,<sup>33</sup> it comes at the price of disrespecting the rights of individual

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<sup>28</sup> *Id.*; see also Wayne A. Logan, *Creating a “Hydra in Government”: Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 93-94 (2006) [hereinafter Logan, *Creating a Hydra in Government*] (describing what Divine calls “triggering” statutes as federal-centrism in the context of federal sentencing statutes).

<sup>29</sup> See, e.g., Divine, *supra* note 8, at 139-40 (summarizing other federal substantive criminal law statutes); see also Evans, *supra* note 11, at 1780 n.45 (citing instances of statutory incorporation in the federal criminal code).

<sup>30</sup> See, e.g., Logan, *Creating a Hydra in Government*, *supra* note 28, at 71-75 (discussing contours of the ACA and its incorporation of state substantive law); Divine, *supra* note 8, at 134-35 (same); Dorf, *supra* note 23, at 111 (same); Larkin, *supra* note 22, at 372 n.141 (same).

<sup>31</sup> 18 U.S.C. § 13(a).

<sup>32</sup> *Id.*

<sup>33</sup> See *United States v. Sharpnack*, 355 U.S. 286, 294 (1958) (“This procedure [laid out in the ACA] is a practical accommodation of the mechanics of the legislative functions of State and Nation

defendants. Professor Wayne Logan's research on the ACA led him to believe that it "creates significant disparities . . . [b]y incorporating by reference state substantive laws and sanctions . . ." <sup>34</sup> For example, the ACA allows the federal government to prosecute and punish a Californian differently than it would prosecute and punish a Texan under the same federal statute. The ACA is illustrative of the inevitable design flaw of statutory incorporation when practically applied amongst federal jurisdictions. It breeds nonuniformity and disparities based on the vagaries of state law.<sup>35</sup>

Statutory incorporation is not just limited to the dozens of substantive federal crimes that incorporate state law;<sup>36</sup> it also enjoys a substantial impact in federal sentencing statutes,<sup>37</sup> collateral consequences,<sup>38</sup> and even immigration law. In the latter context, these differences in state law (big or small) are the difference between remaining in the country or being deported. The Immigration and Nationality Act (INA) incorporates state law in many instances,<sup>39</sup> but the most impactful statutory incorporation determines deportability for noncitizens who have committed an "aggravated felony."<sup>40</sup> The term "aggravated felony" covers a broad scope of federal and state crimes, such as murder, rape, and burglary,<sup>41</sup> which leaves courts to sift through state criminal elements to match with their corresponding federal definitions.<sup>42</sup>

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in the field of police power where it is especially appropriate to make the federal regulation of local conduct conform to that already established by the State.").

<sup>34</sup> Logan, *Creating a Hydra in Government*, *supra* note 28, at 74.

<sup>35</sup> See *United States v. Garcia*, 893 F.2d 250, 253 (10th Cir. 1989) (observing that it is "not always possible" to promote intrastate uniformity by means of the ACA while simultaneously preserving interstate uniformity, and that the ACA represents a deliberate choice of the former goal).

<sup>36</sup> See *supra* note 29 and accompanying text (discussing the incorporation of state law into the federal criminal code).

<sup>37</sup> See Evans, *supra* note 11, at 1774-75, 1802 (discussing statutory incorporation in the Armed Career Criminals Act (ACCA) and studying cases with large sentencing disparities based on previous state criminal convictions); see also Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 208 (2019) [hereinafter Barkow, *Categorical Mistakes*] ("The complexity of the ACCA cases . . . [stem] from Congress's failure to wrestle with any of the tough questions that go along with effectively deciding to turn state crimes into federal ones . . .").

<sup>38</sup> See *infra* notes 78-89 (describing the incorporation of state law in areas of housing and social security benefits).

<sup>39</sup> See, e.g., 8 U.S.C. § 1101(a)(15)(U) (determining eligibility for U-visa based upon victimhood of potential state crimes); 8 U.S.C. § 1182(a)(2)(D) (defining vice crimes for excludability in part under state law); 8 U.S.C. § 1182(a)(2)(E) (defining serious criminal activities in part under state law); 8 U.S.C. § 1182(a)(3)(B)(iii) (defining terroristic activities in part under state law); 8 U.S.C. § 1182(a)(4)(E)(ii) (defining exception to public charge rule in part under state law).

<sup>40</sup> 8 U.S.C. § 1101(a)(43).

<sup>41</sup> *Id.*

<sup>42</sup> See, e.g., *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) ("When the Government alleges that a state conviction qualifies as an 'aggravated felony' under the INA, we generally employ a 'categorical approach' to determine whether the state offense is comparable to an offense listed in the INA.").

This approach yields disheartening disparities and has resulted in noncitizens being treated differently for deportation purposes based on slight differences in state law.<sup>43</sup> And for one unlucky resident noncitizen,<sup>44</sup> the difference between staying in the United States with his family, friends, and the life he had built came down to the placement of an “or” in a Pennsylvania statute, whereas a noncitizen who committed a similar crime was *not* deported under a nearly identical New Jersey statute that did not have the “or.”<sup>45</sup>

These types of disparities—the difference of several years behind bars or being banished completely from your home and family—shock the conscience when they are triggered by the difference of scrivener strokes in states’ laws. Even those that defend statutory incorporation and the Court’s attempt to interpret it in these criminal and immigration contexts have admitted that it leads to disparate federal sentencing and immigration outcomes among defendants who are otherwise similarly situated.<sup>46</sup> Judges too have joined the critique, calling these statutes confusing, complex, and incredibly taxing on judicial economy.<sup>47</sup> They have also recognized the moral dilemma when courts are asked to “treat[ ] similarly situated [noncitizens] disparately” because of the variation of state law.<sup>48</sup>

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<sup>43</sup> See Evans, *supra* note 11, at 1793-94, 1794 nn.149-158 (describing several deportation disparities between similarly situated noncitizens based on differences of state law).

<sup>44</sup> See *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 917 (9th Cir. 2004) (characterizing the defendant as having been “lucky enough” to commit a crime in a more lenient state that resulted in less serious federal consequences).

<sup>45</sup> See Evans, *supra* note 11, at 1792-93 (comparing cases of *Wilson v. Ashcroft*, 350 F.3d 377 (3d. Cir. 2003) (noncitizen convicted of New Jersey drug trafficking law was not deported because conviction did not qualify as aggravated felony) with *Garcia v. Att’y Gen. of the U.S.*, 462 F.3d 287 (3d. Cir. 2006) (noncitizen convicted of Pennsylvania drug trafficking law was deported because conviction qualified as aggravated felony)).

<sup>46</sup> See, e.g., Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 297 (2012) (explaining that individuals who engage in similar criminal behavior may receive different convictions in states with different statutory elements or record keeping practices); Rebecca Sharpless, *Finally, a True Elements Test: Mathis v. United States and the Categorical Approach*, 82 BROOK. L. REV. 1275, 1278 (2017) (conceding the variation between state crimes gives prosecutors options in charging crimes, which can result in disparities in immigration deportation).

<sup>47</sup> See, e.g., *United States v. Perez-Silvan*, 861 F.3d 935, 944 (9th Cir. 2017) (Owens, J., concurring) (comparing sentencing jurisprudence under the ACCA to piecing archaeological puzzles together “to locate the Well of the Souls”); *Lopez-Valencia v. Lynch*, 798 F.3d 863, 866 (9th Cir. 2015) (“[T]he task of figuring out whether a prior offense qualifies . . . under the [ACCA] or . . . immigration law would seem to be a straightforward undertaking . . . [H]owever, the classification has been much more nuanced, and courts have spent inordinate amounts of time parsing whether a crime falls into one of these categories.”).

<sup>48</sup> *Kahn v. INS*, 36 F.3d 1412, 1414 (9th Cir. 1994); see also *id.* (“The INA was designed to implement a uniform federal policy, and the meaning of concepts important to its application are not to be determined according to the law of the forum, but rather require[ ] a uniform federal definition.” (quotations omitted)); *Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996) (expressing courts’

This handful of examples of statutory incorporation in criminal law is but a small sample in a much larger dynamic of statutory design; statutory incorporation is wholly divorced from foundational goals of treating similar people similarly. The notions of fairness and equal treatment in arenas such as criminal liability, sentencing, immigration, and the many other areas touched by criminal justice are bedrock principles that uphold the legitimacy of these respective systems.<sup>49</sup>

### B. *Property Law*

In addition to the effects that statutory incorporation has upon life and liberty under criminal and immigration federal statutes, even more Americans are affected by statutory incorporation's broad application in property law. In areas such as takings,<sup>50</sup> bankruptcy,<sup>51</sup> copyright,<sup>52</sup> and tax,<sup>53</sup> state law is the cornerstone that determines much of federal property rights.<sup>54</sup> As property scholars have described, property rights simply do not exist outside of state law.<sup>55</sup> Thus, Congress has attempted to fashion its own federal property rights regime by incorporating state law. As is the predictable pattern, this produces a variation of federal property rights based upon the variation of state laws.

Bankruptcy is one of the most illuminating examples of how statutory incorporation affects federal property rights. Congress enacted the Bankruptcy Code<sup>56</sup> pursuant to its constitutional mandate to create "uniform Laws on the

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"frequently expressed concern to avoid disparate treatment of similarly situated [noncitizens] under the immigration laws" based on "the differences among state laws").

<sup>49</sup> See Logan, *Creating a Hydra in Government*, *supra* note 28, at 78 (discussing the inconsistencies of statutory incorporation in criminal law and stating that they undermine "the federal government's commitment to fairness, predicated on uniform outcomes for similarly situated defendants. . ."); Evans, *supra* note 11, at 1800-03 (discussing the importance of a uniform application of federal law to the perceived legitimacy of the legal system).

<sup>50</sup> See U.S. CONST. amend. V. While constitutional incorporations of state law are outside the scope of this Article, takings jurisprudence and scholarship nevertheless show further federal rights that are determined by state law. See, e.g., Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 206, 222 (2004) (arguing for state-specific takings clause in federal jurisprudence since federal takings is largely dependent on state-law property laws).

<sup>51</sup> See *infra* notes 56-77 and accompanying text.

<sup>52</sup> See, e.g., *De Sylva v. Ballentine*, 351 U.S. 570, 581 (1956) (using "the ready-made body of state law to define the word 'children' in [the Copyright Act].").

<sup>53</sup> See, e.g., *United States v. Mitchell*, 403 U.S. 190, 197 (1971) ("[W]ith respect to community income, as with respect to other income, federal income tax liability follows ownership . . . . In the determination of ownership, state law controls." (citations omitted)).

<sup>54</sup> See, e.g., Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 74 (2005) (noting that states are the traditional source of property law).

<sup>55</sup> See Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 494 (2000).

<sup>56</sup> 11 U.S.C. §§ 101-1501.



subject of Bankruptcies throughout the United States.”<sup>57</sup> Yet courts and scholars agree that the Bankruptcy Code was not meant to create a federal property regime, but only to create a uniform federal procedure to classify existing state property rights between a debtor and their creditors.<sup>58</sup> This is evidenced by Congress’s uses of statutory incorporation in the Bankruptcy Code, which are legion. Professor Thomas Plank has noted dozens of incorporations throughout the Code,<sup>59</sup> and consequently he and others have recognized bankruptcy courts as the most frequent adjudicators of state law among the federal judiciary.<sup>60</sup>

While federal bankruptcy rights vary according to the complexities of state law determining everything from voidable preferences, secured and unsecured debts, and constructive trusts,<sup>61</sup> perhaps the most salient example is that of property exemptions. Tens of thousands of individual debtors every year make a difficult choice between filing a Chapter 7 or Chapter 13 bankruptcy.<sup>62</sup> Whereas Chapter 7 bankruptcies require the debtor to liquidate all nonexempt assets to pay back creditors, Chapter 13 strikes a different deal and allows debtors to keep their property but requires them to pay back creditors on a multi-year payment plan.<sup>63</sup> This is where state law exemptions come into play. Different states allow for different categories and amounts of exemptions. For example, seven states such as Florida and Texas allow debtors to exempt the entire value of their home in homestead exemptions,<sup>64</sup> whereas over twenty states by comparison allow meager homestead exemptions of \$20,000 or less.<sup>65</sup> There is also wide variation among states regarding various

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<sup>57</sup> U.S. CONST. art. I, § 8.

<sup>58</sup> See Thomas E. Plank, *Bankruptcy and Federalism*, 71 *FORDHAM L. REV.* 1063, 1064-66 (2002) (recognizing bankruptcy law’s role in adjusting relationship between debtor and creditor, which is reliant on state property rights).

<sup>59</sup> See *id.* at 1070-76 (describing all the ways that the federal bankruptcy code relies on nonfederal and state law to determine bankruptcy outcomes).

<sup>60</sup> See *id.* at 1076 (“[By] statutory command, federal courts must in many instances follow and apply state law.”); see also Susan Block-Lieb, *The Costs of a Non-Article III Bankruptcy Court System*, 72 *AM. BANKR. L.J.* 529, 554 (1998) (noting the interstitial nature of bankruptcy law considering the “contract, property, tort, secured transactions, [and] landlord-tenant . . . state laws” that frequently come up in federal bankruptcy cases).

<sup>61</sup> See, e.g., *In re Unicom Comput. Corp.*, 13 F.3d 321, 325 (9th Cir. 1994) (acknowledging that variations in state law determine whether property held by debtor in constructive trust is included in bankruptcy holdings).

<sup>62</sup> See Ed Flynn, *Bankruptcy by the Numbers: Dead-on-Arrival Cases (at Bankruptcy Court)*, *AM. BANKR. INST. J.*, Jan. 2018, at 58, 82-83 (conducting a study on 240,751 Chapter 7 filings and 123,185 Chapter 13 filings over a six-year period).

<sup>63</sup> See *id.* at 58 (explaining the difference between Chapter 7 and 13 bankruptcy cases).

<sup>64</sup> See TEX. PROP. CODE ANN. § 41.001 (2000) (providing unlimited homestead exemption); see also FLA. CONST. art. X, § 4(a)(1) (same).

<sup>65</sup> Raisa Bahchieva, Susan M. Wachter & Elizabeth Warren, *Mortgage Debt, Bankruptcy, and the Sustainability of Homeownership*, in *CREDIT MARKETS FOR THE POOR* 73, 99 (Patrick Bolton &

personal property exemptions such as automobiles, household goods, and tools or other professional supplies.<sup>66</sup> The Code also makes it harder to liquidate property held in tenancies by the entirety, thus benefiting debtors in states with such real estate holding options.<sup>67</sup> Consequently, similar debtors who live in different states may indeed choose different bankruptcy options based on the amount of exemptions they can claim.<sup>68</sup>

These variations among state exemptions steer debtors into different chapters of bankruptcy and produce impactful disparate outcomes. Whereas Chapter 7 cases result in the successful discharge of debt over ninety-five percent of the time, Chapter 13 filings have an abysmal thirty-three percent success rate.<sup>69</sup> This low rate of success usually results in Chapter 13 debtors—most of whom choose this option to save their home<sup>70</sup> perhaps because their state did not have a robust homestead rule—end up losing their homes anyway when the Chapter 13 repayment plan falls apart.<sup>71</sup> This troubling disparity gets worse when accounting for race. Professors Jean Braucher, Dov Cohen, and Robert Lawless found that African Americans are more likely to be steered into Chapter 13 payment plans<sup>72</sup> even though the African American community has a lower success rate due to multiple factors of financial strain.<sup>73</sup> Professor A. Mechele Dickerson has found the same, arguing that

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Howard Rosenthal eds., 2005); *see also* Lawrence Ponoroff, *Exemption Limitations: A Tale of Two Solutions*, 71 AM. BANKR. L.J. 221, 222 & n.8 (1997) (surveying state homestead exemptions).

<sup>66</sup> *See* 11 U.S.C. § 522(d) (allowing exemptions of a motor vehicle, household items, jewelry, and professional tools and equipment, up to various value ceilings); *see, e.g.*, FLA. CONST. art. X, § 4(a)(2) (exempting personal property up to \$1,000); TEX. PROP. CODE ANN. §§ 42.001-002 (2000) (allowing exemption of, *inter alia*, a motor vehicle for each family member, home furnishings, jewelry, and livestock, up to a total of \$60,000 for a family or \$30,000 for a single adult).

<sup>67</sup> *See* 11 U.S.C. § 522(b)(1)(B). *See also* A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 FORDHAM L. REV. 69, 94 n.138 (1998) [hereinafter Dickerson, *Family Values*] (estimating as many as thirty-seven jurisdictions that allow married couples to shield property under tenancy of the entirety).

<sup>68</sup> *See* Flynn, *supra* note 62, at 59, 82 (finding extreme disparities between states when recording how many people choose to file different chapters of bankruptcy respective of the state they live in).

<sup>69</sup> Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 107 (2011).

<sup>70</sup> *See id.* at 135-37.

<sup>71</sup> *See, e.g.*, Michelle J. White & Ning Zhu, *Saving Your Home in Chapter 13 Bankruptcy*, 39 J. L. STUD. 33, 37 (2010) (finding that ninety-six percent of Chapter 13 debtors are homeowners, but many end up losing homes due to Chapter 13 failure).

<sup>72</sup> *See* Jean Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393, 406 (2012) (“[A]ttorneys recommended Chapter 13 more frequently to a hypothetical couple when there were cues that the couple was African American vs. white.”).

<sup>73</sup> *See* Rory Van Loo, *A Tale of Two Debtors: Bankruptcy Disparities by Race*, 72 ALB. L. REV. 231, 234 (2009) (reporting a 19.8% success rate for African Americans compared to a 28.3% success rate for Caucasians in Chapter 13 debt discharge); *see also* Braucher et al., *supra* note 72, at 405 (finding that 36.2% of Chapter 13 cases filed by African Americans fail during the first ten to fourteen months after filing, compared to only 25.5% for other groups).

these Chapter 13 racial disparities favor white debtors because of the wealth gap between white and African American debtors.<sup>74</sup>

For over a century, courts and scholars have recorded and struggled with the moral and economic fallout produced when statutory incorporation leads to disparate federal property outcomes based on the variations of state law.<sup>75</sup> These pains are felt across the federal property landscape, of which bankruptcy is the most salient example.<sup>76</sup> Not only does this mean that identically situated property holders can have drastically different outcomes based on the state of their domicile, but also that debtors from vulnerable and underrepresented communities may be disproportionately impacted due to bankruptcy laws that were designed with white middle-class debtors in mind.<sup>77</sup> In this property context, statutory incorporation continues its pattern of creating moral and economic dilemmas that require significantly high justifications for the detrimental costs it has imposed.

### C. Federal Benefits

Congress has also used its powers to limit various federal benefits by incorporating state law. There are many examples where Congress has used prior criminal activity or convictions under state law to bar eligibility for federal programs. Federal housing programs, for instance, are impacted by the infamous “One-Strike” rule where involvement in drug or other violent state crimes renders applicants ineligible for needed housing subsidies.<sup>78</sup> The One-Strike rule also renders applicants for federal welfare and other income-assistance programs ineligible for the very assistance they might need to

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<sup>74</sup> A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725, 1726-27 (2004) [hereinafter Dickerson, *Race Matters in Bankruptcy*]. For a discussion on disparities for LGBTQ debtors, see Dickerson, *Family Values*, *supra* note 67, at 92.

<sup>75</sup> See, e.g., *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918) (acknowledging that federal recognition of different state laws on property rights could “lead to different [bankruptcy] results in different States.”); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL’Y 801, 809-10 (1994) (outlining the existence of exemptions under state law that create variation in bankruptcy outcomes).

<sup>76</sup> See *supra* notes 56–60.

<sup>77</sup> See Dickerson, *Race Matters in Bankruptcy*, *supra* note 74, at 1726 (arguing that Congress designed bankruptcy laws to favor white middle-class homeowners by allowing more favorable discharge and exemption rules for debt that applies more often to their demographic and wealth profile).

<sup>78</sup> See Barkow, *Categorical Mistakes*, *supra* note 37, at 214 (citing 42 U.S.C. § 13661(c) (2012)) (stating that Congress passed legislation allowing public housing authorities to decline providing housing subsidies to anyone involved in drug-related or other violent criminal activity); see also HUD Announces “One Strike” Rules for Public Housing Tenants, NAT’L DRUG STRATEGY NETWORK (May 1996), <https://www.ndsn.org/may96/onestrik.html> [<https://perma.cc/SKA9-HW5R>] (characterizing collateral consequences as “One-Strike” rules).

successfully reintegrate into society.<sup>79</sup> Even those convicted of state drug crimes are barred from receiving federal student loans for certain periods of time.<sup>80</sup>

Disparities between state laws also arise in the Social Security Act.<sup>81</sup> Similar to other welfare programs, applicants have a burden of proof to qualify for such benefits, such as proving disability or family status. For instance, the Act gives survival benefits to a “widow,” “child,” “wife,” “husband,” or people who are “married” if their qualifying family members pass away.<sup>82</sup> But Congress made the decision to define these terms by incorporating the state law of the applicant’s domicile instead of developing federal definitions to avoid “entanglement in the traditional state law realm of family relations.”<sup>83</sup> Consequently, life altering benefits that are often sought by poorer applicants in need of assistance are determined by state legal definitions.

The pattern of statutory incorporation continues to have discriminatory impacts in this area. As an example, whether a child receives social security survival benefits from their deceased parents turns on the intestacy, inheritance, and time limits of state law.<sup>84</sup> Biological children born through the advances of in vitro technology within three years of a parent’s death could receive such benefits in Louisiana, but not in California or Iowa because of their two-year cutoff.<sup>85</sup> In 1965, when many amendments to the Act were being debated in Congress, a Senate Report explicitly recognized this problematic framework: many children would be denied important benefits because of the different preferences states had when defining the rights of children born outside of a marriage.<sup>86</sup> Courts have come to embrace this

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<sup>79</sup> See Barkow, *Categorical Mistakes*, *supra* note 37, at 214 (citing 21 U.S.C. § 862(a) (2012)).

<sup>80</sup> See *id.* (citing 20 U.S.C. § 1091(r)(1)).

<sup>81</sup> 42 U.S.C. §§ 401–34.

<sup>82</sup> See 42 U.S.C. § 416 (b), (c), (e), (f), (g), (h).

<sup>83</sup> *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 554 (2012); see also *Schafer v. Astrue*, 641 F.3d 49, 62 (4th Cir. 2011) (calling reliance on state law in this context an “advantage” due to “states’ historic competence”).

<sup>84</sup> See *Capato*, 566 U.S. at 544–55.

<sup>85</sup> Compare LA. STAT. ANN. § 9:391.1(A) (2021) (child born within three years of parent’s death can inherit benefits), with CAL. PROB. CODE § 249.5(c) (West 2021) (allowing inheritance if child is *in utero* within two years of parent’s death), and IOWA CODE § 633.220A(1) (2021) (child born within two years of parent’s death can inherit benefits).

<sup>86</sup> See S. REP. NO. 89–404, at 109–10 (1965), as reprinted in 1965 U.S.C.C.A.N. 1943, 2049–50 (“[I]n several States a child whose parents never married cannot inherit his father’s intestate property under any circumstances.”); *Schafer*, 641 F.3d at 57–58 (noting Congress’s acknowledgement of the disparate treatment of similarly situated children when those born “out-of-wedlock” could not be granted inheritance rights).

disparate treatment, not only deeming it constitutional,<sup>87</sup> but also presuming Congress meant these state-by-state disparities as “the most advisable method” to determine familial relationships.<sup>88</sup> In these circumstances, a child has no choice when to be born, where to be born, or to whom to be born. Nevertheless, courts believe that Congress deemed it appropriate to treat child beneficiaries differently based on these factors over which these children have no control. This example of the treatment of child beneficiaries is one of many in which the importance of being a “husband,” “wife,” “child,” or “married”<sup>89</sup> has large implications as determined by the variations of state law.

#### D. Federal Liability

In addition to the federal benefits granted by statute, Congress has also conceded federal liability under the Federal Tort Claims Act (FTCA).<sup>90</sup> Specifically, Congress used statutory incorporation to determine federal liability when a federal official or employee “would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”<sup>91</sup> As the familiar pattern dictates, however, this triumph of government accountability<sup>92</sup> varies in morally problematic ways due to the variability of

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<sup>87</sup> See, e.g., *Lee v. Astrue*, Civ. No. 10-125-GFVT, 2012 WL 912733, at \*3 (E.D. Ky. Mar. 15, 2012) (holding that the Social Security Act’s deference to state law on the definition of marriage satisfies rational basis review).

<sup>88</sup> See *Jones v. Schweiker*, 668 F.2d 755, 763 (4th Cir. 1981) (Bryan, J., dissenting) (finding that Congress concluded that reliance on state laws of intestacy succession was the most appropriate method for determining who was a child for purposes of receiving certain Social Security benefits), *vacated sub nom. Jones v. Heckler*, 460 U.S. 1077 (1983).

<sup>89</sup> In the pre-*Windsor* era, Social Security and many other federal benefits available to married couples also hinged on state law, and whether a state recognized common-law marriage or gay marriage. See *Gill v. Off. of Pers. Mgmt.*, 699 F. Supp. 2d 374, 391 n.126 (D. Mass. 2010) (“[R]ecognizing that whether an individual is ‘married’ is, for purposes of the tax laws, to be determined by the law of the State of the marital domicile.” (quoting *Dunn v. Comm’r of Internal Revenue*, 70 T.C. 361, 366 (1978))); 42 U.S.C. § 416(h)(1)(A)(i) (defining an applicant for purposes of Social Security survivor and death benefits as “the wife, husband, widow, or widower [of an insured person] . . . if the courts of the State [of the deceased’s domicile] . . . would find that such applicant and such insured individual were validly married . . .”); 38 U.S.C. § 103(c) (stating that, for purposes of determining whether a person is a widow or widower of a veteran and therefore eligible for certain benefits, either the law of the state where the parties resided during the marriage or the law of the state lived in when the right to benefits accrued shall be relied on).

<sup>90</sup> See Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2243 (2003) (stating that the FTCA, and other vehicles of “state regulation of the federal government [are creatures] of congressional consent . . .”).

<sup>91</sup> 28 U.S.C. § 1346(b)(1).

<sup>92</sup> The FTCA is an exception of the typically immune United States government. Cf. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201-02 (2001) (“[Sovereign immunity is] an anachronistic relic and the entire doctrine should be eliminated from American

state law. And although the American Law Institute has compiled authoritative restatements of tort law over the generations that synthesize trends and majority rules among the states,<sup>93</sup> there are still significant differences.<sup>94</sup>

Courts have noted the inherent uniformity problems posed by the FTCA and the disparate results based on where a federal official may commit the tort.<sup>95</sup> This means the federal government can get away with tortious actions in certain jurisdictions, limiting liability according to a cost–benefit analysis that is common in tort law.<sup>96</sup> In many cases, this would not be a problem because federal officials and employees are often domiciled, and conduct their duties, in only one state. This might justify holding that federal official accountable under that state’s law. However, for certain plaintiffs, this may not be ideal.

*Feres v. United States*<sup>97</sup> is an instructive case wherein the plaintiffs were soldiers who sustained injuries because of the negligence of other military employees.<sup>98</sup> The Court deemed it fair that a normal plaintiff’s recovery “should be governed by the law of the location where he has elected to be,” but noted this is not the case with soldiers who have “no such choice and must serve . . . any number of places in quick succession” in the states or territories of the United States.<sup>99</sup> Given the “divergencies [that] are notorious” in state tort law, the Court in dicta stated “[t]hat the geography of an injury should select the law to be applied to [a soldier’s] tort claims makes no sense.”<sup>100</sup> Similar logic was contemplated in *United States v. Muniz*, where federal prisoners brought suit alleging that they sustained injuries due to the negligence of the prison staff.<sup>101</sup> In *Muniz*, while the Court acknowledged that prisoners do not have control over where they serve their sentence, it still

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law” because it undermines “the fundamental recognition that the government and government officials can do wrong and must be held accountable.”)

<sup>93</sup> See generally RESTATEMENT (SECOND) OF TORTS (AM. L. INST. 1979).

<sup>94</sup> See Ulrich Magnus, *Why is US Tort Law so Different?*, 1 J. EUR. TORT L. 102, 103-04 (2010) (recognizing wide differences in certain areas of tort law by state).

<sup>95</sup> See *Ducey v. United States*, 713 F.2d 504, 517 (9th Cir. 1983) (Skopil, J., concurring) (“[Since] sovereign immunity depends on application of state law . . . FTCA claims . . . will thus continue to yield the disparate results shown in the cases surveyed in our opinion.”).

<sup>96</sup> See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 179-83 (5th ed. 1998) (discussing the “Learned Hand formula,” where cost–benefit analysis is conducted by parties to determine efficient duties of care to maximize social welfare).

<sup>97</sup> 340 U.S. 135 (1950).

<sup>98</sup> *Id.* at 136-37 (explaining that one soldier was killed in a fire in their barracks caused by negligence, another sustained injury when an army doctor negligently left a towel in their abdomen during a procedure, and another died because of negligent treatment by army surgeons).

<sup>99</sup> *Id.* at 143.

<sup>100</sup> *Id.* at 142-43.

<sup>101</sup> 374 U.S. 150, 150-52 (1963).

held that applying different state laws to the plaintiffs would not prejudice them.<sup>102</sup> Rather, the Court balanced this risk of nonuniformity with the even heavier prejudice if the prisoners were not allowed to recover at all.<sup>103</sup>

The cases of soldiers and prisoners present a morally ambiguous consideration not yet highlighted in the other areas of law. Should an individual's rights depend on what state they live in if they have little to no choice in their domicile? Soldiers follow deployment orders and must live on certain military bases for long periods of time. While federal prisoners have forfeited many of their liberties, they at least have rights to be treated humanely and be free from tortious actions against them. They do not have the freedom to choose what state to live in with all of the costs and benefits of that state's laws. These issues of statutory incorporation raise important problems like these that challenge our notions of fairness, equality, and the role of the federal government in areas of the law that borrow from state preferences.

#### E. *Sacrificing Uniformity, Legitimacy, and Efficiency*

The pattern is plain. Across the diverse subject matters of statutory incorporation, scholars and judges have observed striking disparities based upon the irrelevant moral and economic reality of what state a person happens to call home. Person A who lives in Jurisdiction A enjoys different federal rights, benefits, and accountabilities than Person B who lives in Jurisdiction B. But this reality begs the following question: why is this such a problem? What is so wrong with the federal government treating people differently according to the state in which they live? This Section outlines three considerations that borrow from and summarize the realities highlighted in this Part.

First, there is the problem of conflicting presumptions. The Court has been clear that "when Congress enacts a statute[,] . . . it does not intend to make its application dependent on state law . . . because the application of federal legislation is nationwide."<sup>104</sup> Yet the Court seems to abandon this presumption of federal uniformity when Congress has employed statutory

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<sup>102</sup> *Id.* at 162.

<sup>103</sup> *Id.* at 161-62.

<sup>104</sup> *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 119 (1983) (quoting *NLRB v. Nat. Gas Util. Dist.*, 402 U.S. 600, 603 (1971)); *see also Jerome v. United States*, 318 U.S. 101, 104 (1943) ("Congress when it enacts a statute is not making the application of the federal act dependent on state law."); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (starting with the general assumption that the legislature does not intend for a statutory term of a federal act to be given content by the application of state law); *Taylor v. United States*, 495 U.S. 575, 588, 590 (1990) (stating that federal sentencing enhancement should not rely on the different "technical definitions and labels" or the "vagaries of state law").

incorporation; once again, this presumes Congress enacted these laws with the intent that they would produce disparate federal outcomes based on the variations of state law.<sup>105</sup> Statutory incorporation seems to be an exception that swallows the otherwise useful rule of federal uniformity,<sup>106</sup> specifically negating issues of fairness and legitimacy that comes when similarly situated people are treated differently by the same federal government across its wide jurisdiction.<sup>107</sup>

This leads to the second consideration, that treating similarly situated people differently based on the attribute of state domicile cannot be reconciled with notions of fairness and legitimacy. As the author has noted in the criminal justice and immigration contexts, treating similar cases similarly are bedrock principles that uphold the legitimacy of these respective systems.<sup>108</sup> And while perfect uniformity is nearly impossible to achieve since different judges, attorneys, and a bevy of other factors can lead to materially different outcomes in the application of the law,<sup>109</sup> these human-based disparities are widely accepted as acceptable (but not ideal) results of the imperfect administration of law.

Treating people differently based on where they live, however, is materially different from the human-based disparities because the former can

<sup>105</sup> See, e.g., *Perrin v. United States*, 444 U.S. 37, 50 (1979) (holding that Congress intended for the Travel Act to punish state criminal acts “in order to reinforce state law enforcement.”); Gluck, *Our [National] Federalism*, *supra* note 16, at 2021 (arguing that Congress intends to build diversity into federal statutes by incorporating state law).

<sup>106</sup> See Gluck, *Our [National] Federalism*, *supra* note 16, at 2020 (acknowledging that “[i]t may well be that uniformity is the value most often associated with nationalism,” but that such a goal was no longer a useful concept).

<sup>107</sup> See Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, 123 YALE L.J.F. 499, 503-04 (2014) (acknowledging that statutory incorporation design thwarts uniformity, but nevertheless the same rules can still be uniformly applied); Evans, *supra* note 11, at 1799-1808 (acknowledging different theories of uniformity in federal law).

<sup>108</sup> Evans, *supra* note 11, at 1803; accord Logan, *Creating a Hydra in Government*, *supra* note 28, at 83, 104 (same); see also Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1570 (2008) (noting how some scholars argue that without uniformity in the law, “the legitimacy of the federal court system and the integrity of federal law are undermined” and “predictability would suffer . . .”).

<sup>109</sup> See, e.g., Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 175-208 (1991) (statistically analyzing all relevant sentencing variables and finding that the distribution of average sentences varied from district to district); SUBSTANTIAL ASSISTANCE STAFF WORKING GRP., U.S. SENT’G COMM’N, *Federal Court Practices: Sentence Reductions Based on Defendants’ Substantial Assistance to the Government*, 11 FED. SENT’G REP. 18, 25 (1998) (observing widely varied substantial assistance practices in eight different districts based on interviews of judges, prosecutors, defense attorneys, and probation officers); see also Frost, *supra* note 108, at 1606 (arguing that the detriments of nationwide non-uniformity of federal law are overstated, and that a regional patchwork of federal law has benefits); Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 753-56 (2006) (tracing eight different questions about uniformity that reformers in criminal sentencing have had to confront, illustrating the different goals of various theories of uniformity).



be controlled and mitigated. From a moral point of view, people can and should be treated similarly by the same sovereign unless there is some relevant attribute that justifies different treatment. Many might argue that people have a moral responsibility to adhere to the laws of their jurisdiction, especially since they have the power to vote with their feet and move to other jurisdictions that better accommodate their preferences.<sup>110</sup> But this ignores that moving is a privilege available to few in the upper classes of society that have career mobility, resources to move, and fewer dependents that will not complicate the relocation.<sup>111</sup> For example, consider the average bankruptcy debtor; these middle- to lower-class debtors<sup>112</sup> likely do not have the type of resources to move or otherwise engage in strategic estate planning to take advantage of state property and tax laws. Indeed, their situation is the opposite, which is why they seek relief in bankruptcy. The same can be said for the very people relying on social security or suing the federal government when they suffer from injurious torts. The average American does not have enough cash to cover a \$500 emergency,<sup>113</sup> much less develop the legal expertise to differentiate between state laws before forum shopping with their feet to maximize their preferences.<sup>114</sup> Academic assumptions that most people will migrate to maximize the benefits of state law are divorced from reality. Thus, to treat people differently based on the false narrative that they can vote with their feet lacks credulity.

Third, statutory incorporation has produced its share of confusion and criticism from the judiciary, taxing judicial economy as a result. Even scholars defending statutory incorporation have admitted that it might further

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<sup>110</sup> See *infra* notes 152–154 and accompanying text.

<sup>111</sup> See Chris Pope, *Degenerate Federalism*, NAT'L REV. (May 10, 2018, 11:00 AM), <https://www.nationalreview.com/magazine/2018/05/28/amazon-hq2-cities-shifting-cost-federal-government> [<https://perma.cc/6NV7-8AEQ>] (critiquing theory of voting with one's feet because it assumes that people can readily move, which discounts the degree to which people are tied to certain jurisdictions because of "employment, family ties, homeownership, or other personal attachments . . .").

<sup>112</sup> See Braucher et al., *supra* note 72, at 401 (finding that median monthly income of bankruptcy debtors with one dependent was \$2,267); Scott F. Norberg & Andrew Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 487 (2006) (finding that the average debtor's income was less than half the mean household income in the United States).

<sup>113</sup> See Aimee Picchi, *A \$500 Surprise Expense Would Put Most Americans Into Debt*, CBS NEWS (Jan. 12, 2017, 11:39 AM), <https://www.cbsnews.com/news/most-americans-cant-afford-a-500-emergency-expense> [<https://perma.cc/9FFY-5U8S>] <https://www.cbsnews.com/news/most-americans-cant-afford-a-500-emergency-expense>; Jill Cornfield, *Bankrate Survey: Just 4 in 10 Americans Have Savings They'd Rely on in an Emergency*, BANKRATE (Jan. 12, 2017), <https://www.bankrate.com/finance/consumer-index/money-pulse-0117.aspx> [<https://perma.cc/5PTC-8JH4>] (surveying over one thousand Americans, only forty-one percent of which could cover unexpected emergency expenses from their savings).

<sup>114</sup> See Scott A. Wolla & Jessica Sullivan, *Education, Income, and Wealth*, ECON. RSCH. F. RES. BANK. ST. LOUIS (Jan. 2017), <https://research.stlouisfed.org/publications/page1-econ/2017/01/03/education-income-and-wealth> [<https://perma.cc/XTK7-LCTV>] (detailing the relationship between median income and education level).

“obscure the content of law and lead to confusion, if for example citizens are led to confuse one jurisdiction’s laws with another’s.”<sup>115</sup> Others have lamented that what seems to be a simple concept of incorporating a state’s law can become an Alice in Wonderland “looking glass, on close examination . . . prov[ing] to be quite a bit more complicated.”<sup>116</sup> Several judges have commented on the drain such doctrinal confusion has caused in the criminal and immigration fields,<sup>117</sup> one going as far as saying it has become the most judicially taxing issue in the entire federal judiciary.<sup>118</sup> Navigating statutory incorporation has become “an arduous task” for judges by their own assessment,<sup>119</sup> illustrating the negativity some jurists have felt towards the problems highlighted above.

## II. INCOMPLETE THEORIES OF INCORPORATION

Given statutory incorporation’s shortcomings across so many different areas of federal law, it is curious why Congress continues to employ the practice. Divining congressional intent is never easy,<sup>120</sup> but scholars have nevertheless made meaningful contributions studying the unique statutory relationship between Congress and state legislatures that seemingly manifests as a mirage of federalism or delegations of lawmaking authority. This Part investigates these theoretical claims to determine if statutory incorporation delivers on the benefits of federalism and delegation, which are in some ways two sides of the same coin of diffusing power to other political actors.

Ultimately, the theoretical justifications of federalism- and delegation-based statutory incorporation cannot withstand scrutiny. The one-way unilateral transfer of power in Congress’s incorporation of state law cannot fit into modern notions of federalism and similarly fails to comport with how Congress has traditionally delegated power to agencies and other government officials. Indeed, these are fictions that courts and scholars have fashioned to make sense of a phenomena that so many have struggled to understand.<sup>121</sup>

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<sup>115</sup> See Rossi, *supra* note 26, at 466.

<sup>116</sup> See Boyd, *supra* note 24, at 1203.

<sup>117</sup> See, e.g., Begay v. United States, 553 U.S. 137, 150 (2008) (Scalia, J., concurring) (describing ACCA doctrine as “piecemeal, suspenseful, [and] Scrabble-like . . .”); Lopez-Valencia v. Lynch, 798 F.3d 863, 866 (9th Cir. 2015) (describing the “inordinate amount[] of time” spent by courts determining whether a prior state court conviction qualifies as an “aggravated felony” under immigration law).

<sup>118</sup> See United States v. Aguila-Montes de Oca, 655 F.3d 915, 917 (9th Cir. 2011) (“[O]ver the past decade, perhaps no other area of the law has demanded more of our resources.”), *abrogated by* Descamps v. United States, 570 U.S. 254 (2013).

<sup>119</sup> De Lima v. Sessions, 867 F.3d 260, 268 (1st Cir. 2017).

<sup>120</sup> See John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1952 (2015) (“[T]he more we know, the more we understand how hard it is to identify congressional intent.”).

<sup>121</sup> See *infra* subsection Part II.A.3.

Thus, instead of holding Congress accountable for the troubling disparities and inefficiencies caused by statutory incorporation, apologists have instead used formalistic ivory-tower theories to justify an ill-conceived statutory design with the veneers of federalism and delegation. Understanding the value and the shortcomings of these legal fictions is an important step to fully investigate not only the practical difficulties caused by statutory incorporation explored in Part I, but also the theoretical difficulties and solutions discussed in this Part and continued in Part III.

#### A. Federalism-Based Incorporation

Federalism has served as an important theoretical backdrop in many discussions of statutory incorporation because of the heavy reliance Congress places on state law. The impactful link whereby federal outcomes become dependent on state law implicates a power dynamic between Congress and the legislatures of the states.

The federalism literature is quite voluminous, with theory and debate giving forum to dozens of different theories and concepts.<sup>122</sup> The goal of this Section is appropriately tailored for the task of examining how traditional and contemporary theories of federalism serve to justify statutory incorporation, if at all. This Section argues that these theories and practices of federalism cannot fully explain or justify statutory incorporation because it creates a one-way, unilateral federal-to-state relationship. When Congress incorporates state law into a federal statute, it does so without the consultation, negotiation, or any input from the states.<sup>123</sup> The states, for their part, do not respond in any meaningful way. There is no give and take or exercise of power between the federal and state governments that is characteristic of modern federalism.<sup>124</sup> If statutory incorporation is to be considered as a form of federalism,<sup>125</sup> it should be considered as the weakest form that carries with it the least amount of

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<sup>122</sup> For an excellent introduction to this vast literature, see Bridget Fahey, *Federalism by Contract*, 129 YALE L.J. 2326, 2334 nn.14–15 (2020).

<sup>123</sup> See *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 632 (E.D. Pa. 2017) (“The federal government’s choice to pursue deportation on the basis of local criminal justice outcomes is something that cities and localities have no control over and presumably no input in.”).

<sup>124</sup> See *infra* notes 163–168 and accompanying text.

<sup>125</sup> Compare Gluck, *Our [National] Federalism*, *supra* note 16, at 1997–98 (arguing that state implementation of federal law and incorporation of state law within federal statutory schemes promotes the goals of federalism), with MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 20–29 (2008) (describing state implementation of federal law as “decentralization”), and Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 911 (1994) (stating that federalism is a structuring principle, not a theory to explain managerial decision-making by the federal government that “decentralization” describes).

federalism benefits due to its anemic federal-to-state relationship.<sup>126</sup> Thus, federalism is an unsatisfying theoretical justification for statutory incorporation and should instead fall within the realm of legal fiction divorced from the actual realities of how Congress thinks about and drafts incorporative statutes.

### 1. Traditional Federalism

The traditional study of federalism has identified four primary benefits from the balancing and negotiation between federal and sub-federal loci of power.<sup>127</sup> First, diffusing power can protect individual liberties from being trampled by over-powerful government actors.<sup>128</sup> Second, giving power to state and local actors increases political engagement of the citizenry.<sup>129</sup> Third, states can experiment with different policies as laboratories of democracy.<sup>130</sup> And fourth, states are incentivized through competition with each other to innovate policies that will attract political and economic power.<sup>131</sup> Unfortunately, statutory incorporation accomplishes few of these stated goals.

When it comes to protecting individual liberties from domineering government power, statutory incorporation is left wanting. Federalism recognizes that an unbalanced accumulation of power by federal or state governments often results in the trampling of individual liberties.<sup>132</sup> These lessons are especially important in the very areas that statutory incorporation governs—such as federal criminal and property law—since those rights form

<sup>126</sup> See, e.g., Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 88-107 (2008) [hereinafter Logan, *Criminal Justice Federalism*] (arguing that federal sex offender registry statutes often subvert the traditional goals of federalism).

<sup>127</sup> For a brief list of scholars outlining these traditional benefits of federalism, see Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1324-25 (2004); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 389-405 (1997); and David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2551-60 (2005).

<sup>128</sup> See *Printz v. United States*, 521 U.S. 898, 921 (1996) (“This separation of the two spheres is one of the Constitution’s structural protections of liberty.”).

<sup>129</sup> See DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 91 (1995) (“[O]ne of the stronger arguments for a decentralized political structure is that, to the extent the electorate is small, and elected representatives are thus more immediately accountable to individuals and their concerns, government is brought closer to the people . . .”).

<sup>130</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1990) (“[Federalism] allows for more innovation and experimentation in government . . .”).

<sup>131</sup> *Id.* (“[Federalism] makes government more responsive by putting the States in competition for a mobile citizenry.”).

<sup>132</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“[T]he Constitution diffuses power the better to secure liberty . . .”); SHAPIRO, *supra* note 129, at 52-56 (noting the cases of slavery, Jim Crow, segregation, and criminal procedure as times when the federal government lead the way in protecting individual rights from state preferences to discriminate).

the basis of the American social contract and are often subject to the most dangerous abuses of power.<sup>133</sup> However, statutory incorporation does not fulfill this traditional goal of federalism. While it ensures that federal outcomes respect and defer to state law, it does very little to mitigate abuses of power. Statutory incorporation requires the federal government to take state law into account, but there is no active check against the federal government's exercise of these powers. Instead, the federal government can continue to convict, sentence, and deport people as it pleases. State law is merely a box that federal actors must check, and not a check that protects people from these federal actors. Thousands of people have been affected by federal sentencing enhancements, and hundreds of thousands have been deported under the statutory incorporation of immigration law.<sup>134</sup> This is a far cry from states using their sovereignty to balance power to protect individual liberties from a powerful federal government.

Federalism also carries the benefit of increasing citizens' political engagement. Giving power to local and state politics increases the investment that individuals make, since they can meaningfully influence their government at multiple levels.<sup>135</sup> Proponents of statutory incorporation argue that it empowers state law because it allows Congress to impactfully assist state and local officials by basing federal outcomes on state laws tailored to those jurisdictions.<sup>136</sup> But there is no evidence to suggest that this actually increases civic engagement at the state or local level.<sup>137</sup> While it is difficult to measure civic engagement, a brief survey of state burglary and tax statutes offers a useful look.

The interpretation of "burglary" is a commonly litigated term in statutory incorporation, having reached the Supreme Court over half a dozen times in the past thirty years.<sup>138</sup> As a result, one might expect statutory

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<sup>133</sup> See Charles Hobson, *Atkins v. Virginia, Federalism, and Judicial Review*, 11 WIDENER L. REV. 23, 23-24 (2004) (arguing that the Supreme Court should treat punishment—which is a necessary part of the criminal justice system—with extra care).

<sup>134</sup> See Evans, *supra* note 11, at 1773 n.12 (detailing the many thousands of people every year affected negatively by statutory incorporation in criminal sentencing and immigration laws).

<sup>135</sup> See SHAPIRO, *supra* note 129, at 92 (arguing that small town meetings are the "ultimate form of democracy" because the entire community "is eligible to consider, debate, and vote on substantive matters," and elected representatives take on a managerial role); see also Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 22-25 (2010) (arguing that localism scholars should respect the power and importance of sub-local institutions within the federalism structure).

<sup>136</sup> See Divine, *supra* note 8, at 182-83 (arguing that the federalization of criminal law is meant to assist states since the federal government has no interest in local crime).

<sup>137</sup> See *infra* notes 143-145 and accompanying text.

<sup>138</sup> See *Quarles v. United States*, 139 S. Ct. 1872, 1876 (2019) ("The question here is how to define 'burglary' under § 924(e)."); *United States v. Stitt*, 139 S. Ct. 399, 403-04 (2018) ("[T]he question here is whether the statutory term 'burglary' includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation."); *Mathis v. United*

incorporation—touted as a triumph of federalism that increases civic engagement—to empower states to update their burglary laws to maximize the synergy between federal assistance and state criminal law. Yet of all the fifty states, only a little more than half have updated their burglary statutes in the past decade.<sup>139</sup> This inaction stands in stark contrast to state tax statutes, which are also important subjects of statutory incorporation.<sup>140</sup> Nearly every state updated their tax laws in 2019,<sup>141</sup> which seems to be part of a perennial pattern that states take part in to maximize tax revenues.

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States, 136 S. Ct. 2243, 2257 (2016) (“Because the elements of Iowa’s burglary law are broader than those of generic burglary, [the defendant’s] convictions under that law cannot give rise to an ACCA sentence.”); *Descamps v. United States*, 570 U.S. 254, 277 (2013) (“Because generic unlawful entry is not an element . . . of § 459, a conviction under that statute is never for generic burglary.”); *James v. United States*, 550 U.S. 192, 195 (2007) (“The question before us is whether attempted burglary, as defined by Florida law, is a ‘violent felony’ under the ACCA.”); *Shepard v. United States*, 544 U.S. 13, 16 (2005) (“The question here is whether a sentencing court can look to police reports or complaint applications to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for, generic burglary.”); *Taylor v. United States*, 495 U.S. 575, 577-78 (1990) (“[W]e are called upon to determine the meaning of the word ‘burglary’ as it is used in § 1402 of Subtitle I . . . of the Anti-Drug Abuse Act of 1986 . . .”).

<sup>139</sup> A survey of state burglary laws as of the publishing of this Article shows that only 29 states (including states like Alabama, Louisiana, Texas, and West Virginia) have updated at least one of their many burglary statutes in the past ten years. *See, e.g.*, ALA. CODE § 13A-7-7 (2015); ARK. CODE ANN. § 5-39-101 (2017); CAL. PENAL CODE § 463 (2018); COLO. REV. STAT. § 18-4-203 (2018); DEL. CODE ANN. tit. 11, § 825 (2019); FLA. STAT. § 810.011 (2020); GA. CODE ANN. § 16-7-1 (2017); HAW. REV. STAT. § 708-817 (2014); IDAHO CODE § 18-1401 (2021); 720 ILL. COMP. STAT. § 5/19-1 (2018); IND. CODE § 35-43-2-1 (2014); KAN. STAT. ANN. § 21-5807 (2017); LA. STAT. ANN. § 14:62 (2020); ME. STAT. tit. 17, § 401 (2019); MD. CODE ANN., CRIM. LAW § 6-202 (2014); MO. REV. STAT. § 569.160 (2017); NEB. REV. STAT. § 28-507 (2015); NEV. REV. STAT. § 205.060 (2020); N.H. REV. STAT. ANN. § 635:1 (2014); N.J. REV. STAT. § 2C:18-1 (2013); N.C. GEN. STAT. § 14-54 (2013); OHIO REV. CODE ANN. § 2911.12 (2011); OKLA. STAT. ANN. tit. 21, § 1435 (2018); OR. REV. STAT. § 164.205 (2015); 18 PA. CONS. STAT. § 3502 (2016); TEX. PENAL CODE ANN. § 30.01 (2017); VT. STAT. ANN. tit. 13, § 1201 (2013); W. VA. CODE § 61-3-11 (2018); WYO. STAT. ANN. § 6-3-301 (2013).

<sup>140</sup> *See supra* note 53.

<sup>141</sup> A similar survey to that in note 139 of the hundreds of state tax statutes revealed that at least one (often dozens) such statute in each state was modified or updated in 2019 or 2018, showing a keen sensitivity that each state has in updating tax statutes to maximize tax revenues. *See, e.g.*, ALA. CODE § 40-12-307 (2019); ALASKA STAT. § 43.23.048 (2019); ARIZ. REV. STAT. ANN. § 42-6011 (2019); ARK. CODE § 26-36-315 (2019); CAL. REV. & TAX. CODE § 41017 (2019); COLO. REV. STAT. § 39-22-535 (2019); CONN. GEN. STAT. § 12-39v (2019); DEL. CODE ANN. TIT. 30 § 5171 (2019); FLA. STAT. § 215.86 (2019); GA. CODE ANN. § 48-7-105 (2019); HAW. REV. STAT. § 235-64.2 (2019); IDAHO CODE § 63-602EE (2020); 35 ILL. COMP. STAT. § 750/1-15 (2018); IND. CODE § 6-2.5-15-4 (2019); IOWA CODE § 433.4A (2019); KAN. STAT. ANN. § 79-2925c (2021); KY. REV. STAT. ANN. § 131.250 (2020); LA. STAT. ANN. § 1695 (2019); ME. STAT. tit. 36, § 5190 (2019); MD. CODE ANN. TAX-GEN. § 11-705 (West 2019); MASS. GEN. LAWS ch. 64G, § 3D (2019); MICH. COMP. LAWS § 207.778 (2020); MINN. STAT. § 290.993 (2018); MISS. CODE ANN. § 27-7-823 (2019); MO. REV. STAT. § 140.987 (2019); MONT. CODE ANN. § 15-68-510 (2019); NEB. REV. STAT. § 77-2773 (2019); NEV. REV. STAT. § 372A.250 (2020); N.H. REV. STAT. ANN. § 78-E:7 (2019); N.J. STAT. ANN. § 54:50-46 (2019); N.M. STAT. ANN. § 7-41-2 (2019); N.Y. TAX LAW § 1185 (2019); N.C. GEN. STAT. § 105-113.35A (2019); N.D. CENT. CODE § 57-39.2-04.14 (2019); OHIO REV. CODE ANN. § 5727.75 (2021); OKLA. STAT., tit. 68, § 2395 (2021); OR. REV. STAT. § 317A.131

If the narrative of civic engagement were true, one might expect that state and local governments would frequently update impactful state laws that would in turn shape federal policy. Admittedly, tracking changes in state legislative action is an imperfect way to measure civic engagement in local and state politics.<sup>142</sup> However, it does offer some value to illustrate that state legislatures seem somewhat indifferent to the role they play in the statutory incorporation scheme. Alternatively, states may like their burglary statutes and see no need to change them in order to take advantage of their power under statutory incorporation. Inaction can be a sign of civic engagement, but this theory is much less persuasive.<sup>143</sup> It is more likely that state inaction on burglary statutes and robust involvement with tax statutes highlight an indifference. State and local officials, as well as their constituents, are often concerned with state and local problems, which differ from the type of civic engagement that would increase interest in federal goals.<sup>144</sup> These state and local actors will continue to pass laws that are beneficial to their constituents *regardless* of statutory incorporation, and there seems to be no increase in civic engagement *because* of it.<sup>145</sup> For this reason, burglary statutes can change or remain the same according to the preferences of state and local actors, not because of statutory incorporation. Likewise, tax statutes will continue to be updated because of the benefits these updates have for state and local revenues, notwithstanding any regard for the statutory incorporation regime. To defenders of statutory incorporation, these frequent updates could be characterized as a victory of dynamic incorporation since they ensure that federal law will always update with changing state preferences.<sup>146</sup> But dynamic incorporation has no bearing on the goals of federalism; there is no evidence that statutory incorporation increases state and local civic

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(2020); PA. CONS. STAT. § 1701-K (2019); R.I. GEN. LAWS 44 § 44-5-10.1 (2019); S.C. CODE ANN. § 12-37-2615 (2019); S.D. CODIFIED LAWS § 10-45-113 (2019); TENN. CODE ANN. § 67-5-1332 (2019); TEX. TAX CODE ANN. § 151.0045 (2019); UTAH CODE ANN. § 59-7-624 (2021); VT. STAT. ANN. tit. 32, § 7477 (2019); VA. CODE ANN. § 58.1-3947 (2019); WASH. REV. CODE § 82.16.310 (2019); W. VA. CODE § 11-13EE-8 (2020); WIS. STAT. § 77.707 (2019); WYO. STAT. ANN. § 39-18-101 (2020).

<sup>142</sup> Other ways to track civic engagement might include voter registration, voting participation, attendance at local government body meetings, and other ways that constituents show their interaction with the political system.

<sup>143</sup> For example, if citizens and their representatives engage with their state burglary statutes and find that they meet their needs and portray their collective community sentiments for how that crime should be defined, there is reason to understand why the statute would remain static even after civic engagement with the statute.

<sup>144</sup> See LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* 7-8 (2008) (explaining why local, state, and federal lawmakers have divergent policy goals in part due to different structural incentives and types of constituent accountability).

<sup>145</sup> See *id.*

<sup>146</sup> See Divine, *supra* note 8, at 131-33 (outlining the benefits of dynamic incorporation when Congress drafts incorporative statutes).

engagement.<sup>147</sup> Instead, state and local actors have very little appreciation, notice, or care for how statutory incorporation empowers their state legislative decisions.<sup>148</sup>

Federalism also gives states the freedom to operate as “laboratories,”<sup>149</sup> cultivating new and creative policy solutions within their borders that can then be exported to the nation if proven successful.<sup>150</sup> But statutory incorporation does little to foster such experimentation. When Congress incorporates state law into a federal statute, it does not pick the best law from the best states based on their experimentation or policy expertise. Instead, Congress indiscriminately incorporates the law from all fifty states, in effect creating fifty different applications of the federal statute.<sup>151</sup> This type of incorporation does not encourage or incentivize experimentation. It does not reward expertise or spark a race to the top among state policy makers. Congress is indifferent as to the “best” state laws carefully developed in democratic laboratories that can be spread to benefit the entire nation and is instead content with allowing each state’s law—good or bad—to govern federal outcomes.

Encouraging experimentation among the states is closely tied to reaping the competitive benefits of federalism. Most closely associated with Professor Charles Tiebout’s public choice theories,<sup>152</sup> competitive theories of federalism argue that states strive to offer superior policies to compete for and attract economic and political power.<sup>153</sup> Thus, businesses and individuals will vote

<sup>147</sup> See *supra* note 145 and accompanying text.

<sup>148</sup> See Logan, *Creating a Hydra in Government*, *supra* note 28, at 89, 100 (suggesting that the lack of engagement between state and federal legislatures likely results in state actors not fully appreciating statutory incorporation’s empowerment of state law); see also *United States v. Meade*, 175 F.3d 215, 225 (1st Cir. 1999) (recognizing that statutory incorporation did not affect state court proceedings or other state criminal justice outcomes). But see Dorf, *supra* note 23, at 139 (arguing that incorporation “increases the democratic character of the [federal] system”).

<sup>149</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

<sup>150</sup> See Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 529 (1995) (“Courts and commentators frequently have recognized that the [fifty] States serve as laboratories for the development of new social, economic, and political ideas.”).

<sup>151</sup> See Divine, *supra* note 8, at 154 (“Dynamic incorporation invites the legislatures of all fifty states to influence application of federal law . . . [because] each of the fifty legislatures receive power to update (at least partly) application of federal law in those states.”).

<sup>152</sup> See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (“The consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods.”).

<sup>153</sup> See Wallace E. Oates, *On the Evolution of Fiscal Federalism: Theory and Institutions*, 61 NAT’L TAX J. 313, 314, 318-19 (2008) (explaining that the traditional theory of fiscal federalism, which focuses “on the potential welfare gains . . . from a more efficient allocation of resources in the public sector,” differs from the Tiebout Model because it does not depend on the mobility of households).



with their feet by migrating to and investing in the states with the policies that best conform to their preferences.<sup>154</sup> Of all the theories of federalism, statutory incorporation might actually deliver on some of these goals in certain areas of the law. For instance, there is evidence in bankruptcy and tax contexts that sophisticated businesses and individuals indeed maximize their financial interests by migrating to friendly states and investing resources and assets into those states.<sup>155</sup> There is also evidence that states are aware of how their laws attract businesses and individuals because of their influence on federal tax and bankruptcy outcomes.<sup>156</sup> However, the same is not true when it comes to other contexts of statutory incorporation. States do not compete for citizens looking for the most lenient burglary laws or the broadest family or tort laws that might benefit their individual interests in those areas. This awareness might explain why states vigilantly update their tax statutes but not their burglary statutes.<sup>157</sup> And as stated above, most Americans simply do not have the resources to relocate or the legal training to understand the nuanced differences between state criminal, property, and tort regimes.<sup>158</sup> As a result, statutory incorporation provides some benefits of competitive federalism, but is still largely incongruent.

## 2. Contemporary Nationalism

Statutory incorporation is largely out of step with the traditional goals of federalism, but it has found favor in some contemporary theories. Professor Abbe Gluck has rightfully recognized how much statutory law shapes modern conceptions of federalism,<sup>159</sup> and argues that statutory incorporation is one

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<sup>154</sup> See Tiebout, *supra* note 152, at 420 (acknowledging that citizens voting with their feet exert market pressures on jurisdictions to satisfy the consumer-voter's preference for public goods and taxes at the lowest cost); JAMES M. BUCHANAN & RICHARD A. MUSGRAVE, *PUBLIC FINANCE AND PUBLIC CHOICE: TWO CONTRASTING VISIONS OF THE STATE* 179 (1999) (acknowledging the "exit option" for "individuals, as resource owners and as residents . . . [and noting that] [i]f there is an exit option, if there is a chance to leave, this necessarily imposes discipline on those who would exploit [citizens] through a political structure").

<sup>155</sup> See Robert R. Preuhs, *State Policy Components of Interstate Migration in the United States*, 52 *POL. RSCH. Q.* 527, 544 (1999) ("[Finding that because] voters do act as consumers and are willing to move to increase utility . . . migration patterns . . . are influenced by public policy and the economy.").

<sup>156</sup> See, e.g., Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum-Shopping by Insolvent Corporations*, 94 *NW. U. L. REV.* 1357, 1385 (2000) (describing the Delaware legislature's awareness that state corporate laws attract firms and bolster tax revenues).

<sup>157</sup> See *supra* notes 139–141 and accompanying text.

<sup>158</sup> See Pope, *supra* note 111 and accompanying text.

<sup>159</sup> See, e.g., Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *YALE L.J.* 534, 541 (2011) (addressing a more "interpretive dimension to federalism" arising from Congress giving "both state and federal implementers concurrent jurisdiction over the same federal statutory terrain").

such embodiment that serves to empower state law.<sup>160</sup> Professor Gluck is a prominent and contributing member of the “Nationalism” school of federalism.<sup>161</sup> Nationalists highlight how modern dynamics have transitioned from the traditional “line drawing” between federal–state–local power to more interdependent relationships where these governments work together to implement policies in areas in which they have overlapping power.<sup>162</sup> Its central contribution is realizing that many of the same benefits under traditional federalism remain,<sup>163</sup> but *can* be intentionally redirected by federal officials to benefit the entire nation instead of primarily benefiting the states.<sup>164</sup>

Professor Heather Gerken, a founding member of Nationalism,<sup>165</sup> primarily focuses her work on how the federal government can benefit when states are engaged as agents to implement federal policy.<sup>166</sup> Professor Bridget Fahey has also studied how written contracts memorializing these principal–agent

<sup>160</sup> See Gluck, *Our [National] Federalism*, *supra* note 16, at 1997–98 (explaining how Congress, as federalism’s “primary source,” enables states to “restrain the breadth of federal law” and introduce their own “expertise, variety, traditional authority, and sovereign lawmaking apparatus into federal statutes.”).

<sup>161</sup> Although “nationalism” carries multiple meanings across different academic literatures, it is the term that many leading members of this school of thought use to refer to their separate theories of federalism. See, e.g., *id.* at 1999 (using the term “National Federalism”); Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1720 (2017) [hereinafter Gerken, *Federalism 3.0*] (using the term “new nationalists”).

<sup>162</sup> See, e.g., Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1889 (2014) (arguing that federalism as the new nationalism is “[s]horn of the traditional trappings of sovereignty and separate spheres . . . [and] “attentive to the rise of national power . . . .”); Gillian E. Metzger, *The States as National Agents*, 59 ST. LOUIS U. L.J. 1071, 1073 (2015) (“What do state autonomy and state sovereignty mean in a world in which states are functioning and wielding their biggest powers as national agents?”); Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2097 (2014) (“[F]ederalism constitutes a framework for national integration . . . [because it] creates a multiplicity of institutions with lawmaking power through which to develop national consensus [as well as meaningful disagreement] . . .”).

<sup>163</sup> An exception is that nationalists reject the traditional role that state experimentation plays in federalism theory, describing this concept as an antiquated vestige of traditional federalism. See Gerken, *Federalism 3.0*, *supra* note 161, at 1720 (rejecting the “laboratories account [as] a myth” and arguing that there are only two laboratories stemming from the major political parties that run their policy experiments in any state where they can have a forum); see also Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1126 (2014) (explaining how some believe that the notion of states as laboratories is oxymoronic because “organic local difference and grassroots problem-solving . . . are absent from state experimentation framed by national partisan struggle.”).

<sup>164</sup> See Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1963 (2014) (arguing that federalism today allows the national government to regulate the states and “police federalism’s worst excesses . . . while taking advantage of its best features . . .”).

<sup>165</sup> See Gerken, *Federalism 3.0*, *supra* note 161, at 1719 (establishing Gerken’s status as a founder of Nationalism and outlining her writings on the topic).

<sup>166</sup> While Professor Gluck, discussed in subsection II.B.2, is also part of the Nationalist school, her work differs by acknowledging that statutory forms of federalism need not serve national interests, but can be utilized to preserve states’ rights. See Gluck, *Our [National] Federalism*, *supra* note 16, at 2022.

relationships facilitate Nationalism.<sup>167</sup> Indeed, throughout its literature, Nationalism emphasizes that these federal–state–local relationships are an active, two-way relationship of which there is mutually recognized benefit.<sup>168</sup>

This seems to be at odds with statutory incorporation. There does not appear to be any principal–agent relationship in the way that Nationalists would recognize. There is certainly no written agreement, and no interaction between the federal and state governments. Statutory incorporation is a unilateral adoption of another jurisdiction’s law without any negotiation between the jurisdictions. States will continue on their path with little if any acknowledgment that their current and future laws will carry impactful ramifications in shaping federal law.<sup>169</sup> As Professor Fahey recognized, the dominant understanding of modern federalism—as captured by Nationalism—is “a complex system of governments working together instead of a limited-purpose partnership of fifty states and one federal government operating separately.”<sup>170</sup> This quote captures the dichotomy that exists between mainstream federalism and statutory incorporation. The former operates with interconnectedness and interdependence. The latter allows fifty states to operate separately with little to no connection to the federal government or its policy goals.

### 3. The Fiction of Federalism

After reviewing how little overlap statutory incorporation has with both traditional and contemporary federalism theory, it comes as little surprise that Congress itself is not primarily concerned with federalism during the drafting process. Statutory realists who have conducted surveys and interviews with congressional drafters have confirmed that while drafters appreciate federalism concerns,<sup>171</sup> it is not nearly as front of mind as federalism theorists might want to believe. Just over half of drafters are even aware of federalism doctrines and use them in the drafting process.<sup>172</sup> And very few drafters use clear statements

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<sup>167</sup> See Fahey, *supra* note 122, at 2334 (arguing that intergovernmental agreements, in addition to delineating distinct roles for each government, also participate “in guiding how they act together”).

<sup>168</sup> See Bulman-Pozen & Gerken, *supra* note 14, at 1258–60 (arguing that states have tremendous power over the federal government given their control over implementing federal policy); see also Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL’Y REV. 265, 279–80 (1998) (explaining principal–agent theory as a two-way street).

<sup>169</sup> See, e.g., *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 632 (E.D. Pa. 2017) (“The federal government’s choice to pursue deportation on the basis of local criminal justice outcomes is something that cities and localities have no control over and presumably no input in.”).

<sup>170</sup> Fahey, *supra* note 122, at 2353.

<sup>171</sup> See Gluck & Bressman, *Statutory Interpretation Part I*, *supra* note 5, at 927–28, 942–44, 959 (providing empirical statistics indicating that federalism is but one concern among many for congressional drafters).

<sup>172</sup> See *id.*

to achieve federalism goals.<sup>173</sup> If a statute turns out to be ambiguous, these drafters expressed their expectation that the federal statutory language, not the state law, would control.<sup>174</sup> This finding from statutory realism contradicts scholarly and judicial assumptions that congressional drafters *intend* to imbue federalism principles to empower state law in federal statutes.<sup>175</sup>

These insights from statutory realism should be appreciated in the proper context, since congressional drafters were not specifically asked about statutory incorporation but about federal statutes as a whole. In general, it appears that federalism is a small part of discussions that drafters and negotiators have, but not to the extent that would give judges and scholars confidence that it should govern the interpretation of these statutes. As applied to statutory incorporation, congressmembers and drafters undoubtedly intended to give preference to state law by incorporating it in material ways into federal statutes. But this does not automatically mean that federalism was the reason for doing this. As stated by statutory realism, federalism was perhaps on the radar but was likely not a driving force in these federal incorporative statutes.

Professor David Shapiro's comparison of federalism to a dialogue<sup>176</sup> is an apt way to think about federalism's relationship to statutory incorporation. If federalism is a conversation between federal, state, and local powers, statutory incorporation may be likened to a conversation Congress is having with state legislatures who are wearing headphones and looking in the other direction. State legislatures do not even know they are a part of the one-way conversation and continue on with their business without concern to what they cannot hear. Can this interaction even be considered a dialogue? Perhaps, but it shows how awkward and potentially embarrassing the interaction can be for Congress seemingly talking to somebody who pays little attention to it. In that way, Professor Shapiro's dialogue analogy is a fitting encapsulation of the shortcomings of federalism and the lack of explanatory power it has concerning statutory incorporation.

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<sup>173</sup> *See id.*

<sup>174</sup> *See id.*

<sup>175</sup> This is unsurprising, given that members of Congress are often concerned with maximizing popular political benefits, and "public discourse has never been meaningfully affected by the federalism implications" in statutes. Logan, *Criminal Justice Federalism*, *supra* note 126, at 107.

<sup>176</sup> *See generally* SHAPIRO, *supra* note 129; *see also* Bulman-Pozen & Gerken, *supra* note 14, at 1271 (recognizing that such a dialogue "falls along a continuum.").

### B. Delegation-Based Incorporation

The principal-agent theory that undergirds much of modern federalism and Nationalism also serves as a cornerstone of the power dynamic in congressional delegation.<sup>177</sup> Over the past century, Congress has delegated power to other institutions—primarily executive agencies—to interpret and administer law as a necessary way to keep up with the expanding role of the federal government.<sup>178</sup> Statutory incorporation has been recognized as such a congressional delegation,<sup>179</sup> but instead of delegating to an administrative agency, Congress delegates lawmaking authority to state legislatures.

The uniqueness of this legislature-to-legislature delegation creates an interesting relationship that is undertheorized in the delegation literature of administrative and legislative law. For this reason, this section does not seek to recount the vast literature discussing the materially different legislature-to-agency delegation model,<sup>180</sup> but instead draws from that model to better understand whether statutory incorporation can be justified under the scrutiny of delegation theories.<sup>181</sup>

#### 1. Expertise

For nearly eighty years, the primary justification for congressional delegation has been the expertise of the delegate.<sup>182</sup> All delegation relies on

<sup>177</sup> See Bulman-Pozen & Gerken, *supra* note 14, at 1262-63, 1265 nn.20-22 (recognizing that most theories of interactive federalism employ some application of principal-agent theory and rely on much of the administrative law literature); see also Yingyi Qian & Barry R. Weingast, *Federalism as a Commitment to Preserving Market Incentives*, 11 J. ECON. PERSPS. 83, 84 (1997) (arguing that federalism can be analyzed through theories of the firm).

<sup>178</sup> See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[The Court’s decisions on delegation] ha[ve] been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).

<sup>179</sup> See Dorf, *supra* note 23, at 105 (“[D]ynamic incorporation does delegate lawmaking authority . . . .”); Gluck, *Our [National] Federalism*, *supra* note 16, at 2008 (“Congress can draw on state expertise by taking well-developed bodies of state statutory or common law on the subject and incorporating them by reference into the new federal statute.”).

<sup>180</sup> *Chevron* remains as one of the most cited cases in history, and the literature on its family of cases is outside the scope of this paper. See, e.g., Gluck, *Our [National] Federalism*, *supra* note 16, at 2023 n.120 (cataloguing notable scholarship in the canon of legislature-to-agency delegation).

<sup>181</sup> See Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 21-26 (1982) (“Conventional rationalizations for the delegation of legislative authority . . . [do not] withstand close scrutiny.”); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1731 (2002) (“[I]f Congress has illicitly given away legislative power, why should it matter who the recipient is?”).

<sup>182</sup> For an early progenitor of this approach, see JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 154-55 (1938) (justifying the administrative state on the superior expertise of executive agencies).

some version of the principal–agent relationship,<sup>183</sup> which explains that delegation is beneficial to the principal when the agent uses their expertise or skills to achieve the principal's goals.<sup>184</sup> Therefore, congressional delegation is often justified when Congress delegates to another institution that has superior knowledge, information, or investigatory resources.<sup>185</sup>

Advocates for statutory incorporation have argued that this same dynamic exists when Congress delegates to state legislatures to shape federal statutes.<sup>186</sup> These theories argue that Congress, fulfilling the role of the principal, benefits from the expertise of the states when it incorporates state law in order to make federal statutes work better. And indeed, the states could be said to have more expertise than the federal government when it comes to defining criminal law, property rights, and other traditional spheres of state law. But is this expertise merely perceived, or does it actually have a basis in fact?

There are many methods that could be used to measure the expertise of state legislatures, but one of the most widely accepted metrics of professionalism shows that state legislatures lack the expertise to justify any meaningful congressional delegation.<sup>187</sup> Professors Peverill Squire's and Gary Moncrieff's extensive work studying state legislatures show that their level of professionalism is far behind that of Congress. There are three main factors used to determine legislative professionalism: first is legislator pay; second is the number of days the legislature is in session; and third is the staff resources of state legislators.<sup>188</sup> All of these factors are the exact types of objective measurements that would be useful to justify delegation and are ultimately collated to determine a professionalism score

<sup>183</sup> See Hannah J. Wiseman, *Dysfunctional Delegation*, 35 YALE J. ON REG. 233, 244 (2018) (describing the challenges stemming from the principal-agent relationship, which is a form of delegation).

<sup>184</sup> See Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1290-91 (2012) (“The essence of the agency relationship is the superior information of the agent: the principal delegates to the agent in order to take advantage of the agent’s expertise . . .”).

<sup>185</sup> See *id.*; see also Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J. L. ECON. & ORG. 469, 469 (2007) (“The delegation of substantial policymaking authority to administrative agencies is often both explained and justified by the belief that agencies have more accurate information about the actual impacts of different policy choices.”).

<sup>186</sup> See Dorf, *supra* note 23, at 136 (justifying statutory incorporation if the original jurisdiction has a special expertise); Divine, *supra* note 8, at 134 (explaining benefits of other jurisdictions’ expertise).

<sup>187</sup> See MILLER, *supra* note 144, at 87 (“[Professionalism measurements] offer[] a window into the expertise, seriousness and effort of a legislative process.” (internal quotations omitted)).

<sup>188</sup> See PEVERILL SQUIRE & GARY MONCRIEFF, *STATE LEGISLATURES TODAY: POLITICS UNDER THE DOMES* 62-63 (3d ed. 2020) (identifying different metrics used to measure professionalism); see also THAD KOUSSER, *TERM LIMITS AND THE DISMANTLING OF STATE LEGISLATIVE PROFESSIONALISM* 12 (2005) (noting the three widely accepted components of legislative professionalism).

for each legislature. Legislator pay is an important metric because it correlates with the time legislators are able to dedicate to developing expertise and learning policy issues, while also mitigating attrition so legislators stay in positions long enough to meaningfully increase their legislative skills.<sup>189</sup> The median state legislator salary, however, is only \$24,108,<sup>190</sup> which is abysmal when compared to Congress's \$174,000.<sup>191</sup> Some states offer mere stipends and per diems for the days their part-time legislatures are in session.<sup>192</sup> The number of legislative days in session is an important measurement because it allows legislators more time to legislate, negotiate, and consider policy. But many state legislatures meet once a year for a limited number of weeks. The median number of days in session for state legislatures is 62.4 days per year.<sup>193</sup> This is a far cry from the norms of Congress, a full-time legislature where both houses hold roughly 150 legislative days in session every year.<sup>194</sup> Indeed, these short legislative sessions increase time pressures on state legislatures, with many legislators admitting to stunning clerical errors, word and grammar choice errors, and other imperfections that can have ramifications later if Congress decides to incorporate their state laws.<sup>195</sup> The resources allotted for legislators to hire staff is also of critical importance, allowing both clerical and professional staff to shoulder heavy administrative burdens, handle research, facilitate negotiations, and even draft bills.<sup>196</sup> But staff numbers in state legislatures are woefully small when compared to Congress. The mean among state

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<sup>189</sup> See SQUIRE & MONCRIEFF, *supra* note 188, at 62-63 (describing the relationship between legislator pay and the time legislators devote to their duties).

<sup>190</sup> *Id.* at 65.

<sup>191</sup> See Robert Longley, *Salaries and Benefits of US Congress Members*, THOUGHTCO, <https://www.thoughtco.com/salaries-and-benefits-of-congress-members-3322282> [<https://perma.cc/3JDL-CCHG>] (last updated July 26, 2021) (“The current salary for rank-and-file members of the House and Senate is \$174,000 per year.”).

<sup>192</sup> See SQUIRE & MONCRIEFF, *supra* note 188, at 60-61 (describing the “modest” benefits received by a Wyoming state senator serving part-time).

<sup>193</sup> *Id.* at 65.

<sup>194</sup> See Tom Murse, *How Many Days a Year Congress Works*, THOUGHTCO, <https://www.thoughtco.com/average-number-of-legislative-days-3368250> [<https://perma.cc/34MB-LMAK>] (last updated Feb. 3, 2020) (recording that the House of Representatives has averaged 146.7 legislative days a year since 2001, and the Senate has averaged 165 days a year for the same period). These numbers only account for legislative days in which houses of Congress meet in committees or as a full legislative body. It does not count the many days that congressmembers are still working, researching, drafting, and conducting other political duties.

<sup>195</sup> See SQUIRE & MONCRIEFF, *supra* note 188, at 145-46 (documenting state legislator interviews describing numerous errors made by switching out bill numbers and making word choice and grammatical errors, in part because of immense time pressures caused by short legislative sessions).

<sup>196</sup> See Nourse & Schacter, *supra* note 5, at 584-88 (finding that staffers, lobbyists, and legislative counsel take on most of the drafting duties in the legislative process).

legislatures was 4.5 staff members in 2018,<sup>197</sup> whereas Congress boasted a mean of 17 staff members in 2000.<sup>198</sup> In addition to these individual staff members, Congress also enjoys hundreds of shared committee staff with even more specified expertise on the subject matter of the particular congressional committee.<sup>199</sup> All of these compiled metrics paint a dismal picture of state legislatures. When the professionalism of Congress is set at 1, the mean state legislature has a professionalism score of .225.<sup>200</sup> While legislatures in larger states like California and New York rival the professionalism of Congress, those in smaller states like Montana and New Hampshire measure at .116 and .048 respectively.<sup>201</sup> This general lack of professionalism and expertise among state legislatures is enough to doubt the efficacy of statutory incorporation as an exercise of beneficial delegation.

While professionalism measurements seek to determine legislative expertise, some might argue that state legislators have the expertise of knowing their constituents' preferences. Thus, they should be more trustworthy to legislate according to such preferences that would later be incorporated by Congress into federal law. But there is no reason to believe that state legislators have superior expertise to congressmembers themselves. State legislators are elected by the same constituents that elect congressmembers from their congressional districts and states. Therefore, congressmembers would have the same or comparable expertise of their constituents' preferences when compared to state legislators. All of this supports a conclusion that relying on the questionable expertise of state legislatures is not enough to justify the practice of statutory incorporation.

## 2. Democratic Accountability

In addition to expertise, another traditional justification for delegation is democratic accountability; simply put, Congress might prefer to delegate law-making authority to agencies rather than drafting laws to be interpreted by courts because agencies are more democratically accountable than federal

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<sup>197</sup> SQUIRE & MONCRIEFF, *supra* note 188, at 65.

<sup>198</sup> See *I'd Like to Know More About Congressional Staff and What they Do—And What they Get Paid!*, C-SPAN (Nov. 15, 2000), <https://web.archive.org/web/20150617104805/https://legacy.c-span.org/questions/weekly35.asp> [<https://perma.cc/428Z-UHMN>] (recording that the average House of Representatives member employed 14 personal staff, and the average Senate member employed 34 staff).

<sup>199</sup> See Shobe, *supra* note 5, at 845 (recording that committee staff totaled 1,324 in the House and 913 in the senate in 2009); see also Sitaraman, *supra* note 5, at 87-88 (explaining different roles and expertise of congressional personal and committee staff).

<sup>200</sup> SQUIRE & MONCRIEFF, *supra* note 188, at 65.

<sup>201</sup> *Id.* at 65-66.



courts.<sup>202</sup> Having a certain level of oversight and control in the form of democratic accountability is a foundational piece of successful principal–agent relationships. One of the risks when a principal delegates power to an agent is that the agent will not carry out the principal’s goals or will do so in an inefficient way. Scholars have used this insight to argue for a balance of power that allows principals to effectively monitor their agents while also allowing agents the freedom and flexibility to find the best ways to fulfill their principal’s goals.<sup>203</sup> Congress has at its disposal tools of oversight and control with respect to executive agencies. While many agency heads and members of the President’s cabinet are not elected, they serve at the pleasure of the President and are confirmed by the Senate. In addition, congressmembers maintain healthy control over agencies because various congressional committees have oversight authority over certain agencies, are entitled to hold periodic hearings, and have access to agency reports to increase agency transparency.<sup>204</sup> Congress also has the power of the purse to indirectly control the influence and scope of agency prerogatives.<sup>205</sup> Further, Congress passed the Administrative Procedure Act<sup>206</sup> and the rulemaking procedures therein to ensure a robust public comment requirement and other adjudicatory procedures. This gives members of the public tremendous opportunities to be heard and potentially shape policy from the ground level.<sup>207</sup>

When these principles of superior democratic accountability are applied to statutory incorporation, state legislatures prove much less accountable to Congress than agencies. As stated above, the same constituents that elect state

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<sup>202</sup> See, e.g., *Chevron U.S.A., Inc. v. Nat. Re. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices. . . .”); see also Posner & Vermeule, *supra* note 181, at 1748 (describing Congress’s lack of accountability for agency decisions when power is delegated to those agencies). But see Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593, 1650 (2019) (“[B]road delegations to agencies may reduce political accountability. . . .”).

<sup>203</sup> See, e.g., Wiseman, *supra* note 183, at 237-39, 281-89 (explaining principal–agent problems in cooperative federalism and prescribing oversight tools to ensure better cooperation between the federal and state governments); see also Cox & Posner, *supra* note 184, at 1290-91 (acknowledging the difficulty of a principal effectively monitoring an agent’s actions).

<sup>204</sup> See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 448 (2008) (“[A]gencies are democratically accountable, at least derivatively, because of their relationship with the president and Congress”).

<sup>205</sup> See generally Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343 (1988) (describing several ways Congress can control executive and agency actions and priorities through allocating or rescinding funds).

<sup>206</sup> See generally TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW (2017) (describing administrative rule-making procedures under the Administrative Procedure Act).

<sup>207</sup> See Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 781 (1999) (arguing that agencies are more accessible to the public because participation in agency proceedings are likely to be less costly than lobbying Congress).

legislators also elect congressmembers to federal office. Therefore, in state legislatures, there are no superior or other nuanced benefits of democratic accountability; instead, the democratic accountability is the same between congressmembers and state legislators. If there is no benefit on this front, why should Congress delegate in the first place? Especially when there is no material institutional difference that justifies the delegation. State legislatures do not have superior rulemaking procedures that enhance democratic accountability. In fact, they tend to hold fewer public hearings than Congress does.<sup>208</sup>

Further, by delegating to state legislatures, Congress willfully gives up the power of oversight that it enjoys over executive agencies. The defining feature of statutory incorporation—the one-way unilateral relationship—prevents any such monitoring or effective control. Congress has no control over state

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<sup>208</sup> Compare *Congressional Hearings*, GOVINFO, <https://www.govinfo.gov/app/collection/chr/116> (last visited Nov. 11, 2021) (choose “116th Congress (2019–2020);” then choose “House Hearings”; then choose “Committee on Agriculture,” “Committee on Appropriations,” “Committee on Armed Services,” “Committee on Education and Labor,” “Committee on Energy and Commerce,” “Committee on Financial Services,” “Committee on Foreign Affairs,” “Committee on Homeland Security,” “Committee on House Administration,” “Committee on Natural Resources,” “Committee on Oversight and Reform,” “Committee on Science, Space, and Technology,” “Committee on Small Business,” “Committee on Transportation and Infrastructure,” “Committee on Veteran’s Affairs,” “Committee on Ways and Means,” “Committee on the Budget,” “Committee on the Judiciary,” “Congressional-Executive Commission on China,” “Select Committee on the Climate Crisis”; then choose “Senate Hearings”; then choose “Committee on Agriculture, Nutrition, and Forestry,” “Committee on Appropriations,” “Committee on Armed Services,” “Committee on Banking, Housing, and Urban Affairs,” “Committee on Energy and Natural Resources,” “Committee on Environment and Public Works,” “Committee on Finance,” “Committee on Foreign Relations,” “Committee on Health, Education, and Pensions,” “Committee on Homeland Security and Governmental Affairs,” “Committee on Indian Affairs,” “Committee on Rules and Administration,” “Committee on Small Business and Entrepreneurship,” “Committee on Veteran’s Affairs,” “Committee on the Budget,” “Committee on the Judiciary,” “Congressional Oversight Commission,” “Joint Economic Committee,” “Select Committee on Intelligence,” and “United States Senate Caucus on International Narcotics Control”; then choose “Joint Hearings”; then choose “Commission on Security and Cooperation in Europe” and “Committee on Veteran’s Affairs”) (showing that Congress held over a thousand hearings in 2019), *with Committee Hearings*, N.Y. STATE ASSEMBLY, <https://nyassembly.gov/av/hearings/> (last visited Nov. 11, 2021) (choose “2019”), and *Statewide Senate Events Calendar*, N.Y. STATE SENATE, <https://www.nysenate.gov/events> (last visited Nov. 11, 2021) (choose “Public Hearing” from first dropdown; then choose “VIEW BY MONTH” option; then choose “Jan,” then choose “Feb,” then choose “Mar,” then choose “Apr,” then choose “May,” then choose “Jun,” then choose “Jul,” then choose “Aug,” then choose “Sep,” then choose “Oct,” then choose “Nov,” then choose “Dec”) (showing that New York Senate and Assembly held a total of 129 public hearings in 2019), and *Senate Committee Hearings and Events*, TEX. STATE SENATE, <https://www.senate.texas.gov/events.php> (last visited Nov. 11, 2021) (choose “Administration,” “Agriculture,” “Business & Commerce,” “Criminal Justice,” “Education,” “Finance,” “Health & Human Services,” “Higher Education,” “Intergovernmental Relations,” “Natural Resources & Economic Development,” “Nominations,” “Property Tax,” “State Affairs,” “Transportation,” “Veteran Affairs & Border Security,” and “Water & Rural Affairs”) (showing that the Texas Senate held 168 hearings in 2019); see also SQUIRE & MONCREIFF, *supra* note 188, at 137 (finding that few states require every bill to receive a hearing).

legislative budgets.<sup>209</sup> It cannot hold state legislatures accountable by calling them to testify at hearings to increase their transparency. Congress also cannot tell state legislatures to update their laws to adhere to federal goals of statutory incorporation. Any such attempt to do so would likely violate the anti-commandeering doctrine, which prohibits Congress from dictating what states can and cannot legislate on with the limited exception of preempted areas of the law.<sup>210</sup> Instead, Congress seems to be content with ceding control of federal laws, embarking on a “policy ‘lottery’” of how the law might be applied, with no ability to reign in their state agent.<sup>211</sup>

A related deficiency of statutory incorporation is the lack of incentives that normally motivate agents in a principal–agent relationship. In the contractual context, there is usually some exchange of payment from principal to agent, ensuring the agent will use its expertise to effectively fulfill the principal’s goals. This is also true in the federalism context, where the federal government promises states coveted federal funding to implement various programs,<sup>212</sup> many of which are captured in explicit contracts and other formal agreements.<sup>213</sup> Statutory incorporation, however, lacks incentives to encourage states to fulfill the goals of Congress. There is no federal funding if states adopt laws that Congress deems fit for its statutory regimes; there is little power that accompanies bending federal policy to the legislature’s will; indeed, there is little, if any, empowerment of the state legislature. So why would a state legislature act as a responsible agent, especially if it may not even know the extent of its agency? Such a lack of incentives is yet another

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<sup>209</sup> See Larkin, *supra* note 22, at 373 (recognizing that Congress has much less control over state actors when delegating authority since they have no ability to check state actors or control the budgets of state actors).

<sup>210</sup> See *New York v. United States*, 505 U.S. 144, 176 (1992) (striking down a federal provision requiring that states legislate in accordance with federal policy); *Printz v. United States*, 521 U.S. 898, 933 (1997) (striking down a federal provision requiring state executive agents to run background checks on would-be gun purchasers because it commandeered state executive officials); see also Jessica Bulman-Pozen, *Preemption and Commandeering Without Congress*, 70 STAN. L. REV. 2029, 2041-47 (2018) (explaining nuances between federal commandeering of state powers and preemption).

<sup>211</sup> See Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts*, 119 HARV. L. REV. 1035, 1037 (2006) (describing delegation as Congress embarking on a “policy ‘lottery’” in how a law might be interpreted and implemented).

<sup>212</sup> See, e.g., Samuel H. Clovis, Jr., *Federalism, Homeland Security and National Preparedness: A Case Study in the Development of Public Policy*, 2 HOMELAND SEC. AFFS., Oct. 2006, at 5 (citing MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* (Daniel J. Elazar ed., 1966)); see also Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 63 (2008) (describing a federal criminal registry program that used a “stick” by withholding federal funds unless states developed sex-offender registries); John Kincaid, *From Cooperative to Coercive Federalism*, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 139, 148-49 (1990) (describing coercive federalism that seeks to punish states for not cooperating with federal programs).

<sup>213</sup> See generally Fahey, *supra* note 122, at 2329 (describing extensive relationships between state and federal governments governed by executed contracts).

reason why delegation—which is governed by principal–agent theory—lacks explanatory power to justify statutory incorporation.

### 3. The Fiction of Delegation

Like federalism, the mainstream justifications for delegation cannot be used to justify the legislature-to-legislature transfer of lawmaking authority through statutory incorporation. Also like federalism, statutory realists have found little evidence from surveys and interviews with congressional drafters that delegations of these kinds are meant to reap the benefits of the more traditional model of legislature-to-agency delegation. While congressional drafters overwhelmingly acknowledge their intention to delegate certain lawmaking authority to executive agencies, they reject the idea that they commonly delegate to other institutions.<sup>214</sup> They are perfectly comfortable with characterizing their relationship with agencies as one of a principal and agent through delegation of their authority but see no such relationship with other institutions.<sup>215</sup>

As applied to statutory incorporation, it is unlikely that Congress ever intended to set up a principal–agent relationship with state legislatures. The admissions of congressional drafters show that while Congress does intend to delegate certain matters to executive agencies, its purported delegations to state legislatures are a legal fiction. Statutory incorporation is indeed a delegation, but one from which Congress never intended to reap the relationship or benefits of traditional delegation doctrine.

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The mainstream theories that courts and scholars have used to justify statutory incorporation have been weighed, measured, and found wanting. Traditional and contemporary views of federalism cannot justify the unique, unilateral one-way relationship of statutory incorporation. And the expertise and accountability used to justify delegation are suspect when considering the professionalism of state legislatures and the lack of democratic and principal–agent controls inherent in a legislature-to-legislature delegation. These theories offer unsatisfying answers to the question this Article seeks to answer; why does Congress use statutory incorporation even considering all the practical and moral difficulties it produces? In light of Part II's failure to answer this question, Part III continues by presenting a novel theory with the power to explain this legislative practice.

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<sup>214</sup> See Gluck & Bressman, *Statutory Interpretation Part II*, *supra* note 5, at 765 (noting resistance to acknowledging the existence of a dialogue between Congress and courts).

<sup>215</sup> *Id.*

## III. INTEREST-BASED INCORPORATION

Interest-based incorporation expands upon the accomplishments of statutory realism. Courts and scholars give Congress too much intellectual credit by using erudite theories of federalism and delegation to explain statutory incorporation when, in reality, congressmembers are concerned with self-interested political loss aversion.<sup>216</sup> Many of the laws Congress passes are not designed with such careful attention to theoretical benefits, but “for symbolic and politically profitable purposes . . .”<sup>217</sup> And even federalism and delegation theorists have themselves recognized that these political goals play a role in developing legislation, but they instead have chosen to highlight different aspects of the process in their own federalism and delegation scholarship.<sup>218</sup>

This Part explores how the self-interests of congressmembers fits within the existing theoretical framework used to justify statutory incorporation. By incorporating state law, Congress can diffuse power and delegate to states, while also diffusing and delegating political accountability. Thus, Congress can receive credit for positive developments while simultaneously shifting blame onto the states for negative outcomes. Congress also gains political benefits by partnering with interest groups and lobbyists during the legislative process.

In addition, statutory incorporation allows Congress to benefit from the legislative efficiency of drafting ambiguous terms into statutes. Congress can avoid difficult negotiations that might otherwise stifle the legislative process by incorporating state law in a way that allows opposing negotiators to walk away happy, knowing that their constituents will be subject only to their state’s interpretation of the law.

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<sup>216</sup> *Id.* at 735 (recognizing that “most everyone acknowledges” that legislative drafting is driven by outside influences such as political considerations).

<sup>217</sup> Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 772 (1999); see also Lawrence Ponoroff, *Constitutional Limitations on State-Enacted Bankruptcy Exemption Legislation and the Long Overdue Case for Uniformity*, 88 AM. BANKR. L.J. 353, 356-57 (2014) (documenting “partisan political posturing” in congressional consideration of state-law bankruptcy exemptions, devoid of “high-minded principle.”).

<sup>218</sup> See, e.g., Gerken, *Federalism* 3.0, *supra* note 161, at 1702 (“[T]he federal government’s success almost always depends as much on politics as decrees.”); Abbe R. Gluck, *Nationalism as the New Federalism (and Federalism as the New Nationalism): A Complementary Account (and Some Challenges) to the Nationalist School*, 59 ST. LOUIS UNIV. L.J. 1045, 1047 (2015) (“[P]olitical considerations also incentivize Congress to include state actors in federal schemes . . .”); Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633, 653 (2018) (hypothesizing a theory of delegation based on the assumption that legislators are self-interested and operate in accordance with a desire to be reelected).

### A. *Shifting Accountability*

One of the key features of statutory incorporation is its ability to shift blame away from congressmembers and onto state legislatures for flaws in federal law or policy.<sup>219</sup> This scapegoating theory regards Congress as a body of individual members whose primary goals are reelection.<sup>220</sup> As rational economic actors, congressmembers will enact legislation according to a loss-aversion principle, seeking to maximize benefits to increase their reelection chances while mitigating risks of adopting unpopular or ineffective policies.<sup>221</sup> This principle is especially applicable in criminal law policy, where public opinion is particularly unforgiving if a law proves to be underinclusive and allows a perceived criminal off the hook.<sup>222</sup> Delegation and diffusion through statutory incorporation, from a loss-aversion standpoint, is a brilliant strategy of legislative design that ensures individual congressmembers only reap the benefits of incorporative statutes and are rarely held accountable for the costs.<sup>223</sup> Many scholars have contributed to this scapegoating theory in other contexts,<sup>224</sup> but it is underexplored in the study of statutory incorporation.<sup>225</sup>

Under the scapegoating theory, congressmembers would find statutory incorporation attractive. By attaching federal criminal consequences to the states' definition of "burglary," for example, Congress gets the credit for passing tough-on-crime laws in criminal justice and immigration statutes. However, if a perceived dangerous person or noncitizen escapes punishment due to the under inclusivity of state law or some other legal loophole, Congress can shift blame to the applicable state law or state official that let

<sup>219</sup> See GLEN O. ROBINSON, *AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW* 76-77 (1991) (describing "a strategy of ambiguity in which the legislator can seek credit for doing something while shifting blame for outcomes that cause unexpected political harm").

<sup>220</sup> See DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 13 (1974) (justifying the assumption that members of Congress are primarily interested in reelection).

<sup>221</sup> See Divine, *supra* note 8, at 160 (recognizing that the loss-aversion principle can apply to individual congressmembers and can impact the legislative process); see also Richard A. Posner, *Toward an Economic Theory of Federal Jurisdiction*, 6 *HARV. J.L. & PUB. POL'Y* 41, 44 (1982) (applying the risk-aversion principle to explain political processes at the state and federal level).

<sup>222</sup> See F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 *VA. L. REV.* 281, 312-313 (2021) (describing congressional blame-shifting in the criminal context).

<sup>223</sup> See Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 *MICH. L. REV.* 519, 539-40 (2011) ("[F]rom Congress's perspective, . . . it reaps only benefits from such a decision and does not pay a price [when delegating criminal law enforcement].").

<sup>224</sup> See, e.g., Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 43 (1993) (discussing blame-shifting in the context of delegating to courts); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 *PUB. CHOICE* 33, 46-52 (1982) (discussing blame-shifting in the context of delegating to agencies).

<sup>225</sup> See, e.g., Logan, *Creating a Hydra in Government*, *supra* note 28, at 85-89 (offering a rare discussion of scapegoating in the context of statutory incorporation in criminal law).

that person off the hook.<sup>226</sup> The same can be true of bankruptcy laws or federal benefits statutes, giving congressmembers all of the benefits for passing laws that are responsive to their constituents and produce positive outcomes but allowing them to pass blame for negative or unpopular outcomes onto state actors if their state law produces undesired outcomes among debtors or beneficiaries.<sup>227</sup>

Considering these self-interested goals of the scapegoating theory has important implications. First, the individualism of congressmembers should be highlighted.<sup>228</sup> Any broad presumptions that Congress as a whole might use statutory incorporation to signal values of federalism or delegation should be appropriately discounted.<sup>229</sup> Instead, individual congressmembers are more interested in winning reelection than they are in imbuing statutes with the purported benefits of ivory-tower theory. Second, individual self-interest also challenges whether statutory incorporation or similar legislative schemes serve the public interest.<sup>230</sup> As Arrow's Theorem predicts, when the individual self-interests of congressmembers are properly accounted for, it is nearly impossible to ensure that any given majority vote in Congress will capture the voters' interests.<sup>231</sup> Third, the self-interests at play in statutory incorporation muddle individual congressmembers' loyalties to the federal government when compared to their local constituents. Congressmembers "are as much officers of the entire Union as is the President,"<sup>232</sup> and must serve federal interests when passing laws, irrespective of their loyalty to their home districts. Thus, while a member representing a particular congressional

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<sup>226</sup> See Evan Lee, *Regulating Crimmigration* 8 (U.C. Hastings L. Studs. Rsch. Paper Series, Research Paper No. 128, 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2559485](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2559485) [<https://perma.cc/J2QX-UTFK>] (using a scapegoating argument to explain why Congress does not clearly define terms in criminal and immigration statutes).

<sup>227</sup> As an example, congressmembers may take credit for federal bankruptcy laws when debtors are able to reap substantial benefits from their state homestead exemption laws but would scapegoat state laws that do not provide such generous homestead exemptions when debtors do not get positive outcomes.

<sup>228</sup> See Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 248-50 (1992) (explaining that individual legislators have different intents and purposes).

<sup>229</sup> See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice.").

<sup>230</sup> See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 38-42 (1991) (discussing the implications of cycling, agenda setting, and strategic behavior).

<sup>231</sup> See *id.* at 38 (noting that special interests can corrupt politicians, leading to "political outcomes [that] will represent only the self-interest of factions rather than the public interest").

<sup>232</sup> U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 803 (1995); accord Logan, *Creating a Hydra in Government*, *supra* note 28, at 89 (explaining that federal government "reflects collective national interests and values").

district in Ohio or California might prefer to incorporate the laws of those states into federal law, this goes against their ethical and professional duties to do what is best for the federal electorate. Of course, it is not uncommon for congressmembers to fight for pork and other federal benefits with which to shower their constituents, but statutory incorporation goes further by federally incorporating state law. If congressmembers prefer the preferences of their states' laws, is incorporation into federal statutes serving the federal interests that they have sworn to uphold, or is it serving their individual states and self-interests first? Statutory incorporation presents these ethical questions that are unlikely to produce ethical answers among congressmembers seeking reelection above their duty.

### B. *Interest Group Realities*

The self-interests highlighted in interest-based incorporation also help explain the important role that interest groups and lobbyists play in the statutory drafting process. Interest group theories of politics have received extensive commentary,<sup>233</sup> and their influence on congressional processes is undeniable. Several studies documenting the legislative drafting process found that lobbyists are regularly involved in drafting statutes and even offer first drafts of bills for congressional drafters and legislative counsels to consider.<sup>234</sup> Indeed, many congressional drafters have become somewhat dependent on the research and expertise of lobbyists, finding them to be helpful resources.<sup>235</sup> Further, the pecuniary influence of lobbyists on Congress has only increased in recent years, going from \$1.45 billion in 1998 to \$3.5 billion in 2020.<sup>236</sup> In short, congressional drafters are likely less

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<sup>233</sup> For a brief recitation of relevant pieces, see generally Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991); William N. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875, 877 (1975) (arguing that interest groups form a market-based process trying to outbid other competition for congressional influence); and Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 498 (1994) (noting scholarship that characterizes certain legislators as mere "notary publics" who memorialize the private deals made by interest groups in statutory form).

<sup>234</sup> See Nourse & Schacter, *supra* note 5, at 583 (detailing the frequency of lobbyist involvement); Gluck & Bressman, *Statutory Interpretation Part II*, *supra* note 5, at 740, 747 (finding that legislative counsel, who draft a majority of statutory text, are less able to change or edit statutory text when they are presented with a draft from an outside group such as lobbyists).

<sup>235</sup> See Nourse & Schacter, *supra* note 5, at 610 (detailing interviews with legislative drafters that find lobbyists useful due to the expertise, legal research, and information they bring to the process).

<sup>236</sup> *Lobbying Database*, CTR. FOR RESPONSIVE POLS, <http://www.opensecrets.org/federal-lobbying> [https://perma.cc/5HPR-48D8].



occupied with federalism and delegation concerns as they are with interest group influences.<sup>237</sup>

This interest group dynamic has notable *quid pro quo* benefits for all parties involved. Congressmembers benefit from the immense research, expertise, and resources of interest groups during the legislative process.<sup>238</sup> This research and expertise can help pass laws more effectively, and lobbyists may be able to spread enough influence to build political coalitions that are necessary to pass bills into law. In addition, congressmembers also benefit from making important allies in the private sector during the legislative process that may turn into important campaign contributors. Interest groups in return get high levels of access to the legislative drafting process and enjoy tremendous influence over federal laws.<sup>239</sup>

As applied to statutory incorporation, interest groups may favor delegations of power to weaker institutions that are more susceptible to interest group capture.<sup>240</sup> Others have argued that interest groups would prefer greater centralization of power because capture of this single power source would be more efficient than capturing multiple power sources.<sup>241</sup> But this consolidation of power in Congress or in federal agencies may indeed require more investment and resources than a delegation and diffusion to state legislatures through statutory incorporation.

First, state legislators are paid much less than congressmembers and have fewer legislative resources in the forms of time, research, and staff.<sup>242</sup> Thus, state legislators may be more susceptible to interest group capture than members of Congress who have more resources, more eyes on them, and more responsibility. Second, state legislative bodies tend to be much smaller with fewer legislators than Congress, meaning it may cost less to influence the few state legislators needed to sway a vote than it would be to do so in the larger

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<sup>237</sup> See Gluck & Bressman, *Statutory Interpretation Part I*, *supra* note 5, at 973 (finding that even floor debates on federal statutes are used for political purposes to signal and communicate with interest groups, so as to shore up their support in election campaigns).

<sup>238</sup> See *supra* note 235 and accompanying text.

<sup>239</sup> See Nourse & Schacter, *supra* note 5, at 623 (discussing the involvement of interest groups in the legislative process and whether that level of access “is appropriate from a policy standpoint . . .”).

<sup>240</sup> See Rossi, *supra* note 26, at 486 (“[I]nterest groups can manipulate the legislative process and, through delegation, vest lawmaking with an agent that will be more susceptible to capture . . .”).

<sup>241</sup> See Bell & Parchomovsky, *supra* note 54, at 99-100 (“When lawmaking is done on the state level . . . attempts by interest groups to achieve nationwide uniformity are by and large doomed . . . [F]ederalism dilutes the influence of out-of-state interest groups and diminishes their ability to pass inefficient legislation for the whole country.”); see also Metzger, *supra* note 162, at 1074 (“[H]aving the states serve as key program implementers opens up new political battlefields. Groups must battle on a state-by-state basis, rather than consolidate their political pressure and leverage at the national level.”).

<sup>242</sup> See *supra* notes 189–201 and accompanying text.

Congress.<sup>243</sup> Third, interest groups are not always interested in creating nationwide policies, but may be more attuned to regional and intrastate goals, if their clients operate only in a small number of states. While lobbyists are usually perceived as working out of big firms on K Street that represent multinational conglomerates, lobbyists may have just as much business in representing smaller interests and clients looking to influence regional politics in the pockets around the country in which they do business. Thus, influencing congressmembers to use statutory incorporation empowers interest groups to efficiently target specific states and regions in accordance with regional clients. And finally, interest groups may favor statutory incorporation from a competition standpoint. Because Congress is the largest locus of consolidated legislative power in the nation, competition among lobbyists vying for congressional influence would be greater on the national level than if power were diffused to lesser legislatures. Criminologist Lisa Miller has documented how interest groups, large and small, can skew federalism goals at the local level by ensuring that less organized interests are drowned out by well-resourced and well-organized interest groups.<sup>244</sup> This is often the case with national interest groups, such as the NRA or the ACLU.<sup>245</sup> When these larger interest groups take interest in state and local lawmaking, they displace local mores with nationalized agendas in the creation of state and local law.<sup>246</sup> Therefore, there is merit to the belief that national interest groups and the lobbyists they hire are indeed interested in swaying local and state legislatures.

Interest groups play an ever-important role in the legislative process, and their influence must be appreciated when considering statutory incorporation. The quid pro quo relationship that benefits the self-interests of congressmembers as well as the regional and national aims of interest groups explains why statutory incorporation is an attractive legislative tool for both parties.

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<sup>243</sup> See Note, *City Government in the State Courts*, 78 HARV. L. REV. 1596, 1597 (1965) (characterizing arguments in THE FEDERALIST NO. 10 that smaller legislatures are more likely to be swayed by factions).

<sup>244</sup> See Lisa L. Miller, *The Local and the Legal: American Federalism and the Carceral State*, 10 CRIMINOLOGY & PUB. POL'Y 725, 728 (2011) (“[T]he heavily skewed nature of representation and voice in American politics . . . can easily overrepresent the interests of narrow but highly preference-intense groups.”).

<sup>245</sup> *Id.* at 728-29.

<sup>246</sup> See, e.g., MILLER, *supra* note 144, at 6 (“The centralization of crime policy in state and national governments and the institutionalization of crime policy agendas limit the voice of groups who are most affected by crime and who frame crime as a public interest problem.”).

### C. Negotiating Ambiguity

Statutory incorporation also carries the benefits of intentional ambiguity. Scholars have long recognized that ambiguous statutes are often the result of intentional design,<sup>247</sup> and the study of such ambiguity has large implications for statutory interpretation.<sup>248</sup> Incorporating state law is not all that different from drafting an ambiguous term; whereas ambiguity describes how terms and statutes can be legitimately interpreted in different ways, statutory incorporation all but ensures that federal statutes will be interpreted and applied several different ways among the different states.

The first benefit to drafting ambiguous terms is legislative efficiency. Ambiguous terms allow negotiators to pass over difficult sticking points of disagreement that would otherwise derail the legislative process or take too much time to reach consensus.<sup>249</sup> This is congruent with statutory incorporation. Instead of using the precious little time available in most drafting and negotiation sessions to hash out difficult issues of what “burglary,” “debt,” or “child” should mean in federal statutes, drafters save tremendous time by incorporating the laws of all fifty states into the statutes to resolve these problems.<sup>250</sup> This allows congressional drafters to insert a term that can be read multiple different ways to prevent gridlock in the legislative process, allowing each negotiator to leave the room believing they got what they wanted. And perhaps each of them did, since using statutory incorporation produces a federal statute that will apply differently in each state.

But legislative efficiency should be generally approached with suspicion, especially if congressmembers are flagrantly ignoring their duty to draft meaningful legislation. The federal legislative process was never intended to be efficient; in fact, it was designed to be the opposite. The committee process, multiple tiers of draftsmanship, and the nine vetogates described by Professor William Eskridge, Jr. that a bill must hurdle before even getting to the

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<sup>247</sup> See Saul Levmore, *Ambiguous Statutes*, 77 CHI. L. REV. 1073, 1077-79 (2010) (“Ambiguity can be intentional or unintentional; it can derive from misunderstandings about language, from simple mistakes, from a failure to plan ahead, or from the impossibility of seeing very far ahead.”).

<sup>248</sup> See, e.g., Richard M. Re, *Clarity Doctrines*, 86 CHI. L. REV. 1497, 1532-33 (2019) (discussing theories of ambiguity and the judicial interpretation, including that of *Chevron*, that are triggered by such ambiguity); Easterbrook, *supra* note 229, at 547-49 (1983) (discussing the gap-filling function that many courts serve when responding to ambiguous statutes).

<sup>249</sup> See Harold A. McDougall, *Lawyering and Public Policy*, 38 J. L. EDUC. 369, 379 (1988) (“[T]he wording of a bill has a tactical importance beyond its substance . . . because the wording influences the stability of coalitions forming around the bill and the selection of the committee or subcommittee to which the bill will be assigned.”).

<sup>250</sup> See Divine, *supra* note 8, at 149-50, 188 (arguing that statutory incorporation increases legislative efficiency).

President's desk, is a process that is meant to produce good law, not fast law.<sup>251</sup> In the face of such legislative Darwinism, only the fittest, best negotiated, and most compromised upon bills become law, which explains why as few as three percent of proposed bills become statutes.<sup>252</sup> Statutory incorporation thus serves as a shortcut that diminishes the legitimacy and efficacy of the carefully designed legislative process.

A second and closely related reason why Congress intentionally drafts ambiguous terms is that it allows congressmembers to side-step complex issues and instead defer to other institutions to solve these ambiguities.<sup>253</sup> By refusing to take on the difficult task of negotiating difficult topics, congressional drafters can instead pass this off to agencies or courts to solve themselves.<sup>254</sup> This means that opposing negotiators can walk out of the room each with the hope that another institution will interpret the law in their favor sometime in the future.<sup>255</sup> Statutory incorporation accomplishes the same goal by allowing congressmembers to shirk their legislative duties and pass the difficult task of defining things like “burglary,” “husband,” and various torts to state legislatures who have already defined these terms according to the preferences of their polity. Congressmembers representing California would be just as satisfied with those representing Texas, since they would be able to avoid the taxing negotiating process of defining the complexities of bankruptcy or social security statutes by instead allowing the law of their home jurisdictions to govern how federal law will apply to their constituents.

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Where federalism and delegation theories fall short, interest-based incorporation offers a more complete explanation on why Congress so

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<sup>251</sup> See William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1444-46 (2008) (describing nine “vetogates” that present multiple opportunities to kill a bill, which can often be successfully thwarted by only a few congressmembers).

<sup>252</sup> See Divine, *supra* note 8, at 150 (noting that recent Congresses, even during years when one party controlled the legislative and executive branches, passed as few as two to three percent of proposed bills into law).

<sup>253</sup> See Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 641 (2002) (“[I]t is not unusual for competing factions of Congress to ‘agree to disagree’ in the drafting of a statute [and seek resolution from another institution].”).

<sup>254</sup> See Levmore, *supra* note 247, at 1079 n.18 (acknowledging that intentional ambiguities amount to Congress “essentially asking some agent, often unidentified, to do the work” that Congress should have done to give the statute meaning); Gluck & Bressman, *Statutory Interpretation Part I*, *supra* note 5, at 1015 (reporting that drafters knowingly “punt[]” difficult questions to other decisionmakers by drafting ambiguous terms).

<sup>255</sup> See Nourse & Schacter, *supra* note 5, at 596-97 (noting congressional intent to draft words with “deliberate ambiguity” with the hope that courts or agencies will interpret the law favorably).

frequently relies on statutory incorporation. Interest-based incorporation offers a realistic look into how self-interested politicians seek to continue their careers in politics by passing laws that maximize political benefits while mitigating political risks. Statutory incorporation allows individual congressmembers to reap the benefits of scapegoating, interest group politics, and drafting ambiguous terms. Congress may indeed be the most political branch of the federal government, so it should come as no surprise that congressmembers are the most politically motivated members of the federal government as well.

#### IV. INCORPORATING THE IMPLICATIONS

Statutory incorporation proves to be the result of complex and overlapping congressional considerations. Part II of this Article explores why the scholarly narrative that federalism and delegation theories justify statutory incorporation are incomplete. In this context, Part III proposes that interest-based considerations hold explanatory value.

This Part continues in the spirit of statutory realism to propose judicial and congressional interventions in light of these new understandings. Judges might think differently about how they should interpret federal incorporative statutes with the proper underlying assumptions of congressional self-interest. Instead of presuming legislative intent based on federalism or delegation grounds, this Part argues that judges should consider checking congressional self-interest instead of enabling it. Congress too might think differently in how they can further maximize their self-interest without producing the troubling disparities of statutory incorporation surveyed in Part I. Instead of shirking its legislative responsibility and relying on interest groups and ambiguity, it can further expand its institutional resources and create advisory agencies to offer the type of time, research, and expertise necessary to properly consider the consequences of incorporating state law.

##### A. *Judicial Interventions*

Whenever one wades into the debates of statutory interpretation, the ultimate purpose of canons and what they should accomplish is a necessary starting point. Scholars like Adrian Vermeule and Cass Sunstein acknowledge that canons operate as legal fictions, but nevertheless find such fictions useful if they help facilitate judicial efficiency and create sustainable legal rules.<sup>256</sup>

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<sup>256</sup> See Sunstein & Vermeule, *supra* note 2, at 915 (explaining how interpretive theories can facilitate judicial efficiency); see also Gluck & Bressman, *Statutory Interpretation Part II*, *supra* note 5, at 728 (outlining theories “less tethered to the details of how Congress works,” but more concerned with coordinating legal rules that assist judges).

Such scholars would likely have mixed feelings on the fictions that prop up statutory incorporation; while federalism and delegation serve as simple legal fictions that imagine Congress's dedication to these ideals, these fictions have only served to muddle judicial economy and question fair treatment and legitimacy within several areas of the law.<sup>257</sup>

Others believe in legislative supremacy, where courts are faithful agents to fulfill congressional intent. Under this theory, canons are formalist tools to divine congressional intent in ways that may make sense to legally trained judges.<sup>258</sup> However, statutory realists have proven that legislative drafters have very little training or concern regarding these legal tools of interpretation and actually draft the vast majority of legislation in ways that contradict or diminish the efficacy of these canons.<sup>259</sup> The recent surge in statutory realism is rooted in a long-standing desire of scholars and judges to better understand the statutory drafting process with the goal of adjusting their interpretations accordingly.<sup>260</sup> Without such a connection between how Congress drafts statutes and how courts interpret them, judges are merely playing pretend in a world of make-believe.

What follows is both an embrace of statutory realism and a rejection of legislative supremacy. If anything, these principles conflict. Statutory realism is a useful school that shows how statutes are *actually* drafted, passed, and enacted; interest-based incorporation fits nicely under this larger umbrella as it seeks to argue that statutory incorporation is *actually* used as a tool to benefit political players in the legislative process. With this understanding, why should congressional self-interest reign supreme over the judiciary in a government built on checks and balances? No branch's intent—especially if it is a fictitious intent—should rule supreme, and courts should think carefully about their role in letting congressional self-interests reign. Instead, perhaps they should think about their role in reigning it in.<sup>261</sup> While the proposed

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<sup>257</sup> See *supra* Part I.

<sup>258</sup> See Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 841-42 (1991) (describing legislative supremacy); see also STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* 96 (2010) (arguing that the Court's role is to "help Congress better accomplish its own legislative work.")

<sup>259</sup> See Nourse & Schacter, *supra* note 5, at 615-16 ("[S]taffers are asked to create legislation in an institution whose incentives and institutional attributes are quite different from those of courts."); Gluck & Bressman, *Statutory Interpretation Part II*, *supra* note 5, at 728 ("[M]any other influences . . . have more relevance to the drafting process than most of the Court's interpretive rules.")

<sup>260</sup> See, e.g., *id.*; see also Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637, 660 (2012) (arguing that the realities of congressional drafting are completely divorced from debates and theories on statutory interpretation).

<sup>261</sup> See Levmore, *supra* note 247, at 1083 (discussing courts' role in enabling charades of Congress when they draft ambiguous statutes); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 92-126 (2d ed. 1979) (criticizing the Court's refusal to reign in congressional delegation of power).

judicial interventions are far from exhaustive, this Part seeks to start a more robust conversation among judges and scholars about ways the judiciary can properly serve its constitutional mandate to balance powers and check congressional self-interest.

### 1. Ambiguity Canons

An effective starting point for judicial intervention would be to repurpose existing ambiguity canons to interpret federal incorporative statutes in the light most favorable to the individual. The rule of lenity, which requires that ambiguous criminal statutes be interpreted in favor of the criminal defendant,<sup>262</sup> could be expanded to consider statutory incorporation as an ambiguity due to its multiple interpretations and applications across the states. This rule of lenity has also been applicable in other contexts outside of the criminal law, including ambiguous immigration statutes being interpreted in favor of noncitizens facing deportation,<sup>263</sup> and even favoring bankruptcy debtors when facing deprivations of property due to ambiguous statutes.<sup>264</sup> By focusing on supporting individual defendants and noncitizens, courts can indirectly thwart congressional self-interests and increase congressional accountability by facilitating consistent results that favor individuals in the criminal, property, and liability areas where statutory incorporation is used.

Although the rule of lenity is rarely applied, this section argues that a judicial expansion of its application would be beneficial when interpreting incorporative statutes. As the canon currently stands, lenity is only employed if a statute meets a high standard of ambiguity,<sup>265</sup> and even then it is only

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<sup>262</sup> See *Rule of Lenity*, BLACK'S LAW DICTIONARY (11th ed. 2019); see also *Johnson v. United States*, 576 U.S. 591, 613-16 (2015) (Thomas, J., concurring) (describing the history of the rule of lenity in American jurisprudence).

<sup>263</sup> See, e.g., *INS. v. St. Cyr*, 533 U.S. 289, 320 (2001) (affirming use of lenity in immigration contexts); see also Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 516-17 (2003) (outlining Court precedent establishing the immigration rule of lenity to protect against the drastic penalty of deportation).

<sup>264</sup> See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* app. B at 19-41 (4th ed. 2007) (describing hundreds of canons, including those that construe ambiguities in favor of bankruptcy debtors); see also 11 RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 32:12, at 471-80 (4th ed. 1999) (outlining contract rule of interpretation *contra proferentem*, that interprets ambiguous language against the party who drafted it).

<sup>265</sup> See Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 806-08 (2010) (explaining the difficulty of consistently applying the rule of lenity due to ambiguity standards necessary to trigger its application).

used as a canon of last resort.<sup>266</sup> The mere “existence of some statutory ambiguity . . . is not sufficient to warrant [its] application,”<sup>267</sup> but instead there must be “a grievous ambiguity or uncertainty in the language.”<sup>268</sup> Courts have yet to apply the rule of lenity to instances of statutory incorporation,<sup>269</sup> and such an expansion need only be applied as necessary to hold congress accountable for its flawed federal incorporative statutes. In practice, criminal defendants facing charges would face the most favorable interpretation under state law. So a defendant who committed “burglary” in Colorado would only trigger federal liability if a defendant committed the highest form of burglary in that jurisdiction, such as burglaries in the first degree or those that include use of a deadly weapon.<sup>270</sup> This would apply across the board to the many state crimes incorporated in federal law, and would necessitate the first degree murder, robbery, and other incorporated crimes to trigger harsh federal penalties such as mandatory minimum sentences or deportation for noncitizens.<sup>271</sup> Statutes like the ACA that create federal criminal liability for the violation of state law would also require the highest degree of any such state law to trigger federal liability. It should not be enough that lower degrees of trespassing, nonviolent drug offenses, petty theft, and a host of other crimes should trigger the harsh sanctions of federal criminal law.

Researchers have shown that congressional drafters have very little knowledge or respect for the rule of lenity and draft such harsh federal criminal laws without regard to how the rule of lenity might apply to an ambiguous criminal statute.<sup>272</sup> This is all the more reason to hold congressmembers accountable by expanding the rule of lenity. Apparently, congressmembers and their staffers are too worried about their self-interests to adequately educate themselves on the rights of criminal defendants and

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<sup>266</sup> See *United States v. Shabani*, 513 U.S. 10, 17 (1994) (explaining that the rule of lenity should only be triggered after courts have employed all other traditional canons and are still left with an ambiguity).

<sup>267</sup> *Muscarello v. United States*, 524 U.S. 125, 138 (1998).

<sup>268</sup> *United States v. Walker*, 720 F.3d 705, 708-09 (8th Cir. 2013) (quoting *Chapman v. United States*, 500 U.S. 453, 463 (1991)) (internal quotations omitted).

<sup>269</sup> See, e.g., *Shular v. United States*, 140 S. Ct. 779, 786-87 (2020) (rejecting the application of the rule of lenity to the ACCA).

<sup>270</sup> See, e.g., COLO. REV. STAT. § 18-4-202 (2020) (defining burglary in the first degree to include use of a deadly weapon).

<sup>271</sup> Currently, courts employ a categorical approach taking into account the elements of state crimes and comparing them to corresponding federal elements to make categorical matches. See *Evans*, *supra* note 11, at 1781-84 (explaining complex steps of categorical approach). The rule of lenity would simplify this process by asking if the defendant’s conduct or conviction amounted to the highest criminal definition of state law in that jurisdiction to trigger federal criminal or immigration penalties.

<sup>272</sup> See *Gluck & Bressman, Statutory Interpretation Part I*, *supra* note 5, at 946-47 (explaining that many drafters are not familiar with the rule of lenity).



noncitizens; the rule of lenity is one of the quintessential canons that courts should double down on and reinforce with vigor if for nothing else than to check congressional obliviousness to effect a change.

Expanding the rule of lenity to apply to statutory incorporation would benefit individuals but would also check congressional self-interest by increasing congressmembers' political accountability. In a perverse way, Congress rarely pays attention to its lawmaking failures without sufficient public outcry; and such public outcry is usually only reserved for extreme cases of violence or miscarriages of justice.<sup>273</sup> Thus, if the courts apply the rule of lenity to increase individual liberty, this may indeed result in people that the public considers dangerous going free or facing more lenient punishments. It may seem morally abhorrent to let potentially dangerous criminals off the hook by expanding rules of lenity, but it is logically sound because these are the few instances where Congress is truly held accountable for their legislative failures in the face of such moral panics. Indeed, this unfortunate reality goes to the crux of this Article; Congress is self-interested and will rarely change course unless there is sufficient political accountability attached to its actions.

Expanding the rule of lenity is a worthwhile consideration for the judiciary, but it is still unsatisfying because the problems of nonuniformity would remain. Although many defendants and noncitizens will be treated more fairly, their federal rights will still be tied to the respective state laws of their domicile. Texans will still be judged by Texas law, even though they will benefit from being judged by the most favorable aspect of that law. This can still lead to nonuniform outcomes because a similarly situated Californian can only benefit by the most favorable interpretation of California law, which may be more or less than that enjoyed by their Texas twin.

## 2. Highest-Denominator Canon

As an alternative to ambiguity canons, a second canon of interpretation that could address the problems of nonuniformity is a highest denominator canon, or a way that courts could apply the highest state-law standard to the entire country. In practice, courts would seek the highest denominator among all state laws and adopt that standard as the uniform federal rule.<sup>274</sup> For statutes that incorporate all fifty state versions of "burglary," the courts might

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<sup>273</sup> See, e.g., Wayne A. Logan, *Megan's Laws as a Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371, 373-80 (2011) (outlining public outcry and political response to develop federal sex offender registries and laws after state laws were deemed inadequate to protect children from sexual violence).

<sup>274</sup> The courts might also consider simply developing their own federal common law definition of incorporated terms like "burglary" or "child," but this would refute the language of many statutes that require state law to play a role.

adopt the one state law that has the highest standard for convicting a defendant for that crime. Let's say, for argument's sake, courts find that Minnesota's first-degree burglary statute is the highest standard of burglary—and thus the most lenient to criminal defendants—because it requires common law elements that include a (1) night-time (2) breaking (3) and entering (4) with the premeditated intent (5) to commit a felonious theft (6) with a deadly weapon. It would be incredibly difficult to convict a defendant under this hypothetical statute because of the number of unique elements that rarely apply to most modern burglaries. Thus, under the highest-denominator canon, courts would *incorporate* Minnesota's burglary standard across all federal statutes that were intended to incorporate state definitions of "burglary." The same could be done by incorporating the most lenient standards of "husband," "wife," or "child" for social security benefits, or incorporating the unlimited homestead exemptions enjoyed in Texas and Florida into bankruptcy statutes to allow debtors across the country to gain the maximum benefits under the most favorable standards among the states. Once again, by using the judicial power of interpretation to empower individuals, as opposed to congressional self-interest, the judicial branch would effectively check the abdication and dereliction of duty congressmembers exhibit by employing statutory incorporation.<sup>275</sup>

Similar to the prescribed ambiguity canons, the highest-denominator canon rejects interpretive theories of legislative supremacy in order to embrace the courts' role to check Congress. Instead of faithfully following congressional intent when it expressly or indirectly contradicts principles of federal uniformity, legitimacy, and efficiency, courts should instead interpret statutes in a way that promotes these principles.<sup>276</sup>

This approach carries the benefits of nationwide uniformity while also empowering state law in a way that current statutory incorporation does not. Instead of creating fifty different applications of a federal statute, courts can interpret the statute to incorporate a single state's law that will apply across the country. This uniform standard maximizes benefits to citizens because—like the ambiguity canons—it chooses the most lenient and beneficial standards for defendants, noncitizens, debtors, and beneficiaries alike. This canon would also be a more effective embodiment of federalism and delegation ideals. By picking the most lenient state laws to incorporate into federal statutes, courts would empower states' laws and leverage states'

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<sup>275</sup> See Logan, *Creating a Hydra in Government*, *supra* note 28, at 85 (describing congressional incorporation of state criminal law as an "abdicat[ion] [of] its criminal lawmaking authority in deference to individual states.").

<sup>276</sup> See Radha A. Pathak, *Incorporated State Law*, 61 CASE W. RES. L. REV. 823, 846-47 (outlining several cases where federal courts ignored state law and instead interpreted federal incorporative statutes in ways that forwarded federal interests).

expertise in picking the best option that forwards federal goals. This encourages state experimentation, competition, and expertise in ways that clumsily incorporating *all* state statutes does not.

Both the highest-denominator canon and the ambiguity canons seek to interpret the law in the most favorable light to defendants, debtors, and those opposing the government. While this need not be the case, it is the simplest way to fix the unjust geographical discrimination imposed by statutory incorporation. Surely, courts could adequately check congressional abdication of lawmaking authority by adopting the lowest denominator, or by interpreting ambiguous terms according to the median state laws. There is no perfect explanation on why we should settle for the highest denominator or the most favorable interpretation for the individual other than it produces the most just result by remedying past unjust geographical discrimination.

The highest-denominator canon carries significant benefits but must also be contextualized with its costs. For one, it would further tax judicial economy since nearly every federal incorporative statute would require a fifty-state survey of state laws to find the highest denominator. For example, this process would be easier for homestead exemptions that have an easily determinable highest denominator since several states have an unlimited homestead exemption. This would be much more difficult for criminal statutes since they are legion across the states. Undoubtedly, litigants would carry most of the costs of this research and present it to courts in their briefings, but courts would still have to carry the burden of determining these highest denominators across all state laws. Judicial economy might also be saved when courts rely on each other's research and adopt uniform standards without recreating the wheel if one such court has already determined the highest denominator of a given statute. And when compared to the current taxation of judicial economy,<sup>277</sup> these ex ante costs may prove to be more efficient in the long run once uniform standards have been established.

Another shortfall of the highest-denominator canon would be its inability to alleviate the geographical discrimination of statutes like the ACA or the FTCA. These statutes specifically federalize the criminal and tort actions of the particular state where a prescribed action took place. So if a defendant commits a crime in a federal park in Wyoming, Wyoming criminal law will govern an ACA indictment. There is no way to re-engineer or interpret the ACA to criminalize the law of another state in such an instance. So while applying the highest-denominator canon would benefit most federal incorporative statutes, there will still be outliers that will require congressional interventions to fix.

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<sup>277</sup> See *supra* notes 47, 117–119 and accompanying text (discussing judicial complaints about the difficulty of applying the law when interpreting incorporative statutes).

### 3. Federal–State Interest Canon

Perhaps the least ambitious solution is the most practical, which would allow for courts to differentiate among the many different federal incorporative statutes to discern which subject matters promote important federal interests versus those that promote primary and important state interests. This author has previously suggested such an approach in the separate but related field of the categorical approach, a judicial tool used in criminal sentencing and immigration incorporative statutes.<sup>278</sup> This canon would encourage courts to draw lines based on tradition, practice, and constitutional norms to determine which statutes serve a constitutional national interest and which serve state interests, thus tailoring their interpretation based on subject matter.<sup>279</sup>

To illustrate this conceptual canon, compare criminal and immigration law. Criminal law is traditionally seen as a state power that seeks to regulate certain behavior through criminal punishment. This tradition was broken with sweeping federalization of criminal law throughout the 1980s and 1990s, when Congress passed thousands of criminal statutes<sup>280</sup> during an era of “tough on crime” political rhetoric that was pushed to maximize political gain.<sup>281</sup> The many overlapping federal and state crimes has resulted in perverse negotiations between state and federal prosecutors on who will prosecute a defendant whose crimes could fall into either’s docket, usually based on who can get the most jailtime for the defendant.<sup>282</sup> And even with the exponentially increased involvement that federal law enforcement has taken in criminal law in the past forty years, the states remain the primary arbiter of criminal justice.<sup>283</sup>

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<sup>278</sup> See Evans, *supra* note 11, at 1834–36 (discussing the merits of a categorical approach tailored to the unique policy goals of criminal sentencing statutes and immigration laws).

<sup>279</sup> See Pathak, *supra* note 276, at 846–47 (describing a similar phenomenon, where federal courts have implicitly adopted interpretations of state law when it benefits federal interests in certain subject matters).

<sup>280</sup> See Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 392, 399 (2009) (counting nearly 4,000 federal crimes); Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 L. & SOC. INQUIRY 239, 242–43 (2005) (explaining the history of the federalization of crime and noting that “[a] report by the American Bar Association Task Force on the Federalization of Criminal Law reports that over 40% of all federal criminal statutes enacted since the Civil War were passed after 1970” (citation omitted)).

<sup>281</sup> See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 748–49 (2005) (linking political incentives in the 1990s with tough-on-crime rhetoric and legislation).

<sup>282</sup> See Ronald F. Wright, *Federal or State? Sorting as a Sentencing Choice*, 21 CRIM. JUST. 16, 19–20 (2006) (explaining the sorting that federal and state prosecutors, law enforcement, and other decisionmakers engage in when deciding to prosecute a person in state or federal court).

<sup>283</sup> See, e.g., E. ANN CARSON, BUREAU OF JUST. STAT., DEPT. OF JUSTICE, NCJ 251149, PRISONERS IN 2016, at 3 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/5UEN-ZW75>] (indicating that federal prisoners made up thirteen percent of the total U.S. prison population, with states holding the rest).

Compare this to the constitutional mandate “[t]o establish an uniform Rule of Naturalization”<sup>284</sup> and over one-hundred years of the federal government establishing its unilateral power to deport noncitizens and preempting states from enacting laws attempting to do the same.<sup>285</sup> The Court has often stressed the importance that, in immigration law, the nation speaks with one national voice that signals one uniform national sentiment on the treatment of foreign nationals.<sup>286</sup> Bankruptcy occupies an interesting conflicting position, having a similar constitutional mandate for Congress to establish “uniform Laws on the subject of Bankruptcies throughout the United States”<sup>287</sup> while also relying so heavily on property rights that have always been the purview of the states.<sup>288</sup> Indeed, the stark differences between states’ homestead provisions can be considered a result of rich state histories and community norms of property rights. It is no coincidence that the states with higher or unlimited homestead exemptions are also those that were historically agrarian, thus engraining in the community the importance of keeping one’s home and land as a part of their livelihood and personal identity.<sup>289</sup>

These brief histories are enough to appreciate the different contexts that may sway courts to allow Congress more leeway for state law to affect federal criminal sanctions, but heavily constrict Congress’s attempt to let state law influence federal immigration outcomes. Bankruptcy occupies an odd middle ground in this framework. These histories, constitutional considerations, and national interests are the types of things courts may consider in adopting a federal–state interest canon. For all the flaws, messiness, moral and doctrinal problems that statutory incorporation creates, courts may decide to preserve statutory incorporation in statutes that serve to promote state interests but check congressional abdication of federal lawmaking authority in contexts with strong national interests. This is certainly not an exhaustive list of considerations that a federal–state interest canon might employ, but

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<sup>284</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>285</sup> See *Graham v. Richardson*, 403 U.S. 365, 382–83 (1971) (preempting states from affecting certain rights of noncitizens); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 420 (1948) (preempting states from regulating immigrant rights because the power was reserved for the federal government).

<sup>286</sup> See *Arizona v. United States*, 567 U.S. 387, 409 (2012) (discussing the need for sole federal power in the immigration sphere to speak with “one voice” for the purposes of foreign relations).

<sup>287</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>288</sup> See *supra* notes 58–77 and accompanying text (discussing the role of property rights in bankruptcy law).

<sup>289</sup> See generally Paul Goodman, *The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840–1880*, 80 J. AM. HIST. 470 (1993) (detailing the historical reasoning and importance of homestead exemptions in the American West and South).

nevertheless starts a thoughtful consideration that statutory incorporation may be more appropriate in limited areas of the law.

This consideration also raises an interesting question of identity. As Professor Logan considers, should our federal laws “embrace[] the antebellum view that individuals are tribe-like members of the states,” or promote the political ideals of being “national citizens of a larger federal republic[?]”<sup>290</sup> This begs even more questions. What are people’s personal identities in this country? Do they consider themselves more of a Texan, or more of an American? And is this sense of personal identity material to how they should be treated in different areas of the law? In some cases, perhaps state rights *should* prevail. In other cases, federal interests should prevail. This is the balance of power that has preserved our Republic, and need not be abandoned in the statutory incorporation corner of the law.

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These judicial interventions are not exhaustive but are meant to start a broader conversation on how statutory interpretation can be modeled to handle the unique challenges presented by statutory incorporation. Courts no longer need to apply the legal fiction that statutory incorporation is meant to communicate Congress’s intent to promote ivory-tower principles of empowering state law through federalism or delegating to states that have some advantage of expertise. Instead, courts can interpret these federal incorporative statutes in a way that properly checks congressional self-interests and promotes nationwide interests or that uses a method to tailor interpretation according to prevailing state or federal interests.

### B. *Congressional Interventions*

Courts will indeed play an important role in checking congressional self-interest, but there are also institutional changes that Congress itself could explore that would increase their political aims while also mitigating the harms of statutory incorporation. This brief section outlines a few such institutional changes that would expand congressional lawmaking capacities and also empower the voice of state legislatures within the federal lawmaking process. Just like the judicial interventions explored above, this is far from an exhaustive list of potential congressional interventions, but nevertheless starts a scholarly conversation of how to

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<sup>290</sup> See Logan, *Creating a Hydra in Government*, *supra* note 28, at 89-90.

think about Congress's role in remedying the harmful imperfections of statutory incorporation.<sup>291</sup>

First, Congress can seek to expand its institutional resources by creating additional legislation and budgeting departments within the Capitol. Legislative scholars have noted for decades that Congress simply does not have the time, resources, or expertise necessary to develop well-crafted statutes.<sup>292</sup> With their power of the purse, congressmembers have rarely faced opposition from within their own ranks when it comes to giving themselves raises,<sup>293</sup> expanding the jurisdiction of committees, or determining that they need more resources in their own budget to do their jobs effectively.<sup>294</sup>

Congressmembers already benefit from a number of resources that assist the drafting process, including individual staff, committee staff, the Office of Legislative Counsel (OLC), and the Congressional Research Service.<sup>295</sup> What is to stop Congress from expanding such institutional resources to further help the legislative process? Specifically, as applied to statutory incorporation, Congress may benefit from expanding research staff, expanding the OLC, or commissioning another legislative research department whose sole goal is to analyze potential disparities or discriminatory effects of proposed legislation. Expanded research staff or a new legislative department would carry many benefits, such as analyzing potential racial disparities of proposed legislation,<sup>296</sup> class disparities, and for purposes of statutory incorporation, geographical or regional disparities.

<sup>291</sup> See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 133-34 (1980) (arguing that Congress might expand its native capacities to overcome current limitations).

<sup>292</sup> See LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* 34 (2015) (arguing that congressional capacity is too limited "to develop meaningful policy expertise").

<sup>293</sup> See generally IDA A. BRUDNICK & PAUL E. DWYER, *CONG. RSCH. SERV.*, 91-1011, *SALARIES OF MEMBERS OF CONGRESS: RECENT ACTIONS AND HISTORICAL TABLES* (2021) (recording history of congressional pay raises). *But see* Golden, *Fitzpatrick Successfully Block Pay Raise for Congress in Government Funding Bill*, CONGRESSMAN JARED GOLDEN (Dec. 22, 2020), <https://golden.house.gov/media/press-releases/golden-fitzpatrick-successfully-block-pay-raise-congress-government-funding> [<https://perma.cc/Q28L-JWNN>] (showing example of congressmembers voting against self-interest in giving themselves a pay raise in bleak economic times).

<sup>294</sup> See CHRISTOPHER J. DEERING & STEVEN S. SMITH, *COMMITTEES IN CONGRESS* 27-30 (3d ed. 1997) (discussing historical expansion of committees and Congress's prerogative to create new committees and expand their jurisdiction).

<sup>295</sup> See Sitaraman, *supra* note 5, at 87-91 (explaining different legislative resources of members of Congress).

<sup>296</sup> Several states already require racial impact statements to accompany all new criminal justice bills being considered by the legislature to inform lawmakers how proposed laws would impact communities of color. See Nicole D. Porter, *Racial Impact Statements*, THE SENT'G PROJECT (Feb. 24, 2021), <https://www.sentencingproject.org/publications/racial-impact-statements> [<https://perma.cc/UNB8-D4EY>] ("Nine states—Iowa, Colorado, Connecticut, Florida, Oregon, Maine, Maryland, New Jersey, and Virginia—have implemented mechanisms for the preparation and consideration of racial impact statements;

Any such expansion of congressional resources carries the dual benefits of serving congressional self-interests while also potentially mitigating the harms of disparities across society. Congressmembers would have even more resources at their disposal, more research capacity, and more insight into the practical effects of proposed legislation. In essence, Congress would be serving its own self-interests by expanding its access to resources. This neither constrains Congress nor increases congressmembers' political liability. Instead, it merely allocates more resources and further expands the power of Congress. This is a win-win for self-interested congressmembers and their constituents who are governed by the laws they pass. Second, this suggestion may be even more palatable to congressional self-interests if these expanded resources came in the form of a quasi-legislative agency that served an advisory function. By using these newfound resources to create an advisory agency—somewhat similar to the United States Sentencing Commission's role in updating and advising Congress on criminal sentencing and reform<sup>297</sup>—Congress can get the benefits of agency expertise and retain the ability to scapegoat the agency if there is political backlash.

Taking this prescription even one step further would consider a potential role for an already-existing organization like the National Conference of State Legislatures (NCSL).<sup>298</sup> This little-known organization is a council of state legislatures similar to national councils of governors<sup>299</sup> and mayors.<sup>300</sup> The NCSL is a ready-made council of state legislatures that have the expertise and insight into the very state law that Congress seeks to incorporate into federal statutes. By commissioning the NCSL or even inviting them to consult or advise on federal legislation, Congress would gain the benefits of its expertise<sup>301</sup> and could further explore the potential effects legislation might have on different state

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in addition, the Minnesota Sentencing Guidelines Commission develops racial impact statements without statutory guidance.”).

<sup>297</sup> See 28 U.S.C. §§ 994, 995 (congressional instruction to Sentencing Commission to create sentencing guidelines, policy statements, reports, and conduct business necessary to function as an independent body); see *In re* President's Comm'n on Organized Crime Subpoena of Scaduto, 763 F.2d 1191, 1205 (11th Cir. 1985) (Roney, J., concurring) (distinguishing between advisory commissions and those with “autonomous authority to . . . implement final binding action”).

<sup>298</sup> See About Us, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/aboutus.aspx> [<https://perma.cc/SH34-82W6>] (describing a bipartisan organization representing state and territorial legislatures that seeks “to foster interstate cooperation and facilitate the exchange of information among legislatures.”).

<sup>299</sup> See NAT'L GOVERNORS ASS'N, <https://www.nga.org/cog> [<https://perma.cc/7KLM-59AE>] (describing bipartisan council of ten governors that represent governors of all states and territories).

<sup>300</sup> See U.S. CONF. OF MAYORS, <https://www.usmayors.org> [<https://perma.cc/PL9Y-AFBE>] (describing bipartisan organization of over 3,000 mayors across the nation).

<sup>301</sup> The expertise of the NCLS is indeed quite different than the expertise of individual state legislatures. The former benefits from having experienced delegates from each state serve, whereas the latter does not have such resources or benefits.



citizens while retaining the political safety valve of scapegoating the NCSL in times of political backlash.

Expanding congressional resources in a way that adds the research and expertise necessary to responsibly incorporate state law—whether doing so in-house, creating a new advisory agency, or inviting input from the NCSL—would benefit the lawmaking process and serve to mitigate the harmful disparities of statutory incorporation. By having a better understanding of geographical discrimination, Congress may indeed reform or rethink the problematic applications of incorporative statutes from the past and in the future. In turn, the benefits of federalism and delegation would no longer be fictions; instead, Congress would actually benefit from the expertise of an advisory agency or the NCSL and would actually empower states by educating themselves on states' laws and gaining insight from the input of state legislators.

From an efficiency or political perspective, some may balk at the suggestion of making Congress and its already robust support system even bigger, arguing instead that society benefits when government minimizes the amount of human capital required to run a legal system.<sup>302</sup> With the degrees of legislative problems explored in this paper, considered alongside the political interests of individual congress members, policymakers and society alike may very well be willing to forego the hypothesized benefits of a smaller and leaner legislature for larger and more effective one. Given the increasing complexity of the legislative process<sup>303</sup> and the possibilities for congressmembers to allocate themselves more resources to increase their staffs and other independent research and drafting departments inside the Capitol, expanding the legislature is a solution worth considering.

## CONCLUSION

Our republic of statutes should be built on reality, not fiction. The fictions of statutory incorporation should be appreciated for what they are and what they are not. The ideals of federalism and delegation meant to justify Congress's incorporation of state law into federal statutes serve as theoretical frameworks trying to make sense of a unique statutory structure that produces troubling nonuniformity, unfair disparities, and moral ambiguities. When held up to the scrutiny of how statutory incorporation works in practice along with interventions

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<sup>302</sup> See Daniel Martin Katz & M. J. Bommarito II, *Measuring the Complexity of the Law: The United States Code*, 22 A.I. & L. 337, 338-340 (2014) (discussing the disadvantages of overly complex legislative drafting).

<sup>303</sup> For explanations on the increasing complexity of the law, see, for example, Byron Holz, Note, *Chaos Worth Having: Irreducible Complexity and Pragmatic Jurisprudence*, 8 MINN. J.L. SCI. & TECH. 303, 333 (2007) (discussing the interplay between complex legal systems and judicial decisionmaking); and R. George Wright, *The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex*, 27 FLA. ST. U. L. REV. 715, 717 (2000) (discussing the multidimensional nature of legal complexity).

of statutory realism, these theories fall short to justify statutory incorporation as a beneficial legislative tool. The theory of interest-based incorporation sheds new light and contributes a new framework to judge the merits of statutory incorporation. Congressmembers are less concerned with imbuing erudite theories into legislation but are worried about self-interested political goals to which statutory incorporation is a useful tool. Thus, interest-based incorporation gives further insight into how judges and scholars should think about, interpret, and analyze statutory incorporation in ways that properly match how congressmembers think about, interpret, and analyze the statutes they enact. Given the tremendous breadth and impact statutory incorporation has on so many Americans in criminal justice, immigration, tort, social security, bankruptcy, and even more areas of the law, interest-based incorporation represents an important next step in this growing policy conversation.

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