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***DEHORS* THE RECORD: A CORRECTION OF A FINAL JEOPARDY QUESTION**

*Thomas E. Baker**

I am a loyal fan of the *Jeopardy* television game show.¹ It is a daily ritual in our home. My wife and I try to watch together. I am one of those people who sometimes shouts out the answers at the television, to her sometimes annoyance. Recently, I was enthralled by the *All Star Games*, which brought back past participants who have become legendary winners to compete in a team tournament.² I also am a law professor, however, who has been teaching constitutional law for four decades.³ Imagine my dismay and ambivalence when the two-day championship match ended in a Final Jeopardy category called “Constitutional Amendment Math” that included a mistake of substantive constitutional law.

The Final Jeopardy answer was: “Total of the numbers of the amendments banning state-sponsored official religion, ending slavery & repealing Prohibition.” The program’s Final Jeopardy question—the official correct response that the show credited as being correct—was: “What is 35? (The amendments are 1, 13, and 21).” The writers were cleverly striving to incorporate the thirty-fifth anniversary of the show into their answer.⁴ Alas and alack! The writers’ answer is not strictly correct as a matter of constitutional law.

The scrivener’s error involves the phrasing of the first part of their answer to identify the amendment “banning state-sponsored official religion.” They made a lay person’s error to attribute that effect to the First Amendment. The constitutional law technicality is that the stated effect of unconstitutionality is a consequence of the Fourteenth Amendment.

* Member of the Founding Faculty, Florida International University College of Law. After this essay was accepted for publication, Alex Trebek died. It was sad watching the last episodes he taped, and the show will never be the same. *Requiescat in pace.*

¹ *Jeopardy! America’s Favorite Quiz Show*, <https://www.jeopardy.com/> (last visited Feb. 6, 2020).

² *Contestants Zone, All Star Games*, JEOPARDY! AMERICA’S FAVORITE QUIZ SHOW, <https://www.jeopardy.com/contestant-zone/2019/all-star-games> (last visited Feb. 6, 2020).

³ See *Biography of Thomas E. Baker*, FIU LAW, <https://law.fiu.edu/faculty/directory/thomas-e-baker/> (last visited Feb. 6, 2020).

⁴ Andy Saunders, *Today’s Final Jeopardy—March 5, 2010 (All Star Games Day #10)*, THE JEOPARDY! FAN, <https://thejeopardyfan.com/2019/03/final-jeopardy-3-5-2019.html> (last visited Feb. 6, 2020) (recapping Season 35, Episode 127, on March 5, 2019).

Therefore, their “constitutional amendment math” was off by 13 owing to the Incorporation Doctrine. A brief professorial explanation is in order.⁵

Consider a hypothetical. Thomas Jefferson once confidently predicted that within a generation of the founding everyone in the United States would become a Unitarian.⁶ Suppose the United States Congress passed a statute declaring everyone in the country to be a member of the Universalist Unitarian Association.⁷ That statute would violate the First Amendment (1791), which reads in pertinent part: “Congress shall make no law respecting an establishment of religion”⁸ But the Final Jeopardy answer referred to a “*state-sponsored* official religion.” A *state* legislature’s statute declaring everyone in a state a Universalist Unitarian would be a violation of the Fourteenth Amendment (1868), which reads in pertinent part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law”⁹

In *Permoli v. New Orleans*,¹⁰ the Supreme Court stated matter-of-factly and with no fear of contradiction: “The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states.” Indeed, this was the accepted original understanding of the entire Bill of Rights, ever since the days of Chief Justice John Marshall.¹¹ The protections in the original Bill of Rights applied only to the national government. A few substantive limitations in the body of the Constitution applied to the states, e.g., the prohibitions against bills of attainder, *ex post facto* laws, and impairments of contracts.¹²

⁵ See THOMAS E. BAKER, CONSTITUTIONAL ANALYSIS IN A NUTSHELL 447–49, 548–49 (3d ed. 2019). When I teach the foundation course in Constitutional Law, this explanation is an annual in-class digression. See RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 542–547 (11th ed. 2015) (A Note on the Incorporation of the Bill of Rights).

⁶ “I trust that there is not a young man living in the US. who will not die an Unitarian.” *Letter from Thomas Jefferson to Benjamin Waterhouse, 26 June 1822*, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Jefferson/98-01-02-2905> (last visited Feb. 6, 2020).

⁷ See UNITARIAN UNIVERSALIST ASSOCIATION, <https://www.uua.org/> (last visited Feb. 6, 2020). When Chief Justice Taft paid his respects to Justice Oliver Wendell Holmes, Jr. upon the death of his wife, Fanny Holmes, the Chief offered to help with the funeral arrangements. Holmes explained that “Fanny had called herself a Unitarian—‘In Boston one had to be something, and Unitarian was the least one could be.’” SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 368 (1990).

⁸ U.S. CONST. amend. I.

⁹ U.S. CONST. amend. XIV.

¹⁰ 44 U.S. (3 How.) 589, 609 (1845).

¹¹ See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (Marshall, C.J.).

¹² U.S. CONST. art. I, § 10, cl. 1.

The adoption of the Fourteenth Amendment in 1868 and its interpretation changed that understanding of the original Bill of Rights, which was adopted in 1791. The Due Process Clause of the Fourteenth Amendment guarantees individual liberty against state action, i.e., the clause has a substantive component as well as a procedural component.¹³ Over a long line of cases, the Justices debated amongst themselves whether the Fourteenth Amendment effected a “total incorporation” of all the provisions in the Bill of Rights or a “selective incorporation” of the most fundamental provisions.¹⁴ Clause-by-clause, almost all of the individual rights in the first eight amendments were applied to the states, most recently the Second Amendment in 2010.¹⁵ The modern test to determine whether a guarantee in the Bill of Rights also applies to the states through the Due Process Clause is whether the right is “fundamental to the American scheme of justice.”¹⁶ Applying this test, the Supreme Court has incorporated all of the rights listed in the First Amendment and applied them to the states through the Fourteenth Amendment: free exercise;¹⁷ non-establishment;¹⁸ speech and press;¹⁹ assembly and petition;²⁰ as well as a related, unenumerated, and non-textual right of association.²¹ Once an individual right has been incorporated and applied to the states through the Due Process Clause of the Fourteenth Amendment, the prevailing view is that it is understood to limit the states in the same way and to the same extent that it applies to limit the national government.²² A few individual Justices have insisted that the incorporated right should be applied less strictly against the states.²³

Thus, the writers made a technical mistake to attribute the prohibition of a *state-sponsored* religion to the First Amendment. It is the Fourteenth

¹³ See *Moore v. City of East Cleveland*, 431 U.S. 494, 541–45 (1977) (White, J., dissenting).

¹⁴ See *Adamson v. California*, 332 U.S. 46 (1947).

¹⁵ See *McDonald v. Chicago*, 561 U.S. 742 (2010).

¹⁶ *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

¹⁷ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

¹⁸ *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). Two Justices have questioned whether the Establishment Clause ought to have been incorporated and applied to the states. *Zelman v. Simmons-Harris*, 536 U.S. 639, 677–80 (2002) (Thomas, J., concurring); *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting). Recently, Justice Gorsuch took Justice Scalia’s place beside Justice Thomas. *Espinoza v. Mont. Dept. of Revenue*, 140 S. Ct. 2246, 2264 (2020) (Thomas, J., concurring). But these few outliers have stood alone. See, e.g., *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 230–61 (1963) (Brennan, J., concurring) (offering the traditional justification for incorporation).

¹⁹ *Gitlow v. New York*, 268 U.S. 652 (1925).

²⁰ *De Jonge v. Oregon*, 299 U.S. 353 (1937).

²¹ *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958).

²² E.g., *Malloy v. Hogan*, 378 U.S. 1 (1964).

²³ E.g., *Johnson v. La.*, 406 U.S. 356, 375 (1972) (Powell, J., concurring); *Roth v. United States*, 354 U.S. 476, 498 (1957) (Harlan, J., concurring and dissenting).

Amendment that prohibits a *state-sponsored* religion.²⁴ I would recommend that we graciously pardon the Jeopardy writers, however, since even the venerable Supreme Court Justice William J. Brennan—like Homer—had occasion to nod by mistakenly referring to a state case as a “First Amendment case.”²⁵ Candor—not a lack of humility—motivated me to make this correction *dehors* the record. I am still a loyal fan of the show . . . but I am still also a law professor.²⁶

²⁴ It is footnoteworthy to dismiss out of hand the imagined pedantic suggestion that the word “state” in the question was intended to mean “government.” See BAKER, *supra* note 5, at 450. Anyway, that would be equally erroneous *Jeopardy!* constitutional mathematics to include federal establishments (First Amendment) plus state establishments (Fourteenth Amendment): (1 + 14 = 15).

²⁵ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (Brennan, J., majority opinion).

²⁶ Have you heard this one? A group of law students went up for a flight in a hot air balloon. The wind blew them off course. When they came down from out of the clouds they did not know where they were. One of them yelled to a man walking below, “Help! Where are we?” The man yelled back, “You’re in a balloon!” and kept walking. The student smiled and said to his friend, “That guy must be a law professor so we must be over the campus.” His friend asked, “How do you know?” He answered, “Because when I asked him a question his answer was succinct, totally accurate, and completely useless.” True story. If not, it should be.